The Sword and Sovereignty

EDWIN VIEIRA, JR.

Constitutional "Homeland Security"

Volume Two

The Constitutional Principles of "the Militia of the Several States"

The SWORD *and* SOVEREIGNTY

by

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For some thirty-nine years he has been a practicing attorney, specializing in constitutional law. In the Supreme Court of the United States he successfully argued or briefed the cases leading to the landmark decisions *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), *Chicago Teachers Union* v. *Hudson*, 475 U.S. 292 (1986), and *Communications Workers of America* v. *Beck*, 487 U.S. 735 (1988), which confirmed and enforced constitutional and statutory limitations on the uses to which labor unions, in both the private and the public sectors, may apply fees extracted from nonunion workers as a condition of their employment.

He has written numerous monographs and articles in scholarly journals, and lectured throughout the county. His latest scholarly works are *Pieces of Eight: The Monetary Powers and Disabilities of the United States Constitution* (GoldMoney Foundation Special Edition [2011] of the Second Revised Edition, 2002), a study of American monetary law and history viewed from a constitutional perspective; *How To Dethrone the Imperial Judiciary* (2004), an analysis of the problems caused by "judicial supremacy" and how to deal with them; and *Constitutional "Homeland Security", Volume One, The Nation in Arms* (2007), the first book in the series aimed at revitalizing "the Militia of the several States".

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AUTHOR'S PREFACE

Some people will carp that, in writing this book, I have set myself upon a quixotic task. Yet anyone who actually reads my words will discover that, from the first capital letter to the last period, my motivation lies above and beyond what the Portuguese call *saudade*. *The Sword and Sovereignty: The Constitutional Principles of "the Militia of the Several States"* is not simply a dry intellectual exercise in the rehearsal of long-forgotten American history, and the penetration of a maze of obscure legal analysis, undertaken in order to satisfy a nostalgic craving for the restoration of a country that can never retrace its steps back to its idealistic origins from the brink of catastrophe at which it now finds itself. Even less is this work intended to memorialize in print a resignation to the dictates of what the Portuguese call *fado*. To the contrary: Fate called *The Sword and Sovereignty* into being, not to dust off for the sake of idle curiosity ideas from a bygone era which retain no practical relevance today, but instead to explore, explain, and advocate principles of political organization and action with timeless pertinence, and to apply them for the purpose of bringing about America's renaissance.

To be sure, this will be a massive job, for the completion of which most Americans are, no doubt, woefully unequipped at present. So *The Sword and Sovereignty* has been designed and executed to supply all Americans with the basic tools they now lack, but will all too soon desperately need in order to save from destruction the *real* America—the America of the Declaration of Independence and the Constitution.

Some readers may complain, however, that, in a book replete with footnotes and endnotes complementing an extensive text, I have supplied altogether too many tools for the average man's easy use. This criticism is myopic. Although the matters described in *The Sword and Sovereignty* were common knowledge among most literate Americans once upon a time, they have not been such for quite a while. In fact, the historical and legal character—and especially the uniquely and critically important constitutional place—of "the Militia of the several States" have been passed over, garbled, misrepresented, and even suppressed for generations, not only by all of America's domestic enemies, but also by all too many American patriots who have naively prided themselves as champions of the Second Amendment—so that, today, vanishingly few and extremely far between are those Americans even minimally conversant with the subject. As did the Founding Fathers who subscribed the Declaration of Independence, I believe that "a decent respect to the opinions of mankind" demands more than the airy assumption that my readers should supinely "take my word for it", without perusing the evidence

themselves. Instead, to become sufficiently educated in this area—and, perhaps of more consequence, to be convinced that his education rests on a foundation sufficiently solid to undergird political action—the contemporary student must be presented with, and must himself both ingest and thoroughly digest, the *full* record of historical facts, and the *full* panoply of legal analysis and arguments, in support of the reasoning, conclusions, and recommendations that *The Sword and Sovereignty* lays out.

Other readers may conjecture, though, that, whatever their merits in theory, these tools will prove to be simply too ponderous for politically and economically illiterate, self-indulgent, and slothful Americans to take up and wield in practice. At least as an admonition, this observation may be marginally valuable. Folk-wisdom identifies four types of human minds: The very best mind understands things on its own, and always acts in conformity with its understanding. The good mind understands things when they are explained to it, and usually acts in conformity with that explanation. The bad mind cannot understand things even when they are explained, and therefore never learns how to act properly. And the very worst mind refuses to acknowledge what it knows to be true, so that it can act according to its own contrary, malign purposes. When the Founding Fathers wrote the Second Amendment, they presumed that average American patriots were of sufficiently sound, self-actuating minds that they would understand the Amendment's meaning without being told—in particular, that most Americans could themselves explain what "a free State" is, why "[a] well regulated Militia" is "necessary to the security of a free State", and how "the right of the people to keep and bear Arms" always forms the indispensable foundation for such a Militia. This presumption was valid in the Founders' era, because most free adult male Americans were then actually serving or had served in "well regulated Militia", in times both of peace and of war. Unfortunately, such a presumption would be ill-founded today, because: (i) Next to no Americans have any present or historical experience of serving in true constitutional Militia—indeed, no such Militia have even existed since the earliest days of the Twentieth Century. (ii) Hardly anyone proposes revitalization of the Militia along constitutional lines—proving that the very best minds are not applying themselves to the problem of how to obtain *constitutional* "homeland security". (iii) As a result of this dearth of intellectual leadership, the matter is not being correctly explained to common Americans, leaving them in something of a mental void on the subject. And (iv) that void is being filled with disinformation broadcast by proponents of "gun control" with apparently unlimited access to the mass media who routinely label as an "extremist" or even a "terrorist" whoever dares to advocate Americans' participation in anything to do with "militia". Against this background, it would hardly evidence paranoia to fear that, even were the matter of the Militia properly explained, the great mass of Americans would still not understand, but instead would follow the

pied pipers of "gun control" into the political septic tank of a National *para*-military police state. Yet, if there is room for doubt on one side, there must be room for doubt on the other, too. The presumption that average Americans *can* learn when the matter has been correctly explained to them has yet to be disproven. And it can be disproved only by presenting them with the facts and obtaining no good result.

Of course, there can be no guarantee that even if Americans are fully informed they will take the advice to heart and set their hands to work. Human nature has not changed since the Founding Fathers' days. Only a little more than a generation after ratification of the Second Amendment, in his *Commentaries on the Constitution* Joseph Story observed that

> among the American people, there is a growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burdens, to be rid of all regulations. How it is practicable to keep the people duly armed without some organization it is difficult to see. There is certainly no small danger that indifference may lead to disgust, and disgust to contempt; and thus gradually undermine all the protection intended by th[e Second Amendment.]

Nonetheless, that was then; and this is now. In Story's era, Americans could perhaps afford for a while to indulge the vice of "indifference". Today, common Americans have arrived at the point where "indifference" is no longer an option for which the social cost in treasure—and, perhaps, blood as well—will likely be bearable. The crisis is upon them at this very moment, intensifying with each passing day. And unless they are willing to witness their country's destruction, and themselves to suffer the horrendous consequences of that *débâcle*, they must pick up and put to effective use the tools the Constitution has provided for them, no matter how heavy those tools may seem to be at first. When they do, rather than recoiling in "disgust" and "contempt", they will swell with admiration and give profound thanks for the foresight of the Founding Fathers in incorporating "the Militia of the several States" into the original Constitution, and guaranteeing through the Second Amendment "the right of the people to keep and bear Arms" for their use in "well regulated Militia" that can provide "the security of a free State" everywhere within America.

The struggle that has been thrust upon Americans is not one to *preserve* the uniquely American way of life, but to *restore* it. For most that has been and remains worthwhile in this country has already been systematically denigrated, subverted, corrupted, and even prohibited by bevies of rogue public officials working on behalf of factions and special-interest groups, both domestic and foreign—so that, today, the *true* America exists only as fleeting, dissipating shadows of her former self. To restore America, though, Americans must first wrest control of their country from

the grasping hands of the usurpers, tyrants, and exploiters who have conquered and despoiled her.

The reconquest of America cannot be successfully waged by a people whose primary motivation is the materialistic desire simply to live a comfortable life. The average American will endure only so much deprivation and danger for the benefit of self-indulgence, always finding it easier in the short run to surrender a little material ease in order to gain a respite from the travails of the struggle—until, step by step, he finally surrenders so much that he strips himself of the means, even if he retains the will, to continue the struggle at all. So the reconquest of America must be envisioned and especially carried on, not as a matter of isolated individuals' narrow economic self-interests, but as an *heroic* cause: the renewed assertion, by common Americans in unison, of America's unique character as a truly "free State" that can serve, not only as their own prosperous homeland, but also as a beacon of hope to oppressed and impoverished peoples throughout the world. Such an heroic cause will require no less than an heroic effort to see it through to fruition. For America must be rebuilt, not just economically, but politically, socially, culturally, legally, and morally as well—in the execution of which extensive reconstruction must be called forth labors that might tax the strength of even Hercules himself. And this effort will call for a most unusual sort of heroism, because typical Americans, not mythical Greek heroes, will have to perform the work.

Moreover, heroism by itself will not suffice. Even in the hands of one of the greatest warrior races known to History, *kamikaze* tactics failed, as common sense teaches that all such desperate measures inevitably must fail. To justify their exertions today and tomorrow, Americans will need to be able *confidently* to believe in the *realistic* likelihood of success, because they will be applying *historically proven* methods. Such confidence would be amply justified, though, were they to revitalize and deploy "the Militia of the several States", as the Constitution requires. The Second Amendment, after all, does not describe "[a] well regulated Militia" as "being necessary to the security of a free State" without abundant support in the historical record. To the contrary: It was largely through the efforts of the Militia—in the face of the gravest adversities, and against the determined resistance of powerful enemies who compassed their destruction, if they refused to bend to subjection—that WE THE PEOPLE secured their independence and established just governments throughout America in the late 1700s. That Americans thus won their own freedom through their own efforts was the original cause and the most important effect of what has come to be called "American exceptionalism".

Precisely through this aspect of "American exceptionalism" can contemporary Americans assert once again the principles of independence, freedom, and justice that should always define "the American way of life". "[T]he Militia of the several States" are not the subjects of some *semi-*legendary account from a long-

dead past, interred within dusty tomes in the libraries of obscure historical societies—or resurrected in the persons of reinactors in Colonial garb who parade each year on Independence Day through the Town of Bristol, Rhode Island—but rather the exemplars of an ever-living lesson to be applied whenever great perils threaten this country and ordinary Americans are called to perform even greater deeds in America's defense. And never before have the Militia been more pertinent to the threats confronting this country—or more capable of overcoming them.

Americans can rely and build upon the Militia's historical tradition and legal authority, because now more than ever before they have the incentive, the imagination, the resources, and especially the spiritual strength to use the Militia to restore "the security of a free State" throughout this land:

• The present danger is more serious and more pressing than any the Founding Fathers ever faced. Each and every day, before Americans' very eyes, the malign forces of usurpation, tyranny, and exploitation strike one foul blow after another at National independence, individual freedom, and social justice—with consequences far worse than those the Founders refused submissively to endure from the far less onerous oppressions visited upon them. So "indifference" to the Militia now promises to prove fatal to America's survival.

• Yet most common Americans still instinctively appreciate what "an American" is supposed to be, used to be, and can be—*must* be—once again. With a little encouragement and assistance, they will quickly learn how, working together in the Militia, they can bring out the essential American in every one of their countrymen who is capable of being roused into patriotic action.

• An objective appraisal of what strategists call "the balance of *material* forces" should convince anyone that common Americans, properly motivated, educated, and organized, *can* defeat the usurpers, tyrants, and exploiters—in both public office and private station—who now plague this country. Most obviously, common Americans constitute the vast majority of the population, dispersed throughout the land—and, all other things being equal, "God favors the big battalions". Moreover, to the extent that other things of consequence are not equal, the disparities favor WE THE PEOPLE. *First*, common Americans are imbued not only with all of the general knowledge and skills sufficient to take control of their country, but also with the information and experience related to specifically local conditions that will be necessary to administer it in an economically prudent, politically honest, and legally just fashion. *Second*, common Americans already exercise actual physical possession of almost all of the real and personal property in this country. *Third*, common Americans

cannot easily be dislodged from this commanding position, because tens and even hundred of millions of them are armed, and to some significant degree familiar with the use of arms.

• Finally, "the balance of *spiritual* forces" tips decisively in common Americans' favor. In their hearts as well as in their minds and hands, true Americans are simply *better* than their enemies. As the Declaration of Independent attests, perforce of "the Laws of Nature and of Nature's God" "all men are created equal" with respect to their "unalienable Rights". The usurpers, tyrants, and exploiters, and all of their minions, myrmidons, and blackguards who now infest this country have intentionally set out to deny *human freedom*—the exercise and enjoyment of "unalienable Rights"—to the vast majority of their fellow men. Thus, they have enlisted in a cause so fouled with soot from the fires of Hell that no rationalization can ever whitewash it. With the exercise of a peppercorn's worth of introspection, they know themselves to be ignoble wretches, irretrievably unworthy—and therefore ultimately incapable—of victory. On the other side, the Constitution prohibits all titles of nobility, because the only nobility of consequence, *the nobility of freedom*, is the birthright of all Americans. With the exercise of a peppercorn's worth of introspection, they will realize that this is the wellspring of their strength, and draw upon it against every adversity.

In sum, in *The Sword and Sovereignty: The Constitutional Principles of "the Militia of the several States"* I have endeavored to point out the means by which Americans can once again become the masters of their own country. Now I must hope that my countrymen will put this advice to good use—*immediately, if not sooner*.

Edwin Vieira, Jr.

Front Royal, Virginia
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A NOTE ON STYLE

Three asterisks (* * *) in a quoted text mark an ellipsis interpolated by the author of this study.

A set of brackets ([...]) in a quoted text indicates that material from the original has been excised, modified, or supplemented, generally to clarify the sense or to provide grammatical consistency with the passage in which the quotation appears. Although this may distract some readers, it is necessary to maintain the scrupulous accuracy demanded in constitutional discourse.

Punctuation marks within the quotation marks (" " and ' ') that set off a quoted text are to be found in the original; all other punctuation marks are the present author's, and are placed outside the quotation marks in order to emphasize the difference. Although this bends the rules of contemporary typography, it precludes confusion as to what punctuation an original text contains.

Nowadays peculiar spelling and punctuation from old sources have been left as they appear in the originals, without constant interjection of the distracting disclaimer "[*sic*]".

"Local", "State", and "National" are capitalized throughout the book when they refer to legal jurisdictions within the United States.

Common abbreviations employed in footnotes are as follows:

- "Stat."—the *Statutes at Large*, the official compilation of statutes of the United States as they are enacted (*e.g.*, "116 Stat. 1498" indicates volume 116, page 1498);
- "U.S."—the *United States Reports*, the official reports of decisions of the Supreme Court of the United States (*e.g.*, "143 U.S. 649" indicates volume 143, page 649);
- "U.S.C."—the *United States Code*, the present codification of statutes of the United States, by title and section (*e.g.*, "10 U.S.C. § 311" indicates title 10, section 311);
- "art. [...], § [...], cl. [...]" or "amend. [...]"—a particular *article*, *section*, and *clause*, or an *amendment*, of the Constitution; and "§ [...]" and "¶ [...]" a *section* or *paragraph* of a statute or other legal code.

Throughout this work, material has been quoted from official and original sources whenever possible. For early opinions of the Supreme Court of the United States, however, more than one privately published edition of the *United States Reports* is available in various libraries—and these editions sometimes differ in spelling, punctuation, and capitalization. For the sake of consistency, therefore, quotations from the Court's opinions have been conformed to a single set of the *United States Reports* available on reserve in the Court's own library.

Finally, the various Internet web sites which are referenced in the footnotes were active at the time this book was written.

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THE CONSTITUTIONAL PRINCIPLES OF "THE MILITIA OF THE SEVERAL STATES"

It is evident that every form of government * * * must contain a supreme power * * * , and this supreme power must necessarily be in the hands of one person, or a few, or many; and when either of these apply their power for the common good, such states are well governed; but when the interest of the one, the few, or the many who enjoy this power is alone consulted, then ill * * * . We usually call a state which is governed by one person for the common good, a kingdom; one that is governed by more than one, but by a few only, an aristocracy; either because the government is in the hands of the most worthy citizens, or because it is the best form for the city and its inhabitants. When the citizens at large govern for the public good, it is called a state; * * * and these distinctions are consonant to reason; for it will not be difficult to find one person, or a very few, of very distinguished abilities, but almost impossible to meet with the majority of a people eminent for every virtue; but if there is one common to a whole nation it is valour; for this is created and supported by numbers: for which reason in such a state the profession of arms will always have the greatest share in the government.

Aristotle

The quotation on the preceding page is taken from the *Politics*, Book III, Chapter VII, *in* A TREATISE ON GOVERNMENT OR, THE POLITICS OF ARISTOTLE, William Ellis, Translator (London, England: J.M. Dent & Sons Ltd., 1912), at 78-79.

INTRODUCTION

The Declaration of Independence and the Constitution are the true sources of America's "homeland security".

The theme of this series is ***Constitutional*** *"Homeland Security"*, because America's foundational documents—the Declaration of Independence and the Constitution—are the only *legal* authorities for "homeland security" and thus the only sources of and standards for *legal* "homeland security". And it is *Constitutional* ***"Homeland Security"***, with that term set off in marks of distinction and implicit qualification, because "homeland security" means radically different things to different people. But, as this series explains, the only true, valuable, and lasting "homeland security" must aim first, foremost, and forever at preserving a particular "homeland"—which, as the Declaration attests, is "the separate and equal station" "among the powers of the earth" "to which the Laws of Nature and of Nature's God entitle the[American people]".[1] And it must accomplish this task through the only legitimate "security" available to Americans: the principles, institutions, mechanisms, and procedures the Declaration and the Constitution provide.

When the Declaration of Independence announced, "in the Name, and by the Authority of the good People of the[Thirteen] Colonies", that "Governments are instituted among Men" "to secure these [unalienable] rights"—and "That these United Colonies are, and of Right ought to be FREE AND INDEPENDENT STATES; * * * and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do"—it asserted with the full and permanent force of law the right of "the good People" and those who followed them as inhabitants of America to provide *by themselves* for the "security" of *their own* "homeland". And when the Declaration secured for "the good People" the power of sovereigns to provide for their own "security" through their own governments, it envisioned *only* such "security" as is fully consistent with "the[ ] truths [the good People held] to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights", and "[t]hat to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed". For "the good People" also emphasized

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[1] The typeset version of the Declaration of Independence quoted throughout this book appears in *Documents Illustrative of the Formation of the Union of the American States*, House Document No. 398, 69th Congress, 1st Session (Washington, D.C.: Government Printing Office, 1927), at 22-26.

that whenever any system of ostensible "security"conflicts with these truths—that is, "whenever any Form of Government becomes destructive of these ends"—then "it is the Right of the People to alter or to abolish it". Therefore, under the Declaration of Independence, no purported need for "security" could ever rationalize contradicting the self-evident truths that justify instituting government in the first place. Furthermore, any scheme of "security" that rogue public officials might try to impose which embodied such a contradiction could not be the result of their exercise of "just powers", and if carried far enough—as, for instance, to the establishment of a *para*-military police state—would render illegitimate the "Form of Government" out of which it arose, and thereupon would compel "the good People" "to alter or to abolish" that "Form of Government" in part or in whole.

WE THE PEOPLE then "ordain[ed] and establish[ed]" the Constitution not just to set up a General Government within a federal system.[2] Beyond that, they sought to achieve six specific goals: "to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity".[3] And not for the opposite purpose in any particular. For "[a]ffirmative words are often, in their operation, negative of others than those affirmed; and in this case, a negative or exclusive sense must be given to them, or they have no operation at all".[4] Surely, "[t]he doing of one thing which is authorized cannot be made the source of an authority to do another thing which there is no power to do".[5] Moreover, WE THE PEOPLE never agreed to sacrifice any one of the Preamble's goals in order supposedly to achieve the others, either. To the contrary: The conjunction

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[2] As used herein, the term "General Government" refers solely to the new government the Constitution created, consisting of Congress, the President, and the Supreme Court, as distinct from "the federal government" or "the federal system", which consists of the General Government, the States, and WE THE PEOPLE. This is a clarifying usage common among the Founding Fathers. For instance: "[I]t is to be remembered that the general government is not to be charged with the whole power of making and administering laws." *The Federalist* No. 14 (James Madison). "I confess I am at a loss to discover what temptation the persons intrusted with the administration of the general government could ever feel to divest the States of the[ir] authorities[.]" *Id.* No. 17 (Alexander Hamilton). "Is the aggregate power of the general government greater than ought to have been vested in it?" *Id.* No. 41 (James Madison). "The *second* class of powers lodged in the general government consist of those which regulate the intercourse with foreign nations[.]" *Id.* No. 42 (James Madison). *See also, e.g.,* THE GENUINE INFORMATION, DELIVERED TO THE LEGISLATURE OF THE STATE OF MARYLAND, RELATIVE TO THE PROCEEDINGS OF THE GENERAL CONVENTION, HELD AT PHILADELPHIA, IN 1787, BY LUTHER MARTIN, ESQUIRE, ATTORNEY-GENERAL OF MARYLAND, AND ONE OF THE DELEGATES IN THE SAID CONVENTION (29 November 1787), *quoted in The Records of the Federal Convention of 1787,* Max Farrand, Editor (New Haven, Connecticut: Yale University Press, 1966), Volume 3, at 194, 195, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 220, 221, 222, 223, 224, 225. Since then, the term has often appeared in opinions of the Supreme Court. *E.g.,* Presser v. Illinois, 116 U.S. 252, 265 (1886); *In re* Rahrer, 140 U.S. 545, 554 (1891); House v. Mayes, 219 U.S. 270, 282 (1911).

[3] U.S. Const. preamble. The typeset version of the Constitution quoted throughout this book is *The Constitution of the United States of America*, Bicentennial Edition, House Document No. 94-539, 94th Congress, 2d Session (Washington, D.C.: U. S. Government Printing Office, 1976).

[4] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803).

[5] Wilson v. New, 243 U.S. 332, 345 (1917).

"and" explicitly emphasizes that the Constitution intends *all* of these ends to be attained *fully and simultaneously*, not partially or selectively. Indeed, any other construction of the Constitution in this particular would be self-contradictory and self-defeating: If "the Blessings of Liberty" may be set aside in favor of (say) "the common defence", then to that extent WE THE PEOPLE have actually "ordain[ed] and establish[ed]" the Constitution in order, at least some of the time, to *deny* those "Blessings * * * to ourselves and our Posterity". A "supreme Law of the Land"[6] designed to "secure the Blessings of Liberty", while at the same time providing for their denial, is incoherent to the point of imbecility. To attribute such mutually antagonistic purposes to the Founding Fathers is defamatory. And to impose on WE THE PEOPLE the burden of entrusting their lives, liberty, and property to a "supreme Law" that proffers only a chaos of conflicting goals is to render "the security of a free State"[7] a political gamble as chancy, and perhaps as fatal, as Russian roulette.

Moreover, the very nature of the Preamble's goals proves that WE THE PEOPLE could never have intended in the late 1700s—and should not tolerate today—some of those goals ostensibly to be achieved only at the sacrifice of others. For example, *can* "Justice" be "establish[ed]" *without* "secur[ing] the Blessings of Liberty"? Is not any deprivation of "Liberty" without due process of law itself an injustice? *Can* "domestic Tranquility" be "insure[d]" *without* "establish[ing] Justice"? Will those suffering from injustice long remain "Tranquil[ ]"? And *can* "the Blessings of Liberty" be "secure[d]" *without* adequate "provi[sion] for the common defence"? When have defenseless people ever maintained their freedom?

Furthermore, the "more perfect Union" the Preamble identifies as the first goal of the Constitution is to consist of States each with "a Republican Form of Government", and only of such States—for the Constitution commands that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government".[8] Thus the Constitution impliedly defines the purposes of "a Republican Form of Government" as being to "establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity"—for the United States could not be required to "guarantee to every State" (or to any State, for that matter) a "Form of Government" inconsistent with the Union's own purposes. From this must follow the conclusion that the Preamble's goals constitute the indivisible essence of "homeland security" for WE THE PEOPLE, for the Union, and for its constituent States—for only matters that are fully "guarantee[d]" by force of law are adequately "secured".

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[6] U.S. Const. art. VI, cl. 2.

[7] U.S. Const. amend. II.

[8] U.S. Const. art. IV, § 4.

Because, however, the Declaration of Independence presumes that the "security" any legitimate government provides must be consistent with certain self-evident truths; and because, in its turn, the Constitution intends that all of its Preamble's goals can and will be achieved at the same time and to the maximum possible degree in each case, and that "a Republican Form of Government" attuned to these goals can and will be maintained in every State throughout "this Union" all the while—then, at this country's founding, WE THE PEOPLE must have made available, in and through the "Form of Government" they embodied in the Constitution, what they believed, for good and sufficient reasons, were at that time and would remain thereafter the necessary and sufficient means to secure these ends. Why, then, simply upon the appearance of mere handfuls of criminals who engage in so-called "global terrorism"—and even if these criminals are sometimes harbored and assisted by the established régimes in various rogue nations—must Americans now conclude that the Declaration's principles have been negated, that the Preamble's goals have been rendered impossible of full and simultaneous attainment, that "[t]he United States [cannot] guarantee to every State in this Union a Republican Form of Government" while waging a so-called "war on terrorism", and that, in consequence, the General Government in Washington (and, following its lead, the States, too) may, and even should, impose on Americans in the name of "homeland security" a centralized bureaucratic apparatus that threatens (or perhaps promises) to degenerate into a National *para*-military police state?![9]

Must Americans now denounce the Founding Fathers as bereft of both insight and foresight: that they so misconceived the reality of criminal politics, irregular warfare, and international gangsterism in their era, and so myopically failed to foresee how these evils would evolve, expand, and intensify in the future—and in their ignorance and blindness so misled themselves in the Declaration of Independence and malformed the Constitution—that the only way to achieve a modicum of "homeland security" in America's present circumstances is by adoption of a "Form of Government * * * destructive of" Americans' "certain unalienable Rights"—and with it, by acquiescence in wholesale denials of their "Liberty", the demolition of every State's "Republican Form of Government", and thus the eradication of the Constitution's very essence?

Must thoughtful Americans also conclude that most of their contemporary countrymen—or at least those in whom the Department of Homeland Security

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[9] On several counts, "the war on terrorism" is a deceptive, even duplicitous misnomer. *See* Edwin Vieira, Jr., *Constitutional "Homeland Security", Volume One, The Nation in Arms* (Ashland, Ohio: BookMasters, Inc., 2007), at 8-16. But the term's unfortunate currency in public discourse compels its employment here in order to denote an existing situation—although not to accept the description, explanation, and approval of that situation its proponents usually put forth.

arouses neither trepidations nor even reservations—are no less incorrigible ignoramuses, too? After all, the Department of Homeland Security was created with the primary missions to "prevent terrorist attacks within the United States", "reduce the vulnerability of the United States to terrorism", and "minimize the damage, and assist in the recovery, from terrorist attacks that do occur within the United States".[10] Yet anyone with a sense for history and language knows that, for very good reason, the very first definition of "terrorism" in the English lexicon is "a mode of government by terror or intimidation".[11] So, on its face, the claim that this country must cower in the shadow of any variety of a National *para*-military police state in order to win a "war on terrorism" is patently self-contradictory, self-defeating, and even absurd, because it concedes that the "terrorists" have already prevailed. Proponents of "the war on terrorism" contend that any and every effort to wage it is necessary, because foreign "terrorists"—particularly, fanatical Muslim "jihadists" supposedly committed to an ideology encapsulated in the politically, economically, and religiously ridiculous term "Islamofascism"—"hate our freedoms" and intend to employ every means at their disposal to deprive Americans of them. But what more direct, more expeditious, more economical, and especially more ironic way could such "terrorists" imagine for achieving that goal than to goad gaumless Americans into suppressing their own freedoms themselves, by allowing (even encouraging) rogue officials in the General Government to erect a domestic fascistic National *para*-military police state undoubtedly inimical to "our freedoms" under color of fighting the very foreign forces being excoriated by that government's propaganda-mills precisely because they "hate our freedoms"?! What greater victory could these foreign "terrorists" win than to persuade this country to commit suicide by destroying forever what is unique to, and uniquely valuable in, America: "the Blessings of Liberty to ourselves and our Posterity"?![12]

Yet even the absurd conclusion that common Americans should willingly cast away their freedoms in order to confront foreign "terrorists" who supposedly "hate our freedoms" may have a recondite and sinister logic behind it. For foreign "terrorists" who "hate our freedoms" are not unique on that score among the voracious Forces of Darkness that prowl about the world seeking to devour men's liberties. *Who else*, thoughtful Americans should ask, would win a victory if most of their countrymen stupidly surrendered their freedoms to a National *para*-military police state?

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[10] An Act To establish the Department of Homeland Security, and for other purposes ("Homeland Security Act of 2002"), Act of 25 November 2002, Pub. L. 107-296, TITLE I—DEPARTMENT OF HOMELAND SECURITY, § 101(b)(A) through (C), 116 Stat. 2135, 2142.

[11] *Webster's Revised Unabridged Dictionary* (Springfield, Massachusetts: G. & C. Merriam Company, 1913), at 1489. *Accord, The Compact Edition of the Oxford English Dictionary* (New York, New York: Oxford University Press, 1971), Volume 2, at 3268.

[12] U.S. Const. preamble.

Even if foreign "terrorists" do boundlessly and remorselessly "hate our freedoms", their religiously or ideologically based animosities do not easily translate into successful military, *para*-military, or even simply criminal operations. Short of an actual invasion and savage pacification of this country—which no sensible person believes possible—no means exist by which all of the foreign "terrorists" in the whole world, acting simultaneously and in concert, could ever deprive Americans of "our freedoms" through the "terrorists'" actions alone. Yet everyone with at least a milligram of cerebral cortex realizes that "our freedoms" *are* rapidly being eroded by Americans' own "representatives". Under color of providing for "homeland security", as a result of their incompetence or malevolence these miscreants are transmogrifying this country into a first-class police state in which Lavrenti Beria or Reinhard Heydrich would feel right at home (and would probably be offered employment as "security consultants"). So, judged by that result, *some* "terrorists" *are* in fact winning "the war on terrorism". Moreover, they will continue to prevail because, as its proponents predict, "the war on terrorism" is slated to drag on *indefinitely*, necessitating the perpetuation—and, predictably, the elaboration and augmentation—of a National *para*-military police-state apparatus, and the multiplication and intensification of its intrusions into common Americans' lives.

Which means that either America's present-day public officials and molders of public opinion constitute perhaps the greatest gaggle of nitwits in high offices and influential positions that mankind has ever witnessed, *or* "the war on terrorism" is really something radically different from what they are advertising it to be: Rather than exclusively a *foreign* "war" rogue officials of the General Government claim to be waging against "terrorists" in order to secure "our freedoms", "the war on terrorism" is also, arguably predominately, a *domestic* or *civil* "war" that certain centers of political and economic power in this country are waging through that governmental apparatus—or, more descriptively, through their subversion and perversion of it—in order to suppress common Americans' freedoms. The open, but largely theatrical, "war *on* terrorism" against a few radical Muslims overseas is really a clandestine, but deadly serious, "war *of* terrorism" against all common Americans here at home. This should hardly surprise anyone, inasmuch as the very first definition of "terrorism" is "*a mode of government* by terror or intimidation"[13]—and "terror" means "[e]xtreme fear" and "violent dread",[14] which is precisely the state of mind the touts of "the war on terrorism" try to instill in Americans' collective psyche in order to rationalize public officials' assumption and exercise of ever-expanding, ever-more-intrusive, ever-more-draconian, and ever-more-abusive powers over the citizenry. The whole operation is itself a campaign of "terror":

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[13] *Webster's Revised Unabridged Dictionary, ante* note 11, at 1489 (emphasis supplied). *Accord, The Compact Edition of the Oxford English Dictionary, ante* note 11, Volume 2, at 3268.

[14] *Webster's Revised Unabridged Dictionary, ante* note 11, at 1489, definition 1.

"[t]he threatenings of wicked men", "calculated to impress fear".[15] Whether these domestic power-brokers "hate our freedoms" even more than do supposed "Islamofascists" overseas might be debatable. Beyond dispute is that, unlike foreign "terrorists", America's most dangerous domestic enemies actually enjoy the capability to destroy "our freedoms", root and branch, because they occupy strategic positions *in this country*—within the governmental apparatus, high finance and big business, the mass media, the educational establishment, and the *intelligentsia*, to catalogue the most prominent—and from those vantage points can deploy political, economic, *and especially police* power so as to make their hatred effective.

Viewed in this light, though, the underlying reality of "the war on terrorism" emerges as nothing truly novel in American experience. The Founding Fathers faced perils no less daunting, and rose to the occasion—because they understood perfectly the nature of the evil then afoot and how to confront and defeat it. The Declaration of Independence affirms that

> all men * * * are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government * * * . Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.

Whoever attunes his thinking to the Founders' minds must conclude that any program of "homeland security" that excuses, enables, and empowers the construction of a National *para*-military police state is no part of an acceptable "form[of government] to which [Americans have ever been or now] are accustomed"—is inherently "destructive of the[ ] ends" for which "Governments are instituted among Men"—and if it is not itself an additional part of a preëxisting "long train of abuses and usurpations, pursuing invariably the same Object [that] evinces a design to reduce the[People] under absolute Despotism", yet it

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[15] *See* Noah Webster, *An American Dictionary of the English Language* (New York, New York: S. Cosgrove, 1828), definitions 4 and 5.

undeniably constitutes the commencement of such a "train", traveling to no other terminus. Indeed, the institution of such a program is not just a "light and transient cause[ ]" for action, but a compelling reason and immediate occasion for patriotic Americans in every walk of life (in the words of Samuel Adams) "[t]o tell [the contemporary political descendants of] General Gage * * * no longer to insult the feelings of an exasperated people",[16] and if that does not suffice then "to throw off such Government" (or at least the individuals composing it, and the others pulling their political strings from behind the screen).Therefore, such a program cannot conceivably qualify as "homeland security", but instead must be rejected out of hand as the creation of centrally organized "homeland *in*security" and instability, and thereby the prelude to America's descent into domestic conflict and chaos, if not to her utter destruction.

The opposite conclusion—that, although (as thoughtful Americans of all political persuasions agree) the General Government's present Department of Homeland Security exhibits the potential to devolve into the linchpin of a National *para*-military police-state apparatus along the lines of the Nazis' infamous *Reichssicherheitshauptamt*, it is nonetheless a legally appropriate, even necessary, means to achieve "homeland security" in an era of "global terrorism"—is not simply implausible, but is surely impossible. The legitimacy of the Constitution and the authority of all public officials acting under its aegis depend upon steadfast compliance with the principles of the Declaration of Independence—particularly that, even to secure men's "unalienable Rights", governments may employ only "*just* powers". The Preamble to the Constitution identifies "establish[ing] Justice" as the very first goal of the "more perfect Union" WE THE PEOPLE created. In its purposes and operations, a police state is the epitome of injustice. Therefore, ***no*** *National police state of any variety, erected on any premisses, promises, or pretexts—or for any purpose whatsoever—can even arguably be constitutional.* And "[a]n unconstitutional act is not a law; * * * it imposes no duties; * * * it is, in legal contemplation, as inoperative as though it had never been passed".[17] "An unconstitutional act is not a law; it binds no one".[18] "An unconstitutional law is void, and is as no law. An offense created by it is not a crime."[19]

All this being true, the critical question nonetheless remains: *How* in the present dangerous era—against enemies both foreign *and especially domestic*—does the Constitution actually provide for "form[ing] a more perfect Union, establish[ing] Justice, insur[ing] domestic Tranquility, provid[ing] for the common

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[16] *Quoted in* John Fiske, "The Eve of Independence", *The Atlantic Monthly* (November 1888), at 366.

[17] Norton v. Shelby County, 118 U.S. 425, 442 (1886).

[18] Huntington v. Worthen, 120 U.S. 97, 101-102 (1887).

[19] *Ex parte* Siebold, 100 U.S. 371, 376 (1880), *quoted in* Fay v. Noia, 372 U.S. 391, 408 (1963).

defence, promot[ing] the general Welfare, * * * secur[ing] the Blessings of Liberty to ourselves and our Posterity", and "guarantee[ing] to every State * * * a Republican Form of Government"? For presumably it must supply some adequate means to its ends at all times and against all threats. The answer—written perhaps more plainly than any other on the very face of the Constitution itself—is that ***"the Militia of the several States" are the primary institutions the Constitution recognizes and upon which it relies to solve each and every one of the problems of "homeland security" that confront America, now and in the future***.[20]

True, the Constitution never employs the exact term "homeland security". This, however, is hardly consequential. For the Constitution does set out as one of its goals "to * * * provide for the common defence".[21] And although the "*meaning* [of all constitutional provisions] is changeless", "their *application* * * * is extensible" throughout the ages.[22] So "the common defence" can obviously subsume "homeland security". Even more to the point, though, the Second Amendment highlights WE THE PEOPLE'S concern for "security", by commanding that, "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." "[A] free State" is the goal, "security" the condition *sine qua non*, "[a] well regulated Militia" the indispensable instrument, "the right of the people to keep and bear Arms" the ultimate means. And the Amendment speaks most emphatically on this score: For, other than the Preamble, the Second Amendment is the *only* place in which the Constitution explains the reason for any right, power, privilege, duty, or disability that it recognizes.[23] So the interconnections among "the right of the people to keep and bear Arms", "[a] well regulated Militia", and "the security of a free State" must be extremely important.

Moreover, the Second Amendment not only employs the term "security", but also ties it inextricably to "a *free* State", thus establishing that ***the one and only type of "security" the Constitution countenances is "security" compatible with and instrumental for freedom***—and therefore that public officials may concern themselves with, and enjoy the authority, power, and discretion to work for, *only* such "security". This is hardly surprising, inasmuch as the only other places in which a word relating to "security" appears in the Constitution are: (i) its Preamble, which declares WE THE PEOPLE'S intention "to *secure* the Blessings of Liberty to ourselves and our Posterity"; and (ii) the Fourth Amendment, which guarantees "[t]he right of the people to be *secure* in their persons, houses, papers, and effects, against

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[20] *See* U.S. Const. art. I, § 8, cls. 15 and 16; art. II, § 2, cl. 1; *and* amend. II.

[21] U.S. Const. preamble. *See also* U.S. Const. art. I, § 8, cl. 1.

[22] Home Building & Loan Association v. Blaisdell, 290 U.S. 398, 451 (1934) (Sutherland, J., dissenting).

[23] On the legal terminology of "rights", "powers", "privileges", and so on employed in this book, *see* Wesley N. Hohfeld, *Fundamental Legal Conceptions As Applied In Judicial Reasoning* (New Haven, Connecticut: Yale University Press, 1964); Arthur L. Corbin, "Legal Analysis and Terminology", 29 *Yale Law Journal* 163 (1919).

unreasonable searches and seizures"—thereby protecting both individual liberty ("their persons") and private property ("their * * * houses, papers, and effects").[24] And the Second Amendment's explicit conjunction between "security" and freedom makes perfect sense in a Constitution that conjoins as among its goals *both* "the common defence" "*and* * * * the Blessings of Liberty".[25] Thus, the Second Amendment provides a far more pertinent, precise, and especially protective definition of *constitutional* "security" (looking to substance) than does the vague term "*homeland* security" (looking primarily to place). For, self-evidently, "a free State" cannot possibly be a National (or a State or Local) police state in which individuals are systematically denied "the Blessings of Liberty", through "unreasonable searches and seizures" or otherwise. And therefore "a free State" can never seek, certainly can never attain, and can never, ever acquiesce in "homeland security" through the methods of a police state.

Furthermore, because "[a] well regulated Militia" is "necessary to the security of a free State", "the Militia of the several States"—and the underlying "right of the people to keep and bear Arms"—can never be the instruments, but must always be the antagonists, of a police state. This, too, because the Constitution delegates to Congress the power and the duty "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions", and *only* for these three purposes.[26] Together, these purposes constitute the quintessence of "homeland security"—but none of them lends the least colorable support to the erection of a police state. And if by some wild misconstruction someone imagined that they did, the Second Amendment—which ultimately acts as the most forceful of all "checks and balances" on Congress's powers—declares that those powers can be employed *only* in service of "a free State".

Thus the Constitution renders pellucid the critical distinction between the simple apothegm from the early literature of freedom, that "the Sword and Soveraignty always march hand in hand"[27]—or, in its less elegant but more notorious, albeit equally accurate, modern formulation, that "'[p]olitical power

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[24] Emphases supplied in both instances.

[25] U.S. Const. preamble (emphasis supplied).

[26] U.S. Const. art. I, § 8, cl. 15.

[27] Anonymous [John Trenchard with Walter Moyle], AN ARGUMENT, Shewing, that a Standing Army Is inconsistent with A Free Government, and absolutely destructive to the Constitution of the English Monarchy (London, England: [no publisher identified] 1697), at 7. On Trenchard's importance, *see* Introduction, *The English Libertarian Heritage: From the Writings of John Trenchard and Thomas Gordon in* The Independent Whig *and* Cato's Letters, David L. Jacobson, Editor (Indianapolis, Indiana: The Bobbs-Merrill Company, Inc., 1965); Caroline Robbins, *The Eighteenth-Century Commonwealthman: Studies in the Transmission, Development and Circumstance of English Liberal Thought from the Restoration of Charles II until the War with the Thirteen Colonies* (Cambridge, Massachusetts: Harvard University Press, 1959), *passim*.

grows out of the barrel of a gun'"[28]—and the elaboration of that insight in America. As a generality, the "Soveraignty" that "always march[es] hand in hand" with "the Sword", or the "'[p]olitical power [that] grows out of the barrel of a gun'", can be either good *or bad*, depending upon circumstances. In the hands of Mao Tse-tung—indeed, in the hands of each and every *Führer, Duce, Vozhd'*, or other psychopathological "leader" of the Twentieth Century—it proved to be uniformly malevolent.[29] Conversely, qualified in the manner set out in the Second Amendment, "'[p]olitical power grows out of the barrel of a gun'" is a formula for obtaining and preserving the rarest and best of all political goods: *self-government "of the people, by the people, for the people"*.[30] For, under that interpretation, the aphorism becomes: "political power ***for the defense of freedom*** grows out of the barrels of * * * guns ***held in the hands of the people themselves***". And nothing is "so essential to the liberties of the people" as "plac[ing] the sword in the[ir] hands"—this is "a real security" and "the greatest of all".[31]

Yet, although anyone can see, on the very face of the Constitution, conclusive evidence of the unique and indispensable relationship between "homeland security" and "the Militia of the several States", this book remains necessary. For today Americans are told—and all too many of them believe—that their Constitution does not really mean what it says in the words the Framers penned and WE THE PEOPLE ratified, but that this country has an oxymoronic "living Constitution" which means whatever rogue public officials and subversive

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[28] *Quotations From Chairman Mao Tse-tung* (Peking, China: Foreign Languages Press, First Edition, 1966), at 61.

[29] Doubtlessly, no less than Hitler or Stalin, Mao was a veritable monster, whose tyranny brought about the unjustifiable deaths of countless millions, and the needless suffering of yet millions more. *See, e.g.,* Frank Dikötter, *Mao's Great Famine: The History of China's Most Devastating Catastrophe, 1958-1962* (New York, New York: Walker & Company, 2010). But Mao was not the only political potentate who has enjoyed success and acclaim—at the very same time that he has wrought untold havoc—in the modern political world. Even such an iconic figure among Western statesmen as Winston Churchill must bear posthumous personal responsibility for policies of criminal negligence that verged on actual crimes against humanity. *See, e.g.,* Madhusree Mukerjee, *Churchill's Secret War: The British Empire and the Ravaging of India During World War II* (New York, New York: Basic Books, 2010). Neither did such genocidal policies arise only in the Twentieth Century. *See, e.g.,* Ciarán Ó Murchadha, *The Great Famine: Ireland's Agony 1845-1852* (London, England: Continuum International Publishing Group, 2011). As bad as "the Great Helmsmen" who steer their ships of state along such pernicious courses may be, though, they nonetheless sometimes stumble onto the truth, and popularize it (if only for their own purposes) in apt phrases with wide application. "Political power grows out of the barrel of a gun" is just such a phrase. It states a fundamental axiom of social organization so self-evident in principle and historically validated in practice that even such men as Mao, lost as they are in the depths of political and moral darkness, can recognize it.

[30] Abraham Lincoln, Address Delivered at the Dedication of the Cemetery at Gettysburg (19 November 1863), *in The Collected Works of Abraham Lincoln*, Roy P. Basler, Editor (New Brunswick, New Jersey: Rutgers University Press, 1953), Volume VII, at 23.

[31] Andrew Fletcher, A DISCOURSE OF GOVERNMENT With relation to MILITIAS (Edinburgh, Scotland: M. Cooper, 1755 [reprint of the 1698 edition]), at 7, 34. On Fletcher's contribution to the literature of liberty that inspired Americans in the 1700s, *see* C. Robbins, *The Eighteenth-Century Commonwealthman, ante* note 27, *passim*.

special-interest groups want it to mean from time to time, notwithstanding what it actually says at all times. The only antidotes to such an intellectually preposterous and politically poisonous doctrine are a detailed study of how to interpret the Constitution, and (with this in hand) a painstaking analysis of what WE THE PEOPLE intended—and should still intend—"the Militia of the several States" to be.

That is why this book is subtitled *Constitutional Principles of "the Militia of the several States"*. Americans must understand the constitutional principles of the Militia if they are to know what the Militia are, and how the Militia are to fulfill their constitutional responsibilities. Therefore, whoever wants—and, in the case of all patriotic Americans concerned with "homeland security", *needs*—to understand "the Militia of the several States", to revitalize the Militia, and at length to serve in the Militia, must first become thoroughly conversant with these principles. If WE THE PEOPLE do not take charge of the Constitution intellectually by understanding *in detail* why and how it serves as the foremost instrument of their own freedom *and* security, unscrupulous and wily men in public offices and special-interest groups will pervert the Constitution's powers into engines for depriving common Americans of their freedoms in the name of "security". They are well along that dark path right now.

To understand the Constitution with respect to the Militia (and everything else it contains, for that matter), Americans must focus on what the Constitution's key terms *actually meant in the late 1700s*—and what they continue to mean today, there having been no Amendments on that score in the intervening years. The original Constitution and the Bill of Rights, however, did not define "the Militia of the several States",[32] "[a] well regulated Militia" and "the right of the people to keep and bear Arms",[33] or what it means "[t]o provide for organizing, arming, and disciplining, the Militia".[34] They did not have to, because their original audience, WE THE PEOPLE in 1788 and 1791, knew precisely the import of those phrases. Unfortunately, most contemporary Americans do not. And sources from which they should derive useful information are all too often peculiarly devoid of it.[35] So WE THE PEOPLE today must study the legal history that this book provides—assiduously and with alacrity, for there is much to learn and little time remaining in which to assimilate and apply it.

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[32] U.S. Const. art. II, § 2, cl. 1.

[33] U.S. Const. amend. II.

[34] U.S. Const. art. I, § 8, cl. 16.

[35] For example, in some 1,593 pages of text thickly set with footnotes, the otherwise scholarly and comprehensive *The Constitution of the United States of America: Analysis and Interpretation*, Senate Document No. 92-82, 92d Congress, 2d Session (Washington, D.C.: U.S. Government Printing Office, 1973) devotes only 1-1/2 pages to the Militia Clauses of the original Constitution (Article I, Section 8, Clauses 15 and 16) and but 1-1/2 pages to the Second Amendment.

This is no merely academic exercise. At stake in the struggle for *true* "homeland security"—"the security of a free State"[36] with a "Government[ ] * * * deriving [its] just powers from the consent of the governed"[37] and committed "to secur[ing] the Blessings of Liberty to ourselves and our Posterity"[38]—is no less than America's survival as a free and independent nation. True, in light of the somber history of the last century, the odds against common Americans are daunting. But they are not impossibly heavy. Besides, the odds against National survival *without* revitalization of "the Militia of the several States"—immediately, if not sooner—are even worse. The variability, complexity, and fragility of contemporary society throughout America render the Militia even more important now than ever before, for several reasons:

First, modern society suffers from far more systemic risks than did its Colonial antecedents. Economic cycles of "boom and bust"—especially those caused by the emission of currency based on debt (the so-called "Bills of Credit" that the Colonies, the independent States, and the Continental Congress emitted until the Constitution outlawed such practices[39])—were not unknown during the 1700s. But they never manifested the chronic instability of modern central banking, or the immediacy and intensity of modern monetary and banking crises, which threaten America as a whole with depression, hyperinflation, or even hyperinflation coupled with depression. Colonial society was never exposed to major industrial accidents of a nuclear, chemical, or biological nature. And although epidemics of fatal diseases were not unknown in the 1700s, they were less likely to become pandemics than they are today, because modern means of transporting people and things can spread infections far and wide in very short lengths of time.

Second, the constituents and components of modern society are far more interdependent than those of Colonial society ever were. Today, if something goes seriously wrong in one place, it will usually have deleterious effects in others, and in short order. So, even natural disasters which may be geographically localized are no longer limited in the extent of their economic, social, and political consequences.

Third, modern society does benefit from excellent systems of communication and transportation—*when everything is working properly*. But prudent planners must presume that a true "alarm" (as *pre*-constitutional Americans denoted a serious crisis) will occur when or even because everything is *not* working properly, or even at all; or that some man-made or natural disaster will cause those systems to fail. For

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[36] U.S. Const. amend. II.

[37] Declaration of Independence.

[38] U.S. Const. preamble.

[39] *See* Edwin Vieira, Jr., *Pieces of Eight: The Monetary Powers and Disabilities of the United States Constitution* (Chicago, Illinois: R R Donnelley & Sons, Inc., GoldMoney Foundation Special Edition [2011] of the Second Revised Edition of 2002), at 67-205.

instance, if regional electrical grids shut down, or transportation networks break apart, widespread chaos will likely result (at least in the short term).

Fourth, to compound matters, modern society is far less self-reliant, self-sufficient, and self-confident than Colonial society was. Colonial economies were largely Local, and at least *semi*-agricultural, even in the vicinity of the few major cities—and most people knew how to provide themselves with food and shelter under adverse circumstances. In stark contrast, today the teeming urban and suburban masses in one metropolis after another could not hope to feed themselves for more than a week or two were transportation of food from the hinterlands interrupted. And most Americans do not possess the variety of practical knowledge and personal skills that their Colonial predecessors mastered as a matter of course—knowledge and skills that would be desperately needed everywhere in the event of (say) a catastrophic collapse of this country's economic infrastructure, leading to a prolonged depression. In the face of such major and widespread economic, social, or political crises, "emergency management" of the "top-down", centralized bureaucratic variety simply will not suffice. Inasmuch as the effects of these crises will likely differ in various places even within each State, let alone throughout the country as a whole, appropriate responses must be carefully tailored to the unique and probably constantly changing circumstances in each Locale, employing to the best possible degree the particular people and resources on hand at the time. Therefore, Local preparedness and Local responses through Local organization under Local command in "the Militia of the several States" will be necessary.

This book is intended to help bring that about.

Part One

METHODOLOGY

Instead of applying observation to the things we wished to know, we have chosen rather to imagine them. Advancing from one ill-founded supposition to another, we have at last bewildered ourselves amid a multitude of errors. These errors, becoming prejudices, are, of course, adopted as principles, and we thus bewilder ourselves more and more. The method, too, by which we conduct our reasonings is absurd; we abuse words which we do not understand, and call this the art of reasoning. When matters have been brought to this length, when errors have been thus accumulated, there is but one remedy by which order can be restored to the faculty of thinking; this is, to forget all that we have learned, to trace back our ideas to their source, to follow the train in which they rise, and * * * to frame the human understanding anew.

The Abbé de Condillac

The quotation on the preceding page is taken from Antoine Lavoisier, *Elements of Chemistry*, Robert Kerr, Translator (Edinburgh, Scotland: William Creech, Fourth Edition, 1799; Dover Facsimile Edition, 1965), at xxxv.

CHAPTER ONE

The constitutional principles of "the Militia of the several States" must be derived from the *pre*-constitutional Militia statutes of the American Colonies and independent States.

Where "the Militia of the several States" are concerned, several provisions of the Constitution must be considered:

> ARTICLE I, SECTION 8, CLAUSE 15—"The Congress shall have Power * * * To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions[.]"
>
> ARTICLE I, SECTION 8, CLAUSE 16—"The Congress shall have Power * * * To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress[.]"
>
> ARTICLE II, SECTION 2, CLAUSE 1—"The President shall be Commander in Chief * * * of the Militia of the several States, when called into the actual Service of the United States[.]"
>
> AMENDMENT II—"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."
>
> AMENDMENT V—"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger[.]"

So the Constitution recites. But what do these provisions individually import? How do they interrelate, both among themselves and with other relevant provisions of the Constitution? And by what means of objective verification or falsification can Americans be certain? Just as answers to these questions are not self-evident, the proper method for arriving at them is not self-explanatory. So a

careful study of that method is a necessary preliminary, because no one can determine what the Constitution actually means without first undertaking a detailed analysis of how to interpret the Constitution.

A. The centrality of the Declaration of Independence. The initial step must be to take close account of the legal and historical contexts in which the Constitution arose, in order to determine the source and substance of its authority. For neither the Constitution nor least of all the principles it embodies arose spontaneously out of nothing. That source and substance must be found in the Declaration of Independence.

It is perverse to pretend (as some will persist in doing) that the Declaration of Independence is not the original *and still fully enforceable* supreme organic law of each of the several States and of the United States as a whole. For, if the Declaration were not such, then neither WE THE PEOPLE, nor any of the States individually, nor the United States collectively could have claimed since 1776, or can claim today, an independent sovereignty on the basis of which to enact any other laws, such as the States' constitutions, the Articles of Confederation, the Constitution of the United States, and all of the statutes made in pursuance thereof. Yet, plainly, the Declaration established, not only when an individual living in the *pre-*constitutional era became an American citizen, independent of Britain as a matter of law as well as fact, but also when all American citizens, in their collective political capacities as "the good People of these Colonies", became independent sovereigns, no less as a matter of law.[40]

Nonetheless, some historians have contended that the Declaration of Independence was without the force of law in and of itself, and that it was instead the Resolution submitted by the Virginian Richard Henry Lee on 7 June 1776 and enacted by the Continental Congress on 2 July 1776 which brought about the Colonies' independence.[41] If true, this would mean that nothing contained in the Declaration would be a permanent part of America's supreme law, except for what was also contained in the Resolution of 2 July—and even that would derive its authority from the Resolution, not the Declaration. That contention, though, is self-evidently false. The Resolution of 7 June read as follows:

> *Resolved,* That these United Colonies are, and of right ought to be, free and independent States, that they are absolved from all allegiance to the British Crown, and that all political connection between them and the State of Great Britain is, and ought to be, totally dissolved.

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[40] *See* Inglis v. Trustees of Sailor's Snug Harbor, 28 U.S. (3 Peters) 99, 120-121 (1830); McIlvaine v. Coxe's Lessee, 8 U.S. (4 Cranch) 209, 212 (1808); Harcourt v. Gaillard, 25 U.S. (12 Wheaton) 523, 526-528 (1827).

[41] *See, e.g.,* William Hogeland, *Declaration: The Nine Tumultuous Weeks When America Became Independent, May 1-July 4, 1776* (New York, New York: Simon and Schuster, 2010), at 174.

> That it is expedient forthwith to take the most effectual measures for forming foreign Alliances.
>
> That a plan of confederation be prepared and transmitted to the respective Colonies for their consideration and approbation.[42]

Obviously, the second and third paragraphs can be disregarded here because they were recommendations for future political action by Congress, not the assertion of a fundamental legal position, and could not have been made effective in any event if the first paragraph had proven inoperative. And, in fact, those paragraphs were excised from the Resolution as adopted on 2 July 1776:

> *Resolved,* That these United Colonies are, and, of right, ought to be, Free and Independent States; that they are absolved from all allegiance to the British crown, and that all political connexion between them, and the state of Great Britain, is, and ought to be, totally dissolved.[43]

But one may accept for purposes of argument that the Resolution adopted on 2 July could by itself have "made the colonies independent" in some sense, without in the least acceding to the further notion that therefore the Declaration of Independence had no force of its own as law:

First, the Declaration of Independence was adopted by the selfsame Continental Congress, for the selfsame purpose, as the Resolutions of 7 June and 2 July. Indeed, the mandate for the Declaration derived from a further Resolution brought forward on 10 June 1776, "that no time be lost, in case the Congress agree thereto, that a committee be appointed to prepare a declaration to the effect of the * * * resolution [of 7 June 1776]".[44] And very little time was lost in that endeavor, as the committee "brought in a draught, which was read" to Congress on 28 June 1776.[45]

Second, the Declaration of Independence was adopted contemporaneously with the Resolution of 2 July 1776 (only two days apart),[46] with the Declaration *following* the Resolutions of 7 June and 2 July, and therefore to the extent of any substantive differences in the three documents amending or superseding the latter two.

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[42] Library of Congress, *Journals of the Continental Congress, 1774-1789*, Worthington C. Ford, Editor (Washington, D.C.: United States Government Printing Office, 1904-1937), Volume V (5 June 1776 to 8 October 1776), at 425 (footnote omitted).

[43] *Id.*, Volume V, at 507 (footnote omitted).

[44] *Id.*, Volume V, at 428-429.

[45] *Id.*, Volume V, at 491-502.

[46] *Id.*, Volume V, at 506-507 (Resolution), 510-515 (Declaration).

Third, on 4 July 1776 the Continental Congress also "*Ordered*, That the declaration be authenticated and printed" and "That copies of the declaration be sent to the several assemblies, conventions and committees, or councils of safety, and to the several commanding officers of the continental troops; that it be proclaimed in each of the United States, and at the head of the army"[47]—actions which it did *not* take with respect to the Resolution of 2 July, and which unquestionably demonstrate that Congress believed the important, because legally operative, document to be the Declaration, not the Resolution.

Fourth, in keeping with the Resolution of 10 June 1776, the Declaration incorporated and reasserted in full the operative part of the Resolution of 2 July:

> WE, * * * the REPRESENTATIVES OF THE UNITED STATES OF AMERICA, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, ***That these United Colonies are, and of Right ought to be FREE AND INDEPENDENT STATES; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved***; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do.[48]

If the Resolution of 2 July had issued with the force of law, its verbatim reassertion by the very same Congress for the identical purpose could have had no less of an effect.

Fifth, the Declaration was *not* merely a verbatim rehearsal of the Resolution of 2 July, but instead bracketed it with two very important statements, identifying: (i) the real parties in whose ultimate interest independence was being asserted—namely, "in the Name, and by Authority of the good People of these Colonies" (not just the Colonial governments); and (ii) the ambit of authority those parties intended to wield as a consequence of their independence—namely, the plenary powers "to do all * * * Acts and Things which Independent States may of right do". If the Resolution had sufficed to bring about such complete independence and legal self-sufficiency for "the good People of these Colonies", these further statements in the Declaration would not have been deemed necessary. Interestingly, too, this pattern set in the Declaration then carried over into the Constitution, which identifies the selfsame group as its real parties in interest—namely, "WE THE

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[47] *Id.*, Volume V, at 516 (footnote omitted).

[48] The text of the Resolution of 2 July 1776 appears in ***bold-italic*** typeface.

PEOPLE" who "ordain[ed] and establish[ed] this Constitution",[49] and then sets out those specifically enumerated powers, drawn from among all of the "Acts and Things which Independent States may of right do", that THE PEOPLE have delegated to the United States or withheld from the States.

Sixth, beyond all of this, the Declaration: (i) invoked the principles of "the Laws of Nature and of Nature's God" and carefully explained their application on behalf of "the good People['s]" decision "to dissolve the political bands which have connected them with another, and to assume among the powers of the earth" a "separate and equal station"; and (ii) marshaled damning facts in a lengthy indictment aimed at proving that "[t]he history of the present King of Great Britain" was one "of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States". So, whereas the Resolution of 2 July merely *claimed* independence, the Declaration *asserted and justified* it on the basis of controlling legal precepts and conclusive evidence.

Seventh, the Declaration was directed at Great Britain, the King, Parliament, and even "our Brittish brethren" as defendants, and addressed to the court of world public opinion ("a decent respect to the opinions of mankind") and to a court even higher than that ("appealing to the Supreme Judge of the world for the rectitude of our intentions") as the tribunals in and by which the merits of the dispute between Great Britain and "the good People of these Colonies" would be decided. So the Declaration was a "declaration", not only in the general sense of "[a] proclamation or affirmation",[50] but also and more importantly in the specific legal sense of "properly the shewing forth, or laying out, of an action personal in any suit".[51] True enough, what followed was a "suit" between two peoples and two political systems, the "litigation" of which necessitated a long and sanguinary passage of arms that once again proved the raw truth in the epigram, "'[p]olitical power grows out of the barrel of a gun'".[52] But it took the only form possible for a legal action enforcing "the Laws of Nature and of Nature's God" in the final court of appeal.

Eighth, although a suit in the court of last resort, the Declaration was not predicated upon the uncertain ground of what lawyers call "an issue of first impression". It did not depend for its validity upon utterly novel, even revolutionary principles that had never before been broached or tested "in the Course of human events". To the contrary: Everything of political philosophy upon which the Declaration relied was then part of "the Laws of Nature and of Nature's God" to

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[49] U.S. Const. preamble.

[50] Samuel Johnson, *A Dictionary of the English Language*, First Edition (London, England: W. Strahan, 1755), *and* Fourth Edition (London, England: W. Strahan, 1773), definition 1 in both editions. (Neither edition serially numbered its pages.)

[51] *Id.*, definition 3 in both editions.

[52] *Quotations From Chairman Mao, ante* note 28, at 61.

which "the opinions of mankind" throughout Western civilization had long deferred. Otherwise, how could those "Laws" have "entitle[d]" Americans to a "separate and equal station" "among the powers of the earth" in the view of "a candid world" to which the Declaration submitted its evidence and arguments? Plainly, the Founders did not claim to have invented these "Laws" themselves, only to have applied them to the Colonies' situation. Rather, they found their foundational political and legal principles laid out then most recently in the work of John Locke[53] and Algernon Sidney,[54] whom Thomas Jefferson ranked as the two well-springs from which Americans drew their political inspirations with respect to liberty and men's unalienable rights.[55] And inasmuch as Locke and Sidney had taken explicit pains to debunk Robert Filmer's apology for "the divine right of kings",[56] in which Filmer had attempted unsuccessfully to refute the earlier writings of Robert Bellarmine in favor of popular sovereignty, the tenets upon which the Declaration relied can be traced to Bellarmine's work in the early 1600s.[57] Hardly coincidental, then, was it that Thomas Jefferson owned a copy of Filmer's book, wherein apparently Jefferson himself had marked a passage in which Filmer rehearsed Bellarmine's arguments in favor of popular sovereignty, admitting that they "comprised the strength of all that I [Filmer] have ever read, or heard produced for the *Natural Liberty of the Subject*".[58] And, of course, the principles Bellarmine espoused can be traced back through such of the Spanish Scholastics as Vitoria and Suárez to Thomas Aquinas's *Summa Theologiae*. and thus ultimately to Aristotle's *Politics*. So the Declaration of Independence was anything but the outpouring of an alembic worked by a few radical political alchemists in America. Rather, it comprised the purest distillate of the political wisdom of the ages.

Ninth and last, the Declaration identified fixed legal principles, derived from "the Laws of Nature and of Nature's God", upon which the authority of the newly independent States would rest: namely, (i) What "Independent States may *of right* do" finds its genesis in the permanent "Laws of Nature and of Nature's God", not

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[53] *Two Treatises of Government* (London, England: Awnsham & John Churchill, 1698), Book II, Chapters XVII, XVIII, and XIX.

[54] *Discourses Concerning Government* [written in 1681-1683, published posthumously in 1698], Thomas G. West, Editor (Indianapolis, Indiana: Liberty Fund, Revised Edition, 1996).

[55] *See* Thomas G. West, Foreword, *in id.* at xv (footnote omitted). *See* C. Robbins, *The Eighteenth-Century Commonwealthman, ante* note 27, at 46.

[56] *Patriarcha: A Defense of the Natural Power of Kings against the Unnatural Liberty of the People* (written in 1637-1638, but not published until 1680).

[57] *See generally* John C. Rager, *The Political Philosophy of St. Robert Bellarmine: An Examination of Saint Cardinal Bellarmine's Defense of Popular Government and the Influence of His Political Theory upon the Declaration of Independence* (Spokane, Washington: Apostolate of Our Lady of Siluva, 1995), especially at 83-90.

[58] *See* James Brown Scott, *The Catholic Conception of International Law—Francisco de Vitoria, Founder of the Modern Law of Nations—Francisco Suárez, Founder of the Modern Philosophy of Law in General and in Particular of the Law of Nations, A Critical Examination and a Justified Appreciation* (Washington, D.C.: Georgetown University Press, 1934), at 425-426 & note 83.

in any merely transient human law. (ii) "[T]he governed" can "consent" to delegate to any "Form of Government" ***only*** "*just* powers" for the ***sole*** purpose of "secur[ing]" "certain unalienable Rights". And (iii) no "Form of Government [which] becomes destructive of these ends" can deny the ultimate "Right of the People to alter or to abolish it", and therefore to determine, in the first instance and with finality, when, why, and to what degree that "Form of Government" has "become[so] destructive", and what recourse should be had towards its correction or supersession—*which "Right" necessarily entails "the* People[*'s*]*" independent and complete control over* ***both*** *the interpretation as judges of the constitution or other organic law of that "Form of Government"* ***and*** *the determination as jurors of the underlying facts of the situation to which that juridical interpretation applies*.[59]

Thus, the conclusion must be that, far from having no force of law itself, the Declaration of Independence is *the* source of WE THE PEOPLE'S sovereignty, and through delegation from them, not only of such sovereign powers as the several States individually and the United States collectively may exercise, but also of such disabilities—that is, *absences* of power—as constrain them legally and politically. Therefore, those powers and disabilities must be predicated, conditioned, and applied in all of their particulars upon and according to the principles of law that the Declaration explicitly invoked as the bases for attesting that the "Free and Independent [American] States * * * have full Power * * * to do all * * * Acts and Things which Independent States may of right do".

B. Fundamental insights for interpreting the Constitution. The next question is what the Constitution, interpreted in light of the Declaration of Independence, actually means. In general terms, the answer is far simpler than most people imagine.

1. The meanings of the original Constitution and the Bill of Rights known at the times of their ratifications. The specific problem of how to interpret the language of the Constitution first arose—and was definitively solved for all time thereafter—in the late 1700s. The original Constitution was ratified in State Conventions from 7 December 1787 through 21 June 1788; and the Bill of Rights was ratified by the States' legislatures from 20 November 1789 through 15 December 1791.[60] *At that point in time*, in order to be "ratified" in any rational sense of that verb, the original Constitution and the Bill of Rights individually and

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[59] *See by way of analogy* Ohio Valley Water Company v. Ben Avon Borough, 253 U.S. 287, 289 (1920); Crowell v. Benson, 285 U.S. 22, 60 (1932); Saint Joseph Stock Yards Company v. United States, 298 U.S. 38, 51-52 (1936).

[60] *See* House Document No. 94-539, *ante* note 3, at 10, 12; *Documents Illustrative of the Formation of the Union of the American States, ante* note 1, at 1007-1061, 1063-1067. Hereinafter, unless otherwise qualified, reference to "the Constitution" *simpliciter* should be taken to include the original Constitution and all of its subsequent Amendments in existence at the relevant time.

together had to have meanings, in every word and phrase, fully accessible to the individuals who ratified them—that is, WE THE PEOPLE who the Preamble itself asserts "ordain[ed] and establish[ed] this Constitution", and their representatives in the States' legislatures. THE PEOPLE and their representatives had to understand exactly *what* they were "ordain[ing] and establish[ing]" and "ratifying". Before they took those fateful steps, they had to be assured of far more than that the original Constitution and its Amendments would be explained to them, piece by piece in some random fashion, only at unpredictable later dates in an uncertain future, and then only according to the unilateral interpretations of public officials whose identities they did not yet know, or might never know, and of whose competence and good faith they could have no guarantee. So THE PEOPLE must have believed that no facts material to any question of constitutional interpretation were unascertainable in principle, let alone affirmatively withheld or knowingly and willfully misrepresented by their agents in the Federal Convention that drafted the original Constitution, the State Conventions that ratified it, the Congress that drafted the Bill of Rights, and the State legislatures that ratified the first ten Amendments.

To be a valid "social contract" as American political philosophy understood the term *at that point in time*, the original Constitution upon its adoption had to embody a definite "meeting of the minds" among WE THE PEOPLE as to its substance. So, too, for every subsequent Amendment when it was ratified. For no prudent individuals, as individuals or as a polity, would—or rationally could—enter into a "contract" of any nature the meaning of which they did not then and there understand, or the meaning of which could unpredictably be changed at any time in the future at the mere whim of less than all of the contracting parties in a manner to which all of them did not originally agree. And to be a valid "law" *at that point in time*, the original Constitution (and then its various Amendments as each of them was ratified) had to have ascertainable meanings in all of their particulars. For, ultimately, the Constitution and its Amendments are statutes—and any statute composed "in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law".[61] So, if perforce of unintelligibility the original Constitution had not been a true "social contract" and a "law" *at that point in time*, neither it nor its subsequent Amendments could ever have become such, either then or thereafter. And if the Constitution had not been a "social contract" and a "law" then, so that it and its Amendment do not qualify as a "social contract" and "law" now, then they are useless—except for deceiving common Americans into sheepishly acquiescing in endless *usurpation* and *tyranny* directed against themselves, and otherwise stirring up other potentially limitless mischief and grief.

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[61] Connally v. General Construction Company, 269 U.S. 385, 391 (1926).

In keeping with the necessity to interpret constitutional terms according to the meanings they had during the *pre*-constitutional era, "usurpation" and "tyranny"—which are paradigmatic categories of unconstitutional actions—should be defined here, as well. According to Locke, "Usurpation is the exercise of Power, which another hath a Right to".[62] According to Sidney, three forms of usurpation were the most common:

> The first is, when one or more men take upon them the power and name of a magistracy, to which they are not justly called.
>
> The second, when one or more being justly called, continue in their magistracy longer than the laws by which they are called do prescribe.
>
> And the third, when he or they who are rightly called, do assume a power, tho within the time prescribed, and that the law does not give; or turn that which the law does give, to an end different and contrary to that which is intended by it.[63]

To Locke,

> *Tyranny* is *the exercise of Power beyond Right*, which no Body can have a Right to. And this is making use of the Power that any one has in his hands; not for the good of those, who are under it, but for his own private separate Advantage. When the Governour, however intituled, makes not the Law, but his Will, the Rule; and his Commands and Actions are not directed to the preservation of the Properties of his People, but the satisfaction of his own Ambition, Revenge, Covetousness, or any other irregular Passion.
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> * * * * *
>
> 'Tis a Mistake to think this Fault is proper only to Monarchies; other Forms of Government are liable to it, as well as that. For where-ever the Power that is put in any hands for the Government of the People, and the Preservation of their Properties, is applied to other ends, and made use of to impoverish, harass, or subdue them to the Arbitrary and Irregular Commands of those that have it: There it presently becomes *Tyranny*, whether those that thus use it are one or many.[64]

To which Sidney agreed,

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[62] *Two Treatises of Government, ante* note 53, Book II, Chapter XVIII, § 199.

[63] *Discourses Concerning Government, ante* note 54, at 220.

[64] *Two Treatises of Government, ante* note 53, Book II, Chapter XVIII, §§ 199 and 201.

> *that regard is to be had to the principal end and cause, for which a * * * lord is set over [a people] which is their good and profit, and not that it should turn to their destruction and ruin; for if that should be, there is no doubt but from thence forward, that power would be tyrannical and unjust, as tending more to the interest and profit of that lord, than to the publick good and profit of the subjects; which, according to natural reason, and the laws of God and man, is abhorred, and deserves to be abhorred.*[65]

This definition of "tyranny", of course, was not original with either Locke or Sidney. Much earlier Thomas Aquinas had opined that "[a] tyrannical régime is not just, because it is not directed to the common good but to the private good of the one who rules".[66] For another example, the eminent theologian and jurist Francisco de Vitoria, following Aquinas, held to the same definition: "Herein, indeed, is the difference between a lawful king and a tyrant, that the latter directs his government towards his individual profit and advantage, but a king to the public welfare[.]"[67]

2. The necessity of fixed principles of construction. For the original Constitution and the Bill of Rights to have had ascertainable meanings in 1788 and 1791, a set of equally ascertainable principles of interpretation or construction of their language must then have existed. After all, constitutional questions "must be resolved not by past uncertainties, assumptions, or arguments, but by the application of the controlling principles of constitutional interpretation".[68] Moreover, those principles themselves must have been fixed in substance, and their proper applications well understood, otherwise their very verbal ambiguity and political plasticity would have afforded a surreptitious means for serially amending the Constitution. "Surreptitious", because the original Constitution contained an explicit and complex procedure for Amendments.[69] And if effective amendment simply by alleged "interpretation" or "construction" were allowable, then this provision would have been utterly superfluous, even duplicitous, from the very outset—in derogation of the opposite conclusion, obvious from the structure of the instrument itself, that no "clause in the constitution is intended to be without effect".[70] In derogation, too, of the very purpose of the provision for Amendments, which is to compel extremely careful deliberation by WE THE PEOPLE as a whole on

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[65] *Discourses Concerning Government, ante* note 54, at 51-52 (footnote omitted) (quoting Bartolomé de Las Casas).

[66] *Summa Theologiae*, Secunda Secundae, Quaestio 42, De Seditione, Articulus 2, Ad Tertium, *in Edita Auspiciis et Inspiratione Pontificiae Universitatis Salmanticensis* (Biblioteca de Autores Christianes, Tertio Editio, 1963), Volume III, at 277 (the present author's translation).

[67] *De Iure Belli* (1557), *quoted in* J. Scott, *The Catholic Conception of International Law, ante* note 58, at 38.

[68] Wright v. United States, 302 U.S. 583, 597-598 (1938).

[69] U.S. Const. art. V.

[70] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803).

any proposed change in their Constitution, so as to preserve self-conscious and fully informed popular self-government. Whereas, underhanded *ersatz* amendments jury-rigged by specious "interpretations" or "constructions" of the Constitution aim at the subversion, if not the entire overthrow, of popular self-government—because the concocted "interpretations" or "constructions" derive, not from WE THE PEOPLE themselves, but instead from unelected judges and their law clerks, or nameless and faceless bureaucrats in "alphabet agencies" (the quintessence of political élitism); or from legislators almost always beholden to avaricious special-interest groups (the quintessence of political corruption). All of these constitute "factions"—namely, "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community".[71] Importantly, *even a majority* of the community may constitute a faction, inimical to the Constitution, if its members' aim is other than "the *common* defence" and "the *general* Welfare".[72] Therefore, the correct construction of the Constitution cannot be held hostage to what passes for modern "democracy": namely, the raw will of some majority of the moment, unrestrained by concerns for the community's well-being in the long run—which in its most grotesque manifestations the ancient Greeks disparaged as "ochlocracy", the rule of the mob. For example, Aristotle distinguished between, on the one hand, "a state", which was his name for a government in which "the citizens at large govern for the public good"; and, on the other hand, "democracy", which was his name for "the corruption[ ] attending" the type of government in which "those who have [the supreme power] are worth little or nothing" and rule without "hav[ing] a common good in view".[73] So, today as well, mere numbers can have nothing to do with the matter: The meaning of the Constitution's provisions "may not be submitted to vote; they depend on the outcome of no elections".[74]

Thus, although only implicit, this set of fixed principles of interpretation or construction arguably comprises the most important part of the Constitution, because it controls the meaning and therefore the application of everything else in the document. Self-evidently, too, because these principles were well understood and fixed in 1788 (as they had to be if the original Constitution were to have qualified as a "law" at all), and no Amendment of the Constitution addressed to any of them having supervened (or even been suggested) since then, they remain certainly ascertainable (and presumably still well understood), and still fixed, today.

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[71] *The Federalist* No. 10 (James Madison).

[72] *See* U.S. Const. preamble (emphasis supplied).

[73] *Politics*, Book III, Chapters VII and VIII, *in* A TREATISE ON GOVERNMENT OR, THE POLITICS OF ARISTOTLE, William Ellis, Translator (London, England: J.M. Dent & Sons Ltd., 1912), at 79.

[74] West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638 (1943).

a. The plain meaning of the words. The most important principle of constitutional interpretation is *literalism*: the self-evident truth that the first step in understanding the Constitution must be to read its actual words in the expectation that they will elucidate its meaning. After all, "[w]hy not assume that the framers of the Constitution, and the people who voted it into existence, meant exactly what it says?"[75] Indeed, is not the opposite assumption—that the document might mean something other than what it says—to attribute to its authors either lunacy or fraud?!

History attests that "the framers of the Constitution were * * * practical men" who "prescrib[ed], in language clear and intelligible, the powers that government was to take".[76] No one has ever denied, or even seriously questioned, that they employed words and phrases in "their natural sense";[77] in their "natural and obvious sense";[78] in their "natural signification";[79] with their "natural meaning";[80] with their "normal and ordinary * * * meaning";[81] according to "ordinary and common usage";[82] and according to their "plain meaning".[83]

b. As understood at that time. Yet "language clear and intelligible" *to whom and when*? The answer to this question is found in another key principle of constitutional interpretation: *temporal contextualism*. Namely, that the Constitution's words and phrases are to be construed as the people by and for whom the Constitution was written understood them at that time—that is, WE THE PEOPLE of the late 1700s.

(1) Proper construction of the Constitution must look to and determine "[w]hat * * * those who framed and adopted it understood [its] terms to designate and include"[84]—"that sense in which * * * [the words were] generally used by those for whom the instrument was intended",[85] "the common understanding" "when the Constitution was adopted",[86] "the common parlance of the times in which the

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[75] Lake County Commissioners v. Rollins, 130 U.S. 662, 670 (1889).

[76] South Carolina v. United States, 199 U.S. 437, 449 (1905).

[77] Gibbons v. Ogden, 22 U.S. (9 Wheaton) 1, 188 (1824); McPherson v. Blacker, 146 U.S. 1, 27 (1892); South Carolina v. United States, 199 U.S. 437, 449 (1905).

[78] The Pocket Veto Case, 279 U.S. 655, 679 (1929).

[79] Lake County Commissioners v. Rollins, 130 U.S. 662, 670 (1889).

[80] Wright v. United States, 302 U.S. 583, 588 (1938).

[81] United States v. Sprague, 282 U.S. 716, 731 (1931); Green v. United States, 356 U.S. 165, 210 (1958) (Black, J., dissenting).

[82] The Pocket Veto Case, 279 U.S. 655, 679 (1929).

[83] Bronson v. Kinzie, 42 U.S. (1 Howard) 311, 318 (1843).

[84] Pollock v. Farmers' Loan & Trust Company, 157 U.S. 429, 558 (1895).

[85] Ogden v. Saunders, 25 U.S. (12 Wheaton) 213, 332 (1827) (Marshall, C.J., dissenting).

[86] Ohio *ex rel.* Popovici v. Agler, 280 U.S. 379, 383 (1930).

Constitution was written",[87] and "according to their accepted meaning in that day".[88] Importantly, the analytical emphasis here rests squarely upon "*common*" parlance and understanding—not some arcane and recondite gnosis, hermeneutic, or intuition of a narrow political, judicial, academic, intellectual, or other self-styled and self-empowered élite. For the Constitution was designed to "establish Justice" *throughout* the United States, "insure domestic Tranquility" *everywhere* within this country, "provide for the *common* defence", "promote the *general* Welfare", and "secure the Blessings of Liberty to ourselves and our Posterity" *for Americans as a whole in all ages to come*.[89] So the true sense of the Constitution is not to be found simply in the understanding of the Framers, or of the Founding Fathers, or of some other small group of American patriots, no matter how distinguished they may have been—but exclusively according to the meaning broadly accepted among WE THE PEOPLE: namely, "the *common* understanding" among *common* individuals. And, plainly enough, because the Constitution was "clear and intelligible" to THE PEOPLE "in that day", it remained and remains "clear and intelligible" to THE PEOPLE thereafter, generation upon generation, even unto the present day.

(2) Neither the Framers who composed the original Constitution, nor the Founding Fathers who ratified it in the State Conventions, nor WE THE PEOPLE who empowered them all as agents to draft and adopt it at that point in time could have predicted whether, when, how, or why the particular words and phrases they used and approved, because they understood them in particular senses, might change (or be claimed by someone to have changed) in meaning in the dim, distant, and perhaps disturbed future. Rather, they must have conclusively presumed that the Constitution's words and phrases, no matter how much their connotations and even denotations might be transformed by social convention in other contexts and for other purposes, would nevertheless always remain exactly the same for the purpose of interpreting and applying the Constitution—that is, those words and phrases would display a *legal fixity of meaning* in that document.

Because the Constitution's words and phrases must be understood "according to their accepted meaning *in that day*", that certain of them may subsequently have passed into obsolescence, obscurity, or disuse, or acquired different connotations, *in ordinary daily discourse today* is wholly inadmissible as an argument for construing *the Constitution* in some novel fashion according to such neologisms. For that procedure would amount, not to interpretation, but to *re*interpretation, and therefore to *mis*interpretation. To be sure, in the course of time various words and phrases in the English language may depart from their

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[87] United States v. South-Eastern Underwriters Association, 322 U.S. 533, 539 (1944). *Accord*, Gibbons v. Ogden, 22 U.S. (9 Wheaton) 1, 190 (1824).

[88] Scott v. Sandford, 60 U.S. (19 Howard) 393, 418 (1857).

[89] *See* U.S. Const. preamble (emphasis supplied).

original meanings, develop altogether new meanings, or even disappear entirely in common usage. But, even so, the meanings of those words and phrases *as employed in the Constitution* do not change, in whole or in any part.

The "*meaning* [of constitutional provisions] is changeless; * * * only their *application* * * * is extensible".[90] "What [the Constitution] meant when adopted it still means for the purpose of interpretation",[91] notwithstanding swings in public opinion at home or abroad,[92] variations in "the ebb and flow of economic events",[93] or shifts in what is loosely called "public policy".[94] Indeed, facile and ultimately fatuous political slogans such as "'[p]olicy and humanity' are dangerous guides in the discussion of a legal proposition. He who follows them far is apt to bring back the means of error and delusion."[95] Therefore,

> while [the Constitution] remains unaltered, it must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning, and delegates the same powers to the government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of th[e Supreme C]ourt, and make it the mere reflex of the popular opinion or passion of the day.[96]

For, "[i]f * * * we are at liberty to give old words new meanings * * * , there is no power which may not * * * be conferred on the [G]eneral [G]overnment"[97]—or, for that matter, no power that may not be reallocated away from WE THE PEOPLE to the General Government or the States.[98] ***No constitution can limit the powers it delegates if the definitions of its terms may deviate from their original meanings at the behest of the very persons whose powers are to be limited.***

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[90] Home Building & Loan Association v. Blaisdell, 290 U.S. 398, 451 (1934) (Sutherland, J., dissenting).

[91] Smiley v. Holm, 285 U.S. 355, 365 (1932). *Accord*, South Carolina v. United States, 199 U.S. 437, 448-449 (1905).

[92] Scott v. Sandford, 60 U.S. (19 Howard) 393, 426 (1857).

[93] West Coast Hotel Company v. Parrish, 300 U.S. 379, 402 (1937) (Sutherland, J., dissenting).

[94] Patton v. United States, 281 U.S. 276, 306 (1930).

[95] Edwards v. Kearzey, 96 U.S. 595, 604 (1878).

[96] Scott v. Sandford, 60 U.S. (19 Howard) 393, 426 (1857).

[97] Passenger Cases, 48 U.S. (7 Howard) 283, 478 (1849).

[98] The Tenth Amendment to the Constitution renders apparent the limitless scope of the possible pernicious permutations and combinations that could arise.

(3) Moreover, no subsequent legislative or judicial "precedents"—or, more accurately described, later innovations—can rewrite the Constitution. "[W]hen the meaning and scope of a constitutional provision are clear, it cannot be overthrown by legislative action, although several times repeated and never before challenged."[99] "[N]either the antiquity of a practice nor * * * steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack".[100] Surely, if "a bold and daring usurpation might be resisted, after * * * [long and complete] acquiescence",[101] then a mindless "[g]eneral acquiescence cannot justify departure from the law",[102] no matter how long it may have continued. "Illegality cannot attain legitimacy through practice."[103]

c. What linguistic authority controls. Application of the rule that the Constitution's words and phrases should be interpreted according to their "ordinary acceptation", "ordinary and common usage", "sense most obvious to * * * common understanding", and "plain meaning" as these were known during the *pre-*constitutional period requires reference to some linguistic authority to determine what the meanings of those words and phrases actually were at that time. *How* does one know now what was generally known then?

(1) Then-contemporary dictionaries not necessarily definitive. Plainly, though, recourse simply to some then-contemporary dictionary will not always suffice. For example, both the first and fourth editions of Samuel Johnson's famous *A Dictionary of the English Language* defined "militia" as "[t]he trainbands; the standing force of a nation"; defined "trainbands" as "[t]he militia; the part of the community trained to martial exercise"; and defined "regulate" as "[t]o adjust by rule or method".[104] From this alone, however, it would have been impossible for anyone in 1791, and remains impossible for anyone today, to describe with specificity or surety what the Second Amendment meant or still means by "[a] well regulated Militia". To qualify as such a "Militia", *what* "part of the community" must be "trained", to *what* "martial exercise", and by *what* "rule or method" that will enable it to constitute a "standing force"? No dictionary by itself can answer any of these questions.

(2) Subjective views of the Founding Fathers not controlling. A technique often employed in academic, as well as popular, studies that aim at

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[99] Fairbank v. United States, 181 U.S. 283, 311 (1901).

[100] Williams v. Illinois, 399 U.S. 235, 239 (1970), *quoted in* Pacific Mutual Life Insurance Company v. Haslip, 499 U.S. 1, 18 (1991).

[101] McCulloch v. Maryland, 17 U.S. (4 Wheaton) 316, 401 (1819).

[102] Smiley v. Holm, 285 U.S. 355, 369 (1932).

[103] Inland Waterways Corporation v. Young, 309 U.S. 517, 524 (1940).

[104] Respectively, the sole definition in both the First (1755) and the Fourth (1773) Editions; the sole definition in both editions; *and* definition 1 in both editions.

defending "the right of the people to keep and bear Arms"[105] attempts to ascertain the meaning of that phrase (as well as others in the Constitution) by compiling statements attributed to various of the Framers of the Constitution and others among the Founding Fathers and prominent American patriots of that era. Unfortunately, this approach is multiply flawed. For these statements evidence no more than the bare words that some Framer, Founder, or other patriot spoke or wrote on a particular occasion. They are neither always self-explanatory nor ever self-validating as to their substance. Indeed, they are not necessarily even accurate summaries of actual historical facts, or especially of correct legal principles, or perhaps even of the true personal opinions of those individuals—but instead may require other, and possibly extensive, evidence for their corroboration or correction.

In the best of cases, these statements, taken individually or collectively, and even if they themselves are substantially accurate as far as they go, do not provide all of the information necessary to define the constitutional characteristics of "the Militia of the several States";[106] what constitutes "[a] well regulated Militia" and what is the substance of "the right of the people to keep and bear Arms";[107] and what the power "[t]o provide for organizing, arming, and disciplining, the Militia" requires and allows Congress and the States to do *vel non*.[108] Indeed, these statements do not offer a complete insight into even any particular Framer's or Founder's individual opinions on those matters, his reasons for those opinions, and the facts he may have believed supported them—let alone a reliable gauge as to what the Framers and Founders, let alone the vast majority of politically literate Americans of that era, might all have agreed upon had the matter been put to them collectively.

Moreover, some of this material is patently unreliable. For instance, in the debates in Virginia's Convention of 1788, delegates differed radically as to whether Congress's proposed constitutional power "to provide for organizing, arming, and disciplining, the Militia" is exclusive, or allows for concurrent action in those particulars by the States.[109] On one side were:

> • PATRICK HENRY—"The clause which says that Congress shall 'provide for arming, organizing, and disciplining the militia * * * ,' seemed to put the states in the power of Congress. * * * The power of arming the militia, and the means of purchasing arms, are taken from the states by the

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[105] U.S. Const. amend. II.

[106] U.S. Const. art. II, § 2, cl. 1.

[107] U.S. Const. amend. II.

[108] U.S. Const. art. I, § 8, cl. 16.

[109] An example is drawn from Virginia's Convention because this study focuses in part on Virginia's *pre*-constitutional Militia laws. Similar instances of dissension among the Founding Fathers could easily be found, though, in the reported debates in other State Conventions.

paramount powers of Congress. If Congress will not arm them, they will not be armed at all."[110]

• GEORGE MASON—"The militia may be here destroyed by that method which has been practised in other parts of the world before; that is, by rendering them useless—by disarming them. Under various pretences, Congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it, for Congress has an exclusive right to arm them * * * . Should the national government wish to render the militia useless, they may neglect them, and let them perish, in order to have a pretence of establishing a standing army."[111]

• WILLIAM GRAYSON—"As the exclusive power of arming * * * was given to Congress, they might entirely neglect them; or they might be armed in one part of the Union, and totally neglected in another."[112]

On the other side were:

• EDMUND RANDOLPH—"It is clear and self-evident that the pretended danger cannot result from the clause. Should Congress neglect to arm or discipline the militia, the states are fully possessed of the power of doing it; for they are restrained from it by no part of the Constitution."[113]

• JAMES MADISON—"I cannot conceive that this Constitution, by giving the general government the power of arming the militia, takes it away from the state governments. The power is concurrent, and not exclusive."[114]

• GEORGE NICHOLAS—"The power of arming the[Militia] is concurrent between the general and state governments; for the power of arming them rested in the state governments before; and although the power be given to the general government, yet it is not given exclusively; for, in every instance where the Constitution intends that the general government shall exercise any power exclusively of the state governments, words of exclusion are particularly inserted. Consequently, in every case where such words of exclusion are not inserted, the power is concurrent to the state governments and Congress, unless where it is impossible that the power should be exercised by both. It is, therefore, not an absurdity to say, that Virginia may arm the militia, should Congress neglect to arm

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[110] Jonathan Elliot, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787 (Philadelphia, Pennsylvania: J.B. Lippincott Company, Second Edition, 1836), Volume 3, at 169.

[111] *Id.*, Volume 3, at 379.

[112] *Id.*, Volume 3, at 418.

[113] *Id.*, Volume 3, at 206.

[114] *Id.*, Volume 3, at 382.

> them. But it would be absurd to say that we should arm them after Congress had armed them, when it would be unnecessary[.]"[115]
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> • JOHN MARSHALL—"If Congress neglect our militia we can arm them ourselves. Cannot Virginia import arms? Cannot she put them into the hands of her militia-men?
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> " * * * [T]he power of governing the militia was not vested in the states [only] by implication, because, being possessed of it antecedent to the adoption of the government, and not being divested of it by any grant or restriction in the Constitution, they must necessary be as fully possessed of it as ever they had been."[116]
>
> • EDMUND PENDLETON—"[T]here is nothing to preclude them [that is, the States] from arming and disciplining the[Militia], should Congress neglect to do it."[117]

Obviously, *both* of these mutually contradictory viewpoints could not then have been, and cannot now be, correct. Yet, to determine which of them was and remains cogent requires recourse to evidence and reasoning *other than these statements alone present*.

Of course, men such as Patrick Henry and George Mason, who opposed ratification of the original Constitution, may have voiced what they knew were extravagant constructions of that document merely as a means of putting their opponents on the rhetorical defensive. They were, after all, intent on convincing Virginia's Convention *not* to ratify the Constitution, for which result fear might have proven a stronger motivation than cold reason. Yet some of their utterances are not so easily written off as mere political hyperbole. For instance, Henry stated that, in relation to the Militia, "[t]he great object is, that every man be armed".[118] That, however, is not merely the "object", but *the very historical and constitutional definition*, of the "Militia" in America—the people armed, not as a matter of happenstance, individually and voluntarily, but as a matter of systematic organization, collectively and compulsorily. Had Henry focused on this, he might have been able to advance a far more powerful argument than he did in parsing the Constitution's delegation of power to Congress "[t]o provide for * * * arming * * * the Militia"—perhaps by challenging his opponents to admit that Congress's power constituted a *duty* to see to it, one way or another, whether by Congressional, State, or the people's own action, that (in Henry's own words) "[e]very one who is able may have a gun";[119] and that if Congress did not perform that duty, the

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[115] *Id.*, Volume 3, at 391.

[116] *Id.*, Volume 3, at 421.

[117] *Id.*, Volume 3, at 440.

[118] *Id.*, Volume 3, at 386.

[119] *Id.*

responsibility and right to act fell to the States, and in default of the States to the people themselves.

Similarly, Mason rhetorically shot himself in the foot when he answered his own question—"Who are the militia?"—with the response, "[t]hey consist now of the whole people, except a few public officers. But I cannot say who will be the militia of the future day."[120] For his definition was too narrow, and his implicit misinterpretation of Congressional power too broad. As will appear further on, in *pre*-constitutional times some public officials were exempted from certain Militia duties, but were not thereby excluded from the Militia altogether.[121] The constitutional definition of the Militia derives from and embodies such *pre*-constitutional practices.[122] And Congress cannot change *any* constitutional definition,[123] except as a participant in the formal process of amendment.[124] So Mason would have stood on firmer ground had he demanded that his opponents either admitted as much (thereby conceding the limited power of Congress in that regard), or denied it (thereby supporting his claim that the Constitution delegated too much power to Congress).

Presumably, both Henry and Mason knew better than they spoke, and would have spoken to better purpose had they been in a position to measure their words more calmly and carefully than they did. But their behavior exemplifies how, in the tumultuous circumstances in which they found themselves, even the most prominent figures among the Framers and Founders did not necessarily think through and craft their statements about the Constitution as circumspectly (or perhaps as honestly) as they might have done had they been consciously writing "for the ages" in the quiescent solitude of their own libraries.

Even such an artfully composed compendium as *The Federalist Papers* contains veins of tendentious political propaganda and mutually conflicting passages that unfavorably distinguish it from an objective and even-handed academic analysis of the Constitution. For example, in *The Federalist* No. 29, Alexander Hamilton attacked those opponents of the original Constitution who

> apprehend[ed] danger from the militia itself in the hands of the federal government. It is observed that select corps may be formed, composed of the young and the ardent, who may be rendered subservient to the views of arbitrary power.

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[120] *Id.* at 425.

[121] *See post*, at 252-254 (Rhode Island) and 617-623 (Virginia).

[122] *See post*, at 63-76.

[123] Eisner v. Macomber, 252 U.S. 189, 206 (1920).

[124] U.S. Const. art. V.

Yet Hamilton himself, in that very paper, argued that "[l]ittle more can reasonably be aimed at with respect to the people at large than to have them properly armed and equipped; and in order to see that this be not neglected, * * * to assemble them once or twice in the course of a year"—and then proposed that

> [t]he attention of the government ought particularly to be directed to the formation of a select corps of moderate size, upon such principles as will really fit it for service in case of need. By thus circumscribing the plan, it will be possible to have an excellent body of well-trained militia ready to take the field whenever the defense of the State shall require it.

Hamilton did not explain, however, on what grounds "a select corps of *moderate* size", even if well disciplined, *but without significant support from the remainder of the people*, could be expected to oppose a domestic "standing army" (let alone a force of foreign invaders) presumably larger in size and composed of at least equally competent soldiers. Neither did he preëmptively refute the obvious objection that the members of "a *select* corps" might envision themselves as separate from, independent of, and even antagonistic to the people, and thus become, not just "subservient to the views of arbitrary power", but an actual source and instigator of such "views". In any event, Hamilton must have been familiar with the relevant literature of the period,[125] including the definition in Article 13 of Virginia's Declaration of Rights of 1776 that "a well regulated militia" is "composed of the body of the people, trained to arms"{EN-1}—with which patriots in every other State as well would doubtlessly have agreed. He surely would have known that, in common parlance, "the *body* of the people" meant "[a] collective mass; a joint power" and "[t]he main part; the bulk".[126] And more likely than not he would also have been familiar with the specifically political—and radical—implication that "the body of the people" was the embodiment of *constitutional democracy* in its truest and best sense: incorporating and empowering the entirety of the free adult individuals from all walks of life, occupations, and economic and social classes throughout the community in service of the community's aggregate and permanent interests.[127] Nonetheless, Hamilton frankly opposed preparing most of the citizenry for some sort of effective Militia service, other than requiring the mere personal

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[125] Because the *pre*-constitutional statutes and other material to be referenced in this study are so voluminous, they will be cited in endnotes rather than footnotes. In the text, the endnotes will appear as {EN-1}, {EN-2}, {EN-3}, and so on.

[126] S. Johnson, *Dictionary*, *ante* note 50, definition 5 in both the First (1755) and the Fourth (1773) Editions, and definitions 9 in the First Edition and 8 in the Fourth Edition.

[127] On this then-contemporary understanding of "the body" made notorious in Boston in the 1770s, *see, e.g.*, Benjamin L. Carp, *Defiance of the Patriots: The Boston Tea Party & the Making of America* (New Haven, Connecticut: Yale University Press, 2010), at 99; Esther Forbes, *Paul Revere & The World He Lived In* (Boston, Massachusetts: Houghton Mifflin Company, 1948) at 195-196.

possession of arms. Surely he realized that, even if "the people at large" were "properly armed and equipped", they would remain otherwise unorganized, and largely if not completely undisciplined and untrained—and therefore would not constitute a "militia" at all, any more than contemporary Americans who happen to possess firearms constitute a "militia" merely as a consequence of such possession.

Contrast this with *The Federalist* No. 46, in which James Madison contended that

> [t]he only refuge left for those who prophesy the downfall of the State governments is the visionary supposition that the federal government may previously accumulate a military force for the projects of ambition. * * * That the people and the States should, for a sufficient period of time, elect an uninterrupted succession of men ready to betray both; that the traitors should, throughout this period, uniformly and systematically pursue some fixed plan for the extension of the military establishment; that the governments and the people of the States should silently and patiently behold the gathering storm and continue to supply the materials until it should be prepared to burst on their own heads must appear to everyone more like the incoherent dreams of a delirious jealousy, or the misjudged exaggerations of a counterfeit zeal, than like the sober apprehensions of a genuine patriotism. Extravagant as the supposition is, let it, however, be made. Let a regular army, fully equal to the resources of the country, be formed; and let it be entirely at the devotion of the federal government: still it would not be going too far to say that the State governments with the people on their side would be able to repel the danger. The number to which, according to the best computation, a standing army can be carried in any country does not exceed one hundredth part of the whole number or souls; or one twenty-fifth part of the number able to bear arms. This proportion would not yield, in the United States, an army of more than twenty-five or thirty thousand men. To these would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties and united and conducted by governments possessing their affections and confidence. It may well be doubted whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops.

Of these two, then, who was correct: Hamilton—who proposed Militia the effective portions of which would be composed merely of "select corps"; or Madison, who presumed (as any Virginian of that era would have) that the Militia would always be "composed of the body of the people, trained to arms"? Could the Militia powers and duties of the General Government and the States allow such mutually contradictory results? Or perhaps should the statements of Hamilton and Madison

be reconciled by reference to the *pre-*constitutional practice—with which they both were surely familiar—of creating special units within the Militia (such as "Minutemen" and "Rangers") to which were tolled off the men most capable of performing arduous duties, with other men assigned to less-rigorous ordinary service, yet with all of them at least minimally trained for any tasks they might be called upon to fulfill in an emergency?

Examples such as these prove that random statements drawn from the Framers, Founders, or other American patriots in the late 1700s cannot always—and, really, should never—be naively accepted at face value, but must instead be read critically in their peculiar historical contexts and then checked for accuracy by reference to some other, independent, objective, verifiable, and (if possible) unimpeachable sources capable of providing standards by means of which to winnow the wheat from the chaff. That being the case, though, such other sources can better serve in the first instance as authorities for the substance of the statements than can the statements themselves—thus rendering the statements at best cumulative and even supererogatory simply as a consequence of proving their accuracy.

Even if particular Framers, Founders, or other American patriots could in some sense be considered "experts" on the subject of constitutional principles, and even if their statements and writings could be assimilated to "testimony" (albeit not under oath), that "testimony" would not necessarily constitute conclusive evidence as to the meaning of any constitutional provision. In a court of law, after all, an expert may be allowed to testify as to his opinion on a matter within his area of expertise—but then he is subject to cross-examination on the *basis* for his opinion, and its *sufficiency*. So, even if those Framers and Founders were acknowledged experts, common Americans in the jury of public opinion both then and now would have been and are entitled to test the witnesses' expert opinions by investigating the evidence upon which they had relied, and the methods which they had employed for evaluating it. Moreover, such a jury would have been and would still be justified in discounting or disregarding entirely any such expert's testimony, if it determined that the basis of his opinion, or his reasoning from that basis, were faulty, or that he were biased or otherwise unreliable as a witness.

(3) The objectively probable consensus among WE THE PEOPLE. The personal opinions of simply the Framers, the Founding Fathers, and other prominent American patriots of the *pre-*constitutional era also cannot suffice for constitutional interpretation for the evident reason that, as illustrious in accomplishments as these men were, they numbered very few—whereas the Constitution, as its Preamble attests, was "ordain[ed] and establish[ed]" by WE THE PEOPLE as a whole. So, inasmuch as one of the first steps towards elucidating the true meaning of the Constitution is "to review the background and environment of

the period in which that constitutional language was fashioned and adopted",[128] "to place ourselves as nearly as possible in the condition of" the Americans of that era,[129] and "to recall the contemporary or then recent history of the controversies on the subject" that still "were fresh in the memories of those who achieved our independence and established our form of government"[130]—one must not just enter the individual minds of the Framers of the Constitution who originally drafted it, or the Founding Fathers who worked for its ratification, or others among the most prominent patriots of their time, but instead must search out the most probable consensus among *all* of the reasonably intelligent and informed Americans of personal integrity who worked for independence and whom the Constitution identifies as WE THE PEOPLE. The question then becomes: "How would WE THE PEOPLE in 1788 and 1791 have determined what the original Constitution, and then the Constitution as amended by the Bill of Rights, meant to them?" This reduces to the question: "What were, and how would THE PEOPLE have used, the relevant intellectual resources available to every literate adult American at that time?"

(a) On the one hand, vanishingly few among WE THE PEOPLE anywhere in America had any personal experience of the Federal Convention of 1787 (and none of them who happened to live in Rhode Island, because that State dispatched no delegates to Philadelphia). Very few had any vicarious experience, either: For the proceedings were conducted *in camera*, with no contemporary reports in newspapers or other publications. And both the official Journal of the Convention, and private notes taken by various participants, were not published until many years later—James Madison's now famous notes of the debates, for example, not coming to the public's attention until 1840.[131] Similarly, very few among WE THE PEOPLE had any personal experience as delegates to the several States' Conventions in 1787 and 1788. And THE PEOPLE'S vicarious experiences in that particular were limited to reports of the proceedings in newspapers, which were not entirely reliable.[132]

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[128] Everson v. Board of Education, 330 U.S. 1, 8 (1947). *Accord*, *e.g.*, Pollock v. Farmers' Loan & Trust Company, 157 U.S. 429, 558 (1895); Maxwell v. Dow, 176 U.S. 581, 602 (1900); Grosjean v. American Press Company, 297 U.S. 233, 245-249 (1936).

[129] *Ex parte* Bain, 121 U.S. 1, 12 (1887). *Accord*, *e.g.*, South Carolina v. United States, 199 U.S. 437, 450 (1905).

[130] Boyd v. United States, 116 U.S. 616, 624-625 (1886).

[131] *See The Records of the Federal Convention of 1787, ante* note 2, Volume 1, at xi-xxii.

[132] *See* J. Elliot, THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *ante* note 110, Volume 1, at iii (PREFACE TO THE FIRST EDITION): "In the compilation, care has been taken to search into contemporary publications, in order to make the work as perfect as possible. Still, however, the Editor is sensible, from the daily experience of the newspaper reports of the present time, that the sentiments they contain may, in some instances, have been inaccurately taken down, and, in others, probably, too faintly sketched, fully to gratify the inquisitive politician * * * ." Exactly how, then, anyone could be sure (as the editor vouchsafed to his readers) that "the compilation" accurately "disclose[d] the opinions of many of the most distinguished revolutionary patriots and statesmen, * * * and certainly may form an excellent guide in expounding many doubtful points

Moreover, if the average legally literate American of that era had enjoyed access to such notes as Madison had generated or to such coverage as the press had offered, he nonetheless would not have considered them admissible let alone dispositive evidence, because "legislative history" consisting even of verbatim debates, recorded by an official reporter and contemporaneously transcribed, had no legal standing for the purpose of statutory interpretation in that era. As the general rule came to be stated thereafter, "[i]nquiries into [legislators'] motives * * * are a hazardous matter",[133] as is "bas[ing] speculations about the purposes or construction of a statute upon the vicissitudes of its passage",[134] because "it is impossible to determine with certainty what construction" the legislature as a whole "put upon an act * * * by resorting to the speeches of individual members",[135] the arguments of individual legislators being "so often influenced by personal or political considerations, or by the assumed necessities of the situation".[136] Difficult to interpret in any event, and sometimes colored by ignorance or questionable motives, legislative debates and like materials are inadmissible as evidence of what statutes mean,[137] except in the most extraordinary situations plainly inapplicable to the Constitution, such as where statutory provisions, "literally applied, offend the moral sense, involve injustice, oppression or absurdity, * * * or lead to an unreasonable result plainly at variance with the policy of the statute as a whole".[138] And if WE THE PEOPLE could and would not have relied even on formal "legislative history", they certainly could and would not have treated as controlling the mere opinions that various prominent Americans may have stated informally.

(b) On the other hand, the average legally literate American in 1788 and 1791 had before him the original Constitution and then the Bill of Rights. He knew that these were statutes—enacted "in the Name, and by the Authority of the good People of these Colonies" under the aegis of the Declaration of Independence, and "ordain[ed] and establish[ed]" by WE THE PEOPLE themselves to be "the supreme Law of the Land".[139] And inasmuch as "[a]t the time of the adoption of the Federal Constitution [Sir William Blackstone's *Commentaries on the Laws of England*] had been published about twenty years, and * * * more copies of the work had been sold

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in th[e Constitution]", the editor did not explain.

[133] United States v. O'Brien, 391 U.S. 367, 383-384 (1968). *Accord*, Palmer v. Thompson, 403 U.S. 217, 224 (1971).

[134] Pine Hill Coal Company v. United States, 259 U.S. 191, 196 (1922).

[135] United States v. Trans-Missouri Freight Association, 166 U.S. 290, 318 (1897).

[136] Downes v. Bidwell, 182 U.S. 244, 254 (1901).

[137] *E.g.,* Aldridge v. Williams, 44 U.S. (3 Howard) 9, 24 (1845); United States v. Union Pacific Railroad Company, 91 U.S. 72, 79 (1875); United States v. Trans-Missouri Freight Association, 166 U.S. 290, 318-319 (1897); United States v. Wong Kim Ark, 169 U.S. 649, 699 (1898).

[138] *See, e.g.,* George Van Camp & Sons Company v. American Can Company, 278 U.S. 245, 253-254 (1929).

[139] U.S. Const. preamble *and* art. VI, cl. 2.

in this country than in England; so that undoubtedly, the framers of the Constitution were familiar with it",[140] and considered it "the preeminent authority on English law",[141] every legally literate American was also aware of the general rule for statutory construction which Blackstone taught: namely, that

> [T]HE fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by *signs* the most natural and probable. And these signs are either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law.[142]

So every such American knew that the proper constructions of the original Constitution and the Bill of Rights were to be found in WE THE PEOPLE'S "intentions at the time when the law was made", to be deduced from what those documents themselves contained, explicitly and implicitly.

(4) "Original intent" the fundamental rule of construction. In the parlance of modern constitutional exegetes, Blackstone's phrase "intentions at the time when the law was made" has come to be truncated into the term "original intent". Unfortunately, this neologism comes freighted with the potential for serious confusion, because it implicitly suggests that there may exist some arguably legitimate "*modern* intent" that differs substantially from the Constitution's "*original* intent"—and that therefore appeal to the so-called "living Constitution" may be something other than an intellectual delusion and political deception. It would be more accurate and safe, therefore, to speak solely of "*the Constitution's* intent", which of course can *never* change, unless and until the document's provisions are altered through some formal Amendment, and then only in keeping with an intellectually honest construction of any such provision. But inasmuch as "original intent" has developed a following along legal commentators, successful substitution of a term less susceptible to confusion and misuse is probably impossible. In any event, as Blackstone's teaching evidences, "original intent", whatever its most appropriate label should be, was the prevailing rule in the late 1700s—not some anachronism advanced only recently by ivory-tower intellectuals fixated upon irrelevant historical oddments, or obsessed with retarding "social progress" by appealing to outdated legal principles. Indeed, at the very founding of the Republic the doctrine of "original intent" was already hundreds of years old.[143]

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[140] Schick v. United States, 195 U.S. 65, 69 (1904).

[141] Alden v. Maine, 527 U.S. 706, 715 (1999).

[142] *Commentaries on the Laws of England* (Philadelphia, Pennsylvania: Robert Bell, American Edition, 4 Volumes & Appendix, 1771-1773), Volume 1, at 59.

[143] *See generally, e.g.*, Raoul Berger, "Original Intention in Historical Perspective", 54 *George Washington Law Review* 296 (1986).

Out of stark necessity, as well as familiarity, "original intent" was the interpretive method employed by the Framers who drafted the Constitution, the Founding Fathers who ratified it in the State Conventions, the first public officials in the General Government and the governments of the several States who applied it, and WE THE PEOPLE as a whole whose agents all of the foregoing were. For what rule of construction could Americans *at that time* have employed to draft, interpret, and apply their utterly new Constitution other than to ask what those documents meant to WE THE PEOPLE *at that time*, and to answer that question by reading the documents' words in their linguistic, legal, political, and historical contexts current *at that time*? After all, no legal sophists had yet popularized the fantasy that the Constitution is a supposedly "living" linguistic entity capable of protean meanings that somehow spontaneously "evolve" over time, without any formal amendments, in response to different political, economic, social, and cultural circumstances, tastes, fashions, or fads—and, if they had, their imaginings would have been irrelevant to the issue of what the Constitution meant then and there, before any supposed "evolution" could conceivably have taken place.

Therefore, inasmuch as Americans of the *pre*-constitutional era were thoroughly familiar with the doctrine of "original intent"; inasmuch as "original intent" was then the prevailing rule for statutory construction; inasmuch as everyone at that time would have presumed (and correctly so) that "original intent" could have supplied a viable construction of every provision in the Constitution; inasmuch as *some unique* rule of statutory construction *had* to be adopted if "the supreme Law of the Land" was to be rationally enforced; and inasmuch as no alternative rule of construction enjoyed any currency among WE THE PEOPLE even as a legal theory—then "original intent" must have been adopted as the exclusive means of interpreting the Constitution at that time. And not simply after it had been ratified. For, had not the Framers employed "original intent" when they composed the Constitution, and had not the Founding Fathers utilized "original intent" when they ratified it, and had not WE THE PEOPLE themselves conclusively presumed with legal certitude that the Framers and the Founders were doing so, no one could have known with any semblance of surety what the Constitution meant at any point during the entire process of its enactment. So, too, for the Bill of Rights.

Today, as well, "original intent" continues as *the only legitimate*—indeed, the only rational—method of construing the Constitution. For, "original intent" being the rule in reliance upon which the Constitution was originally drafted and ratified, it is as much an actual, albeit only implied, provision of the Constitution as any other—indeed, perhaps more important (and certainly more often consulted) than any other, because the proper construction of every provision of the Constitution depends upon it.

3. The language and structure of the Constitution often sufficient. Because "original intent" looks to what the Constitution actually says, proper construction usually need not proceed beyond the actual words and form of the document in order to garner sufficient evidence of its meaning.

On its face, the Constitution demonstrates which side of the debate in the Virginia Convention of 1788 quoted above was correct. To be sure, unlike some other powers and disabilities of Congress and the States, their powers and disabilities with respect to the Militia do need to be carefully parsed. For example, the Constitution delegates several powers to the General Government while simultaneously imposing corresponding disabilities on the States—such as with respect to levying "Duties" and "Imposts";[144] "coin[ing] Money";[145] "rais[ing] and support[ing] Armies" and "provid[ing] and maintain[ing] a Navy", on the one hand, but not "keep[ing] Troops, or Ships of War in time of Peace" "without the Consent of Congress", on the other;[146] and "mak[ing] Treaties", one the one hand, but not "enter[ing] into any Treaty" under any conditions or "into any Agreement or Compact * * * with a foreign Power" "without the Consent of Congress", on the other.[147] The Constitution also delegates to the General Government certain powers without imposing any additional express disabilities on the States, because the powers are so defined as to be inherently exclusive in their nature or when exercised—such as the powers "[t]o lay and collect Taxes * * * *to pay the Debts and provide for the common Defence and general Welfare of the United States*",[148] "[t]o borrow Money *on the credit of the United States*",[149] and "[t]o establish an *uniform* Rule of Naturalization, and *uniform* Laws on the Subject of Bankruptcies *throughout the United States*".[150] With respect to the two powers of Congress over the Militia, however, neither of these situations obtains.

The Constitution empowers Congress

> [t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; [and]
>
> [t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment

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[144] *Compare* U.S. Const. art. I, § 8, cl. 1 *with* art. I, § 10, cl. 2.

[145] *Compare* U.S. Const. art. I, § 8, cl. 5 *with* art. I, § 10, cl. 1.

[146] *Compare* U.S. Const. art. I, § 8, cls. 12 and 13 *with* art. I, § 10, cl. 3.

[147] *Compare* U.S. Const. art. II, § 2, cl. 2 *with* art. I, § 10, cls. 1 and 3.

[148] U.S. Const. art. I, § 8, cl. 1 (emphasis supplied).

[149] U.S. Const. art. I, § 8, cl. 2 (emphasis supplied).

[150] U.S. Const. art. I, § 8, cl. 4 (emphasis supplied).

> of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.[151]

Obviously, the Constitution delegates these powers to Congress for the purpose of providing the United States with the ability to rely upon *uniform* Militia drawn from the several States for any of the three constitutionally designated purposes. *But the Constitution imposes no corresponding disabilities upon the States with respect to the subject-matters of these two powers*, other than the implicit limitation always applicable to every concurrent power that the States' regulations in those particulars may not interfere with whatever pertinent and otherwise constitutional regulations Congress may have enacted.[152] This is because, as the Constitution itself recognizes, the "Militia" to be "organiz[ed], arm[ed], and disciplin[ed]" are none other than "the Militia *of the several States*", not "the Militia *of the United States*"—a distinction the Constitution makes exquisitely clear in defining the dual status of the President as "Commander in Chief of the Army and Navy *of the United States*, and of the Militia *of the several States, when called into the actual Service of the United States*".[153] "[T]he Militia of the several States" (or of the American Colonies before the latter declared their independence from Great Britain) preëxisted the Constitution. And during the entire *pre*-constitutional era, each of the Colonies and then independent States exercised *exclusive* jurisdiction over her own Militia and such regular armed forces as she might raise. Even the precursor to the Constitution, the Articles of Confederation, expressly mandated that "every state shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutred"[154]—according, moreover, to each State's own laws, because the Articles granted no powers to Congress for that purpose. The Constitution nowhere explicitly withdrew authority over their Militia from the States, as it did with respect to the States' "keep[ing] Troops, or Ships of War in time of Peace" "without the Consent of Congress".[155] And the Constitution nowhere granted any authority to Congress to form a "Militia of the United States", as it did with respect to "rais[ing] and support[ing] Armies" and "provid[ing] and maintain[ing] a Navy" which were to be known as "the Army and Navy of the United States".[156] Therefore, each of the States retains the authority to "organiz[e], arm[ ], and disciplin[e]" her own Militia in order: (i) to fill any voids in her Militia's preparedness caused by Congress's neglect, failure, or refusal to "organiz[e], arm[ ], and disciplin[e]" the Militia in complete readiness to

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[151] U.S. Const. art. I, § 8, cls. 15 and 16.

[152] *See* U.S. Const. art. VI, cl. 2.

[153] *See* U.S. Const. art. II, § 2, cl. 1 (emphasis supplied).

[154] Arts. of Confed'n art. VI, ¶ 4. The typeset version of the Articles quoted throughout this book appears in *Documents Illustrative of the Formation of the Union of the American States, ante* note 1, at 27-37.

[155] U.S. Const. art. I, § 10, cl. 3.

[156] U.S. Const. art. I, § 8, cls. 12 and 13, *and* art. II, § 2, cl. 1.

be "call[ed] forth" "in the Service of the United States" for any of the three constitutionally designated purposes; (ii) to prepare her Militia to be called forth by State herself for any of those reasons if Congress neglects, fails, or refuses to do so when such mobilization is necessary; and (iii) to enable her Militia to provide defense and other aid to the State in situations not involving any of those three reasons, by supplementing what Congress has mandated should that State consider Congress's action insufficient for her own purposes.[157]

After all, even if the purpose of having Congress "provide for organizing, arming, and disciplining, the Militia" in an uniform manner is so that they may most effectively "be employed in the Service of the United States" when called forth collectively, why should individual Militia not also be "organiz[ed], arm[ed], and disciplin[ed]" in such complementary fashion as each State might deem necessary for her own particular "Service"? In principle, perhaps, if Congress's power "[t]o provide for organizing, arming, and disciplining, the Militia" were not directed solely to three explicit purposes of the General Government, Congress arguably could "provide" different forms of "organizing, arming, and disciplining, the Militia", tailored to the specific needs of each State. But in practice such a program would be extraordinarily cumbersome. So why should the Constitution be tortuously misconstrued to deny the States the authority to perform a necessary task that would overtax, if not lie entirely beyond, Congress's competence as well as its authority? No plausible construction of the Constitution could, for example, license Congress simultaneously to disallow the States from "keep[ing] Troops, or Ships of War in time of Peace", *and* to preclude the States from "organizing, arming, and disciplining" their own Militia, *and* to license itself to neglect, fail, or refuse to "organiz[e], arm[ ], and disciplin[e]" the States' Militia effectively.

The unavoidability of this conclusion appears perhaps most patently in the portion of Congress's power that authorizes it "[t]o provide * * * for governing such Part of them [that is, the Militia] *as may be employed in the Service of the United States*". If Congress may provide for governing *only* that "Part" of the Militia "employed in the Service of the United States", who is to govern the remainder of the Militia at that time, and all of the Militia when no "Part of them" is so employed? The Constitution itself decrees that it cannot be Congress. Therefore it must be the States, or in the event of the States' default "the people" themselves[158]—unless the Constitution implicitly commands the absurd result that under those circumstances the Militia (in "Part" or in whole) are not to be "govern[ed]" at all. But such a result the Constitution obviously precludes, when it "reserv[es] to the States respectively, the Appointment of the Officers [of the

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[157] See U.S. Const. art. VI, cl. 2 *and* amend. X.

[158] *See* U.S. Const. amends. II and X.

Militia]",[159] thereby retaining almost all actual authority of command in the States, because the only officer of the General Government who is simultaneously an officer in any of "the Militia of the several States" is the President of the United States (and then only when the Militia are "called into the actual Service of the United States").[160]

Even more generally, as proven by reference to the *pre*-constitutional practices that this study later surveys in detail, the noun "Militia" in the American legal lexicon means the entirety of the able-bodied adult population, properly organized, armed, and disciplined in some effective manner at all times. By incorporating "the Militia of the several States" into its federal structure, the Constitution ensures that such "Militia"—and, absent an Amendment, *only* such "Militia"—will always exist under its aegis. For the very good reason that, as the Second Amendment attests, such "well regulated Militia" are "necessary to the security of a free State", and therefore the very foundation of the constitutional system. That being the case, Congress's power "[t]o provide for organizing, arming, and disciplining, the Militia" is also a *duty* to do so. In constitutional parlance, a "power" can often imply a "right", and a "duty" as well. A "power" is the ability to create a new legal relationship, either between the government and some other party, or between two or more private parties.[161] A power is part of a government's "jurisdiction", its "authority * * * to govern or legislate"; and with respect to its subject matter it defines the government's "[s]phere of authority; the legal limits within which * * * [that] particular * * * [authority] may be exercised".[162] So, by exercising its *power* "[t]o provide for organizing, arming, and disciplining, the Militia", Congress can, for example, change the legal relations between the General Government and members of the Militia, between the General Government and the States, and among the members of the Militia themselves. Congress could not exercise such a power, though, without enjoying the *right* to exercise it. A "right" is the legal relationship between the government and some other party that exists when the government may command that other party to take, or to refrain from taking, some action, and punish that party's disobedience.[163] So, when Congress exercises its power "[t]o provide for organizing, arming, and disciplining, the Militia", it also exercises the right to do so, because it may command the members of the Militia and the States, on pain of some penalty, to comply with its directives. Furthermore, in the case of the Militia, the power and right "[t]o provide for

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[159] U.S. Const. art. I, § 8, cl. 16.

[160] U.S. Const. art. II, § 2, cl. 1.

[161] *See* A. Corbin, "Legal Analysis and Terminology", *ante* note 23, at 168.

[162] *Webster's Revised Unabridged Dictionary, ante* note 11, at 806, definitions 2 and 3. *Accord*, N. Webster, *An American Dictionary, ante* note 15, definitions 2 through 4.

[163] *See* A. Corbin, "Legal Analysis and Terminology", *ante* note 23, at 167.

organizing, arming, and disciplining" implies a *duty* as well.[164] A "duty" denotes the legal relation perforce of which the government is required to act (or to forebear from acting) for the benefit of some other party or parties, and perforce of which public officials may be subjected to sanctions for their failure in that regard.[165] So, Congress not only *may* but also *must* exercise its power and right "[t]o provide for organizing, arming, and disciplining, the Militia" at all times to the fullest extent possible consistent with "the common defence" and "the general Welfare".[166] This, for four basic reasons:

First, as a general proposition, "[w]hatever functions Congress are by the Constitution authorized to perform they are, when the public good requires it, bound to perform".[167] For all practical purposes, "the public good" *always* requires that the Militia be properly "organiz[ed], arm[ed], and disciplin[ed]". The Second Amendment declares that "[a] *well regulated* Militia"—that is, a Militia properly "organiz[ed], arm[ed], and disciplin[ed]"—is "*necessary* to the security of a free State".[168] Thus the Amendment defines the primary power of Congress "[t]o provide for organizing, arming, and disciplining, the Militia"—and the secondary power allied with it "[t]o make all Laws which shall be necessary and proper for carrying into Execution th[at] Power[ ]"[169]—not as discretionary, but as *obligatory*, because what is "necessary" is "[i]mpossible * * * to be dispensed with".[170] The Constitution delegates that primary power to Congress for the specific purpose of preparing the Militia to be "call[ed] forth to execute the Laws of the Union, suppress Insurrections and repel Invasions".[171] These functions the Constitution considers so critical, and the identities and attributes of the parties designated to perform them so important, that it incorporates "the Militia of the several States" as permanent components of its federal system. If Congress does not properly exercise its power "[t]o provide for organizing, arming, and disciplining, the Militia", then "the Laws of the Union" will not be "execute[d]", "Insurrections" will not be

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[164] This, of course, is not the only example of a duty flowing from some constitutional power or right. *See, e.g.*, United States v. Marigold, 50 U.S. (9 Howard) 560, 567 (1850) (the power implies "the trust and the duty"); Martin v. Hunter's Lessee, 14 U.S. (1 Wheaton) 304, 327-329 (1816) (the power is "mandatory" and "obligatory"); Pensacola Telegraph Company v. Western Union Telegraph Company, 96 U.S. 1, 9 (1878) (the power implies a right, and "not only the right, but the duty"); *and* Second Employers' Liability Cases, 223 U.S. 1, 58 (1912) ("[t]he existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication").

[165] *See* A. Corbin, "Legal Analysis and Terminology", *ante* note 23, at 167.

[166] *See* U.S. Const. preamble.

[167] United States v. Marigold, 50 U.S. (9 Howard) 560, 567 (1850).

[168] Emphasis supplied.

[169] U.S. Const. art. I, § 8, cl. 18.

[170] *Webster's Revised Unabridged Dictionary, ante* note 11, at 967, definition 2. *Accord,* N. Webster, *An American Dictionary, ante* note 15, definition 2.

[171] U.S. Const. art. I, § 8, cl. 15.

"suppress[ed]", and "Invasions" will not be "repel[led]" *in the manner the Constitution specifically sets forth*—the *unique* institution "*necessary* to the security of a free State" will not exist in any State—and therefore the very existence of "a free State" anywhere and everywhere through the Union will be in jeopardy. As such a result would defeat the achievement of the fundamental purposes of the Constitution "to * * * insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity",[172] it cannot possibly be deemed even arguably constitutional. Self-evidently, then, "[t]he language" of the power "[t]o provide for organizing, arming, and disciplining, the Militia" "is manifestly designed to be mandatory * * * . Its obligatory force is so imperative, that Congress c[an] not * * * refuse[ ] to carry it into operation"—for, without the Militia being properly "organiz[ed], arm[ed], [and] disciplined", "it would be impossible to carry into effect some of the [most important] express provisions of the Constitution".[173]

Second, the power of Congress "[t]o provide for organizing, arming, and disciplining, the Militia" is a duty, because the Second Amendment emphasizes that it (along with all other Congressional powers) must be exercised consistently with "the right of the people to keep and bear Arms" *for the very purpose of being able to serve in "well regulated Militia".*[174] If "the people" enjoy "the right * * * to keep and bear Arms" for that purpose, which "right * * * *shall not* be infringed" by *any* public official (because no exception for any public official is stated), then Members of Congress as individuals, and Congress as an institution, must labor under the correlative "duty" to see to it that "well regulated Militia"—properly "organiz[ed], arm[ed], and disciplin[ed]"—*shall actually exist at all times in every State.* For if the practical effectuation of that "right" depends to some significant degree upon the exercise of Congress's power, then that power *shall* be exercised to the selfsame extent that "the right * * * *shall not* be infringed".

Third, that the Constitution explicitly "reserv[es] to the States respectively * * * the Authority of training the Militia according to the discipline prescribed by Congress"[175] implies a right in the States to require that Congress does in fact "prescribe[ ]" such "discipline"—that is, does in fact "provide for * * * disciplining, the Militia" through some régime of "training"—so that the States can exercise their exclusive "Authority" in that regard. This establishes beyond doubt that Congress's power "[t]o provide for * * * disciplining, the Militia" is *mandatory*—not simply a power and a right, but a *duty* as well. For inasmuch as the Constitution

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[172] U.S. Const. preamble.

[173] *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheaton) 304, 328, 329 (1816).

[174] *See post*, Chapter 45.

[175] U.S. Const. art. I, § 8, cl. 16.

explicitly "reserv[es] to the States respectively * * * the Authority of training the Militia according to the discipline prescribed by Congress", Congress cannot refuse to "prescribe[ ]" the necessary "disciplin[e]" without thereby denying the States the ability to exercise their "reserv[ed]" power, thus effectively stripping them of that power altogether—a result which is constitutionally impossible. Indeed, such a result is constitutionally ridiculous, because WE THE PEOPLE would never have explicitly reserved to the States a vitally important power over the Militia which they knew Congress could negate at will simply by inaction. All that being true, the rest of Congress's power—that is, "[t]o provide for *organizing*[and] *arming* * * * the Militia"[176]—must be no less mandatory. For, as a matter of law, all of them being found in conjunction within the very same clause, and each of them taking "the Militia" as its direct object, the present participles "organizing, arming, and disciplining" must be construed *in pari materia*, so that if one of them must be taken as mandatory, then so must all of them. Moreover, as a matter of fact, in general it is impossible to "disciplin[e]" any entity which is not already sufficiently "organiz[ed]"; and in particular it is impossible to "disciplin[e]" a "Militia" which is not sufficiently "arm[ed]", because, by definition, in "[a] well regulated Militia" "the people" exercise "the right * * * to keep and bear *Arms*",[177] and, again by definition, "a well regulated militia" is "composed of the body of the people, trained *to arms*".[178]

Fourth, under the Constitution, "[a] well regulated Militia" is an indispensable component of the American conception of "a Republican Form of Government".[179] "The United States shall guarantee to every State in this Union a Republican Form of Government".[180] "[T]he United States" must fulfill this "guarantee" through every appropriate exercise of their legislative, executive, and judicial authority.[181] As the arm of "[t]he United States" in which "[a]ll legislative Powers * * * granted * * * [by the Constitution] shall be vested",[182] Congress "shall guarantee to every State" "[a] well regulated Militia" through the enactment of appropriate laws—which it is explicitly empowered to do by "provid[ing] for organizing, arming, and disciplining, the Militia", as well as by "mak[ing] all Laws which shall be necessary and proper for carrying into Execution th[at] * * *

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[176] U.S. Const. art. I, § 8, cl. 16 (emphasis supplied).

[177] U.S. Const. amend. II (emphasis supplied).

[178] Virginia Declaration of Rights (1776), art. 13 (emphasis supplied).

[179] *See post*, at 890-893, 921-922, 1038-1040, 1301-1307, 1451-1453, and 1497-1499.

[180] U.S. Const. art. IV, § 4.

[181] The Supreme Court, however, has largely absolved itself of responsibility for the enforcement of this requirement. *Contrast* Luther v. Borden, 48 U.S. (7 Howard) 1 (1849), *with* Minor v. Happersett, 88 U.S. (21 Wallace) 162 (1875), *and* Forsyth v. Hammond, 166 U.S. 506 (1897).

[182] U.S. Const. art. I, § 1.

Power[ ]".[183] Thus, exercises of the latter powers constitute unavoidable aspects of the fulfillment of the former duty. And therefore, taken together, those two powers must constitute a duty, too.

One may, of course, question *how* such a duty could be enforced. Actually, at least five ways exist: (i) A rogue Congress could itself be punished as an institution for its dereliction if "the People" determined that the situation was sufficiently serious to warrant the exercise of their "Right * * * to alter or to abolish" Congress or the entire "Form of Government" of which it is a part.[184] (ii) Congress's duty could be enforced as a moral obligation by Members of Congress on themselves, through the workings of their own consciences. (iii) Congress's duty could be enforced as a political obligation by those Members' constituents at the next election. (iv) Congress's duty could be enforced as a legal obligation on those Members directly, because at some point persistent nonfeasance or misfeasance becomes actionable malfeasance, in violation of the requirement that "Senators and Representatives * * * be bound by Oath or Affirmation, to support th[e] Constitution".[185] Finally, (v) Congress's duty could be enforced indirectly through affirmative action taken by other components of the federal system that exercise concurrent jurisdiction over "organizing, arming, and disciplining, the Militia"—namely, the several States and WE THE PEOPLE. Surely, maintenance of the federal structure and of the Constitution as the supreme law of "a free State" cannot for one moment be held hostage to some rogue Congressmen's neglect, failure, or refusal to exercise the powers that, if exercised, would prove sufficient to the purpose. So, if such Congressmen, derelict in their constitutional duties, for whatever reason do not organize, arm, and discipline "the Militia of the several States", the States must act individually—and because they must act, they must be constitutionally authorized to act. And if under such circumstances any State's government, derelict in its constitutional duties, for whatever reason does not organize, arm, and discipline that State's Militia, then WE THE PEOPLE themselves in that State must act collectively to redress that deficiency—and because they must act, they too must be constitutionally authorized to act. The existence of which reserved authority, to the States or to "the people" as the case may be, the Second and Tenth Amendments verify.[186]

4. WE THE PEOPLE the final authorities on the meaning of the Constitution. These chains of reasoning and the conclusions to which they lead should hardly be surprising even today, and would have been as obvious as the

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[183] U.S. Const. art. I, § 8, cl. 18.

[184] *See* Declaration of Independence.

[185] U.S. Const. art. VI, cl. 3.

[186] *See post*, Chapters 45, 46, and 50.

sunrise to most Americans in 1788 and 1791. Yet, as is painfully obvious as well to all students of this country's history, the Constitution has always been subject to attempts to manipulate its meaning in service of the narrow agenda of influential factions and other special interests. In these situations, under whatever rule of interpretation may rightfully apply, though, the question nevertheless remains: "*Who* is authorized to construe the Constitution *with finality*?" The political fashion today is to acquiesce in the assumption of this responsibility by the Judiciary, on the Judiciary's own plea that "[i]t is emphatically the province and duty of the judicial department to say what the law is".[187] This claim, however, is obviously not true in the expansive sense in which exponents and apologists of contemporary "judicial supremacy" tout it.[188]

Even as to statutes, the Constitution declares that, with respect to the General Government, "[a]ll legislative Powers herein granted"—the powers to make "laws"—"shall be vested in * * * Congress".[189] And the Constitution delegates to Congress, not only a set of discrete enumerated powers,[190] but also a cautionary supplemental authority "[t]o make all Laws which shall be necessary and proper for carrying into Execution [those enumerated] Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof".[191] So, in this sphere, it is emphatically the province and duty of *Congress*, *not* the Judiciary, "to say what the law is", because Congress enacts all of

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[187] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[188] On the vexing problems inherent in "judicial supremacy", *see generally* Edwin Vieira, Jr., *How To Dethrone the Imperial Judiciary* (San Antonio, Texas: Vision Forum Ministries, 2004).

[189] U.S. Const. art. I, § 1.

[190] U.S. Const. art. I, § 8, cls. 1 through 17.

[191] U.S. Const. art. I, § 8, cl. 18. On the grounds that any legislative power must be a power to enact "necessary and proper" laws, Alexander Hamilton contended that this clause is "only declaratory of a truth which would have resulted by necessary and unavoidable implication from the very fact of constituting * * * [the General G]overnment and vesting it with certain specified powers. * * * The declaration itself, though it may be chargeable with tautology or redundancy, is at least perfectly harmless." *The Federalist* No. 33. Dismissing the clause on that facile ground, however, runs afoul of the rule that, "'[i]n expounding the Constitution * * * , every word must have its due force, and appropriate meaning; for it is evident from the whole instrument that no word was unnecessarily used, or needlessly added'". Williams v. United States, 289 U.S. 553, 572-573 (1933). The adjectives "necessary" and "proper", then, must be given a particular effect peculiar to them—which, as they are plainly intended as words of *limitation*, must be to constrain Congress's exercise of implied powers, by requiring that the closest possible relationship be established between Congress's enumerated powers and any powers implied as the means "for carrying [the enumerated powers] into Execution". In *The Federalist*, Hamilton himself recognized this: "The propriety of a law, in a constitutional light, must always be determined by the nature of the powers upon which it is founded." So, if it is unnecessary to imply a particular power in order to "carry[ ] into Execution" an enumerated power, or if a power that might be implied is improper on some other ground, then that purported implied power is one "not delegated to the United States". *See* U.S. Const. amend. X. The final word as to what may be "necessary and proper" is not left with Congress, either. Again, Hamilton: "If the [General G]overnment should overpass the just bounds of its authority and make a tyrannical use of its powers, the people, whose creature it is, must appeal to the standard they have formed, and take such measures to redress the injustice done to the Constitution as the exigency may suggest and prudence justify."

the "Laws", other than the Constitution itself, in the first place. At most, the Judiciary is authorized *and required* simply to parrot Congress's determination—even as to interpretation, because, as a part of its "Laws", Congress may stipulate how judges are to interpret them (if that matter is not obvious from the very texts of the "Laws" themselves).

As to constitutional law, just as no principal in his right mind would empower his agents to act on his behalf according to written instructions that implicitly licensed any one of them to misinterpret that document—perhaps ignorantly, perhaps maliciously, but in any event erroneously and without any recourse on the part of the principal to correct the error other than by laboriously amending his instructions—so too would no rational people in any polity adopt a supposed "constitution" designed to limit the power of the government formed under its aegis but which nevertheless licensed any branch or official of that government to determine the nature and extent of the government's own powers independently of the will of the people. Thus, in principle, it could never be uniquely "the province and duty of the judicial department" of either the General Government or the States "to say what the [constitutional] law is" (or, for that matter, the province of any legislator, executive official, or other public functionary).

In particular, when "WE THE PEOPLE"—*not* "We the Judges"—"ordain[ed] and establish[ed] this Constitution",[192] by that act THE PEOPLE constituted themselves the highest court in the land for the purposes of constitutional interpretation, because "[t]he power to enact carries with it final authority to declare the meaning of the legislation".[193] And by accepting and acting under its authority throughout the years since 1788—when under the ultimate constitutional law, the Declaration of Independence, they could have "throw[n] off such Government, and * * * provide[d] new Guards for their future security"—WE THE PEOPLE in their many succeeding generations have continued to "ordain and establish th[e] Constitution", and thereby have retained and retain the ultimate and unquestionable power "to declare [its] meaning", even unto this very day. This, of necessity: For, as Blackstone pointed out, "whenever a question arises between the society at large and any magistrate vested with powers originally delegated by that society, it must be decided by the voice of the society itself: there is not upon earth any other tribunal to resort to".[194]

Certainly, Americans were not so childish in the *pre-*constitutional period—and should not be so silly today—as to need or to seek tutelage in their

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[192] U.S. Const. preamble.

[193] Propper v. Clark, 337 U.S. 472, 484 (1949).

[194] *Commentaries on the Laws of England*, *ante* note 142, Volume 1, at 212.

constitutional political science from the very public officials whom they themselves had or have selected, particularly judges. For, as Blackstone pointed out, "*the law*, and the *opinion of the judge* are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may *mistake* the law".[195] Neither should Americans today kowtow to judges or other public officials with regard to constitutional interpretation, especially in light of the Supreme Court's own admissions of its numerous errors in that field over the years, which other public officials have hardly ever tried to correct, notwithstanding that they have had the power *and the duty* to do so.[196]

WE THE PEOPLE always need to remember, moreover, that just as they must be ready to don the majestic robes of the ultimate interpreters of law in all situations of contention between themselves and public officials, so too must they willing to pull on the workaday overalls of the ultimate finders of fact: namely, this country's supreme and final investigators, prosecutors, witnesses, and jurors in every political inquest of consequence. For THE PEOPLE'S authority to interpret the law as applied to a particular set of facts will inevitably prove nugatory if someone else predetermines what those facts are. THE PEOPLE, after all, are in no way inferior to the courts which they themselves have created. And the courts correctly hold that, where constitutional issues are involved, they cannot be bound either by conclusions of law alone,[197] or by findings of facts coupled with conclusions of law,[198] put forward by legislators or administrators—but may make their own independent determinations of both law and fact in every case. Could WE THE PEOPLE possibly enjoy less authority than their creatures? Hardy. For the courts are invested solely with constitutional and statutory authority, and can operate within those bounds alone; whereas THE PEOPLE are invested by "the Laws of Nature and of Nature's God", through the Declaration of Independence, with the *supra*-constitutional right and duty to determine "when[ ] any Form of Government [has] become[ ] destructive of the[true] ends" of "Government"—and especially "when a long train of abuses and usurpations * * * evinces a design to reduce them under absolute Despotism", whether through the misbehavior of administrators, or of legislators, or even of judges. When a "Form of Government [has] become[so] destructive", however, public officials cannot be allowed either to find the facts or to apply the law relating to their own misbehavior—for the obvious reason that no "Form of Government" which has "become[ ] destructive" of THE PEOPLE'S rights will ever

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[195] *Id.*, Volume 1, at 71 (emphasis in the original).

[196] *Compare and contrast, e.g.,* Payne v. Tennessee, 501 U.S. 808, 828-830 & note 1 (1991), *with* Edwin Vieira, Jr., *How To Dethrone the Imperial Judiciary* (San Antonio, Texas: Vision Forum Ministries, 2004).

[197] *See, e.g.,* Tyson & Brother v. Banton, 273 U.S. 418, 431 (1927).

[198] *See, e.g.,* Block v. Hirsh, 256 U.S. 135, 154 (1921); Ohio Valley Water Company v. Ben Avon Borough, 253 U.S. 287, 289 (1920); Crowell v. Benson, 285 U.S. 22, 60 (1932); Saint Joseph Stock Yards Company v. United States, 298 U.S. 38, 51-52 (1936).

enforce those rights against itself. So any demand by officials for exclusive authority to find the facts or to apply the law in such a situation would constitute *additional* misbehavior, because its purpose would invariably be to cover up officialdom's misdeeds. Furthermore, inasmuch as THE PEOPLE, unless they investigate for themselves, can never be assured that, no matter how tranquil the times appear, "a long train of abuses and usurpations" is not in its initial stages, or that "a design to reduce them under absolute Despotism" is not being put into operation, they can never entertain, let alone accede to, any such demand. Thus, at *all* times "in the Course of human events", *only* THE PEOPLE themselves—acting independently of the opinions, the influence, and especially the direction of public officials—can qualify as proper political investigators, prosecutors, witnesses, and jurors. This, of course, requires that THE PEOPLE be at pains to enforce the maximum transparency in the operation of their government. The least opacity in public affairs must furnish grounds for suspicion; and the slightest hesitancy on the part of public officials to expose to scrutiny the record of their stewardship must rouse THE PEOPLE to immediate action.

5. WE THE PEOPLE'S interpretive authority limited by the actual meanings of the Constitution's words. WE THE PEOPLE'S authority to interpret the Constitution is not unlimited, however. The rule has always been (and today remains) that statutes should be enforced *as written*.[199] The Constitution is a statute. In every case, then, the Constitution must be interpreted "in such a manner, as, consistently with the words, shall fully and completely effectuate the whole objects of it. * * * No court of justice"—including the ultimate human "court of justice", WE THE PEOPLE themselves—"can be authorized so to construe any clause of the Constitution as to defeat its obvious ends, when another construction, equally accordant with the words and sense thereof, will enforce and protect them."[200]

a. Not problematic that only a few terms are specifically defined. Yet even written words cannot be understood separate from their *meanings*. And the Constitution itself defines very few of the words it employs. For example, "Congress" and its components the "House of Representatives" and the "Senate" are painstakingly described with respect to their structures, compositions, and legal powers and disabilities[201]—because they were entirely new political creations in 1788, for which no prior definitions existed. (A "Congress" did exist under the Articles of Confederation; but its powers were quite different in many particulars

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[199] *See, e.g.*, W. Blackstone, *Commentaries on the Laws of England, ante* note 142, Volume 1, at 59-62; Lewis v. United States, 92 U.S. 618, 621 (1876); Wilbur v. United States *ex rel.* Vindicator Consolidated Gold Mining Company, 284 U.S. 231, 237 (1931); *Ex parte* Collett, 337 U.S. 55, 61 (1949); Rubin v. United States, 449 U.S. 424, 430 (1981); Albernaz v. United States, 450 U.S. 333, 336 (1981); Rosewell v. LaSalle National Bank, 450 U.S. 503, 512 (1981).

[200] Prigg v. Pennsylvania, 41 U.S. (16 Peters) 539, 612 (1842).

[201] U.S. Const. art. I, §§ 1 through 9.

from those of the Congress established under the Constitution. For example, the Congress under the Articles performed many "executive" as well as "legislative" functions; whereas, under the Constitution, "legislative" functions were assigned to Congress and "executive" functions to the President.) So, too, the Constitution lays out in detail the nature and powers of the President, because that office appeared there for the first time in human history.[202] And "[t]he judicial Power of the United States" is also carefully spelled out[203]—because nothing of its kind had ever been seen before, either. Distinguishably, the crimes of "counterfeiting" and "Treason" are narrowly defined—"the Punishment for counterfeiting" being limited to "the Securities and current Coin of the United States",[204] and "Treason" being stipulated to "consist only in levying War against the[United States], or in adhering to their Enemies, giving them Aid and Comfort"[205]—precisely because those crimes *had* long preëxisted the Constitution, but in forms far broader than WE THE PEOPLE desired to continue in their new supreme law.[206] With respect to "Treason" in particular, THE PEOPLE took to heart Blackstone's admonition that, "[a]s * * * [treason] is the highest civil crime, which (considered as a member of the community) any man can possibly commit, it ought therefore to be the most precisely ascertained. For if the crime of high treason be indeterminate, this alone * * * is sufficient to make any government degenerate into arbitrary power".[207]

Otherwise, the Constitution presumes that every linguistically, historically, politically, economically, and especially legally literate and experienced American, in 1788 and thereafter, knew and would know, or could easily determine, what its undefined words and phrases then meant and would continue to mean, unless and until some formal constitutional Amendment deleted them or altered their sense. Plainly too (as noted above), the Constitution presumes that its readers at all times did, do, and will construe its undefined terms "in their natural sense" in "the common parlance of the times" in which they were written,[208] because it nowhere indicates that those terms should be construed in some other, unusual way.

Some of the Constitution's words, of course, have meanings that are truly timeless, so that they apply without distinctions across the ages—such as the nouns

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[202] U.S. Const. art. II.

[203] U.S. Const. art. III, §§ 1 and 2.

[204] U.S. Const. art. I, § 8, cl. 6.

[205] U.S. Const. art. III, § 3, cl. 1.

[206] *See* W. Blackstone, *Commentaries on the Laws of England*, *ante* note 142, Volume 4, at 74-93; William W. Crosskey, *Politics and the Constitution in the History of the United States* (Chicago, Illinois: The University of Chicago Press, 1953), Volume 1, at 470-477; E. Vieira, Jr., *Pieces of Eight, ante* note 39, Volume 1, at 612-622.

[207] *Commentaries on the Laws of England, ante* note 142, Volume 4, at 75 (footnote omitted).

[208] Gibbons v. Ogden, 22 U.S. (9 Wheaton) 1, 188 (1824); United States v. South-Eastern Underwriters Association, 322 U.S. 533, 539 (1944).

"Year" or "Years";[209] "Majority";[210] "Secrecy";[211] "Armies" and "Navy";[212] "Forts, Magazines, Arsenals, [and] dock-Yards";[213] "gold and silver Coin";[214] "Imports or Exports";[215]and "Troops, or Ships of War".[216] Others must be taken in a particular historical context—such as the noun "dollars",[217] which refers uniquely to the Spanish milled dollar adopted as America's monetary unit by the Continental Congress before the Constitution was drafted.[218] Still others must be construed in a specific setting and with a generous measure of common sense—such as the terms "disorderly Behaviour" and "good Behaviour".[219] And others yet are capable of expansive interpretations when, where, and as socio-economic conditions might vary—such as the noun "Commerce", many modern manifestations of which the Framers and Founding Fathers could not have foreseen, but surely (had they been prescient) would have intended to come within the power of Congress to "regulate".[220]

b. "Technical" words and phrases. Linguistic analysis of the Constitution becomes complicated when a word or phrase has both factual *and legal* connotations, such as "disorderly Behaviour",[221] or is purely *a legal term of art*, such as "[t]he Privilege of the Writ of Habeas Corpus".[222] Quite misleading, then, is the notion that, because "[t]he Constitution was written to be understood by the voters", "its words and phrases were used in their normal and ordinary, as distinguished from technical, meaning".[223] For the "technical" meaning of a word or phrase is the particular meaning *the law* attaches to it, which almost always will be narrower and more precise than the meaning attributed to it in common parlance or in some general definition from a popular dictionary. And when the

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[209] U.S. Const. art. I, § 2, cls. 1 through 3, § 3, cls. 1 though 3, and § 4, cl. 2, § 9, cl. 1; art. II, § 1, cls. 1 and 4; *and* art. V.

[210] U.S. Const. art. I, § 5, cl. 1.

[211] U.S. Const. art. I, § 5, cl. 3.

[212] U.S. Const. art. I, § 8, cls. 12 and 13.

[213] U.S. Const. art. I, § 8, cl. 17.

[214] U.S. Const. art. I, § 10, cl. 1.

[215] U.S. Const. art. I, § 10, cl. 2.

[216] U.S. Const. art. I, § 10, cl. 3.

[217] U.S. Const. art. I, § 9, cl. 1 ("a Tax or duty may be imposed * * * not exceeding ten dollars") *and* amend. VII ("where the value in controversy shall exceed twenty dollars").

[218] *See* E. Vieira, Jr., *Pieces of Eight*, *ante* note 39, Volume 1, at 134-141, 183-199.

[219] U.S. Const. art. I, § 5, cl. 2 ("[e]ach House [of Congress] may * * * punish its Members for disorderly Behaviour") *and* art. III, § 1 ("Judges * * * shall hold their Offices during good Behaviour").

[220] U.S. Const. art. I, § 8, cl. 3.

[221] U.S. Const. art. I, § 5, cl. 2.

[222] U.S. Const. art. I, § 9, cl. 2.

[223] United States v. Sprague, 282 U.S. 716, 731 (1931).

issue is the interpretation of a specifically legal document—and no document could be more specifically legal than "the supreme Law of the Land" itself[224]—the "technical" meanings of its words and phrases often constitute their common meanings, because: (i) it is the commonality of their meanings within the legal system that qualifies those meanings as their "technical" meanings; and (ii) the law presumes that every man (lawyer or not) knows the law, particularly if he is among WE THE PEOPLE who originally did, and thereafter continually do, "ordain and establish this Constitution for the United States of America".[225]

The merest inspection of the Constitution proves that to enforce its obvious ends often absolutely requires application of the specifically *"technical"* meanings of certain words and phrases—such as "Felony" and "Felonies",[226] "Breach of the Peace",[227] "Bill of Attainder",[228] "ex post facto Law",[229] "Treason",[230] and "all Privileges and Immunities of Citizens in the several States".[231] Adding further subtlety to the task, not a few of the Constitution's "technical" words and phrases combine legal with other sometimes quite specialized connotations, such as: *legal and economic*—"Bills of Credit";[232] *legal and political*—"high Crimes and Misdemeanors" and "Republican Form of Government";[233] *legal and historical*—"Jury" and "trial by jury";[234] *legal, political, and historical*—"Title of Nobility";[235] and even *legal, political, historical, and theological*—"religious Test" and "establishment of religion".[236] So, in constitutional interpretation, quite often the "normal and ordinary" meaning of some word or phrase *is and must be* its "technical" meaning, even in numerous senses. And any legally literate American in the late 1700s would have known that focusing on the "technical" meanings of certain of its words and phrases was the *only* way in which to interpret the Constitution in those particulars with objectivity, accuracy, and anything approaching certainty.

Moreover, any legally literate individual in contemporary America should know just as much. For, no less than any other words and phrases they contain, the

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[224] U.S. Const. art. VI, cl. 2.

[225] U.S. Const. preamble.

[226] U.S. Const. art. I, § 6, cl. 1; art. I, § 8, cl. 10; *and* art. IV, § 2, cl. 2.

[227] U.S. Const. art. I, § 6, cl. 1.

[228] U.S. Const. art. I, § 9, cl. 3 *and* art. I, § 10, cl. 1.

[229] U.S. Const. art. I, § 9, cl. 3 *and* art. I, § 10, cl. 1.

[230] U.S. Const. art. III, § 3, cl. 1. In this instance, the Constitution itself supplies the "technical" meaning.

[231] U.S. Const. art. IV, § 2, cl. 1.

[232] U.S. Const. art. I, § 10, cl. 1.

[233] U.S. Const. art. II, § 4 *and* art. IV, § 4.

[234] U.S. Const. art. III, § 2, cl. 3 *and* amends. VI and VII.

[235] U.S. Const. art. I, § 9, cl. 8 *and* art. I, § 10, cl. 1.

[236] U.S. Const. art. VI, cl. 3 *and* amend. I.

"technical" terms the original Constitution and the Bill of Rights employed in 1788 and 1791 mean today precisely what they meant then. That the Constitution "speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers"[237] applies to the specifically *legal* meaning its words and phrases had in that day: "The scope and effect of * * * many * * * provisions of the Constitution[ ] are best ascertained by bearing in mind what the law was before."[238] "We are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted[.]"[239] "[O]ur inquiry concerns the [legal] standard prevailing at the time of the adoption of the Constitution, not a score or more years later".[240] Moreover, "[t]he law as expounded for centuries cannot be set aside or disregarded because some of the judges"—or legislators, or factions and special-interest groups, or members of the *intelligentsia*—"are now of a different opinion from those who, [two] centur[ies] ago, followed it in framing our Constitution".[241] Indeed, it is even more ridiculous to suggest that the law upon which the Constitution was based may be "reinterpreted" today than that the Constitution's words may be.

For perhaps the most obvious example, the words "Jury" in Article III of the Constitution and in the Sixth Amendment[242] and "trial by jury" in the Seventh Amendment[243] "were placed in the Constitution * * * with reference to the meaning affixed to them in the law as it was in this country and in England at the adoption of that instrument".[244] So, "[i]n order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791".[245] For "here we are dealing with a constitutional provision which has in effect adopted the rules of the common law in respect of trial by jury as those rules existed in 1791. To effectuate any change in these rules is not to deal with the common law, *qua* common law, but to alter the Constitution."[246] Thus, for instance,

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[237] Scott v. Sandford, 60 U.S. (19 Howard) 393, 426 (1857).

[238] *Ex parte* Wilson, 114 U.S. 417, 422 (1885).

[239] Mattox v. United States, 156 U.S. 237, 243 (1895).

[240] United States v. Barnett, 376 U.S. 681, 693 (1964).

[241] Pollock v. Farmers' Loan & Trust Company, 157 U.S. 429, 591 (1895) (separate opinion of Field, J.) (referring to English common law).

[242] U.S. Const. art. III, § 2, cl. 3 ("[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury") *and* amend. VI ("[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury").

[243] U.S. Const. amend. VII ("the right of trial by jury shall be preserved").

[244] Thompson v. Utah, 170 U.S. 343, 350 (1898).

[245] Dimick v. Schiedt, 293 U.S. 474, 476 (1935), *citing* Thompson v. Utah, 170 U.S. 343, 350 (1898), *and* Patton v. United States, 281 U.S. 276, 288 (1930). *Accord*, Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 656-657 (1935).

[246] Dimick v. Schiedt, 293 U.S. 474, 487 (1935).

a jury must be "constituted, as it was at common law, of twelve persons, neither more nor less".[247] And

> unanimity was one of the peculiar and essential features of trial by jury at the common law. No authorities are needed to sustain this proposition. Whatever may be true as to legislation which changes any mere details of a jury trial, it is clear that a statute which destroys this substantial and essential feature thereof is one abridging the right.[248]

Similarly for construction of the constitutional term "a Republican Form of Government":[249]

> No particular government is designated [in the Constitution] as republican, neither is the exact form to be guaranteed, in any manner especially designated. Here, as in other parts of the instrument, we are compelled to resort elsewhere to ascertain what was intended.
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> The guaranty necessarily implies a duty on the part of the States themselves to provide such a government. All the States had governments when the Constitution was adopted. * * * These governments the Constitution did not change. They were accepted precisely as they were, and it is, therefore, to be presumed that they were such as it was the duty of the States to provide. Thus we have unmistakable evidence of what was republican in form, within the meaning of that term as employed in the Constitution.[250]

C. The rules of constitutional construction applied specifically to "the Militia of the several States" in 1788 and 1791. This method of construing the original Constitution and the Bill of Rights by straightforward reference to principles embodied in the law in force at the time of their ratifications applies most emphatically to those provisions dealing with the Militia.

1. The necessity for definite meanings of the terms at that time. The "*Power*" of Congress "[t]o provide for organizing, arming, and disciplining, the Militia", "the Militia *of the several States*", "[a] *well regulated* Militia", and "the *right*

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[247] Thompson v. Utah, 170 U.S. 343, 349 (1898). *Accord*, Patton v. United States, 281 U.S. 276, 288-289 (1930).

[248] American Publishing Company v. Fisher, 166 U.S. 464, 468 (1897). *Accord*, Andres v. United States, 333 U.S. 740, 748 (1948); Patton v. United States, 281 U.S. 276, 288-289 (1930); Maxwell v Dow, 176 U.S. 581, 586 (1900).

[249] U.S. Const. art. IV, § 4 ("[t]he United States shall guarantee to every State in this Union a Republican Form of Government").

[250] Minor v. Happersett, 88 U.S. (21 Wallace) 162, 175-176 (1874).

of the people to keep and bear Arms" are plainly all "technical" phrases.[251] But they are nowhere defined in the Constitution. Yet the term "[a] well regulated Militia", which the Second Amendment declares to be "necessary to the security of a free State", *must* have had a most definite meaning known to all among WE THE PEOPLE at the time the Bill of Rights was ratified—and a meaning which THE PEOPLE expected could not change absent an Amendment of the Constitution (and, as will be shown hereafter, perhaps not even then).

Is it conceivable that WE THE PEOPLE in 1791 could have considered undefinable the very "well regulated Militia" which they explicitly identified as "necessary to the security of a free State"? Or that they would have left that phrase entirely undefined, and therefore subject to the vagaries of ever-changing definitions by Congress, the States, or the Supreme Court, as the mere ignorance, political intrigues, or even subversive designs of incompetent or malign public officials and special-interest groups might dictate? Not at all. For THE PEOPLE knew that

> [t]he very purpose of a Bill of Rights [is] to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles * * * . One's * * * fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[252]

And insofar as that is true of a single "fundamental right[ ]" of a single individual, it must especially be true of "the security of a free State", which involves *every* American's *every* "fundamental right[ ]". Indeed, only by being true for "the security of a free State" can it become an effective truth for any individual residing in that State—for if "a free State" is itself insecure, none of its constituent individuals can be any better off. So WE THE PEOPLE'S use of the crucially important terms "necessary", "security", and "free" in connection with "[a] well regulated Militia" and "the right of the people to keep and bear Arms", without an explicit definition of any of those terms in the Constitution, proves that the phrases "[a] well regulated Militia" and "the right of the people to keep and bear Arms" *were* sufficiently defined by legal and historical experience so common to most Americans that they could not plausibly be denied. Therefore, no declaration of Congress or of any State's legislature, and no opinion of any court, is necessary to define these terms today; nor can any such contemporary declaration or opinion change those definitions.[253]

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[251] U.S. Const. art. I, § 8, cls. 1 and 16; art. II, § 2, cl. 1; *and* amend. II (emphases supplied).

[252] West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638 (1943).

[253] *See Ex parte* Wilson, 114 U.S. 417, 426 (1885).

The original Constitution authorized Congress "[t]o provide for organizing, arming, and disciplining, *the* Militia, and for governing such Part *of them* as may be employed in the Service of the United States".[254] Although the principles, standards, and required outcomes that govern the exercise of this power are nowhere explicitly set out, they are obviously implicit in the Constitution's incorporation of "the Militia *of the several States*"—in the plural—into its federal system.[255] These are the *only* "Militia" the Constitution recognizes. These are uniquely "*the* Militia" to which the powers and disabilities of Congress pertain. Even more to the point, these were not merely theoretical "Militia", but instead were actual institutions—indeed, the *only* institutions of their kind—which existed in 1788 and had existed theretofore for generations throughout America, settled and regulated pursuant to Colonial and then State statutes. So, from the very beginning, Congress's power was limited to "organizing, arming, and disciplining, the Militia" in such wise as to produce "Militia" *of the type long theretofore and even then extant as "the Militia of the several States"*—and Congress therefore labored under a complete disability as to any other "militia".

To be sure, because of invincible ignorance or for maleficent political purposes, someone might attempt to deny or obscure the obvious, and float the notion that the Constitution licenses Members of Congress to define "organizing, arming, and disciplining, the Militia"—and even the noun "Militia" itself—in any manner that suits their fancy.[256] Certainly this would be the tack taken by those intent on hamstringing or even destroying the Militia, and thereby undermining "the security of a free State", in aid of usurpation and tyranny. And, just as certainly, the citizens of "a free State" would never be worried about domestic threats to their security unless such incompetents and miscreants were likely to turn up as public officials from time to time. So, to ensure that officials would always adhere to the correct construction of the original Constitution with respect to the Militia, the Second Amendment (along with the rest of the Bill of Rights), consisting of "further declaratory and restrictive clauses", was added to the Constitution "in order to prevent misconstruction or abuse of its powers".[257] Thus, the Second Amendment renders pellucid that Congress is "[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States" according to—*and* ***only*** *according to*—the principles of "[a] well regulated Militia" which is based upon

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[254] U.S. Const. art. I, § 8, cl. 16 (emphasis supplied).

[255] U.S. Const. art. II, § 2, cl. 1 (emphasis supplied).

[256] *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 599-600 (2008) (Scalia, J., for the Court), where this sort of nonsense finds voice, albeit only in *dicta*.

[257] RESOLUTION OF THE FIRST CONGRESS SUBMITTING TWELVE AMENDMENTS TO THE CONSTITUTION (4 March 1789), *in Documents Illustrative of the Formation of the Union of the American States*, *ante* note 1, at 1063.

"the right of the people to keep and bear Arms", and which, so structured, is "necessary to the security of a free State", *precisely as those matters were understood throughout America in 1791.*

2. The requisite definitions to be found in the Militia statutes of the *pre*-constitutional era. *Where*, then, outside of the Constitution, can the *historically and legally correct* understanding of the terms "the Militia of the several States", "[a] well regulated Militia", "the right of the people to keep and bear Arms", and "organizing, arming, and disciplining, the Militia" be found? This inquiry must be conducted circumspectly, because uncertainty, confusion, and downright error in terms of definitions can all too easily insinuate themselves into shoddy constitutional analysis.

a. For example, in one of the Supreme Court's most important cases on the subject of unconstitutional paper currency, one Justice pointed out that

> [t]he terms, "bills of credit," are in themselves vague and general, and, at the present day, almost dismissed from our language. It is, then, only by resorting to the nomenclature of the day of the Constitution, that we can hope to get at the idea which the framers * * * attached to it.[258]

Perhaps amazingly, this observation was offered a scant forty-two years after ratification of the Constitution, when men who had been young adults in 1788 were still alive and capable of remembering not only "the nomenclature of th[at] day" but also the actual "bills of credit"—such as the Continental Currency—which had then circulated throughout America. And, these possible witnesses aside, the *pre*-constitutional historical record more than adequately addressed the issue.[259]

If an actual problem with defining the well-understood term "bills of credit" supposedly arose so early in the life of the Constitution, then properly defining "the Militia of the several States", "[a] well regulated Militia", "the right of the people to keep and bear Arms", and the power of Congress "[t]o provide for organizing, arming, and disciplining, the Militia" will require exquisitely meticulous care today. For decade upon decade of disuse, misuse, and abuse have so thoroughly muddled the meaning of "Militia" in contemporary American political discourse that the word is hardly ever encountered except as invective, usually well-freighted with vituperative adjectives such as "extremist" and "violent", broadcast by the enemies of constitutional government (and their dupes and other "useful idiots") for the purpose of intimidating into silence the people they intend to oppress as soon as the

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[258] Craig v. Missouri, 29 U.S. (4 Peters) 410, 442 (1830) (Johnson, J., dissenting), *referring to* U.S. Const. art. I, § 10, cl. 1.

[259] *See, e.g.,* E. Vieira, Jr., *Pieces of Eight, ante* note 39, Volume 1, at 67-79, 94-96, 141-155, 391-454.

vast majority of Americans has been thoroughly disarmed through one form of "gun control" or another.

As used throughout this study, "gun control" and "gun controllers" are meant—without equivocation, sympathy, or apology, and with good reason—to be taken as strongly pejorative terms. "Gun control" is a neologism. *Pre-*constitutional American laws aimed at a near-universality of armament among able-bodied free adult male inhabitants, either through their own efforts or with the assistance of public institutions. In those days, had the term been current, "gun control" would have meant, not keeping firearms and ammunition away from as many private citizens as legislators might contrive to disarm, but instead seeing to it that as many citizens as possible possessed their own arms at all times, and were as well trained in the use of those arms as circumstances permitted. To employ the modern Judiciary's mumbo jumbo, that and only that was considered to be "reasonable regulation" with respect to firearms. That the Colonies and independent States never attempted to exercise a purported power to disarm the general populace—and that no one of consequence ever seriously advocated that they should have done so—provides compelling evidence that no such power was ever believed to exist.[260] The purpose of "gun control" today, conversely, is not to train people in the safe and effective use of firearms, or to regulate the use of firearms so as to minimize negligent, reckless, or criminal behavior while still maximizing the freedom of individuals to possess and use firearms for all legitimate purposes. Rather, "gun control" aims at denying as many people as possible possession of as many types of firearms as possible in as many places as possible with respect to as many uses as possible—as soon as possible. Its goal is the systematic disarmament of common Americans, typically coupled with the equally systematic elaboration of a *para-*military police-state apparatus to keep defenseless people in line through a cynically calculated policy of official *Schrecklichkeit* ("frightfulness") mediated, ironically, through various "law-enforcement agencies". "Gun control", police lawlessness and brutality, and a general contempt on the part of the professional political class for the people's basic human and civil rights inevitably and invariably march together in goose-step. The motivations of "gun controllers" may be debatable. A very few of them may be simple-minded, rather than aggressively malevolent. But no one is so dim-witted as to be unable to read and understand the historical record of modern times. For that chronicle is as pellucid as it is bloody: Once the common people in any country are disarmed, they are helpless against oppression. Aspiring usurpers and tyrants *always* disarm the people as a key step towards oppressing them. And, confronted by a psychopathic political class claiming unlimited "governmental" powers, disarmed people generally become victims of slavery and

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[260] *See, e.g.*, Federal Power Commission v. Panhandle Eastern Pipe Line Company, 337 U.S. 498, 513 & note 20 (1949); Printz v. United States, 521 U.S. 898, 905, 907-908 (1997).

mass murder.[261] Unfortunately, all too many Americans with otherwise sound patriotic instincts who should vocally support revitalization of "the Militia of the several States"—on the undeniably constitutional, as well as practical, ground that "well regulated Militia" are "necessary to the security of a free State" in their own personal interests where they themselves reside—have been so thoroughly cowed and demoralized by "gun controllers'" black propaganda that they shrink from uttering the word "Militia" in public as part of a political proposal, lest they be vilified in the mass media as dangerous crackpots. The jack-booted tramping of political thugs who demonize the word "Militia" cannot drown out the truth, however, because "[a] well regulated Militia" is not some newly contrived conception with no firm foundation in American law and history. Quite the contrary.

b. Where did WE THE PEOPLE in the late 1700s find the definitions of "the Militia of the several States", "[a] well regulated Militia", "the right of the people to keep and bear Arms", and "organizing, arming, and disciplining, the Militia" that they accepted as true and sufficient? Even before the idea of the Constitution entered anyone's head, "the Militia of the several States" (or, earlier, the Militia of the several American Colonies, with the partial, peculiar, and in any event not permanent exception of Pennsylvania[262]) were established and maintained pursuant to statutes enacted throughout the 1600s and 1700s. In those Colonies and then all of the independent States, operations aimed at organizing, arming, and disciplining these Militia were conducted pursuant to these statutes. In those Colonies and States, the vast majority of the able-bodied adult free male inhabitants (other than conscientious objectors) personally possessed firearms, because those statutes imposed upon them a *duty* to keep and bear arms. And as a consequence of all this, throughout America in the *pre-*constitutional era existed "well regulated Militia"*—the products of statutes which Americans had believed were so effective in achieving their ends that they had enacted them and reënacted them and reënacted them yet again, in form and substance, decade after decade and generation after generation.*

That these statutes existed, what they mandated, how they operated, and what they accomplished were known to all Americans. Moreover, during the *pre-*constitutional era, statutes such as these, the principles of which had been reënacted so often, were likely to have been considered of "constitutional" status.

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[261] *See* Rudolph J. Rummel, *Death by Government: Genocide and Mass Murder in the Twentieth Century* (New Brunswick, New Jersey: Transaction Publishers, 1994). For communist "governments" in particular, which have exceeded all others in the extent and ferocity of the wars of enslavement and extermination they have waged against the common people of their own countries, *see, e.g.*, Stéphane Courtois, Nicholas Werth, Jean-Louis Panné, Andrzej Paczkowski, Karel Bartošek, and Jean-Louis Margolin, *The Black Book of Communism: Crimes, Terror, Repression*, Jonathan Murphy and Mark Kramer, Translators (Cambridge, Massachusetts: Harvard University Press, 1999).

[262] *See post*, at 87-88 and 845-848.

For, as Blackstone observed, "[B]Y the sovereign power * * * is meant the making of laws; * * * and all the other powers of the state must obey the legislative power in the execution of the several functions, or else the constitution is at an end"—and therefore in the British Parliament was "lodged the sovereignty of the British constitution".[263] So Americans would hardly have questioned the "sovereign" power of their Colonial and State governments as residing in their legislatures, too. Not surprisingly then, at the end of the *pre-*constitutional period, WE THE PEOPLE not only incorporated directly into the original Constitution's federal system the Militia that these statutes had regulated,[264] but also emphasized the constitutional authority and political indispensability of such statutorily "well regulated Militia" through the Second Amendment. So, because, in the late 1700s, WE THE PEOPLE drew the meanings of "technical" words and phrases from the relevant laws of England, the Colonies, and the independent States as befitted the particular case at hand, ***it is from these* pre-*constitutional statutes that the constitutional meaning of "Militia", in all its particulars, must be gleaned***.

Just as the noun "Legislature"[265] "was not a term of uncertain meaning when incorporated into the [original] Constitution" and "[w]hat it meant when adopted it still means for the purpose of interpretation",[266] so too the phrases "Militia of the several States", "organizing, arming, and disciplining, the Militia", "[a] well regulated Militia", and "the right of the people to keep and bear Arms" were well understood by every adult American in the late 1700s—and, no Amendment of the Constitution having supervened thereafter, have not changed in their constitutional definitions since then.

And just as "[t]he definition of 'a state' is found in the powers possessed by the original states which adopted the Constitution" by studying the laws that evidenced those powers,[267] so too must the definitions of all those words and phrases that relate to the Militia in the Constitution (and in the Articles of Confederation, too) be found in the *pre-*constitutional American Colonial and State Militia statutes, there being no other source of evidence as

- *scientifically ascertainable*—because every statute's every word, phrase, and mark of punctuation is reproducibly verifiable or falsifiable;
- *objective*—because the substance of none of these statutes depends upon anyone's personal and inevitably subjective interpretations, opinions, or recollections;

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[263] *Commentaries on the Laws of England, ante* note 142, Volume 1, at 49, 51.

[264] U.S. Const. art. I, § 8, cls. 15 and 16, *and* art. II, § 2, cl. 1.

[265] U.S. Const. art. I, § 2, cl. 1; art. I, § 3, cls. 1 and 2; art. IV, § 4; art. V; *and* art. VI, cl. 3.

[266] Hawke v. Smith, 253 U.S. 221, 227 (1920).

[267] Coyle v. Smith, 221 U.S. 559, 566 (1911).

• *historically complete and comprehensive*—because these statutes document everything that the *pre-*constitutional American legislatures did throughout the 1600s and 1700s, not just the limited personal experiences of a few Framers, Founding Fathers, or others around the time of the Constitution's ratification;

• *unequivocal*—because these statutes are consistent in content, not only across the varying political jurisdictions of the Colonies and independent States, but also over the entirety of the *pre-*constitutional period; and

• *legally dispositive*—because, being *the actual law*, these statutes are, not only the best evidence, but even the only admissible evidence, of what the phrase "[a] well regulated Militia" means.

With their own States' and their neighbors' Militia statutes before them, WE THE PEOPLE in 1791 did not need to consult isolated statements of various Framers and Founding Fathers in order to ascertain with exactitude the defining constitutional principles of "[a] well regulated Militia". Neither do WE THE PEOPLE today. On the one hand, if particular Framers' or Founders' interpretations, opinions, or reminiscences of or about the "Militia" contradict what the statutes mandated, they are useless for defining "[a] well regulated Militia", because they are erroneous as a matter of law. On the other hand, if they confirm the statutes, they are merely derivative, cumulative, and ultimately superfluous evidence. In either event, the statutes, not any Framer's or Founder's personal conceptions of the "Militia", must control.

c. This is no mere hobbyhorse of modern ivory-tower intellectuals, but a conclusion in which WE THE PEOPLE in 1788 and 1791 undoubtedly concurred. When THE PEOPLE incorporated "the Militia *of the several States*" into their new Constitution's federal system, they knew full well that these were *statutory institutions already in existence, separate in every State and each one the creature of its own State's laws*. When THE PEOPLE referred to "[a] *well regulated* Militia" in the Second Amendment, they knew exactly what the salient principles of "regulat[ion]" were, because those principles could be found, repeated again and again, in statute after statute the Colonies and then the independent States had enacted throughout the 1600s and 1700s. And when THE PEOPLE authorized Congress "[t]o provide for *organizing, arming, and disciplining*, the Militia", they knew to the last detail what those activities entailed, because they were familiar with the "well regulated Militia" the Colonies' and States' statutes had produced in the past.

For example, in their titles, their bodies, or both, Rhode Island's *pre-*constitutional Militia statutes often explicitly described themselves as "regulating" her Militia:

• [1699, 1701, and 1705] An Act for the better regulating the militia, and for punishing offenders as shall not conform to the law thereunto relating.{EN-2}

• [1718, 1730, and 1744] An Act for the Repealing several Laws relating to the Militia within this Colony, and for further Regulation of the same.{EN-3}

• [1726] An Act for regulating the Militia, and the Election of the Officers of each respective Company in this Colony.{EN-4}

• [1730] "[N]o Constraint shall be laid upon the Conscience of any Person whatsoever, by Force of any Act or Law for the keeping up or regulating the Militia within this Colony".{EN-5}

• [1755] Petitioners seeking a charter for an Independent Company "*proposed the Laws of the Colony made for regulating the Militia, for the Rule of their Conduct*".{EN-6}

• [1755] An ACT in Addition to the several Acts regulating the Militia in this Colony.{EN-7}

• [1756] An ACT in Addition to, and Amendment of the several Acts regulating the Militia.{EN-8}

• [1766] An ACT, regulating the Militia in this Colony.{EN-9}

• [1774] An ACT in addition to, and amendment of, an Act entitled "An Act regulating the Militia of this Colony["].{EN-10}

• [1779] "WHEREAS the Security and Defence of all free States essentially depend, under God, upon the Exertions of a well regulated Militia: * * * Wherefore, for the better forming, regulating and conducting the military Force of this State, *Be it Enacted* * * * [.]" An ACT for the better forming, regulating and conducting the military Force of this State.{EN-11}

Similarly, in Virginia the *pre-*constitutional statutes identified themselves as "regulating" or as "regulations" of her Militia:

• [1723] "WHEREAS a due regulation of the Militia is absolutely necessary for the defence of this country * * * ." *An Act for the settling and better Regulation of the Militia*.{EN-12}

• [1738] *An Act, for the better Regulation of the Militia*.{EN-13}

• [1754] *An Act for amending the act, intituled, An Act for the better regulation of the militia*.{EN-14}

• [1755] *An Act for the better regulating and training the Militia.*{EN-15}

• [1757] *An Act for the better regulating and disciplining the Militia*.{EN-16}

• [1759] *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia*.{EN-17}

• [1762] *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*.{EN-18}

• [1766] *An act to continue and amend the act for the better regulating and disciplining the militia*.{EN-19}

• [1771] *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia*.{EN-20}

• [1777] *An act for regulating and disciplining the Militia*.{EN-21}

• [1779] *An act for the better regulation and discipline of the militia*.{EN-22}

• [1781] *An act to amend the act for regulating and disciplining the militia, and for other purposes*.{EN-23}

• [1782] *An act to amend the act, intituled, An act for establishing and regulating the militia*.{EN-24}

• [1784] *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*.{EN-25}

• [1785] *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*.{EN-26}

These and other like and related statutes provide reliable evidence for WE THE PEOPLE today because they constituted reliable evidence for WE THE PEOPLE in the *pre-*constitutional era, being the very evidence that THE PEOPLE in that day themselves created. Indeed, they are the best of all possible evidence, because they document with legal certainty, exactitude, and even redundancy what, time and again over a period of more than a century, the General Assemblies of Rhode Island and Virginia wanted to happen, ordered to happen, expected to happen, and punished if it did not happen with respect to their Militia.

Doubtlessly, the legislators who authored these statutes, the voters who elected those lawmakers and approved of their efforts, and probably the vast majority of the individuals who served in Rhode Island's and Virginia's Militia under the aegis of these enactments believed that they provided, not simply Militia "regulated" in some at least minimally satisfactory manner, but "*well* regulated Militia"—even as "*well* regulated" as Rhode Island's and Virginia's circumstances allowed. After all, although the General Assemblies of those two Colonies and then independent States from time to time did amend their Militia laws whenever they considered them inadequate in various minor particulars, they obviously believed that the laws' fundamental principles of organization and operation were sound, because, although they enacted many Militia statutes and related laws from the

early 1600s through the late 1700s, they never modified, or even questioned, those principles. So the conclusion is unavoidable that *they considered their Militia to be "well regulated" precisely because the Militia were "regulated" by statutes according to those principles*. If the General Assemblies had deemed their Militia seriously defective in some fundamental way, they would have "regulated" them in some other manner, or even experimented with entirely different means of providing their communities with adequate "homeland security". And this was the case, not only in Rhode Island and Virginia, but also throughout the other Colonies and then independent States.[268]

Thus, during the entire *pre*-constitutional period, the common meanings of what became the constitutional phrases "Militia of the several States", "organizing, arming, and disciplining, the Militia", "[a] well regulated Militia", and "the right of the people to keep and bear Arms" *were* their "technical" meanings, because the "Militia" that existed in that era were not some theoretical "militia", but instead the particular "Militia" that were formed and operated under the aegis of these statutes. The "technical" meanings of all these phrases were defined initially in the statutes; and from these "technical" meanings the common meanings derived through Americans' actual experiences as the statutes were applied.

In contrast, just as with statements from Framers, Founders, and other patriots, anecdotes about the Militia from the *pre*-constitutional period in and of themselves provide next to nothing definitive. What is reported to have been done here and there, at one time or another, under the rubric of "militia" activity is not always reliable evidence of what was in fact done, let alone what *should* have been done rather than left undone. For instance, the activity may have occurred in an extreme, possibly unique, situation in which the standing law simply could not have been applied—and therefore, albeit perhaps not actually *il*legal, it would have been at best *extra*-legal. Or the activity may have arisen from a misunderstanding of what the standing law required—and therefore, although not intentionally so, it was technically illegal. Or the activity may have been arguably or even patently illegal, but either tolerated by the authorities or beyond their ability to punish under the circumstances. In any event, one cannot possibly adjudge the legality, *extra*-legality, or illegality of any such action except against admitted standards—which only the Militia statutes provide.

3. No changes in these definitions now possible. All of the foregoing being beyond fair dispute, "the Militia of the several States", "organizing, arming, and disciplining, the Militia", "[a] well regulated Militia", and "the right of the people

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[268] *See generally* The Selective Service System, *Backgrounds of Selective Service, Military Obligation: The American Tradition, A Compilation of the Enactments of Compulsion From the Earliest Settlements of the Original Thirteen Colonies in 1607 Through the Articles of Confederation 1789,* Special Monograph No. 1, Volume II (14 Parts) (Washington, D.C.: Government Printing Office, 1947).

to keep and bear Arms" can *and must* find their definitions in the fundamental principles set out in the Militia statutes of the Colonies and independent States throughout the *pre-*constitutional period. There is, after all, no practical or even plausible alternative.

As Rhode Island's and Virginia's histories demonstrate, the fundamental principles of the *pre-*constitutional Militia statutes never changed, and apparently no one of consequence in that era ever suggested that they should have been changed. Under these circumstances, how could WE THE PEOPLE who "ordain[ed] and establish[ed] th[e] Constitution" and then ratified the Bill of Rights have possibly believed that this unbroken line of both historical and even their own personal experiences, embodied in law and tested in peace and war, had no permanent political meaning—or disproved those principles in any substantial part—or supported the notion that those principles could or ought to be changed at the mere whims of future legislative or electoral majorities? Were WE THE PEOPLE ready to accept for themselves and their posterity *just anything* as "[a] well regulated Militia"—and, if so, were they willing to accept *just anything* as "a free State" for the "security" of which they believed such a "Militia" to be "necessary"? Moreover, if WE THE PEOPLE had imagined that some type of "Militia" quite unknown in *pre-*constitutional practice could be as "well regulated" as, or perhaps even better "regulated" than, the "Militia" with which they were familiar, would they not have explicitly and carefully redefined all the words and phrases relating to "Militia" in the Constitution so as to break the implicit historical continuity with their *pre-*constitutional meanings, as they were so very careful to do with the definition of "Treason"?[269]

Even with some such scrupulous new specification, though, would WE THE PEOPLE have trusted "the security of a free State"—the ultimate goal for which they had just fought the War of Independence—to a form of "militia" of which no American had ever had any practical experience whatsoever? Less plausible yet, would they have left the matter entirely to the unpredictability of political control—so that Members of Congress or of the various States' legislatures might not "organiz[e], arm[ ], and disciplin[e], the Militia" at all? Or perhaps might "organiz[e], arm[ ], and discipline, the Militia" only in such eccentric or slapdash fashion as to render them ineffectual? Or might "organiz[e], arm[ ], and disciplin[e], the Militia" in a purposefully malignant form consisting of members of just a single political party—such as a *Sturmabteilung* or *Rote Front Kämpfer Bund*; or of ideological fanatics—such as a Hitler Youth, Stalinist Komsomol, or Maoist Red Guard; or of men who could be drafted into, or otherwise brought under the orders of, a "standing army"—which American patriots rightfully feared like the

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[269] U.S. Const. art. III, § 3, cl. 1. *See ante*, at 59.

plague; or of mercenaries recruited from both citizens and foreigners—who could act as a ruthless Praetorian Guard for a clique of usurpers and tyrants?

Any such result is impossible to credit. WE THE PEOPLE knew exactly what "a free State" was, and exactly what "[a] well regulated Militia" was, and exactly how the two interrelated—or else they never could have declared with any sense in their statement that such a Militia is "necessary to the security of a free State". Furthermore, knowing all that, they could never have intended or expected that unknown public officials, to be elected or appointed under unpredictable circumstances in an uncertain future, would have any say whatsoever over the definition of "[a] well regulated Militia", any more than they would over the definition of "a free State".

Neither did WE THE PEOPLE leave "the right of the people to keep and bear Arms" undefined, or subject to transmogrifications in meaning at public officials' hands. They knew that "*the* right * * * to keep and bear Arms" was not simply "*a* right" that Congress would enjoy the power to specify, broadly or narrowly, when it chose to "organiz[e], *arm*[ ], and disciplin[e], the Militia", but instead the legal rubric for a pattern of behavior widespread among Americans that had long preëxisted the Constitution. For they declared that "*the* right * * * shall not be infringed". And if "*the* right" were merely "*a* right" *the substance of which derived from Congress*, then it could never be "infringed" by Congress, because its very definition would depend entirely upon the will of Congress in the first place. Similar reasoning also precluded any power in the States' governments to interfere with "the right of the people to keep and bear Arms". THE PEOPLE knew that the meaning of "the right * * * to keep and bear Arms" was utterly independent of the will of anyone in public office in the General Government or the governments of the several States—just as were the meanings of "[a] well regulated Militia" and "a free State"—because it was "the right *of the people* to keep and bear Arms" (not any discretionary power of public officials) that made "[a] *well regulated* Militia" possible, and therefore was the foundation for "the security of a *free* State". In addition, THE PEOPLE knew—most of them from personal experience—that the substance of "the right * * * to keep and bear Arms" was to be found in the Militia statutes in that pattern of behavior relative to firearms that had proven itself necessary for the formation and maintenance of "well regulated Militia" throughout American history—in particular, the personal possession in his own home by every adult able-bodied individual (not a conscientious objector) of a firearm and ammunition suitable for Militia service.[270]

To be sure, during the *pre-*constitutional period the principles of "[a] well regulated Militia" were apparently only statutory in nature. One may leave aside

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[270] *See post*, Chapter 6 (Rhode Island) *and* Chapters 17 and 18 (Virginia).

whether these principles—particularly the unbroken tradition of common Americans to be armed for their individual and collective self-defense—were among the permanent "rights of Englishmen" that patriots could with justice have claimed to be of "constitutional" stature in Anglo-American Colonial law perforce of immemorial usage. For that question became moot when the Declaration of Independence asserted Americans' entitlement to "certain unalienable Rights" derived from "the Laws of Nature and of Nature's God", among which was "the Right of the People to alter or to abolish" an abusive "Form of Government" *by main force if necessary*, and as to which "the right of the people to keep and bear Arms" is a necessary concomitant. Then, when the Constitution incorporated "the Militia of the several States" into its federal structure, the principles of those Militia were elevated from the statutory to the constitutional level. Therefore, the definitions of "the Militia of the several States", of what constitutes "organizing, arming, and disciplining, the Militia", of "[a] well regulated Militia", and of "the right of the people to keep and bear Arms" which arose out the *pre-*constitutional Militia statutes are now beyond the power of the General Government, the States, or even WE THE PEOPLE themselves to change without a formal constitutional Amendment[271]—and even with such an Amendment, if the Amendment purported to override THE PEOPLE'S sovereign power as recognized in the Declaration of Independence.

4. Although immutable, these definitions nonetheless extensible. There remains, however, the further consideration that some words or phrases in "the supreme Law of the Land"[272] WE THE PEOPLE originally *did* intend to be taken in their then-contemporary meanings as generalities, *but with the expectation that the particular things or activities to which those meanings referred probably would vary from era to era thereafter*. Thus the familiar rule of construction that the "*meaning* [of constitutional provisions] is changeless; * * * only their *application* * * * is extensible".[273] For example, self-evidently the "Commerce" that Congress may "regulate"[274] has expanded since the late 1700s in terms, not of the legal category "Commerce", but of the specific economic and technological means, ends, and subjects of "Commerce" that were unknown, and even unpredictable, in that day. The constitutional definition of the category "Commerce" remains the same now as it was then; but the sum total of specific activities that now fall within that definition has greatly increased since the Constitution was ratified. The *power* of Congress over "Commerce" has not expanded; but the *set of possible subjects* of that power has.

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[271] *See, e.g.,* Eisner v. Macomber, 252 U.S. 189, 206 (1920).

[272] U.S. Const. art. VI, cl. 2.

[273] Home Building & Loan Association v. Blaisdell, 290 U.S. 398, 451 (1934) (Sutherland, J., dissenting).

[274] U.S. Const. art. I, § 8, cl. 3.

a. Similarly for the power of Congress "[t]o provide for organizing, arming, and disciplining, the Militia".[275] As will appear hereinafter, "organizing" the Militia is based upon several principles, two of the most prominent being: (i) near-universal enrollment of all eligible able-bodied adults;[276] and (ii) selective exemption for particular individuals based upon their ages, their holding of important public offices, or their engagement in critical private occupations *inter alia*.[277] The first of these principles is fixed—indeed, as Article 13 of Virginia's Declaration of Rights of 1776 set out most clearly, "a well regulated militia" by definition is "*composed of the body of the people*, trained to arms". Application of the second principle, though, affords legislators a certain lattitude, provided that they do not expand or contract the scope of exemptions beyond what "the general Welfare" may require and "the common defence" may allow.[278] "[D]isciplining" the Militia is also both a fixed principle—"a well regulated militia" being "composed of the body of the people, *trained to arms*"—and a discretionary authority for legislators to mandate forms and methods of "train[ing] to arms" that necessarily must differ for different groups within the populace, and from time to time and place to place, in order to deal most effectively with different threats to "homeland security" whenever, wherever, and howsoever they may arise.[279] "[A]rming" the Militia, too, combines fixed principles with a modicum of discretionary legislative power. The fixed principles include: (i) the arming of all eligible able-bodied adults except for conscientious objectors and those few others who might justifiably be exempted; (ii) the personal possession by most armed Militiamen of the firearms with which they are to perform their Militia service, those arms to be acquired where practicable in the free market and usually held as their very own private property; and (iii) the utilization wherever possible of equipment specifically serviceable for Militia duty, which in general requires arms no less up-to-date and effective than those the members of the regular Armed Forces carry.[280] The discretionary authority relates to what arms in particular will fulfill those requirements, the specifications of which will naturally change along with the threats, the tactics and training, and the technology of the times.

Thus, in the first Militia statute under the Constitution, Congress provided that "every citizen" enrolled in the Militia "shall * * * provide himself with a good

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[275] U.S. Const. art. I, § 8, cl. 16.

[276] *See post*, Chapter 5 (Rhode Island) and Chapter 16 (Virginia).

[277] *See post*, Chapter 11 (Rhode Island) and Chapter 22 (Virginia).

[278] *See* U.S. Const. preamble.

[279] *See post*, Chapter 10 (Rhode Island) and Chapter 21 (Virginia). The constitutional connection between "disciplining" and "training" appears most clearly in the provision "reserving to the States respectively * * * the Authority of training the Militia according to the discipline prescribed by Congress". U.S. Const. art. I, § 8, cl. 16. *See, e.g.,* Timothy Pickering, Jr., *An Easy Plan of Discipline for a Militia* (Salem, Massachusetts: Samuel and Ebenezer Hall, 1775), which contains a set of instructions for drilling Militiamen.

[280] *See post*, Chapters 6 through 9 (Rhode Island) and Chapters 17 through 20 (Virginia).

musket or firelock * * * or with a good rifle",[281] which faithfully followed the pattern set in the *pre*-constitutional Militia laws, even to the specification of particular types of equipment. Although this Congressional construction of the Constitution nearly contemporaneous with its and the Second Amendment's ratifications is not evidence of the meaning of "arming * * * the Militia" anywhere near as conclusive as are the *pre*-constitutional Militia statutes, it is strongly corroborative, to the point of precluding any later Congress from deviating from that construction in general.[282] Furthermore, for over one hundred years from 1792 to 1903, Congress retained substantially the same requirement, that "[e]very citizen shall * * * be constantly provided with a good musket or firelock * * * or with a good rifle",[283] until it finally modified its mandate by authorizing the Secretary of War in the latter year "to issue * * * such number of the United States standard service magazine arms, with bayonets, bayonet scabbards, gun slings, belts, and such other necessary accouterments and equipments as are required for the Army of the United States, for arming all of the organized militia".[284] Apparently, during this period Congress presumed (as did the Colonial and State legislatures throughout the entire *pre*-constitutional era) that, when directed to provide himself "with a good musket or firelock * * * or with a good rifle", every man would use his best efforts to procure the most technologically up-to-date firearm he could afford. From 1874 to 1887, though, just as the Colonies and independent States had sometimes provided public arms to their Militia, Congress appropriated money "for the purpose of providing arms and equipments for the whole body of the militia, either by purchase or manufacture, by and on account of the United States".[285] And from 1887 to 1903, Congress authorized appropriations "for the purpose of providing arms, ordnance stores, and camp equipage for issue to the militia", with the requirement that "the purchase or manufacture" of this equipment "shall be made under the direction of the Secretary of War, as such arms, ordnance and quartermaster's stores and camp equipage are now manufactured or otherwise provided for the use of the Regular

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[281] *An Act more effectually to provide for the National Defence by establishing an Uniform Militia throughout the United States*, Act of 8 May 1792, CHAP. XXXIII, § 1, 1 Stat. 271, 271.

[282] *See, e.g.,* Myers v. United States, 272 U.S. 52, 174-176 (1926).

[283] Revised Statutes of the United States (1873-1874), TITLE XVI, THE MILITIA, § 1628, 18 Stat. 285, 285.

[284] An Act To promote the efficiency of the militia, and for other purposes, Act of 21 January 1903, CHAP. 196, § 13, 32 Stat. 775, 777. The Supreme Court claimed that the Militia Act of 1792 (apparently as later included in the *Revised Statutes*) was repealed in 1901. Perpich v. Department of Defense, 496 U.S. 334, 341 & note 9 (1990), *citing* An Act To increase the efficiency of the permanent military establishment of the United States, Act of 2 February 1901, CHAP. 192, § 42, 31 Stat. 748, 758. The latter statute, however, did not contain the word "militia". It did, however, provide for "the establishment of * * * camp grounds for instruction of troops of the * * * National Guard"—an emerging neologism for the Militia—which it assumed was then, and would continue thereafter, in existence. § 35, 31 Stat. at 757. The term "National Guard", of course, does not appear in the Constitution at all, let alone as a synonym for "Militia". *See post,* at 786-793.

[285] Revised Statutes of the United States (1873-1874), TITLE XVI, THE MILITIA, § 1661, 18 Stat. 285, 290.

Army".[286] At that point, Congress simplified the situation by standardizing all of the Militia's arms along with those of the Regular Army.[287]

b. Not surprisingly, the selfsame mode of construction applies to the Second Amendment. As with any other statute, the Constitution must be read as an entirety, consistently interrelating all of its provisions.[288] For all parts of the same law "must be read in relation to each other",[289] and "reconciled so as to produce a symmetrical whole".[290] All other things being equal, "identical words used in different parts of the same act are intended to have the same meaning".[291] So "[w]hen the same term which has been used" in one clause of the Constitution is used in another, "it must be understood as retaining the sense originally given to it".[292] Therefore, when the Constitution first empowers Congress "[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States",[293] "the Militia" and "them" must refer to "the Militia" in the Constitution's next relevant clause:

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[286] An act to amend section sixteen hundred and sixty-one of the Revised Statutes, making an annual appropriation to provide arms and equipments for the militia, Act of 12 February 1887, CHAP. 129, §§ 1 and 3, 24 Stat. 401, 401, 402. *Continued with an increase in appropriations*, An Act To amend section one of the Act of Congress approved February twelfth, eighteen hundred and eighty-seven, entitled "An Act to amend section sixteen hundred and sixty-one of the Revised Statutes, making an annual appropriation to provide arms and equipments for the militia", Act of 6 June 1900, CHAP. 805, 31 Stat. 662.

[287] Unfortunately, in plain violation of the Constitution, Congress also purported to divide the Militia into two components—"the organized militia, to be known as the National Guard * * * , and the remainder to be known as the Reserve Militia"—but to require that *only* "the organized militia" be armed. *Compare* Act of 21 January 1903, § 1, 32 Stat. at 775, *with* § 13, 32 Stat. at 777. This was the first time in American history at which a significant part of the men eligible for the Militia—indeed, decidedly the major part—was not required to be armed (although, of course, the statute did not preclude members of "the Reserve Militia" from being armed by their State governments, or from arming themselves voluntarily). Fortunately, even more than a century later, this error is still correctable, because "no one acquires a vested or protected right in violation of the Constitution by long use". Walz v. Tax Commission of the City of New York, 397 U.S. 664, 678 (1970).

[288] *See* Hostetter v. Idlewild Bon Voyage Liquor Corporation, 377 U.S. 324, 332 (1964); United States v. Wong Kim Ark, 169 U.S. 649, 653-654 (1898); Cherokee Intermarriage Cases, 203 U.S. 76, 89 (1906); Talbott v. Silver Bow County, 139 U.S. 438, 443-444 (1891); Reid v. Covert, 354 U.S. 1, 44 (1957) (opinion of Frankfurter, J.).

[289] United States v. Universal C.I.T. Credit Corporation, 344 U.S. 218, 222 (1952).

[290] Federal Power Commission v. Panhandle Eastern Pipe Line Company, 337 U.S. 498, 514 & n.21 (1949). *Accord, e.g.,* Richards v. United States, 369 U.S. 1, 11 (1962).

[291] Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 433 (1932). *Accord*, *e.g.*, Commissioner of Internal Revenue v. Lundy, 516 U.S. 235, 249-250 (1996); Gustafson v. Alloyd Company, Inc., 513 U.S. 561, 569-570 (1995); Ratzlaf v. United States, 510 U.S. 135, 143 (1994); Department of Revenue of Oregon v. ACF Industries, Inc., 510 U.S. 332, 342 (1994); Brooke Group Ltd. v. Brown & Williamson Tobacco Corporation, 509 U.S. 209, 230 (1993); Commissioner of Internal Revenue v. Keystone Consolidated Industries, Inc., 508 U.S. 152, 159 (1993); Estate of Cowart v. Nicklos Drilling Company, 505 U.S. 469, 479 (1992); Sullivan v. Stroop, 496 U.S. 478, 484 (1990); Sorenson v. Secretary of the Treasury, 475 U.S. 851, 860 (1986); Morrison-Knudson Construction Company v. Director, Office of Workers' Compensation Programs, 461 U.S. 624, 633 (1983). Of course, this rule is only presumptive, not absolute. Helvering v. Stockholms Enskilda Bank, 293 U.S. 84, 86-87 (1934); Atlantic Cleaners & Dyers, 286 U.S. at 433-434.

[292] Hepburn and Dundas v. Ellzey, 6 U.S. (2 Cranch) 445, 453 (1805).

[293] U.S. Const. art. I, § 8, cl. 16.

namely, "the Militia of the several States", of which Militia the President "shall be Commander in Chief * * * when [they are] called into the actual Service of the United States".[294] And these "Militia of the several States" must be the very same "well regulated Militia * * * necessary to the security of a free State" of which the Second Amendment then speaks, if only because each and every State in the Union—that is, "the several States", as the Constitution always describes them collectively[295]—must be taken to be "a free State" within the Amendment's understanding of that term. So, "the Militia of the several States" that Congress is empowered "[t]o provide for organizing, arming, and disciplining" must also be understood as consisting of "the people" as a whole in each of those States. Furthermore, "the people" with respect to whom the Second Amendment commands that "the right * * * to keep and bear Arms, shall not be infringed" must be the largely selfsame "WE THE PEOPLE" who "do ordain and establish this Constitution for the United States of America".[296] For nothing in the Constitution or any of its Amendments identifies any other "people" as entitled to any rights, powers, privileges, or immunities.[297] And the "Arms" to which "the right of the people" pertains must be the "Arms" necessary for them to serve in "well regulated Militia", which must be the very same "Arms" (at least in the general terms of purpose, type, and quality) with which Congress is "[t]o provide for * * * arming * * * the Militia".

As a result, the noun "Arms" in the Second Amendment must be construed in the selfsame sense as the verb "arming" in the power of Congress "[t]o provide" therefor—which is the *functional* sense all references to firearms, ammunition, and accoutrements had in the *pre-*constitutional Militia statutes: namely, the "Arms" necessary and proper for "the people" to possess in order to provide themselves with "the security of a free State" through "[a] well regulated Militia" *under the particular technological circumstances of the period in question*. Thus, the proper inquiry where the Second Amendment (or any other constitutional provision relevant to the Militia) is concerned is whether the firearm in question "*at this time* has some reasonable relationship to the preservation or efficiency of a well regulated militia".[298] Today, then, (as will be demonstrated hereinafter) such "Arms" should embrace at least every form of long gun and hand gun that might adequately serve an infantryman, irregular, partisan, *guerrillero*, or *résistant* of the present era, including the ubiquitous automatic rifle in a military caliber, equipped with a

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[294] U.S. Const. art. II, § 2, cl. 1.

[295] *See* U.S. Const. art. I, § 2, cls. 1 and 3, *and* § 8, cl. 3; art. II, § 2, cl. 1; art. IV, § 2, cl. 1; art. V; art. VI, cl. 3.

[296] U.S. Const. preamble.

[297] *See* U.S. Const. amends. I, IV, IX, and X.

[298] United States v. Miller, 307 U.S. 174, 178 (1939) (emphasis supplied).

detachable magazine, pistol grip, folding stock, flash suppressor, bayonet lug, and optical sights.[299]

D. The correctness of any construction informed by its consequences. Finally, in construing the Constitution with the benefit of critical hindsight, an argument from consequences should not be overlooked. Truly scientific experiments cannot be conducted within society, because the necessary "laboratory conditions" are never available. To control all but one of the variables that could affect the outcome is impossible. Therefore, the historical, as opposed to the scientific, method must be employed.[300] Practical "thought experiments", though, can be worthwhile. With respect to the Militia in particular, it is instructive to ask whether the misconstruction of the Constitution which has been applied over the years has actually worked out well, all things considered, in comparison to what might likely have happened had the quite different construction advanced in the present study been adopted. That under the former construction things have gone very badly provides evidence in favor of the latter construction.

Since the turn of the Twentieth Century,[301] Congress has treated its power "[t]o provide for organizing, arming, and disciplining, the Militia" as a license to leave them, as they now are, almost totally *un*organized, *un*armed, and *un*disciplined, and to substitute for the Militia "the National Guard" and "the Naval Militia", which are actually adjuncts of the regular Armed Forces.[302] And the States have completely lost sight of the constitutional fact that, because the Militia are "the Militia *of the several States*" with only a limited liability to "be employed *in the Service of the United States*",[303] the States enjoy the *primary* authority and labor under the *primary* responsibility for organizing, arming, and disciplining them. After more than a century, the disastrous results prove this neglect to have been anything but benign. Today, at every level of the federal system, America is woefully unprepared to deal effectively with hurricanes, tornados, floods, earthquakes, and other natural disasters; with major industrial accidents, such as leakages from off-shore oil-drilling rigs or meltdowns of nuclear power plants; with epidemics and pandemics; with crop failures and possibly attendant famines; with invasions through the *Volkerwanderung* of illegal immigration; with economic breakdowns, and in particular a collapse of this country's monetary and banking systems; and

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[299] *See post*, Chapter 39.

[300] *See generally* Ludwig von Mises, *Theory and History: An Interpretation of Social and Economic Evolution* (Auburn, Alabama: Ludwig von Mises Institute, 2007).

[301] *See* An Act To promote the efficiency of the militia, and for other purposes, Act of 21 January 1903, CHAP. 196, § 1, 32 Stat. 775, 775; An Act For making further and more effectual provision for the national defense, and for other purposes, Act of 3 June 1916, CHAP. 134, § 57, 39 Stat. 166, 197.

[302] *See* 10 U.S.C. § 311. *See post*, at 786-793.

[303] *See* U.S. Const. art. II, § 2, cl. 1 *and* art. I, § 8, cls. 15 and 16 (emphases supplied).

with the myriad threats posed by *real* terrorism. "[W]ell regulated Militia", however, not only could deal with the consequences of such events, but also could forefend many of them.

For a prime example, hurricanes are not unnatural occurrences that mysteriously and unpredictably arise out of nowhere, and for and from which no prevision, provision, and protection are possible. Meteorologists can usually predict with good accuracy when and where hurricanes will be born (their sources), where they will travel (their paths), how long they will last (their durations), and how destructive they may be (their effects). The various types and extent of damage hurricanes may cause in different Localities are typically foreseeable, as are the means necessary to protect against and to repair such damage. Yet, when Hurricane Katrina devastated New Orleans in 2005—although everyone had known it was coming, had formed a good idea of how strong it was, and without a crystal ball could have foretold its likely effects—the preparations and especially the responses from the professional "homeland-security" agencies at every level, from the Federal Emergency Management Agency to Local police departments, turned out to be abysmal.[304] Most disturbingly, although State and Local authorities (even when backed up by the National Guard) were unable to provide adequate police protection, means for the evacuation of homeless individuals from devastated areas, and emergency shelter, food, and medical treatment for displaced persons, they *were* quick to employ legally unjustifiable storm-trooper tactics to confiscate firearms from innocent citizens. It is impossible to imagine how New Orleans would not have been orders of magnitude better off if, years earlier, Louisiana had begun organizing in "[a] well regulated Militia" even as few as ten percent of the city's eligible citizens, with the emphasis in their training being preparation for hurricanes—and, when Katrina arrived, the Militia had excluded all other "homeland-security" agencies from the area, and assumed complete authority over preparation for the storm and the response to its aftermath.

Revealingly, the predictable yet nonetheless appalling deficiencies of "homeland-security" policies, programs, and personnel exposed in episodes such as Hurricane Katrina have never resulted in the punishment or even the discharge of any significant number of incompetents. Rather, this sorry record of shortsightedness and failure—coupled with hysterical fear-mongering by the same agencies and their touts in the mass media, aimed at convincing gullible Americans that "terrorists" lurk in every dark corner—linked with airy promises that somehow "all will be well" if only central planners in the District of Columbia are endowed with unlimited authority over "homeland security" at every level of the federal

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[304] *See, e.g.,* Christopher Cooper and Robert Block, *Disaster: Hurricane Katrina and the Failure of Homeland Security* (New York, New York: Henry Holt and Company, 2006); Jed Horne, *Breach of Faith: Hurricane Katrina and the Near Death of a Great American City* (New York, New York: Random House Trade Paperbacks, 2008).

system—is now being put forward to promote the erection a National *para*-military police state of the ilk made forever notorious in the East-European Stalinist "people's republics" of the 1950s.

One need not be overly suspicious of the motives of bureaucratic central planners to conclude that the demotion of the Militia into obscurity, along with the Hollywood-style promotion of a police state staffed largely with thugs who have demonstrated little more than a bestial instinct for harassing innocent Americans, is a matter neither of mere negligence, nor even of a reckless disregard for the constitutional admonition that "[a] well regulated Militia" is "necessary to the security of a free State". Rather, it stems from *malign*, not benign, neglect—that is, a studied intent to suppress every vestige of common Americans' instinct for self-defense for the purpose of rendering impossible "the security of a *free* State" through their own efforts in the Militia. Suppression of the Militia suffices to make terrorism successful—not just the largely imaginary "terrorism" from foreign sources which unprepared and unprotected Americans are being conditioned to fear, but especially the *real* terrorism of a domestic police state about which Americans are too often uninformed to know how to prepare and protect themselves.

Thus, this "thought experiment" supports the conclusion that rogue and incompetent officials of both the General Government and the States have misinterpreted and misused their powers with respect to the Militia—and that the construction of the Constitution that allows for the Militia to be *un*organized, *un*armed, and *un*disciplined must be, not only *wrong*, but also *vicious*.

Part Two

EVIDENCE

In construing any act of legislation, whether a statute enacted by the legislature, or a constitution established by the people as the supreme law of the land, regard is to be had, not only to all parts of the act itself, and of any former act of the same law-making power, of which the act in question is an amendment; but also to the condition, and to the history, of the law as previously existing, and in the light of which the new act must be read and interpreted.

Associate Justice Horace Gray

The quotation on the preceding page is taken from Justice Gray's opinion for the Court in *United States* v. *Wong Kim Ark*, 169 U.S. 649, 653-654 (1898).

CHAPTER TWO

The *pre*-constitutional Militia laws of Rhode Island and Virginia establish the principles applicable to "the Militia of the several States" in theory and practice.

Prior to their ratifications of the Constitution in 1790 and 1788, respectively, Rhode Island and Virginia had established, developed, codified, and systematically applied the principles of the Militia in their charters and statutes from the *mid*-1600s to the late 1700s. Although compressed overviews of this history are available,[305] for purposes of construing the Constitution only detailed analyses of the actual legislation in both of these Colonies (and then independent States) will suffice. Some of this extensive material may appear to be cumulative or even redundant; and the tedium of perusing the detailed review presented here may tax the average reader's patience. But legal-historical continuity can be established in no way other than by demonstrating it with numerous examples from throughout the period under investigation. *Sapiens nihil quod probare non possit affirmat.*[306] And continuity is the best evidence of importance: That decade after decade the selfsame principles were embodied in statute after statute proves how much both Rhode Islanders and Virginians considered these principles necessary for their security. On the other hand, no need exists to bring owls to Athens by extending such an historical review to the other eleven Colonies and then independent States. For precisely the same results would be had in any or all of them[307]—with the peculiar exception of Pennsylvania which, because of the political influence of pacifistic Quakers, could not enact Militia laws on the pattern prevailing elsewhere in America until 1777.{EN-27} Yet during the middle 1700s, many Pennsylvanians who were not pacifists did voluntarily "associate"—albeit without specific legal

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[305] *For RHODE ISLAND, see* James B. Whisker, *The American Colonial Militia, Volume II, The New England Militia, 1606-1785* (Lewiston, New York: The Edwin Mellen Press, 1977), at 137-156. *For VIRGINIA, see* James B. Whisker, *The American Colonial Militia, Volume V, The Colonial Militia of the Southern States, 1606-1785* (Lewiston, New York: The Edwin Mellen Press, 1997), at 5-93. *Also see generally* James B. Whisker, *The Rise and Decline of the American Militia System* (Cranbury, New Jersey: Associated University Presses, 1999), *and* Clayton E. Cramer, *Armed America: The Remarkable Story of How and Why Guns Became as American as Apple Pie* (Nashville, Tennessee: Nelson Current, 2006).

[306] "A wise man affirms nothing that he cannot prove."

[307] *See generally* The Selective Service System, *Backgrounds of Selective Service, Military Obligation: The American Tradition, A Compilation of the Enactments of Compulsion From the Earliest Settlements of the Original Thirteen Colonies in 1607 Through the Articles of Confederation 1789,* Special Monograph No. 1, Volume II (14 Parts) (Washington, D.C.: Government Printing Office, 1947).

authority—for mutual defense in groups meant to take the place of the regular Militia which Pennsylvania's legislature refused to settle and regulate.[308]

Chapters 3 through 13 scrutinize the *pre-*constitutional Militia laws of Rhode Island, Chapters 14 through 25 the Militia laws of Virginia. Rhode Island and Virginia were selected as the exemplars, not simply because the author of this study grew up in Rhode Island and now lives in Virginia, but in particular because Rhode Island was a Northern Colony, the smallest Colony, a Colony basically "republican" in political form because her governor and council were elected officials, and of all the Colonies surely the most independent and idiosyncratic; whereas Virginia was a Southern Colony, the largest Colony, a "royal" Colony because her governor and council were appointed by the British Crown, and of all the Colonies among if not the most politically and socially conservative. That *these* two Colonies enacted Militia laws precisely parallel in substance demonstrates something more than mere accident at work.

Rhode Island is an appropriate place to begin because, more than any other Colony, her Militia laws should be expected to display an uniquely *American* nature, inasmuch as they were the products of perhaps the most intensely unregimentary of all of the Colonial peoples. As the Chief Justice of the Colony of New York, Daniel Horsmanden, wrote to the Earl of Dartmouth in 1773,

> as to the Government [of Rhode Island] (if it deserves that name), it is a downright democracy; the Governor is a mere nominal one, and therefore a cipher, without power or authority; entirely controlled by the populace, elected annually, as all other magistrates and officers whatsoever.
>
> * * * * *
>
> Though by their charter, [Rhode Islanders] are inhibited from passing laws contrary to those of England, but to be as near as may be, agreeable to them, yet they seem to have paid little regard to that injunction, as may sufficiently appear upon inspection of the printed book of them; they have never transmitted them for the royal approbation nor indeed, by their charter were they obliged to do so.
>
> Under these circumstances, Your Lordship will not wonder that they are in a state of anarchy * * * .
>
> * * * * *
>
> * * * [I]t must be confessed, as to the people, it would require a gentleman of very extraordinary qualifications and abilities, to adventure

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[308] *See generally* David E. Young, *The Founders' View of the Right to Bear Arms: A Definitive History of the Second Amendment* (Ontonagon, Michigan: Golden Oak Books, 2007), at 14-25. *See post*, at 845-848. Presumably, the same approach might be taken in a crisis today, if neither Congress nor the States properly organized, armed, disciplined, and trained the Militia. *See* Edwin Vieira, Jr., *Constitutional "Homeland Security", Volume One, The Nation in Arms* (Ashland, Ohio: BookMasters, Inc., 2007).

> upon the first arduous task, for modelling them into due subordination and decorum.[309]

Yet, at the siege of Boston immediately following the Battle of Lexington and Concord in 1775, Rhode Islanders under Nathanael Greene were considered better disciplined than any of the other Colonial forces.[310] Perhaps this should not have been surprising, the men of that Colony having theretofore been in the forefront of armed resistance to British oppression. No doubt their Militia training (and the attitudes upon which it was predicated and which it fostered) served the residents of Providence well, when on the night of 9 June 1772, under the leadership of John Brown, one of Rhode Island's "first and most respectable merchants", they set out from Sabin's Tavern to attack the British schooner *Gaspée* as she lay aground on Namquit Point, boarded and captured "that troublesome vessel", and burned her to the waterline, in protest against her captain's heavy-handed enforcement of the Mother Country's revenue laws.[311]

By September of 1772, an outraged King George III had offered rewards "[f]or the discovering and apprehending the persons who plundered and burnt the Gaspee schooner", and pardons to any accomplices who informed on them; had determined that "the persons concerned in * * * that daring insult, *should be brought to England, to be tried*"; and had established a Commission of Inquiry "to the end that [suspects] may be accordingly arrested and delivered to the custody of the commander of [the British] ships and vessels in North America".[312] This was the very first Royal court of inquisition to pry into a criminal case in the Colonies, and the first tribunal of any kind to be impressed with the duty to transport suspects and witnesses to England for trial in such a case.

Although an indentured servant—whose testimony the British coerced and embroidered—implicated John Brown, nothing came of the Commission's investigation. Nonetheless, Rhode Islanders immediately denounced these Royal directives as the very zenith of tyranny. An article by the leading patriot Stephen Hopkins (writing under the *nom de plume* "AMERICANUS") in the *Providence Gazette* of 26 December 1772 warned his countrymen

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[309] *Records of the Colony of Rhode Island and Providence Plantations in New England, 1636 to 1792*, John R. Bartlett, Secretary of State, Editor [10 volumes, 1856-1865; 1968 reprint], Volume VII, 1770 to 1776 (Providence, Rhode Island: A. Crawford Greene, 1862), at 182-183, 184, 185.

[310] Richard M. Ketchum, *Decisive Day: The Battle for Bunker Hill* (New York, New York: Anchor Books, 1991), at 60. *See* Gerald M. Carbone, *Nathanael Greene: A Biography of the American Revolution* (New York, New York: Palgrave Macmillan, 2008), at 23-25.

[311] *See* THE DESTRUCTION OF THE GASPEE, *in* J. Bartlett, *Records of the Colony of Rhode Island*, *ante* note 309, Volume VII, at 57-192. On the Brown family's key rôle in Rhode Island's politics during this era, as well as John Brown's leadership in the *Gaspée* affair, *see* Charles Rappleye, *Sons of Providence: The Brown Brothers, the Slave Trade, and the American Revolution* (New York, New York: Simon & Schuster, 2006).

[312] J. Bartlett, *Records of the Colony of Rhode Island*, *ante* note 309, Volume VII, at 107-108, 104, 111.

to attend to your alarming situation.

The stamp act you opposed with a spirit and resolution becoming those who were truly solicitous to transmit to posterity those blessings which our forefathers purchased for us * * * at an immense expense of blood and treasure.

But behold, an evil infinitely worse, in its consequences, than all the revenue laws which have been passed from the reign of Charles the First, to this time, now threatens this distressed, *piratically plundered* country.

A court of inquisition * * * is established within this colony, to inquire into the circumstances of destroying the Gaspee * * * and * * * the commissioners * * * are directed to * * * apprehend persons * * * and * * * deliver them to Admiral Montagu, * * * to carry them to England, where they are to be tried.

* * * * *

* * * Is there an American, in whose breast there glows the smallest spark of public virtue, but who must be fired with indignation and resentment, against a measure so replete with the ruin of our free constitution? To be tried by one's peers, is the greatest privilege a subject can wish for * * * .

This establishment is the grand barrier of our lives, liberties and estates; and whoever attempts to alter or invade this fundamental principle, by which the liberties of the people have been secured from time immemorial, is a declared enemy to the welfare and happiness of the King and state. The tools of despotism and arbitrary power, have long wished that this important bulwark might be destroyed, and now have the impudence to triumph in our faces, because such of their fellow subjects in America, as are suspected of being guilty of a crime, are ordered to be transported to Great Britain for trial, in open violation of Magna Charta.

Thus we are robbed of our birth-rights, and treated with every mark of indignity, insult and contempt; and can we possibly be so supine, as not to feel ourselves firmly disposed to treat the advocates for such horrid measures with a detestation and scorn, proportionate to their perfidy and baseness?

Luxury and avarice, a more fatal and cruel scourge than war, will ere long ravage Britain and ultimately bring on the dissolution of that once happy kingdom. Ambition, and a thirst for arbitrary sway, have already banished integrity, probity and every other virtue, from those who are entrusted with the government of our mother country. Her colonies loudly complain of the violences and vexations they suffer by having their moneys taken from them, without their consent, by measures more unjustifiable than highway robbery; and applied to the basest purposes,—those of supporting *tyrants* and *debauchees*. No private house is inaccessible to the avarice of custom-house officers; no place so remote

> whither the injustice and extortion of these miscreant tools in power, have not penetrated.
>
> Upon the whole, * * * it is an almost absolute certainty, that, according to the present appearances, the state of an American subject, instead of enjoying the privileges of an Englishman, will soon be infinitely worse than that of a subject of * * * the most despotic power on earth; so that, my countrymen, * * * it is your indispensable duty to stand forth in the glorious cause of freedom * * * and, with a truly Roman spirit of liberty, either prevent the fastening of the infernal chains now forging for you, and your posterity, or nobly perish in the attempt.
>
> To live a life of rational beings, is to live free; to live a life of slaves, is to die by inches. Ten thousand deaths by the halter, or the axe, are infinitely preferable to a miserable life of slavery in chains, under a pack of worse than Egyptian tyrants, whose avarice nothing less than your whole substance and income, will satisfy; and who, if they can't extort that, will glory in making a sacrifice of you and your posterity * * * .[313]

On the other side of the political controversy, the thoroughly Loyalist Governor of Massachusetts, Thomas Hutchinson, recognized that

> [p]eople in this Province [that is, Massachusetts], both friends and enemies to government, are in great expectation from the late affair at Rhode Island, of the burning the King's schooner; and they consider the manner in which the news of it will be received in England, and the measures to be taken, as decisive. If it is passed over without a full inquiry and due resentment, our liberty people will think they may with impunity commit any acts of violence, be they ever so atrocious, and the friends to government will despond and give up all hopes of being able to withstand the faction.
>
> * * * If ever the government of that colony is to be reformed, this seems to be the time * * * . The denial of the supremacy of Parliament, and the contempt with which its authority has been treated by the Lilliputian Assemblies of America, can never be justified or excused * * * .[314]

> Admiral Montague says that Lord Sandwich will never leave pursuing the colony, until it is disfranchised. If [the *Gaspée* incident] is passed over, the other colonies will follow the example.[315]

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[313] *Id.*, Volume VII, at 112-113 note *. Distressingly, every contemporary patriot may be disposed to wonder how much the circumstances of the United States today conform to this indictment. *Le plus ça change, le plus c'est la même chose*.

[314] *Id.*, Volume VII, at 102-103 note †.

[315] *Id.*, Volume VII, at 103 note †.

Although denounced by his contemporaries as "Too infamous to have a friend, Too bad for bad men to commend",[316] Lord Sandwich, First Lord of the Admiralty, was indubitably prescient on this score.

For although they had brought it upon themselves, Rhode Islanders did not stand alone in this crisis, but could count on support from what Thomas Hutchinson had derided as the other "Lilliputian Assemblies of America". On 12 March 1773, Virginia's House of Burgesses[317] appointed "a standing committee of inquiry"—the members of which included such outstanding patriots as Peyton Randolph, Richard Henry Lee, Patrick Henry, and Thomas Jefferson—

> whose Business it shall be to obtain the most early and authentic Intelligence of all such Acts and Resolutions of the British Parliament, or Proceedings of Administration, as may relate to or affect the British Colonies in America; and to keep up and maintain a Correspondence, and Communication, with our Sister Colonies, respecting these important Considerations[.]

In particular, the committee was instructed,

> without Delay, [to] inform themselves particularly of the Principles and Authority on which was constituted a *Court of Enquiry* * * * in *Rhode Island*, with Powers to transport Persons suspected of Offences committed in *America*, to Places beyond the Seas to be tried.

And the House of Burgesses requested "the different Assemblies of the British Colonies * * * to appoint some Person, or Persons * * * to communicate from Time to Time with the * * * Committee".[318]

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[316] *Quoted in The American Heritage Book of the Revolution* (New York, New York: American Heritage Publishing Company, Inc., 1958), at 276.

[317] Virginia's Colonial Government was patterned on Britain's King in Parliament, and consisted of an executive branch, the Governor, and a legislative branch, the General Assembly, itself composed of the Governor's Council (an "upper house") and the House of Burgesses (a "lower house").

[318] JOURNALS of the HOUSE *of* BURGESSES of VIRGINIA, 1773-1776, Including the records of the Committee of Correspondence, John P. Kennedy, Editor (Richmond, Virginia: Library Board of the Virginia State Library, 1905), at 39. *Also in* J.R. Bartlett, *Records of the Colony of Rhode Island*, *ante* note 309, Volume VII, at 226-227. Virginia's concern was not of only then-recent coinage, as three years earlier she had recognized the grave danger posed by what the King later proposed to do to Rhode Islanders. Resolve of the House of Burgesses, Passed the 16th of May, 1769, *reprinted in Revolutionary Virginia: The Road to Independence*, Robert L. Scribner, Editor (The University Press of Virginia: Virginia Independence Bicentennial Commission, 10 Volumes, 1973-1983), Volume I, at 70: "Resolved, *Nemine Contradicente*, That all Trials for Treason, Misprison of Treason, or for any Felony or Crime whatsoever, committed and done in this his Majesty's said Colony and Dominion, by any Person or Persons residing therein, ought of Right to be had and conducted in and before his Majesty's Courts, held within the said Colony, according to the fixed and known Course of Proceeding; and that the seizing any Person or Persons residing in this Colony, suspected of any Crime whatsoever, committed therein, and sending such Person or Persons to Places beyond the Sea to be tried, is highly derogatory of the Rights of

In response to this request, beginning with Rhode Island, all of the Colonies then established Committees of Correspondence, the work of which aroused and unified Americans in opposition to Britain's suppression of their liberties.[319] Indeed, the Committees of Correspondence were of critical importance in the formation of the Continental Congress.[320] For example, as Thomas Cushing, Speaker of the House of Representatives of the Province of Massachusetts Bay, observed in response to Virginia's call,

> [t]*hat there has been long a settled Plan to subvert the Political Constitutions of these Colonies and to introduce arbitrary Power, cannot in the opinion of this House admit of Doubt.*
>
> *Those who have aimed to enslave us, like a Band of brothers, have ever been united in their Councils and their Conduct. To this they owe their Success. Are they not in this Regard worthy Imitation? Here it is praise worthy to be instructed even by an Enemy.*
>
> *The Object which the Conspirators against our Rights seem of late to have had much in View, has been either to lull the Colonies into a State of Profound Sleep and Security, which is forever the Forerunner of Slavery; or to foment Divisions among them. How necessary then, how important is it to counteract and defeat them in this fatal Design? To awaken and fix the Attention of all to the Common Danger—to open & maintain an uninterrupted Intercourse among the Colonies, that all may be fully apprised of the true State and Circumstances of each, and that the Councils of the whole may be united in some effectual Measures for restoring the Publik Liberty.*[321]

Little more than two years later, Massachusetts Militiamen routed British regulars at the Battle of Lexington and Concord. It was not accidental that, in defense of Americans' freedoms, Militiamen were the first to act. For they were on the scene—organized, armed, disciplined, trained, governed, and motivated by the highest sentiments of patriotism. Indeed, it was the Militia's immediate availability as the crisis arose—their ubiquity throughout New England—that strikingly proved the truth of the Second Amendment's declaration that "[a] well regulated Militia" is "necessary to the security of a free State". No other organization available to Americans at that time could have sufficed.

British Subjects".

[319] See J. Bartlett, *Records of the Colony of Rhode Island, ante* note 309, Volume VII, at 227-239. Among the first seven members of Rhode Island's Committee of Correspondence was Moses Brown, the brother of John Brown. *See id.* at 228. In 1784, Moses Brown founded a school (now known as Moses Brown School and located in Providence, Rhode Island), which the author of the present study attended.

[320] David Ammerman, *In the Common Cause: American Response to the Coercive Acts of 1774* (Charlottesville, Virginia: University Press of Virginia, 1974), at 20-23.

[321] Letter of 3 June 1773, *in* JOURNALS of the HOUSE *of* BURGESSES of VIRGINIA, *ante* note 318, at 50. *Also reprinted in* R. Scribner, *Revolutionary Virginia, ante* note 318, Volume II, at 31.

This ubiquity, too, was not accidental, but the consequence of a system that took form in the 1600s and continued, fundamentally unchanged, throughout the entire *pre-*constitutional period. The architectonic principles of this system define the term "Militia" in both the original Constitution and the Second Amendment. Chapters 3 through 26 of this study lay out the copious evidence from which these principles can be drawn; and Chapters 27 through 44 summarize these principles as they should apply today. Chapters 45 and 46 then employ this evidence to construe the Second Amendment. And Chapters 47 through 50 apply these lessons to America's present and future plight.

CHAPTER THREE

Rhode Island founded her *pre*-constitutional Militia on society's right of self-preservation in "the Laws of Nature and of Nature's God".

From Rhode Island's very beginning, provision of her "homeland security" was *the legal duty of every able-bodied adult free male*.[322] The immediate and especially the ultimate sources of this duty were never in doubt.

A. Rhode Island's Charter. In the Colony's first "constitution", the Charter of 1663, King Charles II

> G[a]ve and Grant[ed] unto the * * * Governour and Company [of the Colony] * * * THAT it shall and may be Lawful to and for the said Governour * * * to Nominate, Appoint & Constitute such and so many Commanders, Governours, and Millitary Officers as to them shall seem Requisite for the Leading, Conducting and Training up the Inhabitants of said Plantations in Martial Affairs; & for the Defence and Safeguard of the said Plantations: AND that it shall and may be Lawful, to and for all and every such Commander, Governour and Millitary Officers * * * and Major part of the Freemen of the said Company * * * To Assemble, Exercise in Arms, Martial Array, and put in Warlike Posture the Inhabitants of said Colony for their special Defence and Safety; AND to Lead and Conduct the said Inhabitants, and to Encounter, Expulse, Expel and Resist by force of Arms, as well by Sea as by Land; and also to Kill, Slay and Destroy by all fitting ways, Enterprizes and means whatsoever, all and every such Person and Persons, as shall at any time hereafter Attempt or Enterprize the Destruction, Invasion, Detriment or Annoyance of the said Inhabitants or Plantations * * * .{EN-28}

The Charter's delegation of authority to the "Govenour and Company" was in keeping with the King's exercise of his "sole supreme government and command of the militia", both in England in practice and in her American Colonies in principle.[323] And the King's mandate "To Assemble, Exercise in Arms, * * * and put in Warlike Posture" the "Major part of the Freeman" was necessitated by the Colony's remoteness from England and its sparse population of settlers.

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[322] *See post*, Chapter 5.

[323] *See* W. Blackstone, *Commentaries on the Laws of England*, *ante* note 142, Volume 1, at 262.

B. "[T]he Laws of Nature and of Nature's God". The principle of an universal legal duty persisted, however, even after the Colonists began enacting their own legislation, and then set off on the path that would separate them entirely from the Crown. In that most perilous of times, just before and through the War of Independence, Rhode Islanders still, perhaps especially, knew that "the Preservation of this Colony, in Time of War, depends, under God, upon the military Skill and Discipline of the Inhabitants".{EN-29} And the continuity of this principle over so many decades proves that the basis for Rhode Island's power to require her inhabitants to serve in a Militia, and their corresponding duty to do so, was understood by all as transcending mere Royal prerogative or the positive laws of even popular, representative legislatures.

Rather, both the Colony's legal power and her inhabitants' corresponding duty found their geneses and justifications in the realization that "every Principle, divine and human, require us to obey that great and fundamental Law of Nature, Self-Preservation".{EN-30} This was the law of which Locke had taught that "the *Society* can never, by the fault of another, lose the Native and Original Right it has to preserve it self".[324] It was the law Blackstone described as "justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society".[325] It was foremost among "the Laws of Nature and of Nature's God" that the Declaration of Independence invoked for the right of Rhode Island and her sister Colonies "to assume among the powers of the earth" a "separate and equal station"—certainly (i) the necessary means to secure the right to "Life", which the Declaration identified as first among those "certain unalienable Rights" with which "all men * * * are endowed by their Creator", and (ii) among the "just powers [derived] from the consent of the governed" that "Governments" may and should exercise "to secure these rights". And, operating perforce of and through the Declaration, it was the right upon which the authority, power, and permanence of the Constitution would thereafter rest, encapsulated in the Second Amendment's precept that "[a] well regulated Militia" is "necessary to the security of a free State", and echoed in the preamble of a then-contemporary Rhode Island Militia Act, that "the Security and Defence of all free States essentially depend, under God, upon the Exertions of a well regulated Militia".{EN-31}

C. The absolute necessity of the Militia. But because "that great and fundamental Law of Nature", "the Native and Original Right" of self-preservation, is the foundational norm of society, can never be lost by society, and cannot be "taken away by the law of society" from a single innocent individual, then also *its enforcement on society's behalf cannot be denied, flouted, shirked, or evaded by any*

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[324] *Two Treatises of Government*, *ante* note 53, Book II, Chapter XIX, § 220.

[325] *Commentaries on the Laws of England, ante* note 142, Volume 3, at 4.

individuals living within society, whether private citizens or public officials. So, being establishments that derive their existence from the collective right of self-preservation in "the Laws of Nature and of Nature's God", the Militia were not simply expedient, but *absolutely necessary*. For, as Blackstone observed in reference to England's militia, "[t]his is the constitutional security, which our laws have provided for the public peace, and for protecting the realm against foreign or domestic violence; and which the statutes [of Parliament] declare is *essentially necessary* to the safety and prosperity of the kingdom".[326]

D. The primacy of social duty over individual right. Rhode Islanders of the founding era knew that, as invoked by society, "th[e] great and fundamental Law of Nature" compels a near-universal duty of service and sacrifice (even if not a strict equality thereof) among all those who constitute society and who benefit from their membership in it. So they held that:

> WHEREAS the preservation of this State and the maintenance of its liberties, at all times depend, under God, in a great measure, upon an acquaintance with military discipline * * * it becomes the indispensable duty of every American citizen, to place himself in a situation where he can be useful in repelling the attacks of its enemies.{EN-32}

Rhode Islanders appreciated that none of their fellow citizens should be suffered to claim an individual right to "avoid[ ] contributing their equal and necessary proportion for the defence of our rights, privileges and estates * * * from which they do, and will, derive, in all respects, equal benefit and protection with other subjects of this state, not exempted from personal military service".{EN-33} Quite the contrary: Rhode Islanders asserted that, "all Countries have a Right to the personal service of [their] Inhabitants, the greatest Exertions of whom, in their different Capacities, are especially requisite for the Defence and Protection of their Lives, Liberties and Properties, during the actual Invasion of Enemies". Therefore, "a Refusal or withdrawing" of personal service in times of public danger stands squarely "against the Rights of human Society", no less than "being voluntarily adherent to public Enemies, by giving them Aid or Comfort, or the seeking of their Protection, [which] amount to a total Renunciation of all former Rights, Privileges and Inheritances whatever". So, to Rhode Islanders, those who shirked their duty to provide personal service for their society's protection were no better than those "who * * * hath withdrawn * * * into Parts and Places under the acknowledged Authority and Dominion of the[ir country's enemies]"—and who on that account "shall be held, taken, deemed and judged to have voluntarily renounced all civil and

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[326] *Id.*, Volume 1, at 412 (footnote omitted) (emphasis supplied).

political relation to each and every of the * * * United States, and be considered as an Alien".{EN-34}

CHAPTER FOUR

Rhode Island's *pre*-constitutional Militia was an institution of popular self-government, not in any sense a private establishment.

In Rhode Island, as in all the other Colonies (and later, independent States), the Militia were always integral parts of the communities' *governmental* structures.

The Militia were the institutions in and through the operation of which most Rhode Islanders, as well as the citizens of other Colonies and then independent States, developed "an acquaintance with military discipline" through their own personal service. Such establishments—a refusal to serve in which in times of extreme public danger could be tantamount to treason,[327] and thereby made the basis for reducing an individual from a citizen to an alien—were certainly *not* in any sense *private* organizations, or organizations with which some individuals might simply refuse to affiliate, or the authority of which they might refuse to acknowledge, for reasons sufficient unto themselves alone. Rather, from the beginning (as Rhode Island's Charter evidences),[328] all of her Militia units were raised, organized, trained, and operated exclusively under *governmental* auspices, authorization, supervision, direction, and control. Moreover, they were not simply the products of governmental action—as might be the behavior of private parties subject to governmental regulations, yet for all that still remaining private—but were actually *institutions of government*, through and through. And, even more than that, *institutions of* ***self****-government*.

A. The legislature in ultimate control. As was typical in other Colonies too, Rhode Island's Colonial Governors were the local commanders in chief of her Militia—in keeping with their positions as the chief executive appointees of the King, whose "undoubted right" under British law was "the sole supreme government and command of the militia, within all his majesty's realms and dominions".[329] This, however, did not subject the Militia to some "Leader Principle" of a traditionally monarchical, let alone a modern dictatorial, cast. To the contrary: From the very beginning in the late 1600s, the rule was that "there be power by the Charter with

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[327] *Compare ante*, at 97-98 *with* U.S. Const. art. III, § 3, cl. 1: "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort."

[328] *See ante*, at 95.

[329] W. Blackstone, *Commentaries on the Laws of England*, *ante* note 142, Volume 1, at 262-263.

the Generall Assembly, or in the intervalls of the Generall Assemblys, then with the Governor and Counsell, * * * in extraordinary cases to take care of and order the malitia * * * for defence and safetye of the whole Collony"{EN-35}—so that the Governors were empowered to act on their own recognizance only "when the Generall Assembly shall not be sitting, to constitute Commanders and military officers, for settling, conducting, and training up the inhabitants in martial affairs, * * * and to exercise and put in warlike posture, lead and conduct the inhabitants for the defence and safety of the Plantations".{EN-36} And throughout the *pre-*constitutional period, the General Assembly did not simply delegate sweeping authority to the Governor, or to some other high-ranking Militia officer (such as an Adjutant General), to determine whether, when, and how the Militia should be organized, armed, and disciplined.

B. "Settling" and "regulating" the Militia. As will be detailed further on in this book, through numerous, comprehensive statutes Rhode Island's legislators themselves first "*settled* the Militia"—for example, by designating which Towns should raise what were called "train'd Band[s] of Foot Soldiers" and "Troop[s] of Horse". Then they "*regulated* the Militia"—for example, by specifying what equipment Militiamen should procure; how individuals not called to train or otherwise serve on a regular basis in the "Band[s]" and "Troops" should participate in the Militia; who among otherwise eligible residents might be exempted from some types of Militia service; how infractions of Militia regulations were to be punished; and so on.

The distinction between "settling" and "regulating" the Militia is no mere linguistic quibble, but has significant legal consequences. In the common usage of *pre-*constitutional times, as well as today, "settling" or to become "settled" meant establishing or being established in the first instance: namely, "[t]o place in a fixed or permanent condition"—"to establish; to fix"—or "[t]o become fixed or permanent", "to assume a lasting form, condition, [or] direction * * * in place of a temporary or changing state".[330] Indeed, Samuel Johnson defined "settle" as "[t]o establish" and "[t]o fix unalienably by legal sanctions"[331]—and in his entries for "militia" even provided a specific example of such usage: "The *militia* was so settled by law, that a sudden army could be drawn together."[332] Thus, when the original

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[330] *Webster's Revised Unabridged Dictionary, ante* note 11, at 1318, definition 1 (transitive verb) and definition 1 (intransitive verb). *Accord, The Compact Edition of the Oxford English Dictionary, ante* note 11, Volume 2, at 2751, definitions 4.c., 4.f., and 6, *and at* 2752, definition 31; *Webster's New International Dictionary of the English Language, Second Edition, Unabridged* (Springfield, Massachusetts: G. & C. Merriam Company, 1954), at 2293, definition 12; *Webster's Third New International Dictionary of the English Language* (Springfield, Massachusetts: G. & C. Merriam Company, 1971), at 2079, definition 6a.

[331] S. Johnson, *Dictionary*, *ante* note 50, definitions 4 and 9 in both the First (1755) and the Fourth (1773) Editions.

[332] *Id.*, in both the First (1755) and the Fourth (1773) Editions.

Constitution incorporated "the Militia of the several States" into its federal system, and the Second Amendment declared that "[a] well regulated Militia" is "necessary to the security of a free State", they "settled" the Militia once and for all by "fix[ing them] unalienably by legal sanctions" within America's governmental structure. Distinguishably, during *pre*-constitutional times, "to regulate" meant (and still means) to arrange an already established (or "settled") institution in proper order according to some standard: namely,"[t]o adjust by rule or method" and "[t]o direct";[333] "to direct by rule or restriction" and "to subject to governing principles or laws"; "[t]o put in good order"; and "[t]o adjust, or maintain, with respect to a desired * * * condition".[334]

Thus, a statute of 1746, entitled "An ACT for settling the Militia of the Towns of *Bristol*, *Tiverton*, *Little-Compton*, *Warren*, and *Cumberland*", provided that

> there shall be one train'd Band of Foot Soldiers in the Town of *Bristol*, and two train'd Bands of Foot Soldiers in the Town of *Tiverton*, and one train'd Band of Foot Soldiers in the Town of *Little-Compton*, and one train'd Band of Foot Soldiers in the Town of *Warren*, and one train'd Band of Foot Soldiers in the Town of *Cumberland*. And that one Troop of Horse be raised in the County of *Newport*: And that so many of those in the Towns of *Tiverton* and *Little-Compton*, who are properly equipt for Troopers, and desire to continue so, be Part of said Troop of Horse{EN-37}

—thereby establishing those particular Militia units for the first time. To the same effect, a statute of 1719, entitled "An Act for the Establishing of *Watches* throughout this Colony, both in Time of *War* and *Peace*", provided "[t]hat the *Town Council* of each * * * Town in this Colony, Be Authorized and Impowered, to appoint, Settle and Order a *Military Watch* in Time of *War* * * * of such Number of Persons as they think proper", and "[t]hat each * * * *Town Council* * * * be * * * fully Impowered to appoint and Settle all *Watches* in Time of *Peace*".{EN-38} And a statute of 1742, entitled "An ACT for the more effectual Establishing a *Military Watch in Time of War*, throughout this Colony", stipulated "[t]hat any Five of the Members of the Council of War * * * shall * * * settle all Watches and Wards in Time of War".{EN-39} Whereas, in contrast, other statutes described themselves as "regulating" Rhode Island's Militia—which was already "settled"—by specifying the details of its composition, structure, discipline, equipment, training, and deployment.[335]

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[333] *Id.*, definitions 1 and 2, in both the First (1755) and the Fourth (1773) Editions.

[334] *Webster's Revised Unabridged Dictionary, ante* note 11, at 1211, definitions 1, 2, and 3. *Accord, The Compact Edition of the Oxford English Dictionary, ante* note 11, Volume 2, at 2473, definitions 1., 1.b., and 2.

[335] *See ante*, at 70-71.

So, when the Second Amendment to the Constitution declares that "[a] *well regulated* Militia" is "necessary to the security of a free State",[336] it presumes that such a Militia is already, and always will be, "settled". When the Constitution refers to "the Militia *of the several States*",[337] it presumes that Militia are already, and always will be, "settled" within, by, and under the jurisdiction of each of "the several States"—and under the ultimate control of WE THE PEOPLE in those States who enjoy "the right * * * to keep and bear Arms"—not as a single "Militia *of the United States*" (for which the Constitution nowhere provides). And when the original Constitution empowers Congress "[t]o provide for organizing, arming, and disciplining, *the* Militia",[338] it delegates the authority simply for "regulating", not for "settling", *the* Militia already in existence—that is, "the Militia of the several States". This, in contrast to Congress's powers "[*t*]*o raise* and support Armies" and [*t*]*o provide* and maintain a Navy",[339] powers cognate to which the Constitution prohibits the States from exercising "without the Consent of Congress * * * in time of Peace".[340] In 1788, WE THE PEOPLE saw no need to empower Congress to "settle" the Militia, because the Militia were already "settled" by and within each of "the several States", and had been "settled" under Colonial and State laws for generations—and, under the Articles of Confederation, "every state" was then required "always [to] keep up a well regulated and disciplined militia, sufficiently armed and accoutred".[341] Moreover, WE THE PEOPLE intended the Militia to remain separate establishments "of the several States", just as they always had been and at that time still were. It sufficed, then, solely to empower Congress to "regulate" the Militia for the purpose of inducing reasonable uniformity in their "organiz[ation], arm[s], and disciplin[e]" for certain purposes. Whereas, inasmuch as the States were to be prohibited from establishing their own armies ("Troops") and navies ("Ships of War") "in time of Peace" "without the Consent of Congress", Congress had to be delegated the unique authority to "settle" ("raise" and "provide") those institutions in the first instance—either by its own actions or through its approval of actions by the States—or else "Armies" and "a Navy" of the United States could not have come into existence at all.

C Delegation of authority to Local governments. Reflecting the fundamentally *Local* foundations of the Militia, throughout the *pre-*constitutional period Rhode Island's General Assembly delegated extensive authority to the Colony's Towns. At various times, the Towns were empowered to: supervise the

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[336] Emphasis supplied.

[337] U.S. Const. art. II, § 2, cl. 1 (emphasis supplied).

[338] U.S. Const. art. I, § 8, cl. 16 (emphasis supplied).

[339] U.S. Const. art. I, § 8, cls. 12 and 13 (emphasis supplied).

[340] U.S. Const. art. I, § 10, cl. 3.

[341] Arts. of Confed'n art. VI, ¶ 4.

selection of Militia officers;{EN-40} regulate the authority of Militia officers;{EN-41} designate the days for and regimens of training;{EN-42} judge individuals' compliance with Militia regulations;{EN-43} pass on the sufficiency of firearms for Militia purposes;{EN-44} arrange for inspections and inventories of firearms and ammunition in private hands;{EN-45} see to it that firearms in individuals' personal possession were kept in good repair;{EN-46} ascertain whether individuals had the financial wherewithal to purchase their own firearms and ammunition;{EN-47} provide firearms and ammunition to the poor;{EN-48} determine who was physically able to serve in the Militia's "Alarm List";{EN-49} draft individuals into military service;{EN-50} procure substitutes for men who defaulted on their military duty;{EN-51} establish "watches" in times of peace and war;{EN-52} and maintain magazines for firearms, gunpowder, and shot.{EN-53}

D. Participation by the people themselves. Evidencing the fundamentally democratic character of an institution in which every able-bodied adult free male participated, common Rhode Islanders, too, often enjoyed a direct and significant say in what went on in their Militia.

First, they could always petition the General Assembly to authorize the formation of regular Militia "Companies" in their Towns;{EN-54} to divide an existing overly large Company into two or more smaller Companies;{EN-55} or even to approve the formation of so-called "Independent Companies" that to a great degree organized, armed, disciplined, and trained themselves separate from the Militia's regular establishment.[342]

Second, in the earliest days, Rhode Islanders were empowered to select their own Militia officers by and from amongst themselves, subject to the approval of public officials in the various Towns or in the General Assembly. For example—

> • [1639] "It is ordered and agreed upon, that the Body of the people, viz.: the Traine Band shall have free libertie to select and chuse such persons, one or more from among themselves, as they would have to be officers among them; to exercise and traine them; and then to present them to the Magistrates for their approbation".{EN-56}

> • [1642] "[T]he officers for militarie affairs, [namely] Captains, Leiftenants, Ensigns, Sarjeants and Clarks shall be dewlie chosen every yeare at y^{e} Generall Courte of Election; and that also the officers of each Band shall be chosen within themselves or limitts (and not officers) to be chosen one band out of another Towne or Band; and further that their Powre shall be ordered from time to time by the Towne" .{EN-57}

Sometimes this process was open to all the inhabitants of suitable age in each Town:

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[342] On the last-mentioned point, *see post*, at 224-234.

• [1647] "It is ordered, that all y^e^ Inhabitants in each Towne shall choose their Military Officers from among themselves".{EN-58}

• [1665] "And as for choosing the Captaine and other millitary officers, every one that is eighteene yeares old or more, and hath taken the oath or engagement of alegiance, shall vote if they please therein, though not freemen, intending only the officers soe chosen are only for the military exercise of training".{EN-59}

• [1677] "This Court * * * findinge that his Majesty * * * hath required that the inhabitants of his Collony are to be led, conducted and trained up in martiall affaires, doe * * * order * * * that the inhabitants of every respective towne within this Collony, shall * * * have their free choyce or election of their millitary commanders and officers; and that yearly * * * . And that [a public official] * * * shall give forth warrant * * * to warne the inhabitants to assemble in armes * * * to make choyce and elect their commanders and millitary officers. And that for the future * * * the Captaine * * * of the respective Traine Bands, shall give forth warrant * * * to warne and require the inhabitants yearely * * * to assemble in armes and elect their respective commanders and millitary officers for the exercisinge of the people in martiall affaires in each * * * towne."{EN-60}

• [1699, 1701, and 1705] "[T]hose who shall list themselves under the command of the respective Train Bands, * * * are ordered to give in their names to [certain officers] * * * ; so that when they find there is a suitable number, not exceeding fifty persons for each troop, the said persons so listing themselves, may have liberty to make choice of their own commander".{EN-61}

Otherwise, the procedure might be limited, such that solely "Freemen"were eligible to stand for election, or to vote:

• [1641]"[T]he Traine Bands shall choose among the Freemen, one or more such as shall be for their commanders, and present them to the Towne. The Major vote of the Towne, by the Authority of this Court, shall have the negative voice for the Establishment of them, and shall order their Powre till the next Generall Courte".{EN-62}

• [1705] "This Assembly having taken into their consideration the great inconveniences and dishonor it brings to the Collony in admitting the listed soldiery of each Train Band in this Collony to make choice of their commissioned officers, by which sundry listed soldiers being transient persons, and many youth of small consideration, persons are chosen to office that is not honorable to her Majesty nor capable of serving * * * in the office they are chosen unto:

"Therefore be it enacted * * * That * * * no person shall have any vote in any Train Band of soldiers in this Collony for commissioned

> officers * * * but such as are freemen of the respective towns they live in, or freemen of the Collony".{EN-63}

In that era, to qualify as a "Freeman" a man was required to satisfy religious, economic, and political tests. For example, a statute in 1663 decreed that

> all Men Professing Christianity, and of competent Estates, and of Civil Conversation, who acknowledge, and are Obedient to the Civil Magistrate, though of different Judgments in Religious Affairs (Roman Catholicks only excepted) shall be admitted Free-men, And shall have Liberty to Chuse and be Chosen Officers in the Colony both Millitary and Civil.{EN-64}

And a statute in 1729 mandated that "no Person whatsoever shall be admitted a Freeman of any town in this Colony, unless the Person * * * be a Freeholder of Lands, Tenements, or Hereditaments * * * to the Value of *Two Hundred Pounds*, or *Ten Pounds per Annum*, or the eldest Son of such a Free holder".{EN-65} Today, of course, any such religious test would be plainly unconstitutional.[343] And insofar as conditioning the right to vote "on the basis of wealth or property" violates the principle of "equal protection of the laws",[344] even when voting is constitutionally protected and morally obligatory *but not legally mandatory*, conditioning performance of the constitutional *duty* (as well as right) to serve in the Militia "on the basis of wealth or property" would be no less violative of that principle.[345]

Even for "Freemen", however, Rhode Island's Militia was not a purely democratic institution. For the General Assembly early took upon itself the selection of Militia officers. In 1713, it decreed that an Act passed in 1677,

> empowering the inhabitants of each respective town in the colony to choose or elect their commissioned officers for the militia * * * shall be * * * repealed, made null and void, and of none effect; and all other * * *

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[343] *See* U.S. Const. amend. I *and* amend. XIV, § 1. *See* Torcaso v. Watkins, 367 U.S. 488, 494-495 (1961).

[344] *See* U.S. Const. amend. XIV, § 1, *as applied in* Harper v. Virginia Board of Elections, 383 U.S. 663, 668 (1966).

[345] The two previous footnotes cite the Fourteenth Amendment and judicial decisions applying it. Admittedly, the validity of the ratifications of the Thirteenth, Fourteenth, and Fifteenth Amendments has been, and in some circles remains, a matter of historical, political, and legal controversy. For the sake of simplicity, the constitutionality of these Amendments will be accepted *arguendo* here, because: (i) The arguments against their ratifications are certainly not open and shut. (ii) Its seems highly unlikely than any argument will prevail against the historical record that for over a century and a half those Amendments have been accepted as having been properly ratified. (iii) The vast majority of legal scholars, jurists, and other public officials, and for that matter most common Americans who think about the subject at all, treat those Amendments as legitimate—so that any discussion of the Constitution that does not do so will tend to confuse them even more than they are already confused. And to no evident purpose will such confusion be exacerbated, inasmuch as (iv) *the meaning and application of the Militia Clauses of the original Constitution and the Second Amendment do not depend in any way upon the validity* vel non *of those Amendments*.

> acts, ordinances or customs in this colony, that may in any wise further tend to the same.
>
> And further, * * * for the future, all and every the commissioned officers, for the militia of this colony, shall be nominated, appointed, chosen and elected by the Governor, general council and Assembly * * * annually, pursuant and according to our charter[.]{EN-66}

In 1714, however, this statute was repealed, eliciting a remonstrance from the Governor and others:

> There being a vote of [the General] Assembly, passed for the repealing a late act, wherein the choice of the militia officers was vested in the General Assembly, according to the express words of the charter, and that for the future the military officers shall be elected or chosen by the freemen of each respective company within said colony;—
>
> We * * * are of opinion * * * that the investing of the freemen of each company with the choice of the militia officers, is repugnant to the express words of the charter, and highly dishonorable to the crown and dignity of Her Majesty * * * —the prerogative of the militia being wholly and solely vested in the crown, and by the crown, in the General Assembly of this colony[.]{EN-67}

On the prerogative of the King, of course, the Governor was quite correct.[346] So, too, on the delegation of authority over the Militia "in time of peace" from the King to the Governor of the Colony.{EN-68} Perhaps not surprisingly, then, in 1718, 1730, and 1744 the law stipulated that:

> the Militia of this Government be * * * Divided into two Regiments * * * each of which Regiments shall be Govern'd, Guided and Led by one Colonel, one Lieutenant Colonel, and one Major, which shall be Annually Chosen * * * by the General Assembly * * * ; and that each Company or Trained Band in each of the aforesaid Regiments, shall be Guided, Conducted and Led by one Captain, one Lieutenant, and one Ensign; the which shall annually be Elected and Chosen by the General Assembly * * * : And if any * * * Commission Officer Chosen as aforesaid, shall refuse to Serve in such Office, * * * or shall happen to Die; that then * * * it shall and may be lawful for the Governour, or in his absence, for the Deputy Governour, by and with the consent of the General Council, at any time when the General Assembly shall not be Sitting, to chuse and appoint * * * Officers to Serve in the room and stead of those that shall refuse or Die[.]{EN-69}

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[346] *See* W. Blackstone, *Commentaries on the Laws of England, ante* note 142, Volume 1, at 262-263.

In 1726, however, the General Assembly,

> being advised that through the dissatisfaction and discontent of His Majesty's good subjects in the choice and election of commissioned officers, to lead and conduct them, * * * the militia is of late visibly declining, not only to the scandal and reproach of the government, but also to the imminent danger thereof * * * should it be invaded or assaulted by a common enemy;—
>
> Be it * * * enacted, that the several or respective companies or trained bands of, and within this colony, shall * * * meet together under military arms, at their usual place of meeting, * * * with the freemen within the limits of each band, and * * * shall nominate and elect a captain, lieutenant and ensign of their respective bands, with the inferior or under officers (as shall be well qualified) to be their commanders; and that such as shall be then nominated and elected by a majority of voices or votes * * * by the Governor and council to be approbated and confirmed; without the Governor and council shall see just cause to reject or disapprove of any one or more of them; in which case, the council shall elect another or others * * * .
>
> And it is further enacted * * * that for the better encouragement of the commissioned and other officers of each band, to accouter and inform themselves of the military art and discipline, that such as shall be elected and approved * * * shall continue in their respective offices for the term of three years[.]{EN-70}

But in 1740, the General Assembly once again mandated that the earlier allowance "empowering the Freemen and Soldiers choosing their Military Officers * * * is hereby repealed", and "for the Future, the General Assembly * * * [will] choose and elect the Military Officers in this Government".{EN-71}

Yet, although this was the procedure then followed through the late 1700s,{EN-72} the Militia was not entirely hierarchic and subject to exclusively "top-down" control. For the practice by which Local Militia Companies at least nominated their own commanders still persisted. In 1780, for instance,

> it [wa]s represented to th[e General] Assembly, that the Inhabitants of the Towns of *Newport* and *Portsmouth* are desirous of associating for the Defence thereof against the Enemies of this and the United States: *It is therefore Voted and Resolved,* That the said Inhabitants be, and they are hereby empowered, to associate for the Defence of the said Towns; to form themselves into Companies, and to nominate the necessary Officers, who being returned to and approved by * * * the Governor, shall be commissioned accordingly.{EN-73}

And usages of that type continued after the Constitution was ratified.{EN-74} In addition, Rhode Island's Independent Companies of Militia always selected their own officers—as well as their own members.[347]

If the procedure of exclusive and complete Local selection or at least nomination of officers might not today be constitutionally required perforce of these traditions, it assuredly would be constitutionally recommended, inasmuch as "[a] well regulated Militia" is "necessary to the security of a *free* State"[348]—and in "a *free* State" as much decision-making power as possible is lodged in common people's hands.

E. The Militia an unique governmental institution. As the foregoing should make clear, in Rhode Island as well as in the other Colonies and then independent States, the Militia were "settled"—that is, established in the first instance—and then "regulated"—that is, provided with and administered according to standards and procedures for their day-to-day conduct—*by statutes* and *as institutions part of yet quite distinct from other components of those Colonies' and States' governments*.

1. Not the product of "common law". Contrary to a belief enjoying some unwarranted currency among naive patriots today, *no pre-*constitutional Militia ever derived its authority from "common law", in the strict sense in which American legal history and the Constitution itself employ that term.[349] (Except, of course, insofar as a statute which applied in *common* to all members of the community on an equal basis was thereby an example of "*common* law".) As Blackstone explained, "the common law, or *lex non scripta,*[350] of this kingdom [that is, England]",

> properly so called * * * is that law, by which proceedings and determinations in the king's ordinary courts of justice are guided and directed. This, for the most part, settles the course in which lands descend by inheritance: the manner and form of acquiring and transferring property; the solemnities and obligations of contracts; the rules of expounding wills, deeds, and acts of parliament; the respective remedies of civil injuries; the several species of temporal offences, with the manner and degree of punishment; and an infinite number of minuter particulars, which diffuse themselves as extensively as the ordinary distribution of common justice requires * * * —all these are doctrines that are not set

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[347] *See post*, at 226-228.

[348] U.S. Const. amend. II (emphasis supplied).

[349] *See* U.S. Const. amend. VII.

[350] "The unwritten law." This is something of a self-contradictory appellation, though, because "the common law" *was* often "written" in reports of judicial decisions, without which records it could hardly have been generally or reliably known at all.

> down in any written statute or ordinance, but depend upon immemorial usage, that is upon common law, for their support.[351]

Revealingly, Blackstone did not include within this litany any matter relating to "militia", because English "common law"—the *lex non scripta*—did not extend to that subject.

Even had English "common law" in the very broadest sense—that is, the law "common" throughout the Realm because it embodied "[g]eneral customs; which are the universal rule of the whole kingdom",[352] as well as Parliamentary statutes—controlled the Mother Country's militia on her own soil, the entirety of that law was never transplanted to and imposed upon the Colonies. As Blackstone observed, even in principle, in

> our most distant plantations in America, * * * colonists carry with them only so much of the English law, as is applicable to their own situation * * * . The artificial refinements and distinctions incident to the property of a great and commercial people, laws of police and revenue, (such especially as are enforced by penalties), the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for them, and therefore are not in force. What shall be admitted and what rejected, at what times, and under what restrictions must * * * be decided in the first instance by their own provincial judicature, subject to the revision and control of the king in council * * * . And therefore the common law of England, as such, has no allowance or authority there; they being no part of the mother country, but distinct (though dependent) dominions.[353]

This position was early adopted in Rhode Island, when in 1700 her General Assembly decreed "[t]hat in all *Actions*, Matters, Causes and Things whatsoever, where *no particular Law* of this Colony is made to Decide and Determine the same; that then and in all such Cases the *Laws of England* shall be put in Force, to Issue, Determine and Decide the same".{EN-75} Then, in 1749, the General Assembly finally appointed "*a Committee to prepare a Bill for introducing into this Colony, such of the statutes of* England, *as are agreeable to the Constitution*"; the Committee prepared a short list of the statutes "which * * * have heretofore been, and still ought to be in Force in this Colony"; and the General Assembly "*Resolved,* That all and every of th[os]e Statutes * * * shall be in full Force * * * ***until the General Assembly shall order otherwise***".{EN-76}

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[351] *Commentaries on the Laws of England*, *ante* note 142, Volume 1, at 67-68.

[352] *Id.*, Volume 1, at 67.

[353] *Id.*, Volume 1, at 106-107.

The same position was adopted even earlier in Virginia, when her General Assembly in 1662 declared with careful distinction that it had "endeavoured in all things (***as neere as the capacity and constitution of this country would admitt***) to addhere to those excellent and often refined laws of England, to which we profess and acknowledge all *due obedience and reverence*".{EN-77} And it was reasserted by Virginia's revolutionary Convention in 1776, which declared

> [t]hat the common law of England, all statutes or acts of parliament made in aid of the common law prior to the fourth year of the reign of king James the first, and which are of a general nature, not local to that kingdom, together with the several acts of the general assembly of this colony now in force, so far as the same may consist with the several ordinances, declarations, and resolutions of the general convention, shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by the legislative power this colony.{EN-78}

Moreover, in practice, throughout the *pre*-constitutional era, both Virginia and the New England Colonies not infrequently rejected, in whole or in part, various rules of the English "common law".[354]

In any event, although "common", English "common law" was never supreme and unchangeable, but could always be overridden by what Blackstone called

> the *leges scriptae*, the written laws of the kingdom; which are statutes, acts, or edicts, made by the king's majesty, by and with the advice and consent of the lords spiritual and temporal and commons in parliament assembled.[355]
>
> STATUTES * * * are either *declarator*y of the common law or *remedial* of some defects therein. Declaratory, where the old custom of the kingdom is almost fallen into disuse, or become disputable * * * . Remedial statutes are those which are made to supply such defects, and abridge such superfluities, in the common law, as arise either from the general imperfection of all human laws, from change of time and circumstances, from the mistakes and unadvised determinations of unlearned judges, or from any other cause whatsoever.[356] [And,]

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[354] *See*, *e.g.*, Powell v. Alabama, 287 U.S. 45, 60-65 (1932) (rejecting for purposes of American constitutional law the old English rule that denied a defendant a right to counsel in a criminal case). *See generally* William E. Nelson, *The Common Law in Colonial America, Volume I, The Chesapeake and New England, 1607-1660* (New York, New York: Oxford University Press, 2008).

[355] *Commentaries on the Laws of England*, *ante* note 142, Volume 1, at 85 (footnote omitted).

[356] *Id.*, Volume 1, at 86.

> * * * WHERE the common law and a statute differ, the common law gives place to the statute * * * .[357]

Decisively, at the time of the first settlement of the American Colonies, no one could have doubted that in England the militia laws derived from exercises of the Royal prerogative and Parliamentary statutes, not from the *lex non scripta* of "common law". As Blackstone recounted the relevant history,

> the statute of Winchester obliged every man, according to his estate and degree, to provide a determinate quantity of such arms as were then in use, in order to keep the peace: and constables were appointed * * * to see that such arms were provided.[358] These weapons were changed, by * * * [another] statute * * * into others of more modern service; but both this and the former provision were repealed in the reign of James I. While these continued in force, it was usual from time to time for our princes * * * to muster and array (or set in military order) the inhabitants of every district * * * . But at the same time it was provided, that no man should be compelled to go out of the kingdom at any rate, nor out of his shire but in cases of urgent necessity; nor should provide soldiers unless by consent of parliament. About the reign of Henry the eighth * * * , lord lieutenants began to be introduced, as standing representatives of the crown, to keep the counties in military order * * * , as extraordinary magistrates constituted only in times of difficulty and danger.
>
> IN this state things continued, till * * * when king Charles the first had * * * issued commissions of lieutenancy and exerted some military powers, which having been long exercised, were thought to belong to the crown, it became a question in the long parliament, how far the power of the militia did inherently reside in the king * * * . This question * * * became at length the immediate cause of the fatal rupture between the king and his parliament: the two houses not only denying this prerogative of the crown, the legality of which right perhaps might be somewhat doubtful; but also seising into their own hands the intire power of the militia, the illegality of which step could never be any doubt at all.
>
> SOON after the restoration of king Charles the second, * * * it was thought proper to ascertain the power of the militia, to recognize the sole right of the crown to govern and command them, and to put the whole into a more regular method of military subordination: and the order, in which the militia now stands by law, is principally built upon the statutes which were then enacted * * * the general scheme of which is to discipline a certain number of the inhabitants of every county, chosen by lot * * * . They are not compellable to march out of their counties, unless

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[357] *Id.*, Volume 1, at 89.

[358] 13 Edward I, Chapter 6 (1285), *quoted post*, at 235-236.

> in case of invasion or actual rebellion, nor in any case compellable to march out of the kingdom. They are to be exercised at stated times: and their discipline in general is liberal and easy; but, when drawn out into actual service, they are subject to the rigours of martial law, as necessary to keep them in order. This is the constitutional security, which our laws have provided for the public peace, and for protecting the realm against foreign or domestic violence; and which the statutes declare is essentially necessary to the safety and prosperity of the kingdom.[359]

As the rest of the present study will exhaustively demonstrate, these English militia laws have parallels in both *pre*-constitutional and constitutional American Militia law. Nonetheless, just as with English "common law", English statutory law was never imported into and imposed wholesale upon the Colonies. As Blackstone noted in general, although the Colonies were "subject to the control of parliament" they were "not bound by any acts of parliament, unless particularly named".[360] And the militia laws of England were never applied directly to any Colony. Furthermore, from their beginnings, Colonial Assemblies took upon themselves the task of enacting all of the legislation necessary in light of the peculiar political, economic, and social conditions of their jurisdictions.[361]

So, to determine the character of the laws historically applicable to the Militia in America requires the study of *American legislation* alone. Although in America the *pre*-constitutional Militia laws did rely on "common-law" remedies and the courts in order to enforce fines,[362] the laws themselves never arose out of Colonial and State "common law" (*lex non scripta*), but solely from Colonial and State Militia Acts (*leges scriptae*). Regular Colonial and State Militia units often did have a say in choosing their own officers,[363] and "Independent Companies" often did organize and largely regulate themselves[364]—but always subject to specific governmental approval, supervision, and command *as mandated by some statute*.

Therefore, no matter how patriotically motivated, well organized and equipped, and carefully trained they may be, private groups of individuals appealing to "common law" for their authority do not and can not constitute *constitutional* "Militia"—unless perhaps when: (i) Their actions, if arguably *extra*-legal when performed, are retrospectively validated by governmental authorities. Or, (ii) they assume direct governmental authority on their own recognizance, under aegis of the

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[359] *Commentaries on the Laws of England*, *ante* note 142, Volume 1, at 410-412 (footnotes omitted).

[360] *Id.*, Volume 1, at 107-108.

[361] *See* W. Nelson, *The Common Law in Colonial America*, *ante* note 354, at 130-131.

[362] *See post,* at 275-284 (Rhode Island) and 666-697 (Virginia).

[363] *See ante*, at 103-108 (Rhode Island), *and post*, at 528-530 (Virginia).

[364] *See post*, at 224-234 (Rhode Island) and 567-597 (Virginia).

maxim *salus populi suprema lex*,[365] because of the dire, unavoidable exigencies of the circumstances confronting them—as, for example, the situation the Declaration of Independence posits: "[t]hat whenever any Form of Government becomes destructive of [men's unalienable Rights], it is the Right of the People to alter or to abolish it, and to institute new Government".

2. Not subordinate to Sheriffs. Contrary to another mistaken belief current among not a few contemporary patriots, Local Sheriffs enjoy no unique, supreme authority within their jurisdictions which would somehow entitle them either to assert direct control over whatever Militia units were already settled there, or indirectly to supersede and absorb the Militia entirely under their command by calling forth in the *posse commitatus* every adult eligible for the Militia.[366] Certainly no historical basis exists for any such claim. ***For no* pre-*constitutional American Militia were ever made generally subordinate to, or in any particulars controlled by or answerable to, Local Sheriffs as commanding officers.***

As Blackstone described Sheriffs' traditional powers under the law as applied in England,

> [A]S the keeper of the king's peace, both by common law and special commission, he is the first man in the county, and superior in rank to any nobleman therein, during his office. He may apprehend, and commit to prison, all persons who break the peace or attempt to break it * * * . He may, and is bound *ex officio* to, pursue and take all traitors, murderers, felons, and other misdoers, and commit them to gaol for safe custody. He is also to defend his county against any of the king's enemies when they come into the land: and for this purpose, as well as for keeping the peace and pursuing felons, he may command all the people of his county to attend him; which is called the *posse commitatus*, or power of the county: which summons every person above fifteen years old, and under the degree of a peer, is bound to attend upon warning, under pain of fine and imprisonment.[367]

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[365] "The health [or welfare] of the people is the highest law."

[366] This belief apparently derives, or at least takes comfort, from the Supreme Court's opinion that Congress may not compel a State's executive officials "to execute federal laws" by participating "in the administration of a federally enacted regulatory scheme" aimed at "gun control". Printz v. United States, 521 U.S. 898, 904-905 (1997) (Scalia, J., for the Court). This decision did not turn, however, on the particular rights, powers, privileges, or immunities of Sheriffs under the Constitution or laws of the United States or any State's laws. Local law-enforcement officers in general were the executive officials whom Congress attempted to dragoon into the General Government's service, because typically they happened to have direct access to the data from which an individual's eligibility to purchase a firearm could be ascertained. But the Court's reasoning would have applied just as well to *any* State officer, bureaucrat, or employee whom Congress might have singled out to perform the requisite statutory duties—for example, Local prosecutors or custodians of criminal records other than actual law-enforcement officers.

[367] *Commentaries on the Laws of England*, *ante* note 142, Volume 1, at 343-344 (footnotes omitted).

Blackstone's reference to "common law" in this passage is perhaps the source of the composite proposal circulating among some contemporary patriots for the formation of "common-law militias" specifically commanded by Sheriffs.

The powers Blackstone catalogued, however, were never considered either mandatory, or necessary, or sufficient for organizing the defense of any of the Colonies around their Sheriffs. Although Sheriffs in *pre-*constitutional America traditionally could deputize individual citizens, or even summon them *en masse* in a *posse commitatus*, in aid of keeping the peace and enforcing the criminal law,[368] they played no special—let alone a commanding—rôle in the Militia. Otherwise, neither legal justification nor practical need would have existed for enactment of elaborate Militia statutes, as the matter of defending each Colony, County by County, could simply have been entrusted to the Sheriffs by implication; or the Militia statutes could simply have declared the Sheriffs the commanding officers of the Militia in each County within each Colony—neither of which courses of action ever occurred anywhere in *pre-*constitutional America.

Revealingly, references to Sheriffs are few and far between in the Militia laws of *pre-*constitutional Rhode Island. The only one of consequence this study has uncovered involved a requirement, imposed during the War of Independence, that

> all the male inhabitants of this colony, of sixteen years of age and upwards, who shall be suspected of being inimical to the United American Colonies, and the arduous struggle in which they are engaged, against the force of Great Britain, shall make and subscribe * * * [a] declaration, or test [of loyalty] * * * .
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> * * * * *
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> And * * * , that in case any such suspected person shall refuse to subscribe the same, * * * and if [upon being summoned and interrogated] he shall continue such refusal, without giving satisfactory reasons for the same * * * , or shall refuse to appear upon being summoned, * * * [a] warrant [shall be issued], directed to the sheriff of the county * * * , commanding him * * * to make strict and diligent search for all arms, ammunition, and warlike stores, belonging to such persons so refusing, and to take and deliver the same to the captain of the company of militia in whose district the delinquent shall live, to be made use of in time of an alarm, taking a receipt of the captain, therefor; which arms, ammunition and warlike stores, shall be appraised * * * and be paid for out of the general treasury.{EN-79}

Obviously, in this instance the Sheriff was no more than a pursuivant.

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[368] *See Black's Law Dictionary* (St. Paul, Minnesota: West Publishing Company, Revised Fourth Edition, 1968), at 1324.

Moreover, in the plainest contradistinction to "the Militia of the several States",[369] *Sheriffs derive no explicit authority whatsoever from the Constitution*. Indeed, the noun "Sheriff" does not even appear in that document. And whatever authority Sheriffs may still retain in States such as Rhode Island or Virginia is purely a matter of what those States' own constitutions and laws may grant them.[370]

The peculiar desire of some contemporary patriots to assign a power over the Militia to officials outside of the Militia would perhaps be more fitting on legal-historical grounds if *Constables*, rather than Sheriffs, were selected. Of course, the Constitution neither recognizes any authority inherent in the office of Constable, nor grants any authority to that office, any more than it does for the office of Sheriff. But, as Blackstone explained, "[T]HE general duty of all constables [under English law] * * * [wa]s to keep the king's peace in their several districts; and to that purpose they [we]re armed with very large powers, of arresting and imprisoning, of breaking open houses, and the like"—although, as he added, "of the extent of which powers, considering what manner of men [we]re for the most part put upon these offices, it [wa]s perhaps very well that they [we]re generally kept in ignorance".[371] Moreover, "[o]ne of the[English constables'] principal duties * * * [wa]s to keep watch and ward in their respective jurisdictions".[372] In the early days in Rhode Island, too, Constables could be assigned that duty:

> [1700] "It shall * * * be lawfull for the Governor, Deputy Governor, or any two Assistants, or Justices for their respective town to issue forth their warrant to the respective Constables of their towns, to summons in the house-keepers and any other person, that shall reside in any town in this Collony, for the space of a month, not being servants, &c., to watch, or send some sufficient person to watch for them[.]"{EN-80}

Later on, though, the Militia took over that responsibility.[373] Constables also occasionally performed some services for the Militia:

> [1701] "[I]n case any person or persons that shall through his neglect [of Militia duty] be fineable * * * shall refuse or neglect to pay his or their fines upon demand * * * , and there be no visible estate to be found of said person or persons * * * whereby to make distraint on, then it shall be lawfull * * * to issue forth * * * [a] warrant to any Constables

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[369] U.S. Const. art. II, § 2, cl. 1.

[370] *See, e.g.*, Const. of Rhode Island art. IX, § 5 *and* General Laws of Rhode Island § 42-29-1; Const. of Virginia art. VII, § 4 *and* Code of Virginia § 15.2-530.

[371] *Commentaries on the Laws of England, ante* note 142, Volume 1, at 356.

[372] *Id.*

[373] *See post,* at 235-238.

> or other person to apprehend * * * such [delinquent] person or persons[.]"{EN-81}

Yet, even in cases such as these, a Constable's power of arrest was not exclusive—perhaps because there was a history of individuals' often "refusing to searve * * * in the place of Constable, Towne Sargant, or others constituted to exicute warrants or writts in speciall occasions", or even "to ayd a Constable being thereto required".{EN-82} And no Constable, perforce of that office, ever enjoyed any general authority *within, let alone over*, the Militia. So, that misguided patriots in the present day favor Sheriffs over Constables to assume powers with respect to the Militia that neither of those officers exercised in America during *pre-*constitutional times may reflect no more than simple-minded political pragmatism: The office of Sheriff is still to be found in many States, ready to be twisted to the purpose; whereas the office of Constable is not (at least under that name[374]), and would have to be resurrected before it could be so misemployed.

Nonetheless, the authority that many contemporary patriots want Sheriffs to exercise for the purpose of exposing and suppressing usurpation and tyranny, especially on the part of rogue officials of the General Government, *ought to be exercised by someone*. In fact, it *can* be exercised, with full constitutional sanction, by the Militia, with their commanders—at the National level, the President; at the State level, the Governor; and at the Local level, "the County Lieutenant" or other chief commanding officer in the jurisdiction—performing the functions that Sheriffs as such cannot perform.[375]

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[374] *See* Code of Virginia §§ 15.2-1701 and 15.2-1704.

[375] *See post*, at 327-328, 1135-1138, 1194-1202, 1276-1277, 1291-1293, and 1482-1488.

CHAPTER FIVE

Rhode Island organized her *pre*-constitutional Militia on the principle of near-universal, compulsory service by every adult able-bodied free male.

Notwithstanding that Rhode Island's Charter referred all-inclusively to "the Inhabitants" of the Colony, the legal and social context of the time—and the manner in which such authority was invariably exercised thereafter throughout Colonial America—made plain that its purpose was "[t]o Assemble, Exercise in Arms, Martial Array, and put in Warlike Posture" only, but in principle all of, the able-bodied adult free males.[376] The qualification "in principle" is necessary, because in practice some men for good and sufficient reasons were exempted from certain kinds of service in the Militia, or were allowed to avoid duty upon their provision of satisfactory substitutes.[377]

A. Able-bodied adult free males only. Limitation of membership in the Militia to able-bodied adult free males took into account that—

1. The physical and mental immaturity, weaknesses, or disabilities of the very young and the superannuated precluded their useful service as a practical matter.

2. Although a not inconsiderable number of Colonial women pursued remarkable independent careers,[378] most adult females (other than widows, spinsters, and orphans) found themselves under the legal protection and control of either their fathers or their husbands, and in any event on physiological, psychological, social, cultural, and religious grounds were considered unsuitable for regular service under arms.[379] Today, of course, the changed legal and social status of adult women could recommend, if it would not absolutely require, a somewhat more flexible policy[380]—although even this would not preclude generous exemptions for women from the most arduous of Militia service, and should

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[376] *See* the Charter of 1663, *quoted ante*, at 95.

[377] *See post*, Chapter 11.

[378] *See, e.g.*, Elisabeth W. Dexter, *Colonial Women of Affairs: A Study of Women in Business and the Professions in America Before 1776* (Boston, Massachusetts: Houghton Mifflin Co., 1924).

[379] *See, e.g.*, Robert A. Gross, *The Minutemen and Their World* (New York, New York: Hill and Wang, 1976), at 102.

[380] *See post*, at 950-953.

continue to prescribe their exclusion from actual combat duties in all but the most dire circumstances.[381]

3. Slaves throughout the Colonies were almost always disbarred from the possession of firearms, except under close supervision, no doubt on the basis of Blackstone's admonition that "[t]wo precautions are * * * to be observed in all prudent and free governments: 1. To prevent the introduction of slavery at all: or, 2. If it be already introduced, not to intrust those slaves with arms; who will then find themselves an overmatch for the freemen".[382] This was a principle (or a prejudice) that died hard: For example, notwithstanding that one member of the Militia Company who had stood to arms on Lexington Green and been wounded was the slave Prince Estabrook,[383] even under the critical circumstances of the siege of Boston in 1775 the Massachusetts Committee of Safety refused to enlist slaves generally in that Colony's forces.[384]

Slavery was by no means uncommon in *pre*-constitutional New England.[385] The institution was first "legitimized" by statute in Massachusetts in 1641:

> There shall never be any bond slaverie, villinage or Captivitie amongst us unles it be lawfull Captives taken in just warres, and such strangers as willingly selle themselves or are sold to us. And these shall have all the liberties and Christian usages which the law of god established in Israell concerning such persons doeth morally require. This exempts none from servitude who shall be Judged thereto by Authoritie.[386]

Later, though, as a matter of English law, Blackstone utterly repudiated all but the last sentence of the theory on which this enactment rested:

> [P]ure and proper slavery does not, nay cannot, subsist in England * * * whereby an absolute and unlimited power is given to the master over the

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[381] *See* Rostker v. Goldberg, 453 U.S. 57, 72-83 (1981).

[382] *Commentaries on the Laws of England*, *ante* note 142, Volume 1, at 416.

[383] *See* Thomas Fleming, *The First Stroke: Lexington, Concord, and the beginning of the American Revolution*, (Washington, D.C.: National Park Service, United States Department of the Interior, 1978), at 5. The insert entitled "NAMES OF THE SEVENTY-SEVEN MEN OF CAPTAIN JOHN PARKER'S COMPANY *Who were in the early morning engagement on Lexington Common, April 19, 1775*" lists Estabrook simply as "COLORED". Frank W. Coburn, *The Battle of April 19, 1775 in Lexington, Concord, Lincoln Arlington, Cambridge Somerville and Charlestown Massachusetts* (Lexington, Massachusetts: Lexington Historical Society, Second Edition Revised, 1922), between pages 60 and 61.

[384] *See* R. Ketchum, *Decisive Day*, *ante* note 310, at 58-59.

[385] *See generally* Lorenzo J. Greene, *The Negro in Colonial New England* (New York, New York: Atheneum, 1968).

[386] THE BODY OF LIBERTIES, No. 92, *in* THE COLONIAL LAWS OF MASSACHUSETTS, REPRINTED FROM THE EDITION OF 1660, WITH THE SUPPLEMENTS TO 1672. CONTAINING ALSO, THE BODY OF LIBERTIES OF 1641 (Boston, Massachusetts: Rockwell & Churchill, 1889), at 53.

> life and fortune of the slave. And indeed it is repugnant to reason, and the principles of natural law, that such a state should subsist any where. The * * * origins of the right of slavery * * * are all of them built upon false foundations. As, first, slavery is held to arise * * * from a state of captivity in war * * * . The conqueror * * * had a right to the life of his captive; and having spared that, has a right to deal with him as he pleases. But it is an untrue position, when taken generally, that, by the law of nature or nations, a man may kill his enemy: he has only a right to kill him, in particular cases; in cases of absolute necessity, for self-defence; and it is plain this absolute necessity did not subsist, since the victor did not actually kill him, but made him prisoner. War is itself justifiable only on principles of self-preservation; and therefore it gives no other right over prisoners, but merely to disable them from doing harm to us, by confining their persons: much less can it give a right to kill, torture, abuse, plunder, or even to enslave, an enemy, when the war is over. Since therefore the right of *making* slaves by captivity, depends on a supposed right of slaughter, that foundation failing, the consequence drawn from it must fail likewise. But, secondly, it is said that slavery may begin * * * when one man sells himself to another. This, if only meant of contracts to serve or work for another, is very just; but when applied to strict slavery * * * is also impossible. Every sale implies a price, * * * an equivalent * * * : but what equivalent can be given for life, and liberty, both of which (in absolute slavery) are held to be in the master's disposal? His property also, the very price he seems to receive, devolves *ipso facto* to his master, the instant he becomes his slave. In this case therefore the buyer gives nothing, and the seller receives nothing: of what validity then can a sale be, which destroys the very principles upon which all sales are founded? Lastly, we are told, that besides these two ways * * * slaves * * * may also be hereditary: * * * the children of acquired slaves are * * * slaves also. But this being built on the two former rights, must fall together with them. If neither captivity, nor the sale of one's self, can by the law of nature and reason reduce the parent to slavery, much less can they reduce the offspring.[387]

So, slavery in America stood upon a rather shaky legal foundation from the beginning.

In 1652, though, Rhode Island effectively outlawed perpetual slavery:

> Whereas, there is a common course practised amongst English men to buy negers, to that end they may have them for service or slaves forever; for the preventinge of such practices among us, let it be ordered,

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[387] *Commentaries on the Laws of England, ante* note 142, Volume 1, at 423-424 (footnotes omitted).

> that no blacke mankind or white being forced by covenant bond, or otherwise, to serve any man * * * longer than ten yeares, or untill they come to bee twentie four yeares of age, if they bee taken in under fourteen, from the time of their cominge within the liberties of this Collonie. And at the end or terme of ten yeares to sett them free, as the manner is with the English servants.{EN-83}

However, although apparently never repealed, this law was simply flouted.

As early as 1712, Rhode Island tried to discourage the smuggling of Negroes into the Colony by imposing duties on importation of those people.{EN-84} But in 1732 the Colony complied with "his Majesty's instructions" that her (and every other Colony's) duties on the importation of Negroes be repealed.{EN-85} Perhaps not entirely with reluctance, either. For in New England the slave trade proved extraordinarily lucrative. Newport, Rhode Island, ranked second only to Boston, Massachusetts, as a port for slavers during the Colonial period.[388] And the Browns of Providence, Rhode Island—the illustrious family which included the patriots John Brown, who organized the attack on the *Gaspée*, and his brother Moses, who personally opposed slavery and was one of the first members of Rhode Island's Committee of Correspondence[389]—amassed a fortune from the nefarious trade.[390]

Yet, as economically important as slavery was, and although Rhode Island enacted laws that enforced slavery,{EN-86} restricted the manumission of slaves,{EN-87} prohibited masters of sailing vessels from carrying off slaves without their owners' permission,{EN-88} caused slaves to be sold to pay judgments against them,{EN-89} restricted Negro servants and slaves from venturing abroad at night,{EN-90} prohibited ferrymen from transporting slaves without permission from the slaves' masters,{EN-91} and limited the liberty of free Negroes{EN-92}—nonetheless, her Militia statutes never explicitly excluded or exempted slaves, let alone free Negroes, as a class from service, but instead enrolled "*all* Male persons" or "*all* effective [that is, able-bodied] Males", with no apparent disqualification on the basis of race or condition of servitude.[391] And in one instance in which race was an explicit criterion for action, the statute provided that, rather than being disarmed, "all Indian men servants" on Block Island should "be by the inhabitants * * * carefully provided for with arms and ammunition * * * for the[inhabitants'] defence".{EN-93}

The silence of Rhode Island's Militia laws on the subject of slavery may have derived from the peculiar legal status of bondsmen, who were considered not fully

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[388] L. Greene, *The Negro in Colonial America*, *ante* note 385, at 27.

[389] J. Bartlett, *Records of the Colony of Rhode Island*, *ante* note 309, Volume VII, at 68-73, 227-228.

[390] C. Rappleye, *Sons of Providence*, *ante* note 311, Chapter 3; L. Greene, *The Negro in Colonial America*, *ante* note 385, at 30 & note 87.

[391] *See post*, at 123-128 and Chapter 10.

legal "persons" at all, but instead only "personal estate"{EN-94} (a form of private property).[392]

Or it may simply have reflected how relatively few slaves and free persons of color suitable for Militia service lived in Rhode Island, so that special provision for them was deemed supererogatory. The specific numbers of Negro "servants" (an euphemism which included both indentured servants and slaves), "servants" of mixed race, and free persons of color in Rhode Island varied throughout the *pre*-constitutional period. In 1708, "Black servants" totaled four hundred twenty-six (5.9% of the total population);{EN-95} in 1749, there were three thousand seventy-seven "Negroes"(9.4% percent of the total population);{EN-96} and in 1774, three thousand seven hundred sixty-one "blacks" (6.3% of the total population) were counted.{EN-97} At that time, Rhode Island had the highest proportion of Negro slaves of all the Colonies in New England.[393] Finally, in 1782, the census recorded two thousand eight hundred six "blacks" and "mulattos" (5.4% of the total population).{EN-98} So perhaps people of color were considered not sufficiently important, numerically at least, to warrant expressly including or excluding Negro men in or from the Militia. Yet, when Rhode Island began her gradual abolition of slavery, she did take care to prevent manumitted slaves from becoming financial burdens on the communities in which they resided, thereby indicating that the population of slaves could not have been considered negligible for all purposes.{EN-99}

Or the silence of Rhode Island's Militia laws on the subject of people of color may have resulted from the implicit understanding throughout the Colonial period of what became implicit during the struggle for independence, that the "rights and liberties * * * of personal freedom must be considered as the greatest" of all rights, and that "those who are desirous of enjoying all the advantages of liberty themselves, should be willing to extend personal liberty to others".{EN-100} After all, this conception did not spring forth from the forehead of Jove only in the 1770s.

Whatever Rhode Island's Militia statutes did or did not recite in so many words, though, during the period from 1742 through 1748 (King George's War) her Militia's rolls recorded that from one to three Negroes actually served in each

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[392] *See generally*, *e.g.*, L. Greene, *The Negro in Colonial New England*, *ante* note 385, at 167-186. *See also* Kenneth M. Stamp, *The Peculiar Institution: Slavery in the Ante-Bellum South* (New York, New York: Vintage Books, 1989), at 192-236. The legalistic intricacies of this anomalous situation must have perplexed even the shrewdest thinkers of that day. For example, if slaves had been required to serve in the Militia as "men", their free male owners, when themselves also required to serve, would have been doubly (and arguably unfairly) burdened, both in their own service and in having to provide more of their "property" for the Militia than did non-slaveholding residents—although perhaps this could have been rationalized as the *quid pro quo* for the government's protection of slavery in the first place. On the other hand, requiring widows or spinsters without minor sons or free servants to detach their male slaves for Militia duty could have been considered no less appropriate than requiring independent women with minor sons or servants to provide property in the form of firearms, ammunition, and accoutrements. *See post*, at 155-157 and 244-245.

[393] L. Greene, *The Negro in Colonial America*, *ante* note 385, at 74-75.

Company. And during the period from 1756 through 1763 (the French and Indian War) as well, Negroes served in the Colony's Militia in not insignificant numbers.[394]

Moreover, in 1778, on the personal recommendation of General George Washington himself, Rhode Island raised two battalions composed exclusively of slaves:

> Whereas, for the preservation of the rights and liberties of the United States, it is necessary that the whole powers of government should be exerted in recruiting the Continental battalions; * * * and whereas, history affords us frequent precedents of the wisest, the freest, and bravest nations having liberated their slaves, and enlisted them as soldiers to fight in defence of their country; and also whereas, the enemy, with a great force, have taken possession of the capital, and of a greater part of this state; and this state is obliged to raise a very considerable number of troops for its own immediate defence, whereby it is in a manner rendered impossible for this state to furnish recruits for the said two battalions, without adopting the said measure so recommended.
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> It is * * * resolved, that every able-boded negro, mulatto, or Indian man slave, in this state, may enlist into either of the said two battalions, to serve during the continuation of the present war with Great Britain.
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> * * * * *
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> * * * [T]hat every slave, so enlisting, shall, upon his passing muster * * * , be immediately discharged from the service of his master or mistress, and be absolutely FREE, as though he had never been encumbered with any kind of servitude or slavery.
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> * * * * *
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> And whereas, slaves have been, by the laws, deemed the property of their owners, and therefore compensation ought to be made to the owners for the loss of their service,—
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> It is further * * * resolved, that there be allowed, and paid by this state, to the owner, for every such slave so enlisting, a sum according to his worth; at a price not exceeding £120 for the most valuable slave; and in proportion for a slave of less value.{EN-101}

Rhode Island was the only one of the thirteen States to follow this course;[395] and her own statute was only temporarily in force.{EN-102} "At various times other states turned to their Negro inhabitants, slave and free, when recruiting lagged among whites. Most of these blacks served in integrated units, performing the same duties

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[394] *Id.* at 187-190 & notes 103, 110, 122, 125, and 126.

[395] G. Carbone, *Nathanael Greene*, *ante* note 310, at 97.

as other continentals, but Rhode Island followed a different pattern."[396] The First Rhode Island Regiment, its ranks composed entirely of Americans of Black African descent, fought with distinction until victory came at Yorktown.[397] Interestingly, too, the General Assembly's exercise of what it attested were "*the whole powers* of government" in this instance indicates that slaves could always have been enlisted in the Militia had the exigencies of the situation and political policy so demanded. All of this notwithstanding, even in 1780 and 1782 Rhode Island still excepted "Deserters, *Indians*, Mulattos and Negroes" from "all male Persons whatsoever, of the Age of Sixteen Years and upwards" who might be drafted into military service.{EN-103}

Distinguishably, in Southern Colonies (and later States) such as Virginia, where the population of slaves was extensive, the possibility of slave revolts the source of constant anxiety, and the belief prevalent that enlistment in the Militia would be an irreversible first step towards emancipation, the systematic arming of slaves never occurred.[398] Rather, careful distinctions were made among "free males" (who were enrolled in the Militia), "free mulattos, negros, or Indians" (who were allowed to serve in various noncombatant capacities), and slaves (who were generally disbarred from participation except under special conditions).[399] Today, of course, such a restriction on service in the Militia, or on the possession of arms in general, based upon an individual's condition of servitude could operate in only the most narrowly limited circumstances.[400] And any such restriction based exclusively on an individual's race would be constitutionally out of the question no matter what the circumstances.[401]

B. All eligible men subject to *some* service. These peculiar matters aside, as Rhode Island's Charter envisioned, *all* of the eligible male "Inhabitants of said Plantations" were subject to *some* Militia service: (i) in the Colony's earliest days when the population was sparse; (ii) in periods of emergency throughout the Colony's history when the services of every able-boded adult free man might be needed; and (iii) with respect to such foundational duties as personal possession of

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[396] Robert K. Wright, Jr., for the Army Lineage Series, Center of Military History, United States Army, *The Continental Army* (Washington, D.C.: U.S. Government Printing Office, 1983), at 149.

[397] Bruce Chadwick, *The First American Army: The Untold Story of George Washington and the Men Behind America's First Fight for Freedom* (Naperville, Illinois: Sourcebooks, Inc., 2005), Chapter 25.

[398] *See id.*, Chapter 24. Southern resistance to arming slaves could claim a perverse rationale in political philosophy, too. As one Confederate General later argued in opposition to enlisting slaves in support of the Southern rebellion in the 1860s, "If slaves will make good soldiers our whole theory of slavery is wrong." *Quoted in* James O. Horton & Lois E. Horton, *Slavery and the Making of America* (New York, New York: Oxford University Press, 2005), at 203.

[399] *See post*, at 363-369, 468, and 733-741 (Virginia).

[400] *See* U.S. Const. amend. XIII, § 1. *See post*, at 748-749, 993-998, and 1011-1013.

[401] *See* U.S. Const. amend. XIV, § 1.

firearms and ammunition suitable for Militia service,[402] and participation in "the Watch" and "the Ward".[403]

From the very beginning, Rhode Island's officials ordered that:

> • [1639] "*noe man* shall go two miles from the Towne unarmed, eyther with Gunn or Sword; and * * * *none* shall come to any public Meeting without his weapon";{EN-104}
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> • [1643] "*every man*" should have sufficient "powder", "bulletts", and "shot lying by him";{EN-105}
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> • [1643] inspectors should check "*every inhabitant*" to "see whether *every one of them* has powder, and what bullets run", and "go to *every house*" to determine "what armes are defective";{EN-106}
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> • [1655] "an accompt * * * shall be given of what powder, lead and shot there is in the possession of *everie inhabitant* of y^e^ townes";{EN-107} and
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> • [1669] "each * * * Towne Councill in the Colony * * * [should] see that *the inhabitants of each respective towne* bee furnished with ammunition according to law; and that the armes bee fixed and in readiness for service".{EN-108}

Also, in particular situations of "eminent dangers approaching", such as invasions, insurrections, or other "great extremities", Rhode Island's "magistrates" were "empowered to press or cause to be impressed [that is, to draft for compulsory service], *any* person or persons", and "to raise, appoint and authorize *any or all* persons requisitt for the preservation of * * * [the] Collony * * * to attend their allegiance and duty".{EN-109} Thus, during the War of Independence, the General Assembly:

> • [1775] "directed and empowered [inspectors] to go to the house of *each person in their respective towns*, to take an account of the powder, arms and ammunition";{EN-110}
>
> • [1775] "command[ed] *every man in the colony, able to bear arms*, to equip himself completely with arms and ammunition, according to law";{EN-111} and
>
> • [1780] authorized drafts from among "*all male Persons whatsoever, of the Age of Sixteen Years and upwards, who have resided for the Space of Thirty Days within their respective Towns (Deserters,* Indians, *Mulattoes and Negroes excepted)*".{EN-112}

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[402] *See post,* Chapters 6 and 7.

[403] *See post*, at 235-240.

Moreover, that it was Rhode Island's practice, from the early to the late 1700s, to require Militia service, not just from her permanent residents, but also from mere "transient persons", evidences the near-universality and seriousness of the duty.{EN-113}

C. Different sets of men assigned to different duties. Although the duty of able-bodied adult free men to serve in some capacity in Rhode Island's Militia was near-universal in principle, in practice the extent of its required performance differed for individuals dissimilarly situated. Just as in other Colonies and independent States, Rhode Island singled out by ages particular subsets of her able-bodied male population for disparate types of duty.

1. As described below, those within the group of individuals considered physically and psychologically best able to perform the most strenuous and responsible tasks (from sixteen to fifty years of age) were required to arm themselves, to train on a fixed schedule, and to stand ready for service in the field at any time.[404] Those within the group of individuals considered less capable (from fifty to sixty years of age) were also required to arm themselves, but were exempted from regular training, as well as from most service except in times of the extraordinary public emergencies known as "alarms".[405] Presumably, the individuals in this group had received sufficient training in their earlier years, but because of their ages could have performed useful services only in the most dire circumstances. A few individuals in both age-groups were largely exempted from regular Militia duties—except the foundational duty to arm—because of their important public offices, private professions or trades, or peculiar personal circumstances.[406] But no able-bodied free male above sixty years of age was ever prohibited from volunteering to train or to serve in some capacity with the Militia, commensurate with his abilities, or from arming and training himself simply as an individual at any time.

Some of Rhode Island's early records recite that, unless specially exempted, "all men from sixteene * * * to sixtye yeares old" were required to "find themselves armes and traine in their owne persones", and "that noe person or persons within this Collony from the age of sixteen yeares unto the age of sixty yeares, shall be released from traininge or other duties in millitary affaires".{EN-114} And the laws thereafter consistently required that "every Inhabitant of the Island [of Rhode Island] above sixteen and under sixty years of age, shall alwayes be provided of" a firearm, ammunition, and necessary accoutrements, whether he otherwise participated in the Militia or not.{EN-115} Nevertheless, the general rule for about one hundred fifty years was that only those "effective [that is, able-bodied] Males

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[404] *See post*, at 208-220.

[405] *See post*, at 220-224, 257-258, and 259-261.

[406] *See post*, at 224, 252-256, and 258-259.

between the Ages of Sixteen and Fifty" "who are able to beare arms" would be subject to "Trayning * * * in the arte of military discipline", would be required to "bear Arms in their Respective Train bands or Companies", and would "constitute and make the military Force of this State" in its first rank.{EN-116} Other men would serve in other capacities, with different duties—although all of them might be called upon for full participation in the Militia during "alarms".{EN-117}

In 1777, a statute finally systematized the process of assigning men to different types of service, by mandating that committees

> make regular lists or registers of * * * all male persons inhabiting or residing within their respective towns:
>
> From sixteen to fifty years of age, whom they shall judge able to bear arms.
>
> From sixteen to fifty years of age, whom they shall judge unable to bear arms.
>
> From fifty to sixty, able to bear arms.
>
> From fifty to sixty, not able; and from sixty, upwards.
>
> That lists be made of those who are transient, or resident persons, in the same manner; as also * * * of negroes and Indians, in the same manner; and also of those who have taken the affirmation [of conscientious objection], or produced certificates from the Friends' Meeting, to excuse them from military duty[.]{EN-118}

Self-evidently, the purpose of this census—again, of "*all* male persons" without exception—was to determine how many adult men resided in each of the Towns, and which men within each age-group were sufficiently able-bodied to serve in various capacities.

In 1779, another statute made it clear that age alone was neither an absolute disqualification for the Militia nor an unquestionable excuse to avoid performing every possible form of service therein:

> That all Male Persons between the Ages of Fifty and Sixty, if able in the Judgment of the respective Town-Councils, shall be at all Times armed, accoutred and equipped, * * * upon the same Penalty as though they were held to military Duty * * * : And that they be considered as the Alarm-List of the State, and be subject to all other Duties as those exempted from bearing Arms.{EN-119}

And "those [others] exempted from *bearing* Arms" were nonetheless no more excused from *all other* Militia duties than were "all [able-bodied] Male Persons between the Ages of Fifty and Sixty". For the same statute provided that,

> whereas, by the Experience of all Ages, it has been found expedient, for the better Support of Subordination and military Discipline, to form separate and distinct Corps, which shall take in the different Degrees and Orders of effective Men, so far as respect their Offices and Stations in Life; and whereas this Assembly, influenced by this Principle of general Utility, have ever exempted certain Persons from serving promiscuously in the Militia Battalions; nevertheless, as the Public, in Cases of Necessity, had and have a Right to claim their personal Services, that the same beneficial Purposes may still be effected, *It is Enacted*, That all Persons under the following Description be exempted from serving in the Infantry Battalions, and Companies of Artillery, *viz*. all Persons who have served in the Place of General Officers, Justices of the Peace, or other commissioned Officers, the Ministers or Teachers of each Church or Congregation in this State, all sworn Practitioners in the Law, Physicians, Surgeons, Apothecaries, all Persons appointed to work the Fire-Engines, one Miller to each Grist-Mill, one Ferryman to each stated Ferry, all those who have lost a right Eye, or are disabled by Lameness, all Town-Councilmen, Treasurers, Clerks and Serjeants, while serving in their respective Stations.
>
> *And be it further Enacted*, That all Persons between the Ages of Sixteen and Fifty Years, exempted as aforesaid from serving in the Infantry Battalions, be formed into separate Corps, to be known and called by the Name of the Senior Class, * * * who shall at all Times be armed, accoutred and provided, * * * and subjected to the same Regulations as the Battalions aforesaid.{EN-120}

2. So the differential, as well as deferential, treatment that Rhode Island afforded to men of advanced years, to those with partial disabilities, and to those in certain important public offices and critical private occupations did not imply her recognition of some supposed "right" for any of them to avoid service in the Militia altogether. It was not in any sense a *denial* of the general duty to serve in the Militia that falls on all individuals who, sharing in the sovereignty, must also share in the defense, of "a free State", but only *a relaxation of and partial exemption from that duty, and the substitution for its performance of alternative service in some public office or private occupation*, all based upon the legislative presumptions drawn from practical experience that: *First,* men of advanced years, or suffering from minor disabilities, were often capable of performing Militia functions only to an attenuated degree, and therefore could and should be called upon only in the most desperate situations. *Second,* men holding important public offices or engaged in critical private occupations could usually serve their community better in those positions and tasks

than in the front ranks of the Militia, at least during tranquil times.[407] Yet, being based upon practicalities rather than inflexible principles, even these men's exemptions always had to yield to the right of "the Public, in Cases of Necessity, * * * to claim their personal Services", particularly in times of "alarm".

Moreover, Rhode Island's records nowhere indicate that her public officials ever treated the first of these presumptions as irrebuttable, such that elderly, but still physically active and mentally acute individuals were prohibited from volunteering for Militia service normally assigned to younger men. Quite the contrary: As noted above, even those from fifty to sixty years of age who did *not* volunteer were required to "be at all Times armed, accoutred and equipped" just as were all younger Militiamen, and were "considered as the Alarm-List of the State", subject to possible service in the field during serious emergencies. This, of course, was the policy throughout the Colonies, gloriously exemplified at Lexington and Concord, in April of 1775, when men and boys of all ages and occupations answered the call to defend their communities.[408] Today, if such a presumption might be valid to excuse from the most strenuous Militia duties individuals who elected not to contest but to avail themselves of it, it could never operate to exclude anyone who was both fit and willing to perform that particular, or certainly some less arduous but nonetheless useful, service in the Militia. For exclusion of an individual from the willing performance of his *constitutional duty* cannot be predicated on "an irrebuttable presumption often contrary to fact",[409] or on "a permanent and irrebuttable presumption" that "is not necessarily or universally true in fact, * * * when the [governmental official with jurisdiction over the matter] has reasonable alternative means of making the crucial determination".[410]

D. Membership in the Militia not contingent or conditioned upon formal enrollment. As the foregoing should make clear, the appearance of an individual, whatever his age, public office, or private occupation, on a particular formal "list" was not the criterion of his membership in the Militia. To be sure, many of Rhode Island's statutes employed "list", "enlist", "inlist", and variants of those terms in reference to free men from sixteen to fifty years of age who composed the "Trained Bands" or "Companies" (described hereinafter).{EN-121} But, in the nature of things,

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[407] That exemption from Militia duty for men of advanced years, except during "alarms", was no more than a recognition of common physiological realities in that era is apparent from the similar practice of the Lakota people. *See* Joseph M. Marshall III, *The Day the World Ended at Little Bighorn: A Lakota History* (New York, New York: Penguin Group (USA) Inc., 2007), at 80-81. So, too, the exemption of men in important positions of leadership. For example, before and during the Battle of the Little Bighorn, Sitting Bull—the "old man chief of all the camps combined"—performed religious ceremonies and encouraged the Lakota and Cheyenne warriors to "[m]ake a brave fight", rather than engaging in combat himself. *Quoted in The American Indians: War for the Plains* (Alexandria, Virginia: Time-Life Books, 1994), at 146, 158, 164.

[408] *See* E. Forbes, *Paul Revere, ante* note 127, at 272.

[409] United States Department of Agriculture v. Murry, 413 U.S. 508, 514 (1973).

[410] Vlandis v. Kline, 412 U.S. 441, 452 (1973).

"lists" neither defined nor even fully evidenced the composition of the Trained Bands, let alone the Militia as a whole.

In *pre-*constitutional Rhode Island, a "list" was simply an attempt to identify and record which individuals might be classified as members of a particular group. With respect to the Militia in particular, a "list" might, as in 1676, constitute a census of the entire population: "[T]hat persons be empowered in the towne of Newport and Portsmouth, to take an exact account of all the inhabitants in this Island, English, negros and Indians, and make a true list thereof, the proper inhabitants in one list; the English now come amongst us in another list, the negros in another list, and the Indians in another list; and alsoe to take account how all persons are provided with corne, guns, powder, shot and lead".{EN-122} It might assume, as in 1677, that the "inhabitants" of the Towns and villages and "listed souldiers" were one and the same individuals.{EN-123} It might record, as in 1776, simply "all persons in [certain] towns, being inhabitants thereof, and obliged by law to equip themselves with a good fire-arm, bayonet and cartouch box, and who are not able to purchase the same".{EN-124} It might be consulted, as in 1776, to determine which individuals "upon the Alarm List" "shall have the Benefit and Use of * * * Arms provided [by the Towns] * * * and be exempted from providing themselves".{EN-125} It might be used, as in 1776, to "embod[y]" individuals on "the alarm-list, in each town * * * into a separate company".{EN-126} It might attempt, as in 1777, to take into account in a systematic fashion which men were eligible and which were ineligible for the Militia, into what categories of service the eligible might fall, and who might qualify for exemptions.[411] And it might memorialize, as in 1779, "the Alarm-List of the State", composed of "all Male Persons between the Ages of Fifty and Sixty, if able in the Judgment of the respective Town-Councils".{EN-127}

Thus, the "listing" of individuals did not constitute *creation* of Rhode Island's Militia, or any part of it, but merely *identification in fact* of those particular individuals who already composed some portion of the Militia *as a matter of law* when the "lists" were drawn up. For an individual was part of the Militia—and subject to Militia duties of some sort—because he was a free, adult, able-bodied male member of the community from sixteen to sixty years of age, not because he happened to be included in some "list". The failure of some official to "list" an individual who should have been listed never excluded, exempted, or otherwise released that individual from his legal duty of Militia service (although, of course, an individual's avoidance of "listing" could have assisted him in evading that duty). Just as the population of a State exists, and the members of that population are citizens of that State, even if no census of it is ever taken, so too does a

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[411] *See ante*, at 126.

constitutional Militia exist even if no official "list" of its members is ever compiled. *All of the duties of Militia service—including the duty to be armed; the duty to use arms in defense of the community; and the duty to provide organization, discipline, and training, even if public officials neglect, fail, or refuse to do so—exist in the individual as a consequence of who he is and where he finds himself, irrespective of whether he has formally been "listed" by someone.*

E. Compulsory service often compensated. Although membership in her Militia was always compulsory (and essentially automatic when a free adult male took up residence in Rhode Island, or when a minor then resident reached the minimum age for participation), actual service was not always uncompensated. To be sure, most Militiamen were required to absorb many of the monetary burdens of service themselves—such as the cost of providing their personal firearms, ammunition, and accoutrements;[412] and the loss of time (and presumably income) associated with participation in musters and training.[413] They were also subject to fines, penalties, and punishments for failures to perform those and other duties.[414] In some instances, however, Militiamen were paid or otherwise compensated for actual service in the field.

Militiamen who served as "Minutemen", for example, were paid both for active duty and for training:

> [1775] "[O]ne-quarter part of the militia of this colony [shall] be enlisted as minute men, to meet together, and exercise themselves in military discipline, half-a-day, once in every fortnight.
>
> * * * * *
>
> " * * * [T]hat the following be the form of the enlistment of the said minute men, to wit:
>
> "*Colony of Rhode Island, &c.*
>
> *"We * * * voluntarily enlist ourselves to serve as minute men, in the service of this colony, to be * * * subject to the law of this colony, for regulating the minute men.*
>
> * * * * *
>
> " * * * [T]hat the said minute men march for the defence of the colony, when and as often as they shall be called upon * * * .
>
> "And that the lieutenant general and major general of the colony be * * * empowered to march them out of the colony, whenever they, or either of them, shall think it necessary.
>
> "And * * * that the following wages be allowed and paid out of the general treasury, to the said officers and men, to wit:

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[412] *See post*, Chapter 6.

[413] *See post*, at 208-214.

[414] *See post,* Chapter 12.

> "For every time they shall meet and exercise, each captain shall receive two shillings and sixpence * * * .
>
> "Each lieutenant and ensign, two shillings * * * ; and each other person one shilling * * * .
>
> "And when they march for the defence of the colony, or out of the colony, each captain shall receive six shillings * * * per day.
>
> "Each lieutenant, five shillings * * * per day; each ensign, four shillings * * * per day; and each other person, three shillings * * * per day; and shall also be billeted at the charge of the colony.
>
> * * * * *
>
> "And * * * the several independent companies in this colony, or such of them as shall think proper, [may] form themselves into companies of minute men, * * * and exercise and do duty in the same manner; and * * * receive the same pay and allowance."{EN-128}

Of course, all Minutemen were volunteers, as were the members of Independent Companies.[415]

Other Militiamen, though, could be compensated for their performance of actual duties for which they were drafted:

> • [1734] "[F]or the future there be allowed but one company or training band, to attend on the general election; and that not exceeding the sum of £10 be allowed and paid out of the general treasury for their expenses in attending thereon."{EN-129}
>
> • [1776] "[E]ach and every soldier of the independent companies, and companies of militia; and the soldiers upon the alarm list, who have been upon actual duty upon the late alarm within this state, properly equipped as by law required, shall be entitled to, and receive, three shillings per day, for each and every day * * * in actual service[.]"{EN-130}
>
> • [1776] "Whereas, the committee of the four New England states * * * presented * * * the following resolution, to wit:
>
> * * * * *
>
> "Whereas, the militia of the several states of New England may be frequently called into the same service; and many inconveniences may be prevented, by their being placed upon the same footing, in point of encouragement, wages and rations,—
>
> " * * * [T]hat whenever the militia of the said states * * * shall be called into service, for any term less than two months, that the officers and soldiers be * * *

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[415] *See post*, at 212 (Minutemen) and 224-234 (Independent Companies).

> paid the same wages and rations, that those of equal rank in the Continental army are allowed and paid * * * .
>
> "And that * * * , where the militia shall be called out for a term more than two, and not exceeding four months, that the non-commissioned officers and soldiers be paid a bounty of twenty shillings; and where the term of their service shall amount to five, and shall not exceed six months, * * * [they] be paid a bounty of forty shillings, over and above the Continental pay and rations; provided they shall voluntarily enlist into such service; otherwise that they have, and receive, the Continental wages and rations only, without any bounty * * * .
>
> "Upon consideration, whereof, —
>
> "It is voted and resolved, that the above recommendation be * * * approved[.]"{EN-131}

• [1776] "That all male Persons subject by Law to bear Arms, whether of the Militia, Alarm List or Independent Companies, within this State, be draughted in three Divisions * * * .

* * * * *

" * * * That the Division on actual Duty shall be relieved monthly, in the Order they shall be drawn out, by other Divisions * * * to be made and done punctually, at the Time each Division shall have completed its monthly Round of Duty.

* * * * *

" * * * [T]he Pay of each private Soldier * * * shall be *two Shillings per* Day; and that the Pay of the several Officers be in the same Proportion * * * as regulated by the Laws for paying the Militia when in actual Service; * * * and * * * Officers and Soldiers shall, when in actual Service, be allowed and draw the same Rations as those of the standing Regiments, in the Service of this State."{EN-132}

• [1777] "[T]hat the field-officers * * * and other officers and privates of the militia and alarm-list, within this state, who have been draughted, and have done, or shall do, duty * * * shall receive * * *[certain stipulated] wages and rations[.]

* * * * *

"And * * * the * * * [officers] of the several independent companies within this state, who have been draughted, and have done, or shall do, duty * * * shall * * * receive the same wages that are allowed to the officers of the militia and alarm-list, and the same number of rations * * * ; and * * * the non-commissioned officers and privates of said companies, also receive the same bounties, wages and rations, as are allowed to the non-commissioned officers and privates of the militia, or alarm-list[.]"{EN-133}

• [1777] "[T]hat the first division of the second draft of the militia, and alarm and independent companies * * * march to such part of the shores within their respective counties, as shall be directed by the commanding officer, * * * properly equipped, to relieve those that are now upon duty, and there to remain and do duty for fifteen days from the time they shall actually take the field.

"And * * * for their encouragement to exert themselves in the defence of their country, that a bounty of ten shillings * * * be allowed to each non-commissioned officer and soldier * * * who shall do his duty * * * .

* * * * *

"And * * * the other divisions of the independent companies, alarm companies and militia * * * relieve said division * * * ; and that they be entitled to the same wages and encouragement[.]"{EN-134}

• [1777] "That One of the Divisions, consisting of the One Sixth Part of the Independent and Alarm Companies and Militia heretofore draughted, and One Half of a Division, be immediately called upon actual Duty * * * : That they continue in Service for the Space of Fifteen Days, and be relieved at the Expiration of said Time by the other Half of said Division, and one other Division, in the Order in which said Divisions were drawn, to continue in Service during said Time; and that the Divisions on actual Duty from Time to Time be relieved and do Duty in Manner as is before directed.

" * * * That a Bounty of *Ten Shillings* * * * be allowed to each non-commissioned Officer and Soldier who hath been draughted, and shall do Duty * * * . *And further*, That all Fines which shall be incurred for Delinquency * * * shall be equally divided among the non-commissioned Officers and Soldiers doing Duty, who belong to the same Town with the Delinquents who shall neglect to do Duty."{EN-135}

• [1777] "That one Half of the Militia, Alarm, Independent, and Artillery Companies, be drafted * * * within this State * * * . That they march to and rendezvous at such Place or Places as shall be directed * * * ; and that they remain and continue to do Duty for the Space of one Month * * * , unless sooner discharged * * * .

* * * * *

"AND for the Encouragement of the Persons who shall be drafted * * * to exert themselves in Defence of their Country, * * * each non-commissioned Officer and Private who shall be drafted * * * and shall do their Tour of Duty, shall be allowed, as a Bounty, forty Shillings * * * for one Month's Service, and in the same Proportion for a shorter Time, and the same Wages and Rations as are allowed * * * in the Continental Service."{EN-136}

• [1777] "Whereas * * * one-half of the militia, independent, artillery and alarm companies within this state, were draughted, and have done duty for one month,—

"It is voted * * * that the remaining half-part of said militia, independent, artillery and alarm companies, be draughted into two divisions * * * .

" * * * [O]ne of the said divisions * * * shall march to such place or places as shall be ordered * * * and do duty for the space of thirty days * * * .

" * * * [E]ach non-commissioned officer and private, who shall be draughted and do duty * * * shall be allowed as a bounty, forty shillings, and the same wages as are allowed the non-commissioned officers and privates in the Continental service."{EN-137}

• [1777] "[T]he council of war of this state [may] call forth into actual duty, such part of the militia, independent and alarm companies, within this state, for the defence thereof, as they shall from time to time think necessary, in the order in which they have been draughted, to supply the delinquencies of the quotas to be furnished * * * by the states of the Massachusetts Bay, New Hampshire and Connecticut, and in the proportion they shall be deficient therein.

" * * * [A] bounty of £4 * * * for every month, and in that proportion for any shorter time, [shall] be allowed to each non-commissioned officer and private, who shall be called and do duty * * * ; and that the same bounty be allowed to all the non-commissioned officers and privates of the said militia, independent and alarm companies, who shall do duty from and after the rising of this Assembly.

"And * * * the officers and soldiers of the militia, independent and alarm companies, who may be called into actual service * * * , [shall] be allowed the same wages and rations as the officers and soldiers in the Continental service."{EN-138}

• [1778] "[T]he non-commissioned officers and privates of the militia and alarm companies of the town of Little Compton, who have done duty within said town since the 6th day of November last, [shall] be allowed as a bounty, after the rate of forty shillings per month; and that they be paid, accordingly."{EN-139}

• [1778] "This Assembly, * * * having ordered eight hundred and thirty-nine men to be raised * * * for filling up the state's brigade, * * * and apportioned the same to the several towns; some of which have not raised the quota assigned them, * * *

" * * * such delinquent towns shall keep up in the field so many men from the militia, alarm and independent companies, in such town, as they are deficient in their quota, * * * until the same shall be completed.

"That the militia so doing duty, shall be entitled to the Continental wages and rations only."{EN-140}

> • [1781, 1781, and 1781] "That Twelve Hundred able-bodied effective Men of the Independent, Artillery, Senior and Junior Class Companies of Militia * * * be forthwith embodied; and that they rendezvous at such Places within this State * * * to do Duty therein for One Month from the Time of their arriving * * * , unless sooner discharged by * * * the Governor, or this Assembly.[416]
>
> * * * * *
>
> " * * * That the Men who shall be detached, and do Service * * * as Soldiers, be allowed at and after the Rate of *Fifty Shillings* * * * per Month, and One Ration per Day * * * .[417]
>
> * * * * *
>
> " * * * [E]ach Person who shall be detached * * * or shall voluntarily enter into the said Brigade, [shall] furnish himself with Three Days Provision; and that he be allowed for the same *One Shilling and Sixpence* per Day * * * .[418]{EN-141}

Doubtlessly, the rationale for compensation in such cases was that not all members of the Militia were being called upon to perform these particular duties, and therefore the ones who were singled out by some form of draft, or who volunteered, were entitled to some measure of financial support by the remainder of the community. In contrast, everyone eligible for the Militia (other than conscientious objectors) was required to provide himself with a firearm, ammunition, and related accoutrements *at his own expense*—yet even as to this requirement, an exception was made for those Militiamen too poor to pay for that equipment, for whom arms were furnished at public expense.[419] So, in all of these instances, compensation in money or in kind was another way of spreading the burden of Militia service equitably and with social solidarity throughout the entire community. "They also serve who only stand and wait"[420] —especially if, as the price of being allowed simply to "stand and wait", they must contribute financially to the efforts of those slogging it out in actual service.

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[416] The second and third Acts provided for "incorporating and bringing into the Field Five Hundred able-bodied effective Men" from those units of the Militia.

[417] The second and third Acts provided that "Soldiers" would be "allowed at and after the Rate of *Sixty Shillings* * * * *per* Month".

[418] The second and third Acts provided for an allowance of "*Two Shillings per* Day".

[419] *See post*, Chapter 6.

[420] John Milton, Sonnet XIX, "When I consider how my light is spent", *Poems* (London, England: Thomas Dring, 1673).

CHAPTER SIX

Rhode Island required essentially all of the able-bodied adult free males within her territory to be personally equipped with their very own firearms, ammunition, and necessary accoutrements, suitable for the defense of their community as a whole and of themselves as individuals.

In the *pre*-constitutional era, "gun control" (had such a term then been current at all) would have meant that the people, through their government, required and enabled themselves to control—by means of their very own personal possession—the firearms and ammunition sufficient not only to repel the depredations of hostile Indians and criminals, and attacks by the armies and navies of enemy nations, but also to array the citizenry as a serious deterrent against, if not a match for, any forces their own rogue public officials might deploy against them in furtherance of usurpation, tyranny, or other forms of oppression.

A. Militiamen to furnish themselves with firearms. In most cases throughout that period, individuals (other than *bona fide* conscientious objectors[421]) were required by statute to procure and at all times to maintain personal possession, usually as their own property, of specified types and amounts of firearms, ammunition, and accoutrements, ready for their immediate use. This served both the eminently practical purpose of assuring that the men *could* defend their communities, and the more far-reaching symbolic purpose of affirming that they *would* do so.[422]

1. Rhode Island's earliest ordinances in the late 1630s and 1640s simply presumed that men possessed their own arms and ammunition at home, and would bring them forth for Militia purposes, whether or not they happened to be members of the Trained Bands. Thus, not only were members of the Bands subject to "a view of the[ir] Armes" and to fines if any of the "Armes" they brought to musters proved "defective",{EN-142} but also "*noe man*" was permitted to "go two miles from the Towne unarmed, eyther with Gunn or Sword" or to "come to any public Meeting without his weapon".{EN-143} And "*every man*" was required "to have so much powder, and so many bulletts" "lying by him".{EN-144}

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[421] *See post*, at 266-272.

[422] Again, the similar practice of the Lakota people is instructive. *See* J. Marshall, *The Day the World Ended*, *ante* note 407, at 84-85.

Even in those early days, Rhode Island did provide for public magazines in each of her Towns, in order to store some firearms and ammunition in central locations.{EN-145} But, as a statute of 1665 evidenced, no sharp distinction in terms of purpose existed between "public" and "private" magazines:

> And for the farther providing for the defence of the Collony, in having a Magazine or store of armes and amunition, both in pertickelar men's houses, and alsoe on publicke store in each towne.
>
> It is therefore ordered * * * that every man in each towne be allwayes furnished with two pound of gunpowder, and fowre pound of lead or bulletts, vpon penalty of being fined ten shillings[.]{EN-146}

Moreover, with almost every adult free male presumably armed on his own account, public magazines generally served only to supplement private supplies. Indeed, in 1650 the major Towns of Providence, Portsmouth, Newport, and Warwick together maintained within all of their magazines only fifty-four muskets, hardly enough to equip their own inhabitants, let alone out-lying areas, adequately.{EN-147}

Doubtlessly, too, Rhode Islanders recognized why public magazines were inherently incapable of providing the community with—and might even compromise or subvert its—security: *First*, to repel sudden assaults from hostile Indians or criminals, people (especially in outlying areas) needed to have firearms and ammunition ready at hand. *Second*, entrusting their arms to the exclusive control of possibly incompetent, corrupt, or even criminal public officials ensured that the necessary equipment would be unavailable just when it might, and probably would, be essential to resist domestic usurpation, tyranny, or other oppression.

In any event, that from the very beginning of the Colony almost all able-bodied adult free male Rhode Islanders were supposed to maintain firearms and ammunition in their personal possession at home, as their own private property, repudiated in the most practical and palpable manner possible the old English élitist notion that citizens should have only such arms as were "suitable to their condition and degree" in the social, political, and even religious hierarchy of the Mother Country.[423] In 1663, however, Rhode Island did explicitly exclude Catholics from the right—otherwise extended to "all Men Professing Christianity, and of Competent Estates, and of Civil Conversation, who acknowledge, and are Obedient to the Civil Magistrate, though of different Judgments in Religious Affairs"—to "be admitted Free-men", and to have "Liberty to Chuse and be Chosen Officers * * * both Millitary and Civil".{EN-148} Although this disability appeared to contradict the guarantee in the Colony's Charter "[t]hat no Person * * * shall be any ways

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[423] *See* W. Blackstone, *Commentaries on the Laws of England*, *ante* note 142, Volume 1, at 143.

Molested, Punished, Disquieted, or called in Question for any Differences in Opinion, in matters of Religion", if he "do[es] not Actually disturb the Civil Peace",{EN-149} certainly contracted the principle of religious toleration upon which Rogers Williams had founded the Colony,[424] and probably was enforced only sporadically if at all,[425] nonetheless it was not repealed until 1783.{EN-150} Notwithstanding such religious prejudice, even Catholics were never statutorily disqualified from service in Rhode Island's Militia, except as officers, or from possessing firearms in fulfillment of their Militia duties or for any other lawful purpose. And any such disqualification would obviously be unconstitutional today.[426]

Furthermore, inasmuch as the early statutes neither prohibited in any manner private acquisition of firearms through private channels, nor mandated that public officials alone should distribute firearms (and then only to selected, presumably politically reliable individuals), Rhode Island's laws implicitly recognized every private individual's right to obtain firearms from private sources and to keep them in his personal possession. Moreover, if the Colony's general laws had outlawed possession of firearms by private individuals who lacked some governmental license, her Militia statutes themselves would have established, or would have implicitly constituted, exceptions to such a prohibition, in order to allow individuals to obtain, keep, and bear the firearms they were expected to provide for their service in the Militia. Inasmuch as those statutes encompassed every able-bodied adult free male in the jurisdiction, the permission they extended—or, more descriptively, the specific requirement they imposed—for private possession of firearms would have nullified any such general prohibition.

To be sure, if the government of *pre-*constitutional Rhode Island had only recognized for the time being and for its own purposes, *but could have rigorously regulated or even revoked on the basis of political policy*, a private individual's right to obtain and keep firearms, then that "right" would have been at best a matter of legislative grace. Yet, as did almost all of the other Colonies (and later all of the independent States), Rhode Island relied upon this right, whatever its source and security, in her Militia statutes throughout that period, by imposing on all but the poorest able-bodied men, as individuals, the duty to acquire firearms and ammunition as their own personal property through the free market, and then to maintain that equipment in their own personal possession at all times. This duty necessarily carried with it a corresponding individual right—enforceable against anyone other than, perhaps, the legislature—for each man capable of serving in the

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[424] *See, e.g.*, T.M. Merriman, *THE PILGRIMS, PURITANS, AND ROGER WILLIAMS, VINDICATED: AND HIS SENTENCE OF BANISHMENT, OUGHT TO BE REVOKED* (Boston, Massachusetts: Bradley & Woodruff, 1892).

[425] *See* J. Bartlett, *Records of the Colony of Rhode Island, ante* note 309, Volume II, at 36-37.

[426] *See* U.S. Const. amends. I, II, and XIV, § 1. *See* Torcaso v. Watkins, 367 U.S. 488, 494 (1961).

Militia to take the actions requisite to fulfill his duty. Such duty and right together composing the most critical element in "regulating" her Militia—without which, indeed, no effective Militia could have existed—they constituted important parts of the very definition of "Militia" in Rhode Island and throughout other Colonies (and then all of the independent States). The qualification "*capable of* serving", rather than "*actually* serving", in the Militia must be kept in mind, though, because individuals beyond fifty or sixty years of age were never prohibited from volunteering for Militia service, or from actually performing such service if caught up by circumstances. And although they were subject to no plain statutory duty to defend their communities to the limits of their abilities, they were surely required to do so under "the Laws of Nature and of Nature's God"—which, as the Declaration of Independence teaches, is the foundational authority for any people "to assume among the powers of the earth" a "separate and equal status" as a political community. Therefore, they each must have enjoyed an individual *pre-*constitutional "right to acquire and keep arms" necessary for that purpose—even if that purpose could have been served no further than by defending their own lives against aggressors. Thus, for all Americans other than those physically incapable of defending their communities even if only by simply defending themselves, no real difference existed between an "individual" and a "collective" right to keep and bear arms.[427]

2. From Rhode Island's founding forward, for nearly one hundred fifty years her statutes explicitly codified these principles, setting out the specific requirements that applied, not only to all the members of the actual Trained Bands, but as well to most (if not all) of those free adult males who were exempted for one reason or another from regular Militia training and first-line duty. Over the decades, these requirements were variously phrased, but always imported the same substance: namely, that *every able-bodied free male, who was not specifically exempted (usually by virtue of conscientious objection), was at all times to be possessed of a suitable firearm, ammunition, and necessary accoutrements*.[428] Thus—

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[427] As it does not exist today. *See post*, at 1339-1351.

[428] As to these, in the subsequent text throughout this volume the following definitions apply:

•**"Bandolier" or "bandaleer"** is a belt or strap to which are attached containers carrying separate charges of black powder. It became obsolete upon introduction of the paper **"cartridge"** (*q.v.*). *See, e.g.*, *Encyclopedia of Firearms*, Harold L. Peterson, Editor (New York, New York: E.P. Dutton and Company, Inc., 1964), at 53-54.

•**"Carbine" or "carabine"** is a short, light musket, usually of relatively small caliber, employed primarily by cavalrymen, but also by artillerymen, sappers or engineers, light infantry, and officers. Peterson, *ante*, at 75-76.

•**"Cartridge" or "cartouch"** denotes any disposable container that holds a single load of gunpowder for a firearm, usually including both the main and the priming charges. By the 1700s, cartridges consisted of black powder and a lead ball wrapped in a cylinder formed of paper and tied off at each end . Loose gunpowder and ball were used only for rifles and other special firearms. Peterson, *ante*, at 76. A **"cartridge box" or "cartouche box"** is a container that holds a number of cartridges in a position convenient for reloading a firearm.

• [1647] "[E]very Inhabitant of * * * [Rhode] Island above sixteen or under sixty yeares of age, shall alwayes be provided of a Musket, one pound of powder, twenty bullets, and two fadom of Match, with sword, rest, bandaleers all completely furnished."{EN-151}

• [1658] "And whereas, it was formerly ordered, [that] armes [should] bee muskett and match. Now it is declared, that both it and fyrelockes and snaphaunces with powder hornes bee alowed; and if any bee complayned of for defective armes, the Town Counsill in each towne have power to judge off, and order the armes to bee such as they may finde will fully answer the meaninge of the lawe concerning suffitiant armes".{EN-152}

• [1665] "[N]ine shillings yearly to be paid * * * to such parents and masters as find armes and amunition (as they must doe) for their sones and sarvants that are listable * * * ; as alsoe to such householders or other men that find themselves armes and traine in their owne persones; which all men from sixteene years of age to sixtye years old are hereby required to doe[.]"{EN-153}

• [1677] "[E]very listed souldier"—which included all "persons within this Collony from the age of sixteen yeares unto the age of sixty yeares"—"shall * * * have one good gun or muskitt fit for service, one pound of good powder, and thirty bullets at least".{EN-154}

• [1699, 1701, and 1705] Every "person * * * listed" in the Militia must "appear complete in arms * * * with a good or sufficient muskett or fuse, and sword or bagganett, cotouch box or bandelears, with twelve

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• **"Firelock"** denotes any firearm or firearm action that employs sparks to ignite the priming charge—including the "wheel lock", "snaphance", and "flintlock" (*q.v.*). Peterson, *ante*, at 128-129.

• **"Flintlock"** is a firearm action which discharges when a "cock", actuated by a spring, strikes a piece of flint against a striking-plate (known as the "steel" or "frizzen"), producing sparks that set off a priming charge in a "pan". Peterson, *ante*, at 130. Good diagrams of a typical flintlock action appear in De Witt Bailey, *Small Arms* of the *British Forces* in *America 1664-1815* (Woonsocket, Rhode Island: Andrew Mowbray Incorporated, Publishers, 2009), at 11, *and in* Peterson, *ante*, at 131-137. The flintlock differs from the "snaphance" (*q.v.*) in that the frizzen and pan-cover are separate in the snaphance, whereas they are combined in the flintlock. Peterson, *ante*, at 130; Bailey, *ante*, at 10.

• **"Fusil", "fuse", "fusee", "fuze", and "fuzee"** denote a light, compact flintlock musket, usually of relatively small caliber, which may be either smoothbored or rifled. Sometimes the term "fusil" is used interchangeably for "carbine" (*q.v.*). Peterson, *ante*, at 140; Bailey, *ante*, at 10.

• **"Matchlock"** is a firearm action which uses a slow-burning rope impregnated with potassium nitrate to ignite the priming charge. It was the first action to employ a trigger and lock work to set off the charge. Peterson, *ante*, at 199-200.

• **"Musket", "muskett", "muskitt", and "musquet"** denote a long gun, typically with a smooth bore (if otherwise, specified as a "*rifled* musket"). Peterson, *ante*, at 222.

• **"Musket and match"** denotes a musket with a match lock (*q.v.*).

• **"Pistol"** denotes a handgun.

• **"Snaphance" or "snaphaunce"** is a firearm action in which the steel (frizzen) and the pan are separate, rather than one piece, as in the flintlock. Peterson, *ante*, at 304-305. The term "snaphaunce" was later superseded by "firelock" (*q.v.*).

• **"Wheel lock"** is a firearm action in which a piece of iron pyrite, pressed against a revolving serrated steel wheel, generates a shower of sparks that ignites the priming charge. Peterson, *ante*, at 334-353.

bullets, fit for his piece, half a pound of powder, six good flints"; and those in troops of horse must have "carbine & pistol".{EN-155}

• [1718, 1730, and 1744] "[A]ll Male Persons Residing for the space of three Months within this Colony from the Age of Sixteen, to the Age of Fifty Years" "shall be always provided with one good Musket, or Fuzee, the Barrel whereof not to be less than three foot and an half in length, to the satisfaction of the Commission Officers of the Company; also one pound of good Gunpowder, thirty Bullets, fit for his Gun, six good Flints, fit for Service; one good Sword, or Baionet, a Cartouch Box, ready filled with Cartriges of Gunpowder and Bullets"; and "every Trooper [in the Horse] shall be always provided with one good serviceable Horse, * * * one Carbine, one pair of good Pistols, one Sword, one pound of Gunpowder, thirty sizeable Bullets, twelve good Flints".{EN-156}

• [1755] "[E]very Person * * * by Law to be accoutred * * * is * * * directed to provide himself with Arms[.]"{EN-157}

• [1766] "[A]ll Male Persons, who have resided for the Space of Three Months in this Colony, from the Age of Sixteen to Fifty, shall bear Arms in the * * * trained Bands" and "shall always be provided with One good Musket or Fuzee, the Barrel whereof not to be less than Three Feet and an Half in Length, to the Satisfaction of the Commission Officers, also one Pound of good Gun-Powder, Thirty Bullets fit for his Gun, Six good Flints, One good Sword or Bayonet, a Cartouch Box, ready filled with Cartridges of Powder and Ball"; and "every Trooper shall always be provided with One good serviceable Horse * * * a Pair of good Pistols, One Carbine, One Sword, One Pound of Gunpowder, Thirty sizeable Bullets, Twelve good Flints".{EN-158}

• [1774] Every Militiaman "shall * * * be provided with a sufficient Gun or Fuzee" * * * "with a good Bayonet fixed on his Gun".{EN-159}

• [1775] "[E]very man in the colony, able to bear arms," shall "equip himself completely with arms and ammunition, according to law".{EN-160}

• [1776] "[A]ll * * * pe[r]sons who are by law obliged to equip themselves with a good fire-arm, bayonet and cartouch box; and who shall not * * * be reported incapable of providing themselves * * * do provide themselves * * * agreeably to law".{EN-161}

• [1778] "[A]ll Persons * * * by Law obliged to equip themselves with a good Fire-Arm, Bayonet and Cartouch-Box * * * do provide themselves therewith * * * , or with a Rifle-Gun and Sword[.]"{EN-162}

• [1779] "[E]ach and every effective Man * * * shall provide, and at all times be furnished, at his own Expence (excepting such Persons as the Town Councils * * * shall adjudge unable to purchase the same) with

one good Musquet, and a Bayonet fitted thereto, * * * one Ram-rod, Worm, Priming-wire and Brush, and one Cartouch-Box[.]"{EN-163}

• [1781] "[E]ach of the * * * non-commissioned Officers and Soldiers [of the Militia shall] furnish himself with a good Musket, Bayonet, Cartouch-Box[.]"{EN-164}

• [1781] "[E]ach Person, liable to do military Duty * * * (unless excused by the Town-Council * * * for Inability to procure the same)" must have "a good Gun, being his own Property, * * * a Bayonet * * * , a Ram-Rod * * * , a Wormer * * * , a Priming-Wire * * * , [and] Three good Flints[.]"{EN-165}

Significantly, in specifying that each Militiaman should furnish himself with (say) "one good Musquet, and a Bayonet fitted thereto * * * one Ram-rod, Worm, Priming-wire and Brush, and one Cartouch-Box", these statutes mandated merely the *minimum* sets and qualities of equipment the General Assembly deemed necessary for the service. Nothing precluded any Militiaman from providing himself with as good a musket—or, even better, as good a rifle—and accoutrements as money could buy in the free market, together with useful accessories beyond what the statutes required.

Inasmuch as Rhode Island's Trained Bands enrolled only able-bodied free men from sixteen to fifty years of age, the requirement in some of the statutes quoted immediately above, that men from sixteen to sixty years old had to maintain personal possession of firearms, applied *sotto voce* to those individuals from fifty to sixty years of age who were otherwise exempted from regular, first-line Militia service. In addition, many statutes explicitly specified that those exempted from training were nonetheless to be armed:

• [1718, 1730, and 1744] "[A]ll * * * Persons * * * excus'd from Training * * * shall notwithstanding be provided with the same Arms, Ammunition * * * , &c. as * * * is required of such as are obliged to Train[.]"{EN-166}

• [1755] "[E]very Person excused from Training" is "by Law to be accoutred" and is "directed to provide himself with Arms".{EN-167}

• [1766] "[A]ll such Persons as are * * * excused from training, shall, notwithstanding, be provided with the same Arms, Ammunition, &c. as * * * is required of such as are obliged to train[.]"{EN-168}

• [1774] Every member of the Militia "shall * * * be provided with a sufficient Gun or Fuzee" and "with a good bayonet fixed on his Gun", including "all those who, being exempted from appearing on the Days of Training, are notwithstanding, obliged to be provided with Arms and other Accoutrements".{EN-169}

> • [1775] "That a proclamation be * * * issued * * * , commanding every man in the colony, able to bear arms, to equip himself completely with arms and ammunition, according to law."{EN-170}
>
> • [1776] "It is voted and resolved, that the alarm-list, in each town within this state, be embodied in a separate company"—consisting of men who were excused from most Militia duties except during emergencies[429]— and "[t]hat said company do equip themselves".{EN-171}
>
> • [1778] "[A]ll Persons * * * by Law obliged to equip themselves with a good Fire-Arm, Bayonet and Cartouch-Box, and who shall not * * * be reported * * * incapable of providing themselves * * * , do provide themselves therewith * * * , or with a Rifle-Gun and Sword[.]"{EN-172}
>
> • [1779] "That all Male Persons between the Ages of Fifty and Sixty, if able in the Judgment of the respective Town-Councils, shall be at all Times armed, accoutred and equipped, * * * upon the same Penalty as though they were held to military Duty", "with one good Musquet, and a Bayonet fitted thereto, * * * one Ram-rod, Worm, Priming-wire and Brush, and one Cartouch-Box".{EN-173}

This statutory history proves that:

First, the duty to obtain and maintain personal possession of firearms, ammunition, and accoutrements suitable for Militia purposes—and the corresponding right to do so against any interference contrary to the statutory mandates—were never limited to only those men who happened to compose the Trained Bands. (Which in and of itself supplies a decisive rejoinder to the contention that the contemporary National Guard constitutes "the Militia of the several States" in whole or in part, rather than a component of the regular Armed Forces.)

Second, the men exempted from participation in the Trained Bands were nonetheless members of the Militia, because (unless they were conscientious objectors[430]) they were required to possess the same types of firearms, ammunition, and necessary accoutrements as were the Bands' members.[431] In addition, no statute exists that even suggests that men above the ages of fifty or sixty, or whatever their mere physical disabilities at any age, were ever deprived of the firearms they already possessed (perhaps as a consequence of their former Militia service) or prohibited from acquiring firearms on their own, unconnected to Militia service.

Third, Rhode Island's *pre-*constitutional laws never disqualified from Militia service or excluded from the personal possession of firearms either: (i) those

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[429] *See post*, at 220-224 and 259-261.

[430] *See post*, at 266-272.

[431] *See ante*, at 143-144, *and post*, at 223-224.

individuals who had committed crimes or other offenses for which they had served their sentences, paid their fines, or undergone other punishments, and thereafter had returned to society; or (ii) those individuals who had merely been charged with but not convicted of crimes, and during the pendency of any inquiry or trial had been allowed to remain at large in society. Of course, in those days convictions of many serious offenses often permanently removed perpetrators from the community. For, as Blackstone explained, "[F]ELONY, in the general acceptation of our English law, comprizes every species of crime, which occasioned at common law the forfeiture of lands or goods. This most frequently happens in those crimes, for which a capital punishment either is or was liable to be inflicted[.]"[432] "THE idea of felony is indeed so generally connected with that of capital punishment, that we find it hard to separate them; and to this usage the interpretations of the law do now conform."[433] As the legal commentator William Hawkins explained, among "capital offenses" in *pre*-constitutional English law, "[t]hose by the Common Law come generally under the Title of Felony"; and "[t]he Judgment against a Man or Woman for Felony of Death, hath always been the same * * * That he or she be hanged by the Neck 'till dead".[434] Rhode Island's laws, too, reflected just such an understanding.{EN-174} This aside, however, the duty to defend the community—and to keep and bear arms for that purpose—in *pre*-constitutional times extended even to many of those individuals whom today various "gun-control laws" would disarm entirely on the basis of prior convictions of criminal behavior.[435]

B. Militiamen's firearms to be their own personal property. Rhode Island's *pre*-constitutional Militia statutes made clear that the firearm each able-bodied adult free male was required to obtain and possess was usually to be *his own personal property, which he purchased for himself*, not a firearm owned, supplied, or controlled by any level of government or any public official. Only in a few cases, when individuals were too poor to acquire firearms through their own efforts, might the Militia itself or Local governments supply, and possibly control, the necessary equipment.[436]

1. As early as 1650, the Colony recognized the necessity of relying upon its citizens' private ownership of firearms useful for protection of the community, when it commanded "that [certain named individuals], all excuses sett aparte, shall mende and make all lockes, stockes and pieces that by order from the warden of each Towne shall be *from any of the inhabitants thearof presented to them*, for just and

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[432] *Commentaries on the Laws of England*, *ante* note 142, Volume 4, at 94.

[433] *Id.*, Volume 4, at 98.

[434] *A Treatise of The Pleas of the Crown* (London, England: E. and R. Nutt, and R. Gosling, Third Edition, 1739), Book I, Chapter XXV, § 1, at 65, *and* Book II, Chapter XLVIII, § 7, at 444 (footnotes omitted).

[435] *Compare and contrast post,* at 307-307, *with post*, at 981-1014.

[436] *See post*, at 157-162.

suitable satisfaction in hand payed, without delay," and "that *all men that have gunns and pieces to mend*, and have need to have them mended for their present defence, shall forthwith * * * carrie those pieces to mende".{EN-175} Had these firearms been *public* property, the laws would not have directed private individuals to see to the matter of maintenance, but would have assigned that duty to public officials, and probably to public armorers rather than private gunsmiths. (The widespread private ownership of firearms in *pre*-constitutional America, of course, was hardly unique to Rhode Island, then or later.[437])

Subsequently, the statutes were quite explicit on the subject of the citizens' personal ownership of the firearms they themselves brought to their service in the Militia or to the fulfillment of other military duty:

> • [1665] "[A]ll men from sixteene years of age to sixtye years old are hereby required to" "*find themselves armes*".{EN-176}
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> • [1701] "[A]ll persons that are willing to list themselves in * * * troops [of horse]; and *to accoutre themselves with* * * * carbine and pistol * * * shall be excused from any other duty in militia exercise[.]"{EN-177}
>
> • [1755] "[E]very Person * * * by Law to be accoutred * * * is * * * *to provide himself with* Arms, and other Accoutrements[.]"{EN-178}
>
> • [1775] "[E]very man * * * able to bear arms, [is] *to equip himself completely with* arms and ammunition, according to law[.]"{EN-179}
>
> • [1776] "[A]ll persons in their towns, being inhabitants" "who are by law obliged *to equip themselves with* a good fire-arm, bayonet and cartouch box; and who shall not * * * be reported incapable of *providing themselves* * * * , *do provide themselves*[.]"{EN-180}
>
> • [1776] "[T]he artillery companies * * * [shall] be equipped with small arms and bayonets, *at their own expense*[.]"{EN-181}
>
> • [1776] "It is voted and resolved, that the alarm-list, in each town within this state, be embodied in a separate company" and "[t]hat said company *do equip themselves*".{EN-182}
>
> • [1779] "That each and every effective [that is, able-bodied] Man * * * *shall provide, and at all times be furnished, at his own Expence (excepting such Persons as the Town Councils of the Towns in which they respectively dwell or reside shall adjudge unable to purchase the same)* with one good Musquet, and a Bayonet fitted thereto, * * * one Ram-rod, Worm, Priming-wire and Brush, and one Cartouch-Box."{EN-183}
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> • [1780] "That in order to encourage each Soldier who shall inlist into the Service * * * *to provide the * * * Articles of Accoutrements for*

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[437] *See* Clayton E. Cramer, *Armed America: The Remarkable Story of How and Why Guns Became as American as Apple Pie* (Nashville, Tennessee: Nelson Current, 2006).

themselves, there shall be allowed unto each of the said Soldiers who *shall furnish himself with* a good Musket, Ram-Rod, Bayonet * * * *Eighty Continental Dollars* * * * out of the General-Treasury". And, in this instance, if sufficient firearms were not forthcoming from "each Soldier" himself, "the Commanding-Officer of the Militia in [the] Town * * * [was] to impress from the [other] Inhabitants * * * the Articles * * * deficient"—that is, to require those "Inhabitants" to furnish their own private firearms for use by "the Soldiers".{EN-184}

• [1781] "That each of the * * * non-commissioned Officers and Soldiers [of the Militia] *furnish himself with* a good Musket, Bayonet, Cartouch-Box[.]"{EN-185}

• [1781] "That each Person, liable to do military Duty * * * (unless excused by the Town-Council * * * for Inability to procure the same)" shall not "be found destitute of a good Gun, *being his own Property*".{EN-186}

2. During the *pre-*constitutional era, statutory commands on this subject were sometimes phrased in the indirect passive tense, but with and to the selfsame intent and effect:

• [1647] "[E]very Inhabitant of * * * [Rhode] Island above sixteen or under sixty yeares of age, *shall alwayes be provided of* a Musket, one pound of powder, twenty bullets, and two fadom of Match, with sword, rest, bandaleers all completely furnished."{EN-187}

• [1718, 1730, and 1744] "[E]very Listed Soldier of the * * * Militia, *shall be always provided with* one good Musket, or Fuzee"; and "all * * * Persons * * * excus'd from Training, yet *shall notwithstanding be provided with* the same Arms".{EN-188}

• [1766] "[E]very enlisted Soldier of the * * * Militia, *shall always be provided with* One good Musket or Fuzee"; "all * * * Persons as are * * * excused from training, shall, notwithstanding, *be provided with* the same Arms, Ammunition, &c. as * * * is required of such as are obliged to train"; and "every Trooper *shall always be provided with* * * * a Pair of good Pistols, One Carbine".{EN-189}

• [1774] "[E]ach inlisted Soldier, who *shall not be provided with* a sufficient Gun or Fuzee, as directed in [earlier legislation], shall be fined"; and "the Fines of all those who, being exempted from appearing on the Days of Training, are notwithstanding, *obliged to be provided with* Arms and other Accoutrements, shall be the same for every deficiency, as the Fines of the inlisted Soldiers".{EN-190}

The then-current (albeit somewhat now-archaic) meaning of the verb "provide", used in the indirect passive tense with the prepositions "with" or "of",

was "[t]o furnish; [t]o supply"[438]—"to procure beforehand; to get, collect, or make ready for future use; to prepare"[439]—and "[t]o procure supplies or means in advance; to take measures beforehand in view of an expected or a possible future need, especially a danger".[440] So, in *pre-*constitutional America, for someone "to be provided with" a firearm (in the context in which Rhode Island's Militia statutes employed that phrase) idiomatically meant *for him* "to furnish it", "to supply it", or "to make it available" *to himself*. Coupled with other common definitions of "provide"—namely, "[t]o procure beforehand; to get ready; to prepare"[441]—for someone to be statutorily directed "to be provided with" a firearm could mean nothing less than for him "to procure" that firearm *through his own efforts*. This, of course, is the only reading of the statutes quoted immediately above consistent in purpose with the other statutes on the same subject quoted theretofore.

3. Logic as well as linguistics supports this conclusion. Had all or most of the firearms men used for their service in the Militia been *public* property, the statutes would have required Rhode Island's Towns, or some other governmental bodies, to acquire, distribute, and generally maintain close supervision over them. That, however, never occurred, except when some individuals were simply too poor to purchase their own firearms.[442] Obviously, special provision would not have been made for the poor alone, if the practice had been for everyone in the Militia to use firearms the government owned, supplied, and controlled.

Moreover, if Rhode Island's government had owned, supplied, and controlled the firearms that Militiamen used, how could any of them have been justly fined—as the statutes required them to be—for not originally securing possession of a firearm themselves?[443] A Militiaman could and should have been made financially accountable for spoiling, losing, stealing, or otherwise improperly disabling or disposing of a firearm the government made available to him. But surely some public official would have been responsible for seeing to it that the Militiaman acquired possession of that firearm in the first place.

4. The private ownership of most Militia firearms mandated by Colonial (and later State) law did impose a financial burden directly on individuals. Yet, otherwise, that cost would have had to have been met with taxes no less onerous,

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[438] S. Johnson, *Dictionary, ante* note 50, definition 2 in both the First (1755) and the Fourth (1773) Editions.

[439] *Webster's Revised Unabridged Dictionary, ante* note 11, at 1154, definition 1 (transitive verb). *Accord*, N. Webster, *An American Dictionary, ante* note 15. *See also The Compact Edition of the Oxford English Dictionary, ante* note 11, Volume 2, at 2340, definitions 5, 7, 7b, and 8.

[440] *Webster's Revised Unabridged Dictionary, ante* note 11, at 1154, definition 1 (intransitive verb). *Accord*, N. Webster, *An American Dictionary, ante* note 15.

[441] S. Johnson, *Dictionary, ante* note 50, definition 1 in both the First (1755) and the Fourth (1773) Editions.

[442] *See post*, at 157-162.

[443] *See post*, at 275-284.

which the selfsame individuals would have been required to pay, because only the very poor (who presumably paid little or no taxes at all) received firearms purchased with taxpayers' funds. This direct financial burden, though, brought with it the practical benefits that always arise from an individual's actual ownership of any valuable property. Presumably, when a Rhode Islander had to buy and maintain *his own* firearm, as *his own* personal property, he would have had an incentive initially to purchase one that was up to date in design and well manufactured, and thereafter to keep it in good repair and readiness at all times—as well as to expend the time and effort, in addition to whatever regular Militia training he received, necessary and sufficient to learn how to use it effectively.

5. Most importantly, though, the widespread private ownership of firearms suitable for service in the Militia created a peculiar kind of private property that served a public, governmental, and even sovereign function as the means by which the community itself directly exercised the most fundamental and important of all political and legal powers: the Power of the Sword. Firearms privately owned guaranteed that sovereign power truly resided with WE THE PEOPLE, who held in their own hands as their own property the implements necessary to exercise that power in the gravest extreme. Thus, *firearms privately owned became the most important of all property, private or public, because in the final analysis the security of all other property depended upon them*.

C. Militiamen to maintain possession of firearms in their own homes. Whether a firearm, ammunition, and accoutrements for use in the Militia were his own personal property (in the case of most able-bodied free men), or public property (in the case of some poor individuals), almost all such equipment was to be maintained *at all times in each individual's personal possession at home, within his own immediate control*, not in a governmental magazine, arsenal, armory, or other remote location under someone else's control.[444]

1. To be sure, some Local governments did maintain their own magazines for storage of firearms and ammunition the public owned.[445] And, to minimize the danger from conflagrations in Towns largely constructed of wood, and in which open fires were constantly burning as the sources of heat and light, private citizens were required to store excessively large quantities of explosive black powder in public magazines.[446] But it was always presumed that private powder stored for common safety's sake in public magazines would be returned to its owners on demand. Indeed, in 1774 patriots were given "reason to apprehend some hostile intention against" Boston, when her military governor, General Thomas Gage, "in

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[444] For the few exceptions, *see post*, at 160-161.

[445] *See post*, at 203.

[446] *See post*, at 310-311.

a very extraordinary manner", "forb[ade] the keeper of the magazine at Boston, to deliver out to the owners, the powder, which they had lodged" there.[447] So, until Gage embarked on a scheme for disarming American patriots, aimed at rendering them helpless against British oppression, the existence and use of public magazines in no way limited the ability of common citizens to retain firearms and sufficient powder in their own homes at all times, in order for them to remain suitably provisioned against every hazard.

2. Quite the contrary of any notion that firearms and ammunition were to be consigned to public arsenals unless and until public officials deigned to distribute them, Rhode Island's statutes required her citizens themselves *actually to possess personally* (not simply to own titularly) their firearms and ammunition:

> • [1643] "[E]very man *shall have* foure pounds of shot *lying by him*, and two pounds of powder, and *to have it in readiness*[.]"{EN-191}
>
> • [1665] "[F]or the farther providing for the defence of the Collony, in having a Magazine or store of armes and amunition, both *in pertickelar men's houses*, and alsoe on publicke store in each towne", "every man in each towne *be allwayes furnished* with two pound of gunpowder, and fowre pound of lead or bulletts". {EN-192}
>
> • [1677] Individuals within the Militia "from the age of sixteen yeares unto the age of sixty yeares", not exempted, "*shall* * * * *have* one good gun or muskitt fit for service", one pound of good powder, and thirty bullets at least".{EN-193}
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> • [1718, 1730, and 1744] "[E]very Listed Soldier of the * * * Militia, shall always be provided with one good Musket, or Fuzee * * * ; also one pound of good Gunpowder, thirty Bullets, fit for his Gun, six good Flints, fit for Service; one good Sword, or Baionet, a Cartouch Box, ready fitted with Cartriges of Gunpowder and Bullets, on the penalty of *Three Shillings*, for each time he shall be found not provided[.]
>
> * * * * *
>
> " * * * [A]ll such Persons * * * excus'd from Training, yet shall notwithstanding be provided with the same Arms, Ammunition, &c. as * * * is required of such as are obliged to Train, & that once every year, or oftner * * * , there shall be * * * a Survey and Examination made, whether such Persons are provided as * * * is Required; and all such Persons as shall be found unprovided with such Arms * * * shall pay the Fine of *Five-Shillings* for each default[.]"{EN-194}

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[447] Joseph Warren, *Suffolk Resolves* (6 September 1774), ¶ 9, adopted by the Continental Congress on 17 September 1774, *in Journals of the Continental Congress, ante* note 42, Volume I (5 September to 26 October 1774), at 31-40. On the significance of the *Suffolk Resolves, see, e.g.,* T.H. Breen, *American Insurgents, American Patriots: The Revolution of the People* (New York, New York: Hill and Wang, 2010), at 130-156.

> • [1766] "[E]very enlisted Soldier of the * * * Militia, shall always be provided with one good Musket or Fuzee * * * , also One Pound of good Gun-Powder, Thirty Bullets fit for his Gun, six good Flints, One good Sword or Bayonet, a Cartouch Box, ready filled with Cartridges of Powder and Ball, under the Penalty of Four Pence for each Article of Accoutrement * * * which he shall be deficient in, for every Time he shall be unprovided therewith[.]
>
> * * * * *
>
> " * * * [A]ll such Persons * * * excused from training, shall, notwithstanding, be provided with the same Arms, Ammunition, &c. as * * * is required of such as are obliged to train. And * * * Twice in every Year, * * * there shall be an Examination and Survey made, whether such Persons are provided as * * * is Required; and all such Persons as shall be found unprovided, shall pay the Fine of Four Pence for each Article of Accoutrement they shall be deficient in[.]"{EN-195}
>
> • [1779] "[E]ach and every effective [that is, able-bodied] Man * * * shall provide, and *at all times be furnished*, at his own Expence (excepting such Persons as the Town Councils * * * shall adjudge unable to purchase the same) with one good Musquet[.]"{EN-196}

Statutes commanding each Rhode Islander eligible for the Militia to "find themselves", "provide himself with", "equip himself completely with", "furnish himself with", or "be provided with" a firearm, ammunition, and accoutrements "at his own Expence"—the articles so obtained "being his own Property" and subject to regular "Survey and Examination"—could have intended only that, as with all other personal property, these things would normally have been kept in their owners' own homes, under their owners' own control. And not one of Rhode Island's *pre*-constitutional statutes mandated or even suggested that, after being "furnished" by an individual, at his own expense and for his own use in the Militia, any firearm or ammunition had to be or even ought voluntarily to have been committed to the government's (or anyone else's) storage and control. To the contrary, because Militiamen were required by statute to "be *allwayes* furnished" and "*at all times* be furnished" with firearms and ammunition "in readiness", they had to have them constantly at hand, close by, or available through their own efforts, not just when public officials might distribute the equipment from governmental arsenals as the men appeared for training or musters.[448] Not surprisingly, either, no statute imposed any such requirement of public storage or control on private arms acquired for use other than in the Militia.

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[448] *See also* the *post*-constitutional case from Massachusetts, *Commonwealth* v. *Annis*, 9 Mass. 31 (1812), dealing with this question under *An Act more effectually to provide for the National Defence by establishing an Uniform Militia throughout the United States*, Act of 8 May 1792, CHAP. XXXIII, § 1, 1 Stat. 271, 271; *and An Act in addition to an act, intituled "An act more effectually to provide for the National defence, by establishing an uniform Militia throughout the United States"*, Act of 2 March 1803, CHAP. XV, § 2, 2 Stat. 207, 207.

3. To have their firearms and ammunition close at hand, under their own control, was a practical necessity, because Militiamen were required to appear for training and service in the field completely equipped in every particular:

> • [1640] "[A]ll Men allowed and assigned to beare armes, shall make *their personall appearance completely armed with Muskett and all its furniture* * * * on such dayes as they are appointed to Traine."{EN-197}
>
> • [1643] "[E]very man *do come armed* unto the [Town] meeting upon every sixth day."{EN-198}
>
> • [1664] "[T]he people listed to trayne" are "all * * * required * * * *to appeare in armes, compleat*[.]"{EN-199}
>
> • [1677] "[T]he * * * inhabitants * * * are * * * strictly required and commanded *to make their personall appearance compleat in their armes*[.]"{EN-200}
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> • [1699, 1701, and 1705] Every "person * * * listed" in the Militia must "*appear complete in arms* * * * with a good or sufficient muskett or fuse, and sword or bagganett, cotouch box or bandaleers, with twelve bullets, fit for his piece, half a pound of powder, six good flints".{EN-201}
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> • [1718, 1730, and 1744] "[E]very Enlisted Person [in the Militia]" must "*make his Personal appearance Accoutred*" with "one good Musket, or Fuzee * * * also one pound of good Gunpowder, thirty Bullets, fit for his Gun, six good Flints, fit for Service; one good Sword, or Baionet, a Cartouch Box, ready filled with Cartriges of Gunpowder and Bullets".{EN-202}
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> • [1766] "[E]very enlisted Person [in the Militia]" shall "*make his personal appearance, accoutred*" with "One good Musket or Fuzee * * * also one Pound of good Gun-Powder, Thirty Bullets fit for his Gun, Six good Flints, One good Sword or Bayonet, a Cartouch Box, ready filled with Cartridges of Powder and Ball".{EN-203}
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> • [1777] "[E]ach and every person by law obliged to bear arms * * * , when duly notified, and called out to duty, shall * * * *appear in person, completely equipped with arms and accoutrements*[.]"{EN-204}
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> • [1779] "[I]n Cases of general Alarm" every "Officer, non-commissioned Officer or Private [of the Militia], shall * * * *appear*[ ] *at the Alarm-Post* * * * *armed and accoutred*", or "shall * * * *appear*[ ], *armed, accoutred, and provided* * * * *at the Time and Place of Rendezvous*".{EN-205}
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> • [1781] "[E]very Person, liable by Law to do military Duty * * * *shall* * * * *make his personal Appearance when duly warned, accoutred*" with "a good Gun, being his own Property, * * * a Bayonet * * * , a Ram-Rod * * * , a Wormer * * * , a Priming-Wire * * * , Three good Flints".{EN-206}

These requirements that members of the Militia should appear for duty completely equipped with their own firearms, ammunition, and accoutrements presumed that they already possessed all those things in their own homes, from whence they would depart to make their appearances. For no Rhode Island Militia statute in the *pre*-constitutional era ever: (i) directed all members of the Militia to store or secure their firearms, ammunition, and accoutrements in public arsenals or magazines; (ii) ordered them to repair to public arsenals or magazines to obtain such equipment when necessary for Militia service; (iii) fined or otherwise punished them for not doing so; or (iv) appointed and defined the powers of such public officials as would have been required to administer such a system throughout the Colony.

4. If members of the Militia had not kept their own firearms, ammunition, and accoutrements in their own homes, Rhode Island would have been patently unjust to fine them, as she did, for reporting to Militia service without that equipment.[449] For had their firearms and ammunition instead been secured in public armories or magazines, to have been made available to them by public officials only if and when needed, and thereafter to have been surrendered again to governmental storage and control, *those officials* should have been responsible for insuring that the equipment was fully distributed in good time, and thereafter recovered and secured—and themselves should have been fined or otherwise punished for any defaults or delays in the process, except where refractory Militiamen simply refused to coöperate.

5. Moreover, had Militiamen not kept their own firearms, ammunition, and accoutrements in their own personal possession, there would have been no point whatsoever to Rhode Island's requiring inspections of the men's homes in order to determine whether the statutorily mandated equipment was being maintained there in proper amounts and in good order; and no justice—or even any sense at all—in Rhode Island's fining individuals discovered to be in violation of the regulations.[450] Instead, inspections should have been made of the public arsenals and magazines, and fines for defaults levied against the individuals the government put in charge of those establishments.

6. Finally, Rhode Islanders' practice during the *pre*-constitutional period of keeping their firearms and ammunition in their own homes, ready at all times for service in the Militia, was not simply an arbitrary policy that might have been different. Rather, the "homeland-security" situation in which the community found itself, and the ultimate political purpose of the Militia, required no less. In Rhode Island and elsewhere, Colonial Americans had to be able to muster the full strength of their communities quickly, in order to repel sudden attacks by hostile Indians,

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[449] *See post*, at 275-284.

[450] *See post*, Chapter 8.

pirates and other criminals, or foreign enemies. And they had to be capable of deterring, or (where deterrence failed) immediately resisting, rogue public officials' usurpation and tyranny—a competence most famously tested, and proven sufficient for the occasion, by the Massachusetts Militia at Lexington and Concord on 19 April 1775.

Given the diffusion of many small settlements throughout the Colonies, Americans could not have achieved the first requisite if their firearms had been locked away in a few central locations. And the second would have been impossible of attainment had those locations, howsoever otherwise convenient, been under the thumbs of the very rogue officials the common people needed to confront in arms. Indeed, the Colonists' wisdom in avoiding a concentration of firearms and ammunition in a few officials' hands strikingly manifested itself in 1774 and 1775, when, seeking to thwart the possibility of armed popular resistance to British plans, General Gage repeatedly attempted to seize or destroy the people's martial supplies in eastern Massachusetts—a typical "gun-control" strategy that at length precipitated the battle of Lexington and Concord.[451]

Revealingly in this regard, the only example of a general governmental restriction over Rhode Islanders' use of their firearms and ammunition, not intended simply to promote public safety,[452] that the author of this study has uncovered aimed at securing individuals' personal possession of sufficient supplies of gunpowder available for immediate use during the unsettled times leading up to the War of Independence. In 1774, the General Assembly required that "there be no firing of cannon upon any public occasion, or of small arms; especially by the militia, or incorporated companies, on days of exercising, excepting only for perfecting themselves as marksmen * * * ; and that it be * * * recommended to all the inhabitants of this colony, that they expend no gun powder for mere sport and diversion, or in pursuit of game".{EN-207} *Not* that they should surrender what they had to public officials, but that they should conserve it *in their own hands for their own Militia use*.

A similar purpose animated a restriction on the distribution of ammunition specifically to the Militia in 1778, when the General Assembly

> resolved, that the colonels of the several regiments of militia within this state, be * * * empowered to receive a sufficient number of cartridges and flints, belonging to this state, * * * to furnish the captains of the several alarm and militia companies * * * which are deficient, so that each soldier

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[451] *See*, *e.g.*, E. Forbes, *Paul Revere*, *ante* note 127, at 229-277; R. Gross, *The Minutemen*, *ante* note 379, at 55, 109-132; *and especially* Stephen P. Halbrook, *The Founders' Second Amendment: Origin of the Right to Bear Arms* (Chicago, Illinois: Ivan R. Dee, Publishers, 2008), Chapters 1 through 3.

[452] On regulations for this purpose, *see post*, at 302-313.

> in their respective companies be supplied with seventeen rounds, and with two flints; the colonels and captains giving and taking receipts for the same.
>
> That the captains of the several companies choose out a sufficient number of cartridges to fit the bore of the gun of each soldier in his company, wrap them up in paper, and mark thereon the names of the persons for whom they are chosen out.
>
> That they keep them in their possession until an alarm, when they are to be delivered to the soldiers; and that the commanding officer of each independent company in this state be empowered in like manner to receive a sufficient number of cartridges and flints for his company, and directed to observe the same order respecting them * * * .
>
> * * * [W]henever the several companies shall be dismissed from the service upon which they shall at any time be called out, the captain * * * of each company shall collect the cartridges which shall not have been expended, and wrap them up, and keep them in manner as above directed; and that return be made to the * * * commanding officer of each regiment, or independent company, of the cartridges * * * expended, and of the occasion, that they may be re-placed.{EN-208}

The evident goal of this statute was not to deny the Militia ammunition, but to ensure a constant supply of it from the public stocks when circumstances had created a great stringency, and "several alarm and militia companies * * * [we]re deficient". Authorizing the Captains to control, monitor the use of, and replenish their Companies' reserves of ammunition—even assigning particular individualized cartridges to particular men—guaranteed that minimally sufficient amounts would be available for all upon an "alarm". In any event, nothing in this statute (or anywhere else in Rhode Island's laws) precluded individual Militiamen from acquiring and maintaining in their personal possession their own supplies of gunpowder and ball, if they could do so.

D. Some Militiamen assisted in obtaining firearms. Rhode Island's *pre*-constitutional Militia statutes not only decreed that every able-bodied free man, rich and poor alike, would be suitably armed, but also assisted impecunious individuals in meeting their obligations. This was only just: For a right in society to invoke the duty of all its members to defend the community implies a corresponding responsibility to provide, where and when just and necessary, the means by which all men can fulfill that duty. So, from the earliest days, the principle was established that "the Towne Councils shall have power to cause those which are defective in armes, to be supplied in an equal way according to Estate and strength".{EN-209} How this was accomplished depended on the situation.

1. Minors, servants, and apprentices. One set of those potentially "defective in armes" consisted of Rhode Islanders' minor sons, servants, and

apprentices, the majority of whom were insufficiently wealthy to purchase firearms, ammunition, and accoutrements with their own funds. Not surprisingly, because Rhode Island required that "parents and masters" must "find armes and amunition * * * for their sones and sarvants * * * which are to be listed, and to traine" in the Militia,{EN-210} she also declared parents and masters liable for any fines their sons, servants, or apprentices incurred if they were found "defective" in the performance of their Militia duties:[453]

> • [1665] "[F]or each defecte in not duely attending the trainings, each one * * * deficient, shall for every dayes defect, pay three shillings fine, to be levied by distraint on the partyes goods, or on the goods of the master, or mistress, or parents of such sones or sarvents as are defective[.]"{EN-211}
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> • [1677] "[I]f any person or persons to be" fined "be a son or servant, that have noe visible estate of their owne, * * * then the * * * fines and forfeitures shall be levied and distrained upon the estate of their respective masters, parents or other persons under whose service, command or tuition they are."{EN-212}
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> • [1718, 1730, and 1744] "[E]very Enlisted Person, that shall Refuse or Neglect to make his Personal appearance Accoutred as [required] * * * on * * * Training Days * * * shall for every such Default pay * * * *Three Shillings* in Mony * * * & if such defaulter shall Refuse so to do, * * * the Captain * * * shall Grant forth his Warrant * * * to take and distrain so much of the Personal Estate of such delinquent Person, or such as have them in Tuition,[454] as near as conveniently may be will pay his Fine or Fines * * * ; and such Estate that shall be taken by distress, shall be duly Apprized by Two Free-Holders * * * , and the Captain is * * * Impowered to Administer the same, and the overplus if any there be, to be returned to the owner thereof, and if he shall refuse to receive the same, then the Clerk shall give him Credit * * * which shall be accounted for out of his next Fine that shall become due[.]"{EN-213}
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> • [1756] "[W]hen any Person under the Age of twenty-one Years, shall neglect or refuse to pay his Fine for Neglect of military Duty, the Clerk shall make Distress upon the Goods and Chattels of the Parents or Masters of such Persons[.]"{EN-214}

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[453] In what follows, the term "distress" refers to the legal procedure whereby personal property is seized to enforce the payment of a debt—in this context, fines or taxes. The verb "distrain" and the noun "distraint" refer to the act of making a distress. *See*, *e.g.*, W. Blackstone, *Commentaries on the Laws of England*, *ante* note 142, Volume 3, at 6-15.

[454] "Tuition" means "[g]uardianship; superintendent care", particularly "over a young person". S. Johnson, *Dictionary, ante* note 50, in both the First (1755) and the Fourth (1773) Editions; N. Webster, *An American Dictionary, ante* note 15, definition 1; *Webster's Revised Unabridged Dictionary, ante* note 11, definition 1. Compare the use of this term in 1718 and thereafter to its use in 1677.

> • [1766] "[I]n Case such Delinquent be under the Age of Twenty-one Years, the Clerk shall make Distress upon the Goods and Chattels of the Parents or Masters of such Delinquent Persons[.]"{EN-215}
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> • [1781] "[T]he Sergeant * * * shall take and distrain sufficient of the personal Estate of the Delinquent, if to be found, to satisfy and pay his Fine or Fines, having first required him to pay the same * * * : [and t]hat in case such Delinquent be under the Age of Twenty-one Years, the Sergeant shall make Distress upon the Goods and Chattels of the Parent or Master of such delinquent Person * * * : And that all Goods taken by Distraint shall be immediately advertised for Sale, and if not redeemed in Ten Days, shall be sold by such Sergeant at public Vendue, to pay such Fine or Fines * * * ; and the Overplus, if any shall remain, shall be returned to the Owner[.]"{EN-216}

This allocation of the ultimate costs of their dependents' defaults created a strong incentive for parents, masters, and mistresses to supply their sons, servants, and apprentices with the requisite firearms and ammunition in the first place (which presumably most of them tried to do). This requirement to provide firearms was one of the few Militia duties to which women—as widows with minor sons, or widows or spinsters with male servants, or perhaps widows or unmarried women managing an enterprise left to them by their husbands or fathers—were directly subject. But it evidenced that *even women, to the degree consistent with the* mores *of the times, were expected to participate in their community's defense through the Militia.*

2. The poor. Most of those likely to have proven "defective in armes" were numbered among the independent adult poor. Rhode Island employed several approaches to deal with this group.

a. Sometimes, the government granted pay, bounties, or insurance against loss to individuals who acquired or supplied their own firearms for Militia or other military service:

> • [1665] "The Assembly taking into consideration the great defect in training, and * * * complaining of the great inequality, in that the poorest being vnable to spare wherewith to maintaine armes and amunition, * * * yett are forced by the law to beare armes as well as the most able", "for the incorradgement of the meaner [that is, poorer] sort, there shall be alowed yearly nine shillings in currant pay to or for each soldiare listed in the traine band * * * for the repaireing of armes * * * and * * * nine shillings * * * to such parents and masters as find armes and amunition (as they must doe) for their sones and sarvants that are listable, which are to be listed, and to traine; as alsoe to such householders or other men that find themselves armes and traine in their owne persones"; "and for the raysing the aforesaid allowance * * * each towne shall * * * make a rate [that is, a tax] vpon each one rateable * * * with as much equality as may be, according to each ones estate[.]"{EN-217}

> • [1755] "[I]f the Arms brought by [the] Officers into Service in the Army, shall be damnified afterwards, or lost, the same shall be made good by the Colony, according to the Value thereof. * * * Every common Soldier [shall receive] *Sixteen Pounds per* Month, and *Twenty Pounds* Bounty, if furnished with a good Fire-lock; but no more than *Fifteen Pounds* without: That if the Arms brought by any Soldier into the Army, shall be damnified afterwards, or lost, the same shall be made good by the Colony, according to the Value thereof."{EN-218}
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> • [1776] "[O]n any future alarm, notice or warning being given to the militia, they forthwith repair * * * to the place threatened to be invaded, in order to repel the enemy"; and "every one of the militia appearing properly accoutred, with a good fire-lock, bayonet, cartridge-box, &c. * * * shall be entitled to receive pay".{EN-219}
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> • [1776] For "one regiment * * * raised from the militia of this state * * * the committee of safety * * * are hereby appointed to equip * * * each and every soldier * * * with * * * one good fire-arm, with a bayonet and cartridge-box; to be returned * * * at the expiration of the time of enlistment"; and "for as many * * * fire-arms, with a bayonet and cartridge-box, as cannot readily be furnished by the aforesaid committee, * * * sums [of money] shall be paid to each and every soldier who shall furnish himself with them".{EN-220}
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> • [1780] "[I]n order to encourage each Soldier who shall inlist into the Service * * * to provide * * * Articles of Accoutrements for themselves, there shall be allowed unto each of the said Soldiers who shall furnish himself with a good Musket, Ram-Rod, Bayonet * * * *Eighty Continental Dollars*, * * * and for each Cartouch-Box so furnished, *Twenty Dollars*, in the like Money; which shall be paid * * * out of the General-Treasury[.]"{EN-221}

Some of these benefits were available, of course, not simply to individuals of limited financial means. But without them, in many cases the poor could not have served.

b. Usually, though, in *pre-*constitutional times Rhode Island herself provided her poor citizens with the firearms and ammunition requisite for their service in her Militia.

(1) One method was to supply impecunious members of the Militia with equipment the purchase of which was subsidized by funds the Militia itself amassed from fines statutorily imposed on defaulters:

> • [1647] "[I]f any shall come defective in his Armes or furniture [to Militia service], he shall forfeit and pay y^{e} sum of twelve pence"; and "all the fines and forfeitures shall be employed to the use and service of the [Train] Band".{EN-222}

• [1650] "[Certain named individuals], all excuses sett aparte, shall mende and make all lockes, stockes and pieces that by order from the warden of each Towne shall be from any of the inhabitants thearof presented to them, for just and suitable satisfaction in hand payed, without delay, under the penaltie of ten pounds, to be levied * * * to the use of the sayd Towne's militia"; and "all men that have gunns and pieces to mend, and have need to have them mended for their present defence, shall * * * carrie those pieces to mende, upon paine of forfeiting ten shillings a piece, which shall be levied * * * to the use of the * * * Towne's militia."{EN-223}

• [1658]"[T]he Town councill have power * * * to lay out * * * what fines are taken for men's defect in traininge for such as they judge not able to buy armes[.]"{EN-224}

• [1676] "[A]ll fines or forfeitures of the Traine Bands in each towne are * * * to be returned to the Treasurer of said towne by him to ke kept apart, that it may be for disbursements to furnish the said Traine Band with colors, drums, and other publicke instruments; and what may be more, is to be kept for a magazine."{EN-225}

• [1680] "[F]ines * * * relating to the millitary exercise, shall be returned to the Clerke of every * * * Traine Band, and to be disposed of * * * for the use of the * * * Company[.]"{EN-226}

• [1699, 1701, and 1705] "[A]ll fines and forfeitures that shall arise upon persons neglecting in training and watching, shall be disposed of by the commissioned officers of each respective company, to provide drums, colors, ammunition, &c."{EN-227}

• [1718, 1730, and 1744] "[A]ll such Fines taken * * * shall be laid out to and for the Use of such Company * * * for the defraying their Incident Charge[.]"{EN-228}

• [1755] "[A]ll the * * * Fines [shall] be lodged in the Town Treasury * * * to purchase Arms and Ammunition * * * to be used by such Soldiers as are not able to provide for themselves, after all Military Accoutrements * * * for the Company are purchased[.]"{EN-229}

• [1766] "[T]he * * * Fines * * * shall be paid * * * into the Town-Treasury * * * to purchase Arms and Ammunition * * * for the use of such Town to be used by such Soldiers as are not able to provide for themselves, after all military Accoutrements * * * for the Company are purchased[.]"{EN-230}

• [1779] "[A]ll Fines * * * [shall] be deposited in the Town-Treasurer's Office * * * to be appropriated for purchasing Arms and Ammunition for those who shall be unable to provide for themselves, [after deducting certain other costs.]"{EN-231}

Because the requirements of Rhode Island's Militia laws were largely enforced by fines,[455] the draftsmen of these statutes presumably expected not insubstantial revenue from that source. Indeed, in principle under this system, Rhode Island's Militia might have been self-financing with respect to the acquisition of firearms, ammunition, and necessary accoutrements—being supplied by: (i) the private purchases its richer members made with their own money; and (ii) the public provision of equipment to the poorer ones that a properly adjusted schedule of fines made possible.

In any event, such a system would probably be far more workable today than it ever was then. With a population of able-bodied adult citizens (both male and female) orders of magnitude greater than in *pre-*constitutional times, contemporary Rhode Island (or any other State) could easily maintain an active Militia sufficient for most purposes of "homeland security", even while exempting large numbers of her citizens from regular duties beyond some fundamental requirements of basic training and readiness. If all of the latter individuals were assessed modest fees in exchange for their exemptions (as most of them would doubtlessly be content to pay), the Militia could become financially self-supporting. Thus free of financial control by or pressure from any other department of government, or from private special-interest groups, the Militia could provide a truly *independent* "check and balance" against rogue public officials and the people who manipulate them from behind the political scenery.

(2) Another method whereby Rhode Island in *pre-*constitutional times supplied the poor members of her Militia with the necessary firearms and ammunition was for her Colonial (and later State) and Local governments to procure and when necessary distribute that equipment directly:

> • [1658] "[C]oncerninge * * * supplyeinge such as are not able to gett armes, * * * the Town councill have power to make a rate [that is, to tax] * * * for such as they judge not able to buy armes."{EN-232}
>
> • [1705] "[A]ll Indian men servants and others of [Block] Island, shall * * * be by the inhabitants and authority of said Island carefully provided for with arms and ammunition for [Militia] service out of the rates [that is, taxes] by the Collony's allowance to said inhabitants * * * for all such uses for their defence."{EN-233}
>
> • [1776] The "town councils [shall] give in a list of all persons in their towns * * * obliged by law to equip themselves with a good fire-arm, bayonet and cartouch box, and who are not able to purchase the same"; and each "town shall immediately make order for the supplying such persons with a good fire-arm, bayonet and cartouch box, at such town's

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[455] *See post*, Chapter 12.

expense, to be lodged with the [Militia] captains of such district wherein such poor persons belong, for their use upon any proper occasion".{EN-234}

• [1776] "Two Thousand Stand of good Fire-Arms, with Bayonets, Iron Ramrods, and Cartouch-Boxes, [shall] be purchased for the Use of the Colony * * * , and distributed to each Town, in Proportion to the Number of Polls, upon the Alarm List"; "each Town shall * * * appoint some proper Person or Persons to receive and take the proper Care of them, and see that they are constantly in Order, and fit for Service"; and "the Town-Council * * * shall * * * determine what Persons * * * shall have the Benefit and Use of the Arms provided, * * * and be exempted from providing themselves as the Law requires".{EN-235}

• [1776] "[T]he Town-Councils * * * [shall] furnish such Persons as they shall certify to be unable to furnish themselves, with Arms * * * and Accoutrements, as by Law required; and that the same be paid out of the General Treasury."{EN-236}

• [1777] "That * * * thirty-two Small-Arms, for the Town of *Exeter*, thirty Small-Arms * * * for the Town of *South-Kingstown*, and twenty Small-Arms for the Town of *East-Greenwich* * * * [be delivered] for the Use of * * * the Poor", "[a]nd * * * twenty-five Small-Arms be delivered to the Poor of the Town of *North-Kingstown*".{EN-237}

• [1777] "*Daniel Mowry* * * * presented * * * an Account * * * for twenty-six Guns and Bayonets, purchased by Order of the Town-Council of *Smithfield*, for the poor Inhabitants * * * the Amount thereof * * * be paid * * * out of the General Treasury."{EN-238}

• [1777] "[T]he Small-Arms * * * purchased by this State, for such Persons as should be adjudged unable to furnish themselves therewith, [shall] be delivered to the Committees of Safety[.]"{EN-239}

• [1777] "[I]f any * * * who have been adjudged by the town council * * * unable to furnish themselves [with arms] * * * shall appear not duly equipped, * * * [the] town councils * * * are hereby empowered and directed to furnish them with arms and accoutrements[.]"{EN-240}

As these statutes evidence, sometimes the arms were furnished to individuals directly, and at other times they were "lodged with the [Militia] captains" or some other "proper Person or Persons to receive and take the proper Care of them" until their ultimate users actually needed them.

(3) Yet another method was for Local governments to provide firearms in payment for the use of which the working poor would have their wages docked. For example, a statute of 1781 provided that

> if [an individual] shall not be of sufficient Ability, or shall otherwise neglect to do it, the Town-Council * * * are directed to furnish him with

> a Gun, Bayonet, Cartouch-Box * * * at the Expence of the said Town and receive therefor, out of the Wages of such delinquent Person, if of sufficient Ability to furnish himself * * * , *Twelve Shillings*, in Gold or Silver * * * ; the Persons receiving the said Accoutrements to return them, or account therefor with the Town-Council who shall furnish the same.{EN-241}

c. Importantly, that Local governments supplied poor individuals with firearms was no denial of the latter's personal duty to provide themselves with arms, but rather a merely temporary exemption from that duty while their straitened financial circumstances rendered them incapable of fulfilling it. Moreover, only in some of these situations were the arms Local governments supplied not maintained in the poor persons' private possession. And these exceptions to the general rule doubtlessly derived from a particularized practical concern that desperately poor men would not have places in which to store their firearms securely, or might be tempted to sell those firearms to make ends meet, rather than from some notion that firearms should be under governmental control as a matter of principle. Indeed, in 1777 Rhode Island's General Assembly found that "it frequently happens that the Inhabitants and others, in this State, being instigated with a sordid selfish View of making Gain and Advantage to themselves, do purchase and receive of the Soldiery * * * their Guns * * * which is of the most pernicious Consequence, and ought to be speedily prevented", and mandated "[t]hat if any Person or Persons whoever shall purchase, or take in Pledge, of any Soldier or Soldiers * * * in this State, any * * * Guns, [or] Bayonets," the offender "shall * * * forfeit and pay as a Fine * * * six-fold the Value * * * of such Article * * * or shall suffer * * * corporal Punishment".{EN-242}

E. Firearms supplied to Militiamen serving as regular "Troops". Finally, when raising detachments of soldiers from amongst the men in her Militia for other duty in various military campaigns, Rhode Island supplied firearms, ammunition, and accoutrements to everyone involved. These were the types of "Troops" that the Constitution now prohibits the States from "keep[ing] * * * in time of Peace" "without the Consent of Congress".[456] For, distinguishably, a State *must* maintain her Militia at all times, with or without "the Consent of Congress".

1. Thus, when men were drafted from the Militia during the French and Indian War in 1757, Rhode Island's Towns were "empowered to procure, at the expense of the colony, half a pound of gun powder, twenty bullets, six flints * * * for each soldier * * * ; and * * * to hire horses * * * and to procure arms, and all other necessaries, in the like manner"—and "each and every commissioned officer,

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[456] U.S. Const. art. I, § 10, cl. 3.

and soldier, who has a gun fit for service, shall make use of the same; and those who have none, shall be provided for".{EN-243}

Similarly, when regiments were raised from the Militia for service in the War of Independence:

> • [1776] "[T]he committee of safety * * * equip[ped] and furnish[ed] each and every soldier * * * with * * * one good fire-arm, with a bayonet and cartridge-box; to be returned * * * at the expiration of the time of enlistment[.]"{EN-244}
>
> • [1780] "WHEREAS there are not within the public Stores of this State, a sufficient Number of Guns * * * to accoutre the Soldiers ordered * * * to be raised for Three Months * * * , for their immediate Service:
>
> "*BE it therefore Enacted* * * * , That each and every Town within this State shall provide and furnish for each and every Soldier which they are ordered to raise * * * One good Musket, with a good Ram-Rod, One suitable Bayonet, * * * One Cartouch-Box * * * ."{EN-245}
>
> • [1780] "WHEREAS the Inhabitants of *Rhode-Island* and *Jamestown* have been deprived of their Arms by the Enemy, and are now totally destitute of the same: *It is therefore Voted* * * * That Major General *Heath* be * * * requested, to furnish the Men apportioned and to be raised by the several Towns on the Islands of *Rhode-Island* and *Jamestown*, to do Duty for the Term of Three Months, with Fire-Arms from the Continental Store; and that this State will cause the same to be replaced.
>
> "*It is further Voted* * * * That the said Arms be repaired at the Expence of this State[.]"{EN-246}

Presumably, what Rhode Island did for these "Troops" she always could also have, and sometimes did do, for her Militia.

2. Especially instructive here is the contrast between Rhode Island's *pre*-constitutional Militia and her regular "Troops" with respect to the permanent personal possession of arms that came into the men's hands for service. Militiamen had a statutory duty themselves to obtain and thereafter to retain personal possession (and usually ownership, too) of firearms and related accoutrements, whereas regular "Troops" did not.

a. For a stark example of the difference, in 1757 the General Assembly observed that "this colony hath been greatly injured by the troops in former campaigns, embezzling and destroying the[ ] arms" that had been supplied to them by the government; and "for preventing" this misbehavior in the future it decreed that

> the committee of war be * * * strictly enjoined to require an account of every soldier returning from the camp, without his arms, what became of them; and if the soldier or soldiers so returning, either by furlough or

> discharged, do not bring a certificate from the captain of the company unto which he or they belonged, that he or they have delivered up his or their arms in good order unto * * * the person or persons that may be appointed for that purpose, before his or their leaving the camp, that the said committee of war deduct out of the wages of such soldier or soldiers, the full value of such arms as he or they were furnished with; * * * and that the * * * commanding officer inform the troops of the contents of this act.{EN-247}

Self-evidently, most Militiamen could not possibly have "embezzl[ed] * * * their arms" at any time, because they owned them in the first place; and next to no Militiamen, serving as such, were ever required to "deliver[ ] up * * * their arms in good order" (or at all) to public officials when returning from some service in the field, because public officials had no possible claim to possession of those arms.

The dichotomy between Militia and regular "Troops" with respect to permanent personal possession of firearms appears perhaps most clearly in a statute enacted in 1776, in which the General Assembly "enacted, that one regiment be * * * raised from the militia of this state", to "be composed of six men as soldiers, of every hundred of the male inhabitants of sixteen years of age, and upwards, as last estimated within this state", who would voluntarily enlist and "continue in the service of this state three months from the time of their enlistment, unless dismissed before that time by th[e] Assembly". The statute specifically provided that

> the committee of safety * * * are * * * appointed to equip and furnish each and every soldier, who shall enlist, * * * with * * * one good fire-arm, with a bayonet and cartridge-box; *to be returned to such of the said committee of safety who furnished the same, at the expiration of the time of enlistment of said soldiers*.
>
> And * * * for as many * * * fire-arms, with a bayonet and cartridge-box, as cannot readily be furnished by the aforesaid committee, the following sums shall be paid to each and every soldier who shall furnish himself with them * * * for the use, thereof, to wit:
>
> * * * twelve shillings for a fire-arm and bayonet; and two shillings and sixpence, for a cartridge-box.
>
> * * * [T]he committee of safety * * * are hereby directed to receive the fire-arms in the town of Newport, belonging to this state, in order to equip the soldiers[.]{EN-248}

Thus, although Militiamen were recruited for this service, upon enlistment they became regular "Troops" for up to three months. As such, they all were entitled to the loan of necessary equipment, including firearms and accoutrements, drawn from public stocks (in this case, the Town of Newport)—but upon the expiry of their enlistments they were, quite reasonably, required to turn in that equipment.

As for the Militiamen who supplied their own firearms and accoutrements upon enlistment, the payment the statute mandated was for the temporary hire, not for the sale, of that equipment; for the statute did not require that such men should surrender that equipment to the Committee of Safety when their service ended. This, of course, was neither a novel procedure at the time, nor one which was not employed thereafter. Rhode Island often offered financial incentives from the public treasury in order to encourage her citizens to supply their own firearms:

> • [1755] "[I]f the Arms brought by [the] Officers into Service in the Army, shall be damnified afterwards, or lost, the same shall be made good by the Colony, according to the Value thereof. * * * Every common Soldier [shall receive] *Sixteen Pounds per* Month, and *Twenty Pounds* Bounty, if furnished with a good Fire-lock; but no more than *Fifteen Pounds* without: That if the Arms brought by any Soldier into the Army, shall be damnified afterwards, or lost, the same shall be made good by the Colony, according to the Value thereof."{EN-249}
>
> • [1775] "[E]ach able bodied, effective man, who shall enlist into the service, and find himself a small arm, bayonet and other accoutrements, shall be * * * paid forty shillings, as a bounty; and each able bodied, effective man, not finding himself a small arm, bayonet, and other accoutrements, shall receive twenty-four shillings[.]"{EN-250}
>
> • [1775] "[E]ach able bodied man, who shall enlist into the service, and find himself a small arm, bayonet and other accoutrements, shall be allowed and paid sixteen shillings, therefor."{EN-251}
>
> • [1776] "[E]ach able-bodied, effective man, who shall enlist into the * * * regiment, and find himself a small-arm, bayonet and other accoutrements, shall be allowed sixteen shillings, therefor[.]"{EN-252}
>
> • [1776] "[T]hat for as many * * * fire-arms, with a bayonet and cartridge-box, as cannot readily be furnished by the * * * committee [of safety], the following sums shall be paid to each and every soldier who shall furnish himself with them * * * , to wit: * * * twelve shillings for a fire-arm and bayonet, and two shillings and sixpence, for a cartridge-box[.]"{EN-253}
>
> • [1776] "[I]f any man, who shall enlist himself, * * * shall furnish himself with a gun, bayonet, cartouch-box * * * , he shall be allowed * * * [e]ighteen shillings[.]"{EN-254}
>
> • [1780] "[T]o encourage each Soldier who shall inlist into the Service * * * to provide * * * for themselves, there shall be allowed unto each * * * who shall furnish himself with a good Musket, Ram-Rod, Bayonet * * * *Eighty Continental Dollars* * * * , and for each Cartouch-Box * * * *Twenty Dollars* * * * out of the General-Treasury[.]"{EN-255}

> • [1781] "[I]n case any * * * men shall furnish themselves with a gun, bayonet and cartouch-box, they shall be allowed a further sum of twelve shillings, silver money, each."{EN-256}

b. Other statutes for raising "Troops" (as opposed to deploying Militiamen) also made it clear that the men could not retain possession of, or otherwise treat as their own personal property, the public firearms supplied to them, after their period of service ended. For one example, in 1777 the General Assembly mandated that

> two battalions, each consisting of six hundred men, * * * also a regiment of artillery, consisting of three hundred men, * * * be immediately raised for the defence of the United States in general, and of this state in particular * * * .
>
> * * * * *
>
> " * * * [E]ach able-bodied man, who shall enlist himself * * * shall * * * be furnished with a * * * gun, bayonet, cartouch-box * * * , *to be returned or accounted for, at the expiration of his service* * * * .{EN-257}

As this statute—unlike other enactments of its type{EN-258}—made no provision for the recruits to supply their own firearms and accountrements, the arms with which the men were "furnished" had to be *public* arms merely loaned to them for the duration of their service.

Similarly, in 1779 a statue provided that,

> WHEREAS our Enemies have invaded this State with a powerful Armament, and are now in Possession of the Island of *Rhode-Island*, whereby we are exposed to still more hostile Attacks:
>
> *BE it therefore Enacted* * * * , That Two Battalions of Infantry, each consisting of Five Hundred and Eighty-five Men * * * , and a Regiment of Artillery, consisting of Three Hundred and Thirty Men * * * , be immediately raised for the Defence of the United States in general, and of this State in particular * * * .
>
> * * * * *
>
> " * * * That each able-bodied Man who shall enlist * * * shall be furnished with a Gun, Bayonet, Cartouch-Box, and Canteen; ***the Three former to be returned or accounted for at the Expiration of the Service***[.]{EN-259}

c. In 1777, the General Assembly dealt with a more complex situation:

> Whereas, it frequently happens that the inhabitants and others, in this state, being instigated with a sordid, selfish view of making gain and advantage to themselves, do purchase and receive of the soldiery within this state, their guns * * * ; which is of the most pernicious consequence,

> and ought to be speedily prevented; in order, therefore, to remedy such mal-practices for the future,—
>
> * * * [I]f any person or persons whoever, shall purchase, or take in pledge, of any soldier or soldiers belonging or serving in this state, any * * * guns, bayonets * * * he, she or they, so offending, shall, upon conviction thereof, forfeit and pay as a fine therefor, to and for the use of this state, six fold the value or price of such article by him or them so received; or shall suffer such corporal punishment as the court * * * shall adjudge adequate to such offence * * * .{EN-260}

The peculiar aspect of this statute is that it penalized only the individuals who "purchase[d], or t[ook] in pledge, of any soldier * * * any guns" or "bayonets", and not the "soldiers" themselves who sold or pledged those items. Plainly enough, if a "soldier" sold or pledged the *public* arms with which he had been entrusted, he was just as blameworthy as the individual to whom he transferred those items. In the common usage of the time, however, the noun "soldiers" could have described *both* the members of Rhode Island's Militia *and* the "Troops" in her regular armed forces. In the case of most Militiamen, the firearms and accoutrements they brought to their service were the men's private property, which their owners were perfectly entitled in principle to sell or to give in pledge as they saw fit. (This was also true under various statutes that allowed men who enlisted in the regular troops to supply their own arms.) To be sure, if "soldiers" who had initially supplied their own arms later disposed of that equipment while on duty, they might then have been fined or otherwise penalized under Militia or other military law for being disarmed—but, arguably, not for selling or pledging their very own property. And certainly no Militiaman not actually on duty could have been punished simply for selling or pledging his own firearm or bayonet, as long as he could have arranged to have substitutes at hand when called into the field or subjected to an inspection. So, perhaps because the subset of "soldiers" who supplied their own arms could not fairly be prosecuted simply for disposing of their personal property, but the General Assembly desired to suppress root and branch *any and all* trade in arms from *all* "soldiers belonging or serving in this state" to "any [other] person or persons whoever", the most politic way to shut down the traffic was to penalize the recipients of the arms. That it would have been far easier for the authorities to have apprehended in camp or on the muster-field the "soldiers" who had disposed of their "guns" or "bayonets"—as opposed to the "persons" who had "purchase[d]" those items, or had "take[n them] in pledge", and thereafter might have absconded from the State—renders this explanation conclusive. Thus, in this statute, the draftsmen implicitly recognized, by effectively working around, the difference between Militiamen—who usually came to their service possessed of their very own firearms and accoutrements; and regular "Troops"—who, even if they were Militiamen

before their enlistments, usually served in the regular forces with arms provided for them from public stocks.

In sum, Rhode Island's *pre*-constitutional laws aimed at *an universality of armament among her able-bodied free adult male inhabitants, either through their own efforts or with the assistance of public institutions*. In those days, "gun control" meant, not keeping firearms and ammunition away from as many private citizens as legislators might contrive to disarm, but instead seeing to it that as many citizens as possible possessed their own arms at all times.

The lesson from this history for revitalized "Militia of the several States" today is obvious. In most contexts, the General Government has no obligation to fund activities even if they involve individuals' exercise of so-called "fundamental rights".[457] But, with respect to "the Militia of the several States", Congress has the affirmative duty "[t]o provide for * * * arming" them,[458] "arming" *always* being "*necessary* and proper"[459] because "[a] well regulated Militia" is "*necessary* to the security of a free State".[460] This could require expenditures of public moneys where private moneys did not suffice (as with the poor), or perhaps in all cases, in order to *ensure* that *every* Militiaman would be *properly* armed *at all times*. Congress could achieve this end: (i) by requiring those individuals with sufficient personal financial resources to buy their own firearms in the free market; and (ii) by subsidizing others with tax credits, public grants, or even outright provision of the equipment at public expense. The second course would be a legitimate exercise of Congress's power "[t]o lay and collect Taxes * * * to pay the Debts and provide for the common Defence * * * of the United States"[461]—for the Militia are plainly central to "the common *Defence*", being "necessary to the *security* of a free State". And the discrimination between the rich and the poor (to the favor of the poor) would be justified on the ground that such discrimination was always acceptable within "well regulated Militia" during the *pre*-constitutional era, and therefore constitutes part of the very definition of "well regulated" today.[462]

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[457] *See, e.g.*, Regan v. Taxation With Representation of Washington, 461 U.S. 540, 549-550 (1983); Lyng v. Automobile Workers, 485 U.S. 360, 368 (1988).

[458] U.S. Const. art. I, § 8, cl. 16. *See ante,* at 50-54.

[459] U.S. Const. art. I, § 8, cl. 18 (emphasis supplied).

[460] U.S. Const. amend. II (emphasis supplied). *See ante*, at 50-54.

[461] U.S. Const. art. I, § 8, cl. 1.

[462] To be sure, "[u]nlike the Fourteenth Amendment, the Fifth Amendment contains no equal protection clause" and to that degree "provides no guaranty against discriminatory legislation by Congress." Detroit Bank v. United States, 317 U.S. 329, 337 (1943). That is, "no [*explicit*] guaranty"—for "discrimination, if gross enough, is equivalent to confiscation and [therefore] subject under the Fifth Amendment to * * * annulment". Steward Machine Company v. Davis, 301 U.S. 548, 585 (1937). A subsidy to insure that everyone within the Militia too poor to buy his own arms is nonetheless properly equipped cannot constitute a "gross" discrimination that "is equivalent to confiscation" of rich individuals' property, however. *See* U.S. Const. art. I, § 8, cls. 1 and 16.

CHAPTER SEVEN

Rhode Island aimed at having her *pre-*constitutional Militia provided with the types of firearms, ammunition, and accoutrements that were equivalent to the standard equipment employed in the regular Armed Forces of that day.

Because her *pre-*constitutional Militia was no merely theoretical establishment—but instead a permanently standing and fully equipped force ready to deploy immediately a danger threatened the community—Rhode Island required every eligible male to possess, not just any firearms, but firearms and ammunition *suitable specifically for Militia service* at that time.

A. During the Colonial era, firearms steadily progressed in type from "musket and match" through a variety of "firelocks", which included the "matchlock", "wheel lock", "snaphaunce", and "flintlock".[463] Once perfected, the flintlock remained the standard action for almost all firearms in regular use from the late 1600s until the introduction of the percussion cap in the early 1800s.[464] Whatever the fluidity of the technological development of firearms during that period, though, Rhode Island's inflexible goal was for her Militia to be, man for man, not only absolutely better armed than such irregular marauders as hostile Indians, but also reasonably as well equipped as any European regular armed forces Rhode Islanders might be required to support or to engage in conventional warfare. In practice, this meant firearms, ammunition, and accoutrements equivalent to the types then commonly in day-to-day use in the British Army, not simply arms that sufficed only for individual self-defense, let alone solely for hunting, target shooting, or other sport. Thus—

> • [1647] "[E]very Inhabitant of the Island [of Rhode Island] above sixteen or under sixty yeares of age, shall alwayes be provided of a Musket, one pound of powder, twenty bullets, and two fadom of Match, with sword, rest, bandaleers all completely furnished."{EN-261}

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[463] For definitions of these and other material terms, *see ante*, at 140-141 note 428.

[464] For an overview of the types, operations, and capabilities of the firearms generally employed during the latter part of the Eighteenth Century, *see*, e.g., Bill Ahearn, *Flintlock Muskets in the American Revolution and Other Colonial Wars* (Lincoln, Rhode Island: Andrew Mowbray Incorporated, Publishers, 2005); Michael Stephenson, *Patriot Battles: How the War of Independence Was Fought* (New York, New York: HarperCollins Publishers, 2007), at 119-145.

• [1658] "And whereas, it was formerly ordered, [that] armes [should] bee muskett and match. Now it is declared, that both it and fyrelockes and snaphaunces with powder hornes bee alowed; and if any bee complayned of for defective armes, the Town Counsill in each towne have power to judge off, and order the armes to bee such as they may finde will fully answer the meaninge of the lawe concerninge suffitiant armes[.]"{EN-262}

• [1677] Every inhabitant eligible for the Militia "from the age of sixteen yeares unto the age of sixty yeares" "shall * * * have one good gun or muskitt fit for service, one pound of good powder, and thirty bullets at least".{EN-263}

• [1699, 1701, and 1705] Every member of the Militia shall "appear complete in arms * * * with a good or sufficient muskett or fuse, and sword or bagganett, cotouch box or bandelears, with twelve bullets, fit for his piece, half a pound of powder, six good flints".{EN-264}

• [1718, 1730, and 1744] "[A]ll Male Persons Residing for the space of Three Months within this Colony from the Age of Sixteen, to the Age of Fifty Years" "shall be always provided with one good Musket, or Fuzee, the Barrel whereof not to be less than three foot and an half in length, to the satisfaction of the Commission Officers of the Company; also one pound of good Gunpowder, thirty Bullets, fit for his Gun, six good Flints, fit for Service; one good Sword, or Baionet, a Cartouch Box, ready fitted with Cartriges of Gunpowder and Bullets"; and "every Trooper [in the Horse] shall be always provided with one good serviceable Horse, * * * one Carbine, one pair of good Pistols, one Sword, one pound of Gunpowder, thirty sizeable Bullets, twelve good Flints".{EN-265}

• [1766] "[A]ll male Persons, who have resided for the Space of Three Months in this Colony, from the Age of Sixteen to Fifty" "shall always be provided with One good Musket or Fuzee, the Barrel whereof not to be less than Three Feet and an Half in Length, to the Satisfaction of the Commission Officers, also one Pound of good Gun-Powder, Thirty Bullets fit for his Gun, Six good Flints, One good Sword or Bayonet, a Cartouch Box, ready filled with Cartridges of Powder and Ball".{EN-266}

• [1774] Each member of the Militia "shall * * * be provided with a sufficient Gun or Fuzee * * * [a]nd also * * * a good Bayonet fixed on his Gun".{EN-267}

• [1776] All members of the Militia "are by law obliged to equip themselves with a good fire-arm, bayonet and cartouch box".{EN-268}

• [1776] "[E]very one of the militia appearing properly accoutred, with a good fire-lock, bayonet, cartridge-box, &c. * * * shall be entitled to receive pay."{EN-269}

• [1776] "Persons * * * by Law obliged to equip themselves with a good Fire-Arm, Bayonet and Cartouch-Box * * * do [that is, shall] provide themselves[.]"{EN-270}

• [1778] "[A]ll Persons * * * by Law obliged to equip themselves with a good Fire-Arm, Bayonet and Cartouch-Box * * * do provide themselves therewith * * * , or with a Rifle-Gun and Sword[.]"{EN-271}

• [1779] "[E]ach and every effective Man * * * shall provide, and at all times be furnished, at his own Expence (excepting such Persons * * * unable to purchase the same) with one good Musquet, and a Bayonet fitted thereto, * * * one Ram-rod, Worm, Priming-wire and Brush, and one Cartouch-Box."{EN-272}

• [1781] "[E]ach of the * * * non-commissioned Officers and Soldiers [shall] furnish himself with a good Musket, Bayonet, Cartouch-Box[.]"{EN-273}

• [1781] "[E]ach Person, liable to do military Duty * * * (unless excused by the Town-Council * * * for Inability to procure the same)" must have "a good Gun, being his own Property, * * * a Bayonet * * * , a Cartouch-Box * * * , a Ram-Rod * * * , a Wormer * * * , a Priming-Wire * * * , [and] Three good Flints[.]"{EN-274}

B. The only plausible reading of these statutes is that the requirements of a "good" or "sufficient" firearm "fit for service"—especially "to the Satisfaction of the Commission Officers"—excluded both antiquated types and models unserviceable by either their designs or their states of disrepair.

1. The initial considerations were sound design and good mechanical operation. *First*, Militiamen's firearms had to be up to date: Which is why, as technology and supply improved over the years, the statutes initially ordered the use of "muskett and match", then mandated "fyrelocks and snaphaunces", then required "muskett[s] or Fuze[s]", and finally allowed the "Rifle-Gun". *Second*, Militiamen's firearms had to be up to snuff: Which is why, over and over again, the statutes reiterated each Militiaman's obligation to provide "one *good* gun", "a *good or sufficient* musket", "one *good* Musket * * * *to the satisfaction of the Commission Officers of the Company*", "a *sufficient* Gun", or "a *good* Fire-Arm". Inasmuch as the design of firearms changed very little once the flintlock had come into general usage, "good" firearms throughout most of the *pre*-constitutional period must usually have meant a flintlock smoothbored musket or fusil for infantry, a carbine and pair of pistols for cavalry.

2. The next consideration was suitability for the intended service. The obviously preferable situation was for Militiamen's firearms to be designed specifically for military usage. Which is why the later statutes required "a good Bayonet *fixed on his Gun*" or "one good Musquet, *and a Bayonet fitted thereto*"; or

simply conjoined "a good fire-lock, bayonet", "a good Fire-Arm, Bayonet", or "a good Musket, Bayonet" as an inseparable pair. For, in those days, infantrymen's ability to launch a bayonet charge or to repel an enemy's, or to turn aside a cavalry charge with the points of their own bayonets, often meant the difference between victory or defeat. But Rhode Island's statutes also recognized that many of her men simply could not furnish themselves with a "good Musquet, and a Bayonet fitted thereto"—and therefore allowed them to substitute a sword, as in the phrases "sword *or* bagganett", "Sword *or* Bayenet", and "good Sword, *or* Baionet". The firearms in these Militiamen's hands might not have been designed specifically with Militia service in mind, as the products of many Colonial gunsmiths were not.[465] Nonetheless, in combination with a good edged weapon, they were usable for such service to a reasonably satisfactory degree. Others may have been all-purpose "fowlers" suitable not only for hunting birds and common game, but also for Militia service—even to the extent of sometimes being specially fitted for bayonets.[466] New England gunsmiths produced a distinctive type of fowler, some of which Colonial marksmen employed in the Battle of Lexington and Concord.[467]

Rhode Island did not require, but merely allowed, her Militiamen to be armed with "Rifle-Gun[s]", for two reasons: *First*, although New England did not lack for gunsmiths,[468] rifles were not then particularly common in that area.[469] *Second*, although rifles were *technologically* superior to smoothbored muskets, having longer ranges and far greater accuracy, smoothbored muskets were often *tactically* superior in the set-piece, stand-up battles of the day. In forays based on linear formations firing face-to-face at short ranges on open ground, smoothbored muskets could maintain higher rates of fire than rifles, and when fitted with bayonets as original equipment (as rifles only infrequently were) could be effectively employed as "cold steel" in fighting at close quarters. Under other tactical situations, however, such as fighting in loose order in wooded country or at long range, rifles almost invariably outperformed smoothbored muskets.

In any event, the salient consideration overall was that Militiamen's firearms, of whatever types, should be ***usable*** *for military service,* either as designed or as complemented by or supplemented with other readily available personal weapons. When the statutes referred to a "good Musquet, *and a Bayonet fitted*

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[465] *See, e.g.*, Harold L. Peterson, *Arms and Armor in Colonial America, 1526-1783* (Harrisburg, Pennsylvania: Stackpole Company, 1956), at 178-179.

[466] *See* B. Ahearn, *Flintlock Muskets in the American Revolution, ante* note 464, Part 2, Colonial Fowlers.

[467] *Id.* at 113-119, 105.

[468] *See, e.g.,* F. Allen Thompson, "Worcester County Gunsmiths 1760-1830", *in* The American Society of Arms Collectors, *Longarms in America*, George E. Weatherly, Compiler (Easton, Pennsylvania: The Mack Printing Group, 1997), Volume 1, at 141 (Massachusetts).

[469] *See, e.g.,* Allen French, *The Day of Concord and Lexington: The Nineteenth of April, 1775* (Boston, Massachusetts: Little, Brown, and Company, 1925), at 28 & note 1.

thereto" they intended a *specifically military-grade* firearm all around. When they referred to a firearm to be used in conjunction with a "good Sword *or* Bayonet", they intended what might have been a marginally military-grade firearm, or what today might be labeled a "sporting"-grade firearm—but, in the latter case, obviously *one that possessed a basic military capability simply as a firearm*, and close to full military capability when supplemented with a "good Sword". Thus, Rhode Island's statutes recognized, not a fundamental difference in kind, but only a difference in degree, among the many firearms her Militiamen might have brought to their service. Doubtlessly, some "sporting" arms, such as small-bored fusils and fowling pieces, could not have been used satisfactorily as Militia arms in some situations. But many others could have served that purpose. And most military-grade firearms (with their bayonets set aside) could have been used for such "sporting" purposes as hunting or target shooting, or (perhaps even with the bayonets attached) for personal self-defense.

C. Another indication that Rhode Island concerned herself with the specifically military service to which her Militiamen's firearms were dedicated, not necessarily the purposes for which those firearms might originally have been designed, is what the statutes demanded by way of accoutrements and ammunition. For, whether his firearm was originally of military grade or not, each Militiaman was required to provide himself with bandoliers or a cartridge box, and up to "one Pound of good Gunpowder, [and] Thirty Bullets fit for his Gun". Bandoliers and "a Cartouch Box, ready filled with Cartriges of Gunpowder and Bullets", were typically *military*, not "sporting", accoutrements. "Thirty bullets" was a large number for a hunter to carry, but certainly not for a soldier. And "one Pound of good Gunpowder"—which contained seven thousand grains—could produce more than twice that many cartridges. For instance, in 1759 the British standard charge for a musket cartridge for field service was one hundred sixty-five grains of black powder (including the priming charge), or about one hundred nine grains for a less robust "exercise" cartridge.[470] Later on, the British Pattern 1776 Rifle used a regulation charge of one hundred ten grains, which was likely reduced in the interest of accuracy to about eighty-three grains.[471] If Rhode Island's Militiamen had settled on an average charge of one hundred ten grains in their various firelocks, "one Pound of good Gunpowder" would have provided each of them with about sixty-three rounds—a not inconsiderable supply of ammunition that probably vanishingly few merely "sporting" shooters of that era would ever have taken with them afield.

D. On the other hand, these statutes also indirectly emphasized that her Militiamen brought *their own* firearms to the service. For instance, the explicit

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[470] De Witt Bailey, *Small Arms of the British Forces in America, ante* note 428, at 247.

[471] De Witt Bailey, *British Military Flintlock Rifles, 1740-1840* (Lincoln, Rhode Island: Andrew Mowbray Publishers, 2002), at 34.

requirements from 1699 through 1766 that each Militiaman should supply "bullets, *fit for* ***his*** *piece*" or "Bullets, *fit for* ***his*** *Gun*" reflected the disparities Rhode Island expected to find in the calibers of the various firearms her men possessed—which resulted from their purchases, at widely separated times and from many different manufacturers or suppliers in the free market, of firearms of differing designs and levels of quality, perhaps acquired for reasons in addition to use in the Militia—which purchases were the consequences of the statutory requirements that, if possible, Militiamen should furnish themselves with arms howsover they could. Local economics played a rôle as well. For, to evade the British mercantilist policy that Americans should purchase their manufactured goods from England, New England gunsmiths often made up "combination guns" out of parts acquired from here and there.[472] These were eminently workable firearms—but hardly identical in specifications. Had Rhode Island's government supplied firearms of uniform design and manufacture to her Militia, or mandated that her Militiamen should have purchased only firearms of certain designated calibers, no matter what the source, the requirement the government imposed that each man's bullets should actually fit his firearm would have been unnecessary. (Of course, the disparities with which the statutes from 1699 to 1766 were concerned did not entirely disappear thereafter. Apparently, though, Rhode Island's legislators throughout the remainder of the *pre*-constitutional period took it for granted that her citizens were sufficiently sophisticated to know, without being reminded in her Militia Acts, that their bullets needed to fit the bores of their guns.)

[472] *See* Benjamin F. Hubbell, "The New England Combination Gun, 1730 to 1775", *in* The American Society of Arms Collectors, *Longarms in America*, *ante* note 468, Volume 1, at 27. These likely included parts cannibalized from obsolete firearms and sold into the commercial market by Britain's Board of Ordinance. *See* B. Ahearn, *Flintlock Muskets in the American Revolution, ante* note 464, at 17.

CHAPTER EIGHT

Rhode Island provided for regular inspections in order to insure that her inhabitants possessed all of their requisite firearms and ammunition in serviceable condition.

During the *pre*-constitutional era, Rhode Island did not merely mandate that her able-bodied free adult male inhabitants should acquire firearms and ammunition adequate for Militia service, and thereafter possess them in their own homes at all times, but also searchingly inquired into their actual compliance with her regulations.

A. From the very earliest days onwards, Rhode Island required inspections of the firearms and ammunition actually in her inhabitants' hands, in order to determine who possessed—or did not possess—what, and the condition of serviceability in which those arms were maintained:

1. Some of these inspections occurred more or less automatically in the normal course of events during Militiamen's regular musters for training and exercise, without any specific statutory directives to that effect. For example—

> • [1718, 1730, and 1744] "[E]very Listed Soldier of the * * * Militia, shall be always provided with one good Musket, or Fuzee * * * to the Satisfaction of the Commission Officers of the Company ; also one pound of good Gunpowder, thirty Bullets, fit for his Gun, six good Flints, fit for Service; one good Sword, or Baionet, a Cartouch Box, ready fitted with Cartriges of Gunpowder and Bullets, on the penalty of *Three Shillings*, for each time he shall be found not provided * * * .
>
> " * * * [T]he Captain of each respective Company or Train-band * * * shall * * * Call together the Company under his Command, and Exercise them in Martial Discipline, two Days in each Year in time of Peace and Four in War * * * .
>
> " * * * [E]very Enlisted Person, that shall Refuse or Neglect to make his Personal appearance Accoutred as aforesaid, on such Training Days * * * shall for every such Default pay * * * *Three Shillings* in Mony[.]"{EN-275}
>
> • [1766] ""[E]very enlisted Soldier of the * * * Militia, shall be always provided with One good Musket, or Fuzee * * * to the Satisfaction of the Commission Officers, also One Pound of good Gun-Powder, thirty Bullets, fit for his Gun, six good Flints, One good Sword or Bayonet, a Cartouch Box, ready filled with Cartridges of Powder and Ball, under the

> Penalty of Four Pence, for each Article of Accoutrement * * * which he shall be deficient in, for every Time he shall be unprovided therewith * * * .
>
> " * * * [T]he Captain of each respective Company or Trained Band * * * shall * * * call together the Company under his Command, and exercise them in martial Discipline, Two Days in each Year * * * .
>
> * * * * *
>
> " * * * [E]very Enlisted Person who shall refuse or neglect to make his personal Appearance, accoutred as aforesaid, on such training Days * * * shall for every such Default pay a Fine[.]"{EN-276}

Self-evidently, no Militiaman could have been "provided with one good Musket, or Fuzee * * * *to the Satisfaction of the Commission Officers of* [*his*] *Company*" on those occasions, unless one or more of those "Officers" actually inspected his firearm. And no Militiaman who actually "ma[d]e his Personal appearance * * * on such Training Days" could have been found improperly "Accoutred" and therefore subject to a fine, unless his equipment had been inspected. Presumably as well, on *every* occasion on which Militiamen mustered for *any* form of armed service, *some* "Commission Officer[ ]" would have conducted at least a rudimentary inspection of *some* kind in order to determine whether the men under his command were prepared to perform the duty at hand.

2. Other inspections were the products of explicit and specific mandates:

- [1639] The "Clerke of the Traine Band" was "to take a view of the Armes, and to Returne [that is, report on] the defects".{EN-277}
- [1643] Inspectors were to go "to *every inhabitant*" in the Town of Portsmouth to "see whether *every one of them* has powder, and what bullets run".{EN-278}
- [1643] Inspectors were to look "up *all the armes* in the Towne [of Portsmouth] w[ithin] the month * * * and * * * go to *every house* and [see] what armes are defective".{EN-279}
- [1655] "[A]n accompt shall begiven within ten dayes * * * to y^{e} head officer of everie Towne * * * of what powder, lead and shot there is in the possession of *everie inhabitant* of y^{e} townes".{EN-280}
- [1665] "[T]he Clarke of the traine band in each towne" was "required to informe himselfe" as to the "gunpowder, * * * lead or bulletts" in the home of "*every man* in each towne", "and finding *any man* vnsuplyed * * * to make report to the * * * magistrates".{EN-281}
- [1667] Inspectors were "to goe *from house to house* throughout the towne of Newport, the villages and precincts thereof, and to take a precise and exact account of all the armes, amunition and weapons of warr *each person* is furnished with, or hath in his house to spare to others, and in what condition with regard to service the same is in".{EN-282}

• [1669] Each "Towne Councill" was "to see that the inhabitants * * * bee furnished with ammunition according to law; and that the armes bee fixed and in readiness for service".{EN-283}

• [1676] Inspectors in Newport and Portsmouth were "to take account how *all persons* are provided with * * * guns, powder, shot and lead, and make returne [that is, a report] thereof".{EN-284}

• [1718, 1730, and 1744] "[A]ll * * * Persons * * * excus'd from Training, yet shall notwithstanding be provided with the same Arms, Ammunition, &c. as * * * is required of such as are obliged to Train, & * * * once every year, or oftner, * * * there shall be * * * a Survey and Examination made, whether such Persons are provided as * * * is Required[.]"{EN-285}

• [1755] "[E]very Person * * * by Law to be accoutred" was "directed to provide himself with Arms, and other Accoutrements * * * by the last Monday of *April* next, * * * at which Time, Examination shall be made, and also, on the third Monday of *October*, and last Monday of *April* annually, for the future[.]"{EN-286}

• [1766] "[A]ll * * * Persons * * * excused from training, shall, notwithstanding, be provided with the same Arms, Ammunition, &c. as * * * is required of such as are obliged to train. And * * * Twice in every Year * * * there shall be an Examination and Survey made, whether such Persons are provided as * * * is required[.]"{EN-287}

• [1774] For all Militiamen, including "all those who, being exempted from appearing on the Days of Training, are notwithstanding, obliged to be provided with Arms and other Accoutrements, * * * the examination and survey [of arms] * * * shall be made * * * on the First *Monday* in *February*, and on the last *Monday* in *April*".{EN-288}

• [1775] Inspectors were "directed to take an account * * * of the powder, arms and ammunition, in the several towns in this colony, * * * including private as well as public stock", and "to go to *the house of each person* * * * to take an account of [those items]".{EN-289}

• [1776] "[E]ach captain * * * of the several independent companies, and companies of militia in this state, [shall] notify his company to appear at some proper place * * * under arms, with all accoutrements, agreeably to law.

"That such captain * * * make out a list of the deficiency of each person in each article.

"That he send a proper officer to the dwelling-house of each person not attending, to examine how far such person be deficient.

"That each captain * * * of the companies of militia, make a proper return thereof, to the colonel of the regiment * * * .

> "That each captain * * * of the independent companies, make a like return to th[e General] Assembly[.]"{EN-290}

> • [1779] An inspector was "directed to cause strict examination to be made of the state of the arms * * * of the militia, alarm and independent companies, within this state"{EN-291}—which would have included all able-bodied free adult men from sixteen to sixty years of age.[473]

B. Not surprisingly, one purpose of these inspections was to direct defaulters to have their defective firearms repaired or replaced. In early statutes, this purpose was explicit:

> • [1643] An inspector was to "go to *every house* [in Portsmouth] and [see] what armes are defective; and that the men whose armes are [to be handed] in to be mended".{EN-292}

> • [1650] Certain private gunsmiths, "all excuses sett aparte, shall mende and make all lockes, stockes and pieces that by order from the warden of each Towne shall be from any of the inhabitants thearof presented to them, for just and suitable satisfaction in hand payed, without delay"; and "all men that have gunns and pieces to mend, and have need to have them mended for their present defence, shall forthwith, according to order, carrie those pieces to mende".{EN-293}

> • [1667] Inspectors were "to goe from house to house throughout the towne of Newport, the villages and precincts thereof," and "call vpon such [persons] as have deffects [in their arms and ammunition], that they may be supplyed in the place forthwith * * * to repaire to such persons as may supply them".{EN-294}

Later, the requirement to keep firearms in good repair was implicit in the process of regular inspection of arms, coupled with the imposition of fines against those men whose equipment proved unavailable, unusable at all events, unsuitable for service in the Militia, or unsatisfactory because defective in condition or operation.[474]

C. If these enactments could be described as exemplifying a species of "gun control", their purpose was to certify that Rhode Islanders controlled *their own* firearms and ammunition *themselves*, by possessing the full table of necessary equipment *in their own homes*, ***in good working order***. These statutes presumed that *any and all* of the inhabitants might, and probably should, have been fully armed at all times—indeed, that some individuals might possess a superfluity of firearms and ammunition, and that extensive private arsenals were not only not unlikely but even desirable.

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[473] *See ante*, at 126.

[474] On the imposition of fines to effectuate these controls, *see post*, at 275-284.

Self-evidently, none of this would have been necessary (or sensible, for that matter) had the government itself been monopolistically acquiring firearms and ammunition, maintaining them in public arsenals and magazines, distributing them among the citizens only if and when public officials deemed it necessary, and afterwards collecting the equipment for storage away from common citizens' hands. To the contrary, Rhode Island's *pre*-constitutional inspection-laws presupposed that individuals would and did obtain firearms and ammunition *on their own*, without any prior governmental approval or surveillance, and that they would and did possess those arms *personally in their own homes*, with no subsequent governmental interference aimed at dispossessing them. Indeed, it was precisely because individuals could and did acquire and maintain possession of firearms and ammunition *by and for themselves* that legislators presumed it possible that some might neglect to do so at all, or to keep their equipment in a proper state of readiness, and that therefore regular inspections and penalties for discovered failures to be sufficiently armed and accoutred were necessary and proper.

Moreover, in those days inspections were never distrusted as possible preliminaries to *dis*armament, but instead were accepted as proper means to ensure that every eligible member of the community was always as thoroughly armed as possible. No one feared that public officials, in the otherwise proper exercise of their duties, might misuse inspections to ferret out the locations of firearms and ammunition in private possession, for two reasons: *First*, no one doubted that, in a community in which *every* able-bodied adult free man was statutorily required to be armed, inspections to determine who possessed arms *for the ultimate purpose of targeting individuals to be dispossessed of their arms* would be supererogatory. Even a marginally sensible tyrannical régime would have realized that its myrmidons would have needed to invade essentially *every* home if they were to round up most of the firearms in private hands. *Second*, no one in the *pre*-constitutional era, or for generations thereafter, believed that public officials acting honestly as the agents of a self-governing people could, or ever would, claim a license to strip individuals of the ultimate power of popular sovereignty—the Power of the Sword—by confiscating their arms. To be sure, rogue officials might have presented such a danger—as they finally did, to their own deposition, starting in Boston and its environs in 1775. But it was in preparation for just such a dire contingency that the people always maintained possession of arms in their own hands—and submitted to inspections in order to insure that state of affairs. It was only when "the Militia of the several States" were effectively disestablished and most Americans consigned to the constitutionally self-contradictory and politically ridiculous "unorganized militia",[475] and efforts at systematic "gun control" initiated at every level of the

[475] *See post*, at 786-793.

federal system in and after the early 1900s, that official inquiries of various sorts aimed at determining which Americans possessed firearms and ammunition began to make practical sense from the perspective of aspiring usurpers and tyrants. For after most Americans who were eligible for "the Militia of the several States" instead became members of "the unorganized militia" willy-nilly, exactly *who* possessed *what* firearms and ammunition, and *where* that equipment might be stored, became open to question. At that point, rogue public officials' primary *desiderata* became supervision over the private manufacture, distribution, and purchase of firearms; registration of firearms in Americans' private possession; and other intelligence collected for the eventual purpose of facilitating confiscation of all such firearms.

CHAPTER NINE

Throughout the *pre*-constitutional era, Rhode Island's Militia statutes presupposed, promoted, protected, and relied upon a free market in firearms and ammunition.

All contemporary "gun-control" theories and actual enactments assume the existence of powers in governments at the National, State, and even Local levels to destroy, piece by piece and at length entirely, a free market in the very firearms, ammunition, and accoutrements necessary for "[a] well regulated Militia". Such purported powers, of course, can find no basis whatsoever in *pre*-constitutional law.[476] Indeed, quite the opposite.

A. The presumption of a free market in arms. Throughout the *pre*-constitutional period, Rhode Island's Militia laws presumed that a free market in firearms and ammunition, adequate for the requirements the statutes imposed on her residents to arm themselves, either: (i) already existed; or (ii) would rapidly develop in response to the demand for such equipment for Militia purposes—and (iii) would always remain in operation. This, for three reasons:

First, legislators were surely aware of the powerful tendency for demand to create supply, and doubtlessly expected that their Militia laws would promote the fullest development and expansion of the market possible at that time, certainly far in excess of what would have occurred without the stimulative effects those statutes provided.

Second, legislators understood that political interference with the market would have been self-defeating, and subversive of the community's safety. For, in the absence of governmental arsenals that could have produced sufficient arms, the market was the only practical source for the quantities of firearms and ammunition required to equip the Militia.

Third, everyone in that era knew that, as far as each individual human being is concerned, "[s]elf-defence * * * , as it is justly called the primary law of nature, * * * is not, neither can it be in fact, taken away by the law of society".[477] *Legally, morally, and politically, self-defense is an* ***absolute*** *right.* And surely everyone in those days also recognized that no viable society would ever be composed of members so

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[476] On the types of statutes in that era by which Rhode Island mandated anything even remotely akin to any aspect of modern "gun control", *see post*, Chapter 13.

[477] W. Blackstone, *Commentaries on the Laws of England*, *ante* note 142, Volume 3, at 4.

suicidally demented as to attempt to deprive themselves collectively of the right and ability to preserve their community against all dangers. But, if self-defense is, both individually and collectively, an *absolute* right, then every individual—both by himself alone and as a member of society's ultimate force for self-preservation, the Militia—must enjoy a right no less absolute to possess the means necessary and sufficient for that purpose. And that right can be fully effectuated only through the free market—because, if rogue public officials could monopolize the provision of, let alone prohibit, personal acquisition and possession of the means of self-defense, then self-defense would reduce to a "right" the ostensible "law of society" embodied in those officials' decrees *could* "take[ ] away" in practice.

These beliefs not only persisted, but also must have largely proven true when put into execution, because Rhode Islanders prolonged their reliance on the free market, unchanged, throughout the *pre-*constitutional era.

Although the Militia laws Rhode Island's General Assembly enacted were silent on the subject, they protected the free market in firearms and ammunition by preëmpting in principle all Local regulations aimed at restricting the free market—whether in terms of the types, qualities, or quantities of firearms or ammunition that might be sold, or the number of merchants who might enter the trade. In practice, of course, the laws were silent on this score, because no such regulations ever arose to be disallowed, no one of consequence in the *pre-*constitutional period ever having entertained the notion that "gun control" of today's variety was within public officials' authority, let alone desirable.

Overall, Rhode Island's Militia laws must also have strengthened a free market in, and private ownership and possession of, both amounts and types of firearms and ammunition other those that were or could have been used for actual service in the Militia. For once the network linking suppliers of raw materials to manufacturers to merchants to customers was established, it could have provided—and apparently *did* provide—whatever arms free men as consumers desired, for both public and private uses.

B. Reliance on the free market by common Militiamen. The actual existence of, and encouragement for, what Rhode Island's lawmakers presumed was an adequate free market for firearms is reflected most directly in her Militia statutes' requirements that men should obtain their firearms and ammunition through private purchases. For example:

> • [1665] "[A]ll men from sixteene years of age to sixtye years old are hereby required to" "*find themselves armes*[.]"{EN-295}
>
> • [1699, 1701, and 1705] "[A]ll persons that are willing to list themselves in * * * troops [of horse]; and *to accoutre themselves with* * * * carbine and pistol * * * shall be excused from any other duty in militia exercise[.]"{EN-296}

• [1718, 1730, and 1744] "[E]very Listed Soldier of the * * * Militia, shall always be provided with one good Musket, or Fuzee * * * ; also one pound of good Gunpowder, thirty Bullets, fit for his Gun, six good Flints, fit for Service; one good Sword, or Baionet, a Cartouch Box, ready fitted with Cartriges of Gunpowder and Bullets, on the penalty of *Three Shillings*, for each time he shall be found not provided[.]

* * * * *

" * * * [A]ll such Persons * * * excus'd from Training, yet shall notwithstanding be provided with the same Arms, Ammunition, &c. as * * * is required of such as are obliged to Train, & that once every year, or oftner * * * , there shall be * * * a Survey and Examination made, whether such Persons are provided as * * * is Required; and all such Persons as shall be found unprovided with such Arms * * * shall pay the Fine of *Five-Shillings* for each default[.]"{EN-297}

This statute did not specify from what source the "Listed Soldier[s]" and "all such Persons * * * excus'd from Training" were to acquire the equipment with which they "shall always be provided". But as no statute mandated that the government should provide that equipment (except to the poor), and as the "Soldier[s]" and other "Persons" were personally fined for being "not provided", the only possible source was the free market.

• [1755] "[E]very Person * * * by Law to be accoutred * * * is hereby directed *to provide himself with* Arms, and other Accoutrements[.]"{EN-298}

• [1766]"[E]very enlisted Soldier of the * * * Militia, shall always be provided with one good Musket or Fuzee * * * , also One Pound of good Gun-Powder, Thirty Bullets fit for his Gun, six good Flints, One good Sword or Bayonet, a Cartouch Box, ready filled with Cartridges of Powder and Ball, under the Penalty of Four Pence for each Article of Accoutrement * * * which he shall be deficient in, for every Time he shall be unprovided therewith[.]

* * * * *

" * * * [A]ll such Persons * * * excused from training, shall, notwithstanding, be provided with the same Arms, Ammunition, &c. as * * * is required of such as are obliged to train. And * * * Twice in every Year, * * * there shall be an Examination and Survey made, whether such Persons are provided as * * * is Required; and all such Persons as shall be found unprovided, shall pay the Fine of Four Pence for each Article of Accoutrement they shall be deficient in[.]"{EN-299}

The observation made immediately above in reference to the statute of 1718 (continued through 1730 and 1744) applies here as well.

• [1775] "[E]very man in the colony, able to bear arms, [is directed] *to equip himself completely with* arms and ammunition, according to law."{EN-300}

> • [1776] "[A]ll persons in their towns, being inhabitants" "who are by law obliged *to equip themselves with* a good fire-arm, bayonet and cartouch box; and who shall not * * * be reported incapable of *providing themselves* * * * , *do provide themselves*[.]"{EN-301}
>
> • [1779] "[E]ach and every effective [that is, able-bodied] Man * * * *shall provide, and at all times be furnished, at his own Expence (excepting such Persons as the Town Councils of the Towns in which they respectively dwell or reside shall adjudge unable to purchase the same)* with one good Musquet, and a Bayonet fitted thereto, * * * one Ram-rod, Worm, Priming-wire and Brush, and one Cartouch-Box."{EN-302}
>
> • [1781] "[E]ach of the * * * non-commissioned Officers and Soldiers [of the Militia shall] *furnish himself with* a good Musket, Bayonet, Cartouch-Box[.]"{EN-303}
>
> • [1781] "[E]ach Person, liable to do military Duty * * * (unless excused by the Town-Council of the Town to which he belongs for Inability to procure the same) who shall at any Time be found destitute of a good Gun, *being his own Property*, shall pay * * * a Fine[.]"{EN-304}

Obviously, without an adequate free market within Rhode Island, supplied locally or from somewhere outside the Colony—or absent governmental arsenals capable of manufacturing sufficient quantities of the necessary equipment (for which the Militia statutes made no provision)—her residents would have been unable to satisfy these requirements. In that event, not only would such regulations have been pointless, because the purposes they sought to serve would have been incapable of attainment, but also the inspections the statutes mandated and the fines they imposed for individuals' failures to comply would have been not simply pointless but also grossly unjust, because no man can rightfully be penalized for not doing what he simply cannot do.[478]

C. Reliance on the free market by the government. When Rhode Island's Colonial (later, State) and Local governments needed to acquire firearms and ammunition for her Militia or regular armed forces, they generally purchased or otherwise obtained them in the free market, too.

> • [1755] "That the Committee of War * * * purchase on the best Terms they can, all the Arms that shall be necessary; and that any Person who shall * * * sell to the Colony, a good small Arm, shall be exempted from all Military Duty, for and during the Term of one Year".{EN-305}
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> The incentive this statute offered demonstrates the extent of Rhode Island's dependence on the free market. It also illustrates the fairness with which these matters were conducted, in that an individual

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[478] *See ante*, Chapter 8, *and post*, at 275-284.

who sold his only firearm to the government could not have fulfilled the requirement that he appear at Militia musters fully armed.

• [1757] "[T]hat the deputies of the several towns be * * * empowered to procure, at the expense of the colony, half a pound of gun powder, twenty bullets, six flints * * * for each soldier[.]"{EN-306}

• [1774] Certain individuals were to "purchase * * * at the expense and for the use of the colony, three hundred half-barrels of pistol powder * * * ; three tons of lead and forty thousand flints * * * to be delivered to the several colonels of the militia, and the colonels of the independent companies * * * ; so that each soldier, equipped with arms, according to law, may be supplied with such quantities thereof, as by law is directed; he or they paying for the same, at the prime cost given by the colony".{EN-307}

• [1775] The General Assembly appointed "a Committee, to enquire at what Price good Muskets, for the Use of the Continental Army, can be made in this Colony".{EN-308}

• [1776] Each "town shall immediately make order for the supplying such persons [as are too poor to purchase their own firearms] with a good fire-arm, bayonet and cartouch box, at such town's expense, to be lodged with the captains of such district wherein such poor persons belong, for their use upon any proper occasion".{EN-309}

• [1776] "That Two Thousand Stand of good Fire-Arms, with Bayonets, Iron Ramrods, and Cartouch-Boxes, be purchased for the Use of the Colony * * * , and distributed to each Town, in Proportion to the Number of Polls upon the Alarm List therein[.]"{EN-310}

• [1777] The General Assembly ordered "*Bills * * * to be Paid*" to "Azariah Crandall, for a gun, bayonet and cartouch box, delivered into the Continental store"; and to "Oliver Eddy, for a small arm, delivered by him into the store at Prospect Hill, for the use of the Continent".{EN-311}

• [1777] "*Daniel Mowry* * * * presented * * * an Account, by him charged against the State, for twenty-six Guns and Bayonets, purchased by Order of the Town-Council of *Smithfield*, for the poor Inhabitants of the said Town * * * the Amount thereof * * * [to] be paid * * * out of the General Treasury."{EN-312}

• [1777] "That the Small-Arms heretofore purchased by this State, for such Persons as should be adjudged unable to furnish themselves therewith, be delivered to the Committees of Safety, for the Use of the fifteen Months Battalions, and Train of Artillery, raising within this State."{EN-313}

• [1777 and 1778] "That General *Cornell* immediately apply to the several Committees of Safety for Two Hundred Small Arms and Bayonets, and cause the same to be repaired, and fitted for immediate Service: That

> if the said Number cannot be procured from the said Committees, he * * * purchase the Number deficient upon the best Terms he can, and as many other Bayonets as the State may require[.]"{EN-314}
>
> • [1781] "That each of the * * * non-commissioned Officers and Soldiers furnish himself with a good Musket, Bayonet, Cartouch-Box * * * : That if he shall not be of sufficient Ability, or shall otherwise neglect to do it, the Town-Council of the Town to which he belongs be * * * directed, to furnish him with a Gun, Bayonet, Cartouch-Box * * * at the Expence of such Town; and receive therefor, out of the Wages of such delinquent Person, *Ten Shillings*, in Gold or Silver, or paper Money equivalent * * * ; and that the Persons receiving the said Accoutrements return them, or account therefor with the Town-Council who shall furnish the same."{EN-315}

These enactments prove that significant numbers of firearms must have been held in private hands, available for sale; that if owners were willing to sell their firearms at reasonable prices they must have expected to be able to replenish their stocks in due course; and that public officials routinely served as middlemen between the Militia and the free market in arms.

Besides firearms, Rhode Island's government supplied ammunition to her Militia, sometimes acting simply as an intermediary for the free market. For example, in 1774 the General Assembly ordered its agents to "purchase * * * at the expense and for the use of the colony, three hundred half-barrels of pistol powder * * * ; three tons of lead and forty thousand flints * * * to be delivered to the several colonels of the militia * * * so that each soldier, equipped with arms, according to law, may be supplied with such quantities thereof, as by law is directed; he or they paying for the same, at the prime cost given by the colony".{EN-316} Of course, the government also endeavored to maintain public stocks of ammunition by the age-old method of taxing the market, sometimes by ingenious methods. For example, in 1704 (continued through 1744) the General Assembly directed "[t]hat there shall be paid by the Master of every Ship or other Vessel, of above Ten Tons, coming into any Port * * * of this Colony to Trade or Traffic, which are not wholly Owned by the Inhabitants of this Colony * * * , *Twelve-pence per* Ton, or one Pound of good New Gun Powder".{EN-317} This, however, would prove a problematic procedure today, because "[n]o State shall, without the Consent of Congress, lay any Duty on Tonnage".[479]

Rhode Island's reliance on the free market was not limited simply to muskets, rifles, pistols, and gunpowder, either, but encompassed heavy crew-served weaponry, too. For example, in 1774 her General Assembly "empowered and

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[479]See U.S. Const. art. I, § 10, cl. 3.

directed [the Captain of the Independent Company known as 'The *Train of Artillery*, for the County of *Providence*'], to purchase at the Expence, and for the Use, of the Colony, Four Brass Cannon, Four Pounders, with Carriages, Implements, and Utensils, necessary for exercising them; And that they be lent to the said Company, to improve them in the Exercise of Cannon".{EN-318} Thus, the notion proponents of "gun control" sometimes advance today, that *pre-*constitutional Militiamen retained only small arms in their personal possession, lacks evidentiary support. Indeed, in those days even some Rhode Islanders who were not members of Militia Artillery Companies might nevertheless have possessed cannon. Self-evidently, the *Train of Artillery* did not "purchase [cannon] at the Expence, and for the Use, of the Colony" from the Colony, but looked to private owners—which meant, of course, that such private owners existed. This was no isolated incident, either. On different occasions in 1776, the General Assembly "voted and resolved, that this colony purchase of Metcalfe Bowler, Esq., nine cannon, with the shot and other stores belonging to him";{EN-319} "that the standing committee of audit * * * inquire into the number of cannon now in service, * * * and of whom they were purchased, and what price they cost";{EN-320} and that an appointee determine "who are the present owners of any of the cannon in this state's possession"{EN-321}—indicating that the "number of cannon" the State had acquired from the free market must have been significant. Then, again in 1776, the General Assembly "recommended to the Inhabitants of th[e] State, who are possessed of Cannon, Warlike Stores and Sails, that they forthwith remove them to Places of Safety: And that if they shall neglect to do it, the Commanding Officers * * * [shall] cause the same to be removed".{EN-322} If these "Cannon" had been in public officials' charge, or in the possession of the Militia, such a directive would have been unnecessary. So, even a year into the War of Independence, some cannon still remained in private hands, where officials apparently were satisfied to leave them if their owners took care to "remove them to Places of Safety". And in 1777, the General Assembly ordered a "*Bill*[ ] * * * *to be Paid*" to "Paul Allen, as agent for the privateer sloop Independence, for sundry cannon and warlike stores, taken out of the prize- ship Friendship, for the use of the state".{EN-323}

D. Loans and impressments of arms in and from the free market. In addition to employing outright purchases in the free market, Rhode Island acquired firearms and ammunition for her Militia from private owners by means of loans and impressments.

1. Individuals possessed of firearms or ammunition in excess of their own requirements were expected or encouraged to lend them to others:

> • [1667] Certain individuals were "to goe from house to house throughout the towne of Newport, the villages and precincts thereof, and to take a precise and exact account of all the armes, amunition and

weapons of warr each person is furnished with, *or hath in his house to spare to others*".{EN-324}

• [1755] "That the Committee of War * * * borrow * * * on the best Terms they can, all the Arms that shall be necessary; and that any Person who shall lend * * * to the Colony, a good small Arm, shall be exempted from all Military Duty, for and during the Term of one Year[.]"{EN-325}

2. In times of particularly urgent need, privately owned firearms were impressed—that is, taken by force of law—into public service:

• [1755] "That in Case the Committee of War shall not be able to procure or purchase a sufficient Number of good Arms, * * * the Governor issue a Warrant for impressing as many as shall be found wanting and necessary."{EN-326}

• [1757] "[I]f * * * arms * * * or any other necessaries cannot be procured but by an impress, the deputies are * * * empowered to press each and every article which they shal have occasion for[.]"{EN-327}

• [1777] "[I]f any Person * * * shall appear not duly equipped, that the Commanding Officer * * * be empowered to impress a Gun, or whatever Accoutrements he may stand in Need of."{EN-328}

• [1780] "[I]n case any Town shall neglect or refuse to furnish and supply the Troops * * * , the Commanding-Officer of the Militia in such Town * * * [shall] impress from the Inhabitants thereof, so many of the Articles [that is, 'One good Musket, with a good Ram-Rod, One suitable Bayonet, * * * One Cartouch-Box'] * * * deficient[.]"{EN-329}

• [1781] "[T]he respective Town-Councils be empowered, if necessary, to impress Guns, Bayonets, Cartouch-Boxes * * * sufficient for equipping the Delinquents who shall be detached in Pursuance of this Act, giving Certificates therefor to the Persons from whom the same shall be taken."{EN-330}

3. The government dealt honestly, however, with private parties from whom it obtained firearms other than by outright purchase in the free market—

a. Firearms the government borrowed it later returned to their original owners:

• [1777] "That so many of the Guns, now in the Service of this State, be delivered to Mr. *Oliver Ring Warner*, as he shall prove * * * to be his Property."{EN-331}

• [1778] "WHEREAS *Rowse J. Helme* * * * furnished a Gun for one of the Soldiers who marched * * * upon the intended Expedition against *Rhode-Island*, which was turned into the State's Store * * * That

Major *James Sumner* deliver the said Gun, unto the said *Rowse J. Helme*[.]"{EN-332}

b. The government eventually paid just compensation for any firearms it pressed into public service:

• [1757] "[I]f * * * arms, horses, or any other necessaries cannot be procured but by an impress, the deputies are * * * empowered to press each and every article which they shal have occasion for, * * * taking and keeping an exact account of what they shall procure of any man, that the same may be paid for by the colony[.]"{EN-333}

• [1777] "*Timothy Hopkins*, late a Soldier * * * in the Service of this State, had his Gun detained in Service by Orders from his Excellency General *Washington* * * * , and as yet has had no Allowance for the same: *It is therefore Voted and Resolved*, That two Pounds, eight Shillings, lawful Money, be paid to the said *Timothy Hopkins*, out of the General Treasury, for his said Gun."{EN-334}

• [1780] "That the * * * Commanding-Officer of the Militia* * * make Return of all the Guns and Accoutrements which he shall impress * * * unto [a designated] Committee, who thereupon shall appraise all such Guns and Accoutrements, and make a fair Entry thereof, with the Names of the Persons from whom the same shall be taken, with the Prices affixed thereto * * * ; and that * * * Allowances shall be made unto the Owner thereof, *to wit:* For a good Musket, Ram-Rod and Bayonet, * * * *Forty Continental Dollars*, and for a good Cartouch-Box, * * * *Ten Continental Dollars*, for the Use thereof; which * * * Sums shall * * * be paid out of the General-Treasury, or be deducted out of [the owner's] Proportion of the State-Tax". And "if any of the Muskets, or other Accoutrements shall be lost or spoiled, or shall not within One Month after the * * * Regiment shall be disbanded be sent into the respective Towns, in Order to be returned to the Owners, the same shall be paid for out of the General-Treasury".{EN-335}

• [1781] "THE Account of Mr. *Thomas Allen* * * * , amounting to *Twelve Pounds Nineteen Shillings* * * * , for Three Muskets and Accoutrements taken from him * * * for the Use of the Militia * * * , being duly considered, * * * the Secretary [shall] issue an Order in his Favour to draw the said Sum out of the General-Treasury."{EN-336}

• [1782] "That the Sum of *Two Pounds Eight Shillings*, Silver Money, be * * * paid by the General-Treasurer to Mr. *Hezekiah Medbury*, * * * for a Gun which was taken from him for public Use, in the Year 1775."{EN-337}

• [1784] "A CERTIFICATE given to Mr. *Richard Smith* * * * for a Gun taken from him and turned into the public Store * * * being duly considered, * * * *Eighteen Shillings*, Lawful Money, be allowed and paid *

> * * out of the General-Treasury, in full for said Gun." And "[T]HE Representation of *Freeman Perry* * * * that he had taken from him a Gun, Cartridge-Box, and Twenty-four Rounds of Ammunition, for the Expedition in *August*, A.D. 1778, * * * for which he hath never received any Compensation, being duly considered, * * * *One Pound Four Shillings*, Lawful Money, be allowed and paid * * * out of the General-Treasury, in full Compensation therefor".{EN-338}

c. In other instances the government replaced firearms it had taken from private owners:

> • [1782] "That Mr. *Paul Allen* * * * purchase, at the Expence of the State, and deliver to Mr. *Joseph Rogers*, a Gun, Bayonet, Gun-Case, Cartridge-Box, Priming-Brush and Wire * * * ; it being in Lieu of a Gun and similar Accoutrements which the said *Paul Allen* received of the said *Joseph Rogers*, for the Use of the State, in the Year 1775."{EN-339}

> • [1786] "[T]hat a gun, bayonet and cartouch-box, out of the guns, &c., in the town of Richmond, belonging to this state, be delivered to Mr. Simeon Clarke, Jr., in lieu of the gun and like accoutrements impressed from him * * * in the year 1778, and turned into the public store."{EN-340}

4. Such loans and impressments of privately possessed firearms prove three very important things:

a. The number of firearms in private possession in *pre*-constitutional Rhode Island must have exceeded the number that individuals needed to satisfy their own immediate Militia duties to possess firearms, otherwise next to none would have been available for the government to borrow or impress on the spur of the moment. To be sure, some of the firearms borrowed or impressed for a particular Militia service could theretofore have been used for a Militia purpose of lesser importance. For instance, a superannuated man on "the Alarm List" who was staying at home might have been requested or required to supply a firearm to a younger man in the Trained Band who was deploying for service in the field. (In that case, the individual supplying the firearm would not thereafter have been fined for not personally possessing a firearm, because he could have pleaded a reasonable excuse.[480]) But surely at least *some* of the firearms borrowed or impressed during that era were not at that moment being used for *any* purpose related directly to the Militia. Apparently, then, Rhode Islanders in not insignificant numbers possessed, not just more than one firearm, but *more than one firearm* ***suitable for Militia service***.

b. No one in those days believed that the government enjoyed an unlimited power of "gun control" to outlaw private individuals' personal possession of firearms

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[480] *See post*, at 289.

for other than Militia use, and to confiscate any superfluous firearms they held. If such a power had ever even been imagined, let alone had actually existed, the government could simply have seized such extra firearms as contraband, and never paid for, returned, or replaced them. But such outright seizures were never even attempted, loans or takings with full compensation being employed instead. The absence of any instances of seizures—although that method of obtaining firearms would have been of great economic advantage to the public treasury—establishes the disability to do so.[481]

c. The borrowing and impressment of firearms in those days show how a purely personal "right * * * to keep and bear Arms" (what today's legal controversialists label an "individual right") was inextricably linked with a "right * * * to keep and bear Arms" related to service in the Militia (what those people label a "collective right"), such that the two effectively merged into one—just as any commonsensical reading of the Second Amendment would lead any literate American to conclude. During the *pre-*constitutional era, a *completely personal* "individual right" could have encompassed only hunting and target shooting, and not self-defense. True, in any particular instance self-defense is a highly personal matter in a practical sense. But, legally, it is as well a matter of concern to the community. For individual self-defense, both then and today, always amounts to *enforcement of the law* in a situation in which regularly constituted authorities with specific "police" functions are incapable of intervening. Thus, even in an isolated instance involving only two ostensibly private parties, self-defense is a fundamental Militia function, enforcement of the law being the first responsibility of every member of the Militia.[482] Moreover, the ability of Rhode Islanders in those days to defend themselves in the absence of other regularly constituted authorities deterred crimes of all sorts—from adventitious crimes of passion, to crimes of economic predation, to crimes with political purposes such as usurpation and tyranny.[483] Thus, the potential for individual self-defense provided the community with the maximum conceivable level of protection, because every able-bodied, armed individual could act as a law-enforcement officer whenever confronted with criminal activity. An individual's personal possession of a firearm for hunting or other sport also served the purposes of the Militia, by being the source, in an emergency, of a firearm through a loan or impressment, as well as enabling the individual to perfect his skill with that firearm. (Shooting at targets or game, for example, prepared an individual for service in the Militia in a very direct way.) So possession of numerous firearms

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[481] *See, e.g.*, Federal Power Commission v. Panhandle Eastern Pipe Line Company, 337 U.S. 498, 513 & note 20 (1949); Printz v. United States, 521 U.S. 898, 905, 907-908 (1997).

[482] *See* U.S. Const. art. I, § 8, cl. 15.

[483] The same deterrence operates today. *See, e.g.*, John R. Lott, Jr., *More Guns, Less Crime: Understanding Crime and Gun Control Laws* (Chicago, Illinois: University of Chicago Press, 3d Edition, 2010).

by individuals for apparently "personal" use not only was lawful, but also was desirable, public-spirited, praiseworthy, and even necessary. Thus, in *pre-*constitutional practice, both the "individual" and the "collective" "right * * * to keep and bear Arms" coalesced into a single right: The "individual right" served the "collective right", while the "collective right" reciprocally guaranteed, and in practical ways facilitated the exercise of, the "individual right". Therefore, the Second Amendment is accurate and precise to speak of "*the* right of the people to keep and bear Arms", and to link that *entire* "right", *without exception or qualification*, to "[a] well regulated Militia".

E. Reliance on private gunsmiths. A robust free market in up-to-date, serviceable firearms required sufficient artisans to manufacture and repair them. Not surprisingly, then, Rhode Island relied upon private gunsmiths in numerous ways:[484]

•*By command*. As early as 1650, the Colony mandated "that [certain named individuals], all excuses sett aparte, shall mende and make all lockes, stockes and pieces that by order from the warden of each Towne shall be *from any of the inhabitants thearof presented to them*, for just and suitable satisfaction in hand payed, without delay", and "that *all men that have gunns and pieces to mend*, and have need to have them mended for their present defence, shall forthwith * * * carrie those pieces to mende".{EN-341} These, of course, were private workers, not employees at some public arsenal.

•*By employment*. For example, in 1777 the General Assembly empowered "*Edward Wells* * * * to procure Persons to repair the Guns in the Town of *Hopkinton*, belonging to this State, as soon as may be".{EN-342} Here, the firearms were public property, but the artisans were private citizens. So, sufficient public arsenals, adequately staffed, either did not exist at all or were incapable of performing the necessary work.[485]

•*By special exemption from Militia duties*. In 1777 the General Assembly "recommended to the Independent Company of *Kingston Reds*, that they excuse *George Tesst* and *Jeremiah Sheffield* (who are employed in making and stocking Guns) from doing any Service in said Company".{EN-343} And,

•*By economic encouragement*. In 1774 the General Assembly considered the petition of "Jeremiah Hopkins * * * that he sufficiently understands the business of a gunsmith, so as to make guns, or small arms, with advantage to himself, and to

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[484] As employed here, "gunsmith" is an all-embracing term that actually includes quite a few different, but complementary trades and skills. *See Encyclopedia of Firearms*, *ante* note 428, at 150-156.

[485] Especially during the War of Independence, Rhode Island was not the only Colony that needed to rely on private gunsmiths. *See post*, at 519-522 (Virginia). *See generally, e.g.*, R. Ketchum, *Decisive Day*, *ante* note 310, at 63.

others, by whom guns are much wanted at this time, when they cannot be imported from Great Britain", and "grant[ed] him * * * a lottery, for raising the sum of $200, to be appropriated and applied towards procuring * * * works, tools and instruments" for that purpose.{EN-344}

Obviously, the government's rather routine reliance—indeed, apparent dependence—on the free market for gunsmiths evidenced the existence of numerous gunsmiths, which in turn evidenced a private demand for firearms that was capable of calling forth and supporting such artisans' services when the government did not need them.[486]

F. Regulation aimed at perfecting the free market. Even in those few instances in which Rhode Island regulated the market for arms, her purpose was, not to inhibit or suppress the trade (as with "gun controls" common today), but instead to guarantee the quality of the merchandise offered for sale. For example, in 1776 the General Assembly decreed "[t]hat if any Person * * * within this State, shall vend or expose to Sale any Gunpowder, manufactured within the same, unless said Gunpowder be packed in a good dry Cask, marked with the two first Letters of the Manufacturer's Name, and hath been examined and approved by the Inspector of Gunpowder, for said State, and by him marked with * * * Marks * * * necessary to distinguish the several sorts of Gunpowder; the Person * * * so offending, shall forfeit and pay six Pounds, lawful Money, for every Cask so exposed to Sale".{EN-345} That so many local manufacturers and distributors of gunpowder existed as to warrant an official "Inspector of Gunpowder" to certify the stuff put up for private sale indicated a significant private demand for gunpowder, which in turn indicated a large number of firearms in private use. (In this case, of course, "private" sales would have included purchases members of the Militia made to fulfill their duties.) This exemplifies how *pre-*constitutional "gun control" concerned itself with correcting possible imperfections in the free market so as to ensure that the people were well armed, not with hindering, let alone suppressing, private trade in firearms and ammunition.

G. Subsidization of the free market. In order to supply her Militia and other forces with firearms and ammunition, Rhode Island did not merely encourage and make use of the free market, but also supplemented it by subsidizing production of critical items where necessary. For example, in 1775 her General Assembly "*Voted and Resolved*, That a Bounty of *Three Shillings* a Pound be allowed, and paid out of the General-Treasury, on every Pound of Salt-Petre that may be made in this Colony by the Twenty-sixth Day of *August*, A.D. 1776, suitable to be manufactured

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[486] *See, e.g.*, Benjamin F. Hubbell, "The New England Combination Gun, 1730 to 1775", *in* The American Society of Arms Collectors, *Longarms in America, ante* note 468, Volume 1, at 27; F. Allen Thompson, "Worcester County Gunsmiths 1760-1830", *in id.,* Volume 1, at 141 (Massachusetts).

into Gunpowder, and *Three Shillings* a Pound for every Pound of such Salt-Petre, exclusive of said Bounty";[487] but it also decreed that "no Person [shall] be entitled to said Bounty and Value, until he shall have first made Oath * * * that the Salt-Petre * * * was actually made in this Colony".{EN-346} Then, in 1776, the General Assembly repealed the latter statute and

> enacted, that there shall be given and paid out of the colony treasury, a premium or bounty, of £10, for every hundred pounds weight of good and merchantable salt peter or nitre, that hath been made or manufactured in this colony, since the 1st day of September last past, or that shall be made or manufactured therein, before the 1st day of January, 1777; and so in proportion, for a greater or less quantity.
>
> Provided always, that in case any proprietor of saltpeter works, or manufacturer of saltpeter, shall, upon application and request made to him by any person or persons, neglect or refuse to communicate a full account of the materials out of which, and the process by which, such saltpeter or nitre is made, such proprietor or manufacturer shall not be entitled to have or receive the aforesaid bounty or premium, for any saltpeter or nitre he shall make * * * .
>
> And * * * the claimants of the premium or bounty * * * shall * * * make oath * * * that such saltpeter or nitre, was made and manufactured in this colony, out of materials collected therein * * * .
>
> * * * * *
>
> And * * * every town in this colony, in which saltpeter or nitre works are not, or shall not be erected, and the manufacture of saltpeter is not, or shall not be, carried on by some private person or persons, shall be, and hereby are, enjoined as soon as may be, to erect one set of such works, and carry on the manufacture of nitre or saltpeter, in the same.
>
> * * * [I]t shall be the duty of the town council of each town in this colony, * * * at the expense and for the benefit of said town, to cause such works to be erected; and the manufacture to be carried on in the same, accordingly.
>
> * * * * *
>
> And whereas, it is necessary that one powder mill be immediately erected in this colony, for manufacturing gunpowder,—
>
> * * * that a bounty or premium of £30, shall be paid out of the colony treasury to the person or persons who shall erect a powder mill in this colony, and shall make and manufacture therein five hundred pounds of good and merchantable gunpowder.
>
> And whereas, it is expedient that such powder mill should be so situated as to accommodate the public in the best manner,—

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[487] The powerful oxidant potassium nitrate (KNO_3, colloquially called "saltpeter" or "nitre") is the key ingredient (along with sulphur and charcoal) in black powder.

> * * * no powder mill shall be erected in this colony, for the manufacture of gunpowder, without the license of the General Assembly * * * .{EN-347}

These statutes illustrate that, where ammunition was concerned, the line between "private" and "public" action in *pre*-constitutional times was very fine indeed—and public officials stimulated and designed actions on both sides of the line to work in perfect unison. On the one hand, the General Assembly subsidized the manufacture of saltpeter by private parties, but demanded that the processes for its production be made public, in order to enable others to manufacture the material. On the other hand, the General Assembly compelled Rhode Island's Towns to take up that work at their own expense, but only where it was not being or likely to be carried on by private parties. In addition, the General Assembly stimulated the erection and operation of a private powder mill, but reserved to itself the facility's location so as "to accommodate the public in the best manner". Throughout, the *desideratum* was the *Local* production of gunpowder—to some degree, for Rhode Island's economic benefit, in that Local workers turned Local resources into a product to be used Locally; but, to a larger degree, for Rhode Island's political benefit, by securing Local supplies of the ammunition without which the firearms her Militia and other forces carried in their efforts to win the State's independence from Britain would have been of little use.

H. A free market in arms necessary for "well regulated" Militia. As a matter of fact, *no Militia in* pre*-constitutional Rhode Island ever existed in the absence of a free market for arms—the Militia which did exist was always deemed to be "well regulated"—therefore, the working definition of a "well regulated" Militia in Rhode Island was a Militia which relied and could depend upon a free market in arms to the fullest extent of its needs, whether those needs were expressed by its members as individuals or by the government of which it was an integral part.* Viewed from the other side, *no market in arms ever existed in* pre*-constitutional Rhode Island in the absence of a "well regulated" Militia—the market that did exist was undoubtedly "free" in terms of the way it actually functioned—therefore, the working definition of a free market in arms was a market which operated as a necessary adjunct to and complement of a "well regulated" Militia.*

That during the entire *pre*-constitutional period Rhode Island never negatively interfered with the free market's production and distribution of firearms and ammunition—refraining even from licensing the trade in arms, let alone prohibiting it, but instead requiring most of her citizens to employ the free market in order to acquire the arms they needed to fulfill their Militia duties, as well as relying on the market herself—provides compelling evidence for the legal

conclusion that no power so to interfere was thought to exist.[488] Or, if such a power did subsist in some arcane theory, no one in a position of public authority ever attempted to exercise it. So, when the original Constitution explicitly incorporated "the Militia of the several States" as permanent components of its federal system, just as they then existed and had existed for generations in Rhode Island and the other Colonies (other than Pennsylvania) and then all of the independent States, it also implicitly incorporated the free market in arms as the necessary and permanent constitutional means through which WE THE PEOPLE could always assure themselves of access to sufficient supplies of firearms, ammunition, and accoutrements suitable for their Militia service.

[488] *See, e.g.*, Federal Power Commission v. Panhandle Eastern Pipe Line Company, 337 U.S. 498, 513 & note 20 (1949); Printz v. United States, 521 U.S. 898, 905, 907-910 (1997).

CHAPTER TEN

Rhode Island required all of her resident able-bodied free males between sixteen and sixty years of age to participate in some specifically mandated manner in her *pre*-constitutional Militia.

Rhode Island's *pre*-constitutional Militia was completely organized. By the late 1700s it was composed of several well-tried subdivisions. Yet it was anything but highly centralized and monolithic. Rather, from the 1600s Rhode Island established her Militia on a Local basis. As ultimately arranged, the structure had several components:

- "The Trained Bands" typically consisted of those able-bodied free men from sixteen to fifty years of age who were required to be fully armed and accoutered, to undergo regular Militia training on some set schedule, and to assume the primary responsibility for service in the field.[489]

- "The Alarm List" consisted of able-bodied (and even some partially disabled) men from fifty to sixty years of age, who were required to be fully armed and accoutred, but were not subject to regular training, and were called forth for service in the field only in emergencies.[490]

- "The Senior Class" consisted of able-bodied men from sixteen to fifty years of age who armed themselves and could be called forth in emergencies, but otherwise were exempted by statute from training and regular service in the field, because of their important public offices or specialized private professions or trades which the community considered crucial to its functioning.[491]

- "Independent Companies" were Trained Bands whose members voluntarily recruited, organized, armed, trained, and disciplined themselves as Militia, albeit separately from Rhode Island's compulsory Militia units, and served under regular Militia command only when called forth for actual duty in the field.[492]

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[489] *See post*, at 208-220.

[490] *See post*, at 220-224.

[491] *See post*, at 224.

[492] *See post*, at 224-234.

• Both "the Watch" and "the Ward"—the foundational forms of "homeland-security" service from long before the *pre-*constitutional era in America—consisted of individuals from sixteen to sixty years of age who performed *proto-*police functions.[493]

• Conscientious objectors were not required to possess, train with, or bear firearms, but were assigned special Militia duties—some of which were even more hazardous than serving as front-line fighters in the field.[494]

• *Compulsory* service in the Militia terminated after sixty years of age. But none of Rhode Island's *pre-*constitutional statutes precluded any free male beyond that age from *volunteering* for whatever Militia duties he was capable of performing, or from maintaining possession of whatever firearm and ammunition he had acquired during his Militia service in his earlier years (or any other firearm or ammunition, for that matter).

Cumulatively, these categories embraced every free male from sixteen to sixty years of age (and possibly beyond)—in or of whatever public office, private occupation, or religious conviction—other than those with incapacitating disabilities. Moreover, with respect to the Trained Bands and the "Watch" and "Ward", many free women were indirectly affected, too.[495] The obvious constitutional principle to be drawn from this aspect of Rhode Island's *pre-*constitutional practice is that *Militia duty attaches when an individual first becomes an adult and can serve in some useful capacity, and continues for as long as he remains capable of contributing (unless the legislature decides that special circumstances warrant an exemption in the public interest)*.

More specifically—

A. Total inclusion and employment. In *pre-*constitutional Rhode Island, no able-bodied free male was not *regulated* in some manner by her Militia laws. Whether he was a member of a Trained Band, a member of the Alarm List or the Senior Class, a member of an Independent Company, or even a conscientious objector, each individual was subject to statutes that explicitly defined and provided for enforcement of his participation. Rhode Island's Militia was *completely and comprehensively organized—everyone* found himself in *some* subdivision, with certain *specific* duties. *All* of the members of the Militia, other than conscientious objectors, were *armed* at all times—usually with their own firearms, ammunition, and necessary accoutrements. Members of the Trained Bands and Independent Companies were *trained* and *disciplined*—and almost all of those in the Alarm List

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[493] *See post*, at 235-240.

[494] The exemption for conscientious objectors is treated separately *post*, at 266-272.

[495] *See ante*, at 155-157, *and post*, at 242-245.

and the Senior Class had also seen some, or even extensive, service in the Trained Bands or Independent Companies at one time or another in their younger years or before they obtained the public offices or prepared themselves for the various professions or trades that qualified them for exemptions. Finally, even conscientious objectors were assigned particular, and often very dangerous, noncombatant duties for the fulfillment of which consummate skill might be required. Thus, in Rhode Island, no "*private* militia", "*un*organized militia", or "*select* militia" ever existed—so none of these could ever have qualified as a "well regulated" Militia under Rhode Island's laws, or could qualify as one today under the Constitution or the laws of any State.[496]

B. Comprehensive Local framework. Rhode Island structured her *pre*-constitutional Militia on the basis of her Towns, for several practical reasons. *First*, from the beginning the Towns were the Colony's basic political jurisdictions and therefore closest to the people—and Rhode Island's Militia was always: (i) a *governmental*, never a private, establishment; and (ii) a thoroughly *popular* institution. *Second*, as the centers of settlement in which population, developed property, accumulated wealth, and economic activity were concentrated, the Towns needed the most protection. *Third*, because many people congregated in or around the Towns, the Militia could be most easily organized, trained, and mobilized there in times of emergency.

1. Depending on its population or geographical extent, each of Rhode Island's Towns had one or more Trained Bands, Troops of Horse, or other Companies designated by statutes the General Assembly enacted for "settling the Militia" in those Localities. For example, in 1718 (continued through 1730 and 1744), the General Assembly provided

> [t]hat for the better Ordering and Training up the Inhabitants of this Colony, that the several Companies or Train'd-bands, shall remain in the Stations and Bounds and Division by which they have been heretofore Divided Known & Distinguished, until some further or New Division or Bounds be Stated Appointed or Limited by lawful Authority.
>
> *That is to say*, Three Companies in the Town of *Newport*, Three Companies in the Town of *Providence*, one Company in the Town of *Portsmouth*, one Company in the Town of *Warwick*, Two Companies in the Town of *Westerly*, one Company in the Town of *Newshoreham*, Two Companies in the Town of *Kingstown*, one Company in the Town of *East-Greenwich*, and one Company in the Town of *James-Town*.{EN-348}

In 1746, the General Assembly determined

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[496] *See ante*, at 63-76.

> [t]hat there shall be one train'd Band of Foot Soldiers in the Town of *Bristol*, and two train'd Bands of Foot Soldiers in the Town of *Tiverton*, and one train'd Band of Foot Soldiers in the Town of *Little-Compton*, and one train'd Band of Foot Soldiers in the Town of *Warren*, and one train'd Band of Foot Soldiers in the Town of *Cumberland*. And that one Troop of Horse be raised in the County of *Newport*: And that so many of those in the Towns of *Tiverton* and *Little-Compton*, who are properly equipt for Troopers, and desire to continue so, be Part of said Troop of Horse: And that such others be added to them, as see Cause to inlist, and properly equip themselves for Troopers.{EN-349}

And in 1779, for another instance, legislators followed the same procedure:

> That there be Four Infantry Companies in the Town of *Providence*, Two in the Town of *Cranston*, Two in the Town of *Johnston*, and one in the Town of *North-Providence*: That there be Three Infantry Companies in the Town of *Smithfield*, and Three in the Town of *Cumberland*: That there be Six Infantry Companies in the Town of *Scituate*, and Four in the Town of *Gloucester*: Also that there be Three Infantry Companies in the Town of *Westerly*, Two in the Town of *Charlestown*, and Three in the Town of *Hopkinton*: That there be Four Infantry Companies in the Town of *North-Kingstown*, and Two in the Town of *Exeter* [...and on through an extensive list of Towns].{EN-350}

The General Assembly paid extraordinary attention to Local details in allocating the territorial extent of Militia Companies, as major rearrangements in 1775 illustrate:

> That the Second Trained Band, or Company of Militia, in the Town of *Hopkinton*, be * * * divided into Two Companies: That the Division Line shall begin at the Middle of the long Bridge, and run from thence on a West Course to the Colony Line, and from the Middle of said Bridge Easterly to *Ell-Pond*, *Long-Pond*, and to the South End of *Blue-Pond,* and from thence Easterly Twenty Rods South of *Hezekiah Carpenter's* House, to *Wood-River*: That the North Part of the said Town, from the said Line, be the Third Company * * * .{EN-351}

> That the First Trained Band, or Company of Militia, in the Town of *Westerly*, be divided into two Companies: That the District of the Company taken off, which shall be the Third Company in said Town, be included within the two Roads * * * beginning at the Bridge, near the *Baptist* Meeting-House, commonly called *Crandall's Bridge*; thence Southerly, bounded by the Road, until it comes to the Post-Road, near the

> House of *Joshua Babcock*, Esq; and thence Westerly, by the Post-Road, to the Colony Line at *Pawcatuck Bridge* * * * .{EN-352}
>
> WHEREAS the First Company of Trained Bands in *Scituate* * * * is become so large, that it is very inconvenient that the same should remain entire:
>
> * * * That the * * * First Company in *Scituate* be * * * divided and made into Two, by a Line dividing the late District of that Company, beginning at the Middle of the South Line of the said District, and to run from thence North through the same: And that all those Men who live on the West Side of said dividing Line, shall compose a Fifth Company in said Town * * * .{EN-353}
>
> WHEREAS the Company of Militia in the Town of *Johnston* labours under great Inconveniences, from the Largeness of its Extent, and the Number of its enrolled Soldiers * * *
>
> * * * *Enacted*, That the said Company be * * * divided into Two Companies, by a Line, beginning at *Tripp's* Bridge, upon *Wanasquatucket* River; thence following the Highway, until it comes to the Dividing of the Roads by *Richard Eddy's* Pot-Ash House; thence following the Course of the Highway, which leads over *Neuticonkinut-Hill*, until it comes to the House of *John Waterman*, Miller; and passing which, leaving the Highway, continues its Course still Westerly, so as to run about Sixty Rods to the Northward of *Daniel Sprague's* House; and after passing which, and bearing a little Southerly, extending Westerly, until it joins the *Scituate* Road Eighty Rods Easterly, from the House where *William Harris* now dwells; then following the Course of said Road or Highway, extends Westerly to the Eastern Line of the Town of *Scituate*: That all the Inhabitants upon the North of the said Line shall be One Company, and those upon the South of said Line shall be the other Company: And those who live within the South-East Part shall be the First Company.{EN-354}

Not surprisingly, such painstaking Local organization was not of an arbitrary, "top-down" variety, but instead often arose out of the initiatives and embodied the desires of Local residents themselves. In 1753, for instance, the General Assembly responded favorably when

> sundry of the Inhabitants of *Cumberland*, represented * * * That said Town is almost twelve Miles in length, and but one Company or train'd Band therein; by Reason whereof, they are greatly incommoded in their Attending on Military Discipline; that there are in * * * said Company * * * almost Two Hundred Soldiers; and thereupon prayed, another Company or train'd Band may be set off and made in said Town[.]{EN-355}

In 1775, because "the Second Trained Band, or Company of Militia, in the Town of *Coventry*, contain[ed] about One Hundred and Sixty Soldiers, which [wa]s sufficiently large for Two Companies", that Company

> met * * * and unanimously agreed to pray th[e General] Assembly to divide the same in the following Manner * * * : By a Line beginning at *Scituate* Line, where * * * *Warwick-Brook*, runs into the said Town; from thence down said *Warwick-Brook* to the *Buck's-Horn Brook* (so called;) from thence up said *Buck's-Horn Brook* to the Line between the Lands of *Edmund Jordan* and the Heirs of *John Fox*, deceased; from thence on the dividing Line between said Lands, as far Southward as their Land lieth; from thence on a strait Line Southerly to the old Saw Mill Place, where *Philip Aylsworth's* Saw-Mill formerly stood; and from thence South to *West-Greenwich* North Line, to a Place called *Narrow-Lane*:
>
> AND * * * *it is Enacted*, That the said Company be * * * divided into two Companies, in Manner * * * above described: And that * * * the Part of the said Company which lieth East of the said Line be the Second Company, and the Part which lieth West of the said Line the Fourth Company in the said Town.[EN-356]

In 1780, when it was "represented to th[e General] Assembly * * * that the inhabitants of the towns of Newport and Portsmouth [we]re desirous of associating for the defence thereof against the enemies of [Rhode Island] and the United States", the Assembly "empowered" those "inhabitants * * * to form themselves into companies, and to nominate the necessary officers, who being * * * approved by * * * the Governor, shall be commissioned[.]"[EN-357] And as late as 1781, "[u]pon the petition of a considerable part of the second trained band or company of militia, in the town of Westerly", the General Assembly resolved in its typically careful fashion to divide that Company into two,

> [b]y a line beginning at the Charlestown line to the eastward of William Crandall's house; and thence running west to the said house, leaving the same in the upper or fourth company; from thence, running northerly to Jonathan Sisson's house, leaving the same in the * * * fourth company; and from thence to the meadow brook; and that all to the northward of the said line to be embodied in a company, by the name of the Fourth Trained Band, or Company of Militia, of the town of Westerly.[EN-358]

These were not isolated events, either.[EN-359]

In addition to overseeing the formation of regular Militia Companies, Rhode Island's Towns were also empowered to enlist their residents into Companies of Minutemen.[EN-360]

2. Throughout the *pre-*constitutional period, Rhode Island's Towns, their Militia Companies, or both often participated in the selection of Militia officers:

> • [1641]"[T]he Traine Bands shall choose among the Freemen * * * their commanders, and present them to the Towne. The Major vote of the Towne * * * shall have the negative voice for the Establishment of them, and shall order their Powre till the next Generall Courte."{EN-361}
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> • [1642] "[E]ach Town or Band should chuse their officers within themselves, and not to choose their officers out of another Town or Band * * * ; and further that their Powre shall be ordered from time to time by the Towne[.]"{EN-362}
>
> • [1647] "[A]ll y^e^ Inhabitants in each Towne shall choose their Military Officers from among themselves[.]"{EN-363}
>
> • [1705] "[N]o person shall have any vote in any Train Band of soldiers in this Collony for commissioned officers of the Train Bands, but such as are freemen of the respective towns they live in, or freemen of the Collony[.]"{EN-364}
>
> • [1780] "[T]he inhabitants of the towns of Newport and Portsmouth" are "empowered * * * to form themselves into companies, and to nominate the necessary officers; who being * * * approved by * * * the Governor, shall be commissioned accordingly."{EN-365}

Rhode Islanders doubtlessly adopted these procedures, not solely in deference to subsidiarity and democracy, but also because they were necessary to create and maintain Militiamen's confidence in their officers, and the officers' confidence in one another and in their men—particularly important in the kind of largely irregular warfare in which Americans of the *pre-*constitutional era regularly engaged against the Indians, the French, and later the British, too.

3. From an early date, with their Militia "settled", Rhode Island's Towns were "Authorized and Impowered, to appoint, Settle and Order a *Military Watch* in Time of *War* * * * of such Number of Persons as they think proper" and "to appoint and Settle all *Watches* in Time of *Peace*".{EN-366} Thus, the fundamental duty of "homeland security" was correctly assigned to the Localities most concerned with and capable of seeing to its fulfillment.

4. With her Militia organized on a Local basis, Rhode Island naturally secured martial supplies in and for her Towns, too. As early as 1640, the legislature "ordered, that Two Barrels of Gunn Powder be alway readie in the Treasury of each Towne, with Bullets and match".{EN-367} And in 1650 Rhode Island established in each major Town "a magazine for its present and constant defence", to store "good powder", lead, and muskets, "all in good case and fitt for service".{EN-368}

5. Because these arms in public storehouses merely supplemented the firearms and ammunition that Rhode Island required all of her free able-bodied

adult male residents from sixteen to sixty years of age themselves to possess in their own homes at all times,[497] the amounts, quality, suitability for Militia service, and good repair of the armaments in private hands were of paramount concern. From the first, the Towns were charged with supervision of these matters:

> • [1650] The legislature "ordered, that [certain individuals], all excuses sett aparte, shall mende and make all lockes, stockes and pieces that by order from the warden of each Towne shall be from any of the inhabitants thearof presented to them, for just and suitable satisfaction in hand payed, without delay"; and "all men that have gunns and pieces to mend, and have need to have them mended for their present defence, shall * * * carrie those pieces to mende".{EN-369}
>
> • [1655] "[T]hat an accompt shall begiven within ten dayes * * * to y^e^ head officer of everie Towne * * * of what powder, lead and shot there is in the possession of everie inhabitant of y^e^ townes[.]"{EN-370}
>
> • [1658] The legislature provided that "if any bee complayned of for defective armes, the Town Counsill in each towne have power to judge off, and order the armes to bee such as they may finde will fully answer the meaninge of the lawe concerninge suffitiant armes".{EN-371}
>
> • [1665] "[F]or the defence of the Collony, in having a Magazine or store of armes and amunition * * * in pertickelar men's houses * * * in each towne", the General Assembly "ordered * * * that every man in each towne be allwayes furnished with two pound of gunpowder, and fowre pound of lead or bulletts * * * ; and the Clarke of the traine band in each towne is * * * authorized and required to informe himselfe in that matter, by inquiry; and finding any man vnsuplyed, is to make report to the * * * magistrates in each towne".{EN-372}
>
> • [1667] Certain individuals were deputed to "goe from house to house throughout the towne of Newport, the villages and precincts thereof, and to take a precise and exact account of all the armes, amunition and weapons of warr each person is furnished with, or hath in his house to spare to others, and in what condition with regard to service the same is in * * * . And also to call vpon such as have deffects, that they may be supplyed in the place forthwith, * * * to repaire to such persons as may supply them."{EN-373}
>
> • [1669] "The Councill * * * heerby recommend itto the care of each respective Towne Councill in the Colony * * * to see that the inhabitants of each respective towne bee furnished with ammunition according to law; and that the armes bee fixed and in readiness for service[.]"{EN-374}

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[497] *See ante*, Chapter 6.

Subsequently, the Militia Companies in each Town performed the lion's share of these Local duties of inspection and enforcement of compliance with regulations.[498] Yet, as late as 1775 the General Assembly appointed various Townsmen "to take an account * * * of the powder, arms and ammunition, in the several towns in this colony, * * * including private as well as public stock", and "empowered [them] to go to the house of each person in their respective towns" for that purpose.{EN-375}

6. Throughout the *pre-*constitutional period, too, Rhode Island's Towns provided firearms, ammunition, and necessary accoutrements to those among their residents who were too poor to purchase that equipment on their own:

> • [1647] "[T]he Towne Councils shall have power to cause those which are defective in armes, to be supplied in an equal way according to Estate and strength."{EN-376}
>
> • [1657] "[T]he Town councill have power to make a rate [that is, a tax] or to lay out * * * what fines are taken for men's defect in traininge for such as they judge not able to buy armes."{EN-377}
>
> • [1755] "[A]ll the * * * Fines be lodged in the Town Treasury of each respective Town, to purchase Arms and Ammunition with, * * * for the use of such Towns, to be used by such Soldiers as are not able to provide for themselves, after all Military Accoutrements * * * for the Company are purchased[.]"{EN-378}
>
> • [1766] "Fines * * * shall be paid by the Clerk into the Town-Treasury * * * to purchase Arms and Ammunition * * * for the Use of such Town to be used by such Soldiers as are not able to provide for themselves, after all military Accoutrements to be provided for the Company are purchased[.]"{EN-379}
>
> • [1776] "[E]ach town in this colony * * * [shall] call a town meeting * * * and make order that their respective town councils give in a list of all persons in their towns, being inhabitants thereof, and obliged by law to equip themselves with a good fire-arm, bayonet and cartouch box, and who are not able to purchase the same;" "thereupon, said town shall immediately make order for the supplying such persons with a good fire-arm, bayonet and cartouch box, at such town's expense, to be lodged with the captains of such district wherein such poor persons belong, for their use upon any proper occasion"; "[a]nd * * * upon failure of any town * * * such town be liable to the fine of £100".{EN-380}
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> • [1776] "That Two Thousand Stand of good Fire-Arms, with Bayonets, Iron Ramrods, and Cartouch-Boxes, be purchased for the Use of the Colony, * * * and distributed to each Town, in Proportion to the

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[498] *See ante*, at 175-178.

Number of Polls upon the Alarm List therein"; and "the Town-Council of each Town shall * * * determine what Persons in their respective Towns shall have the Benefit and Use of the Arms provided, * * * and be exempted from providing themselves as the Law requires."{EN-381}

• [1776] "That the Town-Councils of each Town furnish such Persons as they shall certify to be unable to furnish themselves, with Arms * * * and Accoutrements, as by Law required; and that the same be paid out of the General Treasury."{EN-382}

• [1777] "[C]ommanders" shall "cause their * * * companies to be completely equipped with arms * * * ; and if any in said company, who have been adjudged by the town council * * * to be unable to furnish themselves therewith, shall appear not duly equipped, * * * [the] town councils * * * are * * * empowered and directed to furnish them with arms and accoutrements".{EN-383}

• [1781] "[E]ach of the * * * non-commissioned Officers and Soldiers [shall] furnish himself with a good Fire-Arm, Bayonet, Cartouch-Box * * * . And if he shall not be of sufficient Ability, or shall otherwise neglect to do it, the Town-Council of the Town to which he belongs are directed to furnish him with a Gun, Bayonet, Cartouch-Box * * * at the Expence of the said Town and receive therefor, out of the Wages of such delinquent Person, if of sufficient Ability to furnish himself * * * , *Twelve Shillings*, in Gold or Silver[.]"{EN-384}

This, of course, required that the Towns exercised the authority to determine who was, in fact, too impoverished to procure a firearm and ammunition without public assistance:

• [1666] "[I]t * * * shall be in the power of any two magistrates in each towne, together with the Captain and Lieutenant of the band, or the major part of them, to judge of the excuses of such persons who are defective" with respect to their "due exicution of the enacted lawes of this Collony concerninge the militia[.]"{EN-385}

• [1778] "[A]ll Persons * * * by Law obliged to equip themselves with a good Fire-Arm, Bayonet and Cartouch-Box, and who shall not, by Report of the Town-Council of the Town to which they belong, be reported * * * incapable of providing themselves * * * do provide themselves therewith * * * or with a Rifle-Gun and Sword[.]"{EN-386}

• [1779] "[E]ach and every effective Man * * * shall provide, and at all times be furnished, at his own Expence (excepting such Persons as the Town Councils of the Towns in which they respectively dwell or reside shall adjudge unable to purchase the same) with one good Musquet, and a Bayonet fitted thereto, * * * one Ram-rod, Worm, Priming-wire and Brush, and one Cartouch-Box."{EN-387}

> • [1781] "[E]ach Person, liable to do military Duty * * * (unless excused by the Town-Council of the Town to which he belongs for Inability to procure the same) who shall at any Time be found destitute of a good Gun, being his own Property, shall pay * * * a Fine[.]"{EN-388}

7. Besides providing the honest poor with firearms, Rhode Island's Towns were sometimes empowered to find substitutes to serve in the places of men drafted for special Militia duties.[499] For example, in 1777 the General Assembly provided that, when "the militia, independent, artillery and alarm companies within th[e] state were draughted" to "do duty for the space of thirty days", "if any person who shall be draughted * * * shall neglect to do duty, or hire a man to do his tour of duty, the town council * * * are empowered to hire a man in the room of such delinquent person * * * [at his cost] if the delinquent person be adjudged * * * of sufficient ability to bear the expense".{EN-389}

On the other hand, the Towns themselves were also made financially responsible for ensuring that sufficient men were drafted into military service. For example, in 1780 the General Assembly decreed that "each and every Town which shall neglect to raise their whole Quota of Men * * * shall forfeit and pay to the Treasurer of this State * * * double the Sum it shall cost upon an Average to procure a Recruit, for each and every Deficiency; to be collected by adding the same to the next State Tax which shall be assessed on said Town".{EN-390}

8. Thus, throughout the *pre-*constitutional period, Rhode Island's Towns retained significant jurisdiction over the Militia even as her General Assembly enacted increasingly specific statutes covering that subject. This system worked well then, and could work even more efficiently today, because three pillars of timeless strength supported it—

a. The principle of *subsidiarity*: namely, that the people who should make the decisions as to proposed actions impacting upon the adequacy of the defense of their own lives, liberties, and property are the ones possessed of the information necessary and sufficient to make such decisions in a timely fashion, and most directly affected by how that information is evaluated and used. That is, management of "homeland security" should be arranged "from the bottom up" rather than "from the top down". In Rhode Island (as elsewhere in America, both then and now) people on the scene knew best where Militia Companies were needed, and when established Companies were too large. They could arrive at the most accurate judgments as to who amongst themselves might be financially unable to purchase firearms and ammunition, or to hire substitutes. And they could most easily and least intrusively inventory the firearms and ammunition in Local residents' possession, to ensure that all such equipment was always maintained in good order and readiness. Perhaps

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[499] On the use of substitutes in Rhode Island, *see post*, at 238-239 and 261-266.

most importantly, in emergencies Local Militia Companies could take immediate, independent action as soon as dangers became imminent, without having to await the approval, let alone abide the intervention, of less concerned because more removed higher authorities.

b. The system worked because it promoted, as well as relied upon, *social solidarity and sympathy*. Rhode Island's Militia Companies were small Local units composed of men who knew not only the lay of the land in terms of geography, patterns of residence, and economic activities, but also each other as individuals, as well as Local customs and particular social and even *inter-*familial arrangements and understandings. Inasmuch as men from one Town might have been born and raised, or might have relatives or close friends, in a neighboring Town, each Town could always count on others for support in emergencies.[500] And it profited each Town to maintain, and if possible strengthen, those relations of mutual support.

c. The system worked because it reflected the true source and locus of *sovereignty* in a republican government: the people themselves, not public officials: **The Sword *is* Sovereignty—Sovereignty *is* the Sword—and *Popular* Sovereignty demands that WE THE PEOPLE always hold the Sword in *their own* hands.** Having Militia Companies organized within the Towns imparted to Rhode Islanders, not simply the sense, but especially the reality, of:

- Local authority coupled with responsibility—originally delegated by the General Assembly to be sure, but a recognized legal competence nonetheless;
- Local power—with essentially every able-bodied free man possessed of his own firearm and ammunition at home;
- Local control—the product of at least titular legal authority combined with actual physical power;
- Local independence—because organization of a fully armed citizenry "from the bottom up" provided an effective "check and balance" against usurpation and tyranny "from the top down"; and, the ultimate consequence,
- Local importance—not just in feeling, but in fact.

C. The Trained Bands. Throughout the *pre-*constitutional period from the *mid-*1600s to the late 1700s, Rhode Island designated the largest and most active components of her Militia the "Trained Bands" (or "Train Bands"), which

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[500] The most famous example in neighboring Massachusetts being the Town of Concord, on 19 April 1775. *See* R. Gross, *The Minutemen*, *ante* note 379, at 118-119; *and* F. Coburn, *The Battle of April 19, 1775, ante* note 383, Appendices Nos. 3 through 5, at 173-178, which list Militiamen of Companies from the near-by Towns of Acton, Bedford, and Lincoln who "ENTERED THE CONTEST AT CONCORD NORTH BRIDGE".

comprised the infantry,{EN-391} and (in much smaller numbers) the "Troops", which comprised the cavalry.{EN-392} The Trained Bands were also known as "Companies" or "Companies of Militia".{EN-393}

1. The term "trained band" was not original to Rhode Island (or any other American Colony), but derived from the usage of those words in England during the 1500s and 1600s to refer to local militia.[501] Often, in *pre-*constitutional usage, the nouns "militia" and "trained band" were treated as synonyms—as in Johnson's *Dictionary*, which defined "militia" as "[t]he trainbands; the standing force of a nation", and "trainbands" as "[t]he militia; the part of a community trained to martial exercise".[502] And not infrequently today as well, the designation "trained band" is equated with "the militia" as a whole.[503] But as Rhode Island's *pre-*constitutional legislation proves, that attribution of equivalence is erroneous, because her "Trained Bands", strictly so-called, actually encompassed only one portion of the part of her Militia that was subject to regular training and service in the field, the other portions of that part being the Troops of Horse, and to a far lesser degree the Companies of Artillery, along with the Independent Companies of infantry, cavalry, and even artillery.[504]

2. Although some early statutes mandated training for men from sixteen to sixty years of age—

> • [1665] "all men from sixteene years of age to sixtye yeares old * * * , both masters, parents, sones, sarvants and others, excepting such as are in publicke office, or are by former lawes exempted", are required to "find themselves armes and traine in their owne persones";{EN-394}
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> • [1677] "noe person or persons within this Collony from the age of sixteen yeares unto the age of sixty yeares, shall be released from taininge or other duties in millitary affaires, exceptinge only the civill officers in this Collony, or such whose employments render them excusable by law, unless he or they doe render or give under their Captaine * * * a good and full satisfactory reason for their neglect"{EN-395}

—throughout most of the *pre-*constitutional period Rhode Island generally required all able-bodied men only from sixteen to fifty years of age (and not specially exempted[505]) to train:

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[501] *See The Compact Edition of the Oxford English Dictionary*, *ante* note 11, Volume 2, at 3375.

[502] *Ante* note 50, in both the First (1755) and the Fourth (1773) Editions.

[503] *E.g., Black's Law Dictionary, ante* note 368, at 1668.

[504] Hereinafter, the text will refer solely to the Trained Bands, because the distinction between "Trained Bands" and "Troops" in the Militia is the largely adventitious one that the former consisted of infantry, the latter of cavalry. Their tables of organization and equipment differed; but the principles upon which they were raised were identical.

[505] *See post*, Chapter 11.

> • [1638] "[T]her shall be a generall day of Trayning for the Exercise of those who are able to beare armes in the arte of military discipline, and all that are of sixteen yeares of age, and upwards to fifty, shall be warned thereunto."{EN-396}
>
> • [1718, 1730, and 1744] "[A]ll Male Persons Residing for the space of three Months within this Colony from the Age of Sixteen, to the Age of Fifty Years, shall bear Arms in their * * * Train-bands or Companies[.]"{EN-397}
>
> • [1766] "[A]ll Male Persons, who have resided for the Space of Three Months in this Colony, from the Age of Sixteen to Fifty, shall bear Arms in the respective trained Bands whereto by Law they shall belong[.]"{EN-398}
>
> • [1779] "[A]ll effective Males between the Ages of Sixteen and Fifty, except such as are * * * excepted, shall constitute and make the military Force of this State[.]"{EN-399}

Of course, in any era differentiations in types of Militia service by dint of age must be eminently practical, must rely upon averages, and ultimately must be determined by contemporary political, economic, and social conditions and *mores*. During the *pre-*constitutional period, the criterion for Rhode Island's Trained Bands was usually from sixteen to fifty years of age, because the urgent goal was to mobilize for regular service the largest number of men in the best average physical condition, which in those times happened not to include many men much above fifty. Yet, in emergencies, whoever could serve was required to, his advanced age or any partial disability notwithstanding.[506]

3. As explained heretofore, all the members of Rhode Island's Militia other than conscientious objectors and some poor Militiamen were required to possess serviceable firearms, ammunition, and necessary accoutrements in their own homes at all times.[507] In addition, as their designation denoted, the Trained Bands were under an obligation to muster on a regular schedule for actual training and exercises with their arms in the field.

a. The number of days statutorily designated for training depended upon circumstances, being greater in times of war and other public danger than in times of peace and tranquillity—but in any event encompassing the amount of effort considered necessary to impart the requisite knowledge, skills, and discipline to men who were primarily civilians and only secondarily soldiers:[508]

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[506] *See post*, at 220-224 and 259-261.

[507] *See ante*, Chapter 6.

[508] In what follows, the term "discipline" often connotes "drill". *See, e.g.*, Timothy Pickering, Jr., *An Easy Plan of Discipline for a Militia* (Salem, Massachusetts: Samuel and Ebenezer Hall, 1775), which contains a set of instructions for drilling Militiamen; A. French, *The Day of Concord and Lexington*, *ante* note 469, at 23.

• [1638] "[T]her shall be a generall day of Trayning for the Exercise of those who are able to beare armes in the arte of military discipline, and all that are of sixteen yeares of age, and upwards to fifty, shall be warned thereunto[.]"{EN-400}

• [1640] "[E]ight severall times in the yeare the Bands of each Plantation shall openlie in the field be exercised and disciplined * * * . And * * * there shall be two Generall Musters in the yeare[.]"{EN-401}

• [1642] "[T]he first Monday of every month, the Traine Bands shall be exercised by the Commanders, excepting in the months of May and August, January and Febru[ary] * * * ."{EN-402}

• [1647 and 1658] "[E]ight severall times in the yeare, the Bands of each plantation or Towne, shall, openlie in the field, be exercised and disciplined by their Commanders and Officers, in the months of May, August, January and February excepted; and on the first Monday of y^{e} other months, all the Train Bands to make their personal appearances completely armed, to attend their colors[.]"{EN-403}

• [1664] "[F]or the present reviueing the exercise and discipline in the Collony * * * the * * * captain in each town doe * * * give out warrants from time to time to warne the people listed to trayne vpon all such dayes as are by the Collony formerly appoynted, for the exercise of trayning, and that all be required on such dayes to appear in armes, compleat; and to exercise vnder their respective officers[.]"{EN-404}

• [1665] "[S]ixe days only in the yeare be ordered * * * for the milletary exercise in training, which shall be dilligently attended to in each respective towne, * * * ; and the dayes prefixed for the exercise of training, are yearly to be the last Monday in May; the first Monday in September; the first Monday in November; the last Monday in March, and the last Monday in Aprill."{EN-405}

• [1676] "[F]or the future not any of the Traine Bands shall be compelled to traine above two dayes in one yeare: which shall be the first Second day (or Monday) in the first month, March; and the first * * * Monday, in the 7th month, September[.]"{EN-406}

• [1677] "[T]here shall be six traininge days in the yeare * * * which days of traininge shall be for the towne of Newport upon the last Monday save one, in September; the last Monday save one, in October; the last Monday save one, in November; the last Monday save one, in March; and the last Monday save one, in Aprill. And for the townes of Providence, Portsmouth and Warwick, their days of trayninge shall be upon the last Monday in September, the last Monday in October, the last Monday in November, the last Monday in March, and the last Monday in Aprill; and soe for all or any other towne or village within this Collony; and the said inhabitants or listed souldiers are hereby strictly required and

commanded to make their personall appearances compleat in their armes, at the second beate of the drum, in such places in their respective townes, and at such houres as the * * * Captaines * * * shall appoint; and that then and there, the souldiers * * * shall give and yeild all due obedience unto their * * * Captaines[.]"{EN-407}

• [1699, 1701, and 1705] All "persons listed under the command of any Captain * * * of the militia" were to "appear complete in arms * * * upon the ——— training days all ready prefixed".{EN-408}

• [1702] "[T]here shall be but four training days in one year; and three of them to be at the discretion of the commissioned officers of each of the respective Train Bands[.]"{EN-409}

• [1718, 1730, and 1744] "[T]he Captain of each respective Company or Train'd band * * * shall * * * Exercise them in Martial Discipline, two Days in each Year in time of Peace, and four in War"; and "the Captain * * * shall Warn the Troop under his Command to Muster two several Days in every year in time of Peace, and four in time of War".{EN-410}

• [1740 and 1744] "[T]he Council of War * * * are * * * empowered to appoint such other Days as may be necessary to discipline the Militia, and make them expert in the Use of their Arms, over and above the Four Training Days by Law appointed in War Time[.]"{EN-411}

• [1745] "*WHEREAS the several Companies of the Militia, or train'd Bands, * * * being obliged to muster four Times a Year in Time of War, is found to be of ill Consequence in sundry Respects*, * * * for the future, the said Companies, or train'd Bands, shall be obliged to muster but *twice* a Year in Time of War, as well as in Time of Peace[.]"{EN-412}

• [1766] "[T]he Captain of each * * * Company or Trained Band * * * shall warn and call together the Company under his Command, and exercise them in martial Discipline, Two Days in each Year, at such Times and Places within his Town, as he shall see fit"; "the Captain * * * shall warn the Troop * * * to muster Two several Days in every Year * * * in like Manner as the Foot-Companies are to be warned"; and "a Council of War * * * may appoint such other Days as may be necessary to discipline the Militia, and make them expert in the Use of their Arms, over and above the Two training Days aforesaid".{EN-413}

• [1774] "[T]he Captain * * * shall warn and call together the Company under his Command One Day in every Month, and exercise the same in martial Discipline[.]"{EN-414}

• [1779] "That there be annually one grand Muster, for the Review of each Brigade"; and "[t]hat the several Companies of Infantry, Artillery and Horse, besides the Muster aforesaid, meet Two Days at the least in every Year, for Exercise and Reviews".{EN-415}

Admittedly, this level of training could not have produced first-rate soldiers equivalent to most regular British or French troops in parade-ground polish or battlefield prowess of European standards. Yet performance in the field under the special circumstances regularly to be encountered in North America was perhaps another matter. For, during the French and Indian War in the *mid*-1700s, relatively inexperienced Militiamen from New England demonstrated remarkable tenacity in battle.[509] In particular, whether Rhode Island's Militiamen became particularly good shots with the standard smoothbored flintlock muskets and fusils of the day may be debatable. At the time of the War of Independence, though, a typical American Militiaman from New England was likely to be more dangerous with his musket than the average British regular who opposed him.[510] For although, throughout the Colonial period, soldiers in the British Army did regularly practice marksmanship, both as individuals and in formations,[511] by the War of Independence the British military establishment had largely forgotten the lessons of small-unit tactics and fire-discipline which the French and Indian War had taught, but which Americans still remembered.[512]

In any event, changes from time to time in the statutorily required amount of Militia training reflected two key differences between the Militia and any regular army. *First*, the Militia was composed of "citizen-soldiers" for whom their day-to-day work as "citizens" was usually far more important and pressing than their adventitious service as "soldiers". *Second*, being composed of the people themselves, the Militia was strongly subject to "democratic" pressures. Thus, when in 1665 Rhode Island reduced the requisite days of Militia training from eight to six, the General Assembly explained its action as a response to

> the great defect in training, occasioned by the remissnes of some vnder the pretence of the burden in training soe often as eight dayes in the yeare, and other complaining of the great inequality, in that the poorest being vnable to spare wherewith to maintaine armes and amunition, as powder, &c., yett are forced by the law to beare armes as well as the most able; to redresse which grevances, it is enacted and declared, that the sixe dayes only in the yeare be ordered * * * for the milletary exercise in training, which shall be dilligently attended to in each respective towne * * * . And for the incorradgement of the meaner sort [that is, the poor], there shall be alowed yearly nine shillings in currant pay to or for each soldiare listed in the traine band, to be duely payed * * * at the Captain's discretion for the repaireing of armes, &c.{EN-416}

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[509] *See, e.g.,* A. French, *The Day of Concord and Lexington*, *ante* note 469, at 18 (footnote omitted).

[510] *See, e.g.*, *id.*, Chapter V.

[511] *See* De Witt Bailey, *Small Arms* of the *British Forces* in *America, ante* note 428, Chapter 19.

[512] *See* B. Ahearn, *Flintlock Muskets in the American Revolution, ante* note 464, at 22-23.

And when in 1702 the General Assembly reduced the number of days of required training from six to four, it offered a similar rationale:

> Whereas there was an Act made * * * [in] 1677, that there should be six training days in the year, and this Assembly * * * finding it to be a great burden to the poor in losing much time:
>
> Be it therefore enacted * * * That * * * there shall be but four training days in one year; and three of them to be at the discretion of the commissioned officers of each respective Train Bands within this Collony[.]{EN-417}

The essential point in these events was two-fold: *First*, average Rhode Islanders, surely of quite modest means, could not (without some subsidy from wealthier citizens through the public fisc) easily afford the financial burdens that too many days of Militia training imposed upon them—either the direct burden, in terms of the wear and tear on their firearms from, as well as the cost of gunpowder and lead expended in, live-fire exercises; or the indirect burden in terms of the time Militia training took away from their gainful employments in various civilian trades or occupations. *Second*, average Rhode Islanders were both the mainstay of the Militia, whose dissatisfaction impaired its efficiency, and in a political position to prosecute their "grevances" successfully among legislators. So, the result was effective control of—or at least significant influence on—Militia policies from "the bottom up", based upon striking a practical balance between the needs of "the common defense" and maintenance of "the general welfare", as the people understood and applied those concepts in the practical context of their own lives. Rhode Islanders could not have afforded to shortchange "the common defense", because that would have endangered "the general welfare"; but neither would they have exaggerated "the common defense", because that would have undermined "the general welfare". Inasmuch as the people were then (as they remain today) the ultimate guardians of "the common defense" (in their capacity as "soldiers" in the Militia), as well as the most numerous beneficiaries of "the general welfare" (in their capacity as "civilians", producing and consuming in the free market), the final choice as to where the balance should have been struck was (and ought still to be) theirs.

b. During the War of Independence, up to one fourth of the men from among the Trained Bands might have voluntarily served as "Minutemen" in separate "Minute Companies".{EN-418} Minutemen were subject to a schedule of training and responsibility for service in the field more rigorous than that required of ordinary Militiamen. In 1775, for example, Rhode Island's General Assembly mandated "[t]hat One Quarter Part of the Militia of this Colony be inlisted as Minute-Men, to meet together, and exercise themselves in military Discipline, Half a Day, Once in every Fortnight", and "[t]hat the * * * Minute-Men march for the

Defence of the Colony, when and as often as they shall be called upon by the Colonel of the Regiment to which they * * * belong".{EN-419}

4. All of this training aimed at preparing the Militia for duty in the field in times of war and other emergencies. So Rhode Island's statutes defined in detail how Militiamen might be called to particular duties.

a. Inasmuch as participation in Rhode Island's Militia was always in some manner or other *compulsory* for all able-bodied adult free men from sixteen to fifty or sixty years of age, assignment to a specific tour of duty often arose pursuant to an "impressment" or "draft". No one doubted the government's power to follow such a course:

> • [1757] "[E]ach respective captain * * * shall make his return of every man enlisted, (it being witnessed by the muster master that he hath passed muster) * * * ; whereupon, each respective colonel * * * shall immediately grant forth his warrant * * * in every town that shall be found deficient in enlisting its proper quota, immediately to impress * * * so many able bodied men, fit for soldiers, as shall make up each town's proportion * * * .
>
> "And every man so impressed, shall be obliged to serve as a soldier, or find a good, able bodied, effective man to serve in his stead; unless he hath some reasonable or lawful excuse * * * .
>
> "And when any man that hath been impressed, is excused or doth not pass muster, the captain * * * shall * * * impress another, forthwith, in his stead."{EN-420}

> • [1757] "Whereas, a number of men is demanded of this colony, * * * for the relief of Fort William Henry, which is invested by a large body of French and Indians; in compliance with the said demands, and to the end that every thing in the power of this colony may be done for the preservation of the country,—
>
> " * * * [O]ne sixth part of the whole militia of this colony, be forthwith raised and sent to Albany, with all possible despatch, * * * and to continue in the service as long as the immediate preservation of the country requires their stay there, and no longer * * * .
>
> * * * * *
>
> " * * * [T]hat His Honor the Governor, forthwith issue his warrants to the proper officers, to call together all the companies * * * in this colony * * * in each respective town * * * .
>
> " * * * [T]hat the names of all persons in the list of each company, shall be written on a scroll of paper * * * then put into a hat or box; and one sixth part thereof, shall be drawn, (unless the company agree that the commissioned officers shall press said sixth part,) and the persons whose names shall be so drawn or pressed, shall go on this service.
>
> * * * * *

"Provided * * * that no person's name be put into the hat or box, who, through sickness or lameness, cannot go[.]"{EN-421}

• [1776] "That all Male Persons subject by Law to bear Arms, whether of the Militia, Alarm List or Independent Companies, within this State, be draughted in three Divisions[.]"{EN-422}

• [1777] "[T]hat the first division of the second draft of the militia, and alarm and independent companies * * * march to such part of the shores within their respective counties, as shall be directed by the commanding officer * * * , properly equipped, to relieve those that are now upon duty, and there to remain and do duty for fifteen days[.]"{EN-423}

• [1777] "That one of the Divisions, consisting of the One Sixth Part of the Independent and Alarm Companies and Militia heretofore draughted, and One Half of a Division, be immediately called upon actual Duty[.]"{EN-424}

• [1777] "That one Half of the Militia, Alarm, Independent, and Artillery Companies, be drafted * * * ; and that the Persons who shall be drafted * * * be duly equipped with Arms and Accoutrements according to Law."{EN-425}

• [1777] "Whereas * * * one-half of the militia, independent, artillery and alarm companies within this State, were draughted, and have done duty for one month," "the remaining half-part of said militia, independent, artillery and alarm companies, be draughted * * * and do duty for the space of thirty days".{EN-426}

• [1781] "Twelve Hundred able-bodied effective Men of the Independent, Artillery, Senior and Junior Class Companies of Militia * * * be forthwith embodied; and that they rendezvous at such Places within this State * * * to do Duty therein for One Month * * * .

* * * * *

"*AND* * * * the * * * Commanders of each Regiment * * * shall forthwith issue their Warrants to the Captains of each Company * * * , setting forth the Number of the * * * able-bodied effective Men, which such Company is required to furnish, and commanding such Captain * * * , if the said Number of Men shall not voluntarily turn out to do Duty * * * , to detach the Men for the Service * * * and cause them to be marched to the Place of Rendezvous * * * .

* * * * *

"*AND* * * * the * * * Commanders * * * shall proportion the Men which each Company shall raise according to the Numbers of Men which the Company shall consist of, in Proportion to the whole Number to be raised by the Town to which such Companies shall respectively belong.

"*AND* * * * the Commanders of each respective Company * * * shall forthwith call their * * * Companies together, and in case the

> Number of able-bodied effective Men which such Company is required to raise shall not voluntarily turn out to do Duty * * * , that then such Commander shall detach such a Number of Men as will make up their Quota * * * .
>
> "*AND* * * * the Committees appointed to class the Inhabitants of the Islands of *Rhode-Island* and *Jamestown* * * * are * * * empowered and directed, to detach from the Inhabitants of their respective Towns the Number of Men before assigned to the said Towns, unless they shall voluntarily engage in the said Service[.]"{EN-427}

As their name implied, Minutemen in particular were *always* subject to call: "That the * * * Minute-Men march for the Defence of the Colony, when and as often as they shall be called upon by the Colonel of the Regiment to which they respectively belong[.]"{EN-428} This, however, was pursuant to their initial voluntary enlistments in the Minute Companies.

b. In times of greatest peril, Rhode Island extended her drafts of men beyond her Militia proper:

> • [1667] "Whereas, information is given to the Councill of eminent dangers approaching, whereby his Majesties Collony is like to be hazarded by the invasion of the common enemy, or by treachery from amongst the natives, whereby his Majesties subjects may be exposed to great extremities; the Councill * * * doe order, that * * * the magistrates of the townes and places within this Collony * * * are * * * empowered to press or cause to be impressed, any person or persons * * * .
>
> "And it is further ordered, that if any suddain invasion or insurrection shall bee, or that appearance of any such thing shall present * * * then itt is, or shall be in the power of * * * Magistrates, to raise, appoint and authorize any or all persons requisitt for the preservation of his Majestyes Collony and his subjects therein, to attend their allegiance and duty."{EN-429}
>
> • [1780] "WHEREAS * * * Six Hundred and Ten effective Men were ordered to be raised within this State * * * ; and although the same were apportioned to the respective Towns * * * , some of the said Towns have not yet returned a Man, and others are greatly deficient * * * :
>
> "*BE it therefore Enacted* * * * , That [certain named individuals] * * * are * * * empowered and directed, to form all male Persons whatsoever, of the Age of Sixteen Years and upwards, residing within their respective Towns (Deserters, *Indians*, Mulattos and Negroes excepted) into Classes, according to the Deficiencies of their said Towns * * * : And each of the said Classes is directed to furnish * * * One able-bodied effective Man * * * .
>
> * * * * *
>
> "*IT is further enacted* * * * , That if * * * the said Classes shall refuse or neglect to furnish an able-bodied Man * * * , the Persons

appointed to Class the said Men * * * are empowered and directed * * * to detach from the Class * * * an able-bodied effective Man[.]"{EN-430}

• [1780] "*Be it Enacted* * * * , That Three Hundred and Eight able-bodied effective Men * * * be forthwith raised within this State, to serve during the War, or Three Years; and that the whole Number * * * be apportioned to the several Towns in this State, agreeable to a mean Proportion between the rateable Polls and the rateable Estates, compared with the whole number of Polls, and the whole rateable Property in the State * * * :

* * * * *

"*AND* * * * in Case the aforesaid Number of Men * * * shall not be raised and inlisted by such Town * * * , [certain named individuals] * * * are * * * empowered and required, to form all male Persons whosoever, of the Age of Sixteen Years and upwards, residing in their respective Towns (Indians, Mulattoes and Negroes, excepted) into Classes, according to the Deficiency of each Town * * * , that is to say, into as many Classes as there are Men to be inlisted by such Town; * * * class[ing] the whole of the Inhabitants of their respective Towns * * * as equitably as may be, according to the Number of Polls and the Value of the Estates of the Persons to be classed, mingling the Rich and Poor together, so as to make the Classes in Point of Estate as nearly equal as may be: * * * That each of the said Classes shall * * * procure a good, able-bodied effective Man, to serve during the War, or for Three Years: That in case any * * * of said Classes shall neglect or refuse to procure their Recruits, * * * such Town is * * * fully authorized and empowered to hire such Recruit for each of the said neglecting Classes, and may assess the said Class, or the several neglecting Individuals thereof, in the same Proportions as the Taxes * * * are assessed in said Town, against the Individuals of such Class * * * : And that each and every Town which shall neglect to raise their whole Quota of Men * * * shall forfeit and pay to the Treasurer of this State * * * double the Sum it shall cost upon an Average to procure a Recruit, for each and every Deficiency; to be collected by adding the same to the next State Tax which shall be assessed on said Town. And moreover, that if either of the said Classes shall neglect or refuse to furnish an able-bodied Man * * * the [named individuals] * * * are empowered and required thereupon to detach * * * from the Class which shall be deficient * * * an able-bodied effective Man, to serve in this State's Battalion in the Army of the United States, during the said Term of Three Years * * * . And in case any one or more Individuals in a Class shall procure a Recruit at his or their Expence, the Expence * * * shall be reimbursed and repaid to the Person or Persons advancing the same, by the said Class upon whom the same shall be assessed * * * and from whom the same shall be collected in the same Proportions as herein before directed[.]"{EN-431}

These statutes evidenced the full extent of Rhode Island's power to mobilize for what Americans later described as "the *common* defence",[513] in the sense of the commonality of responsibility among her inhabitants for its provision. The General Assembly called in earlier years upon "any or all persons", and in later years upon "all male Persons whatsoever, of the Age of Sixteen Years and upwards, residing within their respective Towns (Deserters, *Indians*, Mulattos and Negroes excepted)", then upon "all male Persons whosoever, of the Age of Sixteen Years and upwards" without exception.

The latter statute also demonstrated the reality of the government's representative nature and concern for what Americans later denoted "the *general* Welfare",[514] by distributing its burdens with an eye towards economic justice. The law apportioned "the whole Number [of draftees] * * * to the several Towns * * * , agreeable to a mean Proportion between the rateable Polls and the rateable Estates, compared with the whole number of Polls, and the whole rateable Property in the State", and established "Classes [for draftees]" "according to the Number of Polls and the Value of the Estates of the Persons to be classed, mingling the Rich and Poor together, so as to make the Classes in Point of Estate as nearly equal as may be". Moreover, it assessed its costs fairly both to each "Class, or the several * * * Individuals thereof"—"in the same Proportions as the Taxes * * * are assessed in said Town, against th[os]e Individuals"; and to each individual who "procure[d] a Recruit at his Expence"—in which case "the Expence" would "be reimbursed * * * by the * * * Class".

5. Because of the nature of Militiamen as "citizen-soldiers" whose permanent vocations as citizens transcended their temporary occupations as soldiers, actual service in the field was neither continuous for any individual nor complete for the Militia as a whole. Rather, the policy was one of *rotation in tours of duty*. This was of particular importance during long periods of continuous strife, such as the War of Independence:

> • [1777] "[T]he first division of the second draft of the militia, and alarm and independent companies * * * [shall] march to such part of the shores within their respective counties, as shall be directed by the commanding officer * * * , properly equipped, to relieve those that are now upon duty[.]"{EN-432}
>
> • [1777] "[T]hat the militia and alarm companies of the town of Little Compton be drafted into two divisions * * * .
>
> "That one of the said divisions do duty within the said town, to guard the shores of the same, for the space of thirty days * * * .

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[513] *See* U.S. Const. preamble (emphasis supplied).

[514] *See* U.S. Const. preamble (emphasis supplied).

"That after the expiration of the said thirty days, the first division be relieved by the second, who shall do duty within the said town, for the space of thirty days.

"That they continue to relieve each other, and do duty in manner as aforesaid, until the further orders of this Assembly."{EN-433}

• [1781] "[T]he Persons who shall do Duty upon the present Tour, shall be excused from doing any further military Duty, until the remaining Part of the military Force within this State shall have done an equal Proportion of military Service, unless in case of a general Alarm, or Invasion of this State.

"*AND* * * * the aforesaid military Force shall not be marched or carried out of this State. And upon the End and Expiration of their serving within this State One Month, * * * if it shall appear necessary then to maintain a military Force, drawn from the Militia, * * * they shall be relieved by other military Force, to be drawn out of the respective Corps, in the same Manner as * * * the present military Force [is] to be embodied."{EN-434}

• [1781] "Whereas it is highly expedient that a Body of Troops, completely armed and accoutred, should be on the Island of *Rhode-Island* * * * for the Safety and Defence thereof: *It is therefore Voted and Resolved*, That the * * * Independent Companies, *to wit*: The Artillery of *Providence*; the *Kentish-Guards*, the *Kingston-Reds*, and the *Pawtuxet-Rangers*, forthwith turn out One Half of the[ir] Men * * * to March to *Newport* * * * : And that the * * * Men who shall do Duty * * * shall be excused from doing further Duty until the remaining Part of the Men in their respective Towns shall have done an equal Tour of Duty."{EN-435}

Once again, though, a plea of rotation did not excuse any Militiaman from service "in case of a general Alarm, or Invasion of this State".

D. The Alarm List. As in the other Colonies, in Rhode Island "times of general alarm" were "when the whole military force of th[e] state shall be ordered upon duty together, and at the same time".{EN-436}

1. During "alarms", Rhode Island required *all* able-bodied free men from sixteen to sixty years of age to muster in defense of their Towns and the Colony as a whole. Those from sixteen to fifty years of age were listed in the Trained Bands,[515] whereas those from fifty to sixty years of age were separately designated "the Alarm List":

• [1718, 1730, and 1744] "That upon any Alarm in time of War, or other eminent danger of any Assault or Invasion, all Male Persons, both Listed Soldiers and others in this Colony, of and between the Age of

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[515] *See ante*, at 125-126 and 208-220.

Sixteen Years and Sixty, shall upon notice of the same, forthwith Repair to the Colours and Ensigns of such Company, within whose Precincts they Inhabit or dwell, provided with Arms & Ammunition required of Trained Soldiers upon Training Days[.]"{EN-437}

• [1766] "[U]pon any Alarm in Time of War or other imminent Danger of any Assault or Invasion, all male Persons, both enlisted Soldiers and others in this Colony, of and between the Ages of Sixteen Years and Sixty, shall upon Notice of the same forthwith repair to the Colours and Ensigns of such Company, within whose Precincts they inhabit or dwell, provided with Arms and Ammunition required of trained Soldiers upon training Days[.]"{EN-438}

• [1779] "That all Male Persons between the Ages of Fifty and Sixty, if able in the Judgment of the respective Town-Councils, shall be at all Times armed, accoutred and equipped * * * upon the same Penalty as though they were held to military Duty, provided that they be enrolled, and an exact List be taken of them, by the Colonel of the Battalion in whose District they live; that upon any Deficiency in Arms, &c. he issue his Warrant * * * : And that they be considered as the Alarm-List of the State, and be subject to all other Duties as those exempted from bearing Arms [in the Trained Bands]."{EN-439}

2. During an "alarm", exemptions even for those serving in high public office were limited.[516] For instance, in 1777 Rhode Island's General Assembly allowed "all [of its] Members * * * who are drawn in the second or third Division of the Alarm-List of this State, [to] be excused from doing Duty in said Divisions at any Time during a Session of this Assembly, and one Day before the Sitting thereof, and two Days after the Rising of the same".{EN-440} Otherwise they were required to serve.

The only excuse generally allowed for avoidance of duty during "alarms" was physical disability. For example, in 1777 the General Assembly ordered "the first division of the second draft of the * * * alarm * * * companies" to "march to such part of the shores within their respective counties, as shall be directed by the commanding officer * * * , properly equipped, to relieve those that are now upon duty", but also provided "that in case of sickness and inability to do duty *(which alone shall excuse any person)*, it shall be in the power of * * * the field officers * * * to permit such a person to hire a man to do his tour of duty; and if such sick and unable person shall be so extremely poor * * * as to be unable to hire a person in his stead, * * * such field officer be empowered to remit such poor person's fine."{EN-441} Exemptions from service on account of disability, though, were closely confined. For example, in 1713, in response to the petition of one John Gavet "to be released and

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[516] *See post*, at 259-261.

acquitted from martial discipline, by reason of an incurable lameness in one of his feet", the General Assembly enacted that "Gavet shall be, and is hereby acquitted and discharged for ever hereafter from all manner of martial discipline, *alarms only excepted*".{EN-442}

Even the employment of substitutes might be curtailed where "alarms" were concerned. For instance, in 1777 the General Assembly decreed

> that if any two men in this state, whether belonging to the militia, alarm list, or independent companies * * * shall * * * enlist and deliver * * * an able-bodied, effective man, to serve in the [Continental battalions], for three years, or during the war, and who shall pass muster, they shall be exempted from being drafted for, or doing, duty in any of the Continental battalions, for, and during the term for which such able-bodied man shall enlist * * * .
>
> Provided, nevertheless, that such exemption shall not extend to excuse any person from doing duty in time of an alarm, or in case of a draft for the immediate defence of this state.{EN-443}

On the other hand, although only men from fifty to sixty years of age were *required* to muster as part of "the Alarm List" during "alarms", all statutory and customary limitations with respect to age were generally inapplicable to or disregarded for *volunteers*.

Moreover, although women were neither expected nor allowed to serve within the Militia even in times of "alarms", they could be found as volunteer auxiliaries in such closely related martial activities as the manufacture of ammunition.[517]

3. An "alarm" was considered so serious that even severe restrictions on travel were imposed. For example, in both 1744 and 1766 the General Assembly ordered

> [t]hat after an Alarm is beaten in any Town in this Colony, no Man whatsoever shall leave or go out of said Town so alarmed, but by Leave or Order from the Commanding Officer there, upon the Penalty of paying to and for the Use of the Colony, the Sum of *One Hundred Pounds,* to be recovered * * * by Action of Debt, Bill, Plaint, or Information, in any Court of Record within this Colony; and in case any Person shall not have sufficient Estate to pay the same, then such Person shall be committed to Goal * * * for the Space of Six Month, or else shall be sent to the Fort, there to serve the Colony as a Soldier for * * * Six Months[.]{EN-444}

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[517] *See* R. Gross, *The Minutemen*, *ante note* 379, at 69 (Massachusetts).

4. Organizationally, "the alarm-list, in each town" came to be "embodied in a separate company", the officers of which were "to be chosen by the company so embodied", and the members of which "equip[ped] themselves".{EN-445} So, as with all other components of the Militia, men on the Alarm List were expected to be fully armed,[518] and were subject to fines and other penalties for each and every default.[519] To enforce compliance, Militia officers were "directed to cause strict examination to be made of the state of the arms, &c., of the militia, alarm * * * and independent companies".{EN-446} These requirements demonstrate that the Alarm List was not something separate from, but instead was integral to, Rhode Island's Militia as a whole—its particular status being the product of nothing more than the commonsensical recognition that, on average, men of advanced years could not perform physically to the level required of the younger men organized in the Trained Bands.

Those on the Alarm List who were unable to provide their own firearms were supplied by Local governments. For example, in 1776 the General Assembly directed "[t]hat Two Thousand Stand of good Fire-Arms, with Bayonets, Iron Ramrods, and Cartouch-Boxes, be purchased for the Use of the Colony * * * and distributed to each Town, in Proportion to the Number of Polls upon the Alarm List therein", and "[t]hat the Town-Council of each Town shall have Power * * * to determine what Persons in their respective Towns shall have the Benefit and Use of the Arms provided * * * and be exempted from providing themselves as the Law requires".{EN-447} That same year, when "all Male Persons subject by Law to bear Arms, whether of the Militia, Alarm List or Independent Companies" were "draughted in three Divisions", the General Assembly directed "[t]hat the Town-Councils of each Town furnish such Persons as they shall certify to be unable to furnish themselves, with Arms * * * and Accoutrements, as by Law required; and that the same be paid out of the General Treasury".{EN-448} And in 1777, when "one Half of the Militia, Alarm, Independent, and Artillery Companies" were drafted, "if any Person * * * appear[ed] not duly equipped, * * * the Commanding Officer of the Company to which he belong[ed was] empowered to impress a Gun, or whatever Accoutrements he m[ight] stand in Need of".{EN-449}

5. Although exempt from regular training, Militiamen on the Alarm List were subject to drafts—a circumstance hardly surprising, inasmuch as any occasion that justified a draft would almost certainly have constituted a proper "alarm". For example, in addition to the instances noted above, in 1777 the General Assembly ordered "[t]hat One of the Divisions, consisting of the One Sixth Part of the Independent and Alarm Companies and Militia heretofore draughted, and One

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[518] *See ante*, Chapters 6 and 7.

[519] *See post*, Chapter 12.

Half of a Division, be immediately called upon actual Duty", and that anyone who "shall neglect to appear * * * , either by himself or a good able-bodied and suitable Person in his Stead, compleatly equipped with Arms and Accoutrements, to enter upon and perform such military Duty as shall be enjoined him, * * * shall be liable to pay * * * a Fine for each Day's Neglect".{EN-450}

E. The Senior Class. This was the name Rhode Island applied to the set of men between the ages of sixteen and fifty who were otherwise exempted from regular Militia service in the Trained Bands because of their important public offices or critical private occupations,[520] but who nevertheless were "at all Times [to] be armed, accoutred and provided, * * * and subjected to the same Regulations" as the Trained Bands.{EN-451} These requirements alone demonstrate that, as with the Alarm List, the Senior Class was not something separate from, but instead was integral to, Rhode Island's Militia—its particular status being the product of nothing more than the commonsensical recognition that men whose offices or occupations warranted their exemptions from the normal duties of the Trained Bands should nevertheless be fully prepared to assume when necessary all of the fundamental Militia duties incumbent upon everyone else. Thus, the exemptions for these men did not operate as exclusions from the Militia, but simply caused them to be assigned to a component separate from the Trained Bands and the Alarm List.

The separate status of the Senior Class did not entail inferior organization, however. To the contrary: The Senior Class was highly organized throughout Rhode Island. Its members were to "be officered in the same Manner as the Infantry Companies, with such Field and Staff Officers as their Numbers * * * entitle[d] them to, and who shall at all Times be armed, accoutred and provided * * * and subjected to the same Regulations as" the rest of the Militia. Members of "the Senior Class in the Town of *Providence* [were to] constitute one Company; those of the Town of *Cranston*, one Company; those of the Towns of *Johnston* and *North-Providence*, one Company; those of the Town of *Smithfield*, one Company; those of the Town of *Cumberland*, one Company; those of the Town of *Scituate*, one Company; and those of the Town of *Gloucester*, one Company: * * * the said Companies [to] be formed into one Battalion, to be commanded by one Lieutenant-Colonel Commandant, and one Major"—and on through the organization into Companies in a list of other Towns. In addition, "Companies of Horse" were "formed from the Senior Class of their respective Districts, at their own Election, * * * due Regard being had to their Abilities and local Situation".{EN-452}

F. Independent Companies. Rhode Island also permitted, encouraged, and provided a procedure for her residents to organize "Independent Companies" as

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[520] *See post*, at 252-256.

separate components of her Militia. As with the Trained Bands, Independent Companies could consist of infantry,{EN-453} cavalry,{EN-454} and even artillery.{EN-455}

1. Although the statutes creating them were variously titled—such as "An ACT for erecting…", "AN ACT establishing…", or "An ACT to incorporate…"—all of Rhode Island's Independent Companies were the products of *governmental*, not merely private, action: invariably, a petition by certain individuals to the General Assembly for permission to form such a Company, followed by a specific statutory grant of authority for that purpose alone. Thus, the enabling legislation might declare that:

> • [1755] "they are hereby made, constituted, and declared a special Company, to be called and known by the Name of, THE ARTILLERY COMPANY, and by that Name shall have and take perpetual Succession";{EN-456} or
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> • [1774, 1775, and 1776] "this Assembly * * * have Ordained, Constituted, and Granted, That they * * * be, and they are hereby, declared to be an *Independent Company*, by the Name of *The Light-Infantry*, for the County of *Providence:* And by that Name they shall have perpetual Succession";{EN-457} or
>
> • [1774] "[*i*]*t is hereby Enacted, Granted, Ordered, and Ordained*, That the said Company now inlisted, and which shall hereafter inlist * * * be * * * incorporated into a distinct and separate Military Company, to be called * * * The *Providence Grenadier* Company".{EN-458}

Moreover, the General Assembly did not supinely accede to whatever petitions for the formation of Independent Companies were submitted, but instead investigated the requests. As in 1774, when it "appointed a committee, to take into consideration the several petitions * * * for establishing an independent company in the town of Newport; an independent company in the towns of East Greenwich, Warwick and Coventry; and a grenadier company in the town of Providence; and that they make report * * * as soon as conveniently may be".{EN-459}

2. Nonetheless, doubtlessly because of their origins in private petitions, Rhode Island considered her Independent Companies to be special establishments, with their own peculiar status. So the general Militia laws recognized:

> • [1766] "[N]othing in this Act * * * shall * * * take away or diminish any of the Liberties, Privileges,or Immunities of any independent * * * Companies established by Law in this Colony; but that the same, according to their Establishment, be preserved to them entire, any Thing herein before contained to the contrary notwithstanding[.]"{EN-460}
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> • [1779] "[T]his Act shall not * * * have Influence upon or prejudice any Charters already granted to Independent Companies[.]"{EN-461}

That special status, however, was conditioned upon faithful compliance with the statutory grants, as enactments from 1774 made clear:

> • "[A]s soon as said Company shall cease to do their Duty * * * this Grant shall be void, and all Persons * * * shall do Duty in the Company in whose District they live, in the same Manner as if they had belonged to said Trained Bands."{EN-462}
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> • "[I]n Case the Rules and Regulations, in this Charter contained, be not performed and complied with, then this Charter shall cease, determine, and be null and void."{EN-463}
>
> • "[T]he * * * Grant is on this Condition, that if the * * * Company shall, for the Space of One Year, neglect to Train, and exercise themselves, that then the * * * Charter shall be void and forfeit."{EN-464}

3. The statutes set out the reason for forming Independent Companies in variations on the same theme: namely, the need for instruction of Rhode Islanders in the military arts. Quite often, the statutes declared that "the Preservation of this Colony, in Time of War, depends, under God, upon the military Skill and Discipline of the Inhabitants".{EN-465} But a statute might be more specific, emphasizing that "the Preservation of this Colony, in Time of War, depends, under God, upon the military Skill and Discipline of the Inhabitants, and especially upon the skill and Discipline of Artillery Companies".{EN-466} Or it might simply acknowledge "[t]hat a Number of Persons in [a particular] * * * Town, animated by a laudable Motive of perfecting themselves in military Discipline, by more frequent and regular Exercisings than they can obtain in the Companies of Militia, in their present State, are desirous of being formed into an Independent Company".{EN-467}

In light of these intentions, hardly surprising was that the General Assembly responded "with a View to encourage a Purpose so Laudable and Useful"{EN-468} and "to give all due Encouragement to so laudable a Design".{EN-469} Thus, in contradistinction to contemporary times, in *pre-*constitutional Rhode Island citizens who sought to form Independent Companies were considered praiseworthy, not suspicious, let alone possibly subject to prosecution for supposedly criminal acts.[521]

4. Each statute specifically identified the men who had petitioned to form an Independent Company—the number varying widely, from two named individuals and other unnamed "Freemen, and Inhabitants of the Town of *Providence*" to ninety-three named individuals from the Towns of Smithfield and Cumberland.{EN-470} Almost all of the statutes specifically limited the enrollments in the Independent Companies they authorized—although, once again, the numbers varied, according to different formulae that included the petitioners "together with such others as shall be hereafter added to them (not exceeding 80, exclusive of

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[521] *See*, *e.g.*, New Hampshire Revised Statutes, Title VIII, Chapter 111, § 111:15.

Officers)",[EN-471] "not exceeding the Number of One Hundred in the whole, Officers included",[EN-472] "not exceeding the Number of One Hundred, exclusive of Officers",[EN-473] or "not exceeding the Number of One Hundred Men, Rank and File".[EN-474]

In some instances, a statute was more specific: One "Company shall consist of any Number of proper Men, not less than Twenty-four, nor exceeding One Hundred, Rank and File", and "are * * * empowered to inlist * * * a sufficient Number to complete their * * * full Compliment * * * within the Boundaries and Limits of the *Providence* Regiment".[EN-475] Another Company was "at all Times empowered to inlist Men sufficient to complete their full Complement of Sixty-four Men, Rank and File, out of the Town of *North-Providence*, and the Easternmost Company of the Town of *Smithfield*".[EN-476] In another instance, the authorization to recruit was less particular: "and such others as shall be added to them".[EN-477]

In any event, the statutes always implied that each Independent Company might choose its own members without any further governmental approval, supervision, or intervention—because none of the statutes named particular individuals who were to join (other than the original petitioners), thus necessarily leaving the matter in practice to the Companies' members themselves.

5. Presumably, in most cases the men who petitioned to form, and who thereafter joined, Independent Companies were at that time not exempt from ordinary Militia duty, and might even have then been serving in regular Militia Companies. For example, one Independent Company was formed "at the Request of the Company now associated and inlisted from the Company of Militia in *North-Providence*, and the Eastermost Company of Militia in *Smithfield* * * * , together with such others as may inlist with them, not exceeding Sixty-four Men, Rank and File".[EN-478]

Yet men who were exempt from Militia service could form Independent Companies, too. In one instance, in 1756 the petitioners declared that

> they have, in Time past, had the Honor to be commissioned Officers in and over some of the Companies, or trained Band, of [Newport] * * * : That notwithstanding they are legally discharged from bearing Arms, as Soldiers in the Militia, they are desirous to be useful unto their Country: And thereupon prayed for an Act of th[e General] Assembly, to incorporate and make them, and such as they shall hereafter receive into their Number, *an Independent Company*[.]

The General Assembly granted their request, but with the proviso that "no Person shall be inlisted into said Company, that is by Law obliged to train in either of the other Companies".[EN-479]

6. In the vast majority of instances, the members of an Independent Company, "or the greater Number of them", were authorized "once in every Year" on a specified day to "meet and assemble themselves together in some convenient Place by them appointed, then and there to chuse their own Officers * * * by the greater Number of Voters present; the Captain, Lieutenants and Ensign, to be approved of by the Governor and Council * * * and * * * [to] be commissionated and engaged in the same Manner that other Military Officers in" Rhode Island were.{EN-480} In some cases, the Governor alone "order[ed], and direct[ed] Commissions to be issued to the[officers]".{EN-481} And in one case the General Assembly took the task of "Approbation" directly upon itself.{EN-482}

Typically, too, members of an Independent Company were not "subject to the Orders or Directions of the Colonel, or other Field Officers of the [regular Militia] Regiment in whose District they live[d], in their said Meetings and Exercisings [that is, training]".{EN-483} But the General Assembly sometimes directed that a particular Independent Company be subject to the command of officers other than its own on certain "Field-Days",{EN-484} or (as in one case) that "the * * * Company shall be at all Times under the Field-Officers of the First Battalion of the Brigade in the County of *Providence*, and take such Rank as they shall appoint on all general Muster-Days".{EN-485}

7. Very rarely, men petitioning to form an Independent Company explicitly "*proposed the Laws of the Colony made for regulating the Militia, for the Rule of their Conduct*".{EN-486} No less infrequently, the General Assembly prescribed that such a Company "shall have Power * * * to make such By-Laws for the better regulating and disciplining the same, from Time to Time, as they shall find necessary; provided that they make no Law, Regulation or Order, but what shall be consistent with the Laws of this Colony, at all Times, respecting Militia Companies".{EN-487} Doubtlessly, such pronouncements were few and far between, because everyone considered them unnecessary, naturally presuming that compliance by the Independent Companies with the pith of the Militia laws was implicit in any charter the General Assembly granted—every Independent Company, after all, being part and parcel of the Militia.

For that reason, most of the statutes simply recited that the members of the Company being established would have the power:

> • [1755, 1774, 1775, and 1776] "to make such Rules and Orders amongst themselves, as they shall think necessary, to promote the End of their Establishment, and lay such Fines and Forfeitures upon any of their own Company, for the Breach of any such Rules and Orders as they shall think proper, so as the same exceed not Forty Shillings for any one Offence; and also shall have full Power to levy the said Fines and Forfeitures * * * by a Warrant of Distress";{EN-488} or

> • [1774] "to appoint their Days for Meeting, and when met, to make all such Laws, Rules, Orders, and Regulations; and for the Breaches thereof, to impose such Fines, Penalties, and Forfeitures, as to them shall seem meet; and by their proper Officers to demand, recover, and receive, to and for the Use of said Company, all such Fines or Forfeitures: * * * Provided always, that no Fine or Forfeiture, for any single Offence, shall exceed the Sum of Twelve Shillings";{EN-489} or
>
> • [1774 and 1775] "[to] make all such Laws, Rules, and Orders, among themselves, as they shall deem expedient, for the well ordering, and disciplining, said Company; and lay any Penalty, or Fine, for the Breach of such Rules, not exceeding Twelve Shillings * * * for One Offence, to be collected [by Warrant of Distress]".{EN-490}

Once formed, though, Independent Companies were not necessarily left entirely to their own devices and without governmental supervision with respect to their internal discipline. For example, in 1779 the General Assembly concluded that "the Fines expressed in the Act * * * for incorporating the *Captain-General's Cavaliers* are so small that they are not by any Means adequate to the good Designs intended in and by said Act", and therefore decreed "That the Fines and Penalties for not meeting and exercising agreeable to the said Act" would be significantly augmented.{EN-491}

8. Almost all of the statutes that chartered Independent Companies were silent as to the requirement imposed on most other Militiamen that the Companies' members would supply their own firearms, ammunition, and accoutrements. Yet, obviously, if they were to perform their purpose, all of the Independent Companies had to be fully armed, no less than the Trained Bands, the Senior Class, and the Alarm List. Unless too poor to do so, members of the latter three divisions of the Militia were always obliged by statute to acquire their own equipment at their own expense by purchase in the free market.[522] Presumably no man too poor to furnish himself with suitable arms would seek or be allowed to form, or be chosen to join, an Independent Company (although Companies composed of wealthy men could have afforded to take on some less financially able members for the sake of social solidarity). Moreover, no provision was made by statute for the public to supply any member of an Independent Company with personal arms. So, implicit in the establishment of each such Company must have been the requirement that its members would conform to the otherwise standard Militia rules for each individual's acquisition and maintenance of necessary equipment. Surely, the power of their members to make "Laws, Rules, and Orders * * * as they shall deem expedient, for the well ordering, and disciplining" of Independent Companies, enforceable by fines, was sufficient to that end.

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[522] *See ante*, Chapters 6 through 9.

In some instances, though, the statutes did explicitly address the matter of equipment:

> • [1774] An Independent Company of infantry known as the *Providence Grenadier* Company was required to "be furnished with suitable Arms, and Accoutrements, and Uniform, for a *Grenadier* Company, at all Times", and "to appoint their own Uniform, and alter, and change, the same, from Time to Time, as they shall think necessary".{EN-492}
>
> • [1775] An Independent Troop of Horse known as the *Captain-General's Cavaliers* was required to "be compleatly equipped with all Accoutrements and Furniture, commonly used by other Troops of Horse, with the Addition of a Carabine [that is, a short musket] to each and every of said Troopers".{EN-493}

These particulars were appropriate—and most likely originated with the petitioners themselves—because one of the Companies consisted of specialized infantry ("grenadiers") and the other intended to serve as a bodyguard or other élite force for the Militia's Commander in Chief. In any event, nothing in these statutes shifted to the government the burden of providing the mandated equipment.

In the case of artillery, however, public assistance in arming Independent Companies was sometimes forthcoming. For example, in 1774 the General Assembly "empowered and directed [the Captain of The *Train of Artillery*, for the County of *Providence*], to purchase at the Expence, and for the Use, of the Colony, Four Brass Cannon, Four Pounders, with Carriages, Implements, and Utensils, necessary for exercising them; And that they be lent to the said Company, to improve them in the Exercise of Cannon".{EN-494}

9. Howsoever they may have been equipped, Independent Companies were not the sole and final judges of their own readiness, but (as with other components of Rhode Island's Militia) were subject to inspections on that score. For example, in 1776 the General Assembly ordered that

> * * * [E]ach captain * * * of the several independent companies, and companies of militia in this state, [shall] notify his company to appear at some proper place * * * under arms, with all accoutrements, agreeably to law.
>
> That such captain * * * make out a list of the deficiency of each person in each article.
>
> That he send a proper officer to the dwelling-house of each person not attending, to examine how far such person be deficient.
>
> That each captain * * * of the companies of militia, make a proper return thereof, to the colonel of the regiment * * * .
>
> That each captain * * * of the independent companies, make a like return to th[e General] Assembly[.]"{EN-495}

And in 1779, an inspector was "directed to cause strict examination to be made of the state of the arms * * * of the militia, alarm and independent companies, within this state * * * as by law is required", and to "cause returns to be made to him of the particular deficiencies in each Company within five days next after such examination".{EN-496}

10. As were her Trained Bands, Rhode Island's Independent Companies were required—actually, obliged themselves—to train on a regular basis. The mandatory minimum was that "they be obliged to meet for exercising, at least four Times a Year, upon the Penalty of paying to and for the Use of said Company, [certain] Fines", differing by the rank of the offender from (for instance) "Five Pounds" for the Captain to "Twenty Shillings" each for "common Soldiers".{EN-497} But, inasmuch as they were units composed entirely of volunteers particularly enthusiastic for the duty, Independent Companies were expected and encouraged to train on a more frequent basis—typically, "*at least four Times in a Year, and as many more as the Company shall agree upon*".{EN-498} In point of fact, precisely the "laudable Motive of perfecting themselves in military Discipline, by more frequent and regular Exercisings than they can obtain in the Companies of Militia, in their present State," animated Rhode Islanders to form Independent Companies.{EN-499} That being so, the statutes were careful to allow that each "Company shall have Liberty"—or "License", as it was sometimes denoted—"to meet and exercise themselves * * * as often as they shall think necessary".{EN-500} And it was left to the Officers to decide when "to call together the * * * Company to exercise and perfect themselves in military Discipline, in such Manner as they may judge most expedient".{EN-501}

11. Membership in an Independent Company always conferred an exemption from other Militia duties—because, after all, membership in such a Company *was* a form of Militia duty, and perhaps a higher form in light of its voluntary nature and oftentimes expanded duties. Many of the statutes provided that "all those who shall be duly enlisted in this Company, so long as they shall continue therein, shall be exempted from bearing Arms, or doing military Duty (watching and warding excepted) in the several Companies or train'd Bands in whose District they respectively live, except such as shall at any Time be Officers in any of the said Companies".{EN-502} Some exempted "all those who shall be duly inlisted in the * * * Company, so long as they shall continue therein, * * * from bearing Arms, or doing military Duty (Watching and Warding excepted), in the several Trained Bands, in whose District they live".{EN-503} More favorably yet, the statute incorporating the *North-Providence Rangers* allowed that "the Persons * * * incorporated, whilst they belong to, and do Duty in, the * * * Company * * * , shall be exempt from doing Duty in any other Militia Company whatever".{EN-504} And the act incorporating the *Providence Grenadier* Company mandated that its members

"shall be free from all military Duty whatsoever, save with, and in, their own Company, so long as they belong thereto".{EN-505}

12. "Alarms", of course, were another matter altogether, with respect to which exemptions for members of Independent Companies (or anyone else) were unknown. The question the statutes answered was to whose command particular Independent Companies would be assigned on those dire occasions. Most of the statutes placed various Companies "in Time of an Alarm * * * under the immediate Direction of the Captain General of the Colony",{EN-506} "the Commander in Chief of the Colony",{EN-507} or " the Captain-General, Lieutenant-General, and Major-General of the Colony".{EN-508} In isolated instances, though, an Independent Company might "in Time of an Alarm, be under the Direction of the Field Officers of the County of *Newport*",{EN-509} or "upon all Field-Days, public Trainings, and Alarms * * * be under the Directions, and Orders, of the Field-Officers of the Regiment, in the County of *Providence*".{EN-510} Howsoever the command was assigned, nothing was left to chance.

13. To encourage and reward the formation of Independent Companies, Rhode Island's General Assembly often granted them special prerogatives and privileges. For example:

> • [1775] "[U]pon all general Reviews, and general Musters, the * * * Company shall rank the first Independent Company for the County of *King's County*[.]"{EN-511}
>
> • [1774] "[The] Company, on all Field-Days, [shall] take the Right Wing of the Third Battalion in the County of *Providence*[.]"{EN-512}
>
> • [1774] "[U]pon all Field-Days, and public Trainings, the * * * Company of Light-Infantry shall hold their Rank and Station in the Front of the left Wing of the Regiment in whose District they are included[.]"{EN-513}
>
> • [1774] "[O]n all general Field-Days, when the whole *Providence* Regiment shall be embodied, the Officers and Soldiers of the [Independent] *Grenadier* Company may * * * appear with their proper Arms, and in their Uniform, and on their proper Ground, * * * holding, and enjoying, at all Times, and upon all Occasions, such Rank, and Precedence, as is proper to them as a *Grenadier* Company[.]"{EN-514}
>
> • [1774] "Commissioned Officers of the * * * Company * * * shall take Rank before the Commissioned Officers of Militia, in the Colony[.]"{EN-515}
>
> • [1774] "[T]he * * * Company shall be under the particular Command of the present Major of the First Battalion in the County of *Providence*. And in Case of his being hereafter advanced in Command, * * * the * * * Company shall still continue to belong to, and be under his

> Command, and be advanced with him to that Place and Station in the Regiment, which Companies, commanded by Officers of that Rank to which he may be advanced * * * are entitled to take[.]"{EN-516}
>
> • [1775] "[F]or the further Encouragement of the * * * Troop, it is further granted to them, who are (as this Assembly is informed by their humble Petition) designed to be composed of such as have sustained Offices in the civil and military Departments, and others of Worth, that [their officers be commissioned in various high ranks.]"{EN-517}

Whatever irony her General Assembly may have relished in acknowledging a "humble Petition" from men who vaunted their former "Offices" and present "Worth", Rhode Island's legislators recognized that honors were not wasted if they elicited patriotic efforts.

14. In the course of the Militia's general operations, too, Independent Companies were often afforded a certain deference. For example—

> • In 1775, the General Assembly "*Enacted* * * * That One Quarter Part of the Militia * * * be inlisted as Minute-Men, to meet together, and exercise themselves in military Discipline, Half a Day, Once in every Fortnight", and "That the said Minute-Men march for the Defence of the Colony, when and as often as they shall be called upon by the Colonel of the Regiment to which they respectively belong". Nonetheless, it also provided "That the several Independent Companies in this Colony, *or such of them as shall think proper*, form themselves into Companies of Minute-Men".{EN-518} Notwithstanding that the Independent Companies were presumably the most likely sources for "Minute-Men", because they were composed entirely of volunteers, they were allowed the option of refusing to reform themselves as such.
>
> • In 1777, the General Assembly "recommended to the Independent Company of *Kingstown Reds*, that they excuse *George Tesst* and *Jeremiah Sheffield* (who are employed in making and stocking Guns) from doing any Service in said Company".{EN-519} "[*R*]*ecommended*", rather than "ordered" or "directed"—even though, at that time, gunsmithing was a skill of critical importance to the community. And,
>
> • In 1781, the General Assembly "*Enacted*, That Twelve Hundred able-bodied effective Men of the Independent, Artillery, Senior and Junior Class Companies of Militia * * * rendezvous at [certain] Places within this State * * * to do Duty therein for One Month". With respect to most of the Militia, the "Commanders of each Regiment * * * shall forthwith issue their Warrants to the Captains of each Company * * * , setting forth the Number of * * * able-bodied effective Men, which such Company is required to furnish, and commanding such Captain * * * , if the said Number of Men

> shall not voluntarily turn out to do Duty * * * , to detach the Men for the Service * * * and cause them to be marched to the * * * Rendezvous". But "where any Independent Company * * * shall be in any Town or Towns, *the * * * Commander of the Regiment, within whose District such Independent Company shall be, and the Commander of such Independent Corps, shall settle and fix the Number to be raised out of such Corps*, in the same Proportion as * * * taken from the Militia at large, in such Town".{EN-520} Thus, in contradistinction to Rhode Island's regular Militia Companies, as to which the matter was one of peremptory *command*, with her Independent Companies it was one of *coöperation*.

15. Independent Companies were not always granted special consideration, however. For example, as already noted, no less than the Trained Bands and the Alarm Companies, Independent Companies were subject to "strict examination to be made of the state of the[ir] arms".[523] Also, along with the Trained Bands and the Alarm List, their members were subject to being drafted.{EN-521} Indeed, in 1781, certain Independent Companies—doubtlessly because of their superior state of readiness—were singled out for such service:

> Whereas it is highly expedient that a Body of Troops, completely armed and accoutred, should be on the Island of *Rhode-Island* * * * for the Safety and Defence thereof: *It is therefore Voted and Resolved*, That the * * * Independent Companies, *to wit*: The Artillery of *Providence*; the *Kentish-Guards*, the *Kingstown-Reds*, and the *Pawtuxet-Rangers*, forthwith turn out One Half of the[ir] Men * * * to March to *Newport* * * * : And that the * * * aforesaid Men who shall do Duty * * * shall be excused from doing further Duty until the remaining Part of the Men in their respective Towns shall have done an equal Tour of Duty.{EN-522}

16. That Rhode Island's Independent Companies were composed of more than pampered "social soldiers", stylishly uniformed dandies, and dilletantes the career of Nathanael Greene illustrates. Although from a Quaker background, Greene enlisted in the Kentish Guards,{EN-523} provided himself with a British musket which he smuggled from Boston in defiance of General Gage's attempts at "gun control", and rose meteorically to become a Brigadier General in command of all of Rhode Island's troops at the siege of Boston in 1775.[524] Then, during the course of the War of Independence, he became George Washington's arguably most able and dependable commander.

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[523] *See ante,* Chapter 8.

[524] J. Bartlett, *Records of the Colony of Rhode Island, ante* note 309, Volume VII, at 322; G. Carbone, *Nathanael Greene*, *ante* note 310, at 10-30; Louis Birnbaum, *Red Dawn at Lexington: "If They Mean to Have a War, Let It Begin Here!"* (Boston, Massachusetts: Houghton Mifflin Company, 1986), at 205-208.

G. The Watch and the Ward. If her Independent Companies represented a strain of voluntary service within Rhode Island's Militia, her Watch and Ward embodied the fullness of compulsory duty.

1. "Watch" variously means "[g]uard; vigilant keep", "[w]atchmen; men set to guard", and the "[p]ost or office of a watchman"[525]—or "[t]he act of watching", "wakeful, vigilant, or constantly observant attention", "preservative or preventive vigilance", and "guarding by night"; "a body of watchmen", "a sentry", "a guard"; "[t]he post or office of a watchman" and "the place where a watchman is posted, or where a guard is kept"; and "[t]he period of the night when a person does duty as a sentinel, or guard"[526]—and, in particular, "men set for a guard, either one person or more, * * * to espy the approach of an enemy or other danger, and to give an alarm or notice".[527] "Ward" variously means "[t]o guard; to watch", "[t]o defend; to protect"[528]—or "the act of guarding * * * specifically, a guarding during the day"; and "[o]ne who, or that which, guards", a "garrison"[529]—and "[t]o keep in safety", "to guard", "[t]o defend", "to protect"; "[t]o be vigilant"; and "[t]o act on the defensive with a weapon".[530] When distinctions are drawn between the two, "watch" usually denotes keeping guard during the night, and "ward" during the day.[531] Some authorities suggest that such a differentiation is a matter more of word-play than of reality.[532] But Rhode Island's *pre*-constitutional statutes treated it as substantial.

The Watch was an institution as ancient in origin as its necessity in Anglo-American society was always apparent. In positive law, it dates from at least the English Statute of Winchester in 1285, which commanded that

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[525] S. Johnson, *Dictionary, ante* note 50, definitions 4, 5, and 7 in both the First (1755) and the Fourth (1773) Editions.

[526] *Webster's Revised Unabridged Dictionary, ante* note 11, at 1630, definitions 1 through 4. *Accord, The Compact Edition of the Oxford English Dictionary, ante* note 11, Volume 2, at 3699, definitions 3, 6, 6b, 8, and 11.

[527] N. Webster, *An American Dictionary, ante* note 15, definition 5.

[528] S. Johnson, *Dictionary, ante* note 50, definitions 1 and 2 in both the First (1755) and the Fourth (1773) Editions

[529] *Webster's Revised Unabridged Dictionary, ante* note111, at 1626, definitions 1 and 2 (noun). *Accord*, *The Compact Edition of the Oxford English Dictionary, ante* note 11, Volume 2, at 3684, definitions 1 and 11 (noun).

[530] *Webster's Revised Unabridged Dictionary, ante* note 11, at 1627, definitions 1 and 2 (transitive verb), *and* definitions 1 and 2 (intransitive verb). *Accord, The Compact Edition of the Oxford English Dictionary, ante* note 11, at 3684, definition 1 (verb).

[531] *See, e.g.*, S. Johnson, *Dictionary, ante* note 50, definition 8 ("watch" is "[a] period of the night") in both the First (1755) and the Fourth (1773) Editions; N. Webster, *An American Dictionary, ante* note 15, definition 8 ("watch") and definition 1 ("ward"); *Webster's Revised Unabridged Dictionary, ante* note 11, at 1630, definition 1 ("watch"), *and* 1626 and 1627, definition 1 ("ward"); *The Compact Edition of the Oxford English Dictionary*, *ante* note 11 Volume 2, at 3699, definition 4; *Black's Law Dictionary*, *ante* note 368, at 1761.

[532] *The Compact Edition of the Oxford English Dictionary*, *ante* note 11, Volume 2, at 3699, definition 7 of "watch".

> all watches be made as it hath been used in times past * * * in every city by six men at every gate; in every borough, twelve men; every town, six or four, according to the number of the inhabitants of the town, and they shall watch the town continually all night from the sun-setting to the sun-rising. And if any stranger do pass by them he shall be arrested until morning[;]

and that

> every man have in his house harness [that is, armaments] for to keep the peace * * * that is to say, every man between fifteen years of age and sixty years shall be assessed and sworn to armour according to the quantity of their lands and goods; that is to wit, from fifteen pounds lands, and goods forty marks, an hauberke, an helme of iron, a sword, a knife, and a horse; and from ten pounds of lands, and twenty marks goods, an hauberke, an helme of iron, a sword, and a knife; and from five pounds lands, a doublet, an helme of iron, a sword, and a knife; and from forty shillings of land, a sword, a bow and arrows, and a knife; and he that hath less than forty shillings yearly shall * * * keep gisarmes, knives and other less weapons; and he that hath less than twenty marks in goods, shall have swords, knives, and other less weapons; and all other that may shall have bows and arrows out of the forest, and in the forest bows and boults. And that view of armour be made every year two times. And * * * two constables shall * * * make the view of armour; and * * * present * * * such defaults as they shall find[.][533]

The Watch in Colonial America is often treated as the first institution established for the regular purposes of "law enforcement", and therefore as the precursor of modern-day municipal police forces.[534] This view, however, forgets that both the Watch and the Ward were effectively subsets of the *pre-*constitutional Militia (as probably no one who served in the Watch or the Ward was not a member of the Militia, too), and that to this day the Militia retain the explicit *constitutional* authority—that *no* police forces share (unless, as they should be, all police forces are deemed to be, and employed as, specialized units within the Militia[535])—"to execute the Laws of the Union" when specially "call[ed] forth" for that purpose,[536] and to execute the laws of their States at all other times.

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[533] 13 Edward I, Chapter 6, ¶¶ IV and VI, *as presented in* William Stubbs, *Select Charters and Other Illustrations of English Constitutional History from the Earliest Times to the Reign of Edward the First* (Oxford, England: Clarendon Press, Eighth Edition, 1905), at 473, 474.

[534] *See, e.g.*, Cynthia Morris & Bryan Vila, Editors, *The Role of Police in American Society: A Documentary History* (Westport, Connecticut: Greenwood Press, 1999), at 3-4.

[535] *See post*, at 327-328, 1135-1138, 1194-1202, 1276-1277, 1291-1293, and 1482-1488.

[536] U.S. Const. art. I, § 8, cl. 15.

2. As with her Militia—when the Trained Bands, Senior Class, Alarm List, and Independent Companies are aggregated—Rhode Island predicated her Watch and Ward on the principle of *near-universal service*.

a. In the earliest days, every man who could carry a firearm performed the functions of Watch and Ward as a practical matter:

> • [1639] "[N]oe man shall go two miles from the Towne unarmed, eyther with Gunn or Sword; and that none shall come to any public Meeting without his weapon."{EN-524}

> • [1643] "[E]very man do come armed unto the [general Town] meeting upon every sixth day."{EN-525}

b. As Rhode Island's legislators systematized the Watch and the Ward by statute, they determined that: (i) the duty should be enforced in both peace and war; (ii) any man of even the most modest physical capabilities who could perform the requisite functions should do so; (iii) a man's conscientious objection to the personal use of firearms should not preclude his service; (iv) women who were the heads of their households should be made financially responsible for providing suitable men to perform the duty; (v) members of Independent Companies should not be exempt; and (vi) even the utterly subservient status of Negroes within society should not disqualify them. Thus—

> • [1676] "[W]hosever in this Island [that is, Rhode Island] hath a negro man capable to watch the said negro, shall be lyable to that service, and capable negros to be as lyable to that service as Englishmen."{EN-526}

> • [1699, 1701, and 1705] "[A]ll persons within this Collony, above the age of sixteen, and under the age of sixty years, as well house keepers as others, shall be obliged to watch or ward, or find or procure a sufficient man to watch or ward, upon legall notice given to any of them[.]"{EN-527}

> • [1719 and 1744] "That the *Town Council* of each respective Town in this Colony, Be * * * Authorized and Impowered, to appoint, Settle and Order a *Military Watch* in Time of *War* * * * of such Number of Persons as they think proper"; and "[t]hat each respective *Town Council* * * * be * * * fully Impowered to appoint and Settle all *Watches* in Time of *Peace*".{EN-528}

> • [1730] Although this statute "exempted [conscientious objectors] from all Service, Fines and Forfeitures, accruing by any Law, for the Neglect of Training, bearing Arms, practicing the Art of War, or of attending on such Persons as do practice the same", it further provided "[t]hat this Act * * * shall not be deemed or constrained to exempt any Person from watching and warding in this Colony".{EN-529}

• [1740] "That all Persons making solemn Engagement * * * that it is against their Conscience to bear Arms at all, shall on an Alarm, appear * * * without Arms, to be employed as * * * Watches * * * or else * * * to watch against or extinguish any Fires that may be kindled at such Times, either by Design or Accident[.]"{EN-530}

• [1755] "[A]ll those * * * duly enlisted in this [Independent Artillery] Company * * * shall be exempted from bearing Arms, or doing military Duty (watching and warding excepted) in the several Companies or train'd Bands in whose District they respectively live[.]"{EN-531}

• [1766] This statute contained the same provisions as the statute of 1740.{EN-532}

• [1774] This statute contained the same provisions as the statute of 1755, albeit for a different Independent Company.{EN-533}

• [1776] "That a Watch, consisting of not more than Six Men, be kept in each of the Towns bordering upon the Sea * * * : That the Colonels of each respective Regiment be empowered and directed to place the said Watch[.]"{EN-534}

c. The only means by which men could obtain exemptions in practice from the Watch and the Ward were by providing suitable substitutes or paying fines. For instance—

• [1699, 1701, and 1705] "[A]ll persons within this Collony, above the age of sixteen, and under the age of sixty years, as well house keepers as others, shall be obliged to watch or ward, or find or procure a sufficient man to watch or ward, upon legall notice given to any of them * * * . And if any person shall refuse or neglect to watch * * * , he or they so neglecting or refusing, shall pay as a fine * * * five shillings * * * , to be taken and imprisoned in manner and form as the fines for neglecting of training or alarum are taken and proceeded in.

"And * * * all house keepers, as well widows as others, although there be no person in said family that is qualified according to law as to watching or warding, yet nevertheless, it shall be in the power and authority of the Captain, commander or head officer * * * , at their discretion, to order the said house keeper to find a suitable watcher or warder, or to pay such money as will hire or procure one; and upon neglect of refusall thereof, to be under the like fine and penalty[.]"{EN-535}

• [1744] "[W]hen it shall be thought necessary to set a double Watch in any Town in this Government, every Person that shall be legally notified to watch at such Times, and shall refuse or neglect to appear, * * * or send a good and sufficient Man in his Room, such Person for every such Offence, shall pay a Fine of *Sixteen Shillings*."{EN-536}

The statutory permission for employment of substitutes has been supposed by some to have weakened the Watch during *pre-*constitutional times, because the men most readily hired were also likely to be the least able to perform the duty.[537] Moreover, this practice—together with toleration of some men's avoidance of participation altogether upon their mere payment of money—has drawn the additional criticism that it enabled the wealthy to shirk their responsibility for performing personal service. Actually, the wealthy—if they chose to pay fines rather than appear in person—may have borne more than their proportionate share of the costs, because their fines were employed to provide necessary equipment and facilities for the Watch and the Ward. For example, at the turn of the Eighteenth Century, the General Assembly mandated that

> all fines and forfeitures that shall arise upon persons neglecting in training and watching, shall be disposed of by the commissioned officers of each respective company, to provide drums, colors, ammunition, &c. And the fines that shall be from the warders, to be disposed of * * * for repairing of ward houses or other conveniences for his Majesty's service.{EN-537}

Had fines from defaulters with the ability to pay not subsidized these things, the expense would have been spread by taxation across the rest of the population, including those men who had faithfully performed their duties in person.

3. In the Watch and the Ward, Rhode Island's Militia carried out, not only "military", but also "police" functions. For example, in 1751 the General Assembly enacted

> [t]hat no *Indian*, *Mulatto*, or *Negro* Servant or Slave, may presume to be absent from the Family whereto he or she shall respectively belong, or be found abroad in the Night-time after Nine of the Clock, unless it be upon some Errand for his or her respective Master, or Mistress, or Owner.
>
> *And* * * * all Justices of the Peace, Constables, Watchmen, and others, * * * being House-holders, are hereby respectively impowered to take up and apprehend * * * any *Indian*, *Mulatto*, or *Negro* Servant or Slave, that shall be found abroad after Nine of the Clock at Night, and shall not give a good and satisfactory Account of his or her Business, and forthwith convey him, her, or them before the next Justice of the Peace * * * , or commit him, her, or them to the common Prison until Morning[.]{EN-538}

By extending to all "Watchmen, and others * * * being House-holders", this delegated authority to "police" all "*Indian, Mulatto,* or *Negro* Servant[s] or Slave[s]"

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[537] *See* C. Morris & B. Vila, *The Role of Police in American Society*, *ante* note 534, at 4.

necessarily empowered a large proportion of the Militia to perform that function—including "Justices of the Peace" and "Constables" who, as public officials, would otherwise have been exempt from performing routine Militia duties.[538] It is difficult to imagine on what basis, other than its undoubted authority to impress everyone into some sort of Militia service, the General Assembly believed that it could command all "House-holders" to perform this possibly dangerous duty at all, let alone without any compensation. Powers of this sort were exercised even more extensively and in a more systematic fashion in the Slave States, where the Militia statutes deployed so-called "slave patrols" to the plantations and other places where slaves congregated, so as to keep the bondsmen in order and to deter or suppress criminal activities, escapes, plots, and rebellions.[539]

[538] On the last point, *see post*, at 252-253.

[539] *See post*, at 338-343, 392-395, and 718-723 (Virginia).

CHAPTER ELEVEN

Rhode Island granted various exemptions from service in her *pre*-constitutional Militia, based upon principles of social utility.

Rhode Island's *pre*-constitutional Militia organized all free males from sixteen to sixty years of age. To some of them the statutes granted various exemptions from service. In its best statement of the reasons for and substance of the basic exemptions available, in 1779 Rhode Island's General Assembly declared that,

> whereas, by the Experience of all Ages, it has been found expedient, for the better Support of Subordination and military Discipline, to form separate and distinct Corps, which shall take in the different Degrees and Orders of effective Men, so far as respect their Offices and Stations in Life; and whereas this Assembly, influenced by this Principle of general Utility, have ever exempted certain Persons from serving promiscuously in the Militia Battalions; nevertheless, as the Public, in Cases of Necessity, had and have a Right to claim their personal Services, that the same beneficial Purposes may still be effected, *It is Enacted*, That all Persons under the following Description be exempted from serving in the Infantry Battalions, and Companies of Artillery, *viz*. all Persons who have served in the Place of General Officers, Justices of the Peace, or other commissioned Officers, the Ministers or Teachers of each Church or Congregation in this State, all sworn Practitioners in the Law, Physicians, Surgeons, Apothecaries, all Persons appointed to work the Fire-Engines, one Miller to each Grist-Mill, one Ferryman to each stated Ferry, all those who have lost a right Eye, or are disabled by Lameness, all Town-Councilmen, Treasurers, Clerks and Serjeants, while serving in their respective Stations.
>
> *And be it further Enacted*, That all Persons between the Ages of Sixteen and Fifty Years, exempted as aforesaid from serving in the Infantry Battalions, be formed into separate Corps, to be known and called by the Name of the Senior Class, * * * who shall at all Times be armed, accoutred and provided, * * * and subjected to the same Regulations as the Battalions aforesaid.
>
> * * * * *
>
> *Provided always*, That this Act shall not extend * * * to any Persons who are excused from bearing Arms, by having taken the

> Affirmation [of conscientious objection], or produced the Certificates from the Meeting of Friends, as by Law required; neither shall the same have influence upon or prejudice any Charters already granted to Independent Companies.{EN-539}

Thus, *any and every* exemption from Militia service depended upon a "Principle of general Utility", not an inherent individual right—and therefore was a matter of legislative discretion to grant or withhold. Moreover, because "the Public, in Cases of Necessity," at all times retained a "Right to claim [every man's] personal Services"—and therefore every man had a continuing duty to provide those "Services" if and when needed—even those to whom some exemption might be granted were nonetheless required to serve, or were at least always subject to service, in some capacity.

Exemption from any Militia duty usually required prior governmental approval, and in any other event demanded a showing of good cause on the part of the individual claiming it. As a statute from 1677 declared, "noe person or persons within this Collony from the age of sixteen yeares unto the age of sixty yeares, shall be released from traininge or other duties in millitary affaires, exceptinge only the civill officers in this Collony, or such whose employments render them excusable by law, unless he or they doe render or give * * * a good and full satisfactory reason for their neglect".{EN-540} The basic exemptions were *gender, age, physical disability, engagement in a critical public office or private occupation, conscientious objection, provision of a substitute, and payment of fines*. Interestingly, conviction for some ordinary crime for which the perpetrator had completed his sentence and returned to society was *never* mentioned as a basis for exemption, exclusion, or other disqualification from service in Rhode Island's Militia—and, as a consequence, from personal possession of the firearms, ammunition, and accoutrements required for such service, either.

A. Gender. Rhode Island implicitly exempted women from all active duties in her Militia in those provisions of her statutes that referred explicitly to "all Male Persons" (1719 through 1780),{EN-541} "all effective Males" (1779),{EN-542} "effective Men" or "effective Man" (1757 through 1780),{EN-543} or simply "men" (1643 through 1780){EN-544}—but never to "women", or generically to "persons" in a manner that could be taken to include women. For example, from 1699 into the early 1700s, Rhode Island's Militia statute did simply state that

> if any person or persons listed under the command of any Captain * * * of the militia, shall or do not appear complete in arms * * * upon the * * * training Days * * * as when their respective Captain * * * shall call them together, either by alarum or any other time or times * * * during times of war. And if any persons listed * * * shall neglect their respective

> duties and due obedience * * * [they] shall forfeit [certain sums of money.][EN-545]

Nonetheless, everyone doubtlessly understood without being told that, in practice, the "person or persons listed" to whom the statute referred without differentiation of gender were and could be men alone, because from the Colony's very earliest days only "Men" were "allowed and assigned to beare armes" and to "make their personall appearance completely armed with Muskett and all its furniture".[EN-546] Yet even this statute made the limitation of service to men clear enough in its further directives

> [t]hat all persons within this Collony, above the age of sixteen, and under the age of sixty years, as well house keepers as others, shall be obliged to watch or ward, or find or procure *a sufficient man* to watch or ward, upon legall notice given * * * .
>
> * * * That all house keepers, *as well widows as others*, although there be no person in said family that is qualified according to law as to watching and warding, yet nevertheless, it shall be in the power and authority of the Captain * * * to order the said house keeper to find a sufficient watcher or warder, or to pay so much money as will hire or procure one[.][EN-547]

Only "a sufficient *man*" qualified as a watcher or warder—a distinction that this statute needed to make explicit, because, in contradistinction to those "persons listed" in the Militia, who everyone knew had always been exclusively male, and even to the class of "householders" that earlier law had described as "men that find themselves armes and traine in their owne persones",[EN-548] this statute obviously included females within the class of *all* "house keepers *as well widows as others*" who were ordered to find or hire someone to watch or ward. The explicit requirement of "a sufficient man" precluded "widows" or other female "house keepers" from satisfying their obligations as to the Watch and the Ward by attempting to serve in those capacities themselves, or by finding other women desirous of doing so. Interestingly, too, "the warders [were] to be such persons as are not in the Captain's list" (that is, were not formally enrolled members of the Militia), whereas "the said persons appointed to watch do at all times and upon all occasions observe and follow such order and instructions as they shall * * * receive from their respective head officer" (and therefore were members of the Militia).[EN-549] Thus, a further differentiation between the two duties was made even among otherwise "sufficient m[e]n". Presumably, this was because the Ward, conducted during the day, could have been satisfactorily performed in many if not most instances by some physically infirm or superannuated men who might not have qualified for most service, or even "list[ing]", in the Militia; whereas the Watch, conducted at night, demanded the

deployment of able-bodied and trained men, in light of the greater likelihood of criminal activity, slave revolts, and sneak attacks by hostile Indians or enemy forces at that time.

The general exemption of women from service in the Militia reflected neither a physical impossibility for women as a class to perform at least some of those functions, nor a lack of legal power in the General Assembly to require them to do so—for the Assembly could have mitigated or removed any and all of women's then long-standing legal disabilities, just as every State legislature gradually did after ratification of the Constitution. Rather, it was simply a matter of policy, based primarily upon considerations of feminine physiology and psychology, together with then-prevailing religious, social, and cultural *mores*. Nowhere did the General Assembly ever suggest that, by explicitly limiting actual service in the Militia to able-bodied adult free males, it was conceding that *in extremis* or at any other time it could not call upon *all* "persons" whatsoever, without distinction, whether free or slave, male or female, for whatever type, degree, and duration of service it considered necessary.

Moreover, all women were not exempted from all Militia duties. Rather, as just explained, female "house keepers" such as widows or spinsters were required to procure suitable male substitutes to serve in the Watch and the Ward. And independent women, such as widows, were obliged to provide firearms, ammunition, and accoutrements for those of their minor sons, other young male dependents, and servants who were enrolled in the Militia, and to ensure that the latter performed their other Militia duties, by being made personally liable in fines for any defaults by their male charges in those particulars:

> • [1665] "[F]or every defecte in not duely attending the trainings, each one listed, soe deficient, shall for every dayes defect, pay three shillings fine, to be levied by distraint on the partyes goods, or on the goods of the master or mistress, or parents of such sones or sarvents as are defective[.]"{EN-550}
>
> • [1677] "[I]f any person or persons to be" fined "be a son or servant, that have noe visible estate of their owne, * * * then the * * * fines and forfeitures shall be levied and distrained upon the estate of their respective masters, parents or other persons under whose service, command or tuition they are."{EN-551}
>
> • [1718, 1730, and 1744] "[E]very Enlisted Person, that shall Refuse or Neglect to make his Personal appearance Accoutred as [required] * * * on * * * Training Days * * * shall for every such Default pay * * * *Three Shillings* in Mony * * * & if such defaulter shall Refuse so to do, * * * the Captain * * * shall Grant forth his Warrant * * * to take and distrain so much of the Personal Estate of such delinquent Person, or

such as have them in Tuition,[540] as near as conveniently may be will pay his Fine or Fines * * * ; and such Estate that shall be taken by distress, shall be duly Apprized by Two Free-Holders * * * , and the Captain is * * * Impowered to Administer the same, and the overplus if any there be, to be returned to the owner thereof, and if he shall refuse to receive the same, then the Clerk shall give him Credit * * * which shall be accounted for out of his next Fine that shall become due[.]"{EN-552}

• [1756] "[W]hen any Person under the Age of twenty-one Years, shall neglect or refuse to pay his Fine for Neglect of military Duty, the Clerk shall make Distress upon the Goods and Chattels of the Parents or Masters of such Persons[.]"{EN-553}

• [1766] "[I]n Case such Delinquent be under the Age of Twenty-one Years, the Clerk shall make Distress upon the Goods and Chattels of the Parents or Masters of such Delinquent Persons[.]" {EN-554}

• [1781] "[T]he Sergeant * * * shall take and distrain sufficient of the personal Estate of the Delinquent, if to be found, to satisfy and pay his Fine or Fines, having first required him to pay the same * * * : [and t]hat in case such Delinquent be under the Age of Twenty-one Years, the Sergeant shall make Distress upon the Goods and Chattels of the Parent or Master of such delinquent Person[.]"{EN-555}

B. Age. Although Rhode Island's Militia statutes never explicitly set out an individual's age as an exemption, they treated age as such implicitly. Because "the Public, in Cases of Necessity, had and have a Right to claim the[ ] personal Services" of all "the different Degrees and Orders of effective Men",{EN-556} the General Assembly could simply have imposed Militia duties on everyone who could physically have performed them, irrespective of age. (Obviously, the impossibility of any performance because of an individual's physical disability would have had to, and did, constitute an absolute excuse and even exclusion.[541]) Therefore, that some men were called but others were not, simply because of their different ages, constituted liability for or exemption from Militia service on that ground.

Rhode Island's statutes generally provided that: (i) able-bodied free males less than sixteen or more than sixty years of age were exempt from all compulsory service in the Militia; (ii) those between sixteen and fifty were liable for regular duty in "the Trained Bands"; (iii) those between fifty and sixty were required to be fully armed, and could be called forth in times of "alarm" as "the Alarm List"; and (iv) those between sixteen and fifty, who might be otherwise exempt, were required to

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[540] Compare the use of the term "tuition" in 1718 and thereafter with its use in 1677, in light of the term's meaning of "[g]uardianship; superintendent care", particularly "over a young person". S. Johnson, *Dictionary, ante* note 50, in both the First (1755) and the Fourth (1773) Editions; N. Webster, *An American Dictionary, ante* note 15, definition 1; *Webster's Revised Unabridged Dictionary, ante* note 11, definition 1.

[541] *See post*, at 249-252.

be fully armed, and could be called forth in times of "alarm" as "the Senior Class". For example—

> • [1638] "[T]her shall be a generall day of Trayning for the Exercise of those who are able to beare armes in the arte of military discipline, and all that are of sixteen yeares of age, and upwards to fifty, shall be warned thereunto[.]"{EN-557}
>
> • [1699, 1701, and 1705] "[A]ny person or persons listed under the command of any Captain * * * of the Militia, shall * * * appear complete in arms, viz.: with a good or sufficient muskett or fuse, and sword or bagganett, cotouch box or bandelears, with twelve bullets, fit for his piece, half a pound of powder, six good flints upon the * * * training days * * * , as when their respective Captain * * * shall call them together, either by alarum or any other time or times * * * during times of war."{EN-558}
>
> This statute did not explicitly designate a range of ages for "persons listed" in the Militia. But it did mandate "[t]hat all persons within this Collony, above the age of sixteen, and under the age of sixty years * * * shall be obliged to watch or ward", and that the "persons appointed to watch do at all times and upon all occasions observe and follow such order and instructions as they shall from time to time receive from the respective head officer [of the Militia]".{EN-559} Inasmuch as those required to watch apparently had to be members of the Militia (they being subject to Militia officers' "order and instructions"), and inasmuch as watchers could range in age from sixteen to sixty, that range must have applied to Militiamen, too.
>
> • [1718, 1730, and 1744] "[A]ll Male Persons Residing for the space of three Months within this Colony from the Age of Sixteen, to the Age of Fifty Years, shall bear Arms in their Respective Train-bands or Companies whereto by Law they shall belong[.]
>
> * * * * *
>
> "*AND* * * * upon any Alarm in time of War, or other eminent danger of any Assault or Invasion, all Male Persons, both Listed Soldiers and others in this Colony, of and between the Age of Sixteen Years and Sixty, shall upon notice of the same, forthwith Repair to the Colours and Ensigns of such Company, within whose Precincts they Inhabit or dwell, provided with Arms & Ammunition required of Trained Soldiers upon Training Days[.]"{EN-560}
>
> • [1766] "[A]ll male Persons, who have resided for the Space of Three Months in this Colony, from the Age of Sixteen to Fifty, shall bear Arms in the respective trained Bands whereto by Law they shall belong * * * .
>
> * * * * *

"*AND* * * * all such Persons as are * * * excused from training, shall, notwithstanding, be provided with the same Arms, Ammunition, &c. as * * * is required of such as are obliged to train. * * *

"*AND* * * * upon any Alarm in Time of War or other imminent Danger of any Assault or Invasion, all male Persons, both enlisted Soldiers and others in this Colony, of and between the Ages of Sixteen Years and Sixty, shall upon Notice of the same forthwith repair to the Colours and Ensigns of such Company, within whose Precincts they inhabit or dwell, provided with Arms and Ammunition required of trained Soldiers upon training Days[.]"{EN-561}

• [1779] "[A]ll effective Males between the Ages of Sixteen and Fifty, except such as are * * * excepted, shall constitute and make the military Force of this State; and that the same be divided into Companies, Battalions and Brigades[.]

* * * * *

"*And* * * * each and every effective Man * * * shall provide, and at all times be furnished, at his own Expence (excepting such Persons as the Town Councils of the Towns in which they respectively dwell or reside shall adjudge unable to purchase the same) with one good Musquet, and a Bayonet fitted thereto, * * * one Ram-rod, Worm, Priming-wire and Brush, and one Cartouch-Box.

* * * * *

"*And* * * * all Persons between the Ages of Sixteen and Fifty Years, exempted * * * from serving in the Infantry Battalions, be formed into separate Corps * * * by the Name of the Senior Class, * * * who shall at all Times be armed, accoutred and provided, in Manner aforesaid, and subjected to the same Regulations as the Battalions aforesaid.

* * * * *

" * * * [A]ll Male Persons between the Ages of Fifty and Sixty, if able in the Judgment of the respective Town-Councils, shall be at all Times armed, accoutred and equipped, in Manner aforesaid * * * : And that they be * * * the Alarm-List of the State, and be subject to all other Duties as those exempted from bearing Arms."{EN-562}

Rhode Island based these different categories of service upon empirical observations of and practical judgments concerning the typical physical and psychological maturities, physical abilities, and continuing mental acuity among different groups of males in that era. Yet these categories were as inclusive as was then thought possible, in deference to the precept that "the Public, in Cases of Necessity, had and have a Right to claim the[ ] personal Services" of *all* "effective Men".

In addition, as with women, although exempted from actual service men over sixty years of age could be required to provide suitable substitutes for the Watch and the Ward, and to pay the fines their minor sons, male servants and

apprentices, and other young male dependents incurred as a result of defaults in their own Militia duties.[542] Being limited to financial obligations, these services were only indirect—but they were services *in the Militia* nonetheless.

Moreover, the implicit exemption from *compulsory* service for Rhode Islanders above sixty years of age never precluded their *voluntary* service in whatever capacities they might have proven useful. After all, the vast majority (if not all) of the men over sixty who were still physically fit had served at one time or another in the Trained Bands, the Senior Class, or the Alarm List—and as a result had acquired possession of, and likely exercised extensively with, firearms. So, unless they had become disabled or had disposed of their arms after reaching sixty, they remained trained, equipped, and ready for *some* further service. And no statute in Rhode Island or anywhere else throughout America ever prohibited such men from volunteering for duty. For famous examples (albeit in a neighboring Colony), one of the first American casualties in the War of Independence, Jonas Parker, killed at Lexington, Massachusetts, on 19 April 1775, was in his sixties.[543] In Menotomy, "about a dozen of the elderly men * * * , exempts mostly," including a minister, ambushed and captured Lord Percy's baggage train as it passed through their Town on its way to Lexington.[544] In Arlington, "[o]ne of the most unequal duels of any war was fought * * * between the venerable Samuel Whittemore, aged eighty years, and a number of British soldiers, acting as a flanking party". Whittemore, who "[i]n his younger days * * * had been an officer in the militia", killed three British soldiers before being shot down, clubbed, and bayonetted. (Almost miraculously, he survived and lived eighteen more years.)[545] And in Somerville,

> James Miller, about sixty-six years old, stood * * * awaiting the British. With him was a companion, and both fired with deadly effect, again and again, as the British marched by * * * . They were discovered finally, and Miller's companion urged him to retreat.
>
> "Come, Miller, we've got to go."
>
> "I'm too old to run," replied Miller, and he remained, only to be pierced with a volley of thirteen bullets.[546]

"[T]oo old to run", but not too old to fight.

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[542] *See ante*, at 155-157 and 244-245.

[543] *See, e.g.*, John R. Galvin, *The Minute Men, The First Fight: Myths and Realities of the American Revolution* (Washington, D.C.: Brassey's, 1989), at 194-195, 220-221; R. Gross, *The Minutemen*, *ante* note 379, at 117-118; R. Ketchum, *Decisive Day*, *ante* note 310, at 53.

[544] F. Coburn, *The Battle of April 19, 1775, ante* note 383, at 118-120.

[545] *Id.* at 141-142.

[546] *Id.* at 151-152 (footnote omitted).

Today, any exemptions for elderly individuals in revitalized Militia would be less far-reaching and more flexible than they were in *pre-*constitutional times. For many duties in these days would require education, experience, and enthusiasm far more than raw physical strength and stamina.

C. Disability. Because the Militia naturally required "*effective* Men", a significant physical or mental disability would always exempt an individual, on the ground that his performance of the required duty was simply not possible, either at that time alone (as the consequence of some temporary sickness) or at all (as the consequence of some irremediable condition). Lower and upper limits on the ages of Militiamen, of course, implicitly addressed that problem in terms of generalities: namely, (i) that those males less than sixteen years of age were typically small, weak, and psychologically immature, and thus in most cases the proper subjects (not the providers) of protection; and (ii) those males more than sixty years of age were often weak, with poor eyesight or hearing, sickly, and prone to mental deterioration, and thus also proper subjects for protection. Within those limits, Rhode Island's statutes further allowed for exemptions in individual cases of proven disability:

> • [1673] Those men "who cannot in conscience traine, fight, nor kill any person * * * shall be exempt from traynings, arminge, rallyinge to fight, to kill, and all such martiall service as men are by any other debility; as said lame, sick, weake, deafe, blinde, or any other infirmity exempteth persons in and by law[.]"{EN-563}
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> • [1718, 1730, and 1744] "Excepting * * * all those that have lost one of their Eyes, or disabled by Lameness".{EN-564}
>
> • [1766] "[E]xcept * * * all those who have lost an Eye, or are disabled by Lameness".{EN-565}
>
> • [1777] "[I]n case of sickness and inability to do duty (which alone shall excuse any person), it shall be in the power * * * of the field officers * * * to permit such a person to hire a man to do his tour of duty; and if such sick and unable person shall be so extremely poor * * * as to be unable to hire a person in his stead, * * * such field officer [shall] be empowered to remit such poor person's fine."{EN-566}
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> • [1778] "Whereas * * * the colonels of the respective [Militia] regiments in this state, have returned * * * many persons, as delinquents in the late expedition * * * , who were sick or incapable of doing personal service in camp * * * ; wherefore—
>
> " * * * the several field officers * * * do make return * * * of the names of all persons whom they have returned as delinquents, who at the time of the draught, and during the time of their tour of duty, were sick, or otherwise incapable of doing personal service in camp, * * * that they may be excused from the penalties * * * made for the punishing of said

> delinquents; the said officers taking great care and precaution that no one be excused, but those who are really deserving thereof[.]"{EN-567}
>
> • [1779] The "Persons" to "be exempted" included "all those who have lost a right Eye, or are disabled by Lameness".{EN-568}

The three basic categories of physical inability which warranted exemption throughout this era included some degree of blindness (total or partial), sickness (permanent or temporary), and lameness. "Lameness" doubtlessly included a very wide variety of debilitating conditions, because the noun meant, not simply "[t]he status of a cripple; loss or inability of limbs",[547] but also "[a]n impaired state of the body or limbs; loss of natural soundness and strength by wound or by disease; particularly applied to the limbs, and implying a total or partial disability".[548] So a man suffering from "lameness" might be chronically weak ("loss of natural soundness and strength") from any number of causes; constantly ill (as the result of a "wound or * * * disease"); or afflicted with one or more limbs incapable of full, or even any, function ("a total or partial disability"). In such a state, it would have been extraordinarily difficult, if not impossible, for such an individual to have fulfilled the normal Militia duties of training and service in the field. So such an individual's exemption would have been dictated by circumstances and common sense.

Yet even exemptions of this sort, which arose from conditions presumably beyond the control of the individuals involved, were neither automatic—for they required general legislative approval in the first instance; nor without fine discriminations based on the needs of the times—as the careful distinction in the statutes of 1718 through 1766, on the one hand, and 1779, on the other hand, between "those who have lost *an* Eye" and "those who have lost *a right* Eye" evidences.[549]

Moreover, in individual cases an exemption on the ground of physical disability could be narrowly tailored. In 1713, when one John Gavet "petition[ed] the Assembly to be released and acquitted from martial discipline, by reason of an incurable lameness in one of his feet", it "enacted * * * that * * * Gavet shall be *

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[547] S. Johnson, *Dictionary, ante* note 50, definition 1 both the First (1755) and the Fourth (1773) Editions.

[548] N. Webster, *An American Dictionary, ante* note 15, definition 1.

[549] An individual who had lost his *left* eye could still have sighted and fired a typical flintlock musket or rifle effectively, because he could have mounted the firearm on his right shoulder, could have viewed the target down the barrel with his right eye, and when the gun discharged would have avoided the flash from the pan as the sparks or flame vented away from his head towards the right. A man who had lost his *right* eye, conversely, could still have mounted the firearm on his right shoulder, but then would have had to crane his neck severely in order to have been able to sight down the barrel; and if he had mounted the firearm on his left shoulder, the flash from the pan would have vented directly in front of and across his face. A flintlock long gun made for a *left-handed* shooter, with the pan on the *left* side of the action so as to vent in that direction, would have been an extremely rare piece.

* * acquitted and discharged for ever hereafter from all manner of martial discipline, *alarms only excepted*".{EN-569}

Actually, in principle Gavet's case was nowhere near unique (other than that he had sought a ruling on the matter from the General Assembly itself). For Rhode Island's Militia statutes exempted merely moderately disabled individuals only from normal participation in the Trained Bands, never from extraordinary, last-ditch Militia service on "the Alarm List":

> • [1718, 1730, 1744, and 1766] "[A]ll Male Persons * * * from the Age of Sixteen, to the Age of Fifty Years, shall bear Arms in their respective Train-Bands or Companies, * * * Excepting * * * all those that have lost one of their Eyes, or disabled by Lameness"—*but* "all such Persons * * * excus'd from Training, yet shall notwithstanding be provided with the same Arms, Ammunition, &c. as * * * is required of such as are obliged to Train"; *and* "upon any Alarm in time of War, or other eminent danger of any Assault or Invasion, all Male Persons, both Listed Soldiers and others in this Colony, of and between the Age of Sixteen Years and Sixty, shall upon notice * * * forthwith Repair to the Colours * * * , provided with Arms & Ammunition required of Trained Soldiers upon Training Days[.]"{EN-570}
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> • [1779] "[A]ll effective Males between the Ages of Sixteen and Fifty, except such as are * * * excepted, shall constitute and make up the military Force of this State", the "exempt[ion] from serving in the Infantry Battalions, and Companies of Artillery" extending to "all those who have lost a right Eye, or are disabled by Lameness"—*but*, "all Persons between the Ages of Sixteen and Fifty Years, exempted * * * from serving in the Infantry Battalions, [shall] be formed into separate Corps, * * * by the Name of the Senior Class, * * * who shall at all Times be armed, accoutred and provided, * * * and subjected to the same Regulations as the Battalions aforesaid"; *and* "all Male Persons between the Ages of Fifty and Sixty, if able in the Judgment of the respective Town-Councils, shall be at all Times armed, accoutred and equipped * * * [a]nd that they be considered as the Alarm-List of the State, and be subject to all other Duties as those exempted from bearing Arms"; *and* "in Cases of general Alarm", no one subject to duty "shall neglect or refuse appearing at the Alarm-Post * * * , armed and accoutred".{EN-571}

Thus, even the lame and the halt from sixteen to sixty years of age were subject to *some* type of Militia service, with those from fifty to sixty years of age to be excused only "if [not] able in the judgment of the respective Town-Councils". Presumably, though, this was no special exemption, as no man of any age who was truly *dis*abled from serving in any useful way perforce of some physical or mental problem could have been required, in justice or common sense, to "Repair to the Colours". But absent an utterly debilitating condition that rendered a man's potential contribution

nil, in principle *no one* could expect to escape *some sort* of Militia service simply because of a disability.

In addition, along with women and elderly men, those men of eligible ages who were exempted from actual personal service on the grounds of some serious disability could nonetheless be required to provide suitable substitutes for the Watch and the Ward, and to pay the fines their minor sons or wards, or their male servants or apprentices, incurred as a result of defaults in their own Militia duties.[550] Being limited to financial obligations, these men's duties were only indirect—but withal they were services in and for the Militia.

D. Public offices and private occupations. The only able-bodied men between sixteen and sixty years of age, without conscientious objections, whom Rhode Island generally exempted from service in her Trained Bands included certain public officials, private parties in necessary occupations, some former officeholders, and a few special cases.

1. Public offices. Throughout the *pre*-constitutional period, Rhode Island exempted various of her public officeholders from regular training in her Trained Bands:

> • [1665] Eligible men were to "find themselves armes and traine in their owne persones; which all men from sixteene years of age to sixtye yeares old are * * * required to doe, * * * excepting such as are in publicke office".{EN-572}
>
> • [1677] "[N]oe person or persons within this Collony from the age of sixteen yeares unto the age of sixty yeares, shall be released from traininge or other duties in millitary affaires, exceptinge * * * the civill officers in this Collony[.]"{EN-573}
>
> • [1718, 1730, and 1744] "[A]ll Male Persons Residing for the space of Three Months within this Colony from the Age of Sixteen, to the Age of Fifty Years, shall bear Arms in their respective Train-bands or Companies whereto by Law they shall belong, Excepting * * * one Goaler to each of his majesties Goals in the Colony, * * * and all Persons that are under Oath or Engagement to any Office."{EN-574}
>
> • [1766] "[A]ll male Persons, who have resided for the Space of Three Months in this Colony, from the Age of Sixteen to Fifty, shall bear Arms in the respective trained Bands whereto by Law they shall belong, * * * excepting * * * one Gaoler to each Gaol, * * * and all other Persons who are under Oath or Engagement to any Office."{EN-575}
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> • [1779] "[A]ll Persons under the following Description be exempted from serving in the Infantry Battalions, and Companies of

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[550] *See ante*, at 155-157 and 244-245.

> Artillery, *viz*. all Persons who have served in the Place of General Officers, Justices of the Peace, or other commissioned Officers, * * * all Town-Councilmen, Treasurers, Clerks and Serjeants, while serving in their respective Stations."{EN-576}

Rather than special privileges of an élitist cast, these exemptions merely recognized that individuals in some public offices or employments performed public duties of a civilian nature that contributed to the maintenance of "homeland security" as much as or even more than their serving as citizen-soldiers in the Trained Bands could have accomplished, and that the full performance of the duties peculiar to them required the partial relaxation of other duties usually applicable to all.

Only a partial relaxation it was, too, always limited to its specific purpose. For example, one would presume that legislators, of all public officials, perform a duty of the very highest importance, interference with which, on the grounds of almost any other, non-legislative duties appertaining to them, should be as limited as possible. Yet in 1777 Rhode Island's General Assembly provided that

> all Members of the General Assembly, who are drawn into the second or third Division of the Alarm-List of this State, be excused from doing Duty in said Divisions at any Time during a Session of this Assembly, and one Day before the Sitting thereof, and two Days after the Rising of the same.{EN-577}

That even Rhode Island's legislators crafted an exemption for themselves so narrowly circumscribed—extending essentially only to the periods of their actual service in their official capacities—emphasizes how chary and niggardly they were in providing exceptions to their "Right to claim [every man's] personal Services" in the community's defense, and how sensitive they were to maintaining an equality of burdens in Militia service throughout the community. (Interestingly, the appropriateness of such a limited immunity was not lost on WE THE PEOPLE thereafter. For the Constitution provides that "[t]he Senators and Representatives [in Congress] * * * shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same"[551]—*and at no other times*.)

In any event, in at least some cases these exemptions doubtlessly proved only theoretical, as men in important public offices were likely to have earned the community's confidence, and therefore to have been chosen to serve as high-ranking Militia officers when danger threatened.

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[551] U.S. Const. art. I, § 6, cl. 1.

On the other hand, some of these exemptions were capable of abuse, and needed to be restrained. In 1736, for example, the General Assembly observed that *it is common for Persons to take Offices in the Militia, and keep them for a short Time, and then refuse to accept the same, for no other Reason, but to be excused from Training thereafter*"—and therefore "*ENACTED* * * * [t]hat no Persons in Commission in the Militia, shall be excused from training, for having had an office in the Militia, if they lay the same down, unless they have served *Five Years*, or are excused by the General Assembly".{EN-578}

2. Private occupations. Rhode Island considered a select set of private occupations sufficiently critical that she exempted the men practicing them, too, from service in her Trained Bands:

> • [1677] "[N]oe person or persons within this Collony from the age of sixteen yeares unto the age of sixty yeares, shall be released from traininge or other duties in millitary affaires, exceptinge * * * such whose employments render them excusable by law[.]"{EN-579}
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> • [1718, 1730, and 1744] "[A]ll Male Persons Residing for the space of Three Months within this Colony, from the Age of Sixteen, to the Age of Fifty Years, shall bear Arms in their Respective Train-bands or Companies * * * Excepting * * * one Minister or Teacher of each respective Congregation in each respective Town, all Sworn Practitioners in Chirurgery and Physick, all Apothecaries and School-masters, and also one Miller to each Grist Mill, [and] one Ferry-man to each stated Ferry[.]"{EN-580}
>
> • [1766] "[A]ll male Persons, who have resided for the Space of Three Months in this Colony, from the Age of Sixteen to Fifty, shall bear Arms in the respective trained Bands where by Law they shall belong, * * * excepting * * * the Ministers or Teachers of each Church or Congregation in the Colony, all sworn Practitioners in the Law, Physicians, Surgeons, Apothecaries, School-masters, all Persons appointed to work the Fire-Engines in this Colony, one Miller to each Grist-Mill, [and] One Ferryman to each stated Ferry[.]"{EN-581}
>
> • [1778] "[T]he council of war * * * are * * * empowered to excuse from personal duty in the militia, such persons as may from time to time be employed within this state, in manufacturing military stores and other articles for the use of the United States, agreeably to * * * a resolution of Congress[.]"{EN-582}
>
> • [1779] "[A]ll Persons under the following Description be exempted from serving in the Infantry Battalions, and Companies of Artillery, *viz*. * * * the Ministers or Teachers of each Church or Congregation in this State, all sworn Practitioners in the Law, Physicians, Surgeons, Apothecaries, all Persons appointed to work the Fire-Engines,

> one Miller to each Grist-Mill, [and] one Ferryman to each stated Ferry[.]"{EN-583}

Significant is how all of the exemptions extended to individuals in private occupations involved critical matters of what today would be included in "homeland security": namely,

> (i) *maintenance of due process of law* ("sworn Practitioners in the Law");
>
> (ii) *public health* ("Physicians, Surgeons, [and] Apothecaries");
>
> (iii) *emergency services* ("all Persons appointed to work the Fire-Engines");
>
> (iv) *Local economic security, specifically with respect to the provision of food* ("one Miller to each Grist-Mill", which was an absolutely necessary occupation in a largely agricultural community);
>
> (v) *an efficient transportation-network* ("One Ferryman to each stated Ferry", which was an highly regulated occupation{EN-584}); and even
>
> (vi) *the community's spiritual well-being and general education* ("the Ministers or Teachers in each Church or Congregation", many of whom were schoolmasters as well).

Indeed, the logical inference is that, although "exemptions" in form, they really amounted in substance to implicit assignments of particular duties in the Militia, which the exempted individuals fulfilled by performing those ostensibly private, but ultimately public, services. That is, one form of Militia service was substituted for another: An individual otherwise eligible for listing in the Trained Band fulfilled his Militia duty by (for example) practicing medicine or operating a ferry every working day of his life; and to enable him to do so he was granted an exemption from having to muster with the Band the four, six, or eight times a year that the statutes mandated for everyone else.

These exemptions must be taken with a practical grain of salt, however. For example, although "Physicians, Surgeons, [and] Apothecaries" were not required to "bear Arms in the * * * Train Bands", when the Militia served in the field they doubtlessly were expected to provide their medical and pharmacological services to the soldiers. Indeed, in some instances their services were mandated by law, as in the Militia Act of 1779, which stipulated "[t]hat besides the Officers and Non-commissioned Officers * * * to each Battalion there be appointed * * * one Surgeon, and one Surgeon's-Mate".{EN-585} And, even if they were never expected to bear arms in the normal course of performing their functions, ferrymen were vital to the Militia's ability to move men, equipment, and supplies through the countryside, especially during periods of "alarm". Therefore, *someone* would have

been detailed exclusively to that duty in any event. On the other hand, even a legal *exemption* from service for men in such professions and trades did not amount to an absolute *exclusion* of them from *voluntary* Militia service anywhere in New England. At Concord, Massachusetts, on 19 April 1775, for instance, "the first on the ground was the minister, gun in hand"; other Ministers mustered in other Companies; the Captain of one Militia Company was a doctor; and a schoolmaster "locked the [schoolhouse's] door and went quietly away to join his company".[552] One surgeon's mate even carried a New England fowler from the siege of Boston throughout the War of Independence.[553]

3. Past services. Past services in the Militia or in some public offices also warranted exemption from participation in Rhode Island's Trained Bands:

> • [1718, 1730, and 1744] "[A]ll Male Persons Residing for the space of three Months within this Colony, from the Age of Sixteen, to the Age of Fifty Years, shall bear Arms in their Respective Train bands or Companies * * * Excepting * * * all Persons that shall have Served in the place of General Officers, Justices of the Peace or other Commission Officers[.]"{EN-586}
>
> • [1766] "[A]ll male Persons, who have resided for the Space of Three Months in this Colony, from the Age of Sixteen to Fifty, shall bear Arms in the respective trained Bands whereto by Law they shall belong, * * * excepting * * * all Persons who have served in the Place of General Officers, Justices of the Peace, or other Commissioned Officers * * * .
>
> "*PROVIDED always*, That no Person shall be excused from training for having had a Commission-Office in the Militia, unless he shall have served Five Years therein, or have been dismissed therefrom by the General Assembly."{EN-587}
>
> • [1779] "[A]ll Persons under the following Description be exempted from serving in the Infantry Battalions, and Companies of Artillery, *viz*. all Persons who have served in the Place of General Officers, Justices of the Peace, or other commissioned Officers[.]"{EN-588}

4. Required enlistment in "the Senior Class". Although not required to be listed in the Trained Bands, men less than fifty years of age who were exempted on the grounds of their public offices or private occupations were required to enlist in "the Senior Class". The Senior Class was fully organized in Companies of Infantry—and even Troops of Horse "at the[men's] own Election, * * * due Regard being had to their Abilities and local Situation"; its Companies in various Towns were to "be officered in the same Manner as the Infantry Companies, with such Field and Staff Officers as their Numbers * * * entitle[d] them to"; and its members

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[552] A. French, *The Day of Concord and Lexington*, *ante* note 469, at 150, 218, 228.

[553] B. Ahearn, *Flintlock Muskets in the American Revolution*, *ante* note 464, at 114-115.

were "at all Times [to] be armed, accoutred and provided, * * * and subjected to the same Regulations" as the Trained Bands.{EN-589} So the exemptions these men enjoyed from regular service in the Trained Bands were rather limited in scope.

5. No exemption from "the Alarm List". As with individuals suffering from disabilities, Rhode Island's Militia statutes exempted those who held important public offices or provided critical private services only from routine participation in the Trained Bands, never from active service on "the Alarm List":

> • [1718, 1730, and 1744] Although "Except[ed]" from the requirement that "[a]ll Male Persons Residing for the space of Three Months within this Colony from the Age of Sixteen, to the Age of Fifty Years, shall bear Arms in their Respective Train-bands or Companies whereto by Law they shall belong", nevertheless "all * * * Persons * * * excus'd from Training" were to "be provided with the same Arms, Ammunition, &c. as * * * is required of such as are obliged to Train, & * * * once every year, or oftner, * * * there shall be * * * a Survey and Examination made, whether such Persons are provided as * * * is Required"; and "upon any Alarm in time of War, or other eminent danger of any Assault or Invasion, all Male Persons, both Listed Soldiers and others in this Colony, of and between the Age of Sixteen Years and Sixty, shall * * * forthwith repair to the Colours * * * provided with Arms & Ammunition required of Trained Soldiers upon Training Days[.]"{EN-590}
>
> • [1766] Again, although "except[ed]" from the requirement that "[a]ll male Persons who have resided for the Space of Three Months in this Colony from the Age of Sixteen to Fifty, shall bear Arms in the respective trained Bands whereto by Law they shall belong", nevertheless "all * * * Persons * * * excused from training" were to "be provided with the same Arms, Ammunition, &c. as * * * is required of such as are obliged to train * * * [a]nd Twice in every Year * * * there shall be * * * an Examination and Survey made, whether such Persons are provided as * * * is required"; and "upon any Alarm in time of War or other imminent Danger of any Assault or Invasion, all male Persons, both enlisted Soldiers and others in this Colony, of and between the Ages of Sixteen Years and Sixty, shall * * * forthwith repair to the Colours * * * provided with Arms and Ammunition required of trained Soldiers upon training Days[.]"{EN-591}
>
> • [1779] Again, the basic rule was still that "all effective Males between the Ages of Sixteen and Fifty, except such as are * * * excepted, shall constitute and make up the military Force of this State". And "exempt[ion] from serving in the Infantry Battalions, and Companies of Artillery" extended to individuals in various public offices and private occupations. Yet, in derogation of this allowance, "all Persons between the Ages of Sixteen and Fifty Years, exempted * * * from serving in the Infantry Battalions, [were to] be formed into separate Corps, to be known * * * by the Name of the Senior Class, * * * who shall at all Times be

> armed, accoutred and provided, * * * and subjected to the same Regulations as th[os]e Battalions". Moreover, "all Male Persons between the Ages of Fifty and Sixty, if able in the Judgment of the respective Town-Councils, shall be at all Times armed, accoutred and equipped * * * [a]nd * * * be considered as the Alarm-List of the State, * * * subject to all other Duties as those exempted from bearing Arms". And "in Cases of general Alarm", *no one* subject to duty "shall neglect or refuse appearing at the Alarm-Post, * * * armed and accoutred".{EN-592}

Thus, even public officials and individuals in critical occupations from sixteen to sixty years of age were not suffered to avoid *every* type of Militia service—but instead were compelled to serve in the most dangerous of them all, "upon any Alarm in time of War, or other eminent danger of any Assault or Invasion"—with even those from fifty to sixty years of age to be excused *only* "if [not physically] able in the judgment of the respective Town-Councils", but *not* because of the arguable importance to the community of their normal work in normal times.

E. Exceptional cases. In addition to these regular categories, Rhode Island's statutes allowed for special exemptions in special circumstances. For example—

> • [1755] "[T]he Committee of War * * * is impowered to borrow or purchase on the best Terms they can, all the Arms that shall be necessary; and * * * any Person who shall lend or sell to the Colony, a good small Arm, shall be exempted from all Military Duty, for and during the Term of one Year[.]"{EN-593}
>
> • [1777] "That it be * * * recommended to the Independent Company of *Kingston Reds*, that they excuse *George Tesst* and *Jeremiah Sheffield* (who are employed in making and stocking Guns) from doing any Service in said Company[.]"{EN-594}
>
> • [1777] "[I]f any two men in this state, whether belonging to the militia, alarm list, or independent companies, * * * shall * * * enlist and deliver to any commissioned officer of either of the two Continental battalions, raising as the quota of this state, an able-bodied, effective man, to serve in the same, for three years, or during the war, and who shall pass muster, they shall be exempted from being drafted for, or doing, duty in any of the Continental battalions, for, and during the term for which such able-bodied man shall enlist[.]"{EN-595}
>
> • [1778] "Whereas * * * the colonels of the respective [Militia] regiments in this state, have returned * * * many persons, as delinquents in the late expedition * * * , who * * * were absent from this state before the militia were at first called out; * * * wherefore—
>
> " * * * the several field officers * * * do make return * * * of the names of all persons whom they have returned as delinquents, who * * * before the first draught of the inhabitants, were absent from this state, and had not any knowledge of the intended expedition, that they may be

> excused from the penalties * * * made for the punishing of said delinquents; the said officers taking great care and precaution that no one be excused, but those who are really deserving thereof[.]"{EN-596}

Exemptions of these kinds emphasized the General Assembly's power to apply the "Principle of general Utility" even in the cases of specific individuals, specific situations, or specific tasks. Yet such *ad hoc* privileges were not granted for arbitrary reasons (such as out of naked political favoritism), or even for legitimate reasons unrelated to the purposes of the Militia. Rather, they plainly conduced to satisfying some of Rhode Island's specific needs in those particulars: namely, through the provision of firearms, the manufacture of firearms, and the recruitment of soldiers.

F. Those exempted nonetheless to be armed and to serve in emergencies. Because "the Public, in Cases of Necessity," always asserted a "Right to claim [every man's] personal Services", exemptions from Militia service were never complete (except where physical disability was involved). Rather, every able-bodied free male from sixteen to sixty years of age, even though he might be exempted from participation in the Trained Bands on various grounds, was required always to be ready to serve, and to come forth for service in the field during emergencies.

1. A fundamental principle of the *pre*-constitutional Militia being the universality and completeness of suitable armament among all eligible individuals, essentially no one, other than conscientious objectors,[554] enjoyed exemption from the requirement that he possess suitable firearms, ammunition, and accoutrements in readiness for use at all times. For example—

> • [1718, 1730, and 1744] "[A]ll * * * Persons * * * excus'd from Training, yet shall notwithstanding be provided with the same Arms, Ammunition, &c. as * * * is required of such as are obliged to Train, & that once every year, or oftner, * * * there shall be * * * a Survey and Examination made, whether such Persons are provided as * * * is Required[.]"{EN-597}
>
> • [1766] "[A]ll such Persons as are * * * excused from training, shall, notwithstanding, be provided with the same Arms, Ammunition, &c. as * * * is required of such as are obliged to train. And * * * Twice in every Year * * * there shall be an Examination and Survey made, whether such Persons are provided as * * * is required[.]"{EN-598}
>
> • [1774] "[T]he Fines of all those who, being exempted from appearing on the Days of Training, are notwithstanding, obliged to be provided with Arms and other Accoutrements, shall be the same for every deficiency, as the Fines of the inlisted Soldiers: And * * * the examination

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[554] To be treated separately. *See post*, at 266-272.

> and survey [of Arms] * * * shall be made * * * on the first *Monday* in *February*, and on the last *Monday* in *April*."{EN-599}
>
> • [1775] "That a proclamation be immediately issued * * * , commanding every man in the colony, able to bear arms, to equip himself completely with arms and ammunition, according to law."{EN-600}
>
> • [1776] "[A]ll such Persons as are by Law obliged to equip themselves with a good Fire-Arm, Bayonet and Cartouch-Box, and who shall not by the Report of * * * [the] Town-Council be declared incapable of providing themselves * * * do provide themselves * * * , agreeable to Law[.]"{EN-601}
>
> • [1778] "[A]ll Persons * * * by Law obliged to equip themselves with a good Fire-Arm, Bayonet and Cartouch-Box, and who shall not, by Report of the Town-Council of the Town to which they belong, be * * * incapable of providing themselves * * * , do provide themselves therewith * * * , or with a Rifle-Gun and Sword * * * . *Provided*, That nothing herein contained shall extend to any Person who shall produce a Certificate * * * that his Gun has been taken from him for public Service, and not accounted for[.]"{EN-602}
>
> • [1779] "[A]ll Persons between the Ages of Sixteen and Fifty Years, exempted * * * from serving in the Infantry Battalions, be formed into separate Corps, to be known * * * by the Name of the Senior Class, * * * and * * * shall at all Times be armed, accoutred and provided, * * * and subjected to the same Regulations as th[os]e Battalions[.]
>
> * * * * *
>
> " * * * [A]ll Male Persons between the Ages of Fifty and Sixty, if able in the Judgment of the respective Town-Councils, shall be at all Times armed, accoutred and equipped * * * upon the same Penalty as though they were held to military Duty, provided that they be enrolled, and an exact List be taken of them, by the Colonel of the Battalion in whose District they live * * * : And that they be considered as the Alarm-List of the State, and be subject to all other Duties as those exempted from bearing Arms[.]"{EN-603}

Taken together, the categories "every man in the colony, able to bear arms", "all * * * Persons * * * by Law obliged to equip themselves" with arms, and "all Male Persons between the Ages of Fifty and Sixty, if able in the Judgment of the * * * Town-Councils", included *every* able-bodied free male, other than conscientious objectors, who might be exempt from service in the Trained Bands.

2. Moreover, the requirements that all able-bodied males more than sixteen and less than sixty years of age who were exempted (other than for reasons of conscientious objection) from doing duty in the Trained Bands were to be embodied in the Senior Class or the Alarm List, and to be fully armed and accoutred at all times, had an eminently practical purpose: namely, the preparation of that part of

the population not enrolled in the Train Bands to support the Train Bands in the field in the event of emergencies—so that *everyone* capable of assisting in the defense of the State could be mobilized to that end without misunderstanding, confusion, or delay.

3. Not surprisingly, then, service in emergencies was a condition of special exemptions, too, as in three instances in 1777:

> [T]he * * * colonel * * * shall, immediately after such draft, give in a list of all the persons [making conscientious objection] * * * to the town council * * * [which] shall depute and appoint one of their members immediately to hire so many able bodied men as shall equal the number returned * * * , and for the same term of time as the persons * * * shall be drafted, * * * ; each person so drafted, to pay the expense of hiring a person in his room * * * .
>
> * * * * *
>
> "*Provided always, * * * that this act shall not extend to times of general alarm, when the whole military force of this state shall be ordered upon duty together, and at the same time*; but operate only when detachments or parts of each respective company * * * shall be ordered to be drafted out or detached for actual service."{EN-604}

> [I]f any two men in this state, whether belonging to the militia, alarm list, or independent companies, * * * shall * * * enlist and deliver to any commissioned officer of either of the two Continental battalions, raising as the quota of this state, an able-bodied, effective man, to serve in the same, for three years, or during the war, and who shall pass muster, they shall be exempted from being drafted for, or doing, duty in any of the Continental battalions, for, and during the term for which such able-bodied man shall enlist * * * .
>
> *Provided, nevertheless, that such exemption shall not extend to excuse any person from doing duty in time of an alarm, or in case of a draft for the immediate defence of this state*.{EN-605}

> [A]ny two persons within this state, subject by law to bear arms, who shall procure one good, able-bodied recruit to enter the Continental service for the term of three years, or during the present war, shall be exempted from actual service, *saving in cases of general alarm*, during the time for which such recruit shall enlist[.]{EN-606}

G. Provision of a substitute. Individuals impressed for particular duty were not necessarily bound to serve personally, but often could fulfill their immediate obligations, or gain some other exemptions, by providing substitutes:

• [1744] "[W]hen it shall be thought necessary to set a double Watch in any Town in this Government, every Person that shall be legally notified to watch at such Times, and shall refuse or neglect to appear, * * * or send a good and sufficient Man in his Room, such Person for every such Offence, shall pay a Fine[.]"{EN-607}

• [1757] "[E]very man so impressed, shall be obliged to serve as a soldier, or find a good, able bodied, effective man to serve in his stead; unless he hath some reasonable or lawful excuse[.]"{EN-608}

• [1757] "[T]he names of all persons in the list of each company, shall be written on a scroll of paper, and rolled up, and then put into a hat or box; and one sixth part thereof, shall be drawn, (unless the company agree that the commissioned officers shall press said sixth part,) and the persons whose names shall be so drawn or pressed, shall go on this service.

"Provided, nevertheless, that any person drawn, who declines going, and shall immediately procure an able bodied, effective man to go in his room, shall be excused; but no person shall be excused without.

"Provided, also, that no person's name be put into the hat or box, who, through sickness or lameness, cannot go[.]"{EN-609}

• [1776] "[I]n case any Officer or Soldier, * * * draughted [from the Militia] * * * , shall refuse or neglect to appear * * * , either by himself or a good able-bodied and suitable Person in his Stead, to enter upon and perform such military Duty as shall be enjoined him, he shall be subject to and pay such Fines, Forfeitures and Penalties, as the * * * Laws and Regulations of this State direct in Cases of general Alarm."{EN-610}

• [1777] "[I]n case of sickness and inability to do duty (which alone shall excuse any person), it shall be in the power * * * of the field officers * * * to permit such a person to hire a man to do his tour of duty; and if such sick and unable person shall be so extremely poor * * * as to be unable to hire a person in his stead, * * * such field officer be empowered to remit such poor person's fine."{EN-611}

• [1777] "[I]in case any Officer or Soldier [of the Militia who is drafted] * * * shall neglect to appear * * * , either by himself or a good able-bodied and suitable Person in his Stead, compleatly equipped with Arms and Accoutrements, to enter upon and perform such military Duty as shall be enjoined him, he shall be liable to pay * * * a Fine for each Day's Neglect[.]"{EN-612}

• [1777] "[I]f any person [in the Militia] who shall be draughted * * * shall neglect to do duty, or hire a man to do his tour of duty, the town council of the town in which such person shall reside, are empowered to hire a man in the room of such delinquent person * * * [at his cost] if the delinquent person be adjudged * * * of sufficient ability to bear the expense[.]"{EN-613}

• [1779] "[E]very Officer, non-commissioned Officer or Private [in the Militia], who shall neglect or refuse appearing, armed, accoutred and provided * * * at the Time and Place of Rendezvous directed [when ordered into the field and upon actual service], shall forfeit and pay * * * the Sum of *Six Pounds*, Lawful Money, per Day * * * ; and if an Officer, shall also forfeit his Commission. *Provided nevertheless*, that each non-commissioned Officer and Private may appear by substitute, at the Discretion of the Commanding Officer."{EN-614}

• [1780] "[I]f any Person who shall be detached * * * shall absent himself, and not * * * be found, and shall not procure an able-bodied effective Man to do the Duty in his Stead, * * * such a Part of the Estate of the Person so detached shall be taken and disposed of * * * as shall be sufficient to procure an able-bodied Man to do the said Duty[.]"{EN-615}

• [1781] "[I]f any Person belonging to the military Force of this State shall absent himself, in order to elude or evade this Act, or shall refuse to march forward, upon being detached, by himself or Substitute, he shall be sent forward to the Continental Army, to do Duty for Six Months, in the *Rhode-Island* Battalion, as a common Soldier[.]"{EN-616}

• [1781] "[I]f any Person belonging to the military Force of this State shall absent himself, in order to elude or evade this Act, or shall refuse to march forward upon being detached, by himself or Substitute, he shall pay the Sum of *Nine Pounds* Lawful Silver Money per Month, as a Fine[.]"{EN-617}

In keeping with the principles of social solidarity and the common good, Rhode Island made special provision for the poor:

• [1777] "[T]hat the first division of the second draft of the militia, and alarm and independent companies, heretofore drafted * * * march to such part of the shores within their respective counties, as shall be directed by the commanding officer * * * , properly equipped, to relieve those that are now upon duty, and there to remain and do duty for fifteen days * * * .

* * * * *

"And * * * in case of sickness and inability to do duty (which alone shall excuse any person), it shall be in the power of * * * the field officers * * * to permit such a person to hire a man to do his tour of duty; and if such sick and unable person shall be so extremely poor * * * as to be unable to hire a person in his stead, that such field officer be empowered to remit such poor person's fine."{EN-618}

• [1777] "Whereas * * * one half of the militia, independent, artillery and alarm companies within this State were draughted, and have done duty for one month,—

> "It is voted * * * that the remaining half-part of said militia, independent, artillery and alarm companies, be draughted into two divisions * * * .
>
> * * * * *
>
> " * * * [I]f any person who shall be draughted * * * shall neglect to do duty, or hire a man to do his tour of duty, the town council of the town in which such person shall reside, are empowered to hire a man in the room of such delinquent person, * * * if the delinquent person be adjudged by such town council of sufficient ability to bear the expense thereof[.]"{EN-619}

Importantly, a substitute would *not* suffice during "times of general alarm, when the whole military force of this state shall be ordered upon duty together, and at the same time", or "in case of a draft for the immediate defence of th[e] state".{EN-620} For in that event would apply the time-honored rule of community self-preservation "that if any suddain invasion or insurrection shall bee, or that appearance of any such thing shall present * * * then itt is, or shall be in the power of * * * Magistrates, to raise, appoint and authorize any or all persons requisitt for the preservation of * * * [the] Collony and [its] * * * subjects therein, to attend their allegiance and duty".{EN-621}

The foregoing justifies the following conclusions—

First, the statutory allowance of substitutes throughout the *pre-*constitutional period proves that the pool of manpower within Rhode Island's Militia more than sufficed for the varied duties her Militiamen were called upon to perform. Otherwise, very few men would have been available to serve as substitutes—a general permission for substitutes would have been unworkable—and therefore the General Assembly would not have adopted that system, let alone maintained it throughout most of the 1700s.

Second, the allowance for substitutes empowered Rhode Islanders freely to distribute some of the burdens of actual Militia and other military duty amongst themselves. For the statutes all explicitly provided, or implicitly presumed, that *substitutes were to be hired in the free market, and at the prevailing market prices for their services*, inasmuch as the statutes themselves established no scale of prices. At the margin, then, this system provided a means for the forces Rhode Island actually deployed to be composed largely of volunteers. For although every adult, able-bodied free male Rhode Islander had a duty in principle to perform Militia service, not every one of them was called upon to fulfill that responsibility in practice on every occasion in which any Militiamen were called forth to serve in the field. Some who were summoned were doubtlessly perfectly willing to go—so they were effectively volunteers. Others who were unwilling to serve if any alternative were available could have employed substitutes who accepted the prevailing free-market payments for their assumption of the duties—so the substitutes were effectively

volunteers, too. If the then-current danger had not risen to the level of a "general alarm" (in which event substitution was prohibited)—and if the pool of Militiamen had remained sufficiently large in comparison to the numbers needed for immediate service so that adequate numbers of substitutes had remained available—Rhode Island's Militiamen in active service could have been as much a voluntary force as if the General Assembly had simply hired out of the marketplace in the first instance the men it needed beyond those who might have come forward spontaneously.

Of course, some Rhode Islanders who were called up neither desired to enter into actual duty themselves nor could afford to hire substitutes. So their service was, by any measure, compulsory. Thus, in its reliance on the free market, the system imposed a *de facto* discrimination based on wealth alone: The relatively rich very often could have avoided personal service in the field; the poor almost never could have done so. Discriminatory as it was, though, such a system was perfectly legal then—not only in Rhode Island but in almost all of the other Colonies and then in all of the independent States as well. And, all other things now being equal to what they were then, such economic discrimination in the enforcement of constitutional duties would be legal even today, because the principles and practices of the *pre*-constitutional Militia embodied in the statutes of that era define "the Militia of the several States" and "[a] well regulated Militia" for all constitutional purposes.[555] All other things, however, have not remained equal over time.[556]

Third, even though hiring in the free market was the method Rhode Islanders generally employed for obtaining substitutes, substitution was not allowed to be an utterly loose *laissez-faire* procedure. The purpose, after all, was to provide a replacement actually qualified to perform the duty of the individual seeking excusal. Therefore, standards and close supervision were necessary to ensure that the substitute was at least as competent in that regard as the Militiaman originally posted to duty. The statutory standards were couched in generalities: namely, "a good and sufficient Man" (1744); "a good, able bodied, effective man" (1757); "an able bodied, effective man" (1757, 1777, and 1780); or "a good able-bodied and suitable Person" (1776 and 1777). Yet these were hardly empty phrases, because to be eligible as a substitute a Rhode Islander had to be eligible for Militia service; and to be eligible for Militia service he had to be able-bodied,[557] and was required not only personally to possess firearms, ammunition, and necessary accoutrements,[558] but also to be instructed in their use, usually in the Trained Bands or the

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[555] *See ante*, at 63-76.

[556] *See post*, at 977-981.

[557] *See ante*, at 249-252.

[558] *See ante*, Chapters 6 through 8 .

Independent Companies.[559] So everyone knew from common experience over many decades the expansive meaning of the phrase "an able-bodied, effective man" in relation to Militia service. Sometimes, too, the statutes emphasized this: As in 1776, when the statute called for "a good able-bodied and suitable Person * * * , *to enter upon and perform such military Duty as shall be enjoined him*"{EN-622}—which the substitute could not have done without arms and training. Or even more pointedly as in 1777, when the statute specified "a good able-bodied and suitable Person * * * *compleatly equipped with Arms and Accoutrements*"{EN-623}—which presumably every potential substitute possessed perforce of his own general Militia duty. In any event, final judgement as to whether a proffered substitute was in fact "an able-bodied, effective man" in the full sense of that phrase obviously could not have been left either to the individual offering the substitute or to the substitute himself, but had to be exercised by the Militia Officers in the units to which the substitute was to be assigned. And as the effectiveness of their own commands (and potentially their own lives) depended on the quality, training, and equipment of their men, the Officers had every incentive to scrutinize potential substitutes carefully.

H. Payment of fines. Rhode Island's Militia laws imposed fines as penalties for most infractions of their requirements.[560] As a practical result, therefore, individuals capable of paying the applicable tariffs on delinquencies could purchase *ad hoc* exemptions from most of those requirements as each of them arose. Although this arrangement especially privileged those who were relatively well off economically, it persisted throughout the *pre*-constitutional period, either because the majority of Rhode Islanders considered its operation fair, or perhaps because the narrowness of the franchise precluded those whom it particularly disadvantaged from gaining sufficient influence in the General Assembly to compel reform.

In some situations, as in 1757, a fine was explicitly stipulated as the price of obtaining an exemption from duty: "[A]ny man so impressed, upon his paying a fine of £100 * * * to one of the field officers * * * shall be excused; and such field officer shall order another to be impressed in his stead, * * * and so on, * * * until the required number of soldiers shall be completed and made up."{EN-624}

I. Conscientious objection. During most of the *pre*-constitutional era, Rhode Island treated conscientious objection as a possible, but not necessary, basis for exemption from performance of some services in her Militia.

1. From her earliest days, Rhode Island allowed conscientious objectors in effect to disarm and demilitarize themselves. This self-separation from most Militia duties did not immunize them from all compulsory service, however.

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[559] *See ante*, at 208-220 and 224-234.

[560] *See post*, at 275-284.

• [1673] "[N]oe person nor persons (within this Collony), that is * * * persuaded in his, their conscience or consciences (and by him or them declared), that he nor they cannot nor ought not to trayne, to learne to fight, nor to war, nor kill any person or persons * * *

" * * * shall at any time be compelled against his or their judgment and conscience to trayne, arm or fight, to kill any person nor persons by reason of, or at the command of any officer of this Collony, civill nor military nor by reason of any by-law * * * enacted; nor shall suffer any punishment, fine, distraint, pennalty nor imprisonment, who cannot in conscience traine, fight, nor kill any person nor persons"; but "such * * * men * * * shall be exempt from traynings, arminge, rallyinge to fight, to kill, and all such martiall service as men are by any other debility; as said lame, sick, weake, deafe, blinde, or any other infirmity exempteth persons in and by law[.]"

Nevertheless, "when any enemy shall approach or assault the Collony * * * then it shall be lawfull for the civill officers * * * (and not as martiall or military) to require such * * * persons as are of sufficient able bodye and of strength (though exempt from arminge and fightinge), to conduct or convey out of the danger of the enemy, weake and aged impotent persons, women and children, goods and cattle, by which the common weale may be the better maintained, and works of mercy manifested to distressed, weake persons; and shall be required to watch to informe of danger (but without armes in martiall manner and matters), and to perform any other civill service by order of the civill officers for the good of the Collony".{EN-625}

• [1701] "[I]t shall be in the power and authority of the Captain and commissioned officers of each respective Train Band in this Collony, if any person, as they shall judge, [is] really conscientious, being within their list, and that they cannot bear arms, in time of alarums, and that if said persons being so conscientious, be any ways serviceable in making discovery, or riding upon any expedition, or any thing else that may be judged convenient for the preservation of his Majesty's interest, * * * to remit the fine or fines imposed for their not appearing in arms[.]"{EN-626}

• [1726] "[I]f the said delinquent person or persons shall plead that it is against his or their consciences to fight or bear any sort of arms or weapons to defend himself, his interest, and the interest of the colony against a common enemy, and * * * produce * * * a certificate from the congregation and meeting to which he or they do belong, or frequent, * * * that they are persuaded and do believe him or them to be truly conscientious * * * , that then the commander * * * shall acquit and discharge such person or persons from paying any fine or fines, with the following proviso, viz.:

"That the person or persons so acquitted and discharged, do upon alarms or other special occasions, when the militia are in arms, and upon

duty, appear and attend * * * and observe and perform all such orders and directions * * * in riding or going upon any discovery, carrying or bringing intelligence, and the like service; but in default or neglect thereof, such person or persons * * * shall not be acquitted and discharged of his or their fine or fines[.]"{EN-627}

• [1730] "[N]o Constraint shall be laid upon the Conscience of any Person whatsoever, by Force of any Act or Law for the keeping up or regulating the Militia within this Colony: Nor shall any Person be compelled to bear Arms, or learn or exercise himself in the Art of War, whose Principles are, that the same is inconsistent with the Doctrine of the Gospel * * * .

"AND * * * Assistants, Justices of the Peace, or Wardens, are * * * to admit any such Person to make * * * his Declaration and Affirmation, (provided his Life and Conversation be not contradictory to his Pretensions) and shall record the same, and give forth a Certificate * * * , whereby such Person shall be exempted from all Service, Fines and Forfeitures, accruing by any Law, for the Neglect of Training, bearing Arms, practicing the Art of War, or of attending on such Persons as do practice the same.

* * * * *

"*AND* * * * this Act * * * shall not * * * exempt any Person from watching and warding in this Colony."{EN-628}

• [1740] "[A]ll Persons making solemn Engagement * * * in the respective Counties where the Alarm is made, that it is against their Conscience to bear Arms at all, shall on an Alarm, appear * * * without Arms, to be employed as Scouts, Messengers, Watches, &c. or else * * * obey the * * * Order, to remove Women and Children, or sick Persons out of immediate Danger, or to watch against or extinguish any Fires that may be kindled at such Times, either by Design or Accident; and to do any other Duty consistent with their Religious Principles: And any Person as aforesaid not appearing, shall be obliged to pay the sum of *Forty Shillings* for each Day's neglect."{EN-629}

• [1744] "[A]ny Person * * * of a sober Life and Conversation, who can and shall Frankly and Freely, upon his solemn Affirmation * * * declare * * * that his Opinion and Religious Sentiments are, that in Matters relating to War, he ought to be Passive; and that the Practice of War, or the Art thereof, and the Use of Arms, and the Exercise thereof in War, are inconsistent with his Belief as a Christian, and that he declineth the Customary Use of Arms in War, and would be excused from the Law relating to Military Discipline for Conscience-Sake and out of Principle, and for no other End or Purpose whatever: In this Case such Person shall be exempted from bearing Arms as a Soldier, and from the Law * * * relating to Military Discipline or Equipment.

* * * * *

"*Provided Nevertheless*, That this Act * * * shall not exempt the Persons who take such Affirmation * * * from such Duties in Time of Alarm, as they are obliged to do, by [the statute of 1740.]"{EN-630}

• [1766] "[A]ll Persons making solemn Engagement * * * in the respective Counties where an Alarm is made, that it is against their Conscience to bear Arms at all, shall on an Alarm appear * * * (though without Arms) to be employed as Scouts, Messengers, Watches, &c. or else * * * they shall * * * obey * * * Orders about removing Women and Children, or the Sick, our of immediate Danger, or to watch against, or to extinguish Fires that may be kindled at such Times by Design or Accident; and to do any other Duty, consistent with their religious Principles: And any Person, not appearing as aforesaid, shall be obliged to pay the Sum of Twelve Shillings for each Day's Neglect[.]"{EN-631}

• [1777] "[A]ny Person inhabiting within this State, and of a sober Life and Conversation, who can and shall frankly and freely take the Affirmation [prescribed by statute] * * * and produce a Certificate thereof, or if one of the People called Quakers, shall produce a Certificate * * * that he is a Member of their religious Society, such Certificate shall excuse such Person from all military Duty whatever.

* * * * *

"AND * * * all Officers impowered * * * to administer this Affirmation * * * be careful to make Enquiry into the Lives and Conversations of such as apply to them for the Benefit of the same, and be satisfied that they are of sober Lives and Conversation, agreeable to the Intent of this Act * * * .

"*PROVIDED nevertheless*, That any Thing * * * contained in this Act * * * not * * * excuse th[os]e Persons * * * from appearing at the Request of any civil Magistrate to extinguish Fires, remove sick Persons, Women and Children, and from affording any Kind of Assistance, of a charitable or merely civil Nature, upon any Time of public Calamity and Distress."{EN-632}

• [1777] "Whereas, the invasion of this, and the other United States of America, by a powerful enemy, occasions great distress, and very heavy burthen of expense, upon the inhabitants; and whereas, many persons within this state * * * have * * * avoided contributing their equal and necessary proportion for the defence of our rights, privileges and estates; and from which they do, and will, derive, in all respects, equal benefit and protection with other subjects of this state, not exempted from personal military service; to prevent which, and that they shall in future bear their equal proportion thereof,—

" * * * [T]he captains of the several companies of militia and alarm men * * * shall make return to their respective colonels * * * of all persons * * * who have taken the affirmation [of conscientious objection], or produced certificates from the meeting of Friends, * * * upon any draft

> being ordered to be made from their said companies; which colonel * * * shall cause them to be drafted in like manner, and in proportion to their numbers, as those of the several companies * * * shall be ordered to be draughted.
>
> "And the said colonel * * * shall, immediately after such draft, give in a list of all the persons, so drawn in each town, to the town council * * * [which] shall * * * hire so many able bodied men as shall equal the number returned * * * , and for the same term of time as the persons * * * shall be drafted, * * * upon the best terms he can, at the expense of the persons within their respective towns, so drafted * * * ; each person so drafted, to pay the expense of hiring a person in his room[.]"{EN-633}

> • [1779] "[T]his [Militia] Act shall not extend * * * to any Persons who are excused from bearing Arms, by having taken the Affirmation, or produced the Certificates from the Meeting of Friends, as by Law required[.]"{EN-634}

Thus, exemption on the grounds of conscientious objection consisted of three elements:

First, proof by the claimant that his objection to the use of arms actually sounded in his own conscience—which depended not only on his "solemn Affirmation" or "solemn Engagement", or on "a certificate from the [religious] congregation or meeting to which he * * * belong[ed]", but also (and doubtlessly of decisive importance) on an "Enquiry" by public officials as to whether he was "of a sober Life and Conversation" that were "not contradictory to his Pretensions".

Second, specification by the General Assembly of exactly what the exemption entailed—whether "from traynings, arminge, rallyinge to fight, to kill, and all such martiall service"; "from all Service, Fines and Forfeitures, accruing by any Law, for the Neglect of Training, bearing Arms, practicing the Art of War, or of attending on such Persons as do practice the same"; "from bearing Arms as a Soldier, and from the Law * * * relating to Military Discipline or Equipment"; or "from all military Duty whatever".

Third, imposition, in lieu of direct military service, of noncombatant duties that the objector had to perform in order to retain his exemption, including:

- "to watch to informe of danger";
- "to watch against or extinguish any Fires that may be kindled at such Times, either by Design or Accident";
- "to conduct or convey out of the danger of the enemy, weake and aged impotent persons, women and children, goods and cattle";
- to "mak[e] discovery", "rid[e] upon any expedition", "carry[ ] or bring[ ] intelligence", or "be employed as Scouts" and "Messengers";

- to "afford[ ] any Kind of Assistance, of a charitable or merely civil Nature, upon any Time of public Calamity and Distress";
- "to perform any other civill service by order of the civill officers for the good of the Collony";
- "to do any other Duty consistent with the[objector's] Religious Principles"; and
- to pay the expense of hiring a substitute for active service.

Plainly, then, conscientious objection was neither open to all, nor a way even for those with *bona fide* religious claims to avoid Militia service altogether, but instead simply the substitution of various ostensibly nonmilitary for military duties. Only "ostensibly nonmilitary", though, because, although all of these duties were noncombatant in nature, many of them furthered ulterior military purposes, and therefore would have been assigned to Militiamen had conscientious objectors not been available to perform them. Moreover, some of the duties conscientious objectors were required to fulfill could actually have been decidedly *more* difficult and dangerous than those assigned to regular Militiamen. For example, Militiamen captured by an enemy that abided by the Law of Nations would merely have been held as prisoners of war; whereas conscientious objectors called upon to "mak[e] discovery", "carry[ ] or bring[ ] intelligence", or "be employed as Scouts" and "Messengers", if captured near or behind the enemy's lines in the basically civilian garb Militiamen typically wore, might actually have been or might easily have been considered by the enemy to be *spies*, for whom the generally accepted punishment was *death*.

2. Importantly, conscientious objection was a statutorily granted immunity from some aspects of Militia service, not any kind of "inherent right". For that reason, legislators enjoyed complete discretion to extend, withhold, qualify, or condition that status as they saw fit, according to their own ideas of sound policy. For example, at various times Rhode Island explicitly excluded conscientious objection as a grounds for exemption from Militia duties.

In 1676, the General Assembly voted

> that whereas there is a clause in a law made * * * [in] 1673, wherein is specified that persons declareinge that it is against their conscience or judgments to beare armes in martiall or millitary manner, that such shall not be lyable to the millitary authority, nor any wayes lyable to pay the fine by law * * * ordered and set; and findinge that severall, under pretence decline their duty, whereby great disturbance is in the severall Traine Bands; therefore, for the encouragment of the millitia in this Collony, the said clause in the said law is made voyd, null and repealed;

> and all persons in this Collony are to be observant actively or passively, as the former lawes have provided in millitary affaires[.]{EN-635}

This provision, though, was soon repealed, and the former law reinstated.{EN-636} Then, in 1677, the General Assembly complained that,

> some [persons,]under pretence of conscience, hath taken liberty to act contrary, and make voyde the power, strength and authority of the millitary soe necessary to be upheld and maintained, that the civill power (in which the whole freedome and priviledges of his Majesty's subjects are kept and preserved), cannot without it be executed, and have soe far acted therein, that this * * * Collony at this time is in effect wholly destitute of the millitary forces for the preservation thereof, and inhabitants therein, and may thereby be made a prey unto the weakest and meanest of his Majesty's enemies. This Court * * * findinge that his Majesty in his Pattent hath required that the inhabitants of his Collony are to be led, conducted, and trained up in martiall affaires, doe * * * order, enact, and declare * * *
>
> * * * * *
>
> that noe person or persons within this Collony from the age of sixteen yeares unto the age of sixty yeares, shall be released from taininge or other duties in millitary affaires, exceptinge only the civill officers in this Collony, or such whose employments render them excusable by law, unless he or they doe render or give under their Captaine * * * a good and full satisfactory reason for their neglect[.]{EN-637}

Thereafter, as detailed immediately above, throughout the remainder of the *pre-*constitutional period Rhode Island recognized conscientious exemption as a ground for exemption.

J. Commission or suspicion of some crime. Revealingly, Rhode Island's statutes never specified that any individual convicted of, indicted for, or the subject of an on-going investigation related to some alleged crime would therefore be exempted or excluded from, or otherwise disqualified for, her Militia, either permanently or temporarily.

To be sure, in the *pre-*constitutional era, in many instances an individual adjudged guilty of a "Felony" would have been executed, whereupon his ability, let alone his liability, for service in the Militia would have terminated forever.[561] In Rhode Island, for example, from the earliest days many crimes were denoted "Felony", and made punishable by death.{EN-638} Similarly, while an individual remained in custody on suspicion of criminal behavior, he would not have retained

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[561] *See ante*, at 145, *and post*, at 983-984

personal possession of his firearm, ammunition, and accoutrements, and could not have appeared at Militia training and musters either armed or disarmed.

Not all convictions for "Felony" necessarily resulted in the deaths of the perpetrators, though. For example, under English law it was "a settled Rule, That the King may pardon any Offence whatever, whether against the Common or Statute Law, so far as the Publick is concerned in it".[562] And "the *effect* of * * * pardon by the king, is to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to that offence for which he obtains his pardon".[563] Pardons might "also be *conditional*", such as "transportation to some foreign country (usually to some of his majesty's colonies and plantations in America) for life, or for a term of years".[564] Of course, because "the offender also forfeit[ed] all his chattel interests absolutely" in "felonies of all sorts" "by *conviction*",[565] an individual adjudicated a "felon" who had somehow avoided execution would likely have been deprived of the Militia firearm, ammunition, and accoutrements he had possessed *at the time of his conviction*.[566] That result alone, however, would not have prohibited him from lawfully acquiring *new* "chattel interests"—including another firearm, ammunition, and accoutrements that were suitable for Militia service—after his return to society. Moreover, on the score of arming himself, Rhode Island's Militia laws granted no leeway for someone who had happened to have lost all of his possessions, for whatever reason. Rather, the laws directed public officials to provide the necessary equipment to any man too poor to obtain it on his own.[567] And if a prior conviction for a "Felony" of an individual who was not executed but was later returned to society as a free man did not necessarily preclude him from subsequent service in the Militia by disqualifying him from possessing a firearm, then conviction for some less serious crime surely did not, either. Similarly, an individual merely suspected of criminal activity, and permitted to remain at large during an investigation, would probably have retained possession of any firearm he had acquired theretofore. For no Rhode Island statute imposed any contrary restriction on such an individual. (Possibly, though, a court might have done so, as a special condition of the perpetrator's release, had the peculiar nature of the case warranted it.[568])

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[562] W. Hawkins, *A Treatise of The Pleas of the Crown, ante* note 434, Book II, Chapter XXXVII, § 33, at 391 (footnote omitted).

[563] W. Blackstone, *Commentaries on the Laws of England*, *ante* note 142, Volume 4, at 395.

[564] *Id.*, Volume 4, at 394.

[565] *Id.*, Volume 4, at 378, 380.

[566] *Id.*, Volume 4, at 380.

[567] *See ante*, at 157-162.

[568] *See* W. Blackstone, *Commentaries on the Laws of England*, *ante* note 142, Volume 4, at 251-254; W. Hawkins, *A Treatise of The Pleas of the Crown, ante* note 434, Book I, Chapters LX and LXI, at 126-133. *See post*, at 303-307

This did not mean that no wrongdoers were ever disarmed as a matter of course in the *pre-*constitutional era—for *disloyal* citizens were, in Rhode Island and other States, during the War of Independence.[569] Professing no loyalty to Rhode Island, they could hardly have been expected to have believed that they had a duty to keep and bear arms in her defense. Whereas, retaining their loyalty to Britain, they might have taken up arms in her behalf, if afforded the opportunity. So, as enemies at least potentially willing to fight against Rhode Island, they obviously wanted no place whatsoever in her Militia—they could not have been trusted to perform any duty to which they might have been assigned therein—and certainly they could not have been allowed, although they might have desired, to prepare themselves for service in some hostile armed force. Thus, their disarmament naturally followed.

K. Exemptions as a means for organizing the Militia. The foregoing survey establishes that exemptions under Rhode Island's *pre-*constitutional laws were not exclusions *from*, but special conditions for defining (and usually limiting) service *within*, her Militia—a principle which must be applied today as well.

In light of the highly practical grounds of "general Utility" upon which they rested, exemptions in Rhode Island could and did change over time. Nonetheless, whether exempted on the grounds of gender, age, physical disability, public office or private occupation, or conscientious objection, *everyone was "organized" in* ***some*** *way*. For Rhode Island always coupled exemptions with particular duties—such as possessing firearms and ammunition, or serving in some noncombatant capacity; or with conditions to or for the exemption—such as provision of substitutes or payment of fines; or with limitations —such as an exemption's not being applicable during "alarms". The only exception (if it can be called that, inasmuch as its beneficiaries were mere children) was for males less than sixteen years of age, for whom exemption was complete and unconditional.

Thus, in Rhode Island *exemptions were actually a means for organizing the Militia*. They did not create an oxymoronic "unorganized militia" composed of vast numbers of individuals simply cast aside, possibly (but not probably) to be "organized" only at some later date, as is the all-too-typical statutory pattern for neglect of the Militia today.[570]

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[569] *See post,* at 298-299 and 301-302 (Rhode Island); *and* 742-745 (Virginia).

[570] *Compare* 10 U.S.C. § 311(b)(2) *with, e.g.,* General Laws of Rhode Island §§ 30-1-4(4) *and* 30-1-5.

CHAPTER TWELVE

Rhode Island enforced her *pre-*constitutional Militia statutes by imposing fines or other penalties for each individual's every infraction.

As did all but one of the other Colonies and all of the independent States during the *pre-*constitutional period, Rhode Island employed various penalties and punishments in order to compel compliance with her Militia regulations. The extent, specificity, and strictness of this system, and the General Assembly's perseverance in it over time, prove the seriousness with which Rhode Islanders took the duty of all able-bodied free adult males to be properly armed and ready to respond to a summons for service, and of most of them to train for that eventuality on a regular basis.

A. Fines. Fines constituted the usual penalties—imposed directly on the defaulter; or if he were a minor son, servant, or apprentice then on his parent, guardian, master, or mistress.

1. Fines were collected immediately in money, or at some temporal remove by the normal process of distraint and sale at public auction of the defaulter's or another responsible party's goods:[571]

> • [1639] "[N]oe man shall go two miles from the Towne unarmed, eyther with Gunn or Sword; and none shall come to any public Meeting without his weapon. Upon the default of eyther he shall forfeit five shillings."{EN-639}

> • [1639] "Mr. Eastone for breach of an order in coming to the public meeting without his weapon * * * is to pay five shillings."{EN-640}

> • [1640] "[E]ight severall times in the yeare the Bands * * * shall openlie in the field be exercised * * * . And * * * there shall be two Generall Musters in the yeare * * * ; and * * * if any shall faile to make their personal appearance * * * , he shall forfeit and pay * * * five shillings * * * . And if any person shall come to * * * Training or Generall Muster, defective in his armes or furniture equivalent, he shall pay * * * twelve pence[.]"{EN-641}

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[571] On this procedure, *see, e.g.,* W. Blackstone, *Commentaries on the Laws of England, ante* note 142, Volume 3, at 6-15. The statutes quoted immediately hereinafter in the text impose fines in "pence", "shillings", and "pounds". In the English system of money the American Colonists used, there were 12 pence (*i.e.*, pennies) to the shilling, and 20 shillings to the pound.

• [1643] A named individual "is to order the dayes of trayning [and] judge [what is] to be the convenient tyme"; and others are to go "to every inhabitant [in Portsmouth and] see whether every one of them has powder, and what bullets run, within ten days of the [trayning]"; and "[e]very one deserting is to forfeit five shillings".{EN-642}

• [1643] A certain individual "shall go to every house and [see] what armes are defective; and that the men whose armes are [to be handed] in to be mended * * * . If the armes be not brought in timely, to forfeit five shillings."{EN-643}

• [1647] "[T]he Bands of each plantation or Towne, shall, openlie in the field, be exercised and disciplined by their Commanders * * * , all the Train Bands to make their personal appearances completely armed * * * ; and if any appear not, they shall forfeit and pay five shillings * * * ; and if any shall come defective in his Armes * * * he shall forfeit and pay y^{e} sum of twelve pence * * * ; Provided, herdsmen, lighter-men and such as be left of necessity at Farmes, shall pay two shillings and sixpence for each dayes absence[.]"{EN-644}

A "lighterman" operated a "lighter", a flat-bottomed boat or barge used to transfer cargo to and from ships anchored in a harbor or river at a distance from a wharf.[572] One might imagine that lightermen, along with herdsmen and "such as be left *of necessity* at Farmes", would have qualified for exemptions from Militia training perforce of the critical nature of their occupations. Exemplifying its ability to make fine distinctions, however, the General Assembly withheld complete exemptions from these workers, but in effect granted them partial exemptions by significantly reducing their fines for nonattendance in comparison to the fines it imposed on ordinary citizens.

• [1650] "[A]ll men that have gunns and pieces to mend * * * for their present defence, shall forthwith * * * carrie those pieces to mende, upon paine of forfeiting ten shillings a piece, which shall be levied by distraint from the head officer of the Towne[.]"{EN-645}

• [1664] "[T]he people listed to trayne vpon all such dayes * * * appoynted, for the exercise of trayning * * * [are] required * * * to appear in armes, compleat; and to exercise vnder their respective officers * * * . And * * * in case of defects * * * the penalty formerly sett to be taken by distraynt[.]"{EN-646}

• [1665] "[E]ach Captain * * * shall be fined in case he call not the listed soulders together * * * to make choyce of * * * officers milletary * * * the summe of ten pound starling * * * ; as alsoe fortye shillings for each defect of calling the * * * company together to traine on each of the

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[572] *See* N. Webster, *An American Dictionary, ante* note 15, definition 2; *Webster's Revised Unabridged Dictionary, ante* note 11, at 852.

training days * * * , or refusing then to exercise them in training; * * * and for every defecte in not duely attending the trainings, each one * * * soe deficient, shall for every dayes defect, pay three shillings fine, to be levied by distraint on the partyes goods, or on the goods of the master or mistress, or parents of such sones or sarvents as are defective[.]

* * * * *

" * * * [E]very man in each towne be allwayes furnished with two pound of gunpowder, and fowre pound of lead or bulletts, vpon penalty of being fined ten shillings * * * to be levied by distraint[.]"{EN-647}

• [1666] Certain officials were empowered "to graunt forth warrant to any officer * * * of the Trayne Band * * * to take by distraynt the fine or fines of such person or persons who shall be defective in non-appearance".{EN-648}

• [1667] Certain individuals were ordered "to goe from house to house throughout the towne of Newport, the villages and precincts thereof, and to take a precise and exact account of all the armes, amunition and weapons of warr each person is furnished with, * * * and in what condition with regard to service the same is in * * * . And also to call vpon such as have deffects, that they may be supplyed in the place forthwith, under the penaltie the law hath provided, to repaire to such persons as may supply them."{EN-649}

• [1677] "[I]f any of the listed souldiers [in the Militia] shall neglect or refuse to appeare on the severall [training] days * * * every of them soe neglectinge, shall * * * pay * * * the just sum of two shillings"; "every listed souldier within this Collony shall * * * have one good gun or muskitt fit for service, one pound of good powder, and thirty bullets at least, upon the penalty of one shilling * * * for each day's defect"; "if any person or persons to be distrayned upon * * * be a son or servant, that have noe visible estate of their owne, * * * then fines and forfeitures shall be levied and distrained upon the estate of their respective masters, parents or other persons under whose service, command or tuition they are"; "each * * * Captaine * * * that shall neglect or refuse to give timely notice unto his * * * souldiers to appeare in armes on the days by law prefixed, shall for each default forfeit forty shillings"; and "if any of the * * * Captains shall neglect or refuse to give forth his or their respective warrants * * * unto such persons * * * appointed to gather in all such defects, fines and forfeitures, * * * every such Captain * * * shall * * * pay * * * the whole sum of what is due".{EN-650}

• [1680] "Whereas the Captains of the severall Traine Bands * * * are by law strictly required to grant forth their warrants * * * to levie and distraine all such fines and forfeitures * * * due * * * from all * * * listed * * * souldjers as shall not appeare compleat in their armes on the severall traininge days", then "whatsoever Traine souldjer * * * [who]

shall refuse or deny to execute any such warrant * * * shall for every * * * default, pay a fine of tenn shillings".{EN-651}

• [1699, 1701, and 1705] "[I]f any * * * persons listed under the command of any Captain * * * of the militia * * * do not appear complete in arms * * * with a good or sufficient muskett or fuse, and sword or bagganett, cotouch box or bandelears, with twelve bullets, fit for his piece, half a pound of powder, six good flints upon * * * training days * * * [or] by alarum or any other time or times * * * during times of war * * * [they] shall forfeit for each neglect * * * for training or other meeting in arms, * * * two shillings * * * ; and for non-appearance or neglect in any alarum, * * * five shillings * * * , to be taken by distraint, or otherwise". "And * * * any person [who] shall refuse or neglect to watch * * * shall pay as a fine * * * five shillings * * * , to be taken and imprisoned in manner and form as the fines for neglecting of training or alarum are taken and proceeded in". Moreover, "all house keepers, as well widows as others, although there be no person in said family that is qualified according to law as to watching and warding * * * [shall] find a suitable watcher or warder, or * * * pay so much money as will hire or procure one; and upon neglect or refusall thereof, to be under the like fine and penalty[.]"{EN-652}

• [1702] "[T]he fine for not appearing in arms * * * on * * * training days, shall be three shillings for each day's defect, with sixpence for each distraint[.]"{EN-653}

• [1718, 1730, and 1744] "[E]very Enlisted Person, that shall Refuse or Neglect to make his Personal appearance Accoutred as [required by statute], on * * * Training Days * * * shall for every such Default pay * * * *Three Shillings* in Money * * * , & if such Defaulter shall refuse so to do, * * * the Clerk of the Band * * * [shall] take and distrain so much of the Personal Estate of such delinquent Person, or such as shall have them in Tuition, as * * * will pay his Fine or Fines". "*AND* * * * all such Persons * * * excus'd from Training, yet shall notwithstanding be provided with the same Arms, Ammunition, &c. as * * * is required of such as are obliged to Train, & * * * there shall be * * * a Survey and Examination made, whether such Persons are provided as * * * is Required; and all such Persons as shall be found unprovided with such Arms * * * shall pay the Fine of *Five Shillings* for each default, to be Levied by Distress and Sale of the Defaulters Goods". "*AND* * * * upon any Alarm in time of War, or other eminent danger of any Assault or Invasion, all Male Persons, both Listed Soldiers and others in this Colony, of and between the Age of Sixteen Years and Sixty, shall * * * forthwith Repair to * * * such Company, within whose Precincts they Inhabit or Dwell, provided with Arms & Ammunition * * * , and in Case any Person shall not appear * * * , such Defaulter shall Pay the Fine of *Five Shillings*, to be Levied * * * by Distress and Sale of such Defaulters Goods[.]"{EN-654}

• [1719 and 1744] "[E]very Person that shall *refuse* or *neglect to Watch* * * * shall pay a Fine of *Three Shillings* * * * for every such Offence[.]"{EN-655}

• [1726] "[T]he penalty upon [each] person who is within the lists of any company or train band in this colony, for his neglect of duty on training days, * * * [shall be] a fine of five shillings * * * for each neglect; and the penalty on each person that is obliged to appear on alarms or other special occasions when the militia are in arms, or upon duty, shall be a fine of ten shillings for each neglect of duty[.]"{EN-656}

• [1731 and 1736] "[A]ll enlisted Soldiers belonging to any of the respective Companys or Train'd Bands in this Government, that shall neglect to train * * * , shall for every Days Neglect * * * pay as a Fine the Sum of *Five Shillings*."{EN-657}

• [1740 and 1744] "[T]he Council of War * * * are * * * empowered to appoint such * * * Days as may be necessary to disciplilne the Militia, and make them expert in the Use of their Arms, over and above the Four Training Days by Law appointed * * * , and * * * every Soldier neglecting to give his Attendance and do his Duty in that Service, shall * * * pay as a Fine the Sum of *Ten Shillings*, and *Forty Shillings* for each Day's neglect on an Alarm[.]"{EN-658}

• [1742 and 1744] "[A]ny Person * * * that shall refuse to watch * * * shall pay a Fine of *Eight Shillings* in Money for each such Offence[.]"{EN-659}

• [1744] "[A]fter an Alarm is beaten [by drum] in any Town in this Colony, no Man whatsoever shall leave or go out of said Town so alarmed, but by Leave or Order from the Commanding Officer there, upon the Penalty of paying to and for the Use of the Colony, the Sum of *One Hundred Pounds*[.]

* * * * *

" * * * [W]hen it shall be thought necessary to set a double Watch in any Town * * * , every Person that * * * shall refuse or neglect to appear, * * * or send a good and sufficient Man in his Room, such Person for every such Offence, shall pay a Fine of *Sixteen Shillings*."{EN-660}

• [1755] "That the fines of every inlisted Soldier, who is not provided with Arms and Ammunition according to Law, be * * * Three Shillings for every Defect in each Article of Accoutrements, and of every Person excused from Training, for not being provided * * * , the Fines be * * * Five Shillings for every Defect in each Article of Accoutrements; and of every inlisted Soldier neglecting or refusing to appear accoutred * * * upon Training Days, the Fine be * * * Forty Shillings *per* Day; and of all Persons not appearing upon an Alarm * * * the Fine be * * * Eight Pounds * * * . And that every Person * * * by Law to be accoutred * * * is * * * to provide himself with Arms, and other Accoutrements * * * ,

upon the Penalties aforesaid[.]" And "all Goods taken by Distraint for Fines, shall be sold * * * at a Public Vendue[.]"{EN-661}

• [1756] "[W]hen any Person under the Age of twenty-one Years, shall neglect or refuse to pay his Fine for Neglect of military Duty, the Clerk shall make Distress upon the Goods and Chattels of the Parents or Masters of such Persons[.]"{EN-662}

• [1766] "[E]very enlisted Soldier of the * * * Militia, shall always be provided with One good Musket or Fuzee, the Barrel whereof not to be less than Three Feet and an Half in Length, to the Satisfaction of the Commission Officers, also one Pound of good Gun-Powder, Thirty Bullets fit for his Gun, Six good Flints, One good Sword or Bayonet, a Cartouch Box, ready filled with Cartridges of Powder and Ball, under the Penalty of Four Pence for each Article of Accoutrement aforesaid which he shall be deficient in, for every Time he shall be unprovided therewith[.]" "[E]very enlisted Person who shall refuse or neglect to make his personal Appearance, accoutred as aforesaid, on such training Days * * * shall for every such Default pay a Fine of Three Shillings[.]" "[W]ithin One Month after each training Day, the Captain shall grant forth his Warrant, directed to the Clerk, * * * to collect the Fines which have accrued, for Deficiency in Accoutrements, Disobedience or Misbehaviour, Neglect or Refusal to appear at Trainings * * * . And the said Clerk * * * shall take and distrain sufficient of the personal Estate of the Delinquent, if to be found, to satisfy and pay his Fine or Fines, having first required him to pay the same[.]" "[A]ll such Persons as are * * * excused from training, shall, notwithstanding, be provided with the same Arms, Ammunition, &c. as * * * is required of such as are obliged to train. And * * * there shall be an Examination and Survey made whether such Persons are provided as * * * is required; and all such Persons as shall be found unprovided, shall pay a Fine of Four Pence for each Article of Accoutrement they shall be deficient in, to be levied * * * in the same Manner as the fines of enlisted Soldiers[.]" "[U]pon any Alarm in Time of War or other imminent Danger of any Assault or Invasion, all male Persons, both enlisted Soldiers and others in this Colony, of and between the Ages of Sixteen Years and Sixty, shall * * * repair to the Colours * * * , provided with Arms and Ammunition required of trained Soldiers upon training Days; and in Case such Persons shall not appear duly accoutred, such Defaulters shall each pay as a Fine the Sum of Twelve Shillings *per* Day, to be levied by Distress and Sale of his Goods[.]" "[A]ll Persons making solemn Engagement * * * in the Counties where an Alarm is made, that it is against their Conscience to bear Arms at all, shall on an Alarm appear * * * (though without Arms) to be employed as Scouts, Messengers, Watchers, &c. or else * * * obey * * * Orders about removing Women and Children, or the Sick, out of immediate Danger, or to watch against, or to extinguish Fires * * * and to do any other Duty, consistent with their religious Principles:

And any Person, not appearing * * * shall be obliged to pay the Sum of Twelve Shillings for each Day's Neglect[.]" "[A]fter an Alarm is beaten in any Town * * * , no Man whosoever shall leave or go out of such Town so alarmed, but by Leave or Order from the commanding Officer there, upon the Penalty of paying * * * the Sum of Twelve Pounds; to be recovered * * * by Action of Debt, Bill, Plaint, or Information, in any Court of Record within this Colony[.]" "[E]very Trooper shall always be provided with One good serviceable Horse of fourteen Hands high, * * * a Pair of good Pistols, One Carbine, One Sword, One Pound of Gunpowder, Thirty sizeable Bullets, Twelve good Flints * * * ; upon the Penalty of One Shilling and Six Pence for each Default in each Article of Accoutrement." "[T]he Captain * * * shall warn the Troop * * * to muster Two several Days in every Year at his own Appointment * * * ; and every Trooper who shall not appear * * * shall pay as a Fine Six Shillings, to be levied by Distress and Sale of his Goods[.]" "[A] Council of War * * * may appoint such other Days as may be necessary to discipline the Militia, and make them expert in the Use of their Arms, over and above the Two training Days * * * : and every Officer and Soldier neglecting to give his Attendance and to do his Duty, shall pay a Fine of Three Shillings[.]"{EN-663}

• [1774] "[E]ach inlisted Soldier, who shall not be provided with a sufficient Gun or Fuzee, * * * shall be fined Two Shillings * * * for each deficiency: And * * * every Soldier be provided with a good Bayonet fixed on his Gun, under the Penalty of Four Pence * * * for each default". And "the Fines of all those who, being exempted from appearing on the Days of Training, are notwithstanding, obliged to be provided with Arms and other Accoutrements, shall be the same for every deficiency as the fines of the inlisted Soldiers[.]"{EN-664}

• [1776] "[A]ll Male Persons subject by Law to bear Arms, whether of the Militia, Alarm List or Independent Companies" who are to be drafted and who "shall refuse or neglect to appear * * * , either by himself or a good able-bodied and suitable Person in his Stead, to enter upon and perform * * * military Duty * * * shall be subject to and pay such Fines, Forfeitures and Penalties, as the military Laws and Regulations * * * direct in Cases of general Alarm."{EN-665}

• [1777] "[E]ach and every person by law obliged to bear arms, who, when * * * called out to duty, shall neglect to appear in person, completely equipped with arms and accoutrements, shall be liable to pay, as a fine, for each and every day's neglect, * * * five shillings, * * * to be levied and collected by warrant or distress, * * * unless the person so deficient, shall * * * pay * * * the fines due[.]"{EN-666}

• [1777] "[I]n case any Officer or Soldier * * * shall neglect to appear * * * , either by himself or a good able-bodied and suitable Person in his Stead, compleatly equipped with Arms and Accoutrements, to enter

upon and perform * * * military Duty * * * , he shall be liable to pay as a Fine for each Day's Neglect * * * *Five Shillings* * * * to be levied and collected by Warrant of Distress[.]"{EN-667}

• [1778] "[A]ll Persons who are by Law obliged to equip themselves with a good Fire-Arm, Bayonet and Cartouch-Box * * * do provide themselves therewith * * * , or with a Rifle-Gun and Sword * * * , upon the Penalty of Nine Pounds * * * for a Gun, and One Pound and Ten Shillings for a Cartouch-Box * * * ; and the * * * Town-Treasurer is * * * to issue his Warrant of Distress * * * for the Fines[.]"{EN-668}

• [1779] "[E]very Person * * * found deficient in any of the Arms, Accoutrements and Equipage * * * shall forfeit and pay as a Fine for every such Delinquency, and as often as such Delinquency shall appear, double the Value of each Article * * * , to be recovered by Warrant of Distress from the Commanding Officer * * * : And if such Commanding Officer shall neglect issuing his Warrant * * * he shall forfeit double the Sum due from such Delinquent[.]" "[E]very non-commissioned Officer or Private, who shall refuse or neglect appearing * * * shall pay as a Fine for every Days Neglect not less than Three or exceeding Six Pounds". "[I]n Cases of general Alarm" whoever " shall neglect or refuse appearing * * * armed and accoutred * * * shall forfeit and pay as a Fine * * * the Sum of *Thirty Pounds*, * * * and *Six Pounds* per Day, for each and every Day the Troops shall be on Duty in Consequence of said Alarm". "[W]henever the Forces * * * shall be ordered into the Field, and are upon actual Service, * * * who[ever] shall neglect or refuse appearing, armed, accoutred, and provided * * * at the Time and Place of Rendezvous * * * shall forfeit and pay * * * *Six Pounds* * * * per Day[.]"{EN-669}

• [1780] "[I]f any Person who shall be detached * * * shall absent himself, and not * * * be found, and shall not procure an able-bodied effective Man to do the Duty in his Stead, * * * such a Part of the Estate of the Person so detached shall be taken and disposed of * * * as shall be sufficient to procure an able-bodied Man to do the said Duty[.]"{EN-670}

• [1781] "[E]very Person, liable by Law to do military Duty, who shall refuse or neglect to make his personal Appearance * * * , accoutred as * * * directed, for training or doing other military Duty, shall pay as a Fine for every Default of Non-Appearance the Sum of *Nine Shillings* * * * for each Day's neglect * * * : That each Person, liable to do military Duty * * * (unless excused by the Town-Council of the Town to which he belongs for Inability to procure the same) who shall at any Time be found destitute of a good Gun, being his own Property, shall pay as a Fine *Six Shillings*, a Bayonet *Three Shillings*, * * * a Cartouch-Box *Three Shillings*, a Ram-Rod *Two Shillings*, a Wormer *One Shilling*, a Priming-Wire *One Shilling*, Three good Flints *Three Shillings*: All which Fines * * * shall be paid by each Delinquent for each Article deficient * * * .

"*AND* * * * the Sergeant * * * shall take and distrain sufficient of the personal Estate of the Delinquent * * * to satisfy and pay his Fine or Fines, having first required him to pay the same * * * : [and t]hat in case such Delinquent be under the Age of Twenty-one Years, the Sergeant shall make Distress upon the Goods and Chattels of the Parent or Master of such delinquent Person * * * : And that all Goods taken by Distraint shall be immediately advertised for Sale, and if not redeemed in Ten Days, shall be sold by such Sergeant at public Vendue, to pay such Fine or Fines and Fees[.]"{EN-671}

• [1781] "[I]f any Person belonging to the military Force of this State shall absent himself, in order to elude or evade [his military duty] * * * , or shall refuse to march forward upon being detached, by himself or Substitute, he shall pay the Sum of *Nine Pounds* Lawful Silver Money per Month, as a Fine[.]" {EN-672}

2. Fines could be remitted, however, on a plea of impoverishment, sickness, inability, *force majeure*, conscientious objection, or some other reasonable excuse:

• [1666] "[I]t * * * shall be in the power of any two magistrates in each towne, together with the Captain and Lieutenant of the band, or the major part of them, to judge of the excuses of such persons who are defective[.]"{EN-673}

• [1718, 1730, and 1744] "[E]very Enlisted Person, that shall Refuse or Neglect to make his Personal appearance Accoutred as [required] * * * on * * * Training Days * * * shall for every such Default pay * * * *Three Shillings* * * * or make his lawful excuse fo the Captain * * * if any he have[.]"{EN-674}

• [1726] "[I]f the * * * delinquent person or persons shall plead that it is against his or their consciences to fight or bear any sort of arms or weapons to defend himself, his interest, and the interest of the colony against a common enemy, and * * * produce * * * a certificate from the congregation and meeting to which he or they do belong * * * then the commander * * * shall acquit and discharge such person or persons from paying any fine or fines[.]"{EN-675} (Rhode Island did not always recognize conscientious objection as a valid excuse, however.[573])

• [1755] "[T]he Captain * * * [may] remit to all Persons their Fines * * * for Neglect of Duty, which shall happen by Means of Poverty, or [on] any other reasonable Excuse[.]"{EN-676}

• [1766] "[I]t shall be in the Power of the Captain * * * to remit any * * * Fines * * * for Neglect of Duty which may happen through Poverty, or on any other reasonable Excuse."{EN-677}

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[573] *See ante*, at 271-272.

• [1776] "[A]ll such Persons as are by Law obliged to equip themselves with a good Fire-Arm, Bayonet and Cartouch-Box, and who shall not by the Report of * * * the Town-Council be declared incapable of providing themselves * * * do provide themselves * * * under the Penalty of *Five Pounds*[.]"{EN-678}

• [1777] "[I]n case of sickness and inability to do duty (which alone shall excuse any person), * * * the field officers * * * [may] permit * * * a person to hire a man to do his tour of duty; and if such sick and unable person shall be so extremely poor * * * as to be unable to hire a person in his stead, that such field officer be empowered to remit such poor person's fine."{EN-679}

• [1778] "[A]ll Persons who are by Law obliged to equip themselves with a good Fire-Arm, Bayonet and Cartouch-Box, and who shall not * * * be reported to [the] Town incapable of providing themselves * * * , do provide themselves * * * , or with a Rifle-Gun and Sword * * * , upon the Penalty of Nine Pounds * * * for a Gun, and One Pound and Ten Shillings for a Cartouch-Box * * * . *Provided*, That nothing herein contained shall extend to any Person who shall produce a Certificate * * * that his Gun has been taken from him for public Service, and not accounted for[.]"{EN-680}

• [1779] "Whereas it appears from the late General Muster and Review throughout this State that there are many Deficiencies in Arms, Bayonets, and Cartouch-Boxes; and that, * * * while a Part [of the State] was in Possession of the Enemy, it was very difficult for the Inhabitants to provide themselves agreeable to Law: And whereas * * * the Delinquents are desirous of furnishing themselves as soon as may be: * * * *Resolved*, That the collecting the Fines * * * be suspended * * * : That all Delinquents, who shall furnish themselves * * * , be exempted from the said Fines[.]"{EN-681}

• [1779] "[E]very non-commissioned Officer or Private, who shall refuse or neglect appearing when warned * * * shall pay as a Fine for every Days Neglect not less than Three nor exceeding Six Pounds, at the Discretion of the Field-Officers, unless he shall render to them a sufficient Excuse[.]"{EN-682}

• [1781] "[E]very Person, liable by Law to do military Duty, who shall refuse or neglect to make his personal Appearance * * * for training or doing other military Duty, shall pay * * * a Fine for every Default * * * unless he shall make a sufficient Excuse to the commanding Officer of the Company"; and "each Person liable to do military Duty * * * (unless excused by the Town-Council * * * for Inability to procure the same) who shall at any Time be found destitute of a good Gun, being his own Property, shall pay * * * a Fine[.]"{EN-683}

B. Other penalties and punishments. In addition to fines and attendant seizures of their property, defaulters could face compulsory labor, imprisonment, conscription into service with the regular Armed Forces, loss of their commissions in the Militia, or other "pains and penalties".

1. Examples of these include:

• [1718, 1730, and 1744] "[I]n case such Persons * * * delinquent * * * shall have no Personal Estate * * * to satisfy * * * Fines * * * the Captain of [the delinquent's Militia] Company, shall set such delinquent Person to work, in mending the Highways of [that Person's] Town, not exceeding one Day for each Fine; and if such defective Person shall refuse to do the same, then the Captain * * * shall commit such Offenders to Prison, twenty-four Hours, or wait further to take his Estate by Distraint."{EN-684}

• [1744] "[A]fter an Alarm is beaten in any Town in this Colony, no Man whatsoever shall leave or go out of said Town so alarmed, but by Leave or Order from the Commanding Officer there, upon the Penalty of paying * * * *One Hundred Pounds* * * * ; and in case any Person shall not have sufficient Estate to pay the same, then such Person shall be committed to Goal * * * for the Space of Six Month, or else shall be sent to the Fort, there to serve the Colony as a Soldier for the Space of Six Months[.]"{EN-685}

• [1756] "[W]hen any Person under the Age of twenty-one Years, shall neglect or refuse to pay his Fine for Neglect of military Duty, the Clerk shall make Distress upon the Goods and Chattels of the Parents or Masters of such Persons; and for Want of such Goods and Chattels, to commit such delinquent Persons to Goal, until his Fines be paid; and where no personal Estate can be found, of any Person of Age, neglecting military Duty, the Clerk is * * * impowered to commit such Person to * * * Gaol[.]"{EN-686}

• [1766] "And for Want of sufficient Estate, Goods and Chattels of any Delinquent, to satisfy and pay * * * the * * * Clerk shall commit him to His Majesty's Gaol in the County, there to remain until such Fine or Fines be paid. And in Case such Delinquent be under the Age of Twenty-one Years, the Clerk shall make Distress upon the Goods and Chattels of the Parents or Masters of such Delinquent Persons, and for Want of such Goods and Chattels, to commit such Delinquent to Gaol[.]

* * * * *

" * * * [A]fter an Alarm is beaten * * * , no Man whosoever shall leave or go out of * * * Town * * * but by Leave or Order from the commanding Officer there, upon the Penalty of paying * * * Twelve Pounds; * * * and in Case any Person shall not have sufficient Estate to pay the same, then such Person shall be committed to Gaol * * * and there continue for the Space of Six Months, or else shall be sent to the

Fort, there to serve the Colony as a Soldier for the Space of Six Months[.]"{EN-687}

• [1776] "[A]t the late alarm, when the militia and alarm-men, of this state, were ordered into service, many of them neglected or refused to appear; and of those who did appear, many absented themselves without leave, and deserted the service; which misconduct is not only of evil example and destructive of due order and discipline, but of the greatest ill consequence to the general safety; and therefore merits a particular attention,—

" * * * [T]he Governor * * * is * * * advised to issue his orders * * * to the colonels and field officers * * * , ordering and directing them to call courts martial within their respective counties, who shall have before them, hear, try, and pass upon, all persons within their regiments, offending, as aforesaid; and inflict such pains and penalties upon the offenders, as the said courts shall judge adequate to their offences, agreeably to the martial and military laws in force, in this state, at the time they committed the same."{EN-688}

• [1779] "[I]n Cases of general Alarm * * * , whatever Officer * * * shall neglect or refuse appearing at the Alarm-Post * * * , armed and accoutred * * * shall * * * forfeit his Commission[.]"{EN-689}

• [1780] "[I]f any Person who shall be detached * * * shall absent himself * * * and shall not procure an able-bodied effective Man to do the Duty in his Stead, * * * such a Part of the Estate of the Person so detached shall be taken and disposed of * * * as shall be sufficient to procure an able-bodied Man to do the said Duty * * * : That if such Person * * * shall not be possessed of a sufficient Estate for that Purpose, the Commanding-Officer of the Regiment to which he belongs shall advertise, in all the public News-Papers of this State, the Person * * * as a Delinquent, and offer a Reward of *Three Hundred Pounds* * * * to the Person or Persons who shall apprehend such Delinquent: That upon such Delinquent being apprehended, the said Officer is directed to deliver him to some One of the Officers of the * * * Continental Battalions to do Duty as a Soldier therein, for the Space of One Year[.]"{EN-690}

• [1780] "[T]he Delinquents in the last general Alarm, who were bound by Law to appear at the Places of Parade, shall furnish Recruits for Three Years, or during the War, in the following Proportions, *to wit:* every Twelve Delinquents shall furnish One Recruit[.]"{EN-691}

• [1781] "[I]f any Person belonging to the military Force of this State shall absent himself, in order to elude or evade [being drafted] * * * , or shall refuse to march forward, upon being detached, by himself or Substitute, he shall be sent forward to the Continental Army, to do Duty for Six Months, in the *Rhode-Island* Battalion, as a common Soldier[.]"{EN-692}

> • [1781] "[F]or Want of sufficient Estate, Goods and Chattels, of any Delinquent, to satisfy and pay [a fine] * * * , then * * * [the] Sergeant shall commit him to the public Gaol in the County, there to remain until such Fine or Fines be paid: That in case such Delinquent be under the Age of Twenty-one Years, the Sergeant shall make Distress upon the Goods and Chattels of the Parent or Master of such delinquent Person; and for Want of such Goods and Chattels, shall commit such delinquent Person to Gaol[.]"{EN-693}

2. Penalties harsher than fines could also be reduced to less onerous service or simply to fines, as occurred in 1781:

> WHEREAS by [certain] Act[s] of this Assembly * * * the Men who were called forth * * * to do the * * * Month's Tour of Duty, and refused or neglected to do the same, in Person or by Substitute, were directed to be sent forward to the Continental Army, to do Duty as common Soldiers for the Space of Six Months: And whereas a Number of Persons in this State did neglect to do Duty * * * , Part of whom have not as yet been sent forward * * * : And this Assembly being willing to mitigate the Penalty by the said Acts inflicted,
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> * * * [*I*]*t is Enacted,* That * * * each and every such Delinquent, who hath not been sent forward, * * * shall pay as a Fine the Sum of *Nine Pounds* Lawful Silver Money * * * : And that in case any Delinquent * * * shall not have sufficient Estate to pay such Fine, he shall be sent forward to *Newport*, to do Duty as a common Soldier with the Militia of this State, for a Term of Two Months.{EN-694}

C. Fines and other penalties taken seriously. The seriousness with which Rhode Island's legislators dealt with the subject-matter of these enactments is evidenced by—

1. The universality of the statutes' requirements. *First*, they extended (among other equivalent verbal formulae) to "every inhabitant", "each Person" and "every Person", "all Male Persons", and "every man" eligible for various types of Militia service. *Second*, they encompassed "each and every day's neglect" and "every Default", "as often as such Delinquency shall appear". Thus, they allowed no able-bodied free male between the ages of sixteen and sixty to escape compliance, or punishment for noncompliance, on any occasion or in any detail, except for some good and sufficient reason.

2. The particularity of the statutes' requirements. *First*, they covered every Militia activity from "Training Days" to "any Alarm in time of War or other imminent Danger of any Assault or Invasion", or "other special occasions when the militia are in arms". *Second*, they included every type of Militia equipment, from generic references to "Arms", "Ammunition", and "Accoutrements"; through

itemization of such things as "bulletts", "lead", "bagganette", "cotouch box", "bandalears", "Ram-Rod", "Wormer", and "Priming-Wire"; to the pointed specification of "*good* Gunpowder", "bullets, *fit for his piece*", "*good* Flints", a "*good* bayonet *fixed on his gun*", "a Cartouch Box, *ready filled with Cartridges of Powder and Ball*", "one *good* gun or muskitt *fit for service*", and "a *good* Gun, *being his own Property*". *Third*, they specified fines or other punishments for each and every kind of default, such as "not duely attending the trainings", failing "to appear in armes, compleat" at training, and any "neglect of duty on training days"; "non-appearance or neglect in any alarum", or "not appear[ing] complete in arms"; "not [being] provided with Arms and Ammunition", with specific penalties "for each Article of Accoutrement * * * [a Militiaman] shall be deficient in, for every Time he shall be unprovided"; not having "defective" arms "mended"; and, for those excused from training, not being "provided with the same Arms, Ammunition, &c. as * * * is required of such as are obliged to Train". Thus, nothing was left to mere implication, let alone to chance.

3. The severity of the statutes' requirements. The fines Rhode Island assessed against defaulters for various infractions of her Militia laws ranged from four pence to thirty pounds, with many from one to twelve shillings. Leaving aside the possibility that not a few imaginable violations could have resulted in *several* fines being assessed simultaneously (as when a Militiamen appeared for training without more than one piece of necessary equipment), even the smaller fines by themselves may have been difficult for many average Rhode Islanders to satisfy on individual occasions, because the Colonists throughout America always complained of a dearth of coinage in circulation (which is why Rhode Island emitted "bills of credit", as paper currency was called in those days, even to a dangerous excess not matched in any other part of New England).[574] In any event, the statutes themselves evidence that, throughout the *pre*-constitutional period, Rhode Islanders in significant numbers apparently could ill afford to pay—otherwise, no necessity would have arisen explicitly to provide by law for distraint and sale of defaulters' goods, or (in the absence of merchantable goods) their imprisonment or consignment to labor gangs. By the mid-1770s, the wages of a typical laborer might have averaged about two to three pounds *per* week, while the price of a serviceable musket fitted with a bayonet might have been up to twice that amount.[575] So, not just a few individuals who lacked regular employment must have been simply too impoverished both to purchase their required Militia firearms and to pay the fines that would have accrued against them as a result of remaining unsupplied. Which explains why Rhode Island's laws made allowance for individuals who were unable

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[574] *See, e.g.*, E. Vieira, Jr., *Pieces of Eight, ante* note 39, Volume 1, at 67-90.

[575] *See, e.g.*, R. Ketchum, *Decisive Day*, *ante* note 310, at 62; M. Stephenson, *Patriot Battles, ante* note 464, at 120.

to comply "by Means of Poverty", to the point of providing such people with firearms at taxpayers' expense. This policy not only was prudent, because it aimed at equipping the maximum number of Militiamen, but also exemplified the social solidarity which lay at the base of the whole conception of the Militia. The duty of near-universal service engendered a corresponding obligation on the part of those individuals who were relatively well off economically to subsidize their poorer compatriots.

To be sure, some rich individuals might have chosen to pay fines rather than obtain firearms and ammunition, appear for training, or perform other Militia duties. This, however, would not have denied, but instead would have proven, the existence and efficacy of those legal duties, inasmuch as fines were the statutorily mandated alternatives to personal performance. Thus, the very payment of fines amounted to recognition and enforcement of the duties. Moreover, the ability of some Rhode Islanders in effect to purchase exemptions from Militia service in those particulars apparently never caused significant concern, because that procedure was consistently followed throughout the *pre-*constitutional period. If the imposition of fines to enforce compliance had not to a satisfactory degree ensured that the underlying duties were actually performed by a sufficient number of individuals, other means would have been employed.

4. The sparsity of excuses for noncompliance with the statutes' requirements. Although the statutes often flexibly tempered justice with mercy, by allowing officials the discretion to take into account any "reasonable Excuse" or "sufficient Excuse", the excuses they did explicitly recognize all derived from circumstances largely beyond a defaulter's control—including "Poverty"; "sickness and inability to do duty"; inability to produce a firearm because "his Gun ha[d] been taken from him for public Service, and not accounted for"; or because he had lived in "a Part [of the State that] was in Possession of the Enemy"—and conscientious objection, although only with a *bona fide* "certificate from the congregation or meeting to which he * * * belong[ed]". Certainly very few men would likely have chosen lifelong poverty in an attempt to avoid their Militia duties; and true conscientious objection derived from the inflexible higher duty to put God's law ahead of man's. Sometimes, too, even what would appear to have been the best of excuses were only grudgingly accepted. For example, in 1713 one John Gavet "petition[ed] the [General] Assembly to be released and acquitted from martial discipline, by reason of an incurable lameness in one of his feet, *he having been cleared in Boston, for said impotencies*". But, unswayed by the opinions of mere Bostonians, the Assembly ruled that Gavet "shall be * * * acquitted and discharged * * * from all manner of martial discipline, *alarms only excepted*".{EN-695}

D. Difficulties in enforcement. As strict as it was, Rhode Island's system of fines and other penalties for noncompliance with her Militia statutes was not free

from practical difficulties, vicissitudes, and frictions. In the 1830s, Justice Joseph Story warned that, although

> the importance of a well-regulated militia would seem so undeniable, it cannot be disguised that, among the American people, there is a growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burdens, to be rid of all regulations. How it is practicable to keep the people duly armed without some organization it is difficult to see. There is certainly no small danger that indifference may lead to disgust, and disgust to contempt; and thus gradually undermine all the protection intended by th[e Second Amendment.][576]

Story's concern that the people themselves might lose sight of the importance of, then seek excuses for shirking, their Militia duties was not simply the product of observations in his own time, but was well-founded in *pre*-constitutional history, too.

As early as 1664, Rhode Island's officials complained of "the great neglect and defficiency in the vse of the military exercise in most townes in this Collony" and "the danger, reproach, and other inconveniancyes lying vpon, or lyckly to ensue vnto the whole in that neglecte".{EN-696} And in 1665, the General Assembly took into its

> consideration the great defect in training, occasioned by the remissnes of some vnder the pretence of the burden in training soe often as eight dayes in the yeare, and other complaining of the great inequality, in that the poorest being vnable to spare wherewith to maintaine armes and amunition, as powder, &c., yett are forced by the law to beare armes as well as the most able; to redresse which grevances, it is enacted and declared, that the sixe dayes only in the yeare be ordered * * * for the milletary exercise in training * * * . And for the incorradgement of the meaner sort [that is, the poor], there shall be alowed yearly nine shillings in currant pay to or for each soldiare listed in the traine band to be duely payed * * * at the Captain's discretion for the repaireing of armes, &c. * * * and * * * nine shillings yearly to be payed * * * to such parents and masters as find armes and amunition (as they must doe) for their sones and sarvants that are * * * to traine; * * * and for the raysing the * * * nine shillings a yeare for each souldier, * * * each towne shall * * * make a rate [that is, levy a tax] vpon each one rateable within the precinckes of the towne, with as much equality as may be, according to each ones estate[.]{EN-697}

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[576] *Commentaries on the Constitution of the United States* (Boston, Massachusetts: Little, Brown, and Company, Fifth Edition, 1905), Volume 2, § 1897, at 646 (footnote omitted).

Apparently, however, this indulgent approach was not entirely successful, because in 1666,

> upon a petition presented by the commaunders and officers of the trayne band of the towne of Newport, and also upon the searious consideration of the great neglect of the due exicution of the enacted lawes of this Collony concerninge the militia, for the pennaltys of persons not attendinge the service of the millitary exercise according to law, is not duly taken by reason that the power of judging and takinge fines, is placed in such persons as either cannot or will not performe the same, the neglect whereof is licke to be an occasion of the ruin of the millitary exercise throughout the whole Collony, if not timely prevented. Vpon the consideration whereof, * * * [the General Assembly] declared * * * it * * * in the power of any two magistrates in each towne, together with the Captain and Lieutenant of the band, or the major part of them, to judge of the excuses of such persons who are defective; which being judged, * * * to graunt forth warrant * * * to take by distraynt the fine or fines of such person or persons who shall be defective in non-appearance[.]{EN-698}

Thereafter, problems of this sort persisted throughout the *pre-*constitutional era:

> • [1702] Although a statute of 1677 had provided "that there should be six training days in the year", "th[e General] Assembly * * * finding it to be a great burden to the poor in losing much time * * * therefore enacted * * * That * * * there shall be but four training days in one year".{EN-699}
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> • [1726] "[T]his Assembly being advised that through the dissatisfaction and discontent of His Majesty's good subjects in the choice and election of commissioned officers, to lead and conduct them, and the smallness of the fine on delinquents, the militia is of late visibly declining, not only to the scandal and reproach of the government, but also to the imminent danger thereof * * * should it be invaded or assaulted by a common enemy;—
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> "Be it therefore enacted * * * that the several * * * companies or trained bands * * * shall * * * meet together under military arms, * * * with the freemen within the limits of each band, and * * * shall nominate and elect a captain, [and other officers] * * * , by the Governor and council to be approbated and confirmed; without the Governor and council shall see just cause to reject or disapprove of any one or more of them * * * .
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> * * * * *
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> "And * * * for the further encouragement * * * of His Majesty's good subjects in this colony, as have a regard to the honor and interest of the same, and constantly do observe and attend upon their duty, and for

bringing of such as contemn the same, and have little regard, if any, to good order and discipline to conformity * * *

"Do enact * * * that the penalty upon such person who is within the lists of any company or train band * * * , for his neglect of duty on training days * * * that he shall hereafter pay a fine of five shillings * * * for each neglect; and the penalty on each person that is obliged to appear on alarms or other special occasions when the militia are in arms, or upon duty, shall be a fine of ten shillings for each neglect of duty[.]"{EN-700}

• [1745] "*WHEREAS the several Companies of the Militia, or train'd Bands, in this Colony, being obliged to muster four Times a Year in Time of War, is found to be of ill Consequence in sundry Respects,*

"*IT is therefore Voted and Enacted*, That for the future, the said Companies, or train'd Bands, shall be obliged to muster but *twice* a Year in Time of War, as well as in Time of Peace[.]"{EN-701}

• [1755] "*WHEREAS the several Fines for Neglect of Military Duty are found by Experience to be too low;*

"*BE it * * * Enacted*, That the fines of every inlisted Soldier * * * not provided with Arms and Ammunition according to Law, be augmented to Three Shillings for every Defect in each Article of Accoutrements, and of every Person excused from Training, for not being provided * * * , the Fines be augmented to Five Shillings for every Defect * * * ; and of every inlisted Soldier neglecting or refusing to appear accoutred * * * upon Training Days, the Fine be augmented to Forty Shillings *per* Day; and of all Persons not appearing upon an Alarm, who are obliged thereto, * * * the Fine be augmented to Eight Pounds[.]"{EN-702}

• [1776] As the Governor of Rhode Island reported to General George Washington, "[f]or many past years, the inhabitants of this colony * * * thought themselves in a perfect state of security, and entirely neglected military discipline; and disposed of their arms so generally, that at the breaking out of the present war, the colony was in a manner disarmed.

"We have taken every method in our power, by purchasing, by employing manufacturers, and by importation, to procure a sufficient quantity, but are still so deficient, that the same arms which have been rated at $6 and $8, at Cambridge, are readily bought here ar $10 and $12. We shall scarcely be able to find arms for the troops we have ordered to be raised for our immediate defence. Besides which, the peculiar situation of the colony requires that every man in it should be provided.

"And the Assembly have accordingly ordered that every man should be furnished by the 15th day of April next, under severe penalties."{EN-703}

Of course, this cycle of complacency and sloth fueled by narrow self-interest—sometimes brigaded with genuine grievances over fair representation in the choice of leaders and equality of burdens in the performance of duties—followed by pressure for rejuvenation as dire circumstances developed, was not confined to Rhode Island's Militia. After the French and Indian War ended in 1763, the Colonists in neighboring Massachusetts, too, began to take their Militia duties less seriously than before. Regular musters become occasions more for socializing than for serious training in marching, maneuvering, and other orthodox military exercises. Yet many Militiamen still drilled in marksmanship and the maintenance of firearms, and engaged in mock engagements in the Indian-fighting style of Rogers' Rangers.[577] By 1774, however, as the urgency of the situation dawned on the Colonists, revitalization of their Militia proceeded apace.[578]

If, during the *pre-*constitutional period, some Rhode Islanders were captious in their criticism of the Militia system, and negligent in fulfillment of their Militia duties; and if some public officials were sometimes inclined overly to indulge their constituents, rather than to inculcate in the public's mind the necessity of the system and its duties; nonetheless Rhode Island's Militia did perdure substantially unchanged for generations. Its utility so outweighed its inconveniences as to render it, not merely expedient, but *indispensable*—as proven by the facts that: (i) *pre-*constitutional Rhode Island never did dispense with her Militia, even during the direst moments of the War of Independence; and (ii) thereafter, the Founding Fathers incorporated "the Militia of the several States", *as they then existed*, into the Constitution as permanent components of the federal system.[579] That is, the Militia were considered so important—as the Second Amendment declares, "necessary to the security of a free State"—that the institutions and the law providing for them were elevated from the merely statutory to the *constitutional* plane, *notwithstanding the manifest difficulties Americans had experienced in fully enforcing compliance with Militia duty*.

Or, perhaps, to some degree *because of them*. After all, a healthy skepticism of and resistance to needlessly burdensome Militia regulations on the part of the people themselves constitute effective "checks and balances" against overreaching by rogue public officials. Membership in the Militia is, always has been, and must be compulsory. But, at the same time, the primary responsibility of the Militia is "to execute the Laws", either of the Union when "call[ed] forth" for that purpose,[580] or of the States at all times—and even "the Laws of Nature and of Nature's God" in

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[577] *See, e.g.,* Gary Zaboly, *American Colonial Ranger: The Northern Colonies 1724-64* (Oxford, England: Osprey Publishing Ltd., 2004).

[578] *See* J. Galvin, *The Minute Men*, *ante* note 543, at 60-61.

[579] U.S. Const. art. I, § 8, cls. 15 and 16; art. II, § 2, cl. 1; *and* amend. II.

[580] U.S. Const. art. I, § 8, cl. 15.

the most serious circumstances.[581] So, inasmuch as overly burdensome regulations may actually violate some of these "Laws", or tend towards a violation, they *should* be opposed—lest, by acquiescing therein, the Militia might defeat their own purpose.

E. Fines as evidence that Militiamen's firearms were a special form of private property. Their problems of enforcement aside, the fines Rhode Island imposed on individuals (other than those sunk in poverty) who were not provided with firearms, ammunition, and necessary accoutrements suitable for Militia service confirmed two matters—

1. The system of fines established that most of such equipment was Rhode Islanders' *personal property* which they maintained in their *personal possession* at all times, not public property the use of which the government allowed them only under certain limited circumstances.

a. Members of the Militia in the Trained Bands were fined if they did not bring firearms and ammunition with them to their days of training. Under some circumstances, this would have been grossly unjust—indeed, utterly senseless—if throughout the rest of the year the equipment had been kept in armories or magazines, under the care of public custodians, to be passed out only at the time of training, and thereafter retrieved again for storage. Under those conditions, if anyone should have been fined for a Militiaman's default in appearing without arms, it should have been the custodian who failed to ensure that the Militiaman left the armory or magazine fully equipped (unless somehow a Militiamen who had been equipped at the armory nonetheless appeared unequipped in the field). But Rhode Island's Militia laws made no provision for fining custodians of armories or magazines for such official derelictions of duty—because they made no provision at all for such custodial duties, or even for such custodians.

b. All members of the Militia, including those on the Alarm List and in the Senior Class who were not required to attend training, were fined if, upon inspection, they proved to be without the requisite firearms and ammunition in good order and ready at hand in their own homes. Plainly, for such fines to have been just, or even rational, these individuals must have labored under a duty personally to possess the arms at all times. Otherwise, when an inspector appeared, a Militiaman would have had to repair to an armory, retrieve a firearm, return to his home, satisfy the inspector, and then surrender the firearm to the armory's custodian until the next inspection—with the Militiaman subject to a fine if *the custodian* refused to supply him with a firearm in proper repair! Actually, not only would the imposition of a fine on a Militiaman have been unfair if he had been

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[581] *See* Declaration of Independence.

unable to obtain possession from some public armory of the firearm assigned to him, but even the entire requirement of inspection of the Militiaman's home would have been absurd. Much more sensible would have been for the inspection to be conducted at the armory, where the custodian would have exhibited the firearms in his care to the inspectors, indicating which of the arms according to his records were to handed out to which Militiamen when the need arose. As no such inspections of public armories or interrogations of their custodians were ever mandated in Rhode Island's Militia laws, it obviously was never the case that Militiamen's arms in any significant numbers were sequestered in such establishments.

2. The system of fines also proved that firearms, ammunition, and necessary accoutrements not only were most Rhode Islanders' personal property, but also were very special forms of private property. For most of the other personal chattels individuals owned could be seized and sold at public auction to pay their fines. Thus, by holding almost all of the rest of each such individual's personal chattels hostage to his compliance with the requirement that he possess a firearm, ammunition, and accoutrements, *the Militia laws elevated private property in those items above private property in almost all other personal chattels*.

Of course, this should also have meant that firearms, ammunition, and accoutrements for use in the Militia could not have been taken by distraint from a debt-strapped Militiaman in aid of his private creditors, whose claims could not have been superior to the Militia's. Rhode Island's statutes did not explicitly recognize such an exemption. (Virginia's, however, did.[582]) Nonetheless, both legal precedent and the economic consequences of the situation compel the conclusion that such an exemption was necessarily implicit in Rhode Island's (and every other Colony's) laws.

a. "[T]he antient common law" always immunized from distraint "a man's tools and utensils of his trade * * * which [were] said to be privileged for the sake of the public, because the taking them away would disable the owner from serving the commonwealth in his station".[583] To have seized a debtor's firearm—the most important "tool[ ] and utensil[ ] of his trade" in "his station" within the Militia—would have prevented him from fulfilling his public duty to defend the community, which by any calculus must have taken (and must still take) priority over the payment of a merely private monetary obligation.

b. If the individual's firearm had been seized in consequence of a private debt that he had remained unable to satisfy, he could then have honestly pled a combination of impossibility and impoverishment as an excuse for not fulfilling his

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[582] *See post*, at 715-717.

[583] W. Blackstone, *Commentaries on the Laws of England*, *ante* note 142, Volume 3, at 9.

Militia duty thereafter. At that point, either the Militia itself or a Local government would have provided him with another firearm—in effect, using public funds to secure the creditor's claim by facilitating his retention of the debtor's own firearm as security for its payment. Thus removing a firearm from its intended use would have sacrificed part the common defense to serve a purely private purpose.

c. Obviously, too, an individual's firearm could never have been seized *and sold*, as Rhode Island's statutes allowed where other personal chattels were concerned, to satisfy some fine an individual incurred for a default in Militia service. As Blackstone explained, "perhaps the true reason, why * * * the tools of a man's trade were privileged [from distraint] at the common law, was because the distress was * * * merely intended to compel the payment of the [debt], and not as a satisfaction for it's nonpayment: and therefore, to deprive the party of the instruments and means of paying it, would counteract the very end of the distress".[584] This reasoning, however, would have excluded seizure and sale of a defaulter's firearm, because to satisfy an impecunious individual's fine by depriving him of the very thing necessary to avoid some future fine, thus guaranteeing that fine's imposition, would "counteract the very end" of the statute that men should possess firearms and thereby avoid fines, not be dispossessed of firearms and thereby incur fines.

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[584] *Id.* (footnote omitted).

CHAPTER THIRTEEN

Rhode Island's *pre*-constitutional Militia statutes embodied the antitheses of modern-day "gun control".

No greater contrast could be imagined than that between Rhode Island's *pre*-constitutional Militia Acts and related laws, on the one hand, and contemporary "gun control", on the other. Inasmuch as today's "gun controllers" aim ultimately at disarming everyone except members of the regular Armed Forces, *para*-military police departments, and *quasi*-civilian governmental agencies that ostensibly exercise powers of "law enforcement", their handiwork could not be more obviously and obnoxiously at odds with Rhode Island's Militia laws—and, as well, the Militia laws of almost every other *pre*-constitutional Colony and then of every independent State. For those laws uniformly required—just as their principles embodied in the Constitution still require—that every able-bodied adult male (and, today, perhaps every able-bodied adult female as well), not a conscientious objector, be personally possessed at all times of firearms at least equivalent to the types carried by modern light infantry and *para*-military police. The same stark dichotomy exists between the *pre*-constitutional Militia Acts and the techniques "gun controllers" now employ to approach their goal incrementally, including:

- extensive regulation of the types of firearms, ammunition, and related equipment that individuals may possess;
- pervasive controls over private commerce in firearms and ammunition that are not applicable to the manufacture of and trade in other commodities—so that no truly free market in arms exists;
- ever-expanding limitations on the possession and use of firearms and ammunition that supposedly reflect concerns for "public safety"; all contributing to
- step-by-step disarmament of one group after another.

A. Disarming individuals an exceptional practice. In *pre*-constitutional Rhode Island, laws that arbitrarily and aggressively disarmed particular groups of people were vanishingly few in number.

1. None of her Militia statutes, for instance, explicitly excluded individuals on the ground of their prior convictions for crimes.[585] And although the Militia laws

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[585] *See ante*, at 272-274.

as applied would probably have exempted from service individuals suffering from serious mental disabilities, no statutes explicitly disbarred such people in general from possessing firearms.[586]

2. During periods of warfare, though, Rhode Islanders enacted legislation aimed specifically at disarming the enemies they found amongst them. In 1667, it was

> ordered, that the Indians residing upon the Island [of Rhode Island] shall bee forthwith disarmed of all sorts of armes, and that the Captain and militarie officers meeting with any Indian armed, they are authorized to seize the armes, and * * * are to search and seize any armes to them belonging; and the said armes wherever so seyzed, to bee delivered to the Governor or some Magistrate, that so they may bee safely kept, and at his or their discretion to bee restored. It is also left to the Magistrates of Providence and Warwick to do as they shall think meet, as referring to disarming the Indians among them.{EN-704}

In 1669,

> [t]he Councill being sencible of the present fears, occasioned by the report of the combination of the Indians against the English, and seeing it necessary to put the Colony in aposture of defence, doe therefore heerby recommend itto the care of each respective Towne Councill in the Colony * * * that they make speedy and diligent provision for * * * seizing the armes of Indians that are in the hands of the English[.]{EN-705}

And in 1776, the General Assembly determined that,

> [w]hereas, the great danger to which this colony is exposed, makes it necessary to use every measure for detecting those persons among us, who are inimical to the United Colonies, and preventing their doing injury to the common cause,—
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> * * * it is enacted, that all the male inhabitants of this colony, of sixteen years of age and upwards, who shall be suspected of being inimical to the United American Colonies, and the arduous struggle in which they are engaged, against the force of Great Britain, shall make and subscribe the follow declaration, or test, to wit:
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> *Declaration of Test, to be made by suspected persons in the Colony, relative to the War with Great Britain*

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[586] This may have been because most individuals with such conditions did not live alone, but were under the care and control of family members.

> "I * * * do solemnly and sincerely declare, that I believe the war, resistance and opposition, in which the United American Colonies are now engaged, against the fleets and armies of Great Britain, is on the part of the said colonies just and necessary; and that I will not, directly or indirectly, afford assistance of any sort or kind, whatever, to the said fleets and armies, during the continuance of the present war; but that I will heartily assist in the defence of the United Colonies."
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> And be it further enacted * * * , that in case any such suspected person shall refuse to subscribe the same, * * * and if [upon being summoned and interrogated] he shall continue such refusal, without giving satisfactory reasons * * * , or shall refuse to appear upon being summoned, * * * [a] warrant [shall be issued], directed to the sheriff of the county * * * , commanding him * * * to make strict and diligent search for all arms, ammunition, and warlike stores, belonging to such persons so refusing, and to take deliver the same to the captain of the company of militia in whose district the delinquent shall live, to be made use of in time of an alarm, taking a receipt of the captain, therefor; which arms, ammunition and warlike stores, shall be appraised * * * and be paid for out of the general treasury.{EN-706}

Of no little moment, however, although many Indians in the 1600s were openly hostile to the Colonists, in not a few instances the arms seized from them were nonetheless "to be delivered to the Governor or some Magistrate, that so they may be safely kept, and at his or their discretion to be restored". Similarly, although those who refused to disavow disloyal affections were deprived of "all arms, ammunition, and warlike stores", they were nevertheless fully compensated for their losses "out of the general treasury". Under the circumstances, this was a fair and measured policy, inasmuch as egregiously disloyal inhabitants of Rhode Island might have suffered confiscation of all of their property, as well as death.[587]

B. Controlling traffic in firearms. Throughout the *pre-*constitutional era, Rhode Island did rather extensively regulate traffic in firearms, ammunition, and related accoutrements.

1. In statute after statute, the General Assembly specified the types of arms and related equipment her inhabitants were not simply allowed (because allowance was never at issue), but rather required, to possess—for the express purpose of thoroughly arming as many as possible with arms equivalent to those the regular armed forces of the day carried. *Never* did Rhode Island enact, or apparently even contemplate, a statute that outlawed or even seriously inhibited private trade in or possession of *any* military-grade firearm available at that time by her loyal and law-abiding residents. The salient purpose and effect of Rhode Island's *pre-*constitutional

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[587] *See post*, at 301.

Militia laws was, not to suppress or even inhibit a free market in arms, but to rely upon and promote it, by requiring every adult able-bodied free male who could afford to do so to purchase in private commerce firearms, ammunition, and accoutrements suitable for his Militia service.[588] Thus, political liberty and economic freedom were integrated in perhaps the most direct manner possible.

2. Of course, from time to time, Rhode Island did rigidly control traffic in arms with her inhabitants' enemies. Indians were the Colonists' first antagonists. In 1642, legislators

> ordered, that if any Person or Persons shall sell, give, deliver, or any other wayes convey any Powder, Shott, Gunn, Pistoll, Sword, or any other Engine of Warr, to the Indians that are, or may prove offensive to this State or to any Member thereof, he or they for the first offence * * * shall forfeit the sum of forty shillings; and for the second offence * * * shall forfeit five pounds[.]{EN-707}

In 1647, legislators expanded on this prohibition, such that

> if any person or persons, shall sell, give, deliver, or any otherwayes convey any powder, shott, lead, gunn, pistoll, sword, dagger, halberd or pike to the Indians that are or may prove offensive to this Colonie, or any member thereof, he or they, for the first offence, shall forfeit y^{e} sum of five pounds; and for his second offence * * * shall forfeit ten pounds * * * . And it is further ordered, that if any person shall mend or repaire their Guns, * * * he shall forfeit the same penaltie.{EN-708}

And in 1650, they sought to expose evasions of the law, by directing that,

> if in case of prohibitions (as concerning gunnes, powder, lead, &c.): it being proved that such and such, or any one had a gunn, &c.; or the Solicitor bona fide, in his owne knowledg, doe knowe and can sware, &c.; that such a one was posest of a gunn, &c., as his owne proper goods, and upon demand of the Solicitor cannot produce, or will not give a good account what is become of it, * * * he shall be judged guiltie of breach of the lawe * * * ; and that the lawe shall extend to enquirie especially of gunnes and other prohibitions, as powder, shott, leade, wine or liquors that hath been merchandized or convayed away to the Indians[.]{EN-709}

These restrictions plainly did not infringe upon any "right of the people to keep and bear Arms" (as the Second Amendment later summarized and codified the legal

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[588] *See ante*, Chapters 6 through 9.

principle involved), because: (i) the individuals the statute targeted were not "keep[ing] and bear[ing]" the interdicted "Arms" themselves for their own lawful uses, but instead transferring them to others for those others' unlawful uses ; and (ii) no rational constitution would ever license individuals to deliver their own or any other "Arms" to the people's enemies in time of war.

3. Later, the War of Independence exposed domestic enemies. In 1775, the General Assembly declared that

> WHEREAS the Ministry of *Great-Britain* have * * * steadily pursued a Plan for subjecting the Inhabitants of the *British* Colonies in *America* to an absolute unconditional State of Slavery; and have proceeded at length to the burning of our Towns, and spreading Desolation and Slaughter, as far as it hath been in their Power, through the Country, in a Manner totally inconsistent with the Practice of civilized Nations, and unworthy of the Reputation formerly sustained by *British* troops: And whereas the aforesaid Colonies have been reduced to the fatal Necessity of taking up Arms, in Defence of those inestimable Rights and Liberties, which they derive from the unerring Laws of Nature, and the fundamental Principles of the *British* Constitution; and which they cannot resign but with their Lives: And whereas several of the Inhabitants of the said Colonies, lost to every generous Sentiment of Liberty, of Love to their Country, and Posterity, have kept up a traitorous Correspondence with and supplied the ministerial Troops and Navy * * * whereby the Safety and Liberties of the said Colonies may be greatly endangered.
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> *BE it therefore Enacted* * * * , That if any of the Inhabitants of the said Colonies, within this Colony, or any of the Inhabitants of this Colony, within any other Colony, shall be found guilty of holding a dangerous Correspondence with the Ministry of *Great-Britain*, * * * or of supplying the ministerial Army or Navy, that now is or may be employed in *America* against the United Colonies, with Provisions, Cannon, Arms, Ammunition, warlike or naval Stores, * * * he or they so offending shall suffer the Pains of Death, as in Cases of Felony, and shall forfeit his Lands, Goods and Chattels, to the Colony[.] {EN-710}

Again, no "right of the people to keep and bear Arms" was insulted by this prohibition and the punishments its violation incurred, because the individuals subject to them, in league with an hostile foreign power, were "endanger[ing]" Rhode Island's "Safety and Liberties", and thereby what the Second Amendment later called "the security of a free State".

Interestingly, the premiss of this statute did not sound in any novel and abstract "right of revolution", but rather in a practical judgment, based upon a political philosophy of long standing, that "the Ministry of *Great-Britain*"—because it had "steadily pursued a Plan for subjecting the Inhabitants of the *British* Colonies

in *America* to an absolute unconditional State of Slavery"—had forfeited its authority as the *legitimate* government of Rhode Island (or of any among "the United Colonies"), whereupon that authority reverted to the people themselves. Thus, rather than asserting a "right of revolution" against usurpers and tyrants who could put forward no just claim to the people's allegiance in any event, Rhode Islanders relied upon a "right of restoration" that returned the exercise of sovereign powers to its true source and ultimate executors: the people themselves.[589] Otherwise, the statute could not rightfully have denounced those individuals who "kept up a *traitorous* Correspondence with and supplied the *ministerial* Troops and Navy".

Thus, in this case (as in all others) such limitations on traffic in firearms as Rhode Island enforced during *pre-*constitutional times did not threaten her people's sovereignty, but instead recognized, safeguarded, and effectuated it—in contrast to "gun control" of the modern variety, which whether by accident or design invariably undermines it, typically for purposes not directed to "the common good" (in the Constitution's phrase, "the general Welfare") at all, and inevitably in derogation of the Constitution's purpose to "provide for the common defence".[590]

C. Perfecting the free market in arms. Where maintaining quality and providing full disclosure were concerned, though, *pre-*constitutional legislation in Rhode Island moved on a track parallel to some contemporary regulations that reach commerce in firearms. In 1776, for instance, the General Assembly declared

> [t]hat if any Person or Persons, within this State, shall vend or expose to Sale any Gunpowder, manufactured within the same, unless said Gunpowder be packed in a good dry Cask, marked with the two first Letters of the Manufacturer's Name, and hath been examined and approved by the Inspector of Gunpowder, for said State, and by him marked with * * * Marks as are necessary to distinguish the several sorts of Gunpowder; the Person or Persons so offending, shall forfeit and pay six Pounds, lawful Money, for every Cask so exposed to Sale[.]{EN-711}

Rather than inhibiting, let alone suppressing, the private manufacture and sale of "several sorts of Gunpowder" in the manner of most modern "gun control", however, this regulation aimed instead at perfecting the market by assuring consumers of products fit for their intended uses.

D. Promoting "public safety". An ostensible concern for "public safety" with respect to firearms and ammunition is not unique to modern-day "gun

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[589] *See post,* Chapter 32.

[590] U.S. Const. preamble *and* art. I, § 8, cl. 1.

controllers", but also really existed during the *pre*-constitutional period. The critical distinction, moreover, is that Rhode Island's laws in that era operated in a manner consistent with the most widespread possible private possession of arms among her inhabitants; whereas contemporary "gun controls" are invariably antagonistic to, and typically aim at maximally contracting the ambit of, such possession.

1. Intentional misuse of arms. That Rhode Island's *pre*-constitutional laws required private citizens' possession of firearms did not entail helpless acquiescence on the part of the public in some individuals' intentional misuse of their arms. To the contrary, serious wrongdoing could have resulted in the perpetrators' disarmament.

Obviously, this was true for those individuals convicted of having committed a "Felony".[591] But it could have happened to men involved in lesser wrongdoing, too. For example, in 1642, the General Court of Election

> ordered, that if John Weeks, Randall Holden, Richard Carder, Stephen Shatton or Robert Porter shall come vpon the Island [that is, Rhode Island] armed, they shall be by the Constable * * * disarm'd and carried before the Magistrate, and there find sureties for their good behaviour; and further be it established, that if that course shall not regulate them or any of them, then a further dew and lawfull course by the Magistrates shall be taken[.]{EN-712}

Although disarmament of these individuals was ordered, this episode exemplified, not a Colonial version of or precedent for modern "*gun* control", but rather the type of "*people* control" necessary in every age. The order to deprive these individuals of certain implements was issued, not because the implements were a threat to society in and of themselves, but because the particular individuals under scrutiny had proven themselves to be dangerously *anti*-social.

To appreciate what was going on in this case, one must understand the old English legal doctrine of "surety of the peace", upon which the General Court implicitly relied. Basically, the law provided the means by which "Security may be had against the Breach of the Peace before it happens".[592] As described by Blackstone,

> [T]HIS preventive justice consists in obliging those persons, whom there is probable ground to suspect of future misbehaviour to stipulate with and to give full assurance to the public, that such offence as is apprehended shall not happen; by finding pledges or securities for keeping

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[591] *See ante*, at 272-274, *and post*, at 983-985 and 989-990.

[592] W. Hawkins, A *Treatise of the Pleas of the Crown, ante* note 434, Book I, Chapter LX, at 126.

> the peace, or for their good behaviour. * * * [T]he caution * * * is such as is intended merely for prevention, without any crime actually committed by the party, but arising only from a probable suspicion, that some crime is intended or likely to happen; and consequently it is not meant as any degree of punishment, unless perhaps for a man's imprudence in giving just ground of apprehension.
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> * * * * *
>
> * * * THIS security consists in being bound, with one or more sureties,[593] in a recognizance or obligation * * * , entered on record, and taken in some court or by some judicial officer; whereby the parties acknowledge themselves to be indebted * * * in the sum required; * * * with condition to be void and of none effect, if the party shall appear in court on such a day, and in the mean time shall keep the peace: either generally, towards * * * [the public at large]; or particularly also, with regard to the person who craves the security. Or, if it be for the good behaviour, then on condition that he shall demean and behave himself well, * * * either generally or specially, for the time therein limited, as for one or more years, or for life.[594]

One branch of this doctrine was "Surety for keeping the Peace", perforce of which, as Hawkins explained,

> any Justice of the Peace may, according to his Discretion, bind all those to the Peace, who in his Presence shall make any Affray, or shall threaten to kill or beat any Person, or shall contend together with hot Words, or shall go about with unusual Weapons or Attendants, to the Terror of the People; and also all such Persons as shall be known by him to be common Barrators; and also all those who shall be brought before him by a Constable for a Breach of the Peace in the Presence of such Constable; and all such Persons who, having been before bound to keep the Peace, shall be convicted of having forfeited their Recognizance.[595]

Under *pre*-constitutional English law, Blackstone pointed out,

> [A]FFRAYS (from *affraier*, to terrify) are the fighting of two or more persons in some public place, to the terror of his majesty's subjects * * * . Affrays may be suppressed by any private person present * * * . But more especially the constable * * * is bound to keep the peace; and to that purpose may * * * apprehend the affrayers; and may either carry them

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[593] A "surety" is an insurer of another party's fulfillment of that party's obligation, who makes himself legally liable if that party defaults on his duty. *See Black's Law Dictionary, ante* note 368, at 1611.

[594] *Commentaries on the Laws of England, ante* note 142, Volume 4, at 248-249, 249-250.

[595] *A Treatise of the Pleas of the Crown, ante* note 434, Book I, Chapter LX, § 1, at 126.

> before a justice, or imprison them by his own authority for a convenient space till the heat is over; and may then perhaps also make them find sureties for the peace.[596]

"COMMON *barretry* is the offence of frequently exciting and stirring up suits and quarrels between his majesty's subjects, either at law or otherwise".[597] According to Hawkins, "a Barrator is a common Mover, Exciter, or Maintainer of Suits or Quarrels, either in Courts, or in the Country"; and "all Kinds of Disturbances of the Peace, and the spreading of false Rumors and Calumies, whereby Discord and Disquiet may grow among Neighbours, are * * * proper Instances of Barratry".[598]

A "Surety of the Peace" would be granted

> where-ever a Person has just Cause to fear that another will burn his House, or do him a corporal Hurt, as by killing or beating him, or that he will procure others to do him such Mischief * * * ; and * * * every Justice of Peace is bound to grant it, upon the Party's giving him Satisfaction upon Oath, that he is actually under such Fear; and that he has just Cause to be so, by Reason of the other's having threatened to beat him, or lain in wait for that Purpose; [and]
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> * * * * *
>
> it seemeth certain, That if the Person to be bound be in the Presence of the Justice, he may be immediately committed [to gaol], unless he offer Sureties; and from hence it follows, *a fortiori*, That he may be commanded by Word of Mouth to find Sureties, and committed for his Disobedience; but it is said, That if he be absent he cannot be committed without a Warrant from some Justice of Peace, in order to find Sureties[.][599]

Distinguishably, the authority of a "Magistrate" with respect to ordering a "Surety for * * * Good Behaviour" was not circumscribed by

> any certain precise Rules for [his] Direction * * * , and therefore * * * he has a discretionary Power to take such Surety of all those whom he shall have just Cause to suspect to be dangerous, quarrelsome, or scandalous, as of those who sleep in the Day, and go abroad in the Night, and of such as keep suspicious Company, and of such as are generally suspected to be Robbers, &c. and of Eves-Droppers, and common Drunkards, and all other Persons * * * of evil Fame, who * * * seem in a great Measure to be

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[596] *Commentaries on the Laws of England, ante* note 142, Volume 4, at 145 (footnote omitted).

[597] *Id.*, Volume 4, at 133 (footnote omitted).

[598] *A Treatise of the Pleas of the Crown, ante* note 434, Book I, Chapter LXXXI, §§ 1 and 2, at 243.

[599] *Id.*, Book I, Chapter LX, §§ 6 and 9, at 127, 127-128. *See* W. Blackstone, *Commentaries on the Laws of England, ante* note 142, Volume 4, at 251-251.

> left to the Judgment of the Magistrate. But if he commit them for want of Sureties, he must shew the Cause, &c. with convenient Certainty.[600]

And if an individual gave his recognizance for good behavior,

> such a Recognizance shall not only be forfeited for * * * actual Breaches of the Peace, * * * but also for some other[wrongdoing], * * * as for going armed with great Numbers to the Terror of the People, or speaking Words tending to Sedition, &c. * * * , but not for barely giving Cause of Suspicion of what perhaps may never actually happen.[601]

"[F]or, though it is just to compel suspected persons to give security to the public against misbehaviour that is apprehended; yet it would be hard, upon such suspicion, without the proof of any actual crime to punish them by a forfeiture of their recognizance."[602]

In the case with which Rhode Island's General Court dealt, Weeks, Holden, and the others were absent from the jurisdiction when they were commanded by the Court's formal order, in the nature of "a Warrant", not to "come vpon the Island armed" lest they be "disarm'd and carried before the Magistrate, and there [be required to] find sureties for their good behaviour". But public officials must have possessed sufficient evidence of those individuals' past misbehavior in Rhode Island or elsewhere to have formed "a probable suspicion, that some crime [was] intended or likely to happen" if any of them were allowed to sojourn on "the Island armed". So, in this situation, the order for disarmament was entered presumably for good cause, pursuant to what was then due process of law, and perhaps only temporarily if they had obtained sufficient sureties for their good behavior.

In addition, had Weeks, Holden, and the others remained in Rhode Island and comported themselves properly, and had they been able-bodied men less than fifty years old (as presumably they must have been to have made for themselves such a record of breaches of the peace), then they would have been required to arm themselves, and been fined if they had failed to do so, pursuant to one or another of the various orders extant at the time for regulating the Colony's Militia:

> • [1638] "It is ordered, that on [a certain date] * * * ther shall be a generall day of Trayning for the Exercise of thos who are able to beare armes in the arte of military discipline, and all that are of sixteen yeares of age, and upwards to fifty, shall be warned thereunto."{EN-713}

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[600] A *Treatise of the Pleas of the Crown, ante* note 434, Book I, Chapter LXI, § 4, at 132. *See* W. Blackstone, *Commentaries on the Laws of England, ante* note 142, Volume 4, at 253.

[601] A *Treatise of the Pleas of the Crown, ante* note 434, Book I, Chapter LXI, § 6, at 133.

[602] W. Blackstone, *Commentaries on the Laws of England, ante* note 142, Volume 4, at 254.

> • [1639] "It is ordered * * * that the Body of the people, viz.: the Traine Band shall have free libertie to select and chuse such persons, one or more from among themselves, as they would have to be officers among them; to exercise and traine them * * * .
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> * * * * *
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> "It is ordered, that noe man shall go two miles from the Towne unarmed, eyther with Gunn or Sword; and that none shall come to any public Meeting without his weapon. Upon the default of eyther he shall forfeitt five shillings."{EN-714}
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> • [1639] "Mr. Eastone for breach of an order in coming to the public meeting without his weapon * * * is to pay five shillings."{EN-715}
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> • [1640] "It is * * * ordered, that all Men allowed and assigned to beare arms, shall make their personall appearance completely armed with Muskett and all its furniture; or pike with its furniture, * * * on such dayes as they are appointed to Traine. * * * And further it is ordered, that all men who shall come and remain the space of twenty days on the Island, he shall be liable to the injunctions of this order[.]"{EN-716}
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> • [1641] "It is ordered, That the order concerning trainings made at Portsmouth, August 6, 1640, shall be dulie observed and kept in all points effectually [with some exceptions.]"{EN-717}
>
> • [1643] "It is * * * ordered, that every man shall have foure pounds of shot lying by him, and two pounds of powder * * * .
>
> "It is further ordered, that upon [a certain] day * * * , there be a generall trayning of the men; and that every man be in readiness at the beate of the drum."{EN-718}
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> • [1643] "It is * * * ordered, that those last orders about trayning, and for every man to have so much powdr, and so many bulletts, and so the forwarning is to stand still in force; and also that every man do come armed unto the meeting upon every sixth day."{EN-719}

Indeed, to fulfill a recognizance for continued "good behaviour", they would have been compelled to obey the Militia laws in all of their particulars.

So, although in this type of case officials' concern for public safety would have counseled and the law would have allowed a temporary disarmament of individuals with known *anti*-social tendencies, the law also would have permitted those individuals to arm themselves if they had provided assurances for their future "good behaviour", and probably even would have required them to arm themselves as evidence of their "good behaviour".

2. Negligence with respect to firearms and ammunition. *Pre*-constitutional Rhode Islanders also recognized the prudential necessity for some general regulations of individuals' possible negligent use of firearms and careless possession of ammunition.

a. As to firearms, the laws generally prohibited only actual shooting under certain presumptively dangerous conditions.

(1) In 1731, the General Assembly decreed that:

> FOR AS MUCH *as Damage has often been done in the Town of* Newport, *and other Towns in this Government*, by firing of Guns and Pistols in the Streets or Taverns in *the said Towns*, *and by firing and throwing of Squibs*, *Rockets*, *and other Fire-Works*, *even to the endangering the Loss of several Lives*, *and firing of the Towns*,
>
> FOR the preventing whereof for the future:
>
> BE *it Enacted* * * * , That no Person whatsoever presume to fire any Gun or Pistol, or fire or throw any Squib, Rocket, or other Fire-work, in the Streets of any of the Towns of this Government, or in any Tavern of the same, after dark, on any Night whatsoever.
>
> AND if any Person shall do contrary hereunto, he, she or they so offending * * * shall * * * pay a Fine of *Five Shillings* for the first Offence, and for the second Offence *Ten Shillings*, and for every other Offence *Twenty Shillings*: And no Appeal shall be from any such Judgment.{EN-720}

The purpose of this law was not to regulate the use of firearms in particular, but to deter the reckless handling of incendiary devices most commonly to be found in private individuals' hands "in the Streets or Taverns"—including "*Squibs, Rockets, or other Fire-works*"—which negligence could have resulted in "*firing of the Towns*", largely composed as they were high inflammable wooden structures. And even then, the law imposed its prohibition only "after dark, on any Night whatsoever".

The statute recognized that many individuals—including possibly even *women*, as the reference to "she" indicates—might have carried both long guns ("Guns") and handguns ("Pistols"), loaded, "in the Streets or Taverns" of Rhode Island's Towns. Nevertheless, it neither deprived anyone of any firearm or ammunition, nor prohibited anyone from carrying a loaded firearm anywhere, but simply enjoined everyone to use their firearms (and other incendiaries) responsibly at certain times. Evidently, the legislators understood "*the endangering the Loss of several Lives*, *and firing of the Towns*" to derive, not from those things themselves, but from their possible misuse. So, rather than demonizing and banning the dumb implements (in the perverse style of modern "gun control"), the statute prohibited and punished their sentient individual possessors' misbehavior.

Moreover, although couched in comprehensive terms, this statute surely was not intended, and would never have been applied, to penalize the discharge of a firearm in self-defense even "after dark", because of the rule of construction known at that time as "the equity of interpretation". As Blackstone explained,

> the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it; or the cause which moved the legislator to enact it. For when this reason ceases, the law itself ought likewise to cease with it. * * *
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> FROM this method of interpreting laws, by the reason of them, arises what we call *equity* * * * "the correction of that, wherein the law (by reason of it's universality) is deficient."[603]

(2) Similarly, in 1768 the General Assembly decreed "[t]hat whosoever shall set up any Mark to be shot at, with a Gun or Pistol, the shooting at which may cross any Highway, Street, or Lane in this Colony, or shall shoot at such Mark with a Gun or Pistol, shall * * * pay a Fine of Twelve Shillings".{EN-721} Once again, the legislature recognized that individuals often carried loaded firearms or firearms together with readily accessible ammunition on or about the "Highway[s], Street[s], or Lane[s] in th[e] Colony", otherwise they would have been unable to "shoot at [a] Mark with a Gun or Pistol" in or about those places. If a statute was required to address this matter, Rhode Islanders must have been engaged in a significant amount of target practice (albeit some of it in an unsafe manner), which further evidences that a large number of firearms and sufficient ammunition for that purpose were always held in private hands. Actually, too, this prohibition was nothing more than the statutory application of common sense, today expressed by the shooters' rule: "know your target and what is beyond". No one shooting at a "Mark" across a road could have been sure of what his unintended target might suddenly have become, when people or animals could have moved across his line of fire without notice. In any event, the statute prohibited neither the possession of firearms and ammunition on or near "any Highway, Street, or Lane"; nor the carrying of firearms, either loaded or with ammunition near to hand, anywhere; nor the shooting at "Mark[s]" in any other, proper places.

(3) Then, in 1774 the General Assembly required that "there be no firing of cannon upon any public occasion, or of small arms; especially by the militia, or incorporated companies, on days of exercising, excepting only for perfecting themselves as marksmen * * * ; and that it be * * * recommended to all the inhabitants of this colony, that they expend no gun powder for mere sport and diversion, or in pursuit of game".{EN-722} This regulation served the two-fold purpose of training Militiamen, while otherwise preserving ammunition, so that the Militia would be as fully prepared and equipped as possible for active service in the field. And it evidenced that "the right of the people to keep and bear Arms" in *pre*-constitutional Rhode Island was primarily addressed to the inhabitants' collective military readiness, not to individuals' "sport", "diversion", or the "pursuit of game".

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[603] *Commentaries on the Laws of England*, *ante* note 142, Volume 1, at 61 (footnote omitted).

Revealingly, too, it did not command, but only "recommended", that individuals not waste gunpowder on sport or hunting.

b. As to ammunition, in 1762 the General Assembly mandated

> [t]hat every Person [in Newport, then the capital of Rhode Island,] who shall have Gun-powder in his or her Possession, and shall neglect or refuse to cause the whole of the same to be conveyed to the * * * Powder-House immediately, excepting 25 lb. [that is, pounds] which shall be kept in a Tin Powder-Flask, shall pay as a Fine into the Town Treasury * * * Ten Shillings in Lawful Money, for every Cask he or she shall neglect or refuse to be conveyed to the Powder-House * * * and in Proportion for any less Quantity.
>
> AND * * * no Person whatsoever shall fire a Gun or other Fire-Works within One Hundred Yards of the * * * Powder-House, upon the Penalty of paying a Fine of Ten Shillings Lawful Money, for every such Offence[.]{EN-723}

Plainly, this law aimed, not at anyone's disarmament—for it would have made just as much sense had the "Gun-powder" been suitable solely for fireworks—but at prevention and mitigation of devastating conflagrations and detonations in a populated area. Black powder (the only "Gun-powder" known in *pre-*constitutional times) is not only highly inflammable but also explosive, even when not confined. Most buildings in Rhode Island during the *mid-*1700s were constructed largely of wood, often (in Towns such as Newport) situated in close proximity to one another. Occupied homes, stores, and artisans' shops always contained sources of open flames—whether fireplaces for heat, ovens for cooking, forges for working metals, or simply candles and lanterns for light—burning for as long as twenty-four hours in each day. So, simply as a matter of elementary prudence, "Gun-powder" needed to be very carefully stored—"in a Tin Powder-Flask" or other suitable non-ferrous container, in order to protect it against stray sparks and static electricity—and its amount in any one location restricted, so as to minimize the damage should accidental ignition occur anyway. Experience had taught that dangerously large quantities needed to be secured in a communal "Powder-House" specially designed and situated for that purpose (although, even so, not perfectly immune from random sparks or flames), and subject to close supervision.

This statute does implicitly evidence, though, that many private individuals in Newport must cumulatively have possessed *very large* amounts of "Gun-powder", if the General Assembly believed that as much as twenty-five pounds represented a significant limitation. Moreover, even a maximum holding of twenty-five pounds of powder still enabled an individual in the *mid-*1700s to prepare from 1,750 to

2,500 cartridges (or loose loads) for a typical flintlock musket of that era.[604] So no one could have believed that compliance with this statute would have effectively disarmed anyone by depriving him of a reasonable stock of ammunition. And nothing in the statute precluded anyone from serially replenishing his store of twenty-five pounds of powder from the powder-house or any other source.

To be sure, this statute and the legislative power it reflected could conceivably have been (although it never was) misused by rogue public officials to obtain control of much (but hardly all) of the citizenry's ammunition in Newport, by requiring deposits from everyone, followed later on by refusing to allow withdrawals by anyone who needed his powder. Indeed, prohibition of withdrawals from powder magazines, seizure of their contents, or both was one of the tactics the British military governor of Massachusetts, General Thomas Gage, attempted to employ in order to reduce the supply of ammunition available to patriotic Militiamen in the environs of Boston. Gage knew that he had only two options for suppressing the patriots' resistance to British oppression: "He could seize [the patriots'] leaders * * * . Or he could seize their military stores; and that would be a blow almost equal to the first."[605] So he dispatched spies and relied on informers to ferret out the locations of the patriots' arms and ammunition in eastern Massachusetts.[606] On 1 September 1774, Gage's troops descended on the powder-house at Charlestown, carrying off some 250 half-kegs of gunpowder, then proceeded to Cambridge, where they seized two field guns. Before Gage's foray, however, the Towns had already withdrawn all of their own powder from the Provincial powder houses. So what remained at Charlestown was powder belonging to the Province, which was arguably Gage's to control. Nonetheless, misinformation about what had actually happened raised an alarm across New England, so inflaming the countryside that by 2 September upwards of some thirty thousand armed men were marching towards Boston.[607] Because the situation soon clarified, hostilities were avoided—for a while.[608] But in the immediate aftermath of what came to be called "the Powder Alarm", Israel Putnam warned his fellow patriots: "We much desire you to keep a strict guard over the remainder of your powder; for that must be the great means, under God, for the salvation of our country."[609]

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[604] Depending upon what a particular shooter desires to accomplish, charges of black powder can vary widely even with one particular musket. For purposes of illustration, with 7,000 grains to the pound (avoirdupois), 25 pounds of gunpowder could produce 1,750 rounds at a charge of 100 grains and 2,500 rounds at a charge of 70 grains.

[605] A. French, *The Day of Concord and Lexington*, *ante* note 469, at 54.

[606] *E.g.*, L. Birnbaum, *Red Dawn at Lexington, ante* note 524, Chapter 11.

[607] *See* T. Breen, *American Insurgents, American Patriots, ante* note 447, at 134-151.

[608] *See* Richard P. Richmond, *The Powder Alarm: 1774* (Princeton, New Jersey: Auerbach Publishers, Inc., 1971), at 4-7, 11.

[609] *Quoted in* A. French, *The Day of Concord and Lexington*, *ante* note 469, at 25.

Next, on 26 February 1775, Gage dispatched another detachment to Salem, in search of cannon.[610] Although unsuccessful, this raid intensified the people's watchfulness. And their disdain for Gage's troops, too—one woman taunting them: "What, do you think we were born in the woods, to be frightened by owls?" When an angry Redcoat presented his musket, she challenged him: "Fire if you have the courage, but I doubt it."[611]

Finally, on the night of 18 to 19 April 1775, Gage ordered a large force to march to Concord, where one of his spies had reported the Militia to be storing firearms and ammunition.

> Gage * * * knew what the minutemen were doing. He even had a good estimate of their numbers. "The Minutemen amount to fifteen thousand are the picked men of the whole body of militia and all properly armed," he told his superiors in London.
>
> Gage also knew something else—knowledge that would eventually have fatal consequences. "Their whole magazine of powder * * * is at Concord." * * * If he somehow managed a swift march to Concord, seized or destroyed the gunpowder * * * , it would have a crippling, perhaps demoralizing impact on [the patriots'] plans * * * .[612]

Rather than submit to that, however, the Colonists countered Gage's last move with "the shot heard 'round the world"—proving the foresight of Thomas Jefferson's veiled admonition to King George III: "[a]n exasperated people, who feel that they possess power, are not easily restrained within limits strictly regular";[613] and of Samuel Adams' more pointed warning to Gage's own personal representative: "[t]ell General Gage * * * no longer to insult the feelings of an exasperated people".[614]

Thus, as the Colonists themselves attested in action at Lexington and Concord, rogue public officials' misuse of a legitimate power cannot validate an illegitimate power implied by that misuse. Rather, that illegitimate power should be resisted; and further "checks and balances" on the exercise of the legitimate power should be established.

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[610] *See, e.g.,* Thomas B. Allen, *Tories: Fighting for the King in America's First Civil War* (New York, New York: HarperCollins Publishers, 2010), at 44-47.

[611] *See*, *e.g.*, William Gavett, "Account of the Affair at North Bridge", *Essex Institute Proceedings*, Volume I (1859), at 126-129; L. Birnbaum, *Red Dawn at Lexington*, *ante* note 524, at 108-109.

[612] T. Fleming, *The First Stroke, ante* note 383, at 34-35. *See also* L. Birnbaum, *Red Dawn at Lexington*, *ante* note 524, at 140-141.

[613] Thomas Jefferson, *A Summary View of the Rights of British America* (*ca.* 8 August 1774), *in, e.g.,* R. Scribner, *Revolutionary Virginia, ante* note 318, Volume I, at 249.

[614] *Quoted in* John Fiske, "The Eve of Independence", *The Atlantic Monthly* (November 1888), at 366.

In stark contrast to General Gage's stratagem, which intended effectively to disarm the patriots of eastern Massachusetts by minimizing their supplies if not depriving them altogether of ammunition, Rhode Island implemented a policy aimed at *maximizing* the supply of ammunition available to her loyal citizens. In 1776, for instance, the General Assembly decreed that "no saltpeter, nitre or gunpowder, made and manufactured in this colony, or that shall be made or manufactured in this colony, shall be exported out of the same, by land or water, without the license of the General Assembly, or His Honor the Governor and committee of safety, under the penalty of £20, for every hundred weight of such saltpeter, nitre or gunpowder".{EN-724} Here, with respect to the very same subject, emerges the clear dichotomy between public officials who wield some power in a manner "destructive of the[proper] ends" of government, and public officials who exercise the identical power in a "just" manner in service of those ends: Both cases involved the power to "regulate". General Gage sought to "regulate" the Massachusetts patriots' access to and use of their own gunpowder *by seizing and withholding it from them*—thus contradicting the fundamental principle of "[a] *well regulated* Militia" that the people must be suitably and sufficiently armed at all times, and thereby denying them "their right" and interfering with "their duty, to throw off [an abusive] Government" "and to institute new Government".[615] Rhode Island's lawmakers, conversely, sought to "regulate" their people's access to and use of all the gunpowder produced within the State *by securing and conserving it for them*—thus ensuring that Rhode Island's Militia would be "*well regulated*", and thereby enabling them (with assistance from other patriots) finally "to throw off [the British] Government".

[615] *Compare* U.S. Const. amend. II *with* Declaration of Independence.

CHAPTER FOURTEEN

Virginia settled her *pre*-constitutional Militia in order to enable a self-governing community to provide for its own self-defense.

The legal history of Virginia's *pre*-constitutional Militia parallels that of Rhode Island.[616] Certainly the two Colonies' (and then independent States') purposes in settling their Militia, and then regulating those establishments with the identical forms and functions for decade after decade, derived from the selfsame consideration: namely, that *self-defense for a self-governing community depends in the first, as well as the final, analysis upon collective self-reliance and self-help by the people themselves*.

From the earliest days, Virginia recognized, as she declared in 1672 and reaffirmed in 1676, that "against all tymes of danger it ought to be the care of all men to provide that their armes and habiliments for war, be alwayes kept fixed and fitt for service".{EN-725} This entailed not merely the arming of individuals in isolation or in *ad hoc* groups, but also their systematic organization within effective Militia.

Virginians realized that their Militia was the community's "proper defence, in time of danger"—so whenever complaints arose (as in 1738 and 1755) that the existing establishment "hath proved very ineffectual", remedial action was taken specifically to improve the Militia, in terms of "training the persons listed to serve therein, and reducing them under a proper discipline" more efficaciously than before, not to replace that institution with some other, wholly untried means of defense.{EN-726} Indeed, "*the good people of* Virginia" did not learn only through their Declaration of Rights in 1776

> THAT all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; * * *
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> * * * [t]hat all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them[; and]
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> * * * * *

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[616] For an overview of Virginia's Militia in that era, *see* James B. Whisker, *The American Colonial Militia, Volume 5, The Colonial Militia in the Southern States, 1605-1785* (Lewiston, New York: The Edwin Mellor Press, 1997), at 5-93.

> * * * [t]hat a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state[;][{EN-727}]

or only in 1784 and 1785 that "the defence and safety of the commonwealth depend upon having its citizens properly armed and taught the knowledge of military duty";[{EN-728}] but knew from at least as early as 1723 that "a due regulation of the Militia is absolutely necessary for the defence of this country".[{EN-729}]

The practical reason was that, just as in 1705, throughout the entire *pre*-constitutional era the Militia could always "be ready on all occasions for the defence and preservation" of Virginia.[{EN-730}] Not just from 1727 through 1753, after all, was it apparent that

> the frontiers of this dominion, being of great extent, are exposed to the invasions of foreign enemies, by sea, and incursions of *Indians* at land, and great dangers may likewise happen by * * * insurrections * * * ; for all which, the militia * * * is the most ready defence. And * * * the militia of those counties, where any of the dangers aforesaid shall arise, must necessarily be first emploied, and may, by the divine assistance, be able to suppress and repel such insurrections and invasions, without obliging that of other counties to be raised[.][{EN-731}]

Thus, in just these few enactments, Virginia summed up the essentials of community self-preservation for a free and self-governing society:

- "[A]ll power is vested in * * * the people"; and "magistrates are their trustees and servants, * * * at all times amenable to them".
- A "well regulated militia, composed of the body of the people," is "the proper, natural, and safe defence of a free state", and "absolutely necessary for the defence of the country".
- All men are to possess, not just "armes and habiliments", but "armes and habiliments *for war*"—that is, *of contemporary military grade*—which are always to be "kept fixed and fitt for service".
- Besides being "properly armed", the citizens are to be "taught the knowledge of military duty", "trained to arms", subjected to "a due regulation", and "reduc[ed] * * * under a proper discipline".
- They are "to be ready on all occasions for the defence and preservation" of their community. And,
- When so organized, the people themselves provide "the most ready defence"—which can be especially effective, because they are deployed

throughout each Local jurisdiction, if possible to anticipate and in any event to meet "any of the dangers" when, where, and howsoever they "shall arise".

Coupled with the undeniable practical truth that "'[p]olitical power grows out of the barrel of a gun'",[617] and the declaration in the Second Amendment that "the right of the people to keep and bear Arms, shall not be infringed", the first point establishes that the people must always retain personal control over firearms, in defiance of any claim by mere public officials to disarm them.

The second point is expressly and exactly what the Second Amendment emphasizes: "[a] well regulated Militia, being necessary to the security of a free State".

The third point undergirds the declaration implicit in the Amendment: that, because "the right of the people to keep and bear Arms" must conduce at least to the maintenance of "[a] well regulated Militia", *the people must possess "Arms" suited, not simply for individual self-defense, let alone for so-called "sporting purposes", but preëminently for the serious work of community self-preservation against every enemy, domestic as well as foreign, from private criminals to rogue public officials to invading armies—and therefore must possess "Arms"* ***at least as good for military purposes*** *as the "Arms" carried by equivalent troops in this country's regular Armed Forces.*

And the remaining three points are inherent in the very concept of a "Militia" as it developed in American experience prior to the Amendment's ratification.

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[617] *Quotations From Chairman Mao*, *ante* note 28, at 61.

CHAPTER FIFTEEN

Virginia's *pre*-constitutional Militia was a governmental institution which proved itself the foundation for popular sovereignty.

As events demonstrated on and after 19 April 1775, in *pre*-constitutional America (as elsewhere throughout the modern world) "'[p]olitical power grows out of the barrel of a gun'".[618] In Virginia, as well as in Rhode Island and the other Colonies, "the good People" (as the Declaration of Independence and Virginia's own Declaration of Rights styled them in 1776) held guns in their own hands. Therefore, in the ultimate analysis, where they stood was the locus of political power—as it always should be in a self-governing commonwealth. Yet, even during periods of actual fighting, no more than Rhode Island or any other Colony or independent State was Virginia home to some species of martial anarchy. For, just as in Rhode Island and elsewhere throughout America, Virginia's *pre*-constitutional Militia was a strictly *governmental* institution.

A. Neither "common law", nor the traditional authority of Sheriffs, nor private action the foundation of the Militia. Just as did almost every other Colony and every independent State, Virginia first "settled" and then "regulated" her *pre*-constitutional Militia,[619] not by reliance on "common law", the authority of County Sheriffs once-traditional in England, or least of all the independent and idiosyncratic initiatives of private individuals and groups, but (as this study demonstrates) *by statute after statute after statute from Virginia's own legislature*.

1. Not the product of "common law". "Common law" (in the sense of the *lex non scripta*) played no greater rôle in the establishment, organization, and operation of Virginia's Militia than it did of Rhode Island's—which was essentially little to none at all.[620]

2. Not subordinate to Sheriffs. Contrary to romantic notions circulating among some deluded patriots today—that Sheriffs enjoy unique status and powers under America's constitutional system—from Virginia's earliest Colonial days the provision of "homeland security" did not center around her Sheriffs exclusively or even in particular, but instead embraced the entire community:

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[618] *Id.*

[619] On the distinction between these terms, *see ante*, at 100-102.

[620] *See ante*, at 108-113.

> • [1676] "WHEREAS of late there hath bin many unlawfull tumults, routs and riotts in divers parts of this country, for prevention of such insolences, and punishing offenders in that kind, * * * *Be it therefore enacted* * * * , that every respective officer and magistrate within this countrey, civill and military, from a constable to the highest civill magistrate, and from the lowest to the highest militia officer, be hereby impowered and strictly commanded for the suppressing and punishing all such unlawfull assemblies, routs, riotts and tumults, to use all lawfull wayes, authoritie, power and command, and whosoever shall be at any time disobedient to any the lawfull commands of any such civill or military officer or magistrate either in assisting, suppressing, quieting and punishing of any unlawfull assemblyes, routs or tumults * * * shall be accounted, judged and punished as mutinous and rebellious."{EN-732}
>
> • [1699] "That if any pirates, privateers or sea robers, or any other persons suspected to be such shall land and put on shoar * * * in this his majestyes collony and dominion upon notice given or knowledge thereof, all officers civill and military are hereby required * * * to raise and levy such a number of well armed men as he or they shall judge necessary for the seizing, apprehending and carrying to goal of all and every such person or persons[.]"{EN-733}

That the duty of community self-defense, and the power to carry it out, ran "from a constable to the highest civill magistrate, and from the lowest to the highest militia officer"—to whatever number of "well armed men" it might be "necessary" to muster in order to deal with the danger at hand—evidences that, from the start, "homeland security" in Virginia was in principle *everyone's* responsibility, not as it is today almost everywhere throughout America the province of just a few "leaders" who command professional "security units" separate from, independent of, and increasingly divorced from and even antagonistic to the people.

a. In *pre-*constitutional Virginia Sheriffs enjoyed no exalted authority, but were mere appointees of the Governor and his Council, exercising whatever powers—but no more than those—the General Assembly assigned to them.{EN-734} (Today, in Virginia Sheriffs are constitutional elected officials; but their specific "duties * * * shall be prescribed by general law or specific act".[621])

b. Early on, Virginia's Sheriffs were sometimes delegated specific authority to deal with the recurrent problem of runaway slaves:

> [1691] "WHEREAS many times negroes, mulattoes, and other slaves unlawfully absent themselves from their masters and mistresses service, and lie hid and lurk in obscure places killing hoggs and

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[621] Const. of Virginia art. VII, § 4, ¶ 1.

> committing other injuries to the inhabitants of this dominion, * * * *Be it enacted* * * * that in all such cases upon intelligence of any such negroes, mulattoes, or other slaves lying out, two of their majesties justices of the peace of that county * * * shall be impowered and commanded * * * to issue out their warrants directed to the sherrife * * * to apprehend such negroes, mulattoes, and other slaves, which said sherriffe is * * * required upon all such occasions to raise such and soe many forces from time to time as he shall think convenient and necessary for the effectual apprehending such negroes, mulattoes and other slaves[.]"{EN-735}

But this was a special statutory grant, not a matter of any Sheriff's inherent authority (in which case, no statute would have been required). And later on, Virginia assigned to her Militia the exclusive responsibility for "slave patrols".[622]

c. Similarly, Virginia's Sheriffs were sometimes empowered to summon Militia officers to serve on draft boards:

> [1757] "[T]he sheriff of every county within this colony, and the serjeants of the city of Williamsburg and borough of Norfolk, shall cause to be summoned the several justices [of the peace], and field-officers, and captains of their respective counties, city and borough * * * [who] shall * * * hold a court, and examine and enquire into the occupation and employment of * * * inhabitants * * * between the age of eighteen and fifty years * * * : And the said courts are * * * required to prick down all such able-bodied persons * * * found loitering and neglecting to labor for reasonable wages; all who run from their habitations, leaving wives or children without suitable means for their subsistance, and all other idle, vagrant, or dissolute persons, wandering abroad without betaking themselves to some lawful employment * * * . And in a case a sufficient number of such persons * * * cannot be found * * * the said courts are hereby impowered to prick down such able-bodied men, not being freeholders or house-keepers qualified to vote at an election of burgesses, as they shall think proper * * * and * * * shall * * * draft out * * * one man for every forty effective soldiers in the militia of each county, city and borough."{EN-736}

And Sheriffs were sometimes called upon to round up individuals who might be suitable for impressment into military service:

> [1740 and 1754] "That * * * the justices of the peace of every county within this colony * * * [may] raise and levy such able-bodied men as do not follow or exercise any lawful calling or employment, or have not

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[622] *See post,* at 339-343, 392-395, and 718-723.

> some other lawful and sufficient support and maintenance, to serve * * * as soldiers * * * . And to require and command all sherifs, under sherifs and constables * * * to be aiding and assisting them * * * ; and for that purpose, to issue out warrants * * * requiring and commanding such sherifs, under sherifs, and constables * * * to make search * * * for all such persons, as they can find, who are, or shall appear to them, to be within the description of this act; and to bring before the said justices, all such persons[.]"{EN-737}

But these, too, were special statutory grants of authority, without which the Sheriffs would have been powerless in the premises.

d. Otherwise, Sheriffs performed simply their workaday duties of enforcing judgments against debtors when they collected the fines and assessments courts-martial and Militia officers laid upon Militiamen delinquent in their duties or desirous of obtaining, by payment of a monetary penalty, a practical exemption from some aspect of their service:

> • [1705] "That the severall fines and penaltys * * * be levyed by distress and sale of the goods and chattles belonging to the defaulter or offender by warrant from the * * * chief officer of the county to the sheriff (in case the defaulter or offender refuse to pay the same in specie upon the ffield officers and captains order without further process)[.]"{EN-738}

> • [1723] "That where any person on whom any fine shall be laid * * * shall fail or refuse to pay the same to the sheriff, in specie, * * * the sheriff * * * [shall] levy the same by distress and sale of the offender's goods * * * . And if * * * the sheriff * * * can find no goods whereon to make distress, * * * the sheriff * * * [shall] cause the body of the said offender to be committed to the county goal, without bail or mainprize, until he shall satisfy the same fine, and all fees incident, in the same manner, as in executions served at common law."{EN-739}

> • [1755] "And after the holding of every such [Militia] court[-martial], * * * the sheriff of the county * * * [shall] demand and receive the money or tobacco * * * charged, of the [delinquents] * * * and in case of nonpayment * * * levy the same by distress and the sale of the goods of the person refusing * * * ; and where any delinquent shall remove out of the county, before he hath paid and satisfied all fines laid on him, * * * and shall not leave sufficient effects in the county, to satisfy the same, then the * * * clerk shall send copies of the * * * orders against such delinquents to the sheriff of the county, into which he or they shall be removed, and such sheriff is * * * required to collect, levy and account for the same[.]"{EN-740}

> • [1757, 1759, 1762, 1766, and 1771] "[T]he field officers and captains of every county * * * [shall] meet at the court house * * *

following the general muster in September or October every year, * * * to hold a court martial * * * to enquire * * * of all delinquents * * * for absence from musters or appearing without arms, powder, or ball; * * * and to order the fines * * * to be levied upon all delinquents who shall not make out some just excuse, for not performing their duty * * * : And * * * the sheriff of the county * * * is * * * required to demand and receive the money * * * charged * * * , and in case of non-payment * * * to levy the same by distress and sale of the goods of the persons refusing * * * ; and where any delinquent shall remove out of the county before he hath paid and satisfied all fines * * * and shall not leave sufficient effects in the county to satisfy the same, * * * the * * * clerk shall send copies of the * * * orders against such delinquents to the sheriff of the county into which he or they shall be removed, and such sheriff is * * * required to collect, levy and account for the same[.]"{EN-741}

• [1781] "[W]here any quaker or menonist shall be allotted to any division of the militia, who is to perform the succeeding tour of duty, he shall not be compelled personally to serve the same, but * * * the commanding officer * * * [may] cause to be levied on all the society of quakers and menonists in such county according to their assessable property, by warrant * * * directed to the sheriff * * * , such sum * * * of money as he shall think sufficient to procure a substitute for each quaker or menonist whose tour of duty it is[.]"{EN-742}

• [1784 and 1785] "[S]hould any person [in the Militia] * * * charged with fines, fail to make payment, * * * the sheriff is hereby authorized to make distress and sale therefor, in the same manner as is directed in the collection of taxes."{EN-743}

e. In the performance of these responsibilities on behalf of the Militia, though, Virginia's Sheriffs enjoyed no autonomy, discretion, or any other special authority—rather, they were expressly made subject to punishment for their own derelictions of duty:

• [1738] "[I]f any sheriff shall refuse to receive the orders of any court-martial offered to him * * * , or to collect and levy the fines therein mentioned; such sheriff * * * shall be fined, for such refusal, fifty pounds current money[.]"{EN-744}

• [1755, 1757, 1759, 1762, 1766, and 1771] "[I]f any sheriff shall refuse to receive the orders of any court martial offered to him, * * * or to collect and levy the fines * * * , such sheriff * * * shall be fined for every such refusal, one hundred pounds[.]"{EN-745}

• [1762, 1766, and 1771] "[W]hereas it hath been doubted whether the sheriffs of York and James City are by law obliged to obey the orders of the courts-martial of the * * * city of Williamsburg, in receiving or collecting the fines to which the inhabitants of the said city may be

> subject,[623] * * * *Be it therefore enacted*, * * * that * * * it shall and may be lawful to and for the courts-martial * * * to order and direct either the sergeant of the said city, or the sheriffs of the said counties of York and James-City, to receive and collect all such fines as shall be inflicted and ordered to be levied by them on such of the inhabitants of the said city as shall reside in their respective precincts; and thereupon the said serjeant or sheriff, respectively, shall proceed * * * to collect such fines, and shall be accountable for them to the courts-martial * * * , and shall be subject and liable to the same prosecution, in case of their failing, neglecting, or refusing, to collect the said fines, as are prescribed, directed and appointed, in the like cases, for the counties of this colony."{EN-746}
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> • [1781] "[A]ny sheriff * * * failing to perform his duty" in collecting moneys levied against Quakers and Menonites to procure substitutes for their service in the Militia "shall forfeit and pay five thousand pounds of tobacco[.]"{EN-747}

f. Perhaps most consequential, although Virginia's Militia statutes exempted various other civil officers from certain Militia duties, *they never explicitly exempted Sheriffs in any way at all*. In 1692, the Governor and Council "declared that it is reasonable Counstables and headboroughs should be * * * Exempted from Musters, dureing the time they remain in the said Offices",{EN-748} but did not exempt Sheriffs. The statute of 1705 withheld any power from Militia officers "to list [in the Militia] * * * any constable during his being such", but recited nothing whatsoever about Sheriffs.{EN-749} And no exemptions for either Constables or Sheriffs appeared in the Militia statutes of 1723,{EN-750} 1738,{EN-751} 1755,{EN-752} 1757 and 1759,{EN-753} 1762,{EN-754} 1766,{EN-755} 1775,{EN-756} 1777,{EN-757} or 1784 and 1785.{EN-758}

Interestingly, though, the Militia Acts of 1705, 1723, 1738, 1762, 1766, and 1771 did explicitly exempt *Justices of the Peace* in one manner or another—the Acts of 1705, 1723, and 1738 exempting any person who "shall be, or shall have been" in that office; whereas the Acts of 1762, 1766, and 1771 circumspectly privileged only those "who are really and *bona fide* acting justices of their respective counties (except such as now do, or hereafter shall, bear any commission as officers of the militia in their respective counties)". And, from 1705 onwards, "no person shall at any time * * * be capable to execute or enjoy the office of sheriff of any county * * * unless such person, at the time of his entering into and upon the said office, shall be a justice of the peace in the same county".{EN-759} So, under the Acts of 1705, 1723, and 1738, a Sheriff could have claimed an implied exemption from some Militia service, because he necessarily "shall have been" a Justice of the Peace before entering upon the office of Sheriff (unless, of course, he had also borne a commission as an officer in the Militia).

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[623] Apparently, in light of the preceding statutes, this was doubted nowhere else.

Such an exemption was narrow, however. For under the Act of 1705, although Justices of the Peace were not to be "list[ed]", they were "required and enjoyned to provide and keep at their respective places of abode a troopers horse, furniture, arms and ammunition * * * and to produce or cause the same to be produced in the county where they respectively reside yearly, and every year at the generall muster"; and "in case of any rebellion or invasion" they were "obliged to appear * * * and serve in such stations as are suitable for gentlemen, * * * under the same penaltys as any other * * * persons * * * listed in the militia".{EN-760} To that extent, they were fully active members of the Militia. And under the Act of 1723, although Justices of the Peace were not ordered "personally to appear at any musters", they were required "to find and provide one able-bodied white man, a good horse, and * * * trooper's accoutrements * * * who shall constantly appear and exercise at all musters".{EN-761} Presumably, had the substitute not been forthcoming, the exemption would have been forfeited. Under the Act of 1738, too, although Justices of the Peace were not compelled "to a personal attendance at musters", they were required "to send one able-bodied man, not being a convict, or man and horse, armed and accoutred, * * * constantly to appear, and exercise at musters".{EN-762} Presumably, too, the benefit of this exemption depended upon satisfaction of the condition. So, under these Acts, with respect to *some* duties Sheriffs who qualified for exemption on the basis of prior service as Justices of the Peace *were* members of the Militia, and upon the possible failure of their exemption would have been subject to *all* of the duties incumbent upon rank-and-file members of the Militia who had no claim to any exemption.

The Militia Acts of 1755, 1757, 1759, 1775, 1777, 1784, and 1785 did not mention either Justices of the Peace or Sheriffs. So the latter had no basis on which to claim an exemption. Under the Acts of 1762, 1766, and 1771, though, present *but not prior* service as a Justice of the Peace entitled an individual to an exemption. So Sheriffs could have claimed an exemption only if an individual could simultaneously have held the offices of Sheriff *and* Justice of the Peace. Of course, this, too, would have amounted to only a limited exemption. For under the latter Acts Justices of the Peace were excused from normal mustering, but nonetheless were required to "provide complete sets of arms * * * for the use of the county", and to "always keep in [their] house[s] * * * such arms, accoutrements, and ammunition, as are * * * required to be kept by the militia".{EN-763} Nothing, however, indicates that the two offices of Sheriff and Justice of the Peace could have been occupied *by the very same individual at the very same time*. Indeed, as Blackstone observed with respect to the powers of a Sheriff, "[n]either may he act as an ordinary justice of the peace during the time of his office: for this would be * * * inconsistent; he being in many respects the servant of the justices".[624] As was

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[624] *Commentaries on the Laws of England, ante* note 142, Volume 1, at 344 (footnote omitted).

just observed, from 1705 onwards anyone seeking the office of Sheriff in Virginia had to be a Justice of the Peace in that County *at the time of his becoming Sheriff* there. But it was never made a condition upon, or a privilege of, an individual's being a Sheriff that he should or could *remain* a Justice of the Peace as well during his term as Sheriff. Being a Justice of the Peace was merely a qualification for becoming a Sheriff. By having become a Sheriff, the individual did not conflate the two offices.

So, throughout the *pre*-constitutional period, Sheriffs were always members of the Militia (in the sense of being subject to at least *some, and often all*, of its duties)—although at times they qualified for the limited exemptions certain Acts extended to Justices of the Peace. That their exemption under some of the statutes derived from *another* office, however, evidences the rather lowly position Sheriffs actually held *vis-à-vis* the Militia—hardly in keeping with the misguided notion all-too-current among many contemporary patriots that Sheriffs somehow are entitled to exercise plenary law-enforcement authority within their Counties.

g. In Virginia it would be more to the point as a matter of historical parallels—yet nonetheless in the final analysis pointless in practice—for misguided patriots to focus on the office of *Constable*, rather than of Sheriff, as their supposed supreme Local authority for law-enforcement. In Virginia today, after all,

> [a]ny locality may, by ordinance, provide for the organization of its authorized police forces. Such forces shall include a chief of police, and such officers and other personnel as appropriate.
>
> When a locality provides for a police department, the chief of police shall be the chief law enforcement officer of that locality. However, in towns, the chief law-enforcement officer may be called the town sergeant.[625]

Thus, in any Locality which provides for an organized "police force[ ]", by statute the Sheriff is *not* the chief law-enforcement officer. Moreover, in contemporary Virginia,

> [t]he police force of a locality is hereby invested with all the power and authority which formerly belonged to the office of constable at common law and is responsible for the prevention and detection of crime, the apprehension of criminals, the safeguard of life and property, the preservation of peace and the enforcement of state and local laws, regulations, and ordinances.[626]

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[625] Code of Virginia § 15.2-1701.

[626] Code of Virginia § 15.2-1704.

Yet, even if the members of modern Local "police forces" in Virginia could be assimilated in legal principle to "constable[s] at common law", they still would not automatically qualify for some special exclusion from, let alone position superior to, the Militia. For (as was just explained), from 1723 through the end of the *pre*-constitutional era, Virginia's statutes granted Constables *no* exemption whatsoever from Militia duty.

h. Nonetheless, this legal history does indicate a possible *constitutional* status for Sheriffs *incorporated within modern revitalized Militia*, which they certainly could never otherwise claim. After all, the Constitution does not contain the noun "Sheriff" or, for that matter, the nouns "Constable", "policeman", "law-enforcement officer", or "emergency-services worker". So these and kindred officials can assert no *specifically constitutional* authority in their own right. Distinguishably, "the land and naval Forces" of the United States enjoy explicit constitutional sanction, inasmuch as Congress may exercise the powers "[t]o raise and support Armies", "[t]o provide and maintain a Navy", and "[t]o make Rules for the Government and Regulation of [both]",[627] and the President is declared to be "Commander in Chief of the Army and Navy of the United States".[628] Even so, the Constitution does not *require* Congress "[t]o raise and support Armies" or "[t]o provide and maintain a Navy", if it should determine in good faith that neither establishment is "necessary and proper"[629]—and it explicitly enables each new House of Representatives alone to disestablish the Army, by refusing "an Appropriation of Money to that Use",[630] an effective legislative veto which in some situations each new House can impose on the maintenance of a Navy, too. In any event, no Sheriff (or other "law-enforcement officer" in the General Government or the States) has ever been considered part of the regular Armed Forces, and therefore can derive no constitutional status from them.

Distinct from Sheriffs, the Militia *are* explicitly incorporated within the Constitution of the United States.[631] And the Constitution devotes more words to setting out Congress's and the States' powers with respect to the Militia than it does to setting out Congress's powers with respect to the Army and the Navy, thereby attesting to the importance of the Militia within the federal system. Moreover, unlike "the land and naval Forces", which Congress—at the insistence of the House of Representatives alone—may refuse to establish at all or may quickly disestablish by cutting off "Appropriation[s]", the Militia are *permanent* constitutional

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[627] U.S. Const. art. I, § 8, cls. 12 through 14. *See also* U.S. Const. amend. V.

[628] U.S. Const. art. II, § 2, cl. 1.

[629] U.S. Const. art. I, § 8, cl. 18.

[630] U.S. Const. art. I, § 8, cl. 12. *See* U.S. Const. art. I, § 9, cl. 7.

[631] In Virginia, Sheriffs are constitutional elected officers. Const. of Virginia art. VII, § 4.

institutions over the continued existence of which the General Government exercises no power whatsoever, because the Militia are "the Militia *of the several States*" not "the Militia *of the United States*". Neither can the States dispense or do away with their Militia—first and foremost, because the Militia are "necessary to the security of a free State",[632] which no State may imperil either for herself alone or for the sister States which depend upon her support; and second, because the Militia are forces upon which the General Government is always entitled to call in certain circumstances,[633] and therefore which the States must maintain in a condition of proper constitutional regulation at all times.[634] So, if Sheriffs and other "law-enforcement officers" were included, as they once were and should now be, in revitalized "Militia of the several States"—in the form of specialized units, somewhat along the lines of the "Minutemen" of *pre-*constitutional times—they could exercise some of the Militia's *constitutional* rights, powers, privileges, and immunities, as well as performing some of the Militia's duties. Indeed, when the Militia were properly revitalized, the statutes could assign to Sheriffs positions of high command in the Militia that would authorize them to perform the functions that not a few contemporary Americans desire that they perform now, but as to which they enjoy no constitutional, and in most cases little statutory, authority.[635]

3. Not a private establishment. Finally, as has been demonstrated for Rhode Island,[636] Virginia's *pre-*constitutional Militia could not possibly have been in any sense a "private" establishment, because from its inception it incorporated by force of law every able-bodied adult free male in the community, leaving nothing from which equivalent, but separate, "private" organizations of any consequence could have been formed.[637] For a prosaic example, when in 1758 a "Company [of Rangers] was not raised *in a Manner conformable to Law*" the Governor "discharge[d] the said Company, but employ[ed] the Men * * * as Part of the Militia, in garrisoning some of the Forts."{EN-764}

B. The central rôle of the Governor in the Militia. The leading rôle Virginia's Governor played in implementing the General Assembly's regulations of the Militia emphasized the latter's governmental character.

1. Other than under the most extraordinary conditions of political flux,[638] private individuals were never allowed to "appoint" themselves or others as

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[632] U.S. Const. amend. II.

[633] U.S. Const. art. I, § 8, cl. 15; art. II, § 2, cl. 1, and § 3.

[634] *Compare* U.S. Const. art. VI, cls. 2 and 3 *with* amend. II.

[635] *See post*, at 1276-1277 and 1291-1293.

[636] *See ante*, Chapters 4 and 5.

[637] *See post*, Chapter 16.

[638] *See post*, at 567-597.

purported "officers" of (or, for that matter, simply as enlisted men in) Virginia's Militia. Rather, from the very beginning, in keeping with his unique position as the King's representative and chief executive officer in the Colony—and thus the delegate of the King's "undoubted right" to "the sole supreme government and command of the militia within all his * * * realms and dominions"[639]—Virginia's Governor commissioned her Militia's officers. These included the various County Lieutenants or "Camand[r]s in Cheife" whom the Governor "Nominated and approved off",{EN-765} "[f]or the better moddling the militia of this Colony, & bringing them under a more regular Discipline".{EN-766} In addition, the Governor approved commissions for officers of lesser rank.{EN-767} This practice continued throughout the *pre-*constitutional era. Typically, though, the Governor did not make his appointments arbitrarily and without consideration of Local conditions and sensibilities, but instead sought nominations from Local "Comand[rs] in Chiefe" "of fitt persons to be Commissionated" officers in the Militia in those areas.{EN-768} This practice, too, continued throughout the *pre-*constitutional era.{EN-769} Similarly, the Governor was directly empowered by the King to remove Militia officers, albeit for just cause and with due process of law—as a Royal instruction in 1688 made clear: "[A]ll Military Officers upon misbehaviour and unfaithfulness in the Execution of their Trust you [that is, the Governor] shall suspend or discharge as shall appear upon due Examination agreeable to Justice[.]"{EN-770}

2. Under English law, "the sole supreme government and command of the militia" may have been the King's "undoubted right", as to which "both or either house of parliament cannot, nor ought to, pretend".[640] But as the division of authority evolved in Virginia (and elsewhere throughout *pre-*constitutional America), ultimate control passed from the Governor to the General Assembly. From a very early date the General Assembly empowered "every commander of the severall plantations" in Virginia "to levy a partie of men out of the inhabitants of that place so many as may well be spared without too much weakening of the plantations and to imploy these men against the Indians, when they shall assault us neere unto our habitations".{EN-771} Yet, as with commissioning of officers, the Governor always played a significant part in the Militia's operations.

As Commander in Chief, Virginia's Governor was authorized to raise, call forth, and deploy her Militia (as well as all of her other military forces):

> • [1684] "And for the forming of a standing force for the more sure and safe guarding the frontiers, and preventing the murthers, depredations, incurtions and spoiles by the Indians, *Bee it enacted* * * * That four troops of horsemen * * * be raised * * * ; but in case the full

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[639] W. Blackstone, *Commentaries on the Laws of England, ante* note 142, Volume 1, at 262-263.

[640] *Id.*

number * * * compleatly mounted, armed and provided * * * cannot be raised by such as shall voluntarily offer themselves for that service, that then his excellency the governour * * * [may] issue forth his warrant for the raiseing soe many men * * * as shall be wanting[.]"{EN-772}

• [1705, 1727, 1732, 1734, 1738, 1740, 1744, 1748, 1753, 1757, 1758, 1759, 1761, 1762, 1764, 1766, 1769, and 1772] "That upon any invasion of the enemy by sea or land, or upon any insurrection, the governor * * * have full power to levy, raise, arm and muster such a number of forces out of the militia * * * as shall be thought requisite and needfull for repelling the invasion or suppressing the insurrection, and the same being raised, to order, direct, march, employ, continue, discharge and disband, as the occasion shall require, or the cause of danger ceases for which they were raised."{EN-773}

• [1757, 1758, 1759, 1761, 1762, 1764, 1766, 1769, and 1772] "And to the end a sufficient number of men may be appointed for guarding the batteries erected in the several rivers of this dominion, and to assist in the better managing the great guns there mounted, when occasion shall be, *It is hereby further enacted*, That it shall * * * be lawful for the governor * * * to appoint and assign such a number of the militia as he shall think fit to attend the said batteries[.]"{EN-774}

• [1780] "[W]hereas by the arts of the enemy joined by disaffected persons, riots have taken place in some counties injurious to the peace and dignity of government; to prevent such pernicious practices in future, and in order to aid the civil power in the due and effectual execution of the laws, *Be it enacted*, That wherever the governour shall have satisfactory information that any persons within this commonwealth shall be inclined to mutiny or riot, * * * he is * * * empowered to order one or more troop or troops of horse to be raised * * * in any county where such persons shall so resist or assemble together with an intention to resist."{EN-775}

• [1784 and 1785] "And whereas, it is necessary that adequate powers be vested in the executive for calling forth the militia and resources of the state, in cases of invasion or insurrection, or upon any probable prospect of such invasion or insurrection;

" * * * *Be it further enacted*, That the governor, with advice of the council, be authorized and empowered, on any such invasion or insurrection, or probable prospect thereof, to call forth such a number of militia, and from such counties as they may deem proper."{EN-776}

• [1787] "That the governor with the advice of council, shall be empowered to order out into actual service from time to time, so many scouts and rangers in any of the counties on the western frontier * * * , the expence whereof shall be defrayed out of the funds provided * * * for the support of government."{EN-777}

3. Officers and men in the Militia were subjected to fines for failing, neglecting, or refusing to report to, or to obey orders from, the Governor:

> • [1757, 1758, 1759, 1761, 1762, 1764, 1766, 1769, and 1772] "[I]f any officer of the militia who upon occasion of any invasion or insurrection, shall receive any orders or informations from the governor * * * , either for calling together the soldiers or marching them to any particular place, shall neglect or refuse to execute such orders or instructions in the best manner he is capable, every such officer so neglecting or refusing, shall respectively forfeit and pay the sums following, that is to say, every lieutenant of a county the sum of two hundred pounds; every lieutenant-colonel the sum of two hundred pounds; every major the sum of one hundred pounds; every captain the sum of seventy five pounds; every lieutenant the sum of fifty pounds; every ensign the sum of twenty five pounds; every serjeant or corporal twenty pounds; and every soldier who shall be summoned to appear * * * and shall fail so to do, or shall fail to bring with him his arms, with one pound of powder and four pounds of ball, or shall refuse to march, shall forfeit and pay the sum of twenty pounds[.]"{EN-778}
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> • [1784 and 1785] "That the following forfeitures and penalties shall be incurred for delinquencies, viz. By the county lieutenant * * * for failing * * * to transmit any recommendations of an officer * * * to the governor, * * * to make a general return of his militia to the governor * * * shall, for each and every such offence or neglect, forfeit and pay twenty pounds; failing to send into actual service any militia called for by the governor * * * , fifty pounds: By a lieutenant colonel commandant, for * * * failing to call forth from his regiment, with due dispatch, any detachment of men and officers, armed and equipped, as shall * * * be required * * * on any call from the governor, * * * twenty-five pounds: By a major for * * * failing to repair to his rendezvous when summoned upon any call of the governor, * * * he shall forfeit and pay sixteen pounds: By a captain, for * * * failing to call forth such officers and men, as the commanding officer shall * * * order from his company, upon any call from the governor, * * * or failing on any such occasion to repair to the place of rendezvous, he shall forfeit and pay twelve pounds: By a subaltern officer, for * * * failing to repair to his place of rendezvous armed as required, when ordered upon any call from the governor * * * he shall forfeit and pay six pounds. * * * By a non-commissioned officer or soldier, for * * * failing to repair to his rendezvous, when ordered upon any call from the governor * * * , he shall forfeit and pay two pounds."{EN-779}

4. Although Local Captains of the Militia were, of necessity, empowered to act on their own initiatives in emergency situations,[641] they were also enjoined to

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[641] *See post,* at 549-555.

report such circumstances immediately to the Governor, obviously to enable the latter to appraise the situation and issue his own orders to the Militia:

> • [1684] "[U]pon discovery, notice or advice of the approach * * * of an enemy, the * * * captain * * * [shall] give speedy advice thereof to the governour * * * , and in the mean time to attend the motion of the enemie, only unless the enemie dureing that time shall first committ some act of hostility, either in burning or in forcible entering into our houses, or by killing, maiming or carrying away any of the inhabitants, and then in such case to engage and destroy them, if he see cause[.]"{EN-780}

> • [1727, 1732, 1734, 1738, 1740, 1748, and 1753] "[E]very officer of the militia, to whom notice shall be given of any insurrection or invasion, shall * * * raise the militia under his command, and * * * send immediate intelligence to the county-lieutenant * * * and to the next militia officer in the same county, informing them at the same time in what manner he intends to proceed; and shall, in the mean time, keep the militia, under his command, under arms, until he receives orders * * * . And every county lieutenant * * * to whom such intelligence shall be given * * * shall forthwith dispatch an express to the governor * * * . And until orders shall arrive from the governor, shall draw together the militia of his county, in such place or places, as he shall judge most convenient for opposing the enemy."{EN-781}

> • [1757, 1758, 1759, 1761, 1762, 1764, 1766, 1769, and 1772] "[E]very officer of the militia, to whom notice shall be given of any invasion or insurrection, shall raise the militia under his command, and send intelligence * * * to the chief commanding office in the county, and shall moreover immediately proceed to oppose the enemy according to the orders he shall receive * * * until further orders arrive from the governor * * * , and such * * * chief commanding officer shall give immediate notice to the officers of the militia of the next adjacent counties of such invasion or insurrection, and the situation and circumstances of the enemy * * * ; and * * * [the chief commanding officer of each adjacent county] shall immediately raise the militia of his county and march part thereof, not exceeding two-thirds, against such enemy, if the circumstances of the case shall require it, * * * and * * * shall cause the remaining part of his militia * * * to remain in arms in the county for the defence and protection thereof, until he shall receive orders from the governor * * * : And every * * * chief commanding officer * * * to whom such intelligence shall be given * * * shall forthwith dispatch an express to the governor * * * , notifying the danger, and * * * the strength and motions of the enemy[.]"{EN-782}

5. The Governor was also authorized to deal with peculiar situations, such as denying certain privileges to conscientious objectors where and when exigencies demanded it:

> [1784 and 1785] "[T]his act shall not be construed to deprive the people called quakers[642] of any privilege granted to them by an act of assembly, intituled, 'An act to exempt quakers from attending musters.' *Provided also*, That the governor, with advice of council, shall have power * * * to suspend the operation thereof in the counties on the western waters, so long as they may think proper."{EN-783}

Or granting special privileges to members of certain religious denominations, as a means of reducing sectarian conflicts within Virginia's military forces:

> [1777] "[W]hereas there are within this commonwealth some religious societies, particularly Baptists and Methodists, the members of which may be averse to serving in the same companies or regiments with others, and under officers of different principles, though they would willingly engage in the defence of their country under the command of officers of their own religion: *Be it enacted*, That the governour, with the advice of the privy council, may * * * appoint proper persons of either of the said religious societies to enlist any members of the same who will engage to enter as volunteers * * * , and such volunteers shall be formed into separate companies, and may choose their own captains, lieutenants, and ensigns; and when a sufficient number of companies shall be raised to form a regiment, the governour, with the advice of the privy council, may appoint proper field officers out of their own societies to such regiment[.]"{EN-784}

6. Because of the apparently broad powers that Governors in Virginia as well as other Colonies and then independent States exercised over the Militia in *pre*-constitutional times, contemporary proponents of revitalizing "the Militia of the several States" are often assailed with the dire prediction that the Militia will simply become new tools in the hands of rogue State Governors, or a rogue President of the United States, or rogue Members of Congress, under the dictates of which WE THE PEOPLE will be made to oppress themselves. An archtypical fear is that the Militia of one State might be marched off into some other State to put down the people there, or somehow convinced or compelled to tyrannize over the people within its own State. These nightmares have next to no historical basis anywhere—and certainly not in Virginia. For, by their very delineation, the powers over the Militia that Virginia's General Assembly delegated to her Governor also entailed corresponding disabilities with respect to any actions in excess or in contradiction of those powers. And not always satisfied with that sort of implicit control, in areas of crucial concern the General Assembly imposed express limitations.

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642 The Act of 1785 applied to "the people called quakers or menonists".

a. Virginia's Militia was usually not to be deployed at a far remove from her own boundaries:

> • [1742] When considering a request of the Governor of Maryland for military assistance against certain hostile Indians, the Governor and Council agreed that "it will be very difficult to perswade [Virginia's Militiamen] to pass over Patowmack River or Chesapeak Bay", because "the government of Virginia can not compel the militia, contrary to law, to march out of the colony".{EN-785}
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> • [1755] "[N]othing * * * shall * * * impower the governor * * * to lead or march the militia of this colony, or cause them to be led or marched, more than five miles beyond where the inhabitants of this colony, shall be settled on the western frontiers."{EN-786}
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> • [1756] "That nothing * * * shall * * * impower the governor * * * , or any other officer, to lead or march the soldiers hereby raised, or cause them to be led or marched out of this colony."{EN-787}

Virginia's Militia, after all, was *that Colony's (or State's) own* Militia, raised first and foremost to provide *Virginia* with security, not to be dragooned out of her territory in wide-ranging adventures without lawful and very specific authorization. The rule was different for Virginia's regular troops, though, as evidenced in 1775 when the Convention of Delegates declared: "whereas it may be necessary, for the publick security, that the forces to be raised * * * should, as occasion may require, be marched to different parts of the united colonies, * * * the officers and soldiers * * * shall * * * be under the controul, and subject to the order, of the committee of safety".[643] Distinguishably from Militiamen, though, these troops voluntarily enlisted in the first place, and could "not be compelled to continue [in the service] more than two years" in any event.{EN-788}

b. Virginia early established and consistently held that the Governor's power to call out her Militia was contingent upon the presence of particular exigent circumstances, not simply a matter of his own arbitrary will:

> • [1705] "[U]pon any invasion of the enemy by sea or land, or upon any insurrection, the governor * * * have full power to levy, raise, arm and muster such a number of forces out of the militia * * * as shall be thought requisite and needfull for repelling the invasion or suppressing the insurrection, and the same being raised, to order, direct, march, employ, continue, discharge and disband, as the occasion shall require, or the cause of danger ceases for which they were raised."{EN-789}

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[643] When Virginia ousted her last Royal Governor, authority passed to a Convention, which appointed a Committee of Safety "invested with the supreme executive powers of government". William Waller Hening, *The Statutes at Large; Being a Collection of all the Laws of Virginia from the First Session of the Legislature, in the Year 1619*, Volume IX, 1775-1778 (Richmond, Virginia: J. & G. Cochran, 1821), Preface, at [4].

> • [1727, 1732, 1734, 1738, 1740, 1744, 1748, and 1753] "[U]pon any invasion of an enemy by sea or land, or upon any insurrection, the governor * * * have full power and authority to levy, raise, arm, and muster, such a number of forces, out of the militia * * * as shall be thought needful for repelling the invasion, or suppressing the insurrection, or other danger, and the same to lead, conduct, march, transport and employ * * * for the suppressing of all such insurrections, and repelling of all such invasions * * * ; and such forces again to discharge and disband, as the cause of danger ceases, for which they were so raised."{EN-790}
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> • [1757, 1758, 1759, 1761, 1762, 1764, 1766, 1769, and 1772] "[U]pon any invasion of any enemy, by sea or land, or upon any insurrection, the governor * * * shall have full power and authority to levy, raise, arm and muster such number of forces out of the militia * * * as shall be thought needful for repelling the invasion, or suppressing the insurrection or other danger; and the same to lead, conduct, march, transport and employ * * * for the suppressing and repelling of all such invasions and insurrections, and such forces again to discharge and disband as the cause of danger ceases."{EN-791}
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> • [1780] "[W]hereas by the arts of the enemy joined by disaffected persons, riots have taken place in some counties injurious to the peace and dignity of government; to prevent such pernicious practices in future, and in order to aid the civil power in the due and effectual execution of the laws, *Be it enacted*, That wherever the governour shall have satisfactory information that any persons within this commonwealth shall be inclined to mutiny or riot, * * * he is * * * empowered to order * * * troops of horse to be raised * * * in any county where such persons shall so resist or assemble together with an intention to resist."{EN-792}

The importance of the requirements, repeated in statute after statute, that the Governor "shall have satisfactory information"—that he shall employ the Militia only for "the suppressing and repelling of all * * * invasions and insurrections" as necessitated the Militia's deployment—and especially that he should "discharge and disband [the Militia] *as the cause of danger ceases*" cannot be over-emphasized. His "full power and authority to levy, raise, arm and muster such a number of forces out of the militia" depended upon an *actual* "cause of danger", specifically in the form of an "invasion", "insurrection", or other disturbance that threatened "the due and effectual execution of the laws"—and therefore terminated as soon as that danger ran its course. Presumably, too, in the plain absence of an *actual* invasion, insurrection, or other dangerous disturbance, the Militia might justifiably have refused the Governor's call to "muster" and "march".

And surely Virginia's Militia would justifiably have refused a call to "muster" and "march" for a patently *illegitimate* purpose—as was most convincingly proven when her last Royal Governor, John Murray, the Earl of Dunmore, attempted to

deploy the Colony's Militia in order to suppress what her Declaration of Rights soon thereafter denominated as "*the good people of* Virginia".[644] In 1775, Dunmore proclaimed that

> a certain Patrick Henry * * * and a Number of deluded Followers, have taken up Arms, chosen their Officers, and styling themselves an Independent Company, have * * * put themselves in a Posture of War * * * : Wherefore I have * * * issue[d] this my Proclamation, strictly charging all Persons, upon their Allegiance, not to aid, abet, or give Countenance to, the said Patrick Henry, or any other Persons concerned in such unwarrantable Combinations; but, on the Contrary, to oppose them and their Designs by every Means; which Designs must, otherwise, inevitably involve the whole Country in the most direful Calamity, as they will call for the Vengeance of offended Majesty and the Insulted Laws, to be exerted here, to vindicate the constitutional Authority of Government.{EN-793}

When these threats of "direful Calamity" and "Vengeance" proved unavailing, Dunmore attempted to assert what he wrongly supposed were his plenary and unchallengeable gubernatorial powers:

> I do in Virtue of the Power and Authority to Me given, by His Majesty, determine to execute Martial Law, and cause the same to be executed throughout this Colony: and to the end that Peace and good Order may the sooner be restored, I do require every Person capable of bearing Arms, to resort to His Majesty's Standard, or be looked upon as Traitors to His Majesty's Crown and Government, and thereby become liable to the Penalty the Law inflicts upon such Offences; such as forfeiture of Life, confiscation of Lands, &c. &c.{EN-794}

But the patriotic Militiamen of Virginia refused to bend beneath the yoke of "Martial Law" and "to resort to His Majesty's standard".

So, during *pre*-constitutional times, neither was Virginia's Governor allowed to posture as some sort of what nowadays might be styled a *Führer* or *Duce*, nor did the Militia function mechanically and mindlessly as a *Shutzstaffel* or Praetorian Guard when the last of her Royal Governors attempted to behave in that high-handed fashion.

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[644] The entire story of the episode appears, for example, in R. Scribner, *Revolutionary Virginia, ante* note 318, Volume III, "An Introductory Note", at 3-28, and with less scholarly detail but more accessibility for the average student in H.J. Eckenrode, *The Revolution in Virginia* (Hamden, Connecticut: Archon Books, 1964 [reprint of the 1916 edition]), Chapter II, *and* Michael Kranish, *Flight from Monticello: Thomas Jefferson at War* (New York, New York: Oxford University Press, 2010), at 45-90. These events form the foundation for the present study's survey of Independent Companies in *pre*-constitutional Virginia. *See post,* at 567-597.

7. Notwithstanding the Governor's significant measure of authority, Virginia did not organize her Militia rigidly "from the top down", on the basis of some early version of *das Führerprinzip* ("the Leader Principle"), but flexibly "from the bottom up", in reliance on what could be styled "the People Principle", which eventually encouraged and enabled Virginians to throw off an abusive monarchy and adopt in its place "a Republican Form of Government"[645] based fully upon "the consent of the governed".[646] Yet even this dependence on the people was not a nod towards anarchy, but instead a reinforcement of the Militia's *governmental* character. Virginia's *pre-*constitutional statutes drew lines of demarcation for her Militia around her Counties, the city of Williamsburg, and the Borough of Norfolk, not because these were simply convenient geographical territories in which to organize Militia units, but because they were political subdivisions that exercised the *governmental* authority necessary for operation of the Militia as a *governmental* establishment. As will be seen, though, this was governmental authority of a ***self-governmental*** character, with (as events eventually proved) the people themselves in ultimate control.[647]

C. The Militia entrusted with "police powers". The exercise of various "police powers" further evidenced that Virginia's *pre-*constitutional Militia were governmental institutions.

1. Suppression of crime. From the earliest days, Virginia empowered her Militia to execute the laws against criminal activities:

> • [1676] "WHEREAS of late there hath bin many unlawfull tumults, routs and riotts in divers parts of this country, for prevention of such insolences, and punishing offenders in that kind, * * * *Be it therefore enacted* * * * , that every respective officer and magistrate within this countrey, civill and military, from a constable to the highest civill magistrate, and from the lowest to the highest militia officer, be hereby impowered and strictly commanded for the suppressing and punishing all such unlawfull assemblies, routs, riotts and tumults, to use all lawfull wayes, authoritie, power and command, and whosoever shall be at any time disobedient to any the lawfull commands of any such civill or military officer or magistrate either in assisting, suppressing, quieting and punishing of any unlawfull assemblyes, routs or tumults * * * shall be accounted, judged and punished as mutinous and rebellious."{EN-795}
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> • [1707] "It is * * * ordered that * * * Maj^{r} Harrison have Power to take under his Comm^{d} so many of the Militia of Surry County as he

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[645] U.S. Const. art. IV, § 4.

[646] *Compare* Declaration of Independence *with* Virginia Declaration of Rights (1776) art. 3.

[647] *See post*, Chapter 21.

shall think Convenient for the better apprehending [certain suspected] murderers" among the Tuscaruro Indians.{EN-796}

• [1711] "Ordered that a detachment of the Militia * * * be forthwith sent to the Maherine [Indian] town to make Search for [certain] suspected [stolen] goods, and that upon discovery thereof they sieze all the Men of that Nation and send them under a guard to Williamsburgh in order to be examined and tryed[.]"{EN-797}

• [1732] When "a Number of the meaner sort of People of [Prince William] County consisting of fifty Men were got together in Arms designing * * * to destroy the Publick Warehouses in that & the adjacent Counties expecting to be joyn'd by other Malecontents from the neighbouring Counties", the Governor and his Council determined that, "for the more effectual Suppressing the s^{d} Insurrection it is necessary that Orders be forthwith Issued to the Comanding Officers of the Militia * * * to call together the several Troops & Companies under their respective Comands * * * & in Case the Mutineers * * * should presume to Continue in Arms that they then march ag^{t} & endeavour to suppress them".{EN-798}

2. Prevention of insurrections among the slaves. Throughout the *pre-*constitutional period, the Militia was charged with the responsibility to maintain local security in and around houses of worship:

• [1619] "All persons whatsoever upon the Sabaoth daye shall frequent divine service and sermons both forenoon and afternoon, and all suche as beare arms shall bring their pieces swordes, poulder and shotte."{EN-799}

• [1632] "ALL men that are fittinge to beare armes, shall bringe their peices to the church uppon payne for every effence[.]"{EN-800}

• [1643] "[M]asters of every family shall bring with them to church on Sondays one fixed and serviceable gun with sufficient powder and shott[.]"{EN-801}

• [1736] The Governor issued a Proclamation which "strictly Charge[d] and Command[ed], That all Persons serving in the Militia, who shall during the * * * Holy-Days, repair to their Parish Churches or Chappels, do take with them their Arms, Ammunition, and Accoutrements; and the Captains * * * of the Militia, are to take Care the same be done accordingly".{EN-802}

• [1738, 1755, 1757, 1759, 1762, 1766, and 1771] "[I]t shall and may be lawful, for the chief officer of the militia, in every county, to order all persons listed therein, to go armed to their respective parish churches[.]"{EN-803}

> • [1775] "[T]he * * * chief officer[ ] of the militia, shall and may order the other officers and soldiers under him to go armed to their parish churches on Sundays, and to any licensed meeting-houses, whenever he judges it necessary."{EN-804}

The Governor and his Council explained the intent of these statutes in 1730, in an order "that all persons repairing to their respective Churches or Chappells on Sundays or Holy Days do carry with them their arms to prevent any Surprize thereof in their Absence when the Slaves are most at Liberty & have greatest Opportunity for that purpose".{EN-805} This was no merely paranoiac concern, as plans for revolts fomented among Virginia's slaves were occasionally discovered and punished.{EN-806}

If the extensive population of slaves in *pre*-constitutional Virginia, with the attendant specter of slave revolts, did not counsel requiring proportionately large numbers of her Militiamen to bear arms at all times and in all places, it certainly created an apparent need to assign to her Militia (and to Militia elsewhere) the special police power to conduct regular "slave patrols".[648] For example:

> • [1727, 1732, 1734, 1738, 1740, and 1744] "[C]ommanding officer[s] of the militia, in any county within this dominion * * * [may] appoint and direct such and so many of the militia of their respective counties, to be drawn out, and to patrole in such places as such commanding officer[s] shall think fit to direct, and from time to time, to cause to be relieved by other parties, for dispersing all unusual concourse of negroes, or other slaves, and for preventing any dangerous combinations which may be made amongst them at such meetings: Which said parties, so sent out to patrole, * * * shall have full power and authority to take up any slaves which they shall find convened together * * * to deliver to the next constable * * * . And if any parties of the militia be emploied in this service, for above the space of two days at any one time, such militia shall be paid[.]"{EN-807}
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> • [1738] "[T]he chief officer of the militia, in every county, * * * [may] appoint an officer, and four men, of the militia, at such times and seasons as he shall think proper, to patrol, and visit all negro quarters, and other places suspected of entertaining unlawful assemblies of slaves, servants, or other disorderly persons. And such patrollers shall have full power and authority, to take up any such slaves, servants, or disorderly persons, * * * unlawfully assembled, or any other, strolling about from one plantation to another, without a pass from his or her master, mistress, or overseer, and to carry them before the next justice of the peace; who is to order every such slave, servant, stroller, or other disorderly person * * * to receive any number of lashes, not exceeding twenty, on his or her bare

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[648] *See generally* Sally E. Horton, *Slave Patrols: Law and Violence in Virginia and the Carolinas* (Cambridge, Massachusetts: Harvard University Press, 2001).

back, well laid on: And in case one company of patrollers shall not be sufficient, to order more companies, consisting of the same number. And such patrollers shall be exempted from attendance at private [*i.e.*, Company] musters [of the Militia], and from the paiment of all public, county, and partish levies, for their own persons, for those years in which they shall be emploied in that service."{EN-808}

• [1754] "[T]he chief officer of the militia * * * in every county * * * is hereby required * * * to appoint an officer, and so many men of the militia as to him shall appear to be necessary, not exceeding four, once in every month, or oftener if * * * required * * * , to patrol and visit all negroe quarters, and other places suspected of entertaining unlawful assemblies of slaves, servants, or other disorderly persons, and such patrolers shall have power and authority to take up any such slaves, servants, or disorderly persons * * * , unlawfully assembled, or any other strolling about from one plantation to another, without a pass from his or her master, mistress, or overseer, and to carry them before the next justice of the peace, who if he shall see cause, is to order every such slave, servant, stroller, or other disorderly person * * * to receive any number of lashes, not exceeding twenty, on his or her bare back well laid on: And in case one company of patrollers shall not be sufficient, to order more companies for the same service: * * * [A]nd if the[Militia officers] shall adjudge the patrollers to have performed their duty * * * the county court * * * are hereby impowered and required, at the laying of their county levy, to allow to, and levy for every one of the patrollers, ten pounds of tobacco for every twenty four hours they shall so patrole; and moreover such patrollers shall be exempt from attendance at private musters, and from the payment of public, county, and parish levies for their own persons, for those years in which they shall be employed in that service."{EN-809}

• [1755] "[T]he chief officer of the militia in every county * * * is hereby required * * * to appoint an officer. and so many men of the militia, as to him shall appear to be necessary, not exceeding four, once in every month or oftener * * * to patrol and visit all negroe quarters, and other places suspected of entertaining unlawful assemblies of slaves, servants, or other disorderly persons, * * * unlawfully assembled, or any other strolling about from one plantation to another, without a pass from his or her master, mistress or overseer, and to carry them before the next justice of the peace, who if he shall see cause, is to order every such slave, servant, stroller, or other disorderly person * * * to receive any number of lashes, not exceeding twenty, on his or her bare back, well laid on. And in case one company of patrollers shall not be sufficient, to order more companies,for the same service. * * * [A]nd if the[Militia officers] shall adjudge the patrollers to have performed their duty * * * the county court * * * are hereby impowered and required at the laying of their county

levy, to allow to, and levy for every one of the patrollers, ten pounds of tobacco for every twenty four hours they shall so patrol, and moreover, such patrollers shall be exempt from the payment of public, county, and parish levies, for their own persons, for those years in which they shall be employed in that service."{EN-810}

• [1757, 1759, and 1762] "[T]he chief officer of the militia in every county * * * is hereby required * * * to appoint an officer and so many men of the militia, as to him shall appear to be necessary, not exceeding four, once in every month or oftner if thereto required * * * , to patrol and visit all negroe quarters, and other places suspected of entertaining unlawful assemblies of slaves, servants, or other disorderly persons * * * , unlawfully assembled, or any other strolling about from one plantation to another without a pass from his or her master, mistress, or overseer, and to carry them before the next justice of the peace, who if he shall see cause, is to order every such slave, servant, stroller, or other disorderly person * * * to receive any number of lashes, not exceeding twenty, on his or her bare back well laid on; and in case one company of patrollers shall not be sufficient, to order more companies for the same service. * * * [A]nd if the[Militia officers] shall adjudge the patrollers to have performed their duty * * * the county court * * * are hereby impowered and required at the laying of their county levy to allow to, and levy for every one of the patrollers ten pounds of tobacco for every day or night they shall so patrol; and moreover such patrollers shall be exempt from the payment of public, county, and parish levies, for their own persons for those years in which they shall be employed in that service."{EN-811}

• [1766 and 1771] "[I]t shall and may be lawful for the chief officer of the militia in every county * * * to appoint an officer, and so many men of the militia, as to him shall appear to be necessary, not exceeding four, once in every month, or oftener if * * * required * * * , to patrol and visit all negro quarters and other places suspected of entertaining unlawful assemblies of slaves, servants, or other disorderly persons, * * * unlawfully assembled, or any other strolling about from one plantation to another, without a pass from his or her master, mistress or overseer, and to carry them before the next justice of the peace; who, if he shall see cause, is to order every such slave, servant, stroller, or other disorderly person * * * to receive any number of lashes, not exceeding twenty, on his or her bare back, well laid on; and in case one company of patrollers shall not be sufficient, to order more companies for the same service * * * ; and if the [county] court shall adjudge the patrollers to have performed their duty * * * , they are hereby impowered and required * * * to allow to and to levy for every one of the patrollers twenty pounds of tobacco, for every twelve hours they shall so patrol."{EN-812}

• [1775] "[T]he commanding-officer of the militia of every county, of the city of Williamsburg, and borough of Norfolk, shall appoint so many patrollers, as he may think fit, * * * who shall receive a reasonable allowance for their trouble, at the laying of the next county levy."{EN-813}

• [1777] "[I]t shall and may be lawful for the chief officer of the militia in every county * * * , yearly, to appoint an officer, and so many men of the militia as to him shall appear to be necessary, not exceeding four, once in every month, or oftener, if thereto required * * * , to patrol and visit all negro quarters, and other places suspected of entertaining unlawful assemblies of slaves, servants, or other disorderly persons, * * * unlawfully assembled, or any others strolling about from one plantation to another, without a pass from his or her master, mistress, or owner, and to carry them before the next justice of the peace, who if he shall see cause, is to order every such slave, servant, or stroller, or other disorderly person * * * to receive any number of lashes, not exceeding twenty on his or her bare back, well laid on.

"And in case one company of patrollers shall not be sufficient, to order more companies for the same service; * * * and if the[Militia officers] shall adjudge the patrollers have performed their duty * * * , the county court * * * are hereby empowered and required to levy fifteen pounds of tobacco, or two shillings and sixpence, for every twelve hours each of them shall so patrole."{EN-814}

• [1784 and 1785] "[T]he commanding officer of the militia in every county, shall * * * in every year, appoint an officer, and so many men of the militia as to him shall appear necessary, not exceeding four, once in every month, or oftener, if thereto required * * * , to patrole and visit all negro quarters, and other places suspected of entertaining unlawful assemblies of slaves, servants, or other disorderly persons * * * unlawfully assembled, or any others strolling about from one plantation to another, without a pass from his or her master, mistress, or owner, and carry them before the next justice of the peace, who, if he shall see cause, is to order every such slave, servant, stroller, or other disorderly person * * * to receive any number of lashes not exceeding twenty, on his or her bare back. And in case one company of patrollers shall not be sufficient, to order more companies for the same service. * * * [A]nd if the[court-martial] shall adjudge the patrollers have performed their duty * * * the county court * * * are thereupon empowered and required to levy twenty pounds of tobacco, or three shillings, for every twelve hours each of them shall so patrole."{EN-815}

The governmental nature of this activity is doubly apparent. *First*, inasmuch as slaves in Virginia were their owners' private property, when conducting "patrols" that doubtlessly often resulted in seizures and bodily punishment of the errant bondsmen, Militiamen were performing as a matter of routine a task that no one

without express governmental authority could have undertaken except in such exigent circumstances as self-defense. *Second*, Militiamen were paid with public funds from some "county levy"—and for many years were also exempted from regular Militia musters, as well as being excused from "the payment of public, county, and parish levies for their own persons"—which public benefits would never have been granted to individuals performing some purely private function.

Virginia's "slave patrols" were prototypical "police forces", in every sense in which that term would be used today. In particular, they exercised the powers to patrol; to conduct surveillance of streets and roads where suspicious "strollers" might have been found; to investigate "places" which might have been the scenes of illicit activities; to stop and interrogate questionable characters in order to ascertain their identities and reasons for being abroad; to arrest any "disorderly persons" or other individuals whom they suspected of wrongdoing; and to turn over to judicial authorities for trial and punishment the persons they detained. In addition, although typically denominated "*slave* patrols", the Militia's jurisdiction extended as well to "servants" (who were not slaves) and "other disorderly persons" (all of whom presumably were free men and women). Furthermore, although typically the statutes directed the appointment of only a single patrol consisting of an officer and four men in each County, they also allowed for as many "more companies" to be mustered as might have been needed. And although generally the statutes mandated only one patrol each month, they also allowed for deployment to be made "oftener" if necessary. So, depending upon circumstances, *an*y greater number of Militiamen could have been called forth on *an*y more comprehensive schedule. Thus, Virginia's organization of her Militia for "slave patrols" was, in principle at least, actually superior to the organization of professional police and Sheriffs' departments in the several States today. For contemporary law-enforcement agencies are limited in the numbers of their personnel, with no significant ability to mobilize in their support the vast reserve of men and women who would be available—sufficiently trained in the basics of law-enforcement to complement, supplement, and otherwise support the regular forces of officers—were "the Militia of the several States" properly revitalized.

CHAPTER SIXTEEN

Every able-bodied adult free male resident in *pre*-constitutional Virginia had an enforceable duty to serve in her Militia in some capacity, but with the burdens of service spread so as to minimize their impacts on society.

The modern *ultra*-"libertarian" notion that men living in society labor under no duties to one another beyond those they voluntarily assume perforce of contracts every detail of which they freely negotiate amongst themselves flies in the face of traditional American political philosophy, which holds that a valid "social contract" must conform to "the Laws of Nature and of Nature's God"—"Laws" that are the products neither of human "contracts" nor even of human will.[649] During the *pre*-constitutional era, the vast majority of Virginians undoubtedly would have agreed with Blackstone that "civil liberty, rightly understood, consists in protecting the rights of individuals by the united force of society: society cannot be maintained, and of course can exert no protection, without obedience to some sovereign power: and obedience is an empty name, if every individual has a right to decide how far he himself shall obey".[650] As a practical consequence of this understanding, Virginians of that time generally held to the political and legal precept that *free men should volunteer, and if they did not volunteer could and should be compelled, to defend—if needs be, with their very own lives—the society in, through, and by the aid of which they enjoyed their freedoms*. So, throughout that era, Virginia regulated her Militia on the basis of three principles:

- *near-universality*—that all those eligible for service under arms should serve, by choice if possible and coercion if necessary;
- *ubiquity*—that everywhere within her territory, at all times, and in anticipation of every danger eligible residents should be suitably armed and trained; and
- *equality*—that the burdens of service should weigh no more heavily on some than on others, unless disproportionate duties would subserve a palpable public good.

For example:

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[649] *See* Declaration of Independence.

[650] *Commentaries on the Laws of England, ante* note 142, Volume 1, at 251.

• [1648] "THIS Assembly haveing knowledge that ***divers persons vpon occasion of a presse of souldiers by warrant from the Govern'r * * * out of a mistake in opinion do conceive their liberties and the lawes of the collonie thereby infringed and themselves particularly injured***, the authority of an Assembly not concurring therein. *It is therefore thought fitt* * * * to declare the judgment of this Assembly * * * that * * * full and ample power is derived from his Majesty to the Governour and Council to make peace or warr, and as a necessary consequent ***to levy or presse men and other provisions for the warr vpon any emergent occasion***[.]"{EN-816}

• [1672 and 1676] "[A]s against ***all tymes of danger*** it ought to be the care of ***all men*** to provide that ***their armes and habiliments for war, be alwayes kept fixed and fitt for service***[.]"{EN-817}

• [1776] "That a well regulated militia, ***composed of the body of the people, trained to arms***, is the proper, natural, and safe defence of a free State" and "that standing armies, in time of peace, should be avoided, as dangerous to liberty[.]"{EN-818}

• [1779] "[I]t is just that ***the whole community should bear an equal part*** in publick defence[.]"{EN-819}

A. Impressment a general practice. Pursuant to this understanding, from the very beginning Virginia consistently asserted a sovereign right and power to require all able-bodied adult free men resident within her territory—except those to whom the General Assembly extended limited exemptions for some necessary and sufficient reason consistent with the common defense and the general welfare[651]—to perform various public services of a military or police nature in her Militia or regular armed forces:

• [1619] "All persons whatsoever upon the Sabaoth daye shall frequent divine service * * * , and all suche as beare arms shall bring their pieces swordes, poulder and shotte."{EN-820}

• [1624 and 1632] "That no man go or send abroad without a sufficient partie will armed" and "[t]hat men go not to worke in the ground without their arms (and a centinell upon them)."{EN-821}

• [1629] "[E]very commander of the severall plantations appointed by commission from the governor shall have power and authoritie to levy a partie of men out of the inhabitants of that place soe many as may well be spared without too much weakening of the plantations and to imploy these men against the Indians[.]"{EN-822}

• [1632] "ALL men that are fittinge to beare armes, shall bringe their peices to the church[.]"{EN-823}

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[651] *See post,* Chapter 22.

• [1639] "ALL persons except negroes to be provided with arms and amunition or be fined[.]"{EN-824}

• [1643] "[M]asters of every family shall bring with them to church on Sondays one fixed and serviceable gun with sufficient powder and shott[.]"{EN-825}

• [1644] "[T]he * * * counsell of warr shall have power to leavie such and soe manie men, arms, ammunition and other necessaries as emergencie of occasions shall require[.]"{EN-826}

• [1659 and 1662] "[T]hat a provident supplie be made of gunn powder and shott to our owne people, and this strictly to bee lookt to by the officers of the militia, (vizt.) That every man able to beare armes have in his house a fixt gunn two pounds of powder and eight pound of shott at least which are to be provided by every man for his family[.]"{EN-827}

• [1672] "[A]s against all tymes of danger it ought to be the care of all men to provide that their armes and habiliments for war, be alwayes kept fixed and fitt for service[.]"{EN-828}

• [1687] "His Excellency [the Governor] acquainting the Councell of the unsetled state of his Maj^{ties} Militia in this Collony, and that for the future the same may be brought into a better Method, * * * it is hereby Ordered, that the Collonells & Justices of every County * * * doe at their next County Court take an acc^{t} of all the ablest Freeholders and Inhabitants in their respective Counties that are Qualified either in Estate or person to finde and Maintaine a Man & Horse to be listed in a Troope for that County, or goe themselves when Occasion shall require, & likewise an account of all other Freeholders and Inhabitants that are fitt to be Listed for foot, and returne the Same to his Excellency[.]"{EN-829}

• [1690] The Governor admonished the Sheriffs that, "[h]aving observed in my being at Severall exercises of some of y^{e} Militia of this Colony that divers persons are resident in Severall Counties who for that they are neither free holders nor housekeepers, are not listed in y^{e} troops or foot Companies of y^{e} s^{d} Counties; and thereby want being exercised which should make them fit and Serviceable * * * to * * * this Country: when occasion should require they being full as proper as any. I do therefore * * * Comand * * * you publickly make known * * * that all tithables within your said County, (slaves and two other Servants in a family onely excepted) and all others without exception who have been resident in your s^{d} County one moneth, and are not listed, do within one moneth * * * list themselves either in y^{e} Troops or foot Compa^{s} of your said County, and provide themselves with armes and amunicon according to Law; And that you acquaint y^{e} Cap^{ts} of y^{e} Militia that they * * * return to y^{e} Comanders in Cheif, y^{e} names of all y^{e} Soldiers under their respective Comands, and that they take care none escape being listed."{EN-830}

• [1699] "[I]f any pirates, privateers or sea robers * * * shall land and put on shoar * * * , all officers civill and military are hereby required * * * to raise and levy such a number of well armed men as he or they shall judge necessary for the seizing, apprehending and carrying to goal of all and every such person or persons[.]"{EN-831}

• [1702] "And y^{t} y^{e} present State of y^{e} Militia * * * may be better known", the Governor ordered the "Commanders in chief of every respective County, to cause y^{e} Captains of y^{e} severall troops and Companys * * * at * * * particular Musters to examine and enquire what officers and Souldiers are dead since y^{e} last list of y^{e} Militia * * * was returned What officers are put in y^{e} Place of those deceased and what new additions of men have been made since y^{e} said time and how their said troops and Companys are now armed[.]"{EN-832}

• [1703] Recognizing that "the most effectual means for the defence of th[e] Colony depends upon the well ordering and disciplining the Militia", the Governor ordered the "Commanders in cheif of each County * * * to appoint a Gen^{ll} Muster of all the Militia under their respective commands, and take especial care & give strict directions that all Persons serving in the Militia be well provided with arms & ammunition according to Law. And * * * to give directions to the Captains of each Troop & Company * * * duly to exercise their said Troops & Companys once every three weeks, and to take care that all Persons without Priveledge or exemption be listed & Personally Performe their duty at the said Musters."{EN-833}

• [1705] "[T]he * * * chief officer of the militia of every county have full power and authority to list all male persons whatsoever, from sixteen to sixty years of age, within his respective county, to serve in horse or foot[.]

* * * * *

" * * * That the * * * chief officer of the militia of every county * * * make * * * a new list of all the male persons in his respective county capable * * * to serve in the militia * * * to the end each trouper or ffoot soldier may be thereby guided to provide and furnish himself with * * * arms and ammunition[.]"{EN-834}

• [1723] "[T]he * * * chief officer of the militia of every county, have full power and authority to list all free male persons whatsoever, from twenty-one to sixty years of age, * * * to serve in horse or foot[.]

* * * * *

" * * * That nothing * * * shall hinder or debar any captain from admitting any able-bodied white person, who shall be above the age of sixteen years, to serve in his troop or company, in the place of any person required by this act to be listed."{EN-835}

• [1727, 1732, 1734, 1738, 1740, 1744, 1748, and 1753] "[U]pon any invasion of an enemy by sea or land, or upon any insurrection, the governor * * * have full power and authority to levy, raise, arm, and muster, such a number of forces, out of the militia * * * as shall be thought needful for repelling the invasion, or suppressing the insurrection, or other danger[.]"{EN-836}

• [1738] "[T]he * * * chief officer of the militia, in every county, shall list all free male persons, above the age of one and twenty years, within this colony, under the command of such captains as he shall think fit."{EN-837}

• [1755] "[T]he chief officer of the militia in every county shall list all male persons, above the age of eighteen years, and under the age of sixty years, within this colony, (imported servants excepted) under the command of such captain, as he shall think fit[.]"{EN-838}

• [1757, 1758, 1759, 1761, 1762, 1764, 1766, 1769, and 1772] "That upon any invasion of any enemy, by sea or land, or upon any insurrection, the governor * * * shall have full power and authority to levy, raise, arm and muster such a number of forces out of the militia of this colony as shall be thought needful for repelling the invasion, or suppressing the insurrection or other danger[.]

* * * * *

" * * *[T]o the end a sufficient number of men may be appointed for guarding the batteries erected in the several rivers of this dominion, and to assist in the better managing the great guns there mounted, when occasion shall be, *It is hereby further enacted*, That it shall * * * be lawful for the governor * * * to appoint and assign such a number of the militia as he shall think fit to attend the said batteries, * * * which number of the militia shall be drafted out of any of the militia of the county by the commanding officer of such county in which such battery is or shall be erected, and shall be exempted from all private musters, except at such battery only during their attendance at such battery[.]"{EN-839}

• [1757, 1759, 1762, 1766, and 1771] "[T]he chief officer of the militia, in every county, except the county of Hampshire, shall list all male persons above the age of eighteen years, and under the age of sixty years, within this colony (imported servants excepted) under the command of such captain as he shall think fit[.]"{EN-840}

• [1763] "The Council * * * were of Opinion that calling the [General] Assembly at this Juncture would be of no use, in as much as could they be prevail'd on to Levy Troops, they could not be rais'd in time to be of service this Year: They therefore advised [the Governor] to order Colo. Stephen to draught five hundred Men * * * out of [certain Counties], in proportion to the number of Militia in each County and to appoint Colo. Andrew Lewis County Lieutenant of Augusta, with

directions to draught out of the Militia in that County as many Men as can well be spared, and then apply to [certain other Counties] for such a proportion of their Militia as he shall think will enable him to defend the Frontiers[.]"{EN-841}

• [1775] "[C]ertain portions of the militia throughout the whole colony should be regularly enlisted, under the denomination of minute-men, and more strictly trained to proper discipline than hath been hitherto customary, * * * from the age of sixteen to fifty[.]

* * * * *

" * * * [I]n each county * * * all free male persons, hired servants, and apprentices, above the age of sixteen, and under fifty years, except such as are * * * excepted [by statute], shall be enlisted into the militia[.]"{EN-842}

• [1775] "And for the more expeditious, convenient, and speedy draughting into service detachments of the militia * * * , as occasion may arise, *Be it farther ordained*, That, at the general muster * * * the commanding-officer of each county or corporation shall, by fair and equal lot, cause to be drawn out of each company so many men as will amount to one tenth part thereof, and cause the names of the persons so allotted to be enrolled * * * as the first division of militia for such county or corporation; and * * * shall in like manner proceed, by lot, to fix * * * nine other divisions * * * ; and thereafter, if the militia * * * shall be called into duty, the same shall be performed by the divisions, in the order they shall so stand enrolled, one after another, so as to preserve the regular rotation of duty amongst them.

* * * * *

"*Provided always*, That if there shall * * * be a sufficient number of men, who will voluntarily enter into the service, to answer the demand made upon the militia * * * , such volunteers shall be accepted instead of calling on the divisions[.]"{EN-843}

• [1777] "[A]ll free male persons, hired servants, and apprentices, between the ages of sixteen and fifty years [with various exceptions] * * shall * * * be enrolled or formed into [Militia] companies[.]

* * * * *

" * * * Every captain * * * shall, at every general muster, make up and report to his county lieutenant a state of the company last assigned to him, noting therein such as are dead, removed, or exempted, and adding the names of such persons, not already enrolled, as * * * ought to be enrolled[.]"{EN-844}

• [1777] "FOR making provision against invasions and insurrections, and laying the burthen thereof equally on all: *Be it enacted* * * * , That the division of the militia of each county into ten parts * * * shall be completed and kept up * * * , each part to be distinguished by fair and equal lot * * * .

" * * * The several divisions of the militia * * * shall be called into duty by regular rotation * * * ; and every person failing to attend when called on, or to send an able bodied man in his room, shall, unless there be good excuse, be considered as a deserter, and suffer accordingly. Any able bodied volunteers who will enter into the service shall be accepted instead of so many divisions of the militia * * * , or of the particular person in whose room they may offer to serve; but if the invasion or insurrection be so near and pressing as not to allow the delay of calling the division * * * next in turn, the commanding officer may call on such part of the militia as shall be most convenient to continue in duty until such division * * * can come in to supply their places."{EN-845}

• [1777] "FOR forming the citizens of Williamsburg, borough of Norfolk, and the professors and students of William and Mary college, into a militia, and better disciplining them: *Be it enacted* * * * , That all male persons between the ages of sixteen and fifty years, within the * * * city or borough, [with certain exceptions] * * * shall * * * be enrolled and formed into companies[.]"{EN-846}

• [1780] "WHEREAS a dangerous invasion of South Carolina now threatens * * * that state, and the troops engaged in its defence may be overpowered by superiour numbers, if timely aid not be sent to them. And as it is incumbent upon this state, on every principle of policy and good neighbourhood, to assist our friends and fellow citizens in distress, as speedily and effectually as possible; *Be it enacted* * * * That two thousand five hundred infantry be forthwith called into service, in legal rotation, from [certain] counties, and in [certain] proportions[.]

* * * * *

" * * * If any * * * soldier shall fail to attend when summoned, not having a just and reasonable excuse, or refuse to march when ordered into actual service according to his tour of duty, or find an able bodied man in his room, * * * such offender shall serve as a regular soldier in the troops of the state eight months[.]"{EN-847}

• [1780] "[T]hree thousand men shall be forthwith raised for the purpose of completing this state's quota of continental forces * * * . The several counties and corporations within this commonwealth * * * shall * * * furnish * * * after their militia shall have been laid off into divisions * * * one fifteenth man of such of their militia as exceed the age of eighteen years, including all * * * officers under the age of fifty years * * * . The * * * commanding officer of each county or corporation * * * shall * * * divide the county and militia into as many separate districts and divisions as the number of men required [to be drafted] * * * , in which districts they shall include all the assessable property * * * , and shall so arrange it * * * as to have as equal a distribution thereof as the nature of the case will admit among the several divisions, which shall consist, as nearly as may be, of fifteen men each. The divisions * * * may collect

among themselves any sum of money * * * and deposit it in the hands of some one of their body * * * , who shall * * * recruit a man to serve in the continental army * * * ; and if any division shall then fail to deliver a recruit * * * the * * * commanding officer * * * shall * * * draft an able bodied man by fair and impartial lot out of such division, to serve in the continental army * * * ; who may nevertheless be permitted to procure an able bodied man in his room; and any person who * * * shall enlist an able bodied soldier to serve in his stead during the war, shall * * * be exempted from all future drafts, except in case of actual invasion[.]"{EN-848}

• [1782] "FOR the more speedy recruiting this state's quota of troops in the continental service, *Be it enacted*, That three thousand men, of able bodies and sound minds, at least five feet four inches high, * * * and between the ages of eighteen and fifty years, shall be forthwith raised * * * : One able-bodied man * * * for every fifteen militia-men. And for effecting that purpose in the most equitable manner,

" * * * [Certain officers] of the militia * * * shall * * * divide each county into as many classes or districts as there are men required * * * , making such classes as equal as may be, having regard as well to an equal proportion of taxable property in the county, including the property of exempts, as the number of able-bodied men. * * *

" * * * [E]ach class or district * * * shall * * * enlist * * * one man * * * to serve as a soldier in the continental army for three years or during the war, * * * or pay a sum equal to one eighth part of the taxes payable by the several persons of which such class shall consist * * * to such person as they * * * shall appoint * * * . And in case of failure of the payment * * * or delivering such soldier * * * the class * * * may choose a collector * * * to receive the sums payable from the individuals of such class, or to enlist such soldier; * * * and in case the same shall not be paid or such soldier enlisted * * * [the] commanding officer of the company to which [the] delinquents * * * belong * * * [shall] cause one of the * * * able-bodied militia-men to be drafted, by fair and equal ballot[.]"{EN-849}

• [1784 and 1785] "[A]ll free male persons between the ages of eighteen and fifty years, [with certain exceptions] * * * shall be enrolled or formed into [Militia] companies[.]

* * * * *

" * * * Every captain * * * of a company * * * shall, within ten days after every regimental and general muster, make up and report to the commanding officer * * * a return of his company, * * * noting therein such as have died, removed, been exempted or added, and all persons within the bounds of his company not on his roll, who ought to be enrolled."{EN-850}

B. Source of the power of impressment. The foregoing establishes that a general power to impress men for military duty plainly existed and was regularly exercised in *pre-*constitutional Virginia. But from what source did this power derive?

1. Certainly not from any notion that every "government" claims the power to impose "slavery" or "involuntary servitude" on "its subjects", as many modern *ultra*-"libertarians" complain. *Pre*-constitutional Virginians would have scoffed at the charge that compulsory service in their own Militia—"composed of the body of the people" themselves, "trained to arms"[652]—constituted "slavery", "involuntary servitude", or any state or status akin to either of them. To the contrary: Virginians of that era would surely have agreed with Blackstone's admonition that

> [t]wo precautions are * * * advised to be observed in all prudent and free governments: 1. To prevent the introduction of slavery at all: or, 2. If it be already introduced, not to intrust those slaves with arms; who will then find themselves an overmatch for the freemen.[653]

So, true slaves—of which Virginia then had no dearth—were debarred from her Militia, and generally prohibited even from possessing firearms except under strict supervision.[654] And inasmuch as a, if not *the*, distinctive mark of slaves was their disability to keep and bear arms, while under the yoke of masters who were thoroughly armed, Virginians who were compelled to be armed along with the vast majority of their fellow citizens from every socio-economic class were not slaves—and in light of their armament and training, and the self-consciousness of their own physical power, could not have been reduced to slavery. So, some other basis must be found for the governmental authority for general impressment.

2. In his discussion "OF THE MILITARY AND MARITIME STATES" under English law, Blackstone related nothing *in haec verba* about the impressment of soldiers for the regular British Army, but observed only that,

> [W]HEN the nation [that is, England] was engaged in war, more veteran troops and more regular discipline were esteemed to be necessary, than could be expected from a mere militia. And therefore at such times more rigorous methods were put in use for the raising of armies and the due regulation and discipline of the soldiery: *which are to be looked upon only as temporary excrescences bred out of the distemper of the state, and not as any part of the permanent and perpetual laws of the kingdom.*[655]

With respect to the British Navy, however, although he opined that "[T]HE *maritime* state is * * * much more agreeable to the principles of our free constitution", he also pointed out that

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[652] Virginia Declaration of Rights (1776) art. 13.

[653] *Commentaries on the Laws of England, ante* note 142, Volume 1, at 416.

[654] *See post*, at 365-369 and 733-742.

[655] *Commentaries on the Laws of England, ante* note 142, Volume 1, at 412 (emphasis supplied).

> [t]he power of impressing men for the sea service by the king's commission, has been a matter of some dispute, and submitted to with great reluctance; though * * * the practice of impressing * * * is of very antient date, and hath been uniformly continued by a regular series of precedents to the present time * * * . The difficulty arises * * * that no statute has expressly declared this power to be in the crown, though many of them very strongly imply it. * * * All which do most evidently imply a power of impressing to reside somewhere; and, if any where, it must * * * reside in the crown alone.
>
> *BUT * * * this method of impressing * * * is only defensible from public necessity, to which all private considerations must give way*[.][656]

On this point, American political philosophy went beyond Blackstone. In 1776, the Declaration of Independence—which summarized the Colonists' understanding of the fundamental principles of political science applicable to them; from which the Constitution, the States' constitutions, and all the laws of this country thereafter derived; and upon which they all still depend for their legitimacy[657]—implicitly identified the source of the power of impressment as "the Laws of Nature and of Nature's God", from which issued the people's "right", *and* "*their duty*, to throw off [an abusive] Government" by force "whenever any Form of Government becomes destructive of [men's 'unalienable Rights']".[658] Because the people as a whole have a political "*duty*, to throw off such Government", that "duty" can—indeed, as a true "duty" should and must—be *enforced* by the community on each of its members as an individual.

That same year, Virginia, too, endorsed the very same principle: "[W]henever any government shall be found inadequate or contrary to the[ ] purposes [of securing the common benefit, protection, and security of the community], a majority of the community hath an indubitable, unalienable, and indefeasible right, to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal".[659] An "indubitable" right is one that is "[u]ndoubted; unquestionable"; an "indefeasable" right, one that is "irrevocable"; an "unalienable" right, one "of which the property may [not] be transferred".[660] So, in the ordinary course of human events, the right "to reform, alter, or abolish" a government is as much under the majority's permanent and complete control—in conformity, of course, with "the Laws of Nature and of Nature's God"—as is

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[656] *Id.*, Volume 1, at 418-419 (emphasis supplied).

[657] *See ante*, at 22-27.

[658] Emphasis supplied.

[659] Declaration of Rights art. 3.

[660] *See* S. Johnson, *Dictionary*, *ante* note 50, in both the First (1755) and the Fourth (1773) Editions. Johnson spelled "indefeasible" as "indefeisible".

conceivable. Because, in the ordinary course of events, a majority of the community exercises such an absolute "right" on behalf of the community as a whole and in its interest, and because the only way to effectuate that "right" may be by the application of main force against the community's enemies, therefore the minority of the community must labor under a corresponding duty to assist the majority in that regard—a duty the fulfillment of which the majority may compel by force. Yet it may also come to pass in extraordinary circumstances that the majority of the community aligns itself against the whole community's true interests, or in league with the community's foreign or domestic enemies, and thereby becomes a dangerous "faction", "united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community".[661] In that eventuality, the minority of the community which remains committed to securing the community's "permanent and aggregate interests" may compel the errant majority to participate in fulfilling the whole people's duty "to throw off [an abusive] Government". Meaning that the doctrine of universal impressment applies in favor of whichever segment of the community truly represents what is actually "conducive to the public weal".

Moreover, if the doctrine of the people's right and duty to abolish a bad government by force may not have been in the forefront of Americans' political discussions prior to the 1770s, certainly its correlate was, that it is the people's right and duty to maintain and defend a good government in the first place, "reform[ing]" or "alter[ing]" it incrementally if necessary; and to deter rogue public officials from transmogrifying a good government into a bad one. Meaning that the doctrine of universal impressment applies at all times.[662]

3. The universal and compulsory nature of the Militia is not merely an arbitrary policy that even the largest majority of citizens can change to suit its fancy. Quite the contrary. The Declaration of Independence did not create this set of interlocking and mutually dependent rights and duties *ex nihilo*. Rather, the Declaration treated and relied upon it as part of a collection of preëxistent "truths", generally recognized "to be self-evident" and with unchallengeable legal force, that enjoyed a status superior to any British law, because it provided the justification for supplanting British law in the Colonies. The source of these rights and duties the Declaration identified as "the Laws of Nature and of Nature's God". For it was

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[661] *The Federalist* No. 10 (James Madison).

[662] Today, these ideas would be explained on economic, as well as political, grounds. If some members of the community take up arms in its defense, and prevail, *every* member of the community will benefit, including those who do nothing. Conceivably, the malign self-interest of too many shirkers in receiving a "free ride" on the efforts of others could endanger everyone, by preventing an adequate defense from being mounted. To forefend this, coercion of the entire community through some variety of *impressment*—whether of persons, or property, or both—is warranted. *See generally* Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Cambridge, Massachusetts: Harvard University Press, Revised Edition, 1971).

those "Laws" that "entitled" Americans "to assume among the powers of the earth, [a] separate and equal station". And the Colonists achieved this separation by forcibly "throw[ing] off [the British] Government". Therefore, a people seeking to enjoy "certain unalienable Rights", and to live under "Governments * * * deriving their just powers from the consent of the governed", have the absolute right, *and labor under the absolute duty*, to organize themselves in Militia—*absolute*, because this right and duty arise out of "the Laws of Nature and of Nature's God", which no merely human positive law can annul. Thus, *the Militia do not derive from a political power of universal impressment—for a power of universal impressment could conceivably be employed to oppress the people; rather, the political power of universal impressment derives from the necessity for the Militia under "the Laws of Nature and of Nature's God",* ***and must be exercised so as to preserve the Militia as "the proper, natural, and safe defence of a free state", because "[a] well regulated Militia" is "necessary to the security of a free State"***.[663]

4. For that reason, from her earliest days, Virginia could safely take the practical position that her sovereign power of impressment would override "all private considerations". From time to time, Virginia did raise regular troops. But the first call on Virginians for participation in community self-defense always came from her Militia. Before anything else, every able-bodied free man was already drafted into the Militia as a consequence simply of his residence within the jurisdiction. Some might be exempted from service, in large measure or small.[664] But no one who was neither physically incapable of service (the very young, the very old, and the infirm), nor politically ineligible for service (women, slaves, and most people of color), enjoyed an immunity from impressment. Thus, the only individuals who remained subject to impressment outside of the Militia were those who either were not able-bodied at all (and therefore as a practical matter were ineligible for any draft) or were altogether excluded from normal Militia duty on some other ground (which constituted an extremely small, usually nonexistent, set of individuals). Any significant draft for the purpose of raising regular troops, then, had to came from among those who in principle at least were already Militiamen. That is, *almost all of the men drafted to serve as regular troops had to be drafted out of the Militia*. So a draft of men into Virginia's regular troops derived from and was an extension of the original draft of all able-bodied free men into the Militia, in effect "a draft upon a draft". A draft for the regular troops, moreover, could never be deemed generally superior to the original draft for the Militia, in the sense that the regular troops could always claim the first call on all of the available men, *because that claim had already been settled in favor of for the all-important purpose of guaranteeing "the proper, natural, and safe defence of a free state" through the Militia*.

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[663] Virginia Declaration of Rights (1776) art. 13 *and* U.S. Const. amend. II (emphases supplied).

[664] *See post*, Chapter 22.

Thus, any "draft upon a draft" labored under the inherent limitation that impressment for the regular Armed Forces could draw men from the Militia only up to the point at which a dangerous "standing army" might thereby be created, and the Militia sufficiently weakened by such attrition that it might be unable to oppose that army. Especially in Virginia, Americans in the *pre-*constitutional era knew the difference between their Militia and "standing armies"—namely, that "the people" in their Militia, on the one hand, and "standing armies", on the other hand, were categorically different things, and all too often mutual antagonists: "a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state", but "standing armies, in time of peace, should be avoided, as dangerous to liberty".[665] So, today, any drafts for "standing armies" in America must be put into practice according to the principles of constitutional federalism and therefore be based upon a *strictly limited* power to withdraw men from the States' Militia.[666]

C. The reserved power of the people to impress themselves. As evidenced by such designations as "ALL men that are fittinge to beare armes", "ALL persons except negroes", and "every man able to beare armes", as well as the extremes of the ages upon and to which men were required to serve in the Militia at various times—the lowest being sixteen, the highest being sixty, years—*pre-*constitutional Virginia asserted and enforced a right and power to call forth essentially *every* free man of *any* age who presumably was physically, mentally, and emotionally capable of performing such service. That, from time to time, the extremities of actual mandatory service were narrowed or expanded—from "ALL men" and "ALL persons" of any age (in 1632 and 1639); to "every man able to beare armes" whatever his age (in 1659 and 1661); to sixteen to sixty years of age (in 1705); to twenty-one to sixty, with individuals sixteen to twenty permitted to volunteer in someone else's stead (in 1723); to over twenty-one (in 1738); to eighteen to sixty (in 1755, 1757, 1759, 1762, 1766, and 1771); to sixteen to fifty (in 1775 and 1777); to eighteen to fifty (in 1780, 1784, and 1785)[667]—was no denial of Virginia's authority to require Militia service from individuals then outside of the statutorily stipulated ranges, but merely the exercise of her privilege to create temporary exemptions from universal service, based on age, when mobilization of her entire male population was considered unnecessary. *In principle, every able-bodied adult free male residing in Virginia—which the range of ages from sixteen to sixty fairly well defined as a practical generality—was* ***always*** *a member of the Militia, in the sense that he labored under a* ***permanent*** *duty to serve whenever summoned.*

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[665] Virginia Declaration of Rights (1776) art. 13.

[666] *See post*, Chapter 49.

[667] *See post*, at 611-614.

Which age-groups were actually called forth to fulfill that inchoate duty, the exact terms of each man's actual service, and the formalities under which that service might be required, however, depended upon other factors, such as the numbers of men of various ages and abilities available, the immediacy and severity of the threats the community faced, the types of duty deemed appropriate from one time to another, and the responsibilities to the community other than Militia service under which certain individuals labored. For example, in 1705 the Militia statute provided that

> nothing * * * shall * * * give any power or authority * * * to list [in the Militia] any person that shall be, or shall have been of her majesty's councill in this colony, or any person that shall be, or shall have been the speaker of the house of burgesses, or any person that shall be, or shall have been her majesty's attorney general, or any person that shall be, or shall have been a justice of the peace within this colony, or any person that shall have born any military commission within this colony as high as the commission of a captain, or any minister, or the clerk of the councill for the time being, or the clerk of the general court for the time being, or any county court clerk during his being such, or any parish clerk or schoolmaster during his being such, or any overseer that hath four or more slaves under his care, or any constable during his being such, or any miller who hath a mill in keeping, or any servant by importation, or any slave, but that all and every such person * * * be exempted from serving in either the horse or foot. * * *
>
> *Provided always*, That if any overseer * * * exempted from being listed shall appear at any muster, either of horse or foot, he shall appear in arms fit for exercise, and shall perform his duty as other private soldiers do * * * . But for as much as severall of the persons exempted * * * , though they be of sufficient ability to find and keep a serviceable horse and horse arms, and such men whose personal service may not only be usefull, but necessary upon an insurrection or invasion, * * * will perhaps account themselves free from provideing and keep the same at the places of their abode, which is not intended:
>
> *Be it therefore enacted* * * * That the persons of a councellor, of a speaker of the house of burgesses, of a justice of the peace, of an attorney-general, and of a captain or an higher officer in the militia, are exempted from being listed and serving either in the horse or foot under command as the rest of the militia do, merely for the dignity of the office which they do or shall have held, and that * * * it is the true intent and meaning of this act, that all and every such person * * * , and also the clerk of the councill, the clerk of the general court, and every county court clerk shall provide and keep * * * at their respective places of abode a troopers horse, furniture, arms and ammunition * * * , and to produce * * * the same *

> * * in the county wherein they respectively reside yearly, and every year at the generall muster * * * .
>
> And in case of any rebellion or invasion shall also be obliged to appear when thereunto required, and serve in such stations as are suitable for gentlemen, under the direction of the * * * chief officer of the county where * * * they shall reside, under the same penaltys as any other person * * * enjoyned to be listed in the militia[.]{EN-851}

So, *although not even allowed to be "listed"*, an overseer who "appear[ed] at any muster * * * [was to] appear in arms fit for exercise, and * * * *perform his duty as other private soldiers d*[*id*]". And other individuals, *although excluded from "being listed and serving" perforce of their public offices*, were nonetheless obliged to keep horses, arms, and ammunition; to produce that equipment "yearly" in their Counties and "every year at the generall muster"; and to serve in the field "in case of any rebellion or invasion". Moreover, these individuals were recognized as being *part* of the Militia—simply "exempted from being listed and serving either in the horse or foot under command as *the rest of the militia do*, merely for the dignity of the office which they * * * h[e]ld"; and "under the same penaltys *as any other person * * * enjoyned to be listed in the militia*".

For another example, in 1784 and 1785, although the Militia statutes required that "all free male persons between the ages of eighteen and fifty years * * * be enrolled", they also provided that

> whereas, it will be of great utility and advantage in establishing a well disciplined militia, to annex to each regiment a light company, to be formed of young men, from eighteen to twenty-five years old, whose activity and domestic circumstances will admit of a frequency of training, and strictness of discipline, not practicable for the militia in general, and returning to the main body on their arrival at the latter period, will be constantly giving thereto a military pride and experience, from which the best of consequences will result;
>
> * * * [T]he governor * * * shall * * * for each county, appoint and commission for each regiment therein [certain officers] of the most proper persons therefor, for a light company * * * . The captain * * * shall * * * enroll * * * a sufficient number of young men * * * . And as the men of such light company shall * * * arrive at the age of twenty-five years, * * * the county lieutenant * * * shall order them to be enrolled in the [regular] company whose districts they may respectively live in, and deficiencies shall be supplied by new enrollments.{EN-852}

This illustrated operational differentiations *within* the Militia based on the ages of men "whose activity and domestic circumstances will admit of a frequency of training", but nonetheless for the purpose of "establishing a well disciplined militia"

overall. The young men in a "light company" were not some separate establishment, but merely an "annex to each regiment" who would "return[ ] to the main body" as they grew older.

Thus, formal "listing", "enrolling", or even "forming into companies" or special units did not create or define an individual's membership in the Militia, but followed from and evidenced the statutory activation of that membership. "Listing" or "enrolling" was merely the formality of recording the presence in the jurisdiction of individuals from whom the statutes required actual performance of Militia duties. "Listing" took men from membership in the Militia in principle to membership in practice. Both then and now, however, recordation was and is never the dispositive matter. An event occurs or a status obtains as the consequence of some fact, whether or not a formal record of it is made. Reality does not depend upon compliance with bureaucratic procedures and paperwork.[668] Nonetheless, "listing" was of practical import, because it brought to each individual Militiaman's attention in a formal manner the necessity to fulfill then and there the personal duties always incumbent upon him as a member of the community—as in 1705, when the statute required "a new list of all the male persons * * * capable * * * to serve in the militia * * * *to the end each trouper or ffoot soldier may be thereby guided to provide and furnish himself with * * * arms and ammunition*".{EN-853}

An absence of "listing" by itself—or even the absence of a statute providing for "listing"—could never have denied or precluded then, and cannot deny or preclude now, any man's actual (as opposed to merely formal) membership in the Militia. This is because, in an extreme situation, WE THE PEOPLE who constitute the Militia must be able to act on their own initiative, without observing any possibly inhibitory formalities demanded of them by rogue public officials whose acts of usurpation and tyranny THE PEOPLE must resist, and whose persons in places of public trust they must replace.

1. Summing up the political philosophy "*the good people of* Virginia" asserted during the *pre-*constitutional era, Virginia's Declaration of Rights announced in June of 1776:

> THAT all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

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[668] For example, a birth certificate records a birth—but the certificate is not what causes an individual to be an human being, or to be born, or to be born in a certain country, or to be the child of certain parents, with all of the rights, powers, privileges, and immunities appertaining to that nature and those circumstances. Rather, the certificate simply records those facts, which are wholly independent of, subject to proof in ways other than by reference to, and legally consequential even without, that document.

> * * * * *
>
> * * * That government is, or ought to be, instituted for the common benefit, protection, and security, of the people, nation, or community; * * * and that whenever any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, unalienable, and indefeasible right, to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal.
>
> * * * * *
>
> * * * That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state[.]{EN-854}

Because "all men * * * by nature * * * have certain inherent rights" of which they cannot be "deprive[d] or divest[ed]"; and because one of these is the right to a "government * * * instituted for the common benefit, protection, and security of the people"; and because "a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state"—therefore, "*the good people*" of every "free state", or every "*good people*" seeking to live in a "free state", enjoy and may exercise an "indubitable, unalienable, and indefeasible right" to form and deploy themselves in Militia for the purpose of "reform[ing], alter[ing], or abolish[ing]" a rogue governmental apparatus "in such manner as shall be judged most conducive to the public weal", whenever and however in their own discretion they deem such a course unavoidably necessary.

Obviously, "*the good people*" must take this action while the rogue governmental apparatus is still in existence and (presumably) resisting their efforts, and before they have instituted a new government. For that reason, the legitimacy of their actions cannot be contingent upon any constitutional provision, statute, or other form of permission of or from either the rogue government, which is in the process of abolition, or the new government, which at that point may not even be in the process of construction. Instead, their authority must rest upon the principle that "all men * * * *by nature* * * * have certain *inherent* rights" that neither derive their existence from nor depend for their enforcement upon governments, constitutions, and statutes—and that one (or a complex) of these inherent rights empowers them to form "a well regulated militia, composed of the body of the people, trained to arms".

As a corollary of this inherent right of community self-preservation, self-defense, self-help, and self-regeneration, rogue public officials are rightless and powerless, both legally and morally, to interpose any of their purported "governmental authority" against the people's self-mobilization of their Militia under such circumstances. For, by definition, *rogue* public officials have forfeited all claims to *legitimate* "governmental authority". And those officials who proceed

mistakenly, albeit arguably in good faith, lack "governmental authority" to the extent of their errors. Neither the studied malevolence nor the simple ignorance of temporary officeholders can bind "*the good people*" where their inherent rights are at stake. That, after all, is the operational meaning of an "inherent right". Thus, ***in a political emergency "the good people" may impress themselves into their Militia, without authorization from, and even in the face of prohibition by, rogue public officials***.

2. This reasoning was and remains applicable not only to Virginians. On behalf of *all* of "the good People" of the Thirteen Colonies, and their political descendants, the Declaration of Independence explained that "whenever any Form of Government becomes destructive of [men's unalienable Rights], it is the Right of the People to alter or to abolish it", and "when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security". "[T]o *throw off* [a bad] Government" plainly implies *main force*—the "'[p]olitical power [that] grows out of the barrel of a gun'"[669]—exercised by the people themselves, with arms in their own hands, because certainly the old despotic "Government" will not do so, and the Declaration identifies no one else to undertake this task. The employment of force is "the good People's" *right*, the right of popular sovereignty, because "Governments are instituted among Men, deriving their just powers from the consent of the governed". And it is "the good People's" *duty*, because every right requires a remedy, a means of enforcement: "A right without a remedy is as if it were not. For every beneficial purpose it may be said not to exist."[670] Which implies impressment of the people themselves, by the people themselves, into a military force sufficient for that purpose.

The right and especially the duty "to throw off [a bad] Government" are never to be found within the "laws" of such a "Government"—for inevitably the products of such a "Government" are *bad* "laws", not really "laws" at all, but instead component parts of the "long train of abuses and usurpations * * * design[ed] to reduce the[people] under absolute Despotism". The "laws" of that "Government" will vehemently deny the existence of any such right, and strictly prohibit the fulfillment of any such duty. Neither can the right and the duty "to throw off [a bad] Government" in favor of a good one be found in the laws of the new government—for until the bad "Government" is replaced, they will have yet to be enacted. As the Declaration makes clear, the people's right and duty of community self-defense against usurpers and tyrants come from none of man's feeble and fallible

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[669] *Quotations From Chairman Mao*, *ante* note 28, at 61.

[670] United States *ex rel.* Von Hoffman v. City of Quincy, 71 U.S. (4 Wallace) 535, 554 (1867). *Accord*, Poindexter v. Greenhow, 114 U.S. 270, 303 (1885); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

positive laws at all, but from the highest and unerring body of law: "the Laws of Nature and of Nature's God", *to be construed and executed by the people themselves, there being no other earthly adjudicator of their grievances*.

These principles were so clearly established in the *pre*-constitutional period that even Blackstone, himself anything but a panegyrist of any Colony's rebellion against the Mother Country, correctly opined that "[s]elf defence * * * , as it is justly called the primary law of nature, so it is not, neither can it be *in fact*, taken away by the law of society".[671] The positive "law" of some place (the so-called "municipal law") might purport to deny the right and duty of self-defense. But *in fact* they could and would be exercised and fulfilled on the basis of the higher "law of nature"—and through that exercise would supplant the old and usher in the new municipal law.

More specifically, in his discussion of "the rights of the people of England"—which all of the American Colonists demanded as the very minimum set of their rights, too—Blackstone elucidated the right

> of having arms for their defence, suitable to their condition and degree, and such as are allowed by law. Which * * * is indeed a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.[672]

But, self-evidently, "when the sanctions of society and laws are found insufficient to restrain the violence of oppression", *because those "sanctions" and "laws" are themselves the very rationalizations for and instruments of "oppression"*, then only "the good People" themselves remain to restrain their oppressors. At that point, *ex necessitate*, the "arms for their defence, suitable to their condition and degree, and such as are allowed *by law*", are to be identified by the people themselves through their own recourse to "the Laws of Nature and of Nature's God" and the proper definition of a "Militia".

D. Discriminations based on servitude. Virginia's *pre*-constitutional Militia statutes were in principle near-universal in scope. That catholicity was marred, however, by different forms of discrimination based on various individuals' conditions of servitude.

1. Although the understanding at the time was that servants and apprentices were not entirely "free", because they were bound to their masters by indentures or other contracts—service under some of which may have been little

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[671] *Commentaries on the Laws of England, ante* note 142, Volume 3, at 3 (emphasis supplied).

[672] *Id.*, Volume 1, at 143-144.

better than slavery for a term of years[673]—such men were generally included amongst those eligible for membership in the Militia. Recognizing these individuals' distinct status, however, Virginia's legislators often chose to enumerate them explicitly:

> • [1619] "All persons whatsoever upon the Sabaoth daye shall frequent divine service * * * , and all suche as beare arms shall bring their pieces swordes, poulder and shotte. * * * . But if a servant in this case shall willfully neglecte his [master's] comande he shall suffer bodily punishmente."{EN-855}
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> • [1632] "ALL men that are fittinge to beare armes, shall bringe their peices to the church * * * , yf the mayster allow not thereof to pay 2 lb. of tobacco * * * , and the servants to be punished."{EN-856}
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> • [1643] "[M]asters of every family shall bring with them to church on Sondays one fixed and serviceable gun with sufficient powder and shott * * * , and servants being commanded and yet omitting shall receive twenty lashes on his or theire bare shoulders[.]"{EN-857}
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> • [1705] "[N]othing * * * shall * * * give any power * * * to list [in the Militia] * * * any servant by importation * * * , but * * * all and every such person * * * be exempted from serving either in horse or foot."{EN-858}
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> • [1755, 1757, 1759, 1762, 1766, and 1771] "[T]he chief officer of the militia in every county shall list all male persons above the age of eighteen years, and under the age of sixty years, within this colony, (imported servants excepted)[.]"{EN-859}
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> • [1775] "[I]n each county * * * all free male persons, hired servants, and apprentices, above the age of sixteen, and under fifty years, except such as are * * * excepted [under the statute], shall be enlisted into the militia[.]"{EN-860}
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> • [1777] "[A]ll free male persons, hired servants, and apprentices, between the ages of sixteen and fifty years [with various exceptions] * * * shall * * * be enrolled or formed into [Militia] companies[.]"{EN-861}

Not surprisingly in light of the latitude of control the law allowed masters to exercise over their servants and apprentices, the masters found themselves held responsible for their servants' and apprentices' derelictions of duty. For example, masters were generally required to enable their impecunious servants to participate in the Militia by providing them during their terms of service with the firearms, ammunition, and accoutrements necessary to fulfill their Militia duties, or else

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[673] *See* Edmund S. Morgan, *American Slavery American Freedom: The Ordeal of Colonial Virginia* (New York, New York: W.W. Norton & Company, Inc., 1975); David Galenson, *White Servitude in Colonial America: An Economic Analysis* (New York, New York: Cambridge University Press, 1981).

paying the fines that otherwise would have been assessed against the servants for being unarmed.[674]

The servants' and their masters' joint liability in this regard was sometimes recognized even when the period of servitude ended. In 1705, a statute mandated that, "whereas there has been a good and laudable custom of allowing servants corn and cloaths for their present support, upon their freedom * * * , *Be it* * * * *enacted* * * * That there shall be paid and allowed to every imported servant, not having yearly wages, at the time of service ended, by the master or owner of such servant, viz: To every male servant, * * * one well fixt musket or fuzee, of the value of twenty shillings, at least[.]"{EN-862} This juxtaposition of a servant's "freedom" with his ownership of "one well fixt musket or fuzee" was neither accidental nor the result of some purposeless generosity. Virginia's General Assembly obliged masters to arm their servants "upon the[latters'] freedom" because *all* adult, able-bodied free men in the community were required (unless specifically exempted) to possess a firearm suitable for Militia service at all times.[675] Freedom and the personal possession of firearms were two sides of the same social and political coin.

Notwithstanding the great degree of control masters exercised over their servants and apprentices, they could not refuse to allow them to participate in the Militia. This inability contrasted starkly with the leeway the General Assembly was willing to provide to masters to forbid their servants and apprentices from voluntarily enlisting in Virginia's regular Armed Forces:

> • [1775] "[N]o recruiting officer shall be allowed to enlist into the service any servant whatsoever, except apprentices bound under the laws of this colony, nor any such apprentices unless the consent of his master be first had in writing[.]"{EN-863}
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> • [1777] "[R]ecruiting officers * * * shall have power to enlist any able-bodied men willing to enter into the service, except apprentices and hired servants under written contracts at any iron works, * * * also imported servants, and those who are by law obliged to serve to thirty one years of age[.]"{EN-864}
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> • [1778] "[I]t shall not be lawful * * * to enlist any artificer employed by contract * * * in the publick manufactories of fire arms, or at any iron works, nor any indentured apprentice in such manufactory or work, nor any imported servant, without leave in writing from the manager of such manufactory or work, or owner of such servant."{EN-865}

2. From the earliest days, in contrast to Caucasian servants (who were generally expected to be armed), even free Negroes, Indians, and other people of

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[674] *See post*, at 428-432.

[675] *See post*, Chapters 17 through 19.

color were generally expected to be disarmed—and, in the case of slaves, were rigorously excluded from the unsupervised possession of firearms:

> • [1639] "ALL persons except negroes to be provided with arms and amunition or be fined[.]"{EN-866}
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> • [1680] "WHEREAS the frequent meeting of considerable numbers of negroe slaves under pretence of feasts and burialls is judged of dangerous consequence; for prevention whereof for the future, * * * that * * * it shall not be lawfull for any negroe or other slave to carry or arme himselfe with any club, staffe, gunn, sword or any other weapon of defence or offence[.]"{EN-867}
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> • [1705] "That no slave go armed with gun, sword, club, staff, or other weapon, nor go off the plantation and seat of land where such slave shall be appointed to live, without a certificate of leave in writing * * * from his or her master, mistress, or overseer: And if any slave shall be found offending herein, it shall be lawful for any person or persons to apprehend and deliver such slave to the next constable * * * who is hereby * * * required, without further order or warrant, to give such slave twenty lashes on his or her bare back, well laid on[.]"{EN-868}
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> Violators of this statute were threatened with being "prosecuted according to the Strictest Severity & Rigor of the Common Law as such Disobedience requires."{EN-869}
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> • [1723 and 1748] "[N]o negro, mulatto, or Indian whatsoever", with certain exceptions,[676] "shall * * * presume to keep, or carry any gun, powder, shot, or any club, or other weapon whatsoever, offensive or defensive; but that every gun, and all powder and shot, and every such club or weapon * * * found or taken in the hands, custody, or possession of any such negro, mulatto, or Indian, shall be taken away; and * * * be forfeited to the seisor and informer, and moreover, every such negro, mulatto, or Indian, in whose hands, custody, or possession, the same shall be found, shall * * * receive any number of lashes, not exceeding thirty-nine, well laid on, on his or her bare back, for every such offence."{EN-870}
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> (By the late 1700s, a "mulatto" was defined as "every person who shall have one-fourth part or more of negro blood".{EN-871})
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> • [1785] "No slave shall keep any arms whatever * * * unless with written orders from his master or employer, or in his company with arms, from one place to another. Arms in possession of a slave contrary to this prohibition, shall be forfeited to him who will seize them."{EN-872}

Free Negroes, Indians, and people of mixed races, however, were allowed to serve in the Militia, but only in capacities that did not require them (and presumably did not normally allow them, either) to bear firearms:

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[676] *See post*, at 734-736.

• [1705] This statute empowered "the * * * chief officer of the militia of every county * * * to list all male persons whatsoever, from sixteen to sixty years of age * * * to serve in horse or foot, as in his discretion he shall see cause and think reasonable", but also provided that "any slave * * * be exempted from serving either in horse or foot". It did not, however, say whether and to what extent *free* Negroes, Indians, or persons of mixed race could be enlisted.{EN-873} Perhaps such individuals were excluded because Militia officers simply did not "see cause and think reasonable" to enlist them. If non-Whites had regularly been listed, the explicit statutory commands on the subject enacted in subsequent years would not have been necessary.

• [1723] "[S]uch free Negros, Mulattos, or Indians, as are capable, may be listed and emploied [in the Militia] as drummers or trumpeters: And that upon any invasion, insurrection, or rebellion, all free Negros, Mulattos, or Indians, shall be obliged to * * * march with the militia, and to do the duty of pioneers, or such other servile labour as they shall be directed to perform.

" * * * [I]f * * * any free Negro, Mulatto, or Indian, other than as before excepted, shall presume to appear at any muster whatsoever, the party so offending, shall for every such offence, forfeit and pay one hundred pounds of tobacco[.]"{EN-874}

• [1738] "[E]very person * * * listed [in the Militia], (except free mulattos, negros and Indians,) * * * shall be armed * * * .

" * * * [A]ll such free mulattos, negros, or Indians, as are or shall be listed, * * * shall appear without arms; and may be emploied as drummers, trumpeters, or pioneers, or in such other servile labour, as they shall be directed to perform."{EN-875}

• [1755] "[E]very person * * * inlisted [in the Militia], (except the people commonly called Quakers, free Mulattoes, negroes and Indians) * * * shall be armed and accoutred * * * .

* * * * *

" * * * [A]ll such free mulattoes, negroes and Indians, as are or shall be listed, * * * shall appear without arms, and may be employed as drummers, trumpeters or pioneers, or in such other servile labor, as they shall be directed to perform."{EN-876}

• [1757, 1759, 1762, 1766, and 1771] "[E]very person * * * inlisted (except free mulattoes, negroes, and Indians) shall be armed[.]

* * * * *

" * * * [A]ll free mulattoes, negroes, and Indians as are or shall be inlisted [in the Militia] * * * shall appear without arms, and may be employed as drummers, trumpeters, or pioneers, or in such other servile labor as they shall be directed to perform."{EN-877}

• [1777] "[A]ll free male persons, hired servants, and apprentices, between the ages of sixteen and fifty years" with certain exceptions "shall * * * be enrolled or formed into companies * * * . The free mulattoes * * * shall be employed as drummers, fifers, or pioneers."{EN-878}

Inevitably, slaves had to be excluded from the Militia on the perverse but highly practical principle that men held in perpetual bondage could never safely be entrusted with firearms, let alone trained to use them in military formations. In 1705, the statute explicitly exempted slaves from the Militia: "That nothing * * * shall * * * give any power or authority * * * to list * * * any slave, but that all and every such person * * * be exempted from serving either in horse or foot."{EN-879} Then, the statutes in 1723 and 1738 implicitly excluded slaves by authorizing "the chief officer of the militia of every county" to "list all free male persons" only.{EN-880} Thereafter, from 1755 through 1771, the statutes called for "list[ing] all male persons * * * (imported servants excepted)", with no reference to freedom or bondage, but apparently with the tacit understanding that slaves were not included among "persons" or even "imported servants",{EN-881} having long theretofore been declared a form of "real estate".{EN-882} For those same statutes also provided "[t]hat all such *free* mulattoes, negroes and Indians, *as are or shall be listed*, * * * shall appear [at musters] without arms"{EN-883}—indicating that "*all* male persons" did not include *unfree* "mulattoes, negroes and Indians". Finally, in 1775, 1784, and 1785, the statutes broadly mandated that "all free male persons, hired servants, and apprentices * * * shall be enlisted into the militia",{EN-884} or "all free male persons * * * shall be enrolled or formed into companies,"{EN-885} without any explicit disabilities being imposed upon free persons of color.

In practice, too, slaves could not have surreptitiously insinuated themselves within Militia Companies, because such Companies were always composed of Local residents at least some of whom knew which Negroes residing in the area were free, and which were not, and all of whom would have been particularly suspicious of Negro strangers who arrived claiming they were free men.

Enlistment in the regular Armed Forces of Virginia or the United States might have been easier for runaway slaves during the War of Independence than at other times, had not the Commonwealth enacted a prophylactic law in 1777: "[W]hereas several negro slaves have deserted from their masters, and under pretence of being free men have enlisted as soldiers * * * it shall not be lawful for any recruiting officer within this commonwealth to enlist any negro or mulatto into the service of this or either of the United States, until such negro or mulatto shall produce a certificate from some justice of the peace for the county wherein he resides that he is a free man."{EN-886}

In any event, although Virginia's Militia statutes neither required nor allowed even free Negroes, Indians, and people of mixed races to be armed *for*

service in the Militia, they did not prohibit such individuals from possessing and using firearms at other times for other legitimate reasons. And various other statutes specifically allowed many of them to be armed.[677]

E. Preference for volunteers. Virginia's *pre-*constitutional Militia was near-universal in membership, compulsory in participation, and disseminated in operation in every Locality throughout the Commonwealth. Yet, although Virginia was thus a political community totally organized along *para-*military lines, she was not "a garrison state" or a "national-security state", but "a free state"—and it was precisely her "well regulated militia, composed of the body of the people, trained to arms," which secured that freedom.[678] Paradoxical? No. For although the statutes mandated total inclusion of the population of able-bodied free adult males in the Militia as an institution, they did not require total involvement of all Militiamen in the institution's every activity. Although all Militiamen (other than a few specially exempted) were always possessed of arms,[679] and "trained to arms",[680] not every one of them was always standing to arms at home or called to bear arms in the field. Rather, from the very beginning, Virginia always took account of the necessity to spread the burden of active service in order to maintain the socio-economic order in a state of normalcy to the greatest degree possible:

> [1629] "[E]very commander of the severall plantations appointed by commission from the governor shall have power and authoritie to levy a partie of men out of the inhabitants of that place soe many as may well be spared without too much weakening of the plantations and to imploy these men against the Indians, when they shall assault us neere unto our habitations[.]"{EN-887}

This was only the common sense of the situation: After all, as the Declaration of Independence summarized the accumulated political wisdom of *pre-*constitutional American patriots, "Governments are instituted among Men" for the purpose of "secur[ing certain unalienable] rights", foremost among which are "Life, Liberty, and the pursuit of Happiness". People will not be able to pursue happiness in the normal "Course of human events", though, if they are perpetually under arms, when being so is not necessary to secure their lives and liberties.

So, although in *pre-*constitutional Virginia service in her Militia was always obligatory, and service in her regular troops could be compulsory, in many instances in both the Militia and the regular troops the practice was to seek volunteers for

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[677] *See post*, at 733-742.

[678] Virginia Declaration of Rights (1776) art. 13.

[679] *See post*, Chapters 17 through 19.

[680] *See post*, at 541-549.

particular duty, and only if not enough of them were forthcoming to rely upon impressment:

> • [1645] "[T]he * * * counsell of warr shall have power to leavie such and soe manie men, arms, ammunition and other necessaries as emergencie of occasions shall require, * * * And * * * for the manageing the warr * * * , That evrie 15 tithable persons shall sett forth, compleatly furnish and maintain, one soldier * * * ; And * * * all negro men and women, and all other men from the age of 16 to 60 shall be adjudged tithable: * * * And where ffifteen are joyned to set forth one and cannot agree amongst themselves, * * * the council of warr shall press whom they shall think fitt[.]"{EN-888}

> • [1676] "[I]t shall * * * be lawfull to and for * * * [the] commander in cheife * * * to raise such number of volunteers for the more expeditious carrying on this warr, as shall freely offer themselves for this service * * * . Provided alsoe, that if * * * the number of volunteers * * * shall be * * * suffitient and fully effectuall for the prosecution of this * * * warr * * * , that then * * * [the commander in chief] is * * * impowered and authorized to dispense, and * * suspend the levying and raiseing of such part of all the forces, ammunition and provisions intended[.]"{EN-889}

> • [1679] "[T]hat fower houses for stores or garrisons be erected and built at the heads of the ffower greate rivers * * * . *And* * * * that every forty tythables within this colony be assessed and obleiged * * * to fitt and sett forth one able and suffitient man and horse, with furniture well and compleatly armed * * * , which fforty tythables * * * shall either refuse, neglect or be uncapable to fitt out such man and horse, armes, provisions and ammunition * * * , that then the justices and militia officers * * * impresse a man and horse with armes, ammunition and provisions * * * and send them to the said storehouse or garrison, and assesse the said delinquent tythables, the whole charge thereof [.]"{EN-890}

> • [1682] "[T]hat twenty men well furnished with horses and all other accoutrements be raised * * * in each of [certain] counties * * * of such housekeepers * * * as shall voluntarily offer themselves for this service, and for want of such or so many housekeepers, that then the said number shall be made of such freemen as shall willingly offer themselves * * * ; but in case such twenty men quallified * * * shall not be found in each of the said counties, then it shall and may be lawfull for the militia officers * * * to impresse such, and soe many men furnished * * * as shall be wanting[.]"{EN-891}

> • [1684] "That four troops of horsemen * * * be raised * * * , every way well horsed and armed * * * ; but in case the full number * * * compleatly mounted, armed and provided * * * cannot be raised by such as shall voluntarily offer themselves for that service, that then his

excellency the governour * * * [may] issue forth his warrant for the raiseing soe many men * * * as shall be wanting[.]"{EN-892}

• [1684] "Whereas Cap^{t} Geo: Cooper Commander of y^{e} Thirty men appointed by Act of Assembly to range in Rappahanack County * * * finds an unwillingnesse in y^{e} former soldiers to continue y^{e} service & doubts he cannot raise y^{e} aforesaid number; It is therefore ordered, that * * * Capt: Geo: Cooper return to his Command, to compleat his number of men and horse, w^{ch} if he cannot doe * * * then he is hereby required to signifye y^{e} same to y^{e} Council, to y^{e} intent y^{e} number may be compleated by way of impresse by warrants w^{ch} will issue forth for that purpose. And whereas It is probable, y^{e} other Commanders may meet with y^{e} like difficulty, y^{e} same method is to be observed by them[.]"{EN-893}

• [1691] The Council, "takeing into their Consideration that there are soe many Young Lusty Men in this Country, which noe doubt will offer themselves Voluntiers for Rang^{rs} that none Neede be Imprest, Doe therefore Order that none be Imprest, and that the likelyest of those that Offer themselves to doe their Ma[jesties'] Service be taken".{EN-894}

• [1711] "[T]he commander in chief * * * [shall] constitute and appoint * * * lieutenants or commanders of the rangers for the * * * frontiers; each of which * * * shall choose * * * able bodyed men, with horses and accoutrements, arms and ammunition, residing as near as conveniently may be, to that frontier station * * * . But if such lieutenant cannot find a sufficient number of able bodyed men * * * to serve voluntarily * * * it shall and may be lawfull for the commander in chief of the militia in the same county * * * to order and impress out of the militia of that county, so many able bodyed men[.]"{EN-895}

• [1755] "That * * * a sum of money not exceeding two thousand pounds * * * be laid out for and in the raising and maintaining three companies of men * * * to be employed as rangers, for the protection of the subjects in the frontiers of this colony * * * , and shall not be sent out of this colony, nor incorporated with the soldiers now in his majesty's service, or made subject to martial law. And in case the * * * men, cannot be raised, by such as will voluntarily enlist * * * chief officer[s] of the militia * * * [may] draft out of the militia * * * such and so many young men * * * who have not wives and children * * * to be employed in the * * * service."{EN-896}

• [1755] "[I]n case the [required] number of men cannot be raised, by such as will voluntarily inlist * * * , it shall and may be lawful, for the field officers and captains of the militia * * * to draft out of the militia of their counties * * * such and so many of their militia, who have not wives or children, * * * to be employed in the * * * service[.]"{EN-897}

• [1756] Various officers "of the militia * * * shall * * * inlist all such able bodied men as will voluntarily enter into his majesty's service,

but in case so many of them will not voluntarily enlist as will make one of every twenty of the militia, then they shall cause so many distinct blank pieces of paper to be prepared, as the number of the able-bodied single men * * * , upon one of which pieces of paper for every twentieth man * * * shall be written the words * * * *"This obliges me immediately to enter his majesty's service,"* which distinct pieces of paper * * * shall be put into a box * * * , and then * * * all the said able bodied men single men * * * one after another * * * [are] to draw forth one of the said pieces of paper * * * ; and the person * * * whose lot it shall be, to draw forth * * * any of the said papers, so written upon * * * , shall immediately * * * be deemed and taken to be an inlisted soldier[.]"{EN-898}

• [1775] "And for the more expeditious, convenient, and speedy draughting into service detachments of the militia of this colony, as occasion may require, *Be it* * * * *ordained*, That, at the general muster of the militia * * * the commanding-officer of each county or corporation shall, by fair and equal lot, cause to be drawn out of each company so many men as will amount to one tenth part thereof. and cause the names of the persons so allotted to be enrolled * * * as the first division of the militia for such county or corporation; and * * * in like manner proceed, by lot, to fix * * * the nine other divisions of the said militia * * * ; and thereafter, if the militia * * * shall be called into duty, the same shall be performed by the divisions, in the order they shall so stand enrolled, one after another, so as to preserve the regular rotation of duty amongst them.

* * * * *

"*Provided always*, That if there shall * * * be a sufficient number of men, who will voluntarily enter into the service, to answer the demand made upon the militia * * * , such volunteers shall be accepted instead of calling on the divisions[.]"{EN-899}

• [1777] "[F]or the more speedy and certain completion of the * * * new battalions, every county, city, and borough [with certain exceptions] * * * , in case the * * * officers by them appointed * * * shall not * * * enlist the[ir] quota * * * , shall make up such deficiency by draughts, to be taken from their respective militias in manner following * * * : The [field officers and magistrates in the commission of the peace] * * * shall first ascertain the * * * deficiency * * * , and immediately * * * divide the whole militia * * * into as many lots as there may be men wanting to supply their quota, * * * taking care to allot to each division * * * as many able bodied men as conveniency will admit, having regard to the property of each individual composing such divisions, so as to make the number of able bodied men, and the property in each, as equal as may be; that each of the * * * divisions shall be required to furnish one man; and in case any such division refuse, or neglect to do so * * * , that then the field officers and magistrates * * * shall fix upon and draught one

man, who, in their opinion, can be best spared, and will be the most serviceable[.]"{EN-900}

• [1777] "FOR making provision against invasions and insurrections, and laying the burthen thereof equally on all: *Be it enacted* * * * , That the division of the militia of each county into ten parts * * * shall be completed and kept up * * * , each part to be distinguished by fair and equal lot * * * .

" * * * The several divisions of the militia * * * shall be called into duty by regular rotation * * * . Any able bodied volunteers who will enter into the service shall be accepted instead of so many of the divisions of the militia * * * , or of the particular person in whose room they may offer to serve; but if the invasion or insurrection be so near and pressing as not to allow the delay of calling the division * * * next in turn, the commanding officer may call on such part of the militia as shall be most convenient to continue in duty until such division * * * can come in to supply their places."{EN-901}

• [1777] "WHEREAS it is indispensably necessary that the regiments of infantry raised * * * , on continental establishment, be speedily recruited * * * : *Be it therefore enacted* * * * , That * * * the said regiments * * * be completed by recruits or draughts * * * .

* * * * *

"But as an encouragement to persons to enter voluntarily into the said service, and thereby avoid the necessity of making such draughts, as far as may be done, *It is farther enacted*, That * * * [certain public officials and Militia officers] shall have power to enlist any able-bodied men willing to enter into the service, except apprentices and hired servants under written contracts at any iron works, or persons solely employed in the manufacture of fire arms, not having leave in writing from the owner or manager of such works, except also imported servants, and those who are by law obliged to serve to thirty one years of age * * * ; and so many men as can be thereby enlisted into the said regiments * * * shall be deducted from the number of men to be draughted[.]"{EN-902}

• [1779] "WHEREAS [a previous statute] * * * hath not produced the end proposed, many counties having failed to furnish one twenty fifth man * * * ; and whereas it is just that the whole community should bear an equal part in publick defence: *Be it enacted* * * * , That the * * * commanding officer of the militia shall * * * cause his county to be immediately laid off into divisions, * * * each of which * * * shall furnish a man * * * ; and if * * * any division shall still have failed, the county lieutenant * * * by fair and impartial lot, [shall] draft one man out of such division, to serve as a regular soldier for * * * eighteen months[.]"{EN-903}

• [1782] "FOR the more speedy recruiting this state's quota of troops in the continental service, *Be it enacted*, That three thousand men, of able bodies and sound minds, at least five feet four inches high, not

> being deserters and between the ages of eighteen and fifty years, shall be forthwith raised * * * : One able-bodied man * * * for every fifteen militia-men. And for effecting that purpose in the most equitable manner,
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> " * * * That * * * [certain officers] of the militia * * * shall * * * divide each county into as many classes or districts as there are men required * * * , making such classes as equal as may be, having regard as well to an equal proportion of taxable property in the county * * * as the number of able-bodied men. * * *
>
> " * * * That each class or district * * * shall * * * enlist * * * one man * * * to serve as a soldier in the continental army * * * or pay a sum * * * for the enlistment of a soldier or payment of the money in lieu of him. * * * [A]nd in case the same shall not be paid or such soldier enlisted * * * the captain * * * of the company to which such delinquents * * * belong * * * [shall] cause one of the said able-bodied militia-men to be drafted, by fair and equal ballot[.]"{EN-904}
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> In this instance, presumably the Militiamen decided who would go pursuant to some voluntary agreement amongst themselves, because the statute did not prescribe how they were to designate their recruit, only that if they failed to do so or to pay a fee then one of their own number would be drafted.

This preference for volunteers, of course, is precisely what one would expect in "a free state". For the essence of "a free state" is popular self-government. Popular self-government is not a process in which a few individuals are active participants and most others merely passive spectators. Rather, it aims at *all* individuals' acceptance of their responsibilities to concert their efforts with their neighbors in the necessary affairs of the community. The ideal is full voluntary participation by everyone, to the extent of each person's competence. So, in a perfectly self-governing community, coercion of individuals to perform public services would never be necessary, because everyone would always understand his civic duties and spontaneously carry them out. Individuals would willingly subordinate their purely private interests to "the *common* defence" and "the *general* Welfare", because they would realize that only in this way could they, in and through their community, "establish Justice, insure domestic Tranquility, * * * and secure the Blessings of Liberty to [them]selves and [their] Posterity".[681] Inasmuch, however, as every community is composed of morally weak and intellectually fallible human beings who on the basis of one facile rationalization or another will attempt to shirk their responsibilities and shift the burdens of their civic duties to others at least part of the time, no perfectly self-governing community can exist. For any community to practice self-government as well as can be expected in the face of its constituents' personal imperfections, universal impressment with respect to fundamental civic

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[681] U.S. Const. preamble (emphasis supplied).

duties must be its basic principle of organization (although not necessarily its inevitable practice with respect to all of its members). This will vindicate the efforts of those who volunteer for public service—while, as to everyone else, promoting proper behavior, deterring improper behavior, and punishing misbehavior if deterrence fails.

Inasmuch as participation in "a well regulated militia" is the most important of all civic duties—because "a well regulated militia" is "the proper, natural, and safe defence of a free state" and is "necessary to the security of a free State"[682]—universal impressment must ever be the first principle of the Militia. Nonetheless, the goal in operation of the Militia should be to encourage the socio-political ideal, by relying on volunteers to the degree that is possible and prudent—so that, outside of the most basic duties, impressment remains an abstract principle rather than a recurring practice; and that, in all but times of the most extreme danger, the community need not call upon every one or even most of its members to serve in the field, but can allow the great majority of them to remain trained and ready, but reposed in reserve. After all, "[t]hey also serve who only stand and wait".[683]

F. Selective drafts. Because volunteers in the first instance select themselves, reliance on them is always a chancy business. On the one hand, an individual volunteer might be someone who is more valuable to the community serving in his civilian capacity at home than as a Militiaman or regular soldier in the field. On the other hand, an individual volunteer might be someone who, although he can qualify as able-bodied, is of little use in the civilian community, yet still can be at least minimally desirable for military duty. The same, of course, is true with an indiscriminate draft. The service ends up taking the good along with the bad, in varying degrees, promiscuously.

1. Considerations of this kind no doubt subtended Virginia's adoption of *selective* impressments in certain circumstances:

> • [1740] "WHEREAS, his majesty hath * * * sen[t] instruction * * * to raise and levy soldiers, for carrying on the present war, against the Spaniards, in America * * * ; and taking into * * * consideration, that there are in every county, within this colony, able-bodied persons, fit to serve * * * , who follow no lawful calling or employment:
>
> " * * * [T]he justices of the peace * * * [may] raise and levy such able-bodied men as do not follow or exercise any lawful calling or employment, or have not some other lawful and sufficient support and maintenance, to serve * * * as soldiers * * * .

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[682] Virginia Declaration of Rights (1776) art. 13 *and* U.S. Const. amend. II.

[683] John Milton, Sonnet XIX, "When I consider how my light is spent", *Poems* (London, England: Thomas Dring, 1673).

" * * * [N]othing * * * shall extend to the taking or levying any person to serve as a soldier, who hath any vote in the election of * * * burgesses, to serve in the general assembly of this colony; or who is * * * an indented or bought servant."{EN-905}

• [1754] "WHEREAS his majesty has * * * sen[t] instructions * * * to raise and levy soldiers for carrying on the present expedition against the French on the Ohio * * * ; and * * * there are * * * able bodied persons, fit to serve his majesty, who follow no lawful calling or employment.

" * * * [T]he justices of the peace of every county and corporation with in this colony, * * * upon application made to them, by any officer * * * appointed or impowered to enlist men, * * * [may] raise and levy such able bodied men, as do not follow or exercise any lawful calling or employment, or have not some other lawful and sufficient support and maintenance, to serve his majesty, as soldiers in the present expedition * * * .

" * * * [N]othing * * * shall extend to the taking or levying any person to serve as a soldier, who hath any vote in the election of a Burgess or Burgesses to serve in the General Assembly * * * , or who is, or shall be an indented or bought servant, or any person under the age of twenty one years, or above the age of fifty years."{EN-906}

• [1755] "That * * * a sum of money not exceeding two thousand pounds * * * be laid out for and in the raising and maintaining three compa[n]ies of men * * * to be employed as rangers, for the protection of the subjects in the frontiers of this colony, * * * and shall not be sent out of this colony, nor incorporated with the soldiers now in his majesty's service, or made subject to martial law. And in case the * * * men, cannot be raised, by such as will voluntarily enlist * * * chief officer[s] of the militia * * * [may] draft out of the militia * * * such and so many young men * * * who have not wives and children * * * to be employed in the said service."{EN-907}

• [1755] "[I]n case the * * * [required] number of men cannot be raised, by such as will voluntarily inlist * * * , it shall and may be lawful, for the field officers and captains of the militia * * * to draft out of the militia of their counties * * * such and so many of their militia, who have not wives or children, * * * to be employed in the * * * service[.]"{EN-908}

• [1756] "[T]he * * * chief commanding officer of the militia in every county, and of the city of Williamsburg, and borough of Norfolk, except the county of Hampshire, * * * [shall] hold a council of war * * * at which * * * the * * * captains of the militia * * * shall deliver in lists * * * of all the single men in their * * * muster-rolls * * * ; which council of war shall enter the names of all the able-bodied single men upon a list, and shall immediately appoint a certain day * * * for the said able-bodied single men * * * to meet at the court-house of such county, city, or

borough * * * : And the [various officers] of the militia * * * shall then inlist all such able bodied men as will voluntarily enter into his majesty's service, but in case so many of them will not voluntarily inlist as will make one of every twenty of the militia, then they shall cause so many distinct blank pieces of paper to be prepared, as the number of the able-bodied single men * * * , upon one of which pieces of paper for every twentieth man * * * shall be written the words * * * *"This obliges me immediately to enter his majesty's service,"* which distinct pieces of paper * * * shall be put into a box * * * , and then the said council of war shall cause all the said able bodied men single men * * * one after another * * * to draw forth one of the said pieces of paper * * * ; and the person * * * whose lot it shall be, to draw forth * * * any of the said papers, so written upon * * * shall immediately * * * be deemed and taken to be an inlisted soldier[.]"{EN-909}

• [1757] "[F]or the more speedy raising the men * * * the several justices [of the peace], and field-officers, and captains of their respective counties, city and borough, * * * shall * * * hold a court, and examine and enquire into the occupation and employment of the several inhabitants * * * between the age of eighteen and fifty years * * * : And the said courts are * * * required to prick down all such able-bodied persons * * * as shall be found loitering and neglecting to labor for reasonable wages; all who run from their habitations, leaving wives or children without suitable means for their subsistance, and all other idle, vagrant, or dissolute persons, wandering abroad without betaking themselves to some lawful employment * * * . And in a case a sufficient number of such persons * * * cannot be found * * * , then the said courts are hereby impowered to prick down such able-bodied men, not being freeholders or house-keepers qualified to vote at an election of burgesses, as they shall think proper to make up the same. * * * [A]nd such court shall then proceed to draft out * * * one man for every forty effective soldiers in the militia of each county, city and borough."{EN-910}

• [1777] "[F]or the more speedy and certain completion of the * * * new battalions [for the Continental Army], every county, city, and borough [with certain exceptions] * * * , in case the * * * officers by them appointed * * * shall not * * * enlist the[ir] quota * * * , shall make up such deficiency by draughts, to be taken from their respective militias in manner following * * * : The * * * [field officers and magistrates in the commission of the peace] * * * shall first ascertain the * * * deficiency * * * , and immediately * * * divide the whole militia of each county, city, and borough * * * into as many lots as there may be men wanting to supply their quota, * * * taking care to allot to each division * * * as many able bodied men as conveniency will admit, having regard to the property of each individual composing such divisions, so as to make the number of able bodied men, and the property in each, as equal as may be; that each

> of the * * * divisions shall be required to furnish one man; and in case any such division refuse, or neglect to do so * * * then the field officers and magistrates * * * shall fix upon and draught one man, who, in their opinion, can be best spared, and will be the most serviceable[.]"{EN-911}
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> • [1777] "WHEREAS it is indispensably necessary that the regiments of infantry raised * * * , on continental establishment, be speedily recruited * * * : *Be it therefore enacted* * * * , That * * * the said regiments * * * be completed by recruits or draughts * * * .
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> * * * * *
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> "*It is farther enacted*, That * * * a number of men shall be draughted from the single men of the militia of the several counties, and the city of Williamsburg, * * * above eighteen years of age, who have no child * * * .
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> * * * * *
>
> "And to the end that the draughts * * * may be fairly and equally made, *It is farther enacted*, That the * * * commanding officer of the militia in each county or corporation shall * * * collect from the muster rolls the names of all the * * * men * * * who have not a wife or child, or who are not exempted by this act, or from militia duty by having a substitute in the army, adding thereto the names of any other such single men as are * * * not enrolled, and who by the militia law ought to be enrolled, and shall direct all such single men to * * * meet * * * to determine, by fair and equal lot, which of them shall enter into the service[.]"{EN-912}

2. In principle, a selective draft is perfectly legitimate, now as much as then. Everyone may have a duty to serve in the Militia; but the existence of that duty does not necessarily entail uniformity in its fulfillment with respect to the time or type of service that may be required of each and every individual. Common sense and experience teach that, depending upon circumstances, some members of the Militia would best serve their community by continuing to perform their civilian functions, others by temporarily moving out of domestic life into military service. Inasmuch as a State's legislature may draft anyone and everyone for her Militia, and inasmuch as no one may claim an exemption from such service as a matter of "right" superior to the legislature's authority,[684] any call to or any exemption from active duty is a matter purely of legislative discretion or grace, to be determined according to the legislators' (and, ultimately, WE THE PEOPLE'S) well-formed conceptions of what will best serve "the common defence" and "the general Welfare" under the particular conditions affecting their State at that moment.[685] The practical problem, of course, will be whether the set of standards for selection or exemption does, in point of fact and law, reasonably advance "the common

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[684] *See post*, at 629-631.

[685] *See* U.S. Const. preamble.

defence" and "the general Welfare", or is merely the product of arbitrary or invidiously discriminatory political, economic, or social considerations.

In the case of Virginia's *pre-*constitutional selective drafts, the standards fell into three categories—

First, some were self-evidently proper, and even mandatory, on their face:

> (i) Selection of "able-bodied persons, fit to serve" (1740 and 1754) and men "who * * * will be the most serviceable" (1777) depended upon more or less objective observations and judgments that related directly to the abilities of the draftees to perform the duties to be required of them. And
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> (ii) The exclusion from a draft of "any person under the age of twenty one years, or above the age of fifty years" (1754) or not "between the age of eighteen and fifty years" (1757) simply reflected limitations on the ages of Militiamen to be found in various Militia statutes,[686] and obviously served the selfsame purpose as the explicit preference for men "who * * * will be *the most serviceable*".

Second, some standards were justifiable, both then and now:

> (i) Such "men as do not follow or exercise any lawful calling or employment" (1740 and 1754); "persons * * * as shall be found loitering and neglecting to labor for reasonable wages" (1757); "all * * * idle, vagrant, or dissolute persons, wandering abroad without betaking themselves to some lawful employment" (1757); and particularly "all who run from their habitations, leaving wives and children without suitable means for their subsistence" (1757)—all individuals of this ilk provide little or nothing to the civilian community in which they live, and most likely are a constant drain upon it. Inasmuch as impressment for purely civilian labor is out of the question for those "idle, vagrant, or dissolute persons" who have not been convicted of a serious crime,[687] the only way to transform them into productive citizens, if they refuse to do so on their own, is to draft them for Militia or other military service.
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> (ii) Although "young men * * * who have not wives and children" (1755), men "above eighteen years of age, who have no child" (1777), and all "single men" (1756 and 1777) may not be outright parasites or even unproductive citizens, they do labor under fewer responsibilities than married men who must support their

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[686] *See post*, at 611-614.

[687] *See* U.S. Constitution amend. XIII.

families, which constitute the bone and sinew of any community. Therefore, all other things being equal, it is reasonable and socially prudent that "single men" should be consigned to military duty in preference to married men.

(iii) To be sure, a "man, who, in the[ ] opinion [of Militia officers and civil magistrates], can be best spared" (1777) is a somewhat amorphous criterion. But, in the actual statute in which the phrase appeared, it meant "be best spared" in consideration of the man's relative lack of value to the Militia, with the caveat that he also would be "the most serviceable" for duty in the regular Army. The making of such judgments has always been rather commonplace in the assignment of duties within any military or *para*-military organization—and although it depends more upon a selecting officer's accumulated experience and practical acumen than upon written rules, it usually proves both workable and fair.

Third, some *pre*-constitutional standards for exclusion from a selective draft would be unacceptable today:

(i) Individuals "who hath any vote in the election of * * * burgesses" (1740 and 1754) and who were "freeholders or housekeepers qualified to vote at an election of burgesses" (1757) constituted a political élite able to wrangle special privileges from legislators in those days. Now, everyone who is "eighteen years of age or older" is constitutionally entitled to vote in elections for public office at every level in the federal system.[688] So exclusion from a draft on this basis would be impossible for the vast majority of Militiamen. "A well regulated Militia", though, should include individuals of both sixteen and seventeen years of age, too, who lack a right to vote. The question then would be whether any legitimate difference existed between those men sixteen and seventeen years old who could be drafted and those (say) eighteen and nineteen who could not. Even the most constrained application of the constitutional command that "[n]o State shall * * * deny to any person within its jurisdiction the equal protection of the laws"[689] would discountenance such a discrimination, for the simple reason that any "classification must be reasonable, not arbitrary, *and must rest upon some ground of difference having a fair and substantial relation*

[688] U.S. Const. amend. XXVI.

[689] U.S. Const. amend. XIV, § 1.

to the object of the legislation".[690] Self-evidently, the right to vote *vel non* would have no "fair and substantial relation to the [only legitimate] object of the legislation", which would be to draft men particularly suitable for the intended service. And the older men would surely be at least as suitable on physical, mental, and emotional grounds as the younger ones—thus rendering the classification plainly "arbitrary".

(ii) The exclusion from the draft of every man "who is * * * an indented or bought servant" (1740 and 1754) was doubtlessly enacted, not for the benefit of such servants, but for the benefit of the economic class composed of their masters. Servitudes of those types, though, do not and probably cannot exist today, except for individuals properly subjected to "slavery [ ]or involuntary servitude * * * as a punishment for crime whereof the party shall have been duly convicted".[691] And any such convicts not recruited for a forlorn hope would almost surely be excluded from bearing arms whilst they served their sentences.

(iii) Finally, the draft of "men as do not follow or exercise any lawful calling or employment, *or have not some other lawful and sufficient support and maintenance*" (1740 and 1754) specially privileged "the idle rich" at the expense of the financially less well off, because those who did enjoy "lawful and sufficient support and maintenance" other than from "any lawful calling or employment" were not required to serve. Functionally, this was indistinguishable from granting an immunity from a draft simply on the basis of an individual's wealth: Those who did not need to work were not required to fight. Today, of course, the exercise of such fundamental rights as the right to vote,[692] or the right to due process in judicial proceedings,[693] cannot be conditioned on an individual's ability to pay for them. On what reasoning the Constitution might be construed to allow the burden of impressment to be conditioned in that manner—when the consequence might be an individual draftee's loss of life or limb—is not apparent.

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[690] F.S. Royster Guano Company v. Virginia, 253 U.S. 412, 415 (1920) (emphasis supplied).

[691] U.S. Const. amend. XIII, § 1. *See post*, at 748-749, 993-998, and 1011-1013.

[692] *E.g.,* U.S. Const. amend. XXIV; Harper v. Virginia Board of Elections, 383 U.S. 663 (1966); Bullock v. Carter, 405 U.S. 134 (1972).

[693] *E.g.,* U.S. Const. amends. V and XIV, § 1; Griffin v. Illinois, 351 U.S. 12 (1956); Burns v. Ohio, 360 U.S. 252 (1959); Smith v. Bennett, 365 U.S. 708 (1961); Douglas v. California, 372 U.S. 353 (1963); Draper v. Washington, 372 U.S. 487 (1963); Gardner v. California, 393 U.S. 367 (1969); Boddie v. Connecticut, 401 U.S. 371 (1971); Lindsey v. Normet, 405 U.S. 56 (1972).

The foregoing illustrates that, although all of the statutory principles of the *pre-*constitutional Militia translated into constitutional principles upon the Constitution's incorporation of "the Militia of the several States" into its federal system, not all of the *pre-*constitutional statutory practices by which those principles may have been implemented in that era necessarily did. A *selective* draft is one such principle. Selection for a draft *on the basis of mere wealth* is one such practice. The first remains legitimate; but the second is no longer so. Which emphasizes why, in constitutional analysis, principles must always be carefully distinguished from practices.

G. Acceptance of substitutes. Not only did Virginia balance the burdens of Militia and other military service in the field against the domestic needs of the community by adopting selective drafts from time to time, but also she allowed individuals selectively to excuse themselves from certain duties by providing adequate substitutes to serve in their stead.

1. The personal privilege (and immunity as a consequence) of providing a substitute was available throughout the *pre-*constitutional era:

> • [1676] "[I]t shall and may bee lawfull for any person commanded to goe forth to the war to quitt his owne person by presenting any other such suffitient able man in his place as his perticuler commander shall approve, be he servant or ffreeman, provided the master of such servant be consenting and the servant willing, the master to have the pay allowed [to soldiers] by this act, and the servant the plunder [taken in the war] to his owne proper use."{EN-913}
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> • [1723] "[N]othing * * * shall * * * compel any person or persons that shall be, or shall have been, of his Majesty's council * * * , speaker of the house of burgesses, secretary of this colony, judge of the court of vice-admiralty, his Majesty's attorney-general, a justice of the peace, or any person that shall have born any military commission * * * as high as * * * captain, or the clerk of the council, for the time being, or the clerk of the general court, for the time being, or any county court clerk, during his being such, personally to appear at any musters: But that all, and every the persons aforesaid * * * are * * * required, to find and provide one able-bodied white man, a good horse, and * * * trooper's accoutrements * * * , who shall constantly appear and exercise at all musters."{EN-914}
>
> • [1723] "[N]othing * * * shall hinder or debar any captain from admitting any able-bodied white person, who shall be above the age of sixteen years, to serve in his troop or company, in the place of any person required by this act to be listed."{EN-915}
>
> Presumably, the "person required * * * to be listed" arranged for his substitute personally.

• [1738] "[N]othing * * * shall * * * compel any persons herein after-mentioned, to a personal attendance at musters: that is to say, Such as are, or shall have been, members of his majesty's council, speaker of the house of burgesses, secretary, receiver-general, auditor, judge of the court of vice-admiralty, attorney-general, clerk of the council, clerk of the house of burgesses, clerk of the secretary's office, a justice of the peace, clerk of any county court, or any person that shall have borne any military commission as high as that of a captain, or any of the people commonly called Quakers: Yet all the persons aforesaid, shall * * * send one able-bodied man, not being a convict, or man and horse, armed and accoutred, * * * constantly to appear, and exercise at musters."{EN-916}

• [1755] "[I]n case the [required] number of men cannot be raised, by such as will voluntarily inlist in the * * * service * * * the field officers and captains of the militia * * * [may] draft out of the militia of their counties * * * such and so many of their militia, who have not wives or children * * * . And if any person so drafted, shall refuse to serve * * * or find and provide some other able person to serve in his room, every person so refusing shall forfeit and pay the sum of ten pounds * * * , and in case of failure in paying down * * * then such person shall * * * be committed to goal, there to remain until he shall agree to enter into the said service, or provide another * * * , or pay[.]"{EN-917}

• [1766 and 1771] "[T]he * * * chief commanding officer of the militia in every county shall list all male persons of the people called Quakers, above the age of eighteen years, and under the age of sixty years, * * * under the command of such captain as he shall think fit; and if upon any invasion or insurrection the militia * * * shall be drawn out into actual service, and any Quaker so inlisted shall refuse to serve or provide an able and sufficient substitute in his room, if thereto required by the * * * chief officer of the militia of his county, * * * every Quaker so refusing * * * shall forfeit and pay the sum of ten pounds * * * , which sum shall be applied * * * towards providing a substitute in the room of the Quaker[.]"{EN-918}

• [1775] "And for the more expeditious, convenient, and speedy draughting into service detachments of the militia * * * as occasion may require, *Be it* * * * *ordained*, That * * * every person so enrolled, who shall fail to attend, when required, or find an able-bodied man to serve in his room, shall be subject to * * * fines[.]"{EN-919}

• [1777] "[F]or the more speedy and certain completion of the * * * new battalions, every county, city, and borough [with certain exceptions] * * * , in case the * * * officers * * * shall not * * * enlist the[ir] quota * * * , shall make up such deficiency by draughts, to be taken from their respective militias * * * ; and the person so furnished or draughted shall * * * be considered as a regular soldier * * * , unless he shall procure an able bodied man to serve in his room."{EN-920}

• [1777] "The several divisions of the militia * * * shall be called into duty by regular rotation * * * ; and every person failing to attend when called on, or to send an able bodied man in his room, shall, unless there be good excuse, be considered as a deserter, and suffer accordingly."{EN-921}

• [1777] "WHEREAS it is indispensably necessary that the regiments of infantry raised * * * , on continental establishment, be speedily recruited * * * : *Be it therefore enacted* * * * , That * * * the said regiments * * * be completed by recruits or draughts * * * .

* * * * *

" * * * And if any single man subject to the draught * * * shall procure an able-bodied man so to enlist, such single man shall be thereby exempted from the draught.

* * * * *

"*And be it enacted*, That quakers and menonists who shall be so draughted shall be discharged from personal service, and that the field officers and justices [of the peace] * * * shall * * * procure, upon the best terms they can, proper substitutes to serve in their stead, and to adjust and divide the charge thereof among all the * * * quakers and menonists[.]"{EN-922}

• [1779] "If any non-commissioned officer or soldier shall refuse to march when ordered into actual service according to his tour of duty, or find an able bodied man in his room, * * * such offender shall serve as a regular soldier in the troops of this state six months[.]"{EN-923}

• [1780] "If any * * * soldier [of the Militia] shall fail to attend when summoned, not having a just and reasonable excuse, or refuse to march when ordered into actual service according to his tour of duty, or find an able bodied man in his room, * * * such offender shall serve as a regular soldier in the troops of the state for eight months[.]"{EN-924}

• [1780] "[T]hree thousand men shall be forthwith raised for the purpose of completing this state's quota of continental forces"; "and if any division [of the Militia] shall * * * fail to deliver a recruit * * * the * * * commanding officer * * * shall immediately * * * draft an able bodied man by fair and impartial lot out of such division * * * ; who may nevertheless be permitted to procure an able bodied man in his room[.]"{EN-925}

• [1780] "[A]ny Quaker or Menonist who shall be so drafted, shall be discharged from personal service, and * * * the commanding officer * * * is * * * required to employ any two or more discreet persons, to procure on the best terms they can, a proper substitute or substitutes to serve in his or their room, and to adjust and divide the charge thereof among all the * * * Quakers or Menonists[.]"{EN-926}

• [1780] "The * * * commanding officer of the county or corporation shall assemble * * * his militia * * * ; and if any division shall then fail to deliver a recruit * * * , fit for present duty, between the ages of eighteen and fifty years, of able body and sound mind, who is neither a prisoner of war, a deserter from the enemy, nor engaged to serve for a longer term than eight months", then "[t]he said commanding officer * * * shall immediately * * * draft an able-bodied man, by fair and impartial lot, out of such division, to serve in the continental army * * * , who may nevertheless be permitted to procure a substitute * * * . No man shall be drafted, unless * * * he comes within the above description of a recruit; neither shall any recruit or substitute be accepted * * * unless he comes up to such description."{EN-927}

• [1781] "[E]very militia-man ordered into actual service, who shall refuse and neglect to appear * * * , without a reasonable excuse, or produce an able-bodied substitute to serve in his room * * * shall * * * be declared a regular soldier for six months[.]"{EN-928}

• [1781] "[W]here any quaker or menonist shall be allotted to any division of the militia, who is to perform the succeeding tour of duty, he shall not be compelled personally to serve the same, but * * * the commanding officer * * * [may] cause to be levied on all the society of quakers and menonists in such county according to their assessable property, by warrant * * * directed to the sheriff * * * , such sum * * * of money as he shall think sufficient to procure a substitute for each quaker or menonist whose tour of duty it is[.]"{EN-929}

• [1782] "[W]here any quaker or menonist shall be subjected to a tour of duty in consequence of the militia or invasion law, such quaker or menonist shall not be compelled to perform such duty, but the * * * commanding officer of the militia, shall * * * procure a substitute upon the best terms possible". And "the consideration agreed to pay" the substitute shall "be against the estate of each quaker or menonist so draughted * * * , to be levied on their lands, goods, and chattels * * * ; and i[f] any of the said quakers or menonists so draughted, shall not have sufficient property on which a levy can be made, then * * * such substitute money, shall be levied on the property of all the quakers and menonists * * * that are subject to militia service, each to pay in proportion to his taxable property."{EN-930}

2. The foregoing statutes allowed men, by providing a substitute, to obtain exemptions from specific service as the duties arose, with the statutes imposing the duties also granting the exemptions. During the War of Independence, though, Virginia's General Assembly went further, offering broad exemptions from most future duties upon a man's present provision of a recruit for the Continental Army:

• [1780] "[A]ny person who * * * shall enlist an able bodied soldier to serve in his stead during the war, shall * * * be exempted from all future drafts, except in case of actual invasion[.]"{EN-931}

• [1780] "[A]ny person enlisting a soldier between eighteen and fifty years of age, of able body, sound mind, at least five feet four inches high, and not being a deserter * * * , to serve during the war in the troops of this state in continental service, or a soldier in any * * * troops [of the United States], * * * shall be exempted from all future drafts and all musters of the militia, except in case of an insurrection or actual invasion of this state, and then shall be subject to serve within the state only."{EN-932}

3. Not surprisingly, the statutory allowance for substitutes was not immune from various abuses and inconveniences, which Virginia's General Assembly sought to extirpate:

• [1780] "[W]hereas it has been a practice of many tradesmen to entice their apprentices to enlist as soldiers, and to sell them as substitutes for large sums of money; *Be it enacted*, That if any tradesman or other person to whom any infant is, or shall be bound as an apprentice, shall directly or indirectly take or receive, or agree to take or receive any money or other gratuity in consideration of such apprentice, his enlisting as a soldier or sailor in any corps whatsoever, every such tradesman or person so offending, not being an able bodied man under the age of fifty years, shall forfeit and pay double the sum of money or worth of such other gratuity so taken, received, or agreed for * * * ; and every such offender, being an able bodied man under the age of fifty years, * * * shall be deemed a soldier to serve in this state's quota of continental troops during the war[.]"{EN-933}

This problem arose because, under the act of 1777, "all free male persons, hired servants, *and apprentices*, between the ages of sixteen and fifty years" were to be "enrolled" in the Militia, and therefore were eligible for all military duty.{EN-934} And pursuant to the contractual terms of most apprenticeships, masters were empowered to sell their apprentices' services.

• [1781] "[E]very militia-man ordered into actual service, who shall refuse and neglect to appear * * * , without a reasonable excuse, or produce an able-bodied substitute to serve in his room (but no person shall be admitted as a substitute except he belongs to the militia of the same county, and if it shall come to such substitute's tour of duty before he returns, then the person employing him shall be obliged to serve in his room or procure a second substitute) shall * * * be declared a regular soldier for six months[.]"{EN-935}

This was designed to prevent the use of substitutes from reducing the pool of men in active service by the number of substitutes, as well as to maintain the onus of substitution on the individual seeking to avail

> himself of it. It emphasizes, too, that many, if not most, substitutes must have come from the ranks of Militiamen themselves, because otherwise those substitutes would not have been subject to their own "tour[s] of duty". So substitution was usually a means of distributing the burdens of active service *within* the Militia, rather than drawing upon men outside of it. In addition, this statute evidences a policy to distribute those burdens among the men of each Local jurisdiction, rather than across jurisdictions, in keeping with Virginia's general preference for Local organization and operation.[694]

4. The conclusions to be drawn from Virginia's experience in this regard are largely the same as follow from Rhode Island's.[695] Virginia did, however, take advantage of substitutes in some ways that Rhode Island did not:

a. An allowance for substitutes was used to expand the range of ages eligible for service. In 1705, Virginia's Militia statute had provided that "all male persons whatsoever [other than certain individuals explicitly exempted], *from sixteen to sixty years of age*", were to be listed "to serve in horse or foot".{EN-936} In 1723, though, the statute mandated "list[ing] all free male persons whatsoever [other than certain individuals explicitly exempted], *from twenty-one to sixty years of age* * * * to serve in horse or foot"—but it also provided that "nothing in this act * * * shall hinder or debar any captain from admitting any able-bodied white person, *who shall be above the age of sixteen years*, to serve in his troop or company, in the place of any person required by this act to be listed".{EN-937} Thus, although the Act of 1723 reduced the number of classes subject to mandatory service, it retained the overall range under the Act of 1705 by making service for the classes from sixteen through twenty years of age voluntary in the form of substitution. Evidently, the legislators in 1723 determined that full participation by all of the younger men was not necessary as in 1705, but in part could still be useful. Interestingly, this was the only instance in which a statute specified a range of allowable ages for any substitutes. Subsequent statutes merely stipulated that a substitute needed to be an "able-bodied man, not being a convict" (1738), "an able and sufficient substitute" (1766 and 1771), or just "an able-bodied man" (1775, 1777, 1779, and 1780). Presumably, in these cases, that a substitute's age might be outside of the range of ages set for mandatory "listing" at the time was not necessarily a disqualifying factor if he met the applicable criterion of fitness to the satisfaction of his Militia officers.

b. In some special cases the provision either of a substitute or of arms for the Militia was required as the *quid pro quo* for an exemption—and the exemption itself was inoperative in times of "alarm". For example, in 1705 the statute provided that

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[694] *See post*, Chapter 21.

[695] *See ante*, at 261-266.

> the persons of a councellor, of a speaker of the house of burgesses, of a justice of the peace, of an attorney-general, and of a captain or an higher officer in the militia, are exempted from being listed and serving either in the horse or foot under command as the rest of the militia do, merely for the dignity of the office which they do or shall have held, and * * * that all and every such person * * * , and also the clerk of the councill, the clerk of the general court, and every county court clerk shall provide and keep * * * at their respective places of abode a troopers horse, furniture, arms and ammunition * * * , and to produce or cause the same to be produced in the county wherein they respectively reside yearly, and every year at the generall muster * * * .
>
> And in case of any rebellion or invasion shall also be obliged to appear when thereunto required, and serve in such stations as are suitable for gentlemen * * * under the same penaltys as any other person * * * enjoyned to be listed in the militia[.]{EN-938}

So, although individuals in these categories were "exempted from being listed and serving either in horse or foot under command as the rest of the militia do", they were required to "provide and keep * * * at their respective places of abode a troopers horse, furniture, arms and ammunition", and "in case of any rebellion or invasion shall also be obliged to appear * * * and serve". Thus, theirs was only a partial personal exemption—and none at all from mandatory armed service in the field in the most dangerous times.

In 1723, for a similar list,[696] the statute mandated that

> nothing * * * shall * * * compel any person * * * that shall be, or shall have been, of his Majesty's council in this colony, speaker of the house of burgesses, secretary of this colony, judge of the court of vice-admiralty, his Majesty's attorney-general, a justice of the peace, or any person that shall have born any military commission within this colony, as high as * * * captain, or the clerk of the council, for the time being, or the clerk of the general court, for the time being, or any county court clerk, during his being such, personally to appear at musters: But that all, and every the persons aforesaid, shall * * * find and provide one able-bodied white man, a good horse, and * * * trooper's accoutrements, * * * who shall constantly appear and exercise at all musters.{EN-939}

So, although these individuals were not required "personally to appear at musters", they did have to recruit suitable substitutes "who shall constantly appear and exercise at all musters" in their stead. This was a full personal exemption, but

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[696] This Act added to the catalogue of exempted individuals the "secretary of this colony" and the "judge of the court of vice admiralty".

conditioned on its recipients' "find[ing] and provid[ing]" such substitutes at their own expense.

The statute of 1738 added "any of the people commonly called Quakers" to the list of exempted individuals, and specified that all of the latter were required "to send one able-bodied man, not being a convict, or man and horse, armed and accoutred, * * * constantly to appear, and exercise at musters".{EN-940}

The statutes of 1755, 1757, 1759, 1762, 1766, and 1771 relieved from the duty

> to muster * * * such as are members of the council, speaker of the house of Burgesses, receiver general, auditor, secretary, attorney general, clerk of the council, clerk of the secretary's office, ministers of the church of England, the president, masters or professors, and students of William and Mary college, the mayor, recorder, and Aldermen of the city of Williamsburg, and borough of Norfolk, the keeper of the public goal, any person being *bona fide*, an overseer over four servants or slaves, and actually residing on the plantation where they work, and receiving a share of the crop or wages, for his care and pains, in looking after such servants and slaves: Any miller having the charge and keeping of any mill, and founders, keepers, or other persons employed in or about any copper, iron or lead mine, who are all hereby exempted, from being inlisted, or in any way concerned in the militia, during the time they shall continue in any such station or capacity.

However, these same statutes required that

> the several persons * * * exempted from mustering (except ministers of the church of England, the president, masters or professors, and students of William and Mary college, the keeper of the public goal, overseers and millers, and all workers in any mine whatsoever) shall provide arms for the use of the county, city or borough, wherein they * * * reside in the following manner; that is to say, each councillor not being an officer of the militia, four complete sets of arms * * * for a foot soldier: The speaker of the house of Burgesses not being an officer of the militia, four compleat sets of arms * * * : The receiver general, auditor, and secretary, not being a councillor or officer of the militia, each four compleat setts * * * : The attorney general, not being an officer of the militia, two compleat sets * * * : The clerk of the council, and clerk of the secretary's office, not being officers of the militia, each two compleat sets * * * : The mayor, recorder, and aldermen of the city of Williamsburg, and borough of Norfolk, (not * * * being officers of the militia) each two compleat sets[.]{EN-941}

In 1762, 1766, and 1771, the statutes included within

> the several persons * * * to be free and exempt from appearing or mustering either at the private or general musters of their respective counties * * * : All of his majesty's justices of the peace within this colony who have qualified themselves for their offices by taking the oaths by law appointed * * * , and who are really and *bona fide* acting justices * * * (except such as * * * bear any commission as officers of the militia * * *) all persons bred to and actually practising physick or surgery, and all inspectors at the publick warehouses appointed for the inspection of tobacco[.]

The statutes required, however, that these individuals "provide complete sets of arms * * * for soldiers, for the use of the county, city or borough, wherein they shall respectively reside". In 1766 and 1771, the statutes also added "all the people called Quakers" to the list of those "free and exempt from appearing or mustering", but excused Quakers from having to "provide compleat sets of arms".{EN-942} In addition, these statutes mandated

> [t]hat every person so exempted [except Quakers after 1766] shall always keep in his house or place of abode, such arms, accoutrements, and ammunition, as are * * * required to be kept by the militia of this colony * * * : And such exempts shall also, in case of any invasion or insurrection, appear with their arms and ammunition, at such place as shall be appointed by the commanding office of the militia * * * , and shall then be incorporated with, and be subject to the same discipline, rules and orders, and also the same fines, forfeitures and penalties, for non-appearance or misbehaviour, as the other militia of this colony are subject to.{EN-943}

In 1775, the statute provided that

> the members of his majesty's council, and the committee of safety, the president of the convention, treasurer, attorney-general, auditor, clerk of the council, clerk of the secretary's office, clerk of the general convention, and clerk of the committee of safety (each of which exempts furnishing a stand of arms for a soldier) all clergymen and dissenting ministers, the president, professors, students, and scholars, of William and Mary college, the keeper of the publick jail, all overseers of four tithables residing on a plantation, and all millers, and persons concerned in iron works, shall be exempted from * * * enlistment.{EN-944}

Finally, the statutes of 1777, 1784, and 1785 dispensed with the requirement that individuals exempted from regular Militia duty should provide either substitutes or arms.{EN-945}

That, instead of requiring individuals who benefitted from exemptions to provide *men* as substitutes, many of the statutes required them to supply *arms* made practical sense in two respects: (i) Although the suitability of a substitute was always a matter of opinion, the quality of arms was more or less an objective matter—and with good arms in their hands, Militia officers could have properly equipped the good men they already had. Obviously, it would have been preferable to field a somewhat smaller number of reliable and well-armed Militiamen rather than a larger number not so well furnished and possibly of questionable personal reliability to boot. (ii) Many of the exemptions, and limitations on exemptions, set out in these statutes were largely theoretical, because the statutes themselves explicitly presumed that not a few of the individuals exempted in principle from such paperwork as "listing" and such mundane Militia duties as mustering were in practice "officers of the militia" who would have been in charge of "listing", mustering, training, disciplining, and leading Militiamen anyway. And (iii) in some cases the exemptions were entirely defeasible upon an "alarm".

In any event, the sequence that these statutes followed demonstrates the flexibility of the system: At first, individuals were exempted from appearing at musters, but were required to possess arms and to serve in the field under exigent circumstances. Then they were required to provide a substitute at all times. Then they were required simply to provide arms for others. Then they were required to provide arms and to serve personally during "alarms". The next step—which was not taken during the *pre-*constitutional period except in a rudimentary fashion (but which could be taken upon revitalization of "the Militia of the several States" today)[697]—was and would be to require individuals benefitting from exemptions to pay set fees for them, and to allow Local Militia units to decide whether to hire substitutes, to purchase equipment, or to make other use of the moneys.

H. Payment for services. Although participation in Virginia's Militia was compulsory—and even required almost all Militiamen to purchase their own firearms and ammunition[698]—along with other forms of military service it was not always uncompensated. Often, men were paid, in money or in kind, during periods of active service. The justification for this was the eminently fair idea that if the general public benefitted from the services of but a part of the Militia, the relatively few men who provided those services while others remained at home should be specially compensated by the rest of the community:

> [1727, 1732, 1734, 1738, 1740, 1744, 1748, and 1753] "WHEREAS the frontiers of this dominion, being of great extent, are exposed to the invasion of foreign enemies, by sea, and incursions of

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[697] *See post*, Chapter 43.

[698] *See post*, Chapter 17.

> *Indians* at land, and great dangers may likewise happen by the insurrections of negros, and others; for all which, the militia * * * is the most ready defence. And forasmuch, as the militia of those counties, where any of the dangers aforesaid shall arise, must necessarily be first emploied, and may, by the divine assistance, be able to suppress and repel such insurrections and invasions, without obliging that of the other counties to be raised: And it being reasonable, that such services as shall be performed by any part of the said militia, be rewarded at the public charge[. . .]"{EN-946}

1. Not surprisingly, the service for which Virginia's Militiamen most consistently received compensation from the public, year after year, was "the slave patrol".[699] The self-evident reason was that the patrols were absolutely necessary so long as slavery persisted as a permanent and widespread institution. For rebellions among the slaves were always a distinct possibility; and only by free Virginians' constant vigilance and resolute shows of force could conspiracies among their bondsmen be deterred or uncovered before they ripened into open revolt. So statutes were enacted to punish conspiracies and insurrections,{EN-947} plots were uncovered,{EN-948} informers among the slaves were even rewarded with their freedom{EN-949}—and "slave patrols" were deployed. The patrols must have constituted a most distasteful round of drudgery for the average Militiaman, though—doubtlessly dull, dirty, depressing, and possibly dangerous duty that demanded a suitable reward for even a passable performance, let alone a demonstration of zeal:

> • [1727, 1732, 1734, 1738, 1740, and 1744] "[I]f any parties of the militia be emploied in this service [of slave patrols], for above the space of two days at any one time, such militia shall be paid for all that time they shall be so emploied[.]"{EN-950}
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> • [1738] "[S]uch patrollers shall be exempted * * * from the paiment of all public, county, and parish levies, for their own persons, for those years in which they shall be emploied in that service."{EN-951}
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> • [1754, 1755, 1757, 1759, and 1762] "[I]f the[court-martial] shall adjudge the patrollers to have performed their duty according to law, * * * the county court * * * are * * * impowered and required, at the laying of their county levy, to allow to, and levy for every one of the patrollers, ten pounds of tobacco for every twenty four hours[700] they shall so patrole; and moreover such patrollers shall be exempt * * * from the payment of public, county, and parish levies for their own persons, for those years in which they shall be employed in that service."{EN-952}

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[699] On the nature of "the slave patrols", *see ante*, at 339-343.

[700] The Act of 1757 substituted "every day or night" for "every twenty four hours".

> • [1766 and 1771] "[I]f the [county] court shall adjudge the patrollers to have performed their duty * * * they are hereby impowered and required at the laying of their county levy, to allow to and levy for every one of the patrollers twenty pounds of tobacco, for every twelve hours they shall so patrol."{EN-953}
>
> • [1775] "[T]he commanding-officer of the militia of every county, of the city of Williamsburg, and borough of Norfolk, shall appoint so many patrollers, as he may think fit, * * * who shall receive a reasonable allowance for their trouble, at the laying of every county levy."{EN-954}
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> • [1777] "[A]fter every patrol the officer of each party shall return to the captain * * * a report in writing, upon oath * * * of the names of those of his party who were upon duty, and of the proceedings in such patrol. And * * * if * * * the patrollers have performed their duty according to law, * * * the county court * * * are * * * empowered and required to levy fifteen pounds of tobacco, or two shillings and sixpence, for every twelve hours each of them shall so patrol."{EN-955}
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> • [1784 and 1785] "[A]fter every patrole, the officer of each party shall return to the captain * * * a report * * * of the names of those in his party who were upon duty, and of the proceedings in such patrole * * * ; and if the[next court-martial] shall adjudge the patrollers have performed their duty according to law, * * * the county court * * * are * * * empowered and required to levy twenty pounds of tobacco, or three shillings, for every twelve hours each of them shall so patrole."{EN-956}

Most revealing of the locus of practical economic-*cum*-political power in those days was that the general public paid for the Militiamen's services on slave patrols—either a reasonable wage in money (or its equivalent value in tobacco) dispensed from the public treasury, or exemptions from certain taxes allowed at the expense of the treasury, or both. Inasmuch as all free Virginians ostensibly benefitted from the patrols' presumed success at suppressing the slaves, charging the community with some of the cost may have appeared fair at first glance. But the underlying reality was that the patrols benefitted, not only the community, but also and especially the slaveholders, because the patrols shifted from the slaveholders to the general public much of the burden of controlling the slaveholders' fractious human "real estate"—but none of the enhanced returns the slaveholders derived from the labors of slaves whom the patrols intimidated into docility. Even if every taxpaying member of the community who owned no slaves derived economic advantage to some degree from the plantation system, and therefore from the suppression of the slaves in favor of the smooth working of that system, the slaveholders profited to a far greater degree. Moreover, if the community was in danger from rebellions amongst the slaves, the original and permanent source of that peril was the Peculiar Institution of slavery itself, and the avarice of the

slaveholders who fattened on it. So, inasmuch as preventing and if necessary quelling rebellions among their slaves were part and parcel of the slaveholders' unavoidable costs of doing business, and inasmuch as that perilous business exposed the whole community to insurrections of the bondsmen and thereby compelled the establishment of the slave patrols in the first place, the lion's share (if not the totality) of the patrols' costs should have been assessed against the slaveholders, not the general public.

To some, this history might suggest that revitalization of "the Militia of the several States" would actually be politically unwise—for if the Militia upheld slavery in *pre*-constitutional times, might they not be subverted, corrupted, or otherwise inveigled into supporting some new form of oppression today? The short answer is "no". Slave patrols existed during the *pre*-constitutional era because slavery was accepted as legitimate in those days. The slaves, on the one hand, and the free men who made up the Militia, on the other hand, comprised two distinct, separate, and mutually antagonistic classes. The Militia were "composed of the body of the people"—but individuals of African ancestry in America, both bond and free, were often considered not part of "the people" at all.[701] Today, though, with the abolition of slavery "except as a punishment for crime whereof the party shall have been duly convicted",[702] no community in any of the States can be divided as a matter of law into such irreconcilably hostile factions. There can be neither a "master race" or a "master class",[703] nor "an establishment of religion",[704] nor any other scheme or ideology of physical, economic, political, or spiritual superordination that permanently subordinates some Americans to others claiming to be somehow "superior" Americans, or (even worse) to be separate from and superior to all Americans yet entitled to reside in America against the wishes of real Americans.[705] *A fortiori*, no such scheme or ideology that purports to subordinate some, or even all, Americans to foreigners or their domestic fellow travelers and "fifth columnists" can possibly be countenanced, either. Under these circumstances, modern Militia can be expected to resist any inroads on common Americans' freedoms, by quickly suppressing each and every self-chosen élitist group of whatever provenance that tries to pervert the law in order to set itself above "the people" as a whole. (This, no doubt, is why such groups are adamantly opposed to revitalization of the Militia. If

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[701] *Contrast* Virginia Declaration of Rights (1776) art. 13 *with* Scott v. Sandford, 60 U.S. (19 Howard) 393, 403-421 (1857) (opinion of Taney, C.J.).

[702] U.S. Const. amend. XIII, § 1.

[703] U.S. Const. amends. XIV, § 1; XV, § 1; XIX; and XXIV, § 1.

[704] U.S. Const. art. VI, cl. 3 *and* amend. I.

[705] "Claiming to be", because no one can actually *be* an "American" unless he subscribes in belief, word, and deed to the tenets of the Declaration of Independence, and in particular to the self-evident truth "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness".

the Militia were likely to aid and abet their schemes, they would be singing a different tune.)

Besides, in the absence of slavery as a widespread institution, disarmament of any sizeable portion of "the people" is legally impossible. How, then, could the Militia in each Locale—"composed of the body of the people, trained to arms", *and permanently in possession of arms*—oppress "the people"? Would members of the Militia in significant numbers be sufficiently psychotic, politically at least, to attempt to oppress each other, let alone to oppress themselves? To be sure, a corrupted majority in some Militia unit might seize upon an evil design to oppress the minority. This would not be a danger peculiar to the Militia, but could occur in any group composed of weak and fallible human beings tempted by avarice, ambition, and the appetite for abusive powers. At least within the Militia, though, the minority—already organized, armed, and trained to deal with precisely such usurpation and tyranny from any quarter—could defend itself against the majority.

2. Virginians also received compensation for Militia and other military duties of a general nature, both when they enlisted voluntarily and when they were impressed into actual service:

> • [1727, 1732, 1734, 1738, 1740, and 1744] Upon any invasion or insurrection "there shall be raised, and paid by the public, to the officers and soldiers which shall be drawn out into actual service * * * [certain *per diem*] rates[.]
>
> * * * * *
>
> " * * * [F]or the pay and allowance * * * every horseman shall find and provide himself with a horse and horse-furniture, arms, and ammunition; and every foot soldier shall find and provide himself with a foot soldier's arms, and ammunition.
>
> " * * * [W]hensoever any part of the militia * * * shall be discharged again, within two days, no pay or allowance shall be given * * * , but every man shall bear his own charge: And that when any part of the militia * * * shall be kept in service above two days, the same shall be paid and allowed for the whole time of service[.]"{EN-957}
>
> • [1748 and 1753] When the Militia were to be deployed during invasions or insurrections, "there shall be raised paid, by the public, to the officers and soldiers drawn out into actual service * * * [certain *per diem*] rates[.]
>
> * * * * *
>
> " * * * *Provided always*, That for the pay aforesaid, every trooper shall find and provide himself with a horse, and horse furniture, arms and ammunition; and every foot soldier, with a foot soldier's arms and ammunition; and that when any part of the militia * * * shall be discharged again within two days, no pay or allowance shall be given for the same, but every man shall bear his own charges; and when they shall

be kept in service above two days, then the whole time shall be paid for[.]"{EN-958}

• [1754] "[T]he pay of every soldier enlisted * * * shall commence from the time of his being taken, and delivered to such officer * * * appointed or impowered to enlist men [by impressment]."{EN-959}

• [1755] "[I]n case the [required] number of men cannot be raised, by such as will voluntarily inlist in the * * * service * * * , it shall and may be lawful, for the field officers and captains of the militia * * * to draft out of the militia of their counties * * * such and so many of their militia, who have not wives or children, * * * to be employed in the * * * service, who shall be entitled to the same privileges, exemptions, and pay, as if they had voluntarily enlisted themselves."{EN-960}

• [1757, 1758, 1759, 1761, 1762, 1764, 1766, 1769, and 1772] "[T]here shall be raised and paid by the public to the officers and soldiers drawn out into actual service [upon an invasion or insurrection] * * * , and to the look-outs after the rates following: * * * to the county lieutenant * * * ten shillings per day; a colonel, lieutenant colonel each ten shillings per day; major eight shillings per day; captain six shillings per day; lieutenant three shillings per day; ensign two shillings per day, serjeant and corporal each one shilling and four-pence each day; drummer one shilling and two-pence per day; soldier one shilling per day; and to a look-out after the rate of thirty shillings per month."{EN-961}

• [1775] "[T]he officers and minute-men shall be allowed one day's pay for every twenty miles travelling to the place appointed for the general rendezvous of the several battalions, and the same for returning home; and moreover, sixpence per day in lieu of provisions. * * * [A]nd the officers and minute-men * * * shall be also allowed six-pence per day each, besides their pay, for the four days they shall exercise in their respective counties, in lieu of provisions.

* * * * *

"And for the more regular pay of the battalions, *Be it farther ordained*, That one paymaster shall be appointed by the committee of safety for each of the sixteen districts; and the pay of the officers and soldiers, when on duty in their counties, or in battalion, or when drawn out into actual service, shall be as followeth, to wit: To a colonel, fifteen shillings per day; a lieutenant-colonel, twelve shillings and sixpence; a major, ten shillings; a captain, six shillings; a lieutenant, four shillings; an ensign, three shillings; a serjeant, two shillings; corporal, drummer, and fifer, each one shilling and eightpence; and a private man, one shilling a four pence per day; a chaplain, ten shillings per day; a surgeon, when the battalion is in training duty, or actual service, ten shillings per day; a surgeon's mate, five shillings; an adjutant, holding no other office, six shillings; if in other office, three shillings; a quarter-master to be appointed, and allowed the same as an adjutant; a commissary of musters

to each battalion, * * * ten shillings per day * * * ; and to a serjeant-major, to be chosen by the commanding-officer out of the most expert serjeants, two shillings and sixpence per day.

"*And* * * * the pay of the several officers and minute-men * * * shall commence from the completion of their respective battalions, and their meeting at the general rendezvous to be appointed[.]"{EN-962}

•[1784 and 1785] "Whenever any militia shall be in actual service, they shall be allowed pay and rations * * * , to commence from the time of rendezvousing in their counties, and to end on being discharged, viz. [here followed a specification of rates of pay and rations for all ranks]. And moreover, every militia man upon his discharge from actual service, shall be entitled to, and receive one day's pay for each twenty miles such place of discharge shall be distant from his place of abode."{EN-963}

3. Very early on, Virginia offered pay for men who brought their own firearms to Militia or other military service. For example,

[1682] "[T]he pay of each officer and soldier shall be as followeth: To the captain * * * finding himself horse, armes, ammunition and provision, eight thousand pounds of tobacco * * * for one whole yeare * * * ; and to each soldier finding himselfe horse, armes[,] furniture, provision, amunition and other necessaries * * * , two thousand pounds of tobacco[.]"{EN-964}

This policy continued throughout the *pre*-constitutional period.[706] In some measure, this compensated for the requirement that every Militiamen who could afford to do so should purchase his own firearm, ammunition, and accoutrements.[707]

4. Also from an early date, Virginia reimbursed men who lost their arms while on active duty. For example,

[1676] "[I]f any horse or horses be killed in service, or armes lost, the owner or owners of such horse or armes soe lost, shall be satisfyed for the same of the publique, hee or they produceing a certificate from the cheife commander of the trueth thereof[.]"{EN-965}

This policy, too, continued throughout the *pre*-constitutional period.[708] Again, this somewhat mitigated the burden under which most Militiamen labored of having to equip themselves with arms.

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[706] *See post*, at 432-435 and 437.

[707] *See post*, Chapter 17.

[708] *See post*, at 435-436.

5. During the *pre-*constitutional period, various Militia officers and functionaries received salaries derived either from fines imposed on defaulters or from Local taxes:

> • [1705 and 1723] "[F]ield officers and captains have full power and authority to appoint and imploy a clerk to attend them at [Militia musters] * * * , and to keep a register of all their proceedings, and to allow the said clerk such sallary for his said service * * * as * * * they shall think fit and reasonable, and to pay the same out of the penaltys and fines accrewing [against defaulters.]"{EN-966}

> • [1777] "One or more adjutants shall be appointed by the court martial of each county to attend musters general and private, and instruct the officers and soldiers in military duty, who shall * * * have an allowance * * * to be paid out of the fines; or if they not be sufficient, the deficiency to be supplied * * * in the[ ] next county levy[.]
>
> * * * * *
>
> "The * * * court[-martial of each County] shall have power to appoint a clerk * * * , and may also appoint a provost martial * * * for the preservation of order and good behaviour * * * . And the said court martial shall also appoint * * * a bursar, who shall receive from the collector all fines by him collected * * * .
>
> "All fines imposed [on delinquents in the Militia] * * * shall be appropriated, in the first place, to the payment of the salaries and allowances to the adjutant, clerk, provost martial, collectors, and bursar[.]"{EN-967}

> • [1784 and 1785] "Each [Militia] court or board * * * are empowered to appoint a clerk and provost marshal" who shall "receive such allowance, to be paid out of the fines arising from delinquencies, as the said court or board shall think reasonable."{EN-968}

6. Finally, Virginia provided pensions for men disabled as the result of their military service. For example,

> • [1754] "[I]f any person or persons enlisted [as soldiers] * * * shall be so maimed or wounded, as to be rendered incapable of maintaining themselves, they shall, upon their return [from the campaign], be supported at the public expence."{EN-969}

> • [1775] "[I]f any of the regulars, minute, or militia-men * * * shall be so maimed or disabled as to be rendered incapable of maintaining themselves, they shall, upon their discharge, be supported at the expense of the publick."{EN-970}

I. Rotation in service. The burden of actual service was also distributed among the men through regular rotation:

• [1775] "[A]s well for the ease of the minute-men, as that they may be returned in regular rotation to the bodies of their respective militias, *Be it* * * * *ordained*, That after serving twelve months sixteen minute-men shall be discharged from each company * * * , and the like number at the end of every year, beginning with those who stand first on the roll, and who were first enlisted[.]"{EN-971}

• [1775] "[F]or the more expeditious, convenient, and speedy draughting into service detachments of the militia * * * , as occasion may require, *Be it* * * * *ordained*, That, at the general muster * * * the commanding-officer of each county or corporation shall, by fair and equal lot, cause to be drawn out of each company so many men as will amount to one tenth part thereof, and cause the names of the persons so allotted to be enrolled * * * as the first division of militia for such county or corporation; and * * * shall in like manner proceed, by lot, to fix * * * nine other divisions * * * ; and thereafter, if the militia * * * shall be called into duty, the same shall be performed by the divisions, in the order they shall so stand enrolled, one after another, so as to preserve the regular rotation of duty amongst them."{EN-972}

• [1776] "[W]here it shall be necessary to call on duty the militia of any colony [*sic,* 'county' must have been meant], upon an invasion or insurrection within the same, or any county adjoining, the commanding-officer shall have full power and authority to order into service such part of the militia of his said county as to him shall seem necessary, and shall also call in the divisions, or any part thereof, according to allotment; and the militia first called on duty shall be discharged as soon as the divisions called in shall be ready to perform the service required of such division."{EN-973}

• [1777] "FOR making provision against invasions and insurrections, and laying the burthen thereof equally on all: *Be it enacted* * * * , That the division of the militia of each county into ten parts * * * shall be completed and kept up * * * , each part to be distinguished by fair and equal lot * * * .

" * * * The several divisions of the militia * * * shall be called into duty by regular rotation * * * ; but if the invasion or insurrection be so near and pressing as not to allow the delay of calling the division * * * next in turn, the commanding officer may call on such part of the militia as shall be most convenient to continue in duty until such division * * * can come in to supply their places."{EN-974}

• [1780] "WHEREAS a dangerous invasion of South Carolina now threatens * * * that state, and the troops engaged in its defence may be overpowered by superiour numbers, if timely aid not be sent to them. And as it is incumbent upon this state, on every principle of policy and good neighbourhood, to assist our friends and fellow citizens in distress, as speedily and effectually as possible; *Be it enacted* * * * , That two

> thousand five hundred infantry be forthwith called into service, in legal rotation, from [certain] counties, and in [certain] proportions[.]"{EN-975}
>
> • [1782] "[T]he governor shall cause to be delivered to the * * * commanding officers of the militia of such counties as are most exposed to the incursions of the enemy, and to the officers of the militia of the city of Williamsburg, and borough of Norfolk, such a number of arms as he may think necessary, not less than sufficient to arm three tenths of their militia, * * * which such * * * commanding officers * * * shall deliver * * * to such of the militia as are first to be called on duty * * * ; who, on having served their tour of duty, shall return their arms, in good order, * * * to be delivered in like manner to such of the militia as stand next in rotation."{EN-976}
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> • [1786] "That * * * the * * * commanding officers * * * are hereby required to enroll the militia within their several counties and corporations, into distinct companies; and * * * to divide [each] company into divisions, * * * from one to ten, for the purpose of a regular rotine of duty when called into actual service[.]"{EN-977}

Rotation was feasible, of course, only when more than enough men were available to perform the necessary duty. But that was generally the situation, because the Militia incorporated in principle *every* able-bodied adult free man. Thus, if the number of volunteers for some service in the field proved insufficient, impressment could be employed to fill the ranks. Even men who were impressed could provide substitutes. And those without substitutes might be called upon to serve only in rotation. Moreover, all of the men who might have volunteered or otherwise been called up were likely to have had at least rudimentary Militia training. As one contemporary observer marveled, "[i]t may be asserted that North-America is entirely military, and inured to war, and that new levies may continually be made without making new soldiers".[709]

Today, revitalized "Militia of the several States" could do as well, if not better, than their *pre*-constitutional ancestors in spreading the burden of service throughout their communities on an efficient and equitable basis. For, with far larger populations composed of more highly educated people—and with greater capital investment, technology, and productivity in every area of human endeavor—than any of the Colonies ever enjoyed, the States could grant generous exemptions from routine Militia service for men with crucial civilian occupations; could employ very selective drafts, carefully qualified systems of substitution, and rapid rotation when men were called forth for special duties; and could pay reasonable compensation for many of the services Militiamen performed.

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[709] Marquis de Chastellux, *Travels in North-America, in the Years 1780, 1781, and 1782* (London, England: G.G.J. & J. Robinson, 1787), Volume 1, at 19.

J. Limitations on Militia duty. Finally, that every adult, able-bodied free man in *pre*-constitutional Virginia might have been required to perform some form of military service, in person or through a substitute, did not entail an absolutely unlimited commitment.

1. Virginia herself had to be in actual danger:

> • [1705] "[U]pon any invasion of the enemy by sea or land, or upon any insurrection, the governor * * * have full power to levy, raise, arm and muster such a number of forces out of the militia * * * as shall be thought requisite and needfull for repelling the invasion or suppressing the insurrection, and the same being raised, to order, direct, march, employ, continue, discharge and disband, as the occasion shall require, or the cause of danger ceases for which they were raised."{EN-978}
>
> • [1727, 1732, 1734, 1738, 1740, and 1744] "[U]pon any invasion of an enemy by sea or land, or upon any insurrection, the governor * * * have full power and authority to levy, raise, arm, and muster, such a number of forces, out of the militia * * * as shall be thought needful for repelling the invasion, or suppressing the insurrection, or other danger * * * ; and such forces again to discharge and disband, as the cause of danger ceases, for which they were raised."{EN-979}
>
> • [1748 and 1753] "[U]pon any invasion of an enemy by sea, or land, or upon any insurrection, the governor * * * shall have full power and authority to levy, raise, arm, and muster, such a number of forces, out of the militia * * * as shall be thought needful for repelling the invasion, or suppressing the insurrection, or other danger * * * , and such forces again to discharge, and disband, as the cause of danger ceases."{EN-980}
>
> • [1757, 1758, 1759, 1761, 1762, 1764, 1766, 1769, and 1772] "[U]pon any invasion of any enemy, by sea or land, or upon any insurrection, the governor * * * shall have full power and authority to levy, raise, arm and muster such a number of forces out of the militia * * * as shall be thought needful for repelling the invasion, or suppressing the insurrection or other danger; * * * and such forces again to discharge and disband as the cause of danger ceases."{EN-981}

So, notwithstanding that Virginia was fully organized and armed at all times, she was not "a garrison state" or "a *para*-military police state". For her people, although always possessed of arms, were not always under arms, but took up their arms only when confronted with a *real* "cause of danger".

2. Except under extraordinary circumstances, Virginians could not be required to serve outside of Virginia's own territory; and when they were, they remained under the command of Virginia's own authorities:

> • [1755] "That * * * a sum of money * * * be laid out for * * * raising and maintaining three compa[n]ies of * * * rangers, for the

> protection of the subjects in the frontiers of this colony, as the governor shall direct from time to time, and [they] shall not be sent out of this colony, nor incorporated with the soldiers now in his majesty's service, or made subject to martial law."{EN-982}
>
> • [1755] "[N]othing * * * shall * * * impower the governor * * * to lead or march the militia of this colony, or cause them to be led or marched, more than five miles beyond where the inhabitants of this colony, shall be settled on the western frontiers."{EN-983}
>
> • [1756] "[N]othing * * * shall * * * impower the governor * * * to lead or march the soldiers hereby raised, or cause them to be led or marched out of this colony."{EN-984}
>
> • [1775] "[W]hereas it may be necessary, for the publick security, that the forces to be raised * * * should, as occasion may require, be marched to different parts of the united colonies, * * * the officers and soldiers * * * shall, in all things, * * * be under the controul, and subject to the order, of the committee of safety."{EN-985}

3. Restrictions of these kinds, repeated over and over again throughout the years, reflected two fundamental principles "*the good people of* Virginia" later codified in her Declaration of Rights in 1776: namely, (i) "[t]hat government is, or ought to be, instituted for the common benefit, protection, and security, of the people, nation, or community" (equality of public benefits for the people); and (ii) "[t]hat a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state; that standing armies, in time of peace, should be avoided, as dangerous to liberty; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power" (equality of public service from the people).{EN-986}

a. Without special authorization from "*the good people*" "of a free state", a government established by the people for the benefit of themselves, their communities, and their nation as a whole should never be allowed, on its own recognizance, to deploy the Militia to fight for other peoples, communities, or nations—particularly when, having been dispatched to foreign lands, Militiamen would no longer be available to defend their own communities and nation from imminent threats to their own "homeland security". Which is why the Constitution delegates to Congress the power "[t]o provide for calling forth the Militia" *only* "to execute the Laws of the Union, suppress Insurrections and repel Invasions",[710] tasks that, in almost every conceivable instance, the Militia would be expected to perform within or in close proximity to the territory of the United States, and of "the several States" whose establishments they are.[711]

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[710] U.S. Const. art. I, § 8, cl. 15.

[711] *See post*, at 870-871 and 1187-1188.

b. In addition, in "a free state" not caught up in the coils and toils of a total war for its very survival, the people are not always under arms and thereby potentially subject to some species of "martial law".[712] If any substantial portion of the people are permanently so regimented in "a standing army", their polity is not "a free state", but "a garrison state", "a national-security state", or "a *para*-military police state"—which is not simply dangerous to liberty, but inevitably fatal. A true "Militia" settled and regulated on the *pre*-constitutional pattern is not "a standing army", because *inter alia*: (i) Its members consist of "the body of the people" themselves, not some élitist force that imagines itself separate from, independent of, and superior to the people. (ii) Its members are mobilized and deployed in full military array only during times of actual danger, but otherwise remain for the large part diffused throughout the community in their ordinary walks of life. And, especially, (iii) its members are not subject to "martial law", except perhaps when in actual service during those times—and then only to "martial law" administered by members of the Militia themselves for the sole purpose of disciplining the Militia. Which is why the Constitution provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or *in the Militia, when in actual service in time of War or public danger*".[713] Importantly, too, this "except[ion]" *allows* for the possible application of some variety of "martial law" "in the Militia, when in actual service in time of War or public danger", *but does not require it*.

"[T]he land or naval forces" constitute what the Founding Fathers understood as "a standing army";[714] and therefore their members, as the consequence of the nature of the institutions in which they are enrolled, arguably may be exposed to some species of "martial law" peculiar to them throughout the time they remain in service. Even strictly confined to those "forces" alone, such a régime would be bad enough. For, as Blackstone observed,

> martial law, which is built upon no settled principles, but is entirely arbitrary in it's decisions, is * * * is truth and reality no law, but something indulged, rather than allowed as a law: the necessity of order and discipline in an army is the only thing which can give it countenance; and therefore it ought not to be permitted in time of peace, when the * * * courts are open for all persons to receive justice according to the laws of the land.[715]

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[712] On the significantly different definitions of so-called "martial law" possible, *see post*, Chapter 48.

[713] U.S. Const. amend. V (emphasis supplied).

[714] *See* U.S. Const. art. I, § 8, cls. 12 through 14.

[715] *Commentaries on the Laws of England, ante* note 142, Volume 1, at 412 (footnote omitted).

Far worse yet would the situation be if the "martial law" peculiarly applicable to "a standing army" were extended at all times to the Militia—which today should consist of potentially every able-bodied adult throughout "the several States". For then, if the terms "War or public danger" were imaginatively construed, civilian law in serious criminal cases might simply disappear; and, in that event, "the military [would not] be under strict subordination to, and governed by, the civil power"—but instead "the civil power" would find itself largely at the mercy of "the military"—with all of the disastrous consequences to individual liberty that inversion of authority would entail. (Unless, of course, the Militia themselves refused, as they should, to acquiesce in that result.)

If not politically impossible were America to find herself squeezed in the iron grip of militaristic usurpers and tyrants, such an over-extension of "martial law" is always *constitutionally* impossible. In 1781, Virginia's General Assembly declared "martial law" on quite specific grounds:

> WHEREAS it is ***necessary for the safety of the army*** that all persons ***within a limited distance thereof*** should be subject to martial law; *Be it enacted*, That all persons whatsoever either ***in the American army or within twenty miles thereof***, and also all persons ***within twenty miles of the enemy's camp***, shall * * * be subject to martial law, as declared by the continental rules, articles and regulations of war; and any person within the said limits, guilty of disobedience of orders or any other offence, punishable by the said articles of war, shall be tried, acquitted or condemned, and punished as in and by the said rules and articles of war is ordered and prescribed.{EN-987}

Plainly, the conditions precedent that these patriotic lawmakers required were: (i) a time of actual "war"; (ii) geographical boundaries that fairly represented the immediate range of the Army's operations, including areas in which spies, informers, or other subversives or irregulars could operate profitably and in which movements by civilians loyal to either side could embarrass or complicate the Army's activities; and (iii) the reasonable conclusion flowing from the latter two circumstances that a declaration of "martial law" applicable to civilians in that area was "necessary for the safety of the army", because the civilian authorities in the area (if any there were) could not, in fact, deal with the situation.

Thus, the restrictions *pre*-constitutional Virginia imposed on the employment of her Militia ultimately reflected the political principle of *practical popular sovereignty* that remains equally compelling today: namely, that WE THE PEOPLE are not mere "human resources" available for scheming politicians, avaricious factions, rogue public officials, and Napoléonic "men on white horses" to misuse for their pet projects, particularly when those projects involve aggressive military adventures abroad or police-state oppression at home. A free people does

not exist to provide cannon fodder and logistical support for "a garrison state" or a "national-security state", or informers, investigators, and enforcers for "a *para*-military police state". Rather, the critical mass of military force available in "a free state" must remain in the people's own hands, through their organization in the Militia, in order to prevent the emergence of such conditions in the first place, and to prevail against any attempts to maintain and expand any such conditions that rogue public officials might somehow insinuate into the polity behind the people's backs.

CHAPTER SEVENTEEN

Virginia required most of the members of her *pre*-constitutional Militia to supply their own firearms and ammunition, and otherwise encouraged and rewarded the use of private arms in public service.

Article 13 of Virginia's Declaration of Rights in 1776 emphasized that "a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state"; and the Second Amendment in 1791 added that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed". Yet, then as now, that all able-bodied adult free males were or are simply nominal members of a "Militia" was and is, by itself, not enough to provide a "safe defence" or "the security of a free State". That degree of organization is necessary, to be sure; but withal it is insufficient. *Equipment suitable for performing the Militia's tasks* must also be at hand. Indeed, such equipment may even be arguably more important than organization—because no variety of mere organization can guarantee to provide equipment; whereas proper equipment will serve whatever form of organization can eventually be adopted. Thus, the conditions *sine qua non* to put into effect the essential organizational principle that the "militia, composed of the body of the people, [must be] trained to arms" are that: *(i) in fact,* ***the people themselves*** *actually possess sufficient quantities of "arms"* ***suitable specifically for Militia service****; and (ii) in law, their possession is guaranteed by an* ***absolute and fully enforceable*** *"right * * * to keep and bear Arms".*

During the *pre*-constitutional era, Virginians never doubted the wisdom of these conclusions. From at least 1672, they knew that "as against all tymes of danger it ought to be the care of all men to provide that their armes and habiliments for war, be alwayes kept fixed and fitt for service[.]"{EN-988} Based on this precept, the acquisition, ownership, and permanent possession of firearms, ammunition, and accoutrements by the people themselves for their own service in their Militia was always the general rule in Virginia (as, indeed, it always was in almost every other Colony and thereafter in every independent State throughout America).

A. The community to be thoroughly armed. From the earliest days of her settlement, Virginia considered a thoroughly armed populace vital to the community's "homeland security":

> • [1624] "That the commander of every plantation take care that there be sufficient of powder and amunition within the plantation * * * and their pieces fixt and their arms compleate."{EN-989}
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> • [1639] "ALL persons except negroes to be provided with arms and amunition[.]"{EN-990}
>
> • [1644] "[I]n places of danger it shall not be lawfull for any to seat or inhabitt without ten sufficient men at the least, and arms and ammunition accordingly[.]"{EN-991}
>
> • [1645] "WHEREAS the carelesse stragling of many people hath exposed them to the slaughter of the enemie, *Be it enacted*, that [certain officers] * * * in the severall precints, shall hereby have power to restraine all such persons (as not being considerable party to defend themselves) shall either hunt in the woods or travell abroad[.]"{EN-992}

These early enactments—which set the tone for everything that followed—embodied the very antithesis of modern-day "gun control", which aims at preventing ordinary individuals from acquiring the most effective firearms. In *pre*-constitutional Virginia, "ALL persons" (other than women, children, and persons of color) in "every plantation" were required to possess firearms and ammunition "sufficient", "compleate", and "fixt". In general usage at that time, just as now, anything that was "fixed" was "ma[d]e fast, firm, or stable".[716] So, in relation specifically to arms, "fixt" plainly meant "put in order[,] * * * adjust[ed,] * * * set or place[d] in the manner desired or most suitable" or "repair[ed]"[717]—that "use", of course, being individual and especially collective self-defense against every conceivable threat. Moreover, in the starkest contrast to contemporary "gun control", which aims at preventing ordinary individuals from carrying firearms in public as a matter of course, when Virginians in *pre*-constitutional days "travell[ed] abroad" they were to form some "considerable party to defend themselves" so as to be able adequately to deal with whatever dangers might have lain in wait for them. Thus, Virginians could have defended themselves, their homes, and their businesses, and moved about their communities in safety, because *at all times they themselves as individuals* possessed effective firearms and ammunition, in good working order, and *among themselves as a community* they had organized "considerable part[ies]" for the purposes of mutual aid and assistance.

B. An individual duty to acquire and possess firearms. For most able-bodied adult free male Virginians, their duty was, not simply to be armed, but

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[716] S. Johnson, *Dictionary*, *ante* note 50, in both the First (1755) and the Fourth (1773) Editions. *Accord, Webster's Revised Unabridged Dictionary, ante* note 11, at 565, definition 1; *Webster's New International Dictionary, ante* note 330, at 958, definition 1.

[717] *Webster's Revised Unabridged Dictionary, ante* note 11, at 565, definition 5. *Accord*, *The Compact Edition of the Oxford English Dictionary, ante* note 11, Volume 1, at 1012, definition 14.a.; *Webster's Third New International Dictionary, ante* note 330, at 861, definition 3a.

specifically *to arm themselves out of their own resources if they were capable of doing so, and thereafter to maintain personal possession of their arms at all times:*[718]

> • [1659 and 1662] "[T]hat a provident supplie be made of gunn powder and shott to our owne people, and this strictly to bee lookt to by the officers of the militia, (vizt.) That every man able to beare armes ***have in his house*** a fixt gunn two pounds of powder and eight pound of shott at least ***which are to be provided by every man for his family***[.]"{EN-993}
>
> • [1673 and 1676] "FOR the better supply of the country with armes and ammunition, *Be it enacted* * * * , that the captaines of ffoote and horse in each county doe take a strict and perticuler account of what armes and ammunition are wanting in their severall companies and troops * * * : *And be it further enacted* * * * , that the perticuler county courts be * * * impowred upon their respective counties to lay and raise a levy for the provideing of armes and ammunition for supplying the wants aforesaid, that is to say, muskitts and swords for the ffoote, and pistolls, swords and carbines for horse, as alsoe for every lysted souldier at the least two pounds of powder and six pounds of shott, the said armes and ammunition * * * to remaine in the hands of the officers of the militia for them to dispose of the same as there shalbe occasion; ***and that those to whome distribution of armes and ammunition shalbe made doe pay for the same at a reasonable rate***[.]"{EN-994}
>
> • [1684] "FOR the encouragement of the inhabitants * * * of Virginia, ***to provide themselves with*** arms and ammunition, for the defence of this * * * country, and that they may appear well and compleatly furnished when commanded to musters and other * * * service, which many persons have hitherto delayed to do, for that their arms have been imprest and taken from them * * * *it is hereby enacted*, That all such swords, musketts, pistolls, carbines, guns, and other armes and furniture, ***as the inhabitants of this country are already provided, or shall provide and furnish themselves with***, for their necessary use and service, shall * * * be free and exempted from being imprest or taken from him or them, * * * neither shall the same be lyable to be taken by any distresse, seizure, attachment or execution * * * .
>
> "*And* * * * That * * * every trooper * * * ***shall furnish and supply himself with*** * * * all arms and furniture, fitt and compleat for a trooper, and that every foot soldier, ***shall furnish and supply himselfe, with*** a sword, musquet and other furniture fitt for a soldier, and that each trooper and foot souldier, ***be provided with*** two pounds of powder, and eight pounds of shott, and ***shall continually keep*** their arms well fixt, cleane and fitt for * * * service."{EN-995}

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[718] As to those individuals eligible for the Militia but not financially capable of providing their own firearms, *see post*, at 424-432.

• [1705] "That the * * * chief officer of the militia of every county * * * make * * * a new list of all the male persons in his respective county capable * * * to serve in the militia, and to order and dispose them into troops or companys, according to * * * the respective circumstances of the ability of the persons listed, ***to the end each trouper or ffoot soldier may be thereby guided to provide and furnish himself with*** * * * arms and ammunition * * * .

" * * * That every ffoot soldier ***be provided with*** a firelock, muskett or fusee well fixed, a good sword and cartouch box, and six charges of powder, ***and appear constantly with*** the same at * * * muster and exercise, and that besides those each foot soldier ***have at his place of abode*** two pounds of powder and eight pounds of shott, and ***bring the same into the field with him*** when * * * required, and that every soldier belonging to the horse ***be provided with*** * * * a case of good pistolls well fixed, * * * double cartouch box, and twelve charges of powder, and ***constantly appear with*** the same * * * to muster and exercise, and that besides those each soldier belonging to the horse ***have at his usuall place of abode*** a well fixed carabine, * * * two pounds of powder and eight pounds of shott, and ***bring the same into the field with him***, when * * * required.

* * * * *

" *Provided always* * * * That eighteen months time be given and allowed to each trooper and ffoot soldier not heretofore listed ***to furnish and provide himself with*** arms and ammunition * * * .

"And for the encouragement of every soldier in horse or ffoot ***to provide and furnish himself*** * * * ***and his security to keep his*** * * * ***arms and ammunition, when provided***,

" * * * That the musket or ffuzee, the sword, cartouch box and ammunition of every ffoot soldier, and * * * the carbine, pistolls, sword, cartouch box and ammunition of every trooper ***provided and kept*** in pursuance of this act ***to appear and exercise withal*** be free and exempted at all times from being impressed upon any account whatsoever, and likewise from being seized or taken by any manner of distress, attachment or writt of execution[.]"{EN-996}

• [1723] "That every soldier belonging to the horse, ***be provided with*** * * * a case of pistols, cutting sword, or cutlace, and double cartouch box, and six charges of powder, and ***constantly appear with*** the same * * * for muster and exercise; and ***shall keep at his place of abode***, a well fixed carbine * * * , one pound of powder, and four pounds of shot, and ***bring the same into the field with him*** when * * * required. And that every foot soldier ***be provided with*** a firelock, musquet, or fuzee, well fixed, and bayonet fitted to such musquet or fuzee, or a good cutting sword or cutlace, a cartouch box, and three charges of powder, and ***appear constantly with*** the same * * * for muster and exercise; and ***shall keep at***

his place of abode, one pound of powder, and four pounds of shot, and ***bring the same into the field with him***, when * * * required[.]

* * * * *

" * * * *Provided always* * * * That eighteen months time be given and allowed to each soldier, ***to furnish and provide himself with*** arms and ammunition * * * —So as every soldier, during the said eighteen months, ***do appear*** at all musters ***with such arms as he is already furnished with***.

* * * * *

" * * * And for an encouragement of every soldier ***to provide and furnish himself*** * * * , ***and his security to keep his horse, arms, and ammunition, when provided***, * * * That the * * * arms and ammunition, ***provided and kept***, * * * be free and exempted at all times from being impressed upon any account whatsoever; and likewise, from being seized or taken by any manner of distress, attachment, or writ of execution."{EN-997}

• [1738] "That every person * * * listed [in the Militia], (except free mulattos, negros and Indians,) and placed or ranked in horse or foot, shall be armed and accoutred in manner following: * * * Every horse-man ***shall be furnished with*** a * * * carbine or fuzee, * * * a case of pistols, cutting sword or cutlass, double cartouch-box, and six charges of powder; and ***constantly appear with*** the same, at * * * muster and exercise; and ***shall keep at his place of abode***, one pound of powder, and four pounds of ball, and ***bring the same into the field with him***, when * * * required. And every footman ***shall be furnished with*** a firelock, musket, or fuzee, well fixed, a bayonet fitted to the same, or a cutting sword or cutlass, a cartouch-box, and three charges of powder; and ***appear with the same*** * * * for muster and exercise * * * ; and ***shall also keep at his house***, one pound of powder, and four pounds of ball; and ***bring the same into the field***, when * * * required.

* * * * *

" * * * *Provided always* * * * That eighteen months time be given and allowed to each soldier ***to furnish and provide himself with*** arms and ammunition * * * ; so as every soldier, during the said eighteen months, ***do appear*** at all musters, ***with such arms as he is already furnished with***.

" * * * And, for encouragement to every soldier ***to provide and furnish himself*** * * * , ***and his security to keep his arms and ammunition, when provided***, * * * That the * * * arms and ammunition, ***provided and kept***, * * * be free and exempted, at all times, from being impressed upon any account whatsoever; and likewise from being seised or taken by any manner of distress, attachment, or writ of execution."{EN-998}

• [1755] "[E]very person * * * inlisted [in the Militia], (except the people commonly called Quakers, free Mulattoes, negroes and Indians) and placed or ranked in the horse or foot, shall be armed and accoutred in the manner following, that is to say; every horseman ***shall be***

furnished with a * * * carbine * * * , a case of pistols, cutting sword, double cartouch box, and six charges of powder, and ***constantly appear with*** the same * * * for muster and exercise, and ***shall keep at his place of abode***, one pound of powder and four pounds of ball, and ***bring the same into the field with him*** when * * * required: And every footman ***shall be furnished with*** a firelock well fixed, a bayonet fitted to the same, a cutting sword, a double cartouch box, and three charges of powder, and ***constantly appear with*** the same * * * for muster and exercise * * * , and ***shall also keep at his place of abode***, one pound of powder and four pounds of ball, and ***bring the same with him into the field*** when * * * required.

* * * * *

" * * * *Provided also* * * * That twelve months time be given and allowed to each soldier, ***to furnish and provide himself with*** arms and ammunition * * * , so as such soldier ***do appear*** at all musters, during the said twelve months, ***with such arms as he hath, and is already furnished with***: And if any soldier shall appear at any muster not armed and accoutred, * * * it shall and may be lawful, for the captain of the troop or company to which such soldier shall belong, to examine such soldier upon oath, ***whether he hath any***, and what arms and ammunition ***he really hath of his own property***, and if on such examination it shall appear, that such soldier ***hath any arms or ammunition of his own property, and hath not brought the same***, * * * he shall be liable to * * * penalties * * * although he hath not been inlisted twelve months * * * . And for an encouragement to every soldier ***to provide and furnish himself*** * * * ***and his security to keep his arms and ammunition when provided***:

" * * * That the * * * arms and ammunition, ***provided and kept*** * * * , be free and exempted at all times from being impressed upon any account whatsoever; and likewise, from being seised or taken by any manner of distress, attachment or writ of execution[.]"{EN-999}

•[1757, 1759, 1762, 1766, and 1771] "[E]very person * * * inlisted [in the Militia] (except free mulattoes, negroes, and Indians) shall be armed in the manner following, that is to say: Every soldier ***shall be furnished with*** a firelock well fixed, a bayonet fitted to the same, a double cartouch-box, and three charges of powder, and ***constantly appear with*** the same * * * for muster and exercise, and ***shall also keep at his place of abode*** one pound of powder and four pounds of ball, and ***bring the same with him into the field*** when * * * required[.]

* * * * *

" * * * *Provided also* * * * That twelve months shall be given and allowed to each soldier, not already inlisted, ***to furnish and provide himself with*** arms and ammunition * * * , so as such soldier ***do appear*** at all musters during the said twelve months ***with such arms as he hath and is already furnished with***: And if any soldier shall appear at any muster not armed, and with ammunition * * * it shall and may be lawful for the

captain of the company * * * to examine such soldier, upon oath, ***whether he hath any***, and what arms and ammunition ***he really hath of his own property***, and if on such examination it shall appear that such soldier ***hath any arms or ammunition of his own property, and hath not brought the same***, * * * he shall be liable to * * * penalties * * * altho' he hath not been inlisted twelve months * * * .

" * * * And for an encouragement to every soldier ***to provide and furnish himself*** * * * , ***and his security to keep his arms and ammunition when provided***, * * * That the arms and ammunition ***provided and kept*** * * * be free and exempted at all times from being impressed upon any account whatsoever, and likewise from being seized or taken by any manner of distress, attachment, or writ of execution[.]"{EN-1000}

• [1775] "That every militia man so to be enlisted ***shall furnish himself with*** a good rifle, ***if to be had, or otherwise with*** a * * * common firelock, bayonet, pouch, or cartouch box, three charges of powder and ball, * * * and ***shall constantly keep by him*** one pound of powder and four pounds of ball * * * .

"*Provided always,* That no person shall be subject to * * * penalties * * * for the not ***providing or producing*** the quantity of powder required, who shall make it appear * * * that he ***has used his best endeavours to procure*** such powder, and ***hath not been able so to do*** * * * .

* * * * *

"That the soldiers shall be allowed six months after enlisting ***to provide themselves with*** arms, and ***in the mean time shall bring with them*** such arms ***as they have*** * * * ; and that all arms of the militia shall be exempted from executions or distresses[.]"{EN-1001}

• [1777] "Every * * * soldier ***shall appear*** at his respective muster-field * * * armed and accoutred * * * with a rifle and tomahawk, or good firelock and bayonet, with a pouch and horn, or a cartouche or cartridge box, and with three charges of powder and ball; and, moreover, * * * ***shall constantly keep*** one pound of powder and four pounds of ball, ***to be produced*** whenever called for by his commanding officer. * * *

" * * * Every * * * soldier shall be allowed six months after his * * * enrollment [in the Militia] ***to provide*** such arms or accoutrements ***as he had not at the time***. All arms and ammunition of the militia shall be exempted from executions and distresses at all times[.]"{EN-1002}

• [1784] "Every officer and soldier [in the Militia] ***shall appear*** at his respective muster-field * * * , armed, equipped, and accoutred, as follows: * * * every non-commissioned officer and private, with a good clean musket, carrying an ounce ball, and three feet eight inches long in the barrel, with a good bayonet and iron ramrod well fitted thereto, a cartridge box properly made, to contain and secure twenty cartridges fitted to his musket * * * ; and moreover, each non-commissioned officer and private shall have at every muster, one pound of good powder and four

pounds of lead; including twenty blind cartridges; * * * provided, that the militia of the counties westward of the Blue Ridge, and the counties below adjoining thereto, shall not be obliged to be armed with muskets, but may have good rifles with proper accoutrements in lieu thereof. And every of the * * * non-commissioned officers, and privates, ***shall constantly keep*** the aforesaid arms, accoutrements and ammunition ***ready to be produced*** whenever called for by his commanding officer.

* * * * *

" * * * That twelve months after the commencement of this act shall be allowed ***for providing*** the arms and accoutrements herein directed; but in the mean time, the militia ***shall appear at musters with, and keep by them*** the best arms and accoutrements ***they can get***.

* * * * *

" * * * All arms, ammunition, and equipments of the militia, shall be exempted from executions and distresses at all times * * * .

" * * * That no arms or accoutrements, which may hereafter be lost in service, shall be paid for by the public, unless the loser shall be killed, wounded, or otherwise incapacitated in the opinion of a court-martial, from preserving his arms."{EN-1003}

• [1785] "Every officer and soldier [in the Militia] ***shall appear*** at his respective muster-field * * * , armed, equipped, and accoutred, as follows: * * * every non-commissioned officer and private, with a good, clean musket, carrying an ounce ball, and three feet eight inches long in the barrel, with a good bayonet and iron ramrod well fitted thereto, a cartridge box properly made, to contain and secure twenty cartridges fitted to his musket * * * , and moreover, every non-commissioned officer and private shall have at every muster one pound of good powder, and four pounds of lead, including twenty blind cartridges * * * . *Provided*, That the militia of the counties westward of the Blue Ridge, and the counties below adjoining thereto, shall not be obliged to be armed with muskets, but may have good rifles with proper accoutrements, in lieu thereof. And every of the * * * non-commissioned officers, and privates, ***shall constantly keep*** the aforesaid arms, accoutrements, and ammunition, ***ready to be produced*** whenever called for by his commanding officer.

* * * * *

" * * * That two years after the commencement of this act, shall be allowed ***for providing*** the arms and accoutrements herein directed; but in the mean time, the militia ***shall appear at musters with, and keep by them,*** the best arms and accoutrements ***they can get***.

* * * * *

" * * * All arms, ammunition, and equipments, of the militia, shall be exempted from executions and distresses at all times * * * . No arms or accoutrements, which may hereafter be lost in service, shall be paid for by the public, unless the loser shall be killed, wounded, or otherwise incapacitated * * * from preserving his arms."{EN-1004}

In each and every one of these instances over a period of some one hundred twenty-five years, the statutes explicitly required every member of the Militia who was financially capable of doing so to supply himself with his own firearm, ammunition, and necessary accoutrements:

- In 1659 and 1662, the arms "every man able to beare armes" was required to "have in his house" were "to be provided by [that very] man".

- In 1673 and 1676, "distribution of armes and ammunition" was to be made to "lysted soldier[s]" who lacked that equipment, who would "pay for the same at a reasonable rate", and who thereafter would own and possess it as their private property.

- In 1684, each man was commanded to "furnish and supply himself with" certain arms and accoutrements. He was also required to "be provided with" ammunition, the source of which was not expressly identified, but in context must have been "himself" as well, there being nothing in the statute to suggest that the individual would "furnish and supply" part of his mandatory equipment, but that some unnamed someone else would "provide[ ]" the remainder.

- In 1705, each Militiamen was to "be * * * guided to provide and furnish himself with [certain specified] arms and ammunition". In this context, when the statute further mandated that he was "to be provided with" and to "have at his place of abode" or to "have at his usual place of abode" additional enumerated equipment, it plainly intended that he himself would supply those items, too. Then, the explicit emphasis on each man's acquiring his equipment on his own was repeated in the allowance of time "to furnish and provide himself with arms and ammunition", and in "the encouragement * * * to provide and furnish himself * * * and his security to keep his horse, arms and ammunition, when provided", by exempting "the [arms and ammunition] provided and kept" from being taken from him.

- In 1723, the statute first required in general terms that every Militiaman should simply "be provided with" certain arms and ammunition, "keep at his place of abode" additional ammunition, and "be furnished and provided with [such] arms and ammunition" at musters. But that these requirements imposed on each Militiaman the duty to acquire that equipment on his own became obvious from the statutory period of grace "allowed" for each of them "to furnish and provide himself with [the necessary] arms and ammunition", and otherwise to "appear * * * with such arms as he is already furnished with", which could only have been his own personal arms. In addition, the statute encouraged each man "to provide and furnish himself" with the necessary arms and ammunition, by

guaranteeing "his security to keep his * * * arms, and ammunition, when provided", through exemption of such "arms, and ammunition, provided and kept", from seizures. That is, each Militiaman was originally to acquire arms and ammunition, and thereafter to keep them, on and as his own, legally secured in his right of possession.

• In 1738, although some of the verbal formulae in the statute differed trivially from those employed in 1723 ("be furnished with" *as opposed to* "be provided with"; "keep at his house" *as opposed to* "keep at his place of abode"; and "for encouragement to every soldier to provide and furnish himself * * * and his security to keep his arms and ammunition" *as opposed to* "for an encouragement of every soldier to provide and furnish himself * * * and his security to keep his arms and ammunition"), the rest were identical ("to furnish and provide himself with", "with such arms as he is already furnished with", "to provide and furnish himself", and "keep at his place of abode")—so that the meaning of the former statute was exactly the same as that of the latter.

• In 1755, 1757, 1759, 1762, 1766, and 1771, the statutes adopted essentially the same verbiage as the statutes of 1723 and 1738, with one internally redundant exception ("with such arms as he hath, and is already furnished with" *as opposed to* "with such arms as he is already furnished with")—which emphasized even more strongly that each Militiaman himself was responsible for supplying his own arms. Revealingly, too, in 1755 through 1771, the statutes authorized "the captain of the [Militia] company * * * to examine * * * upon oath" "any soldier" who "appear[ed] at any muster" without arms and ammunition, in order to determine "what arms and ammunition he really hath *of his own property*". This inquiry would have been pointless if the norm had been other than for each Militiamen initially to supply, and then to maintain in *his own* possession, his *very own* arms and ammunition.

• In 1775, the statute required each Militiaman to "furnish himself with a good rifle, if to be had"—that is, if he could find one, presumably in the free market; and "otherwise" to furnish himself "with a * * * common firelock"—doubtlessly, in the same manner and from the same source. The additional command that he "constantly keep by him one pound of powder" was followed by the mitigation of "penalties" for any Militiaman who "has used his best endeavours to procure such powder, and hath not been able to do so"—thus plainly establishing that it was the Militiaman's personal responsibility to obtain the powder in the first instance. (Certainly the statute identified no one else to whom he could have delegated that task.) Moreover, the statutory "allow[ance]" of time for Militiamen "to provide

themselves with arms, and in the mean time [to] bring with them such arms as they have", unequivocally identified the men themselves as the only sources of both their new and their old arms.

•In 1777, the statutory period of grace during which each Militiaman was "allowed * * * to provide such arms or accoutrements as he had not at the time" clearly intended that the man himself was to "provide" in the future the arms he had not so "provide[d]" before—and, otherwise, "to provide such arms" that satisfied statutory standards as he *did* have "at the time". That is, the presence or the absence of arms, or both, resulted from the same individual's own actions or inactions, past, present, or future. Also, although not as explicit as in 1775, the additional requirement that each Militiaman "constantly keep one pound of powder and four pounds of ball" could have been construed only as requiring him personally to acquire that ammunition in the first place—for nothing in the statute pointed to any other actor or source; and no reason exists why one rule should have applied to a Militiaman's basic complement of arms and an altogether different one to his further stock of "powder and * * * ball".

•In 1784 and 1785, the statutes did not explicitly identify who should be "allowed" the period of grace "for providing the arms and accoutrements". But the permission-*cum*-requirement that "in the mean time, the militia shall appear at musters with, and keep by them, the best arms and accoutrements they can get" obviously implied that the new arms and accoutrements were to be "provid[ed]" in the future by the selfsame men then using—because they had previously acquired—"the best arms and accoutrements they c[ould] get" sometime in the past. The statutes simply required them to "get" arms better than the ones they already possessed, if the latter did not measure up to the Militia's standards. Then, too, if "the militia of the counties westward of the Blue Ridge, and the counties below adjoining" were "not * * * obliged to be armed with muskets, but [might] have [had] good rifles with proper accoutrements in lieu thereof", who initially was to decide whether particular "rifles" were "good", and whether they should be substituted for "muskets" in Militia service, other than the Militiamen who actually owned those firearms? Moreover, the special allowance in these two statutes that Militiamen's "arms * * * lost in service, shall be paid for by the public" identified those arms as privately held. For "the public" would hardly have paid anyone had *public* arms been "lost in service"—rather, the derelict Militiamen would have been held financially accountable. So, because "the public" absorbed the losses, any such "arms" must have been some Militiaman's own personal property, as the statutes themselves recognized in describing the equipment as "*his* arms". And, if

"his" at the time of their loss, the arms must have been supplied by him *ab initio*.

Sometimes, of course, a Militia statute was not as explicit as those described above, although the result of its application was the same. For example:

> [1777] "FOR forming the citizens of Williamsburg, borough of Norfolk, and the professors and students of William and Mary college, into a militia, and better disciplining them: *Be it enacted* * * * , That all male persons between the ages of sixteen and fifty years, within the * * * city or borough, except the persons exempted by an [earlier Militia A]ct * * * and such of the professors and students of William and Mary college as would otherwise be part of the militia of James City county * * * , shall * * * be enrolled and formed into companies * * * .
>
> " * * * And the militia of the said city and borough, with the professors and students of the said college, shall be mustered, trained, and employed, * * * and * * * shall be armed with the same weapons, and be subject to the same * * * regulations * * * as the militia of a county * * * are * * * by the before mentioned act[.]"{EN-1005}

The "before mentioned act" was also passed in 1777.[719] Under the two statutes read together, then, "the professors and students of William and Mary college" were all required to appear at musters each "with a rifle and tomahawk, or good firelock and bayonet", along with ammunition and accoutrements, if such they possessed at the time of their enrollments in the Militia, or to obtain within six months whatever of that equipment they "had not at th[at] time".

Inasmuch as "the professors and students" would naturally have kept their firearms and ammunition in their residences at the college itself or somewhere close by, this statute alone proves how repulsive *pre-*constitutional Virginians (and, truly, all Americans of that era) would have found the notion of "gun-free schools" (or of any "gun-free zones") so fashionable today among the enemies of "a free State" and their fellow travelers, ideological transmission-belts, and assorted hangers-on and dupes.[720] Virginians then knew that, especially in a college, professors should teach and their students (and the professors as well) should learn by example, controlled experimentation, and experience, as well as by mere exhortation, wherein a Militia is "well regulated"; why "a well regulated militia" is "the proper, natural, and safe defence of a free state", and therefore "necessary to the security of a free state"; and what constitute the first two principles of such a Militia: namely, that (i) "a well regulated militia" is "composed of the body of the people" themselves, "trained to

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[719] *Quoted ante,* at 413 & {EN-1002}.

[720] *See post*, at 1415-1418.

arms"; and (ii) the people enjoy an absolute "right"—and, indeed, a *duty*—"to keep and bear Arms" in order to render the Militia effective.[721] True enough, inasmuch as the lowest age for eligibility in Virginia's Militia in 1777 was sixteen years, some college students would have been both minors and Militiamen.{EN-1006} But at what better time and under what better circumstances to form their characters and fill their minds according to the principles of freedom?

Thus, throughout this entire period, other than with respect to individuals too impoverished to purchase their own firearms and ammunition,[722] or in other special circumstances,[723] Virginia (as well as Rhode Island and all but one of the other Colonies and then all of the independent States) considered a nearly complete dependence upon her Militiamen's own acquisition of firearms, ammunition, and accoutrements to be a fully adequate way to "regulate" her Militia. Inasmuch as what was generally recognized as proper "regulation" throughout *pre-*constitutional America defines *constitutional* "regulation" today,[724] it would now be acceptable and even advisable for Congress "[t]o provide for * * * arming * * * the Militia"[725] by first establishing minimal National standards for Militia firearms and ammunition, and then allowing WE THE PEOPLE in the States immediately to arm themselves with whatever they might have to hand or could purchase in a truly free market, until in due course and with no excessive economic burden they could acquire whatever new or additional arms they might need. Or, recognizing that revitalization of the Militia under contemporary conditions must be to some significant degree an *experimental* enterprise, Congress could encourage each State to set a separate standard that reflected the peculiar imperatives of "homeland security" within her own territory, and then to start a process of gradual compliance with that standard among her people through their utilization of the free market.

C. Even otherwise exempted individuals required to supply arms. In *pre-*constitutional Virginia, even certain individuals who were to some degree exempted from Militia service were nonetheless required to provide firearms to their Local governments or to the Militia, personally or through a substitute, or to possess firearms for their own possible active Militia service, or both:

> • [1705] "[F]or as much as severall of the persons exempted * * * , though they be of sufficient ability to find and keep * * * horse arms, and such men whose personal service may not only be usefull, but necessary upon an insurrection or invasion * * * , *will perhaps account*

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[721] *See* Virginia Declaration of Rights (1776) art. 13 *and* U.S. Const. amend. II. *See post*, at 1331-1333 and 1401-1423.

[722] *See post*, at 424-432.

[723] *See post*, at 437-439

[724] *See ante*, at 63-81.

[725] U.S. Const. art. I, § 8, cl. 16.

themselves free from provideing and keep[*ing*] *the same at the places of their abode, which is not intended*:

"*Be is therefore enacted* * * * That the persons of a councellor, of a speaker of the house of burgesses, of a justice of the peace, of an attorney-general, and of a captain or an higher officer in the militia, are exempted from being listed and serving either in horse or foot under command as the rest of the militia do, merely for the dignity of the office which they do or shall have held, and * * * all and every such person or persons, and also the clerk of the councill, the clerk of the general court, and every county court clerk *shall provide and keep* * * * *at their respective places of abode* a troopers * * * arms and ammunition * * * .

"And in case of any rebellion or invasion shall also * * * appear * * * and serve in such stations as are suitable for gentlemen[.]"

Under this statute, "a troopers * * * arms and ammunition" included "a case of good pistolls well fixed, sword and double cartouch box, and twelve charges of powder", as well as "a well fixed carbine" and "two pounds of powder and eight pounds of shott".{EN-1007}

• [1723] "[N]othing * * * shall * * * compel any person or persons that shall be, or shall have been, of his Majesty's council * * * , speaker of the house of burgesses, secretary of this colony, judge of the court of vice-admiralty, his Majesty's attorney-general, a justice of the peace, or any person that shall have born any military commission within this colony, as high as * * * a captain, or the clerk of the council, for the time being, or the clerk of the general court, for the time being, or any county court clerk, during his being such, personally to appear at any musters: But that all, and every the persons aforesaid * * * are hereby required, *to find and provide* one able-bodied white man * * * and * * * trooper's accoutrements, * * * who shall constantly appear and exercise at all musters."

Under this statute, a "trooper's accoutrements" included "a case of pistols, cutting sword, or cutlace, and double cartouche box, and six charges of powder" along with "a well fixed carbine, * * * one pound of powder, and four pounds of shot". Presumably, too, the "able-bodied white man" who "appear[ed] and exercise[d]" as a substitute for an exempted individual would not have been entitled to claim the statutory period of "eighteen months * * * to furnish and provide himself with [such] arms and ammunition", because the substitute's principal was required "to * * * provide one able-bodied white man" with "trooper's accoutrements" then and there.{EN-1008}

• [1738] "[N]othing * * * shall * * * compel any persons herein after-mentioned, to a personal attendance at musters: that is to say, Such as are, or shall have been, members of his majesty's council, speaker of the house of burgesses, secretary, receiver-general, auditor, judge of the court of vice-admiralty, attorney-general, clerk of the council, clerk of the house

of burgesses, clerk of the secretary's office, a justice of the peace, clerk of any county court, or any person that shall have borne any military commission as high as * * * captain, or any of the people commonly called Quakers: Yet all the persons aforesaid, *shall, and are hereby required, to send* one able-bodied man, not being a convict, or man and horse, armed and accoutred, * * * constantly to appear, and exercise at musters."

Under this statute, an ordinary "footman" was to "be furnished with a firelock, musket, or fuzee, well fixed, a bayonet fitted to the same, or a cutting sword or cutlass, a cartouch-box, and three charges of powder"; whereas a "horse-man" needed a "carbine or fuzee, * * * a case of pistols, cutting sword or cutlass, double cartouch-box, and six charges of powder"; and both were further required to keep "one pound of powder, and four pounds of ball" ready at hand. Presumably here, too, an able-bodied substitute who was "constantly to appear, and exercise at musters" could not have availed himself of the statutory allowance of "eighteen months * * * to furnish and provide himself with arms and ammunition", because the person in whose stead he "appear[ed]" was "to send one able-bodied man * * * armed and accoutred", not a man bearing only an excuse.{EN-1009}

• [1755, 1757, 1759, 1762, 1766, and 1771] "[T]he several persons * * * exempted from mustering * * * *shall provide arms for the use of the county, city or borough, wherein they * * * reside* in the following manner; that is to say, each councillor not being an officer of the militia, four complete sets of arms * * * for a foot soldier: The speaker of the house of Burgesses not being an officer of the militia, four compleat sets of arms * * * : The receiver general, auditor, and secretary, not being a councillor or officer of the militia, each four compleat setts * * * : The attorney general, not being an officer of the militia, two compleat sets * * * : The clerk of the council, and clerk of the secretary's office, not being officers of the militia, each two compleat sets * * * : The mayor, recorder, and aldermen of the city of Williamsburg, and borough of Norfolk (* * * not being officers of the militia) each two compleat sets[.]"

Under these statutes, a "complete set[ ] of arms * * * for a foot soldier" included "a firelock well fixed, a bayonet fitted to the same, a cutting sword, a double cartouch box, and three charges of powder", with "one pound of powder and four pounds of ball" in reserve.{EN-1010}

• [1762] "[T]he several persons herein after-mentioned shall be * * * free and exempt from appearing or mustering either at the private or general musters of their respective companies * * * : All his majesty's justices of the peace within this colony, who have qualified themselves for their offices * * * and who are really and *bona fide* acting justices * * * (except such as * * * bear any commission as officers of the militia * * *) all persons bred to and actually practising physick or surgery, and all

inspectors at the publick warehouses appointed for the inspection of tobacco * * * .

" * * * [T]he persons so exempted * * * *shall provide complete sets of arms * * * for soldiers, for the use of the county, city or borough, wherein they * * * reside*[.]

* * * * *

" * * * [E]very person so exempted *shall always keep in his house or place of abode* such arms, accoutrements, and ammunition, as are * * * required to be kept by the militia * * * : And such exempts shall also, in case of any invasion or insurrection, *appear with* their arms and ammunition * * * and shall then be incorporated with * * * the other militia[.]"

Under this statute, a "complete set[ ] of arms" was the same as that required under the statutes of 1755, 1757, and 1759, quoted immediately above.{EN-1011}

• [1766 and 1771] "[T]he several persons herein after mentioned shall be * * * free and exempt from appearing or mustering either at the private or general musters of their respective counties, that is to say, all his majesty's justices of the peace * * * who have qualified themselves for their offices * * * and who are really and *bona fide* acting justices * * * (except such as * * * bear any commission as officers of the militia * * *) all persons bred to, and actually practising physick or surgery, all the people called Quakers, and all inspectors at the public warehouses, appointed for the inspection of tobacco * * * .

" * * * [T]he persons so exempted (not being Quakers) *shall provide compleat sets of arms * * * for soldiers, for the use of the county, city or borough, wherein they * * * reside*[.]

* * * * *

" * * * [E]very person so exempted (not being a Quaker) *shall always keep in his house or place of abode*, such arms, accoutrements and ammunition, as are * * * required to be kept by the militia * * * : And such exempts shall also, in case of any invasion or insurrection, *appear with* their arms and ammunition * * * and shall then be incorporated with * * * the other militia[.]"

Under this statute also, a "complete set[ ] of arms" was the same as that required under the statutes of 1755, 1757, and 1759, quoted immediately above.{EN-1012}

• [1775] "That the members of his majesty's council, and the committee of safety, the president of the convention, treasurer, attorney-general, auditor, clerk of the council, clerk of the secretary's office, clerk of the general convention, and clerk of the committee of safety (*each of which exempts furnishing a stand of arms for a soldier*) * * * shall be exempted from * * * enlistment [in the Militia]."{EN-1013}

Interestingly, some of these exemptees' liability to provide firearms and ammunition was *more extensive* than a regular Militiaman's—because, whereas each regular Militiaman furnished arms only for himself, and continued to own those arms, some exempted individuals would have owned only the arms they had provided for themselves or for substitutes, but would have surrendered any claim of title to the arms they had provided to their Local governments.

Finally, exemplifying how peculiarly specific such conditional exemptions might become are statutes from:

> • [1705] "[N]othing * * * shall * * * give any power * * * to list [in the Militia] * * * any overseer that hath four or more slaves under his care * * * .
>
> "*Provided always*, That if any overseer that is * * * exempted from being listed shall appear at any muster, * * * he shall appear in arms fit for exercise, and shall perform his duty as other private soldiers do[.]"
>
> Distinguishably from every regular Militiaman, who was allowed "eighteen months * * * to furnish and provide himself with arms and ammunition" after being initially "listed", an overseer had to produce sufficient arms the very first and every other time he appeared.{EN-1014}
>
> • [1775] "[O]verseers, heretofore exempted, shall be obliged to furnish themselves with arms and ammunition, in the same manner as the militia men, and shall be obliged to act as patrollers when thereto required[.]"{EN-1015}
>
> That overseers were required to arm themselves in order "to act as patrollers" was hardly surprising, though, inasmuch as the basic duty of both overseers and patrollers was to police the behavior of slaves.[726]

D. Provision made for those unable to acquire arms on their own. The general rule that each Militiaman should supply himself with the firearms, ammunition, and accoutrements necessary for his Militia service did not—because it justly could not—apply to anyone who was simply unable to do so through no fault of his own. For example, a statute in 1740 allowed Militia courts-martial to "excuse and acquit any soldier, who [s]hall not * * * be furnished and provided with arms * * * and whom they, in their consciences, shall * * * adjudge to be unable to furnish and provide the same, from the fines and forfeitures * * * for want thereof".{EN-1016}

1. Lack of supply in the marketplace. Because most Militiamen were expected to rely upon the free market as the source of their personal arms, and because the trade in firearms extended across the Atlantic Ocean to England, a temporary excess of demand over supply in the Local marketplace would have excused a Militiaman's failure to comply with the statutory requirements:

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[726] *See ante*, at 339-343 and 392-395; *and post*, at 718-723.

> • [1692] "[B]ut for that some persons have been lately listed who have not had time to be provided with Armes * * * none being to be had but from England. It is Ordered that they be * * * Exempted from the penalty of the Law relateing thereto till after a Fleete of Ships hath gon from hence for England, and a return from thence made hither, it not being reasonable any person should be fined till after it hath been possible for him to be provided[.]"{EN-1017}
>
> • [1775] "[N]o person shall be subject to * * * penalties * * * for the not providing or producing the quantity of powder required, who shall make it appear * * * that he has used his best endeavours to procure such powder, and hath not been able so to do[.]"{EN-1018}

2. Financial inability of the individual. Most commonly, though, the difficulty stemmed from a particular Militiaman's straitened financial situation. This was a problem Virginians had long faced. As early as 1690, for example, the Colony's Council had sought to petition the King "to Ord[r] some Armes, Swords, Biggonetts [Baggonetts, Bayonets] & Amunition to be Sent into this Colony that those persons that are really Indigent may upon all Occasions be furnished, that they may all Joyne in the defence of this * * * Country and the Inhabitants thereof".{EN-1019} Under those conditions, the Militia itself, the public treasury, or some private party personally responsible for such an individual subsidized the provision of his equipment.

a. The adult poor. An adult male Virginian who was neither a servant nor an apprentice, and was simply too poor to purchase the arms required of him, could depend upon the Militia or some other governmental institution to assist him—because Virginia's goal was to arm every eligible man fully and properly, whatever his ability to pay *vel non*.[727] Where required, any necessary moneys could come from fines imposed upon other Militiamen for their infractions of the Militia's rules (whom the statutes typically denoted as "delinquents"), or from taxes.[728] For the community to aid the poor in this regard was a matter both of social solidarity and of political and economic self-interest, because it promoted the *common* defense and the *general* welfare for *everyone*. Thus—

> • [1691] "On takeing into Consideration the returnes of their Ma[jesties'] Armes * * * in the Severall Counties in this Colony * * * , It appeare[d]" to the Governor and his Council that "those few there be, are almost Spoyled with Rust unfixt * * * and that lyeing Scattered up and downe the Charge of haveing them got together and fixed here, or sent for England to be fixed, will Exceede the Reall value of them, and * * * the onely way to make them Serviceable is to dispose them to the Inhabitants

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[727] On the special rule applicable to minors, servants, and apprentices, *see post*, at 428-432.

[728] *See post*, at 439-446.

of this Country who are without and Cannot be Supplyed, they getting them well fixed and keepeing them soe for their Ma[jesties'] Service, It is therefore Ordered that the said Armes * * * be * * * distributed among the Comand[rs] in Cheife of this Colony * * * (but Cheifely to the Comand[rs] in Cheife of the Frontier Countyes) which said Comand[rs] are to distribute them to the Soldiers und[r] their Comand, who are in Want * * * the Severall persons to whom they are soe distributed * * * giveing notes under their perticular hands to keepe the said Armes well fixed for their Ma[jesties'] Service, and in case of their removall out of the County where they dwelt at the receipt thereof, or Death, that the said Armes * * * be returned to the Comander in Cheife or Cap[t] under whom they Served, who is to dispose of them to Such as shall be in want takeing the like Notes."{EN-1020}

• [1755, 1757, 1759, 1762, 1766, and 1771] "[I]f it shall be made [to] appear to the court of any county, by the * * * chief commanding officer in the county, and captain of any company, that any soldier inlisted in the foot, is so poor, as not to be able to purchase the arms * * * [required of a Militiaman]; then such court shall, and they are hereby required immediately, to depute some person to send for the same to England, by the first opportunity, and to levy the charge * * * in the next county levy, which arms so to be sent for, shall be marked with the name of the county; and if any person shall presume to buy or sell any such arms * * * then * * * every person so buying or selling, shall forfeit and pay the sum of six pounds * * * , one moiety whereof shall be * * * for the use of the county, to which the arms shall belong, for the purchasing other arms * * * ; and all arms purchased by any county, and delivered to any poor soldier * * * , shall on his death or removol out of the county, be delivered to the chief officer of the militia in the county, or to the captain of the company to which such poor soldier did belong, to be * * * delivered to any other poor soldier, that the commanding officer * * * shall adjudge unable to provide himself with arms[.]"{EN-1021}

• [1775] "[I]f it be certified by a court-martial that any soldier enlisted is so poor as not to be able to purchase the arms [required of him] * * * , then such arms shall * * * be procurred so soon as may be, at the expense of the publick. And if any person shall presume to sell or buy any arms thus provided, he shall forfeit and pay the sum of six pounds; and all arms so purchased and delivered to any such poor soldier shall on his death, or removal out of the county, be delivered to the chief officer of the militia in the county, or to the captain of the company to which such poor soldier did belong, to be * * * delivered to any other poor soldier * * * adjudge[d] unable to provide himself with arms[.]"

And the fines levied against Militia officers for failing to appear properly armed were to be "appropriated to the purchasing arms and

ammunition for the use of such [Militiamen] as are not able to procure the same".{EN-1022}

• [1777] "If any soldier be certified to the court martial to be so poor that he cannot purchase * * * [the required] arms, the said court shall cause them to be procured at the expense of the publick, to be reimbursed out of the fines on the delinquents of the county, which arms shall be delivered to such poor person to be used at musters, but shall continue the property of the county; and if any soldier shall sell or conceal such arms, the seller or concealer, and purchaser, shall each of them forfeit the sum of six pounds. And on the death of such poor soldier, or his removal out of the county, such arms shall be delivered to his captain, who shall * * * deliver the same to such other poor soldier as the[next court-martial] shall order.

"And if any poor soldier shall remove out of the county, and carry his arms with him, he shall incur the same penalty as if he had sold such arms[.]

* * * * *

"All fines * * * shall be appropriated, in the first place, to the payment of the salaries [of certain Militia personnel] * * * , then to reimbursing the publick treasury for any arms purchased for the poor soldiers of such county, and for drums, fifes, and colours, bought for the severall companies; and if any surplus remain, it shall be laid out * * * in establishing and furnishing, for the use of the[ ] county, a magazine of small arms, field pieces, ammunition, and such other military stores as may be useful in case of invasion and insurrection."{EN-1023}

• [1784 and 1785] "If any private shall make it appear to the satisfaction of the court * * * appointed for trying delinquencies * * * that he is so poor that he cannot purchase * * * the arms * * * required, such court shall cause them to be purchased out of the money arising from delinquents. The arms * * * shall * * * be delivered to the captain of the company to which such poor private may belong, who shall deliver such arms to the private, but they shall continue the property of the county; and if any private shall sell or conceal the same, the seller, concealer, and purchaser, shall each forfeit and pay four pounds * * * . And on the death, disability, or exemption of such poor private, or his removal out of the county, such arms, shall be delivered to the commanding officer of the company, who shall * * * deliver the same to s[ome] other poor private * * * . And if any poor private shall remove out of the county, and carry such arms with him, he shall incur the same penalty as if he had sold them. * * * And to the end that such arms may be known, the commanding officer shall cause to be stamped or engraved on them, the name of the county, together with the number of the regiment to which they may belong."{EN-1024}

> • [1788] "[E]ach of the militia in the several counties on the western waters, shall keep always ready a good musket or rifle, half a pound of good powder, and one pound of lead, to be produced whenever called for by his commanding officer * * * ; unless he be so poor as to be unable to furnish the same, in which case the former regulations [in 1785] * * * concerning poor soldiers, shall be in force."{EN-1025}

These provisions for assisting the poor supply more evidence that every Militiaman who was financially able to do so was required to furnish or provide himself, out of his own private resources, with a firearm (or firearms), ammunition, and accoutrements suitable for Militia service. Self-evidently, the statutes would not have singled out solely the poor to be supplied with arms at some form of public expense—"in the next county levy", "at the expense of the publick", "at the expense of the public, to be reimbursed out of the fines on the delinquents of the county", or "out of the money arising from delinquents"—if public officials had supplied arms to everyone. Neither would the statutes have emphasized that only arms supplied to the poor "shall be marked with the name of the county", "shall continue the property of the county", and on the basis of rotation would be "delivered to any other *poor* soldier" (not to just any other Militiaman), except to distinguish those arms which were public property from all the other arms, purchased for themselves by Militiamen with the financial means to do so, which were private property.

In addition, the statutes' requirements for evidence that the individual in question was "*so* poor, as not to be able to purchase" the required firearms and ammunition emphasized the narrowness of the exception in favor of a truly impoverished Militiaman. For a man to be relieved of the duty to provide his own arms, his poverty had to be "made [to] appear to the court of any county" by a Militia officer, to be "certified by a court-martial", or to "appear to the satisfaction of the court * * * appointed for trying delinquencies". This proves how dependent Virginia in fact was—and, in light of the consistency among her Militia statutes in this regard throughout the period, was willing to be—on the private provision and ownership of firearms used for Militia service.

Finally, the statutes' commands to supply poor Militiamen quickly—that officials should "*immediately* * * * send for the [arms] to England", and that the arms should be "procurred *so soon as may be*"—reflected Virginia's goal of maintaining *as many men as possible actually armed at all times.* As described above, other Militiamen were allowed some period of grace during which to furnish themselves with arms that met statutory requirements—but in the meantime were nonetheless enjoined to bring to Militia service "such arms as [they] hath" or were "already furnished with", or "the best arms * * * they c[ould] get". The poor obviously enjoyed none of those options. Were they to be seasonably and suitably

armed, the necessary equipment had to be procured for them as soon as practicable by someone else.

b. Minors, servants, and apprentices. For most of the 1700s, free White male Virginians less than twenty-one years of age, as well as apprentices and many servants both below and above that age, were required to serve in the Militia (unless specifically exempted).[729] Yet not a few able-bodied free males in all of these categories might have enjoyed no regular incomes or accumulated wealth of their own, or might have earned little or no ready money from their labor during the periods of their service. If these individuals were not to be treated as being too poor to purchase their own firearms, and therefore entitled to receive arms at public expense, the fulfillment of their Militia duties in this regard had to be guaranteed by someone else with both some legal responsibility under the circumstances and the ability to pay. Because minors were entirely under the legal control of their parents or guardians, and apprentices and servants under the direction of their masters to varying degrees pursuant to contracts, liability for their defaults in Militia duty came naturally to be imposed upon their parents, guardians, and masters.

In 1705, a statute provided that, "whereas there has been a good and laudable custom of allowing servants corn and cloaths for their present support, upon their freedom * * * , *Be it* * * * *enacted* * * * That there shall be paid and allowed to every imported servant, not having yearly wages, at the time of service ended, by the master or owner of such servant, viz: To every male servant, * * * one well fixt musket or fuzee, of the value of twenty shillings, at least[.]"{EN-1026} The motive for this enactment was not disinterested charity. Rather, the statute recognized that, "upon their freedom", servants would have to fend for themselves. And under the statutes of 1705,{EN-1027} and then of 1723 and 1738,{EN-1028} if already listed in the Militia they would have been required to appear at musters "with a firelock, muskett or fusee well fixed"; or, if not so listed, they would have been allowed "eighteen months time * * * to furnish and provide [themselves] with [such] arms"—and if they had then appeared at musters without being "furnished and provided with arms and ammunition" or "compleatly armed and accoutred", they would have been fined. Although these statutes did not so specify, under general principles of law the payment of such fines incurred by minors would surely have been the responsibility of the parents or guardians who failed to forefend their charges' misbehavior; and when incurred by servants could possibly have been the responsibility of masters who improperly prevented their otherwise willing servants from complying with the regulations. (The statute of 1705 did exempt "any servant by importation" from being "list[ed]" in the Militia; but the statutes of 1723 and 1738 granted no such allowance.{EN-1029})

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[729] *See ante*, at 363-365, *and post*, at 611-614.

Later statutes expressly forged the links of vicarious financial liability in such cases:

> • [1755, 1757, 1759, 1762, 1766, and 1771] "[T]he chief officer of the militia in every county shall list all male persons, above the age of eighteen years, and under the age of sixty years, within this colony, (imported servants excepted) * * * .
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> * * * * *
>
> " * * * [E]very person inlisted to serve in the horse, appearing at muster without a * * * carbine * * * , a case of pistols, cutting-sword, double cartouch-boxes, and six charges of powder and ball shall pay five shillings, for every such failure; and every person listed to serve in the foot, appearing at such muster without a firelock well fixed, and a bayonet fitted to the same, * * * [and] without a cutting-sword, a double cartouch-box, and three charges of powder and ball shall pay three shillings, for every such failure * * * . *Provided*, That no person be fined above six times in the year for any particular default[.[730]]
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> " * * * That twelve months time be given and allowed to each soldier, to furnish and provide himself with arms and ammunition * * * , and that no soldier be fined for appearing without, or not having the same at his place of abode, until he hath been inlisted twelve months * * * , so as such soldier do appear at all musters, during the said twelve months, with such arms as he hath, and is already furnished with: And if any soldier shall appear at any muster not armed and accoutred, * * * it shall and may be lawful, for the captain of the troop or company to which such soldier shall belong, to examine such soldier upon oath, whether he hath any, and what arms and ammunition he really hath of his own property, and if on such examination it shall appear, that such soldier hath any arms or ammunition of his own property, and hath not brought the same, * * * he shall be liable to * * * penalties * * * , although he hath not been inlisted twelve months[.]
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> * * * * *
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> " * * * [T]he fines and penalties incurred by infants and servants for the breach or neglect of their duty in any particular service * * * required, of them, shall be paid by the parent, guardian or master, respectively; and if the breach or neglect of such servants is not occasioned by their master's influence or direction, then the fines incurred by them, and so paid by the master, shall be repaid to the master by the

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[730] In 1757 through 1771, the equivalent provision read: "[E]very soldier appearing at muster without a firelock well fixed, and a bayonet fitted to the same, shall pay three shillings for every such failure, and for appearing at muster without a double cartouch-box shall pay one shilling, and without three charges of powder shall pay two shiilings for every such failure * * * . *Provided*, That no person be fined above six times in the year for any particular default."

> further service of such servant, after the time they are bound to serve is expired[.]"{EN-1030}
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> • [1775] "[A]ll free male persons, hired servants, and apprentices, above the age of sixteen, and under fifty years, except such as are * * * excepted, shall be enlisted into the militia[.]
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> * * * * *
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> " * * * [E]very soldier * * * appearing without proper arms, [shall be fined] five shillings; or for not bringing with him three charges of powder and ball, three shillings; or failing to bring into the field when required by his commanding officer, one pound of powder, and four pounds of ball, five shillings.
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> * * * * *
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> " * * * [T]he soldiers shall be allowed six months after enlisting to provide themselves with arms, and in the mean time shall bring with them such arms as they have, under the penalty of five shillings[.]
>
> * * * * *
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> " * * * [A]ll fines and penalties incurred by infants or servants, for breach or neglect of duty in any particular service * * * required of them, shall be paid by the parent, guardian, or master, of such infant or servant; and if the breach or neglect of such servants is not occasioned by their masters influence or direction, then the fines incurred by them, and so paid by their masters, shall be repaid to their masters, by the farther service of such servants after the times they are bound to serve are expired."{EN-1031}
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> • [1777] "[A]ll free male persons, hired servants, and apprentices, between the ages of sixteen and fifty years * * * [except those individuals exempted] shall * * * be enrolled or formed into companies[.]
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> * * * * *
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> " * * * Every officer and soldier shall be allowed six months after his appointment or enrollment to provide such arms or accoutrements as he had not at the time. * * * For failing to appear at any * * * muster, properly armed or accoutred, every * * * soldier [shall forfeit] five shillings. * * * Every officer failing to furnish himself with one pound of powder shall forfeit and pay ten shillings, and the same for failing to furnish himself with four pounds of ball; and every soldier failing therein shall likewise be liable for the same penalties, which penalties, when incurred by infants, shall be paid by the parent or guardian, and where incurred by servants shall be paid by the master, who, if such delinquency were without his influence or direction, may retain so much out of the hire of such servant, or be compensated by farther service[.]"{EN-1032}

This was no inconsequential matter, because, for a large part of the 1700s, whatever the population of servants or such individuals' eligibility for enrollment in the Militia may have been in Virginia, most able-bodied free males there (as elsewhere throughout America) began their Militia service as minors. Evidently,

these statutes aimed at putting the required firearms and ammunition into the hands of minors, apprentices, and servants as soon as possible, by imposing the financial burden on whichever individuals with legal exposure enjoyed the apparent ability to pay. A parent or guardian would have had to supply a minor in his care with a suitable firearm as either an outright gift or a loan presumably without any guarantee of eventual payment. Whereas, if an apprentice or servant had earned sufficient wages out of which to purchase a firearm, but had obstinately refused to do so, his master would have been required to supply the firearm in the first instance, the cost of which the servant would have been compelled to pay off later. Even if an apprentice or servant had earned no or insufficient wages at the time, he would not have been deemed "too poor to purchase" a firearm if his master could have advanced the necessary funds, and then have recouped the cost by demanding further service from the servant (if the master paid no wages) or by withholding installments from the servant's wages, or both.

The sums involved in obeying these statutes were not excessive, at least in comparison to the alternative cost of serial noncompliance. In 1705, a master was obliged to give "[t]o every male servant", upon the latter's release from service, "one well fixt musket or fuzee, of the value of twenty shillings, at least".{EN-1033} So Virginia's General Assembly did not consider that amount an exorbitant burden to lay on a master. (Presumably, too, an equivalent cost would have been borne by a parent or guardian with a minor son listed in the Militia.) Because the Militia statutes of 1705 and 1723 set the fine for an individual's failure to appear properly armed at a muster at "one hundred pounds of tobacco", rather than money, the financial impact remains somewhat conjectural.{EN-1034} In 1738, however, the fine for a foot soldier in the Militia was set at "five shillings, or fifty pounds of tobacco, at their election" for each muster, with at least five musters to be held each year, but no more than five fines allowed *per annum*—for a possible total fine of twenty-five shillings or two hundred fifty pounds of tobacco.{EN-1035} In 1755 through 1771, the fine was ten shillings for each muster, with no less than six musters to be held each year, and no more than six fines to be imposed *per annum*—for a possible total fine of sixty shillings.{EN-1036} In 1775, the fine was five shillings for each muster, with twenty musters to be held each year—for a possible total fine of one hundred shillings.{EN-1037} And in 1777, the fine was five shillings for each muster, with twelve musters annually—for a possible cumulative fine of sixty shillings.{EN-1038} Against these amounts, the average cost of a firearm suitable for Militia service ranged from about twenty shillings in 1705 to several times that much in the *mid*-1770s.[731]

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[731] In October of 1774, the Provincial Congress of Massachusetts proposed to purchase five thousand muskets (with bayonets) for £2 (or 40 shillings) each. *See The Journals of Each Provincial Congress of Massachusetts in 1774 and 1775* (Boston, Massachusetts: Dutton and Wentworth, 1838), at 30. And from September of 1775 to July of 1776, Virginia's Committee of Safety purchased from Virginia's gunsmiths some 3,325 muskets and 2,098 rifles for a total cost of approximately £20,212, or an average cost *per* firearm of slightly less than £4 (or

Under these conditions—and because servants' indentures typically ran for several years, and a son's or ward's minority could embrace as much as five years' enlistment in the Militia—it probably would have behooved a minor's parent or guardian, a servant's master, or a servant himself (possibly through a loan from his master) to have purchased the necessary firearm as soon as financially possible, rather than being mulcted *seriatim* with fine after fine (the total eventually exceeding the price of a good firearm), while still remaining liable to provide one in any event. No doubt the intent of the legislation was to create precisely that incentive for quick action. Also, a parent or guardian would have been unlikely to have absorbed the cost of fines for his own minor son's or ward's lack of a firearm—thereby imposing upon the latter a practical inability to learn, let alone to perform, his Militia duties—when the parent or guardian knew that those fines would be used to provide arms to poor individuals outside of his own family.

Finally, making parents, guardians, and masters financially liable for their sons and servants effectively extended Militia duty to women, as well as to men. For a widow might have been the sole surviving parent of one or more sons, or the head of a household which included one or more servants—and in such cases would have been financially responsible for providing the necessary arms either finally (with respect to a son) or initially (with respect to a servant). So, although in Virginia women were always ineligible to be actual listed *members of*, some of them could thus have become indirect *participants in*, the Militia.

E. Public funds laid out for private firearms. Further to encourage, or at the least to take advantage of, the widespread private ownership of firearms throughout Virginia, the General Assembly paid bounties to individuals who supplied their own arms for, reimbursed individuals whose arms were lost in, and purchased arms from individuals for use by themselves or others during, various forms of military service.

1. Not surprisingly, paying or otherwise compensating individuals who supplied their own firearms, ammunition, and other accoutrements for Militia and other miliary service began very early on, and then continued throughout the *pre*-constitutional period:

> • [1682] "[T]he pay of each officer and soldier shall be as followeth: To the captain * * * finding himself horse, armes, ammunition and provision, eight thousand pounds of tobacco with caske out of the publique leavy for one whole yeare * * * ; and to each soldier finding himselfe horse, armes, furniture, provision, amunition and other necessaries * * * , two thousand pounds of tobacco[.]"{EN-1039}

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80 shillings). *See* Harold B. Gill, Jr., *The Gunsmith in Colonial Virginia* (Williamsburg, Virginia: The Colonial Williamsburg Foundation, 1974), at 109-124. At this juncture, however, the prices of firearms were surely rising due to apprehensions about the possibility of armed conflict with Britain, and then the war's actual outbreak.

• [1684] "[T]he pay of each captain finding himselfe provision, ammunition, horse, armes and all other necessaries for one whole yeare, shall be ten thousand pounds of tobacco and cask, and so after that rate for a longer or shorter time, * * * and the pay for every private souldier mounted, armed and provided * * * shall be three thousand pounds of tobacco and cask * * * , all which summes shall be paid by the country.

* * * * *

" * * * [U]pon the incursion, invasion or inroad of any Indian enemie * * * , it shall and may be lawfull to and for the militia officers * * * (as the emergency or occasion shall require) to put the souldiers under their command, into a posture of war and defence for the safeguard of the counties, and if they shall happen to continue in such service, above the space [o]f six dayes (which six dayes they shall serve at their owne charge) that then * * * each person (if a horseman, well mounted, armed and furnished, and finding himselfe ammunition and provision * * * , shall have the like allowances * * * as a trooper or horseman by this act appointed, * * * and every foot souldier, well armed, and finding himselfe armes, ammunition and provision * * * , after the rate of two thousand pounds of tobacco and caske per annum[.]"{EN-1040}

• [1691, 1692, 1693, and 1695] "[T]he pay of each officer and soldier be as followeth: The * * * commander of each party of souldiers finding himselfe horse, armes, ammunition and provision shall have * * * five thousand pounds of tobacco and casque out of the publique levie for one whole year, and so after that rate for a longer or shorter time, and each soldier finding himselfe horse, armes, furniture, ammunition and other necessaries, three thousand pounds of tobacco and casque[.]"{EN-1041}

• [1711] "[T]here shall be levyed and paid to every * * * commander of the rangers, for himself, his horse, with accoutrements, arms and ammunition, for his service for one year, five thousand pounds of tobacco, with cask, and in proportion to that for a lesser time than a year. And to every man listed * * * , for himself, his horse, with accoutrements, arms and ammunition, for his service for one year, three thousand pounds of tobacco, with cask, * * * out of the public levy * * * . And for the greater encouragement of the said rangers, every officer and other persons listed under him shall * * * be free and exempted from the payment of the * * * county and parish levys dureing their continuance in the said service."{EN-1042}

• [1727, 1732, 1734, 1738, 1740, 1744, 1748, and 1753] "[A]s the militia of these counties, where * * * dangers * * * shall arise, must necessarily be first emploied, and may, by the divine assistance, be able to suppress and repel * * * insurrections and invasions, without obliging that of the other counties to be raised: And it being reasonable, that such services as shall be performed by any part of the said militia, be rewarded at the public change,

* * * * *

" * * * there shall be raised, and paid by the public, to the officers and soldiers which shall be drawn out into actual service [certain *per diem* wages payable in tobacco]. * * *

" * * * *Provided always*, * * * That for the pay and allowance * * * , every horseman shall find and provide himself with a horse, * * * arms, and ammunition; and every foot soldier shall find and provide himself with a foot soldier's arms, and ammunition.

* * * * *

" * * * *Provided also,* That whensoever any part of the militia * * * shall be discharged again, within two days, no pay or allowance shall be given * * * , but every man shall bear his own charge[.]"{EN-1043}

• [1775] "[T]he soldiers to be enlisted shall, at the expense of the publick, be furnished each with one good musket and bayonet, cartouch box, or pouch * * * ; and, until such musket can be provided, * * * they bring with each of them the best gun, of any sort, that can be procured; and that such as are to act as rifle-men bring with them each one good rifle, to be approved by their captain, for the use of which he shall be allowed at the rate of twenty shillings a year[.]

* * * * *

" * * * [E]ach minute-man * * * to be enlisted shall be furnished with proper arms at the publick expense, and until such can be provided shall bring into service the best gun that he can procure; and for every good rifle, to be approved by the respective captains, there shall be allowed to the owner making use of the same at the rate of twenty shillings a year[.]"{EN-1044}

• [1775] "[T]he soldiers to be enlisted * * * shall, at the expense of the publick, be furnished each with one good musket and bayonet, cartouch box, or pouch * * * ; and until such musket can be provided * * * they bring with them the best gun of any other sort that they can procure; * * * and that such as are to act as riflemen bring with them one good rifle and tomahawk, each to be approved by their captain, for the use of which guns they shall be allowed as follows, to wit: For the smooth-bores, or muskets, the rate of 20[shillings] and for the rifles * * * after the same rate by the year[.]

* * * * *

" * * * [E]ach minute-man who shall furnish himself with a good musket, or other gun, to be approved of by his captain, shall be allowed by the publick ten shillings per annum, as a consideration for the use thereof[.]"{EN-1045}

• [1776] "That six troops of horse, consisting of thirty each, rank and file, be immediately raised * * * . And that the several officers and troopers shall, at their own expense, be furnished with horses, proper arms, and accoutrements, and shall be allowed * * * [certain rates of] pay

per day, * * * which pay * * * of the troopers [shall commence] from the time of their being provided with a sufficient horse, and properly armed, in the opinion of any field officer of the militia of the county wherein they are enlisted."{EN-1046}

• [1776] "[E]very cadet who shall enter into the service, * * * and furnish himself with a good horse, and the arms and accoutrements herein directed, shall be allowed * * * pay[.]"{EN-1047}

This was a matter not only of Legislative command but also of Executive policy, as in 1758, when the Governor's Council noted that "General Forbes will do what he can, to procure Arms for our Thousand Men, but recommends * * * to give some small Gratuity to those Men who can furnish their own Arms".{EN-1048}

2. Virginia also created an incentive for men to employ their own arms and accoutrements in public service, by reimbursing those who through no fault of their own lost their personal equipment:

• [1676] "[I]f any horse or horses be killed in service, or armes lost, the owner or owners of such horse or armes soe lost, shall be satisfyed for the same of the publique, hee or they produceing a certificate from the cheife commander of the trueth thereof[.]"{EN-1049}

• [1684] "And for encouragement of officers and souldiers in each troop. *Bee it enacted*, that in case any souldier shall loose his horse or armes * * * in actual engagement against the enemie, he shall be allowed the vallue thereof by the country, he makeing proofe of the reall vallue before the county court[.]"{EN-1050}

• [1778] "FOR strengthening the continental army * * * , *Be it enacted* * * * , That a regiment of horse * * * shall be raised within this commonwealth * * * . If any of the * * * troopers shall furnish himself with a horse, arms, or accoutrements, such horse, if * * * lost, not through the default of the trooper, and such arms and accoutrements, if captured, or otherwise lost, without the default of the trooper, shall be made good to such trooper by the publick."{EN-1051}

• [1780] "[W]herever the governour shall have satisfactory information that any persons within this commonwealth shall be inclined to mutiny or riot, * * * he is * * * empowered to order one or more troop or troops of horse to be raised * * * in any county where such persons shall so resist or assemble together with an intention to resist. * * * The officers and privates of each troop or troops, shall furnish their own horses, arms, and accoutrements, which shall be paid for by the publick in case they are lost or destroyed in the service, without the neglect of the owner. *Provided nevertheless*, That all such horses, arms, and accoutrements, shall be valued by two respectable freeholders upon oath, at the time of entering into the said service."{EN-1052}

> • [1784 and 1785] "[W]hereas the practice of paying for arms and accoutrements by the public, which are lost in service, is productive of the most mischevious consequences, in as much as it takes away a very great incentive to the holding them fast in action, and the preservation of them elsewhere;[732]
>
> " * * * *Be it enacted*, That no arms or accoutrements, which may * * * be lost in service, shall be paid for by the public, unless the loser shall be killed, wounded, or otherwise incapacitated in the opinion of a court-martial, from preserving his arms."{EN-1053}

This was no merely theoretical allowance, but one that the highest British authorities, too, considered expedient, if not required by simple justice. For example, during the height of the French and Indian War, General James Abercromby wrote to Prime Minister William Pitt, concerning the provision of arms to Colonial troops in New Jersey:

> [T]he greatest Difficulty of all was about the Arms, in relation to which I repeated to [the Colonial authorities] His Majestys Expectations, that they shou'd with particular Diligence immediately collect and put into the best condition, all such serviceable ones as cou'd be found within their Government; The Number of these by private Information being likely to fall very short of the Complement Wanted, I found it necessary in Order to lose no Time, to insinuate to them, that as most of their Men had their own Private Arms, to which they were accustomed, and consequently wou'd give the Preference, as being much surer of their Mark with them, than with those they had never handled before, that therefore I wou'd propose they shou'd come provided with them, and that they might not suffer any Loss on that Account, I wou'd engage to make good, in Money, to the Proprietors, such of those arms as shou'd be spoiled or lost in Actual Service[.][733]

It may be that men with their own arms were simply reluctant to volunteer for service, whereas the men most likely to volunteer often did not have arms or the wherewithal to buy them.[734] But perhaps the more plausible explanation is that most men simply did not want to bring their own arms to even a short term of regular military service, during which their equipment might be ruined or lost—because in New Jersey (as elsewhere throughout *pre*-constitutional America) at all other times they would be required to possess and to appear with them for Militia duty, and be subject to fines if they did not.{EN-1054}

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[732] This explanatory preamble does not appear in the 1785 Act.

[733] Letter of 28 April 1758, *quoted in* De Witt Bailey, *Small Arms of the British Forces in America, ante* note 428, at 122.

[734] *Id.*

3. Virginia's government also purchased firearms from individuals for their own use in performing military service, as in 1779:

> [T]hat blankets and tents * * * be provided for them [that is, the volunteers], together with necessaries for travelling and camp uses, arms, ammunition, and accoutrements; and if it shall so happen that any soldier who shall be enlisted into the service, shall have it in his power to furnish any of the conveniences and accoutrements which may be necessary, the same may be purchased from him for the publick use, at a reasonable and adequate price.
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> * * * * *
>
> * * * [F]or the defence and protection of the western frontiers against the Indian or other enemies, * * * battalions shall be furnished with such clothing, arms, and accoutrements, as are most proper for that service; and if any soldier * * * shall be willing to furnish himself with proper clothing, arms, and accoutrements, the governour, with advice of council, may fix the sum to be paid for the purchase or use of such clothing, arms, and accoutrements, and direct the * * * officer commanding * * * to take care that such necessaries, especially the arms, are in proper order and kind, and fit for the service.{EN-1055}

F. Impressment of private firearms. Just as Virginia often impressed men into various forms of military service—including of course the Militia as a whole, which was never voluntary in nature—she sometimes drafted them along with their own arms, ammunition, and accoutrements, or impressed their arms alone:

> • [1645] "[T]he * * * counsell of warr shall have power to leavie such and soe manie men, arms, ammunition and other necessaries as emergencie of occasions shall require, * * * And * * * for the manageing the warr * * * , That evrie 15 tithable persons shall sett forth, compleatly furnish and maintain, one soldier * * * ; And where ffifteen are joyned to set forth one and cannot agree amongst themselves, * * * the council of warr shall press whom they shall think fitt * * * , And the said counsell of warr shall have power to arme the soldier with all necessaries out of the said fifteen men, provided that the soldier be responsible for his arms (in case he shall negligently loose or spoyle them)[.]"{EN-1056}
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> • [1676] "[W]hatsoever the cheife commander or commanders * * * shall finde wanting in the severall armies, whether ammunition, provision, armes, baggage horses, or other necessaries whatever, the same shall * * * have full power to impress it * * * , and that the charge of whatsoever shall be soe impressed be defrayed by the publique[.]"{EN-1057}
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> • [1679] "[T]hat fower houses for stores or garrisons be erected and built at the heads of the ffower greate rivers * * * . *And* * * * that every forty tythables within this colony be assessed and obleiged * * * to

fitt and sett forth one able and suffitient man and horse, with furniture well and compleatly armed with a case of good pistolls, carbine or short gunn and a sword, together with two pounds of powder and tenn pounds of leaden bullett or high swan shott, * * * which fforty tythables * * * shall either refuse, neglect or be uncapable to fitt out such man and horse, armes, provisions and ammunition * * * , that then the justices and militia officers * * * impresse a man and horse with armes, ammunition and provisions * * * and assesse the said delinquent tythables, the whole charge thereof [.]"{EN-1058}

• [1682] "[T]hat twenty men well furnished with horses and all other accoutrements be raised * * * in each of [certain] counties * * * of such housekeepers belonging to the said counties as shall voluntarily offer themselves for this service * * * ; but in case such twenty men qualified * * * shall not be found in each of the said counties, then it shall and may be lawfull for the militia officers * * * to impresse such, and soe many men furnished * * * as shall be wanting[.]"{EN-1059}

• [1684] "That four troops of horsemen * * * be raised * * * , every way well horsed and armed: viz. Every man to have a good able horse for service, a case of pistolls, a carbine, sword and all other [f]urniture [ ]usual and necessary for horse-souldiers * * * ; but in case the full number * * * compleatly mounted, armed and provided * * * cannot be raised by such as voluntarily offer themselves for that service, that then his excellency the governour * * * [may] issue forth his warrant for the raiseing soe many men * * * as shall be wanting[.]"{EN-1060}

• [1711] "[T]he commander in chief * * * [shall] constitute and appoint * * * lieutenants or commanders of the rangers for the * * * frontiers; each of which * * * shall choose * * * able bodyed men, with horses and accoutrements, arms and ammunition, residing as near as conveniently as may be, to that frontier station * * * . But if such lieutenant cannot find a sufficient number of able bodyed men, furnished and provided * * * , to serve voluntarily * * * it shall and may be lawfull for the commander in chief of the militia in the same county * * * to order and impress out of the militia of that county, so many able bodyed men, furnished as aforesaid[.]"{EN-1061}

• [1764] "[W]here arms have been impressed for * * * [Militia] service, and the proprietor thereof hath refused * * * such arms when returned, * * * commissioners shall allow such proprietor the appraised value thereof, and such arms shall be delivered to the * * * commanding officer, for the use of the publick, to be used by the militia as occasion requires[.]"{EN-1062}

• [1777] "The several divisions of the militia of any county shall be called into duty by regular rotation * * * . The soldiers of such militia, if not well armed and provided with ammunition, shall be furnished with

> the arms and ammunition of the county, and any deficiency in these may be supplied from the publick magazines, or if the case admit not that delay, by impressing arms and ammunition of private property, which ammunition, so far as not used, and arms, shall be duly returned, as soon as they may be spared."{EN-1063}

In such situations, Virginia supplied, but did not originally own and in most cases probably never took title to, the firearms and ammunition she impressed into her service. Moreover, the very employment of impressment in these statutes rested on the presumption that suitable firearms and ammunition were sufficiently widespread as private property within the community so that the tasks at hand could be served by impressing them, either by themselves or together with their owners.

Actually, this was just another example of, or occasion for, use of the Commonwealth's power of conscription that underlay the entire Militia system, whereby all men were required to serve (unless specifically exempted) and to provide their own arms (unless too poor to do so). In practice, *each man and his arms were considered an integral unit*.

G. Firearms and ammunition supplied by the government. At various times during the *pre-*constitutional era, Virginia also provided some of her residents who engaged in Militia and other military service with arms purchased with or manufactured by dint of funds derived from Militia fines, taxes, or other sources of public revenue. Of course, in "a free State" wherein "WE THE PEOPLE * * * do ordain and establish th[e] Constitution",[735] although a formal distinction exists between THE PEOPLE and their government, a substantial difference or degree of separation—and certainly an inherent conflict of interest, let alone an antagonism—should not. So there existed no inconsistency between these instances and Virginia's more widespread policy of requiring her Militiamen to provide their own arms out of their own private resources.

That in some cases the government assisted individuals in performing their duty to be armed obviously did not detract from that duty, nor draw into question Virginians' right to keep and bear arms that flowed from their duty to do so. Individuals' duty (and right) to keep and bear arms was not an adventitious consequence of the government's sometime provision of arms. Rather, the government's provision of arms was a consequence of individuals' permanent duty to have them at hand. Just as today, if Congress exercised its power "[t]o provide for * * * arming * * * the Militia"[736] by actually delivering sufficient arms to individual Militiamen through expenditures of the General Government, public

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[735] U.S. Const. amend. II *and* preamble.

[736] U.S. Const. art. I, § 8, cl. 16.

officials could not plausibly claim that, because Congress had once adopted this procedure *for* arming Americans, it could then turn around and totally *dis*arm them, on the grounds that their duty (and right) to be armed were merely consequences of Congress's exercise of its power "[t]o provide for * * * arm[ing]" them, and that therefore if Congress chose to disarm them it would deny them no right in the premises.

1. One early expedient for amassing sufficient public stores of ammunition was a tonnage duty to be paid in kind:

> • [1645] "[F]or this present yeare all shipps which have arrived since the Governor's last comeing in, or that shall arrive before midsumer next shall pay one halfe pound of powder to the publique, for every tunne of there burthen, And * * * all shipps arriveing after midsumer next shall pay to the publique [one-half] pound of powder and three pound of leaden shott or lead for every tunne of their burthen[.]"{EN-1064}
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> • [1683] "Whereas y^e^ Barbarous Seneca Indians have lately made Incursions & Inroads * * * , that wee may be therefore in all readinesse, not only to defend our selves, but if occasion should require, that we may be likewise in a posture to oppose and debar their further progresse, all * * * Collectors * * * are requested and ordered by [the Council] * * * to use their best care and endeavours to provide att their entry of ships one thousand weight of shot, bullet, Carbine, pistoll, swan and goose, for w^ch^ charge they shall be allowed againe att their making up their accounts of fort Duties att y^e^ Audit."{EN-1065}
>
> • [1689] "Whereas upon the veiw [that is, inspection] of his Majesties Magazine of Powder Shott for this Colony, it is found to be very Short in proportion to what may be thought fitt," the Governor and Council ordered that the "Audit^r^ * * * doe take Care to Send to England, for fourty barrells of Powder with Musquett Bulletts, Carbine and Pistoll Bulletts, proportionable (to be and remain as the Standing Magazine of his Colony) and the Same be accompted for and paid out of the Mony ariseing from Port Duty's."{EN-1066}

Of course, today, "[n]o State shall * * * lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws", or "lay any Duty on Tonnage", in either case "without the Consent of Congress".[737] But nothing precludes any State from taxing ordinary businesses within her jurisdiction in amounts of ammunition (or amounts of money required to be paid in the form of ammunition), and even stipulating that the goods come from manufacturers located within that State.[738] Besides simply stimulating a

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[737] U.S. Const. art. I, § 10, cls. 2 and 3.

[738] *See* Lane County v. Oregon, 74 U.S. (7 Wallace) 71, 76-78 (1869).

domestic industry, such a policy would tend to provide a ready, sure, and secure supply of ammunition, without which firearms in Militiamen's hands would be of very limited use. And it could be enacted in *every* State, because *every* State with a fully functioning Militia needs such a sure and steady local supply.

2. Throughout the *pre-*constitutional period, fines imposed for violations of Militia or other military duty[739] were a major source of funds with which public arms and ammunition were purchased:

> • [1655 and 1658] "WHEREAS * * * the comon enemie the Indians, if opportunity serve, would suddenly invade this collony to a totall subversion of the same, and whereas the only means for the discovery of their plotts is by allarms, of which no certainty can be had in respect of the frequent shooting of gunns in drinking, whereby they proclaim, and as it were, justifie that beastlie vice spending much powder in vaine, that might be reserved against the comon enemie, *Be it therefore enacted* that what person or persons soever shall * * * shoot any gunns at drinkeing (marriages and ffuneralls onely excepted,) * * * shall forfeit 100 lb. of tobacco * * * to be disposed of by the militia in amunition towards a magazine for the county where the offence shall be comitted."{EN-1067}
>
> • [1659 and 1662] "That every man able to beare armes have in his house a fixt gunn two pounds of powder and eight pound of shott at least * * * , and whosoever shall faile of makeing such provision to be fined ffiftie pounds of tobacco to bee laied out by the county courts for a common stock of amunition for the county."{EN-1068}
>
> • [1666] "WHEREAS the officers of the militia have complained that divers refractory persons have * * * refused to appeare upon the dayes of exercise * * * , *It is enacted* * * * that every person soe neglecting to appeare, shall * * * be * * * fined one hundred pounds of tobacco to be disposed of by the militia to the use of the regiment[.]"{EN-1069}
>
> • [1705] "[T]he * * * ffield officers * * * have full power and authority to * * * dispose the tobaccoes which shall * * * arise upon the ffines * * * for furnishing the severall troops and companys belonging to the county with necessary drums, colours, trumpets, leading staffes, partizans and halberts, and for procuring * * * books of military dissipline * * * , and after all these for providing arms and ammunition for the countys use with the overplus."{EN-1070}
>
> • [1723] "[T]he * * * field officers * * * have full power and authority to * * * dispose of the fines * * * for furnishing the several troops and companies belonging to the county, with necessary drums, colours, trumpets, leading-staffs, partizans, and halberts, and after all those, for providing arms and ammunition for the county's use."{EN-1071}

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[739] *See post*, at 666-697.

• [1738] A Militia court-martial shall "order and dispose of all * * * fines, in the first place, for buying drums, trumpets, and trophies, for the use of the troop or company from whence the same arise; and afterwards, for supplying the militia with arms." And fines collected from certain officers shall be divided "one moiety * * * for and towards the better supplying the county with arms; and the other moiety to the informer, to his own proper use."{EN-1072}

• [1755] The penalty for buying or selling publicly owned arms shall be "six pounds * * * , one moiety whereof shall be to, and for the use of the county, to which the arms shall belong, for the purchasing other arms, and the other moiety to the informer[.]"

And a court-martial may "order and dispose of all * * * fines [on delinquents], for buying drums, trumpets and trophies for the use of the militia of the county, and for supplying the militia of the * * * county with arms".{EN-1073}

• [1757, 1759, 1762, 1766, and 1771] A court-martial shall "order the fines * * * to be levied upon all delinquents * * * and * * * order and dispose of all such fines for buying drums and trophies for the use of the militia of the county, and for supplying the militia of the * * * county with arms[.]

* * * * *

" * * * [T]he fine * * * imposed on the * * * chief commanding officer of the militia for neglecting to order general musters, shall be one moiety to the informer and the other to and for the use of the county for providing arms[.]"{EN-1074}

• [1757, 1758, 1759, 1761, 1762, 1764, 1769, and 1772] "[A]ll the fines inflicted by this act, and not otherwise directed, shall be one half * * * for and towards supplying with arms the militia of the county to which the offender belongs, and the other half to the informer[.]"{EN-1075}

• [1775] Fines levied against Militia officers for failing to appear properly armed shall be "appropriated to the purchasing arms and ammunition for the use of such as are not able to procure the same.

* * * * *

" * * * [T]he fines imposed * * * on the chief officer for not enlisting the men in his county, and on the commanding-officer present in the county for not appointing general musters, shall be to the use of the county, for providing arms[.]"{EN-1076}

• [1777] "All fines * * * shall be appropriated, in the first place, to the payment of the salaries [of certain Militia personnel] * * * , then to reimbursing the publick treasury for any arms purchased for the poor soldiers of such county, and for drums, fifes, and colours bought for the several companies; and if any surplus remain, it shall be laid out * * * in establishing and furnishing, for the use of the[ ] county, a magazine of

small arms, field pieces, ammunition, and such other military stores as may be useful in case of invasion or insurrection."{EN-1077}

• [1784 and 1785] "[E]ach serjeant shall have a pair of moulds fit to cast balls for their respective companies, to be purchased * * * out of the monies arising on delinquencies[.]"

And a court-martial "shall cause [firearms supplied to poor Militiamen] to be purchased out of the money arising from delinquents".{EN-1078}

That these fines were actually applied to such purposes Virginia's records evidence. For example, in 1692, the Governor and his Council became aware that "the fines on delinquent Soldiers in Severall Countyes in this Colony, have not been putt to the uses the Law directs", and "therefore Ordered that the Law * * * be both duely observed and performed".{EN-1079} And in 1772, when her Governor informed his Council "that he had been applied to, to remit certain Militia Fines" and "ask[ed] their advice", the Council "gave it as their Opinion, that all such Fines being appropriated by the Act of Assembly to particular Purposes, it was not in his Excellency's Power to remit them".{EN-1080}

3. Virginia's officials also relied on general tax revenues for the funds necessary to purchase firearms and ammunition:

• [1645] "That [certain named individuals] be imployed by themselves joyntly and severally or by any whom they shall think fitt in the behalfe of the collony for purchasing of powder and shott at the cheapest rates they can, And that they * * * receive of severall sherriffs all the present readie tobacco and dispose of the same for that purpose[.]"{EN-1081}

• [1656] "[T]hat for this present year the com'rs. of the militia in every county endeavour to provide four barrels of powder with shot proportionable for each regiment which shall be allowed the next year out of the several county levies[.]"{EN-1082}

• [1666] "WHEREAS there is a generall complaint of the want of ammunition for defence of the country in these times of eminent danger, * * * every county shall * * * make such provision thereof at a county charge as their severall occasions shall necessarily require."{EN-1083}

• [1673 and 1676] "FOR the better supply of the country with armes and ammunition, * * * the captaines of ffoote and horse in each county doe take a strict and perticuler account of what armes and ammunition are wanting in their severall companies and troops * * * : *And* * * * that the perticuler county courts be * * * impowred * * * to lay and raise a levy for the provideing of armes and ammunition for supplying the wants aforesaid[.]"{EN-1084}

• [1740] "WHEREAS, during the present war, it will be necessary, that the militia * * * should be * * * better armed; the better to enable them to contend with regular troops:

" * * * [T]he treasurer of this colony shall be * * * impowered and directed, out of the public money in his hands, to issue and apply the sum of two thousand pounds, in providing arms for the militia[.]"{EN-1085}

• [1755, 1757, 1759, 1762, 1766, and 1771] "[I]f * * * any soldier inlisted in the foot, is so poor, as not to be able to purchase the arms * * * [required of a Militiaman]; then [a county] court shall, and they are hereby required immediately, to depute some person to send for the same to England, by the first opportunity, and to levy the charge * * * in the next county levy[.]"{EN-1086}

• [1775] "[T]he soldiers to be enlisted [in the regular forces] shall, at the expense of the publick, be furnished each with one good musket and bayonet, cartouch box, or pouch[.]

* * * * *

" * * * [I]f * * * any soldier enlisted [in the Militia] is so poor as not to be able to purchase the arms [required of him] * * * , then such arms shall * * * be procurred so soon as may be, at the expense of the publick."{EN-1087}

• [1775] "WHEREAS, in this time of imminent danger, it is found expedient, for the better defence of this colony, to provide an ample supply of arms and ammunition, by encouraging the manufacturing the same within this colony: *Be it therefore ordained* * * * , That a manufactory of arms be erected * * * and that * * * artificers be employed * * * at the expense of the public, and be constantly employed in manufacturing of arms * * * .

* * * * *

"*And be it further ordained* * * * , That the committee of safety shall have * * * authority to purchase in the neighboring colonies, or elsewhere, any number of stands of arms, not exceeding three thousand, which they may judge necessary for the use of the troops * * * , and also any number of gun locks * * * wanted for the arms made at the aforesaid manufactory, if * * * proper locksmiths cannot be employed: and * * * a sufficient quantity of gun flints and cartridge paper * * * .

"And for the greater encouragement of persons to make saltpetre and sulphur, *Be it further ordained*, That * * * three shillings for every pound of good saltpetre, and * * * one shilling per pound for * * * good sulphur, which shall be manufactured * * * of materials of the natural produce of this colony, * * * shall be paid to the proprietor * * * by the [public] treasurer * * * ; and the * * * committees [of safety] shall * * * forward all such saltpetre and sulphur to some manufacturer of powder * * * , obliging himself to deliver for the public use as much powder, in exchange for the said saltpetre and sulphur, as shall be agreed on * * * .

"And for the more immediate provision of lead, *Be it farther ordained,* That the committee for the county of Fincastle shall and may contract with the proprietors or certain lead mines * * * for such quantities of lead as may from time to time be judged necessary[.]"{EN-1088}

• [1775] "[T]o the end that the forces to be raised may be well and speedily supplied with * * * arms, * * * *Be it farther ordained*, That the committee of safety shall * * * appoint some fit person * * * to provide arms * * * upon the best and cheapest terms[.]"{EN-1089}

• [1775] "[T]he soldiers to be enlisted * * * shall, at the expense of the publick, be furnished each with one good musket and bayonet[.]"{EN-1090}

• [1775] "[T]he committee of safety * * * are hereby required to contract, upon the best terms they can, with such gunsmiths, or others, as they may approve, for manufacturing or supplying such quantity of arms as they shall judge proper for the defence of this colony.

* * * * *

"And for the more speedy and effectual providing of powder, * * * the committee of safety * * * are hereby required to contract with proper persons willing to manufacture the same on the publick account, and to erect, or cause to be erected, one or more powder mills, at the publick expense, at such places as the said committee of safety may judge to be free from danger, and conveniently situated with respect to the colony in general."{EN-1091}

• [1784] "That the governor with the advice of council, be authorized and required to purchase on the best terms he can, either in the country or by importation, in the ensuing year, as many thousand stand of arms and accoutrements brass mounted, of the descriptions directed in the militia law, with the words 'Virginia militia' engraved thereon, as the money which from time to time may be appropriated for that purpose will purchase.

* * * * *

" * * * That the governor, with advice of council, shall also in like manner * * * import ten tons of musket powder, two hundred thousand gun-flints; and one hundred ream of musket cartridge paper, to be deposited in the public magazines."{EN-1092}

• [1787] "[T]he governor with the advice of council, shall apply the money by law appropriated to the purchase of arms, in procuring such artillery, small arms, accoutrements and ammunition, as may to him with such advice seem proper; and the small arms so procured shall be distributed to the different counties in proportion to the number of their militia. Every private receiving such arms and accoutrements shall hold the same subject to the like rules, penalties and forfeitures, as are prescribed for a poor private in and by the [Militia A]ct of [1785.]"{EN-1093}

Yet it was always clear that, notwithstanding the government's provision of firearms and ammunition for public purposes, Militiamen were not absolved of their personal duties to furnish themselves with that equipment. As early as 1692, for example, the Governor and his Council,

> takeing into their Consideration that the Powder their Ma[jesties] have * * * Sen[t] to this Colony for the defence thereof, being disperst in the Severall Counties, may give some persons occasion to think it is Sent * * * to be used at Musterings, and to Excuse them from being provided as the Law directs, to the End therefore that no person may be soe deceived, It is hereby declared that the said Powder is onely for the defence of the Country, and not to be used but when the Comand^{rs} * * * in Chief shall finde Emergent Occasion requires, and doth not Excuse any person from being provided according to Law[.]{EN-1094}

An admonition that, with respect to *all* arms in private hands, applied throughout the *pre*-constitutional era.

4. Notwithstanding all of this, perhaps the most sweepingly negative summation of the extent to which Virginians towards the close of the *pre*-constitutional period relied upon direct governmental provision of firearms is that "[a]t the beginning of the [W]ar [of Independence,] Virginia had no supply of firearms except those in private hands".[740] Doubtlessly, though, the author of this conclusion meant to say "no [*significant or sufficient*] supply of firearms", because *some* firearms and ammunition owned by the public, even if ultimately to prove inadequate in supply, quality, or state of repair when most needed, must surely have reposed in public magazines, or in the custody of various Militia officers or other public officials or agents, not only in 1776 but throughout the preceding decades. For example:

> • [1643] "VPON consideration * * * of the scarsity of powder and aminition in the plantation and the difficultie in procureing the same, *It is thought fitt and enacted* that the Governour * * * do allott a barrel of powder to each countie, to be kept and preserved * * * a publique stock, for which the comander of each county is to be responsible."{EN-1095}
>
> • [1682] "Whereas * * * his Majesties stores att middle Plantation will be exposed to great hazards and dangers, if not guarded, * * * It's resolved and * * * ordered that M^{r} Thomas Broomer (who hath y^{e} care and custody of his Majesties Stores), doe deliver unto Coll John Page * * * all y^{e} Armes, partizans, Halberts, Drums, Swords, pikes and amunition * * * All w^{ch} * * * Coll John Page do Cause to be carted unto [his] house * * * to be then secured[.]"{EN-1096}

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[740] H. Gill, Jr., *The Gunsmith in Colonial Virginia, ante* note 731, at 33.

• [1683] "That y^e^ brick wind mill att Green Springs is y^e^ securest place for y^e^ Powder and all other his Majesties Stores, to be kept in[.]"{EN-1097}

• [1691] After the Governor and his Council "read a Letter from [certain Militia officers] * * * wherein the[latter] signifye[d] that they shall provide the Men appointed them to raise for Rangers, but know not where to furnish them with Pistolls and Carabines", it was "Ordered that if [those officers] cannot otherwise provide the said persons with Carabines that they Send to Ralph Wormeley Esq^re^ for as many of those at his House belonging to their Ma[jesties William and Mary] as will supply their Wants, which he is desired to deliver to their Ord^r^ takeing receipt for them."{EN-1098}

• [1691] The Governor and his Council, "takeing into Consideration that there is noe Fort nor place of defence to keepe that small quantity of Powder which remains undisposed of in this Country, and that it will be great Charge to build a Storehouse on purpose * * * , also that it will be dangerous to keepe the said Powder at one Place for fear of being blowen up or otherwise," concluded "that the best way to preserve the same for * * * this Countryes Service, is to Cause it to be placed in the Severall Counties of this Colony in small quantities, * * * distributed * * * to the Severall Comand^rs^ in Cheife of the forces of this Colony * * * and by them Securely kept in such Convenient places as they shall finde fitt, takeing receipts of the persons with whom they shall place the same not to make use of any part thereof, but upon Emergent Occasion of Suddain Invasion or Insurrection, and to Render an account of the same when demanded."{EN-1099}

• [1693] The Governor and his Council ordered "that a powder roome and a small building over itt be forthwith built in James Citty and paid for * * * out of their Maj^ts^ Revenue of this Colony".{EN-1100}

• [1699] The Governor and his Council "Ordered, that the severall Commanders in Cheif of the respective Countyes within this Colony, do take an exact account of all such Armes and Amunition as have at any time been sent into the Countyes under their commands for the publick service, and how the same have been disposed of and in what condition they are now".{EN-1101}

• [1701] The Governor prepared a proclamation "Commanding the Comand^rs^ in Cheif of Each and Every Countie * * * that they make strict and publick Enquiry of all ancient officers & all others w^th^in their respective Counties w^ht^ publick armes or ammunition is in their severall Counties and in whose Custody[.]"{EN-1102}

• [1703] "Whereas Edward Ross * * * hath * * * undertaken to clean & keep in good order all the arms now in the Magazine * * * It is ordered * * * he be allowed fifty Pounds[.]"{EN-1103}

• [1705] One "Edw^{d} Ross [was to] carefully look to y^{e} * * * Powder & the other Stores of war under his charge that none be spoiled or dammaged".{EN-1104}

• [1707] "Ordered that a supply of arms & ammunition be sent to the County of New Kent and King William and lodged in such manner as may be most usefull for the defence * * * ag^{t} the Indians."{EN-1105}

• [1708] "Ordered that a barrell of powder & a proportionable quantity of Shott with thirty Musquetts and Swords be sent to Yorktown and lodged at Major Buckners for the use of the Inhabitants in case any attempt be made on that place by the Enemys Privateers."{EN-1106}

• [1710] "Upon consideration of the best way to preserve the arms sent to the respective Countys and which by reason of the extreem poverty of the Inhabitants cannot be sold", the Governor and Council "ordered that the Commanders in Cheif of the several Countys give directions to the officers in whose hands the s^{d} arms are to deliver them out to such persons serveing in the Militia as they shall judge responsible takeing their bond for keeping their said arms in good order and to return the same or the value thereof when thereunto required."{EN-1107}

• [1710] "The Hon^{ble} Collonel Robert Carter is impowered and desired to cause the arms lodged at his house for the use of the Northern Countys to be cleaned & fixed and to return an account of the charge thereof that the same may be paid."{EN-1108}

• [1710 and 1713] "Whereas the arms lodged at Williamsburgh for the use of the adjoining Inhabitants upon any emergency are in a great measure useless for want of being kept clean and fitt for Service It is ordered that the Clerk of the Council be impowered * * * to agree with an Armourer at a certain Sallary per annum to keep the arms clean and fitt for Service."{EN-1109}

• [1714] "WHEREAS our late sovereign lady queen Anne * * * was pleased to bestow a considerable quantity of arms and ammunition, for the service of this colony, which are in danger to be imbezzled and spoilt, for want of a convenient and proper place to keep them in.

" * * * [T]here shall be erected and finished one good substantial house of brick, which shall be called the magazine * * * : In which * * * all the arms, gun-powder, and ammunition, now in this colony, belonging to the king, * * * may be lodged and kept."{EN-1110}

• [1717] "Ordered That the Arms and Stores of War belonging to his Majesty which were dispersed through y^{e} several Countys * * * be called in and lodged in his Majesties Magazine at W^{ms}burgh the same being in danger of becoming unservicable for want of due care taken thereof[.]"{EN-1111}

• [1727, 1732, 1734, 1738, 1740, 1744, 1748, 1753, 1757, 1759, 1761, 1762, 1764, 1766, 1769, and 1771] "[W]hereas it may be needful, in time of danger, to arm part of the militia, not otherwise sufficiently provided, out of his majesty's magazine, and other stores, within this colony,

" * * * if any person * * * so to be armed * * * shall detain or imbezzle any arms, accoutrements, or ammunition, * * * [such person shall] be imprisoned * * * till he * * * ha[s] made satisfaction for the arms, accoutrements, or ammunition[.]"{EN-1112}

• [1738] "Whereas the Inhabitants on Sherrando River * * * have prayed for a Supply of Arms & Ammunition for their defence, It is * * * Ordered that out of his Majesties Stores there be delivered to John Lewis Gent who is hereby Approved to be a Capt over such of the Inhabitants as live in Beverly Mannor, Thirty Muskets & Eight pair of Pistols with a proportionable quantaty of Powder and Ball[.]"{EN-1113}

• [1775] "[T]he militia or volunteers to be employed, if not well armed, shall be furnished with arms out of such as belong to the county or corporation, to be returned as soon as they shall be discharged from the service."{EN-1114}

• [1777] "The several divisions of the militia of any county shall be called into duty by regular rotation * * * . The soldiers of such militia, if not well armed and provided with ammunition, shall be furnished with the arms and ammunition of the county, and any deficiency in these may be supplied from the publick magazines[.]"{EN-1115}

• [1780] "That the governour, with the advice of the council, do adopt the most speedy and effectual measures for completely arming and accoutring one third part of the militia in * * * [certain named] counties, taking care that there be sent therewith a proper quantity of ammunition. And that the said arms, accoutrements, and ammunition may be effectually preserved, * * * the captain of each company shall take a receipt from every man to whom he delivers a gun, bayonet, cartouch box, powder, or ball; and every such person shall be liable to pay double the value of the same if lost, or damaged by his default[.]"{EN-1116}

• [1781] "That two legions * * * be forthwith raised to serve during the war * * * in cases of actual or threatened invasion, during which, they shall continually remain in the field * * * . Immediately after any invasion shall cease, or the business of training shall be over, the men shall be marched to some magazine, there to deliver their arms, ammunition, and accoutrements * * * .

" * * * All * * * arms, and every military apparatus * * * shall be furnished at the expense of the state, and shall whilst the men are out of service, be safely stored in some magazine to be provided for that purpose."{EN-1117}

Indeed, in 1714 Virginia erected a public magazine, and appointed a "keeper" "to look after and take charge of the magazine, and the ammunition which shall be lodged therein", as well as an "armourer" "to take care of, keep clean, and mend the arms which shall be kept in the said magazine".{EN-1118} And, notwithstanding occasional complaints that a "great part of the Arms in the Magazine and at the Governors House are much out of repair & unfitt for Service" and "that if the present Armourer, do not put in sufficient repair, the said Arms, his Salary be stopt, and applyed towards amending and repairing the same",{EN-1119} an armorer (but only one) appeared on the public payroll throughout the 1700s.{EN-1120} So some not entirely insignificant supply of public firearms, meant to be maintained in a reasonable serviceable condition at all times, must have lain in storage during that period.

And certainly the firearms purchased with Militiamen's fines or other public funds, and distributed to individuals too poor to buy their own, remained public property, albeit temporarily entrusted to private hands.[741]

Nonetheless, the raw numbers of firearms recorded at various times during the *pre*-constitutional period as having reposed in public ownership and possession in Virginia were often less than impressive. For example:

> • In 1698, "[a]n Acco^{t} of Stores in his Maj^{ts} Magazeen in James City" catalogued "Burnt Snaphaunce Match lock & Carabine barrels from Middle Plantation 270", "Burnt Locks * * * from Middleplantation: 336", "Old broke Muskets 135", "Old Pistolls 8", "burnt barrels of Musket at y^{e} State house 197", "burnt locks * * * 180", but no more than "Good Muskets: 3".{EN-1121}
>
> • In 1699, "it Appear's there are not any Armes Amunicon or Stores, Except only those at James Citty Yorke and Tindalls pointe, * * * nor hath any Armes been sent into this Colony Since the year 1692 at w^{ch} time about two hundred were Sent in * * * which were all burnt last fall in the State house Except three or four".{EN-1122}
>
> • In 1705, a table prepared for the Governor and his Council of "the Arms and Shott to be sent to ye several Countys for the Service of the Militia on any emergency" listed only three hundred twenty-two carbines, three hundred twenty-two cases of pistols (that is, six hundred forty-four handguns all told), and eight hundred twenty muskets.{EN-1123}
>
> • In 1713, the Council recorded "the arms belonging to her Majesty now at Williamsburg [as] consisting of two hundred Sett of Footmans Arms and one hundred of horse arms".{EN-1124}

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[741] *See ante*, at 424-428.

• In 1728, Virginia's public "Stores of War" totaled only "serviceable Musquets 404, Carbines with swivel belts 100 and cases of Pistols with holsters 100".[742]

By themselves, these small quantities of arms could hardly have sufficed to defend the entire Colony at those times. Perhaps even more revealing, during the period 1756 through 1763, which coincided with the years of the French and Indian War, Virginia imported from Britain six hundred muskets for public service, but three thousand eight hundred and eighty-five—*more than five times as many*—for private sale and use.[743]

Of course, during the great crisis of the War of Independence, Virginia sought to amass as extensive an arsenal as practicable in the shortest time possible. So, from September of 1775 to July of 1776, her Committee of Safety purchased from Local gunsmiths some three thousand three hundred and twenty-five muskets and two thousand ninety-eight rifles.[744] (Had the public not purchased these arms, though, they might have been sold to private citizens fulfilling their Militia duties.)

5. Also highly consequential to any assessment of the limited rôle that public arms usually played in equipping her Militia is that many of the firearms and much of the ammunition that Virginia initially acquired were then sold to Militiamen or other members the general public. For example—

a. In 1699, the Governor and his Council noted that

> [w]hereas Edward Ross Gunner at James City hath this day laid * * * an acco^{t} of y^{e} powder which he hath delivered according to order for y^{e} use of y^{e} severall Countyes whereby it appeares that much y^{e} greatest part of y^{e} Powder is yet remaining in his Custody whereupon he hath prayed directions how he shall dispose thereof because y^{e} vault where it lyes being very damp will prove very prejudiciall to it if some speedy care be not taken therefore
>
> Ordered that the said Ross do take y^{e} first oppertunity of Sending to such of y^{e} Commanders in Cheif of y^{e} Militia as have not already received y^{e} proportion of Powder allotted for their respective Countyes and desire them to send for y^{e} same as soon as may be; but if * * * any of them shall neglect sending accordingly, the said Ross is Directed to make Sale of such powder as shall remain in his hands * * * to y^{e} best advantage he can[.] {EN-1125}

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[742] De Witt Bailey, *Small Arms of the British Forces in America*, *ante* note 428, at 110.

[743] *Id.* at 237. Of the arms for public service, 500 muskets with bayonets were "for the Province", and 100 for the Militia of a single County. Of the arms "for the Planters" (that is, private parties), only 110 were muskets with bayonets. The remainder, however, would have sufficed at least temporarily for Militia service if supplemented with swords or tomahawks, and might later have been fitted with bayonets by Local gunsmiths.

[744] H. Gill, Jr., *The Gunsmith in Colonial Virginia*, *ante* note 731, at 109-124.

> For the prevention of any accident which may happen to the powder now lyeing at Jame's Citty, Ordered that the same be distributed into the Severall Counties * * * ; and that it may not be decayed and Spoiled after it is Soe distributed, the Comanders in Cheif of the Militia are hereby impowered to make sale of half the powder in their respective Counties, and with the money which they receive for the Same, they shall send for other new and good powder[.] {EN-1126}

b. In 1703, the Governor and his Council considered

> how the arms & Ammunition sent in for the use of the Militia * * * may be disposed of in the most convenient manner * * * and * * * Are of opinion that 12½ percent be laid upon the prime cost * * * & therefore
>
> Ordered that an Estimate of the Price of each Species of the said arms (including the s^{d} 12½ per cent) be drawn & sent to every County, together with one of each sort of the said arms, and * * * Commanders in chief of the said respective Countys cause the said arms to be publickly showed at their General Muster * * * , giving notice to every Person not already provided with arms & Ammunition as the Law directs that they take care to furnish themselves out of her Matys Stores now at James City, Certifying such as shall be deficient after the s^{d} intimation that they shall be proceeded against and fined according to law. And for the more easie furnishing the several Countys with arms & ammunition out of the said Stores, every * * * Commander in chief is hereby directed to take an acco^{t} of all Persons within his County who shall desire any of the said Arms or Ammunition, * * * provided always that if any Person desire horsemans arms, he shall be obliged to take a compleat Sett viz Carbine & belt, Pistols and holsters & Swords & belt; and also every foot Soldier, to take Musquets, Sword & belt & Cartouch box; but in case the Person buying the said arms shall not have occasion for the whole, he may dispose of what he has not occasion for as he thinks fitt[.] {EN-1127}

In 1704, however, the Governor complained that

> whereas her * * * Majesty * * * hath * * * sen[t] in a considerable Supply of Armes and Ammunition for the Service of the militia which are to be sold at easier rates than any other of the like goodness can be purchased here, and timely notice having been given [in 1703] * * * to all Persons who pleased to furnish themselves therewith, so that such as have not yet provided themselves with Armes and Ammunition are rendered inexcusable, I have thought fitt to signify my intentions to the * * * Comanders in Chief, who are * * * to intimate the same to the Militia under their Command that all such Persons as have hitherto neglected to furnish themselves with armes and Ammunition as by Law they are required, shall no longer escape the Penaltys by the said Law enjoyned,

> And to that end I do require the * * * Commanders in Chief to cause exact Lists to be taken of those Persons that shall appear at the * * * General Musters unprovided of Armes and Ammunition[.]{EN-1128}

Shortly thereafter, though, the Governor and Council,

> [u]pon representation * * * that the poorer sort of Inhabitants serving in the Militia by reason of the Low Price of Tob[acco] this year are not able to buy Arms & Ammunition according to y^e^ late order of his Excell^ey^ in Council; His Excell^cy^ & the Council * * * have thought fitt to give notice that all Persons who shall purchase any Arms or Ammunition out of her Maj^ties^ Stores * * * shall have time given them * * * for paying for the same. And ordered * * * exact Lists to be taken * * * of all Persons, who after y^e^ Publication of this Order shall appear either at Gen^ll^ or particular musters not provided w^th^ Arms & Ammunition according to Law they having been allowed so long time & such favourable terms to provide themselves.{EN-1129}

This offer having proven insufficient to move the goods, the Governor and Council,

> willing to make the Purchase of the said Arms as easie as possible, * * * Ordered that where any Person cannot advance money for the Arms & Ammunition w^ch^ he shall be desireous to purchase, the * * * Comand^r^ in chief of any County to whom application shall be made for the same, shall have Power & liberty, to sell & dispose of the said Arms & Ammunition for Tob[acco] or any other Commodity offered, and make what bargain he thinks best, he being obliged to Acco^t^ * * * for such quantity of Arms & Ammunition as he shall send for, and dispose of, at the rate formerly ascertained by his Excell^cy^ & y^e^ Council & no more.{EN-1130}

Then, in 1705, the Governor and his Council ordered that "Commanders in cheif of the Countys who have received any of y^e^ * * * arms & ammunition be required to transmitt * * * an accompt how they have disposed of them, and that they remitt * * * the Price of all such arms or ammunition as they have sold".{EN-1131} But later that year the Council finally conceded that,

> [w]hereas the Arms and Ammunition sent in by her Majesty for y^e^ Service of the Militia of this Country lyes now at James City and by y^e^ slow & inconsiderable sale * * * it is very improbable that any quantity can be expected to be sold as was intended, occasioned party by the high price sett thereon, and partly by the poverty of the Inhabitants[.] * * * [T]he Storehouse at James City where they now ly is very unsafe for keeping y^e^ said arms, * * * it lying upon a Navigable River where there is no Fortification nor other defence, so that they are lyable to be surprised

> not only by any Pirate or Privateer who shall attain to the knowledge of the condition they ly in, but also easily seized by our own Serv^ts^ and Slaves or any ill disposed Persons and made use of ag^t^ the Country is case any Insurretion should happen. And therefore * * * it will be very effectuall for the preservation of the arms from being spoiled by rust, and the dangers of surprize * * * & be also very serviceable to the Country that y^e^ same be dispersed through the several Countys in proportion to y^e^ number of Inhabitants and y^e^ wants of the said Countys that the said Arms be intrusted to the Commander in Cheif of the Militia of each County * * * who may be directed to distribute y^e^ same to such of the Inferior Officers of the Militia * * * to be by them kept in good order and fitt for Service, and to be made use of only upon an Alarm. Which officers may also have power to sell the said arms at the price already sett thereon if an offer be made * * * . That a proportionable quantity of Shott may be sent to every County * * * for the Service of the Militia and not to be used but ag^t^ an enemy. That the Powder be distributed throughout the several Countys * * * . That one half of the Powder * * * be kept for y^e^ supply of the County on any emergency, and the other half sold * * * , And y^e^ * * * Officers * * * are to take care that none of y^e^ said Powder be sold to any but such as are listed in y^e^ Militia.{EN-1132}

Evidently, then, the government originally intended to sell *all* of these arms to Militiamen as their private property—"at easier rates than any other of the like goodness can be purchased" and "on favorable terms"—and only because economic circumstances prevented such sales were the arms stored as public property for use by the Militia "through the several Countys" "upon an Alarm".

c. In 1712, the Council "Ordered that the Officer having the charge of the Queen's powder in [certain] Countys deliver to the Officers of the Militia in the Frontier Countys a quantity of the said powder for the use of the Soldiers under their command not exceeding one pound per man at the rate of three Reals per pound."{EN-1133} (A "Real" was one-eighth of a silver Spanish milled dollar.)

d. In 1760, the Council reported that "many stands of Arms had been lately imported for the Militia of King and Queen, Gloucester and James City", and that the Governor "would write to the commanding Officers of those Counties requesting them to purchase and Collect the said Arms for the * * * service".{EN-1134}

e. And in 1763, "[t]he Governour acquainting the Council there was a large quantity of old Gun powder in the Magazine which was in danger of spoiling, they advis'd that the same be sold at public Auction".{EN-1135}

6. In sum, Virginia's *pre*-constitutional practice rather blurred the distinction between "public" and "private" arms, to the decided advantage of "private" arms. No doubt this was largely the consequence of the unique character of the Militia: namely, its being the one *governmental* entity that consists of WE THE

PEOPLE themselves, who at the same time also compose the free market. But of no little significance, too, was that, for almost the entire *pre*-constitutional period, even the arms that Virginia originally acquired came, directly or indirectly, from the free market. To be sure, although statute after statute instructed some official or other to expend public moneys on firearms and ammunition, none of them recited in so many words that any official should repair to or rely upon the market for that purpose. Yet the only reasonable way to read this legislation is by implicit reference to the free market. For example—

a. In 1701, the Governor proclaimed that "no armes Nor ammunition upon any Pretence w^{t} soever be Exported or Carried out of this Country [and] that all merch^{ts} and Dealers in this Colony give an acco^{t} to the Comd^{r} in Cheif of that County where they Inhabitt w^{ht} Guns Carabines Swords Pistolls and Ammunition they have to dispose of And at w^{ht} rates they will dispose thereof to the End y^{t} y^{e} same may be purchased and bought up for the Necessary defence of this Colony in time of Eminent danger".{EN-1136}

b. In April of 1702, Virginia ordered from the British Board of Ordinance five hundred muskets, three thousand pairs of pistols, and three thousand five hundred carbines "for the complete arming of the Militia of Virginia". In August of that same year the Board shipped another one thousand snaphaunce muskets, four hundred carbines, and four hundred pairs of pistols.[745] These firearms the Governor and his Council then undertook to sell to Militiamen.[746] And in 1712, three hundred more snaphaunce muskets were sent from England.[747] In the final analysis, however, all of these arms came from the free market, because the Board did not manufacture firearms itself, but instead simply contracted with private concerns to provide them.[748]

c. In 1750, the Colony ordered "from England five Hundred Muskets (to be mark't with Virginia 1750) Bayonets and Catouch Boxes of the best sort",{EN-1137} some of which upon arrival were issued to Militiamen commanded by George Washington—but these guns and accoutrements, too, were supplied by a private manufacturer.[749]

d. Even during the War of Independence, when the government's direct involvement in the production of firearms might have been expected to expand by leaps and bounds had public institutions been capable of expeditious and efficient action, the Commonwealth purchased large quantities of firearms from private

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[745] De Witt Bailey, *Small Arms of the British Forces in America, ante* note 428, at 22-23.

[746] *See ante*, at 451-454.

[747] De Witt Bailey, *Small Arms of the British Forces in America, ante* note 428, at 110.

[748] *Id.* at 93-100.

[749] B. Ahearn, *Flintlock Muskets in the American Revolution*, *ante* note 464, at 135.

gunsmiths, including the Rappahannock Forge (under what was apparently the very first governmental contract of that kind in America).[750]

e. Moreover, only one statute during the entire *pre-*constitutional period ever mandated "[t]hat a manufactory of arms be erected [in Virginia] * * * and that * * * artificers be employed * * * at the expense of the public, and be constantly employed in manufacturing of arms".{EN-1138} And although this was the first governmental factory for the production of firearms established by *any* of the Colonies, it operated only from 1775 until 1783.[751]

The salient points of this mass of historical evidence are that, throughout the entire *pre-*constitutional period, *the free market supplied the vast preponderance of the firearms in Virginia, and most firearms were "provided and furnished" to Virginians by Virginians themselves, as those Virginians' own private property—and remained such, even when their owners dedicated them in large part to public use in their Militia or other military service*. Which compels the further conclusion that, throughout this era, her legislators believed that the free market for firearms and ammunition was, not only adequate for Virginia's purposes, but also preferable to (or at least more expedient than) any other source of such equipment.[752]

Of course, the use of private property and reliance on the free market for this particular public purpose posed no problem in political philosophy or practice, because the people themselves were always the central actors. The purpose of arming the people was to secure their own freedom—and the best way to do that, Virginians believed, was to conjoin use with ownership (and, as the next Chapter of this study explains, personal possession), by having the people for the most part arm themselves out of their own economic resources.

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[750] *See* Edward R. Flanagan, "Virginia Militia Small Arms", *in* The American Society of Arms Collectors, *Longarms in America*, *ante* note 468, Volume 1, at 427; B. Ahearn, *Flintlock Muskets in the American Revolution*, *ante* note 464, at 148, 150. *See post*, at 519.

[751] *See* H. Gill, Jr., *The Gunsmith in Colonial Virginia*, *ante* note 731, at 38-41; B. Ahearn, *Flintlock Muskets in the American Revolution*, *ante* note 464, at 148-149.

[752] *See post*, Chapter 20.

CHAPTER EIGHTEEN

Throughout the *pre*-constitutional era, most Virginians not only owned the firearms, ammunition, and accoutrements they used for their Militia service, but also personally possessed that equipment at all times.

Just as in Rhode Island (as well as in almost every other Colony and then every other independent State),[753] not simply ownership, but also *permanent personal possession*, of firearms, ammunition, and accoutrements was almost always an indicium of an individual's membership in Virginia's *pre*-constitutional Militia. Therefore, such possession is one of the indispensable elements of the very definition of "the Militia of the several States" and "[a] well regulated Militia" under the Constitution.[754]

A. Militiamen's personal possession of their firearms the rule. The previous review of Virginia's *pre*-constitutional statutes—which her General Assembly phrased again and again in such terms as "furnish and supply himself with", "furnish and provide himself with", "be furnished with", "be provided with", "furnish himself with", "provide themselves with", and have "arms and ammunition of his own property"—establishes beyond any reasonable doubt that members of the Militia who were financially able to do so acquired their own firearms, ammunition, and accoutrements at their own expense through purchase in the free market.[755] Where impecunious minors, servants, or apprentices listed in the Militia were concerned, their parents, guardians, or masters supplied the requisite arms.[756]

Upon their acquisition by these Militiamen, though, the firearms and ammunition did not become public property or come under governmental control (other than that the government required Militiamen to remain in possession of their arms). And nothing in the statutory record suggests that any individuals who bought or otherwise obtained firearms for their Militia service ever at any other time dedicated title to, or surrendered possession of or control over, these arms to the government as a matter of course.

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[753] *See ante*, Chapter 6.

[754] *See* U.S. Const. art. I, § 8, cls. 15 and 16; art. II, § 2, cl. 1; *and* amend. II. *See ante*, at 63-81, *and post*, Chapters 38 and 39.

[755] *See ante*, at 407-423.

[756] *See ante*, at 428-432.

Indeed, quite the opposite: From the earliest days, individual Virginians might have purchased firearms from the government for their own use in Militia service. For example:

> [1673 and 1676] "[T]hat the perticuler county courts be * * * impowred upon their respective counties to lay and raise a levy for the provideing of armes and ammunition * * * , that is to say, muskitts and swords for the ffoote, and pistolls, swords and carbines for horse, as alsoe for every lysted souldier at the least two pounds of powder and six pounds of shott, the said armes and ammunition * * * to remaine in the hands of the officers of the militia for them to dispose of the same as there shalbe occasion; and that those to whome distribution of armes and ammunition shalbe made doe pay for the same at a reasonable rate, to be collected by the sherriffe or collector as in the case of levyes and publique dues, to the use and towards the reimbursement of the county[.]"{EN-1139}

Or they might have been specially compensated for supplying their own firearms for their own use in public service. For example:

> [1682] "[T]hat the pay of each officer and soldier shall be as followeth: To the captain * * * finding himself horse, armes, ammunition and provision, eight thousand pounds of tobacco * * * for one whole yeare * * * ; and to each soldier finding himselfe horse, armes[,] furniture, provision, amunition and other necessaries * * * , two thousand pounds of tobacco[.]"{EN-1140}

Or they might have been reimbursed for the value of their own arms lost in such service. For example:

> [1684] "[T]hat in case any souldier shall loose his horse or armes * * * in any actual engagement against the enemie, he shall be allowed the vallue thereof by the country[.]"{EN-1141}

Those too poor to purchase their own arms, of course, formed a separate class. But if they did not actually own the firearms made available for their use, they usually did possess them.[757]

This cannot be overemphasized, because modern-day soldiers, sailors, and airmen in America's extensive "standing army"[758] neither actually own the firearms they carry when in training or on deployment, nor maintain (or even enjoy a legal

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[757] *See ante*, at 424-432, *and post*, at 486-495.

[758] *See* U.S. Const. art. I, § 8, cls. 12 through 14; *and* art. II, § 2, cl. 1.

claim to) personal possession of those arms at all times. Ownership of the Armed Forces' firearms is vested in the General Government; and, as a consequence of that, final control over their use rests in the hands of civilian public officials, not of the service personnel themselves. This situation is eminently desirable—yea, indispensable—for any "standing army" maintained by "a Republican Form of Government" in "a free State".[759] For WE THE PEOPLE themselves must jealously guard the Power of the Sword in their very own hands—especially as it relates to who may possess military equipment, and for what purposes. Not only because the General Government is nothing but THE PEOPLE'S agent, the public property in the temporary custody of which they may distribute among themselves at any time—and even the very existence of which they may terminate—either by constitutional processes or by extraordinary actions.[760] But also because THE PEOPLE may want to disband their "standing army", in part or in whole, if they determine that it is not necessary, or that it is too expensive or otherwise inefficient, or especially that it threatens their liberties, or for any other reason sufficient unto themselves.[761]

If, however, the "standing army" and *para*-militarized police forces brigaded with it are always armed, and THE PEOPLE are unable to disarm them, but THE PEOPLE can be disarmed by the army and the police, then the polity must be considered, not "a free State", but "a national-security state", "a garrison state", or "a police state". Such a polity would not be "a free State", because it lacked "[a] well regulated Militia". And it would lack "[a] well regulated Militia" because THE PEOPLE would not enjoy an absolute right to *possess* firearms suitable for Militia service at all times—*a right enforceable* ***by themselves*** *because they always maintained in their own hands the means to do so.* Observe carefully: not simply a right to *own* such firearms. For, in principle, rogue public officials could concede individuals' rights to formal *ownership* of firearms, yet also deny them any right to untrammeled *possession* of arms under all circumstances, and thereby all the legitimate uses such possession allowed. In the contemporary judicial jargon, private ownership would be recognized, but possession would be "regulated" in order to achieve some supposed "compelling governmental interest", such as protecting society from criminal misuse of firearms—but in fact to suppress THE PEOPLE in the guise of defending them. Actual legal ownership of firearms is not necessary for their possession; but without possession use is impossible. And without at least the potential for WE THE PEOPLE'S immediate use of firearms at all times, "the security of a free State" cannot be achieved.

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[759] *See* U.S. Const. art. IV, § 4 *and* amend. II.

[760] *Compare* U.S. Const. art. IV, § 3, cl. 2, *and* art. V, *with* Declaration of Independence.

[761] *See, e.g.,* U.S. Const. art. I, § 8, cl. 12: "no Appropriation of Money [to raise and support Armies] shall be for a longer Term than two Years".

B. Militiamen's firearms afforded extensive legal protection. The firearms with which individual Virginians "provide[d] themselves" constituted a very special form of private property, protected by sweeping legal immunities:

> • [1645] "That the act [of] the last Assembly excepting servants, armes, amunition, and corn for present subsistence from the rigor of exec'n. be still in full force and power and so to continue till the twentieth of October next."{EN-1142}
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> • [1684] "FOR the encouragement of the inhabitants * * * of Virginia, to provide themselves with arms and ammunition, for the defence of this * * * country, and that they may appear well and compleatly furnished when commanded to musters and other * * * service, which many persons have hitherto delayed to do, for that their arms have been imprest and taken from them * * * *it is hereby enacted*, That all such swords, musketts, pistolls, carbines, guns, and other armes and furniture, as the inhabitants of this country are already provided, or shall provide and furnish themselves with, for their necessary use and service, shall * * * be free and exempted from being imprest or taken from him or them, * * * neither shall the same be lyable to be taken by any distresse, seizure, attachment or execution[.]"{EN-1143}
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> • [1705] "[F]or the encouragement of every soldier * * * to provide and furnish himself * * * and his security to keep his horse, arms and ammunition, when provided,
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> " * * * That the musket or ffuzee, the sword, cartouch box and ammunition of every ffoot soldier, and the horse, * * * the carbine, pistolls, sword, cartouch box and ammunition of every trooper provided and kept * * * to appear and exercise withall be free and exempted at all times from being impressed upon any account whatsoever, and likewise from being seized or taken by any manner of distress, attachment, or writt of execution, and that every distress, seizure, attachment or execution made or served upon any of the premises, be unlawfull and void, and that the officer or person that presumes to make or serve the same be lyable to the suit of the paty grieved, wherein double damages shall be given upon a recovery."{EN-1144}
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> • [1723] "And for an encouragement of every soldier to provide and furnish himself * * * , and his security to keep his horse, arms, and ammunition, when provided, *Be it enacted* * * * , That the horses and furniture, arms and ammunition, provided and kept * * * be free and exempted at all times from being impressed upon any account whatsoever; and likewise, from being seized or taken by any manner of distress, attachment, or writ of execution. And that every distress, seizure, attachment, or execution, made or served upon any of the premises, be unlawful and void: And that the officer or person that presumes to make

or serve the same, be liable to the suit of the party grieved: wherein double damages shall be given upon a recovery."{EN-1145}

• [1738] "[F]or encouragement to every soldier to provide and furnish himself * * * , and his security to keep his arms and ammunition, when provided, *Be it enacted* * * * , That the furniture, arms, and ammunition, provided and kept * * * be free and exempted, at all times, from being impressed upon any account whatsoever; and likewise from being seised or taken by any manner of distress, attachment, or writ of execution. And that every distress, seisure, or execution, made or served upon any of the premises, be unlawful and void: And that the officer or person that presumes to make or serve the same, be liable to the suit of the party grieved; wherein double damages shall be given, upon a recovery."{EN-1146}

• [1755, 1757, 1759, 1762, 1766, and 1771] "And for an encouragement to every soldier to provide and furnish himself * * * and his security to keep his arms and ammunition when provided:

" * * * That the furniture, arms and ammunition, provided and kept * * * be free and exempted at all times from being impressed upon any account whatsoever; and likewise, from being seised or taken by any manner of distress, attachment or writ of execution, and that every distress, seisure or execution, made or served, upon any of the premises, be unlawful and void, and that the officer or person who presumes to make or serve the same, be liable to the suit of the party grieved, wherein double damages shall be given upon a recovery[.]"{EN-1147}

• [1775] "[A]ll arms of the militia shall be exempted from executions or distresses[.]"{EN-1148}

• [1777] "All arms and ammunition of the militia shall be exempted from executions and distresses at all times[.]"{EN-1149}

• [1784 and 1785] "All arms, ammunition, and equipments of the militia, shall be exempted from executions and distresses at all times[.]"{EN-1150}

1. From 1705 through 1771, the statutes declared Militia firearms, ammunition, and accoutrements "free and exempted at all times from being impressed upon any account whatsoever". The statute of 1684 declared them "free and exempted from being imprest or taken", without any exception, which should have been construed as applying in all cases, too (but perhaps erroneously was not so interpreted by over-zealous officials, in light of the emphatic language later employed). In any event, these provisions would or should have prevented the equipment from being taken for some public purpose unrelated to Militia service, even when a Militiaman who owned and possessed it was not himself being called forth for duty in the field. Moreover, in the case of an individual too poor to purchase a firearm by himself, and therefore to whom the government had supplied

one on loan, these statutes would have disabled public officials from seizing that firearm, even though it was public property, so long as the poor Militiaman possessed it for the performance of his Militia service—one essential aspect of which was precisely his permanent personal possession of that firearm.

2. From 1705 through 1771, Virginia's statutes declared Militia firearms, ammunition, and accoutrements "free and exempted at all times * * * from being seized or taken by any manner of distress, attachment, or writ of execution", and from 1777 through 1785, "exempted from executions and distresses at all times". The statute of 1684 provided that they were not "lyable to be taken by any distresse, seizure, attachment, or execution", and the statute of 1775 that they were "exempted from executions or distresses" in general, both of which would have been construed as conferring a blanket immunity, too, because they identified no situations in which the exemption did not apply. Thus, Militiamen were absolutely protected from being dispossessed of their arms in satisfaction or as security for payment of their civil debts and judgments entered against them. Such an immunity would not have been needed, though, in the case of a poor Militiaman, because the firearm he possessed was *public*, not private, property held by him for a *public* purpose, and therefore could not have been taken by some private party in order to satisfy a private claim.

3. Whether expressed in so many words, or merely implied by the absence of any explicit exception, the qualification "at all times" in these enactments pointed up the importance to Virginia's legislators of her Militiamen's *continuous personal possession* of firearms, ammunition, and accoutrements. For all of these statutes went far beyond the immunity "from arrests in civil cases" and other legal exposure that some of them afforded to the "persons" of Militiamen in relation to musters, courts-martial, and other actual service in the field.[762] Self-evidently, the General Assembly believed that Virginia should promote, not only the widespread availability of firearms and ammunition through the free market, and not only the private ownership of arms by as many individuals as could afford them, but also *the* ***permanent personal possession*** *of arms in all circumstances by the largest number of adult, able-bodied male residents possible*. Because, whatever the ultimate locus of title, ***individuals' actual possession*** *of firearms and ammunition always serves a critical public purpose*—indeed, the ultimate public purpose, "the security of a free State". Revealingly, the earliest statute in this group, in 1645, emphasized just how important Virginia considered its inhabitants' "armes" and "ammunition", by grouping them with "corn *for present subsistence*" as items "except[ed] * * * from the rigor of exec'n." Along with food, arms were deemed the very stuff of life itself. Indeed, they were considered more precious even than food, as the later statutes did

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[762] *See post*, at 717-724.

not exempt from seizure any of the materials of "present subsistence" (perhaps on the tacit understanding that a man with a gun could always acquire food).

C. Militiamen's firearms usually stored in their own homes. Further evidence that the vast majority of Virginia's *pre-*constitutional Militiamen personally possessed their firearms, ammunition, and accoutrements at all times is that nowhere in the relevant statutes of that period are most Militiamen ordered first to repair to some arsenal, magazine, or other public facility in order to retrieve their arms, and then to return those arms to such a place after they had performed their service. Of course, some exceptional cases existed.[763] But that these had to be spelled out at all proves the general rule to have been quite the opposite.

1. In most instances, Virginia commanded her Militiamen themselves to maintain possession of firearms, ammunition, and accoutrements in their own homes; to keep all of that equipment in good working order; and to assume full personal responsibility for appearing with it for training, musters, and actual service in the field. Thus:

> • [1619] "All persons whatsoever upon the Sabaoth daye shall frequent divine service * * * , and all suche as beare arms shall bring their pieces swordes, poulder and shotte."{EN-1151}
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> • [1624 and 1632] "That no man go or send abroad without a sufficient partie will armed"; and "That men go not to worke in the ground without their arms (and a centinell upon them.)"{EN-1152}
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> • [1632] "ALL men that are fittinge to beare armes, shall bringe their peices to the church * * * , yf the mayster allow not * * * the servants to be punished."{EN-1153}
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> • [1643] "[T]hat masters of every family shall bring with them to church on Sondays one fixed and serviceable gun with sufficient powder and shott * * * , and servants being commanded and yet omitting shall receive twenty lashes[.]"{EN-1154}
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> • [1672] "[A]s against all tymes of danger it ought to be the care of all men to provide that their armes and habiliments for war, be alwayes kept fixed and fitt for service[.]"{EN-1155}
>
> • [1684] "[E]very trooper * * * shall furnish and supply himself with a good able horse * * * and all arms and furniture, fitt and compleat for a trooper, and that every foot soldier, shall furnish and supply himselfe, with a sword, musquet and other furniture fitt for a soldier, and that each trooper and foot souldier, be provided with two pounds of powder, and eight pounds of shott, and shall continually keep their armes well fixt, cleane and fitt for * * * service."{EN-1156}

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[763] *See post*, at 486-489.

• [1705] "[I]f any overseer * * * exempted from being listed shall appear at any muster * * * , he shall appear in arms fit for exercise, and shall perform his duty as other private soldiers do[.]

* * * * *

" * * * [T]he persons of a councellor, of a speaker of the house of burgesses, of a justice of the peace, of an attorney-general, and of a captain or an higher officer in the militia, are exempted from being listed and serving either in horse or foot under command as the rest of the militia do, merely for the dignity of the office * * * , and that notwithstanding * * * all and every such person or persons, and also the clerk of the councill, the clerk of the general court, and every county court clerk shall provide and keep * * * at their respective places of abode a troopers horse, furniture, arms and ammunition * * * , and to produce or cause the same to be produced in the county where they respectively reside yearly, and every year at the general muster * * * .

"And in case of any rebellion or invasion shall also be obliged to appear * * * and serve in such stations as are suitable for gentlemen[.]

* * * * *

" * * * That every ffoot soldier be provided with a firelock, muskett or fusee well fixed, a good sword and cartouch box, and six charges of powder, and appear constantly with the same at * * * muster and exercise, and that besides those each foot soldier have at his place of abode two pounds of powder and eight pounds of shott, and bring the same into the field with him when * * * required, and that every soldier belonging to the horse be provided with a good serviceable horse, * * * a case of good pistolls well fixed, * * * double cartouch box, and twelve charges of powder, and constantly appear with the same * * * to muster and exercise, and that besides those each soldier belonging to the horse have at his usuall place of abode a well fixed carabine, * * * two pounds of powder and eight pounds of shott, and bring the same into the ffield with him, when * * * required.

* * * * *

" * * * That eighteen months time be * * * allowed to each trouper and ffoot soldier * * * to furnish and provide himself with arms and ammunition [.]"{EN-1157}

• [1723] "That every soldier belonging to the horse, be provided with a good serviceable horse, * * * and a case of pistols, cutting sword, or cutlace, and double cartouch box, and six charges of powder, and constantly appear with the same * * * for muster and exercise; and shall keep at his place of abode, a well fixed carbine * * * , one pound of powder, and four pounds of shot, and bring the same into the field with him when * * * required. And that every foot soldier be provided with a firelock, musquet, or fuzee, well fixed, and bayonet fitted to such musquet or fuzee, or a good cutting sword or cutlace, a cartouch box, and three charges of powder, and appear constantly with the same * * * for muster

and exercise; and shall keep at his place of abode, one pound of powder, and four pounds of shot, and bring the same into the field with him, when * * * required.

* * * * *

" * * * That eighteen months time be * * * allowed to each soldier, to furnish and provide himself with arms and ammunition * * * So as every soldier, during the said eighteen months, do appear at all musters with such arms as he is already furnished with."{EN-1158}

• [1738] "[E]very person * * * listed [in the Militia], (except free mulattos, negros and Indians,) * * * shall be armed and accoutred in manner following: * * * Every horse-man shall be furnished with a serviceable horse, * * * carbine or fuzee, * * * a case of pistols, cutting sword or cutlass, double cartouch-box, and six charges of powder; and constantly appear with the same * * * for muster and exercise; and shall keep at his place of abode, one pound of powder, and four pounds of ball, and bring the same into the field with him, when * * * required. And every footman shall be furnished with a firelock, musket, or fuzee, well fixed, a bayonet fitted to the same, or a cutting sword or cutlass, a cartouch-box, and three charges of powder; and appear with the same * * * for muster and exercise * * * ; and shall also keep at his house, one pound of powder, and four pounds of ball; and bring the same into the field, when * * * required.

* * * * *

" * * * And further, it shall and may be lawful, for the chief officer of the militia, in every county, to order all persons listed * * * to go armed to their respective parish churches * * * .

* * * * *

" * * * That eighteen months time be * * * allowed to each soldier to furnish and provide himself with arms and ammunition, * * * so as every soldier, during the said eighteen months, do appear at all musters, with such arms as he is already furnished with."{EN-1159}

• [1748, 1753, 1757, 1758, 1759, 1761, 1762, 1764, 1766, 1769, and 1772] "[E]very soldier who shall be summoned to appear, upon any such occasion" of invasion or insurrection shall "bring with him his arms and accoutrements, together with one pound of powder, and four pounds of ball[.]"{EN-1160}

• [1755] "[E]very person * * * inlisted [in the Militia], (except the people commonly called Quakers, free Mulattoes, negroes and Indians) and placed or ranked in the horse or foot, shall be armed and accoutred in the manner following, that is to say; every horseman shall be furnished with a serviceable horse, * * * carbine * * * , a case of pistols, cutting sword, double cartouch box, and six charges of powder, and constantly appear with the same * * * for muster and exercise, and shall keep at his place of abode, one pound of powder and four pounds of ball,

and bring the same into the field with him when * * * required: And every footman shall be furnished with a firelock well fixed, a bayonet fitted to the same, a cutting sword, a double cartouch box, and three charges of powder, and constantly appear with the same * * * for muster and exercise * * * , and shall also keep at his place of abode, one pound of powder and four pounds of ball, and bring the same with him into the field when * * * required.

* * * * *

" * * * And every captain shall have the power to appoint a clerk to his troop or company, * * * and such clerk shall be exempted from mustering but shall appear with arms at all * * * musters. And, further, it shall and may be lawful, for the * * * chief officer of the militia in the county, to order all soldiers listed therein, to go armed to their respective parish churches.

* * * * *

" * * * That twelve months time be * * * allowed to each soldier, to furnish and provide himself with arms and amunition, * * * so as such soldier do appear at all musters, during the said twelve months, with such arms as he hath, and is already furnished with[.]"{EN-1161}

• [1757, 1759, 1762, 1766, and 1771] "[E]very person * * * inlisted [in the Militia] (except free mulattoes, negroes, and Indians) shall be armed in the manner following, that is to say: Every soldier shall be furnished with a firelock well fixed, a bayonet fitted to the same, a double cartouch-box, and three charges of powder, and constantly appear with the same * * * for muster and exercise, and shall also keep at his place of abode one pound of powder and four pounds of ball, and bring the same with him into the field when * * * required[.]

* * * * *

" * * * [E]very captain shall have power to appoint a clerk to his company, * * * and such clerk * * * shall be exempted from mustering, but shall appear with arms, and powder, and ball * * * at all such musters: And further, it shall and may be lawful for the * * * chief officer of the militia in the county, to order all soldiers inlisted therein to go armed to their respective parish churches.

* * * * *

" * * * [T]welve months shall be * * * allowed to each soldier, not already inlisted, to furnish and provide himself with arms and ammunition * * * , so as such soldier do appear at all musters during the said twelve months with such arms as he hath and is already furnished with[.]"{EN-1162}

• [1762] "[E]very person * * * exempted [from regular Militia duty] shall always keep in his house or place of abode such arms, accoutrements, and ammunition, as are * * * required to be kept by the militia * * * : And such exempts shall also, in case of any invasion or

insurrection, appear with their arms and ammunition * * * and shall then be incorporated with * * * the other militia[.]"{EN-1163}

• [1766 and 1771] "[E]very person so exempted (not being a Quaker) shall always keep in his house or place of abode, such arms, accoutrements and ammunition, as are * * * required to be kept by the militia * * * : And such exempts shall also, in case of any invasion or insurrection, appear with their arms and ammunition * * * and shall then be incorporated with * * * the other militia[.]"{EN-1164}

• [1775] "[E]ach minute-man * * * shall be furnished with proper arms at the publick expense, and until such can be provided shall bring into service the best gun that he can procure[.]

* * * * *

" * * * [E]very militia man * * * shall furnish himself with a good rifle, if to be had, or otherwise with a * * * common firelock, bayonet, pouch, or cartouch box, three charges of powder and ball, and appear with the same * * * for mustering, and shall constantly keep by him one pound of powder and four pounds of ball, to be produced whenever called for by his commanding officer.

* * * * *

" * * * And the * * * chief officer of the militia, shall and may order the other officers and soldiers under him to go armed to their parish churches on Sundays, and to other licensed meeting-houses, whenever he judges it necessary.

* * * * *

" * * * [The soldiers shall be allowed six months after enlisting to provide themselves with arms, and in the mean time shall bring with them such arms as they have[.]"{EN-1165}

• [1777] "Every officer and soldier [in the Militia] shall appear at his * * * muster-field * * * armed and accoutred as follows: * * * every captain and lieutenant with a firelock and bayonet, a cartouch box, a sword, and three charges of powder and ball; * * * every non-commissioned officer and private with a rifle and tomahawk, or good firelock and bayonet, with a pouch and horn, or a cartouch or cartridge box, and with three charges of powder and ball; and, moreover, each of the said officers and soldiers shall constantly keep one pound of powder and four pounds of ball, to be produced whenever called for by his commanding officer.

* * * * *

" * * * Every officer and soldier shall be allowed six months after his appointment or enrollment to provide such arms or accoutrements as he had not at the time."{EN-1166}

• [1784 and 1785] "Every officer and soldier [in the Militia] shall appear at his respective muster-field * * * , armed, equipped, and accoutred, as follows: * * * the captains, lieutenants, and ensigns, with a

> sword and espontoon; every non-commissioned officer and private, with a good clean musket, carrying an ounce ball, and three feet eight inches long in the barrel, with a good bayonet and iron ramrod well fitted thereto, a cartridge box properly made, to contain and secure twenty cartridges fitted to his musket * * * ; and moreover, every non-commissioned officer and private shall have at every muster, one pound of good powder and four pounds of lead; including twenty blind cartridges; * * * provided, that the militia of the counties westward of the Blue Ridge, and the counties below adjoining thereto, shall not be obliged to be armed with muskets, but may have good rifles with proper accoutrements in lieu thereof.
>
> * * * * *
>
> " * * * [T]welve months * * * shall be allowed for providing the arms and accoutrements * * * ;[764] but in the mean time, the militia shall appear at musters with, and keep by them the best arms and accoutrements they can get."{EN-1167}

2. Implicitly or explicitly, Virginia's statutes also specified, not only who should appear for Militia service with firearms, but who should *not*:

> • [1723] "[S]uch free Negros, Mulattos, or Indians, as are capable, may be listed and emploied as drummers or trumpeters: And that upon any invasion, insurrection, or rebellion, all free Negros, Mulattos, or Indians, shall be obliged to attend and march with the Militia, and to do the duty of pioneers, or such other servile labour as they shall be directed to perform."{EN-1168}
>
> • [1738, 1755, 1757, 1759, 1762, 1766, and 1771] "[A]ll such free mulattos, negros, or Indians, as are or shall be listed [in the Militia] * * * shall appear without arms; and may be emploied as drummers, trumpeters, or pioneers, or in such other servile labour, as they shall be directed to perform."{EN-1169}
>
> • [1777] "[A]ll free male persons, hired servants, and apprentices, between the ages of sixteen and fifty years" (with certain exceptions) "shall * * * be enrolled or formed into companies [within the Militia] * * * . The free mulattoes in the said companies * * * shall be employed as drummers, fifers, or pioneers."{EN-1170}

3. Virginia would hardly have needed to repeat these statutory commands, again and again throughout the *pre-*constitutional period, if—rather than being held in the personal possession of her Militiamen themselves—all or even most firearms and ammunition actually used for Militia service had been sequestered, unavailable for any other purpose, in public arsenals and magazines.

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[764] The Act of 1785 allowed for two years in this regard.

a. Had that been the case, at least one sufficient arsenal or magazine would have been established in every County, as well as the City of Williamsburg and the Borough of Norfolk—because Virginia organized her Militia primarily on a County basis, and quick access to arms in the Locales subject to danger was always imperative. For example:

> • [1727, 1732, 1734, 1738, 1740, 1744, 1748, and 1753] "[E]very officer of the militia, to whom notice shall be given of any insurrection or invasion, shall have full power and authority * * * forthwith to raise the militia under his command, * * * and shall, in the mean time, keep the militia * * * under arms, until he receives orders[.]"{EN-1171}
>
> • [1757, 1758, 1759, 1761, 1762, 1764, 1766, 1769, and 1772] "[E]very officer of the militia, to whom notice shall be given of any invasion or insurrection, shall raise the militia under his command * * * and shall moreover immediately proceed to oppose the enemy according to the orders he shall receive from his chief commanding officer[.]"{EN-1172}
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> • [1784 and 1785] "If a sudden invasion shall be made into any county of this commonwealth, or in case of an insurrection in any county, the county lieutenant is * * * required to order out the whole, or such part of his militia as he may think necessary, and in such manner as he may think best, for repelling or suppressing such invasion or insurrection, and shall call on the * * * commanding officers of the adjacent counties for such aid as he may think necessary, who shall forthwith in like manner furnish the same."{EN-1173}

Self-evidently, the Militia could not have been "order[ed] out * * * for repelling or suppressing s[ome] invasion or insurrection" *without arms in the Militiamen's hands*. And if Militiamen's arms had largely been kept in public arsenals and magazines, those facilities would have had to have been conveniently located in every County, because transportation in those days was slow and uncertain. Necessarily, too, had the government established arsenals and magazines throughout Virginia, numerous public officials would have had to have been appointed to administer them; to supervise the distribution of firearms to, and collection of those firearms from, members of the Militia in the course of their performance of their duties; and to maintain appropriate records and exercise other administrative controls.

Yet no systematic statutory scheme was ever set up to provide any such extensive facilities, numerous personnel, or comprehensive procedures. Instead, dispersal of public arms was often effected on a catch-as-catch-can basis. For instance, in 1705, the Governor and his Council determined that

> [w]hereas the Arms and Ammunition sent in by her Majesty for y^{e} Service of the Militia of this Country lyes now at James City and by y^{e} slow & inconsiderable sale * * * it is very improbable that any quantity

> can be expected to be sold as was intended * * * it will be very effectuall for the preservation of the arms from being spoiled by rust * * * & be also very serviceable to the Country that y^e^ same be dispersed through the several Countys in proportion to y^e^ number of Inhabitants and y^e^ wants of the said Countys that the said Arms be intrusted to the Commander in Cheif of the Militia of each County * * * who may be directed to distribute y^e^ same to * * * the Inferior Officers of the Militia * * * to be by them kept in good order and fitt for Service, and to be made use of only upon an Alarm. * * * That a proportionable quantity of Shott may be sent to every County * * * for the Service of the Militia and not to be used but ag^t^ an enemy. That the Powder be distributed throughout the several Countys * * * . That one half of the Powder * * * be kept for y^e^ supply of the County on any emergency, and the other half sold[.] {EN-1174}

Then, following this counsel, in 1710 they ordered that "Collonel Robert Carter is impowered and desired to cause the arms lodged at his house for the use of the Northern Countys to be cleaned & fixed". {EN-1175} But in 1717, they ordered "[t]hat the Arms and Stores of War belonging to his Majesty which were dispersed through y^e^ several Countys * * * be called in and lodged in his Majesties Magazine at W^ms^burgh the same being in danger of becoming unserviceable for want of due care taken thereof". {EN-1176}

b. If firearms and ammunition for Militia service had been under the control of public officials, Militiamen would have had to have been instructed as to when, according to published schedules of regular musters and training, or under other circumstances, they were to have repaired to particular public arsenals or magazines in order to obtain their equipment. The statutes commanded, however, not that Militiamen should assemble at certain central locations where they would receive temporary custody of firearms and ammunition from public officials, but instead that they "shall provide and keep" that equipment "at their respective places of abode" (1705), and "keep by them the best arms and accoutrements they can get" (1784 and 1785). And the statutes ordered Militiamen, not simply to secrete their firearms and ammunition in the hidden recesses of their homes, but instead to "constantly appear with the[ir arms and ammunition] * * * for muster and exercise" (1705, 1723, 1738, 1755, and 1757 through 1771), "bring with" them their arms and accoutrements (1643, 1748 through 1772, and 1775), "appear at all musters with such arms as [they are] already furnished with" (1723, 1738, 1755, and 1757 through 1771), "bring into service the best gun[s they] can procure" (1775), "bring [firearms and ammunition] into the field with [them] when * * * required" (1705, 1723, 1738, 1755, and 1757 through 1771), and even "go armed to their respective parish churches" (1738, 1755, 1757 through 1771, and 1775).

Plainly, it would have been nonsensical for the statutes simply to have ordered Militiamen to "appear" with firearms with which they were "already

furnished", or to "bring" firearms "with" them, unless all the men had actually possessed, as well as mostly owned, those very firearms in the first instance. If the firearms had been lodged originally in public arsenals, the statutes would have ordered Militiamen first to withdraw arms from the arsenals according to some procedure, and then simply to assemble at musters or for training. No need would have existed to command them also to "bring" the firearms "with" them, because that would have been the only allowable purpose for the release of the guns into the Militiamen's temporary possession in the first place. And "free mulattos, negros, or Indians, as are or shall be listed" in the Militia would not have had to have been ordered to "appear without arms" (1738 through 1771), because the custodians of the public arsenals and magazines would have known not to supply such persons with that equipment in any event. Moreover, the statutes would have set up some further procedures for the Militiamen's return of firearms and ammunition to the arsenals and magazines after musters, training, or other service in the field, in order to ensure that *all* of the firearms to be returned *were* returned. But such procedures—let alone the extensive facilities and numerous personnel necessary to implement them—being conspicuously absent throughout the *pre-*constitutional period, Virginia's plan was obviously *for the vast majority of her Militiamen to maintain personal possession of their own firearms and ammunition in their own "place[s] of abode"—to bring that equipment along with themselves to Militia musters, training, and other service in the field—and then to return it to their own homes, where it would remain subject to their own control at all times.*[765]

c. That Virginia's *pre-*constitutional statutes assigned to her Militiamen themselves the primary responsibility, not only for obtaining suitable firearms and ammunition in the first place, but also for maintaining that equipment in satisfactory working order at all times thereafter, provides further proof of who actually possessed those arms. Had the arms most Virginians used for Militia service reposed in public arsenals or magazines as a matter of course, the officials in charge of such facilities would have been responsible for the condition of the equipment, as well as for its mere presence, in their custody. Prudent legislators would have delegated the vital task of caretaking to qualified armorers, gunsmiths, and other operatives in the public employ sufficient in number to maintain in working order the many firearms reposed in public magazines if not also the few remaining in private hands. In fact, however, although during the *pre-*constitutional period Virginia did call upon private gunsmiths to repair firearms individuals employed for Militia and other military service, she never put into motion any large-scale, systematic effort to employ numerous public armorers even to maintain the relatively few firearms held in the public magazines.[766] Rather, throughout the

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[765] On the few exceptions to this rule, *see post*, at 486-495.

[766] *See ante*, at 446-451, *and post,* at 519-522.

1700s, only *one* armorer was regularly employed at the capital.[767] And only in 1775 did Virginia erect a public workshop for manufacturing firearms, which might also have attended to defective pieces brought in for repairs.[768]

Instead, from the Colony's earliest days—as in statutes enacted in 1672 and 1684—the rule in Virginia was that "it ought to be the care of all men to provide that their armes and habiliments for war, be alwayes kept fixed and fitt for service", and that Virginians themselves "shall continually keep their armes well fixt, cleane and fitt for * * * service".[769] The goal was to field a self-actuating, self-reliant, and self-sufficient armed force throughout the community. So the statutes required the Militiamen themselves to maintain "*fixed and serviceable* gun[s]" (1643)—and not just any working "gun[s]", but "arms *fit for exercise*" (1705)—and not "fit" for just any "exercise", but "musquet[s] and other furniture *fitt for a soldier*" (1684). Even Virginia's Minutemen of the 1770s and 1780s, who were generally the most highly trained and best equipped of all her Militiamen,{EN-1177} were often expected to provide their own firearms:

> • [1775] "[E]ach minute-man * * * shall be furnished with proper arms at the publick expense, and until such can be provided shall bring into service the best gun he can procure; and for every good rifle, to be approved by the respective captains, there shall be allowed to the owner making use of the same at the rate of twenty shillings a year[.]"{EN-1178}
>
> • [1775] "[E]ach minute-man who shall furnish himself with a good musket, or other gun, to be approved of by his captain, shall be allowed by the publick ten shillings per annum, as a consideration for the use thereof[.]"{EN-1179}

True enough, ultimately his Captain had to "approve[ ]" the firearm a Minuteman "furnished"; yet the initial responsibility for seeing to it that the "rifle", "musket, or other gun" was in fact "good"—in design, workmanship, repair, and suitability for service—was each Minuteman's own. Self-evidently, Virginia's legislators would never have assigned to her Militiamen the responsibility for keeping their firearms "fixed and serviceable", "fit for exercise", and "fitt for a soldier"—let alone for ascertaining in the first instance whether those arms were "good" enough to be "approved" for service—if the men had not also been required personally to possess those arms, and had not been presumed to have the attitudes, knowledge, and skills necessary to maintain their equipment in good working order at all times.

D. Inspections to insure that Militiamen actually possessed the requisite arms. Compliance with the statutory requirement that each Militiaman should

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[767] *See ante*, at 450.

[768] *See ante*, at 456, *and post*, at 521.

[769] *Quoted and cited ante*, at 463.

personally possess a firearm both suitable and properly maintained for service was not left to chance, either. If "as against all tymes of danger it ought to be the care of all men to provide that their armes and habiliments for war, be alwayes kept fixed and fitt for service,"{EN-1180} eventually someone in authority with appropriate expertise needed to verify that such was the case. So, from the earliest days, investigatory procedures were adopted in order to ascertain the facts.

1. Early inquiries were conducted to determine who stood in need of armaments, and to remedy any deficiencies that were discovered:

> • [1632] "That the comanders of all the severall plantations, doe upon holy days exercise the men under his comand, and that the comanders yearlie doe likewise uppon the first day of December, take a muster of theire men, * * * as also of armes and munition[.]"{EN-1181}

> • [1673 and 1676] "FOR the better supply of the country with armes and ammunition, *Be it enacted* * * * , that the captaines of ffoote and horse in each county doe take a strict and perticuler account of what armes and ammunition are wanting * * * *And* * * * the perticuler county courts be * * * impowred * * * to lay and raise a levy for the provideing of armes and ammunition for supplying the wants aforesaid, that is to say, muskitts and swords for the ffoot, and pistolls, swords and carbines for horse, as alsoe for every lysted souldier at the least two pounds of powder and six pounds of shott, the said armes and ammunition * * * to remaine in the hands of the officers of the militia for them to dispose of the same as there shalbe occasion; and that those to whome distribution of armes and ammunition shalbe made doe pay for the same at a reasonable rate[.]"{EN-1182}

> • [1702] Aware that "since y^{e} last returns of y^{e} Melitia Lists there has been great quantity of armes and ammunition brought into this Country", the Governor ordered the "Commanders in chief to * * * cause strict and dillig^{t} inquiery to be made what armes and ammunition are at present in their respective Countys and in whose custody".{EN-1183}

The evident purpose of this exercise was to put arms into individual Virginians' private ownership and possession. For, had the firearms and ammunition been intended to remain public property stored in armories or magazines, they would not have been subject to "distribution" and the recipients required to "pay for the same at a reasonable rate"; and public officials would always have known "in whose custody" the arms were lodged.

2. Regular, formal inquiries invariably took place at Militia musters. These were intended, not to assist men in acquiring firearms, but to compel that acquisition, by determining which Militiamen were not in actual compliance with the laws, and punishing them for their derelictions of duty.

a. All of Virginia's Militia statutes provided for general investigations of "defaults"—into which category fell a Militiaman's failure personally to possess firearms and ammunition under various circumstances:

> • [1705 and 1723] "[T]o the end no wilfull and obstinate defaulter or offender * * * may escape the penalty * * * for his default or offence, * * * all captains of troops and foot companies * * * be required * * * at every muster * * * to take * * * an exact account in writing of every * * * default or offence made or committed in his troop or company, by whom the default or offence was made or done, and at what time[.]"
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> Perhaps the most serious "default or offence" was when a Militiaman "shall not be furnished and provided with arms and ammunition * * * for muster and exercise, or shall not keep at his place of abode what * * * he is directed there to have and [shall not] bring into field with him all and singular the arms and ammunition * * * when thereunto specially required". For, not being properly "furnished and provided, he could not perform a Militiaman's most important function.{EN-1184}
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> • [1723] The Act of 1705 had allowed "eighteen months time * * * to each trouper and ffoot soldier * * * to furnish and provide himself with arms and ammunition" before he was subject to a fine. But the Act of 1723 qualified this immunity with the requirement "[s]o as every soldier, during the said eighteen months, do appear at all musters with such arms as he is already furnished with".{EN-1185} Having every man armed, to whatever degree was possible, was so important that *all* usable arms in private hands—whatever their shortcomings—were to be mobilized.
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> • [1738] To ensure that all Militiamen were "furnished" with the firearms, ammunition, and accoutrements statutorily required, "every captain * * * shall duly make a list of all the persons upon his muster-roll, who * * * do not appear at any of the * * * musters, armed and accoutred, as * * * is directed[.]"
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> Again, the main goal was to compel compliance by penalizing "[e]very person listed to serve in the horse * * * [a]nd every person listed in the foot * * * , for not appearing at muster, compleatly armed and accoutred".
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> A related default occurred when a Militiaman, during the first eighteen months of his service, failed both "to furnish and provide himself with" and "hav[e] * * * at his place of abode" the specific "arms and ammunition" the statute mandated, and to "appear at all musters, with such [other] arms as he is already furnished with."
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> Yet another penalty applied to "every person ordered to go to church armed, failing to do his duty therein".{EN-1186}

• [1748, 1753, 1757, 1758, 1759, 1761, 1762, 1764, 1766, 1769, and 1772] "[U]pon occasion of any invasion or insurrection * * * every [Militiaman] who shall be summoned to appear * * * shall * * * bring with him his arms and accoutrements, together with one pound of powder, and four pounds of ball", or be severely fined.{EN-1187} Presumably, in serious situations of this kind, Militia officers paid special attention to who within their units failed to appear at all, or to bring with him the full panoply of required equipment.

• [1755, 1757, 1759, 1762, 1766, and 1771] "[E]very captain * * * shall duly make a list of all the persons upon his muster-roll, who * * * do not appear at any of the * * * musters armed and accoutred[.]"

One serious default occurred whenever any "person inlisted to serve in the horse, appear[ed] at muster without a * * * carbine * * * , a case of pistols * * * , and six charges of powder and ball"; or when any "person listed to serve in the foot, appear[ed] at such muster without a firelock well fixed, and a bayonet fitted to the same, * * * and three charges of powder and ball".

Another offense involved Militiamen who failed or refused "to go armed to their respective parish churches" when ordered by a "chief officer of the militia in the county".

Wrongdoing was also assignable to a Militiamen who, during his first "twelve months" of service, failed both "to furnish and provide himself with" and "hav[e] * * * at his place of abode" the specific "arms and amunition" required by the statute, and to "appear at all musters * * * with such [other] arms as he hath, and is already furnished with".{EN-1188}

• [1775] "[E]very captain * * * shall make return of all delinquencies in his company, either at general or private musters * * * ; and the better to enable him so to do, the senior sergeant * * * shall act as a clerk, and call over the roll at each muster."

And following the by then long-familiar pattern, one serious default occurred for "every soldier, not appearing, or appearing without proper arms, * * * or for not bringing with him three charges of powder and ball, * * * or failing to bring into the field, when required by his commanding officer, one pound of powder, and five pounds of ball". Another offense involved Militiamen who failed or refused "to go armed to their parish churches on Sundays, and to any licensed meeting-houses", whenever any "chief officer[ ] of the militia" "judged it necessary".{EN-1189}

• [1777] "Each captain shall, at every muster, * * * note down the delinquencies occurring in his company", which included any Militiaman's "failing to appear at any general or private muster, properly armed or accoutred", and "failing to furnish himself with one pound of powder" and "four pounds of ball"—although, as an accommodation to the economic stringencies of the time, "[e]very officer and soldier shall be allowed six

months after his appointment or enrollment to provide such arms or accoutrements as he had not at the time".{EN-1190}

• [1780] "[E]very captain appointed to command such part of the * * * militia as are * * * directed to hold themselves in readiness, shall once in every fortnight call them together at some convenient place within their respective counties, * * * for the purpose of inspecting and examining * * * their arms, ammunition, and accoutrements."{EN-1191}

• [1784 and 1785] "At every muster, each captain * * * shall call his roll, examine every person belonging thereto, and note down all delinquencies occurring therein[.]"

As throughout the *pre*-constitutional period, the quintessential violation to be uncovered was whether any officer or soldier "fail[ed] to attend at any muster, with the arms, ammunition, and equipments, as directed by" these statutes. This list was extensive, including (for rank-and-file Militiamen): "a good clean musket, carrying an ounce ball, and three feet eight inches long in the barrel, with a good bayonet and iron ramrod well fitted thereto, a cartridge box properly made, to contain and secure twenty cartridges fitted to his musket * * * ; and moreover, * * * at every muster, one pound of good powder and four pounds of lead; including twenty blind cartridges; * * * provided, that the militia of the counties westward of the Blue Ridge, and the counties below adjoining thereto, shall not be obliged to be armed with muskets, but may have good rifles with proper accoutrements in lieu thereof." Nonetheless, scrutiny might also be given as to whether a Militiaman had any available arms, of any type or quality, at all—because the Acts provided "[t]hat twelve months * * * be allowed for providing the arms and accoutrements [t]herein directed; but in the mean time, the militia shall appear at musters with, and keep by them the best arms and accoutrements they can get".{EN-1192}

b. Investigations on this score could amount to highly particularized inquisitions, not only as to the existence of arms, but also as to their suitability for Militia service:

• [1755, 1757, 1759, 1762, 1766, and 1771] "That twelve months time be given and allowed to each soldier, to furnish and provide himself with arms and ammunition, * * * and that no soldier be fined for appearing without, or not having the same at his place of abode, until he hath been inlisted twelve months, * * * so as such soldier do appear at all musters, during the said twelve months, with such arms as he hath, and is already furnished with: And if any soldier shall appear at any muster not armed and accoutred, * * * the captain * * * [may] examine such soldier upon oath, whether he hath any, and what arms and ammunition he really hath of his own property, and if on such examination it shall appear, that such soldier hath any arms or ammunition of his own property, and hath

not brought the same, or so much thereof as th[e statutes] require[ ], he shall be liable to * * * penalties * * * , although he hath not been inlisted twelve months[.]"{EN-1193}

• [1784 and 1785] "Every captain * * * of a company shall, within ten days after every regimental and general muster, make up and report * * * a return of his company, including all arms, ammunition, and accoutrements, by th[e statutes] directed, distinguishing effective and good from non-effective and bad[.]"{EN-1194} No such "return" could have been made unless the Captain had closely examined the state of the equipment his men brought to the muster.

Obviously, though, if most Militiamen had not been required to maintain personal possession of their own firearms and ammunition, but instead had been expected to obtain their equipment on temporary loan from some public armory or magazine only when called into actual service, inquiries at musters directed towards "what arms and ammunition [any Militiaman] really hath *of his own property*" would have been pointless. If a man appeared for duty without a firearm or ammunition, the fault more likely than not would have been traceable to the custodian of some public armory or magazine who should have supplied the equipment, and in any event would not have been correctable by grilling the defaulter about what firearms (if any) he himself owned. Conceivably, a defaulter might simply have failed, through sloth, to repair to the armory on time. But then the proper order from his Captain would have been to do so; and the statutes would have directed as much.

3. Besides through regular and searching inquiries at musters, Militiamen's constant personal possession of firearms and ammunition was subject to verification by special requirements that the equipment be produced for inspection, be brought into the field, and be made available for "spot checks" at any time:

• [1705] "[T]he persons of a councellor, of a speaker of the house of burgesses, of a justice of the peace, of an attorney-general, and of a captain or an higher officer in the militia, are exempted from being listed and serving either in horse or foot under command as the rest of the militia do, merely for the dignity of the office * * * , and that notwithstanding * * * all and every such person or persons, and also the clerk of the councill, the clerk of the general court, and every county court clerk * * * are * * * required and enjoyned to provide and keep at their respective places of abode a troopers horse, furniture, arms and ammunition * * * , and to produce or cause the same to be produced in the county where they respectively reside yearly, and every year at the generall muster * * * to the * * * chief officer present[.]" And an ordinary Militiaman would be fined if he failed to "bring into the field with him all and singular the arms and ammunition directed by th[e statute] * * * when thereunto specially required".{EN-1195}

> • [1723] Every Militiaman was enjoined to "bring [all of his arms and ammunition] into the field with him, when thereunto specially required".{EN-1196}
>
> • [1738] Every Militiaman was ordered to "bring [his arms and ammunition] into the field, when he shall be required".{EN-1197}
>
> • [1755] Every Militiaman was ordered to "bring [his arms and ammunition] into the field with him when thereunto required".{EN-1198}
>
> • [1757, 1759, 1762, 1766, and 1771] Every Militiaman was ordered to "bring [his arms and ammunition] with him into the field when he shall be required".{EN-1199}
>
> • [1775] "[E]very militia man * * * shall furnish himself with a good rifle, if to be had, or otherwise with a * * * common firelock, bayonet, pouch, or cartouch box, three charges of powder and ball, and appear with the same * * * for mustering, and shall constantly keep by him one pound of powder and four pounds of ball, to be produced whenever called for by his commanding-officer."{EN-1200}
>
> • [1777] "[E]ach of the * * * officers and soldiers shall constantly keep one pound of powder and four pounds of ball, to be produced whenever called for by his commanding officer."{EN-1201}
>
> • [1784 and 1785] "Every officer and soldier [in the Militia] shall appear at his respective muster-field * * * armed, equipped, and accoutred * * * . And every of the said officers, non-commissioned officers, and privates, shall constantly keep the[ir] * * * arms, accoutrements and ammunition ready to be produced whenever called for by his commanding officer."{EN-1202}

Self-evidently, if the typical Militiamen's firearms and ammunition had been locked away in public armories and magazines, it would have been utterly ridiculous for these statutes to have commanded, for example, that "every of the said officers, non-commissioned officers, and privates * * * constantly keep the[ir] * * * arms, accoutrements and ammunition *ready to be produced whenever called for by his commanding officer*", or "bring [his arms and ammunition] into the field, *when he shall be required*"—because, most of the time, "his commanding officer" would always have known exactly where every Militiaman's arms were, and could himself have verified their status *en masse* at any time simply by consulting the keeper of the magazine. (Presumably, the statutes also applied when a Militiaman turned out for actual service in the field. Then, however, he was likely to be in the very presence of, or close by, his "commanding officer".) So, that the statutes required *every Militiaman himself* to "produce[ ]" his arms "whenever called for" or "required", proves that the law intended for each man to maintain personal possession of his arms at all times.

4. These statutes, furthermore, were not paper tigers. Rather, from the earliest days, the Governor and his Council took steps to see to their enforcement. For example:

> • [1684] "[O]rdered, that Letters be writt unto the militia officers of every respective County forthwith to render to his Excellency y^{e} condition of their militia, what number they consist of, both horse and foot, as likewise how furnished with armes[.]"{EN-1203}
>
> • [1690] "Ord^{r}d that the Respective Comand^{rs} in Cheife, doe * * * return an account * * * of the Severall Captaines of Horse and Foot, and the Number of Souldi^{rs} under every of their Comands, and how furnished[.]"{EN-1204}
>
> • [1691] "[T]he respective Cap^{ts} of Horse, Dragoones and foot * * * to return * * * an Exact List of the Names of the Souldiers under their Comand, how armed, and * * * that they take all possible Care the Souldiers under their comands be furnished with Horses Armes and Amunition according to Law[.]"{EN-1205}
>
> • [1695] "Ordred the Severall Comanders in Cheife of this Colony to Inspect the State of the Militia and to se how Armed & to returne account thereof."{EN-1206}
>
> • [1701] "[R]equire[d] all & Every y^{e} Colls and Comand^{rs} in Cheife of Each and Every County * * * Imediately to Issue out orders to y^{e} sev^{ll} officers und^{r} their Command to return a true and perfect List of y^{e} sev^{11} troops of horse & Companies of foot under their respective Commands, & how & in what they are fitted & Equipt wth Armes an Amunition Setting the same down in Distinct Columns[.]"{EN-1207}
>
> • [1703] The commanders in chief of the Militia in each County were "to cause dilligent enquiry to be made & an exact acco^{t} taken of all arms, Powder and Shott within their respective Countys, and of what quality the said arms are".{EN-1208}
>
> • [1706] "[T]he Chiefe officer of the Militia residing in each County do forthwith give notice to y^{e} respective Troops & Companys under their Command * * * that all persons serving in the militia be in areadiness with arms and ammunitions, and provisions to march for y^{e} defense of the Country."{EN-1209}
>
> • [1706] "[T]he late [statute] for settling the militia [in 1705] having strictly enjoyned all persons to provide armes on a certain penalty, the due execution of that Law will oblige people to be more diligent in purchasing."{EN-1210}
>
> • [1709] "Ordered that the Commanders in Cheif of the Militia * * * appoint Masters of the Militia * * * for training & exerciseing the Soldiers and that they take particular Care that the said Soldiers be provided with arms and ammunition according to Law & have their arms

constantly well fixed & themselves in a readiness to draw together on an hours warning, hereby strictly chargeing all the said Officers to take particular notice of any person who on this Occasion shall prove deficient in their duty that they may be punished according to Law[.]"{EN-1211}

• [1711] "That a General Muster of the Militia of each County be forthwith appointed and an exact account taken how they are armed & provided with ammunition."{EN-1212}

E. Fines imposed on Militiamen who did not possess the necessary arms. Additional evidence that most Militiamen personally possessed firearms and ammunition even when not actually at musters, in training, or in the field appears in the elaborate scheme of fines Virginia's statutes imposed on men who were discovered to have defaulted on any part of that obligation.

1. The statutes extended over a long period of time and were mutually consistent in substance:

• [1705] "[T]he persons of a councellor, of a speaker of the house of burgesses, of a justice of the peace, of an attorney-general, and of a captain or an higher officer in the militia, are exempted from being listed and serving * * * , and that notwithstanding * * * all and every such person or persons, and also the clerk of the councill, the clerk of the general court, and every county court clerk shall provide and keep * * * at their respective places of abode a troopers horse, furniture, arms and ammunition * * * , and to produce or cause the same to be produced in the county where they respectively reside yearly, and every year at the generall muster * * * , upon pain of forfeiting for every neglect * * * twenty shillings current money of Virginia.

* * * * *

" * * * That every ffoot soldier be provided with a firelock, muskett or fusee well fixed, a good sword and cartouch box, and six charges of powder, and appear constantly with the same * * * for muster and exercise, and that besides these each foot soldier have at his place of abode two pounds of powder and eight pounds of shott, and bring the same into the field with him when thereunto specially required, and that every soldier belonging to the horse be provided with a good * * * horse, * * * a case of good pistolls well fixed, sword and double cartouch box, and twelve charges of powder, and constantly appear with the same * * * to muster and exercise, and that besides those each soldier belonging to the horse have at his usual place of abode a well fixed carbine, * * * two pounds of powder, and eight pounds of shott, and bring the same into the ffield with him when thereunto specially required.

" * * * [W]hatsoever trooper or ffoot soldier * * * shall not be furnished and provided with arms and ammunition * * * for muster and exercise, or shall not keep at his place of abode what * * * he is directed there to have and bring into field with him all and singular the arms and

ammunition * * * when thereunto specially required, such trooper or ffoot soldier shall for his neglect in any of the premises, be fined one hundred pounds of tobacco, every time he is * * * to appear."{EN-1213}

• [1723] "That every soldier belonging to the horse, be provided with a good * * * horse, * * * a case of pistols, cutting sword, or cutlace, and double cartouch box, and six charges of powder, and constantly appear with the same * * * for muster and exercise; and shall keep at his pace of abode, a well fixed carbine, * * * one pound of powder, and four pounds of shot, and bring the same into the field with him when thereunto specially required. And that every foot soldier be provided with a firelock, musquet, or fuzee, well fixed, and bayonet fitted to such the musquet or fuzee, * * * a cartouch box, and three charges of powder, and appear constantly with the same, at * * * muster and exercise; and shall keep at his place of abode, one pound of powder, and four pounds of shot, and bring the same into the field with him, when thereunto specially required.

" * * * [W]hatsoever soldier * * * shall not be furnished and provided with arms and ammunition * * * for muster and exercise, or shall not keep at his place of abode, what * * * he is directed, such soldier, for every such failure, shall be fined one hundred pounds of tobacco.

" * * * [T]hat no soldier be fined for appearing without [arms and ammunition], or not having the same at his place of abode, until he hath been listed eighteen months * * * —So as every soldier, during the said eighteen months, do appear at all musters with such arms as he is already furnished with."{EN-1214}

• [1738] "Every horse-man shall be furnished with a serviceable horse, * * * carbine or fuzee, * * * a case of pistols, cutting sword or cutlass, double cartouch-box, and six charges of powder; and constantly appear with the same * * * for muster and exercise; and shall keep at his place of abode, one pound of powder, and four pounds of ball, and bring the same into the field with him, when thereunto required. And every footman shall be furnished with a firelock, musket, or fuzee, well fixed, a bayonet fitted to the same, * * * a cartouch-box, and three charges of powder; and appear with the same at * * * muster and exercise * * * ; and shall also keep at his house, one pound of powder, and four pounds of ball; and bring the same into the field, when he shall be required.

* * * * *

" * * * Every person listed to serve in the horse, shall pay seven shillings and six pence, or seventy five pounds of tobacco: And every person listed in the foot, shall pay five shillings, or fifty pounds of tobacco, at their election, for not appearing at muster, compleatly armed and accoutred * * * .

" * * * [T]hat no soldier be fined for appearing without [arms and ammunition], or not having the same at his place of abode, until he hath

been listed eighteen months * * * so as every soldier, during the said eighteen months, do appear at all musters, with such arms as he is already furnished with. .

* * * * *

" * * * [E]very person ordered to go to church armed, failing to do his duty therein, shall pay five shillings."{EN-1215}

• [1748, 1753, 1757, 1758, 1759, 1761, 1762, 1764, 1766, 1769, and 1772] "[E]very [Militiaman] who shall be summoned to appear [upon an invasion or insurrection]* * * and shall fail so to do, or shall fail to bring with him his arms and accoutrements, together with one pound of powder, and four pounds of ball, shall forfeit and pay the sum of ten pounds[.]"{EN-1216}

• [1755] "[E]very horseman shall be furnished with a serviceable horse, * * * carbine * * * , a case of pistols, cutting sword, double cartouch box, and six charges of powder, and constantly appear with the same * * * for muster and exercise, and shall keep at his place of abode, one pound of powder and four pounds of ball, and bring the same into the field with him when thereunto required: And every footman shall be furnished with a firelock well fixed, a bayonet fitted to the same, a cutting sword, a double cartouch box, and three charges of powder, and constantly appear with the same, * * * for muster and exercise * * * , and shall also keep at his place of abode, one pound of powder and four pounds of ball, and bring the same with him into the field when he shall be required.

* * * * *

" * * * [E]very person inlisted to serve in the horse, appearing without a serviceable horse, * * * carbine * * * , a case of pistols, cutting-sword, double cartouch boxes, and six charges of powder and ball shall pay five shillings, for every such failure; and every person listed to serve in the foot, appearing at such muster without a firelock well fixed, and a bayonet fitted to the same, * * * a cutting-sword, a double cartouch-box, and three charges of powder and ball shall pay three shillings, for every such failure; * * * every soldier ordered to go armed to church, neglecting to do so, shall pay five shillings, for every such failure[.]

* * * * *

" * * * That twelve months time be given and allowed to each soldier, to furnish and provide himself with arms and ammunition, * * * and that no soldier be fined for appearing without, or not having the same at his place of abode, until he hath been inlisted twelve months, * * * so as such soldier do appear at all musters, during the said twelve months, with such arms as he hath, and is already furnished with[.]"{EN-1217}

• [1757, 1759, 1762, 1766, and 1771] "Every soldier shall be furnished with a firelock well fixed, a bayonet fitted to the same, a double cartouch-box, and three charges of powder, and constantly appear with

the same * * * for muster and exercise, and shall also keep at his place of abode one pound of powder and four pounds of ball, and bring the same with him into the field when he shall be required[.]

* * * * *

" * * * [E]very soldier appearing at muster without a firelock well fixed, and a bayonet fitter to the same, shall pay three shillings for every such failure, and for appearing at muster without a double cartouch-box shall pay one shilling, and without three charges of powder shall pay two shillings for every such failure * * * . Every soldier ordered to go armed to church neglecting to do so shall pay five shillings for every such failure[.]

* * * * *

" * * * [T]welve months shall be given and allowed to each soldier, not already inlisted, to furnish and provide himself with arms and ammunition according to the directions of this act, * * * so as such soldier do appear at all musters during the said twelve months with such arms as he hath and is already furnished with[.]"{EN-1218}

•[1762, 1766, and 1771] "[E]very person * * * exempted [from regular Militia duty by these statutes, other than Quakers,] shall always keep in his house or place of abode such arms, accoutrements, and ammunition, as are * * * required to be kept by the militia of this colony; and if he shall fail or refuse so to do he shall forfeit and pay the sum of five pounds * * * : And such exempts shall also, in case of any invasion or insurrection, appear with their arms and ammunition * * * , and shall be incorporated with, and be subject to the same * * * fines, forfeitures and penalties, for non-appearance * * * as the other militia[.]"{EN-1219}

•[1775] "[E]very [regular] soldier or minute-man failing to appear, and not bringing with him his arms, shall forfeit and pay the sum of five pounds[.]

* * * * *

" * * * [E]very militia man * * * enlisted shall furnish himself with a good rifle, if to be had, or otherwise with a * * * common firelock, bayonet, pouch, or cartouch box, three charges of powder and ball, and appear with the same * * * for mustering, and shall constantly keep by him one pound of powder and four pounds of ball, to be produced whenever called for by his commanding-officer.

* * * * *

" * * * [E]very soldier [in the Militia] * * * appearing without proper arms, [shall forfeit and pay] five shillings; or for not bringing with him three charges of powder and ball, three shillings; or failing to bring into the field, when required by his commanding-officer, one pound of powder, and four pounds of ball, five shillings.

* * * * *

> " * * * [T]he soldiers shall be allowed six months after enlisting to provide themselves with arms, and in the mean time shall bring with them such arms as they have, under the penalty of five shillings[.]"{EN-1220}
>
> • [1775] "[E]ach minute-man who shall furnish himself with a good musket, or other gun, to be approved of by his captain, shall be allowed by the publick ten shillings per annum, as a consideration for the use thereof, and shall be liable to a fine of twenty shillings for not appearing with the same when called on duty.
>
> * * * * *
>
> " * * * [O]verseers * * * shall be obliged to furnish themselves with arms and ammunition, in the same manner as militia men * * * ; and if any militia man, or overseer, shall neglect or refuse to do so, he or they * * * shall be liable to a fine of five shillings for every neglect or refusal[.]"{EN-1221}
>
> • [1777] "For failing to appear at any general or private muster, properly armed and accoutred, * * * every non-commissioned officer or soldier [shall pay] five shillings. * * * Every officer failing to furnish himself with one pound of powder shall forfeit and pay ten shillings, and the same for failing to furnish himself with four pounds of ball; and every soldier failing therein shall likewise be liable[.]"{EN-1222}
>
> • [1784 and 1785] "By a non-commissioned officer or soldier, for failing to attend any muster, with the arms, ammunition, and equipments, as directed by th[e statute], he shall forfeit and pay ten shillings[.]"{EN-1223}

And that these statutes were not paper tigers, either, an order from the Governor and Council in 1736 evidences:

> [T]o the End all Persons oblig'd to serve in the Militia, and who ought to be furnished with Arms and Ammunition, as the Law directs, may no longer be excused from this necessary part of their Duty, * * * the County Lieutenant * * * in each County * * * do take care, that a Court Martial be appointed and held * * * and to cause to be fined, all Persons whatsoever, who shall have absented themselves from General or Private Musters, or shall have appeared there not Armed and Accoutred as the Act of Assembly doth direct and require.{EN-1224}

2. The pattern throughout these statutes is pellucid: They imposed fines on the vast majority of Militiamen if they failed: (i) to furnish and provide themselves with firearms and ammunition suitable for Militia service; (ii) to keep in their houses or places of abode such arms, accoutrements, and ammunition as were required, ready for use at all times; and (iii) to appear completely armed and accoutred with their equipment at musters, in training, or for other duty in the field—including such assignments as going armed to church. Even when the statutes granted a Militiaman an allowance of time in which to obtain the particular

type of firearm the laws required, he nonetheless was liable to a fine if he did not "appear * * * with such arms as he is already furnished with" (1723, 1738, 1755, 1757 through 1771, and 1775), or if he "hath any arms or ammunition of his own property, and hath not brought the same" (1755 through 1771). Thus, the statutes' plain intent was that *the typical Militiaman's appearance "compleatly armed and accoutred" depended upon his own acquisition and possession of that equipment; and such possession was not only personal but also permanent, by himself in his own home at all times*.

Nowhere does this extensive body of *pre*-constitutional Militia laws with respect to fines even suggest that—let alone set out any procedures whereby—most Militiamen repaired to public armories or magazines to obtain the firearms and ammunition necessary for their service as that service arose; and then returned the equipment whence it came when their service ended. The typical Militiaman was *never* threatened with fines for (say) "not withdrawing firearms and ammunition from the public armory" when he should have done so—although a Militiaman entrusted with public arms could have been penalized for not returning that equipment after he had finished his particular service.[770] Rather, most Militiamen were fined for not keeping the requisite arms at their own places of abode.

Certainly it would have been unjust, as well as irrational, to fine a man (as all of these statutes did) for not keeping arms at his place of abode, if those arms were to be stored in some public armory instead; or to fine a man for not bringing with him to his Militia service the arms and accoutrements mandated by statute, if his ability to do so depended upon the coöperation of some public functionary who through bureaucratic punctiliousness, incompetence, or just plain individual pique or spite might have neglected, failed, or refused to make the equipment available. Conceivably, Militiamen directed to obtain their arms from public armories could have been justly punished if they had refused or neglected to follow those instructions. But the existence of such a punishment would have depended upon the availability of such a procedure, which Virginia's statutes nowhere evidenced.

And if the custodians of public arsenals or magazines had exercised determinative authority over when almost all of Virginia's Militiamen were granted access to publicly owned firearms and ammunition, the statutes would have explicitly enjoined *those custodians* to take care to arm Militiamen in full and on time, and imposed on *those custodians* fines the immensity of which would have been commensurate with the harm that might have been visited on the community by the custodians' failures to perform their duties. Yet, although the statutes overflowed with detailed specifications of fines for many other forms of

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[770] The latter type of control did apply to *some* Militiamen, however. *See post*, at 489-490 and 492-494.

misbehavior,[771] they *never* imposed a single shilling's penalty upon *any* such custodian—self-evidently because, even if such custodians existed here and there, they played no significant part in actually putting arms into most Militiamen's hands.

3. Furthermore, the statutory provisions for verification of Militiamen's possession of firearms and ammunition must have been rather broadly interpreted and applied. For example, statute after statute specified that every Militiaman should keep certain equipment "at his place of abode" or be fined for noncompliance.{EN-1225} Nevertheless, none of Virginia's statutes explicitly set out a procedure for house-by-house inspections of Militiamen's stores of arms, as Rhode Island's Militia laws did.[772] To be sure, regular inspections that occurred at musters and other service in the field, or *ad hoc* inspections incident on some special call-up, would have discovered what a Virginian who was required to appear actually possessed in his home, because that is what he would have brought with him. And if he brought nothing (or not enough), many of the statutes mandated that he could be interrogated "upon oath" about what he did possess.{EN-1226} Yet some Virginians were both exempted from the normal duty to muster and enjoined to maintain arms in their own homes, subject to fines if they failed to do so.{EN-1227} Plainly, these individuals' compliance with the requirement personally to possess firearms and ammunition in their homes could not have been enforced through their attendance at musters, because they were exempt from appearing. And although they were ordered to appear, armed and accoutred, "in case of any invasion or insurrection", the discovery of noncompliance at such a critical time would doubtlessly have proven too late for effective remedy. The Act of 1705 did require all such exempts "to produce or cause the[ir arms] to be produced in the county where they * * * reside[d] yearly, and every year at the generall muster".{EN-1228} But no such procedure appeared in later Militia statutes. So some practical measures, not specifically prescribed by statute, must have been put into operation to see to it that the men so exempted did possess the arms required of them. And if for them, then for others as well.

F. Public arms in Militiamen's possession. Many of *pre-*constitutional Virginia's regular soldiers did receive firearms and ammunition directly from the government, rather than through private purchases. And some of her Militiamen did, too. Yet, although those Militiamen did not own the arms they used, many of them often possessed those arms for long stretches of time.

1. During the *pre-*constitutional era, Virginians were fully aware of the legal distinction between public and private arms:

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[771] *See post*, at 666-697.

[772] *See ante*, Chapter 8.

> • [1643] "VPON consideration * * * of the scarsity of powder and aminition in the plantation and the difficultie in procureing the same, *It is thought fitt and enacted* that the Governour * * * do allott a barrel of powder to each countie, to be kept and preserved * * * a publique stock, for which the comander of each county is to be responsible."{EN-1229}
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> • [1714] "WHEREAS * * * queen Anne * * * bestow[ed] a considerable quantity of arms and ammunition, for the service of this colony, which are in danger to be imbezzled and spoilt, for want of a convenient and proper place to keep them in.
>
> " * * * That * * * there shall be erected and finished one good substantial house of brick, which shall be called the magazine * * * : In which * * * all the arms, gun-powder, and ammunition, now in this colony, belonging to the king, * * * may be lodged and kept."{EN-1230}

Virginians always knew the difference between "a *publique* stock" of gunpowder and "the arms, gun-powder, and ammunition * * * *belonging to the king*", on the one hand, and private arms and ammunition, on the other. But ownership was one thing, possession often a different matter altogether. Public arms were usually lodged in some public magazine or under the care of some Militia officer.[773] And although private arms might sometimes be impressed into public service,[774] they generally remained in some private individuals' possession, as when those individuals were employing in their own Militia service the very arms taken from other individuals.

a. For example, during the War of Independence, Virginia raised her own regular Armed Forces, to which she distributed public arms for training and active duty—arms that were stored in public magazines when not in actual use:

> [1781] "WHEREAS at this critical juncture, when the enemy have made this state the object of their vengeance, it is necessary to provide a standing force, for the immediate defence thereof, *It is therefore enacted*, That two legions * * * be forthwith raised to serve during the war * * * in cases of actual or threatened invasion, during which, they shall continually remain in the field * * * . Immediately after any invasion shall cease, or the business of training shall be over, the men shall be marched to some magazine, there to deliver their arms, ammunition, and accoutrements * * * .
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> "And to encourage men to engage in so useful a service, *It is farther enacted*, That all persons who shall serve in the said legions, shall be exempt from all militia duty and from all manner of drafts * * * . All * * * arms, and every military apparatus * * * shall be furnished at the

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[773] *See ante*, at 446-451.

[774] *See ante*, at 437-439.

> expense of the state, and shall whilst the men are out of service, be safely stored in some magazine to be provided for that purpose."{EN-1231}

But, then, in *pre-*constitutional Virginia, her regular troops also used their own private arms in the performance of their duties—arms which never left their own hands for storage in public armories:

> • [1775] "[T]he soldiers to be enlisted shall, at the expense of the publick, be furnished each with one good musket and bayonet * * * ; and, until such musket can be provided, * * * they bring with each of them the best gun, of any sort, that can be procured; and that such as are to act as rifle-men bring with them each one good rifle, to be approved by their captain, for the use of which he shall be allowed at the rate of twenty shillings a year[.]"{EN-1232}

> • [1775] "[T]he soldiers to be enlisted * * * shall, at the expense of the publick, be furnished each with one good musket and bayonet * * * ; and until such musket can be provided that they bring with them the best gun of any sort that they can procure; * * * and that such as are to act as riflemen bring with them one good rifle * * * , each to be approved by their captain, for the use of which guns they shall be allowed * * * [f]or the smooth-bores, or muskets, after the rate of 20[shillings] and for the rifles * * * after the same rate by the year[.]"{EN-1233}

Even for these limited levies, though, at first the government evidently could not find enough smoothbored muskets in the public stocks, because it had to hire them, just as it had originally been forced to hire rifles, an adequate supply of which it never acquired.

b. Similarly, small portions of Virginia's Militia, too, were sometimes issued public arms, or paid for the use of their own arms, while on active service. For instance:

> • [1775] "[E]ach minute-man so to be enlisted shall be furnished with proper arms at the publick expense, and until such can be provided shall bring into service the best gun that he can procure; and for every good rifle, to be approved by the respective captains, there shall be allowed to the owner making use of the same at the rate of twenty shillings a year[.]"{EN-1234}

> • [1775] "That the militia or volunteers to be employed, if not well armed, shall be furnished with arms out of such as belong to the county * * * , to be returned as soon as they shall be discharged from the service."{EN-1235}

But (as the dearth of statutes so providing proves) this method was employed only in exigent circumstances, when Virginia had to maximize the forces available for immediate deployment in a particular campaign. During normal times, when some

Militiamen proved too poor to purchase their own firearms and ammunition—and therefore were "not well armed"—they returned the firearms loaned to them only upon death, disability, exemption from Militia service, or removal out of the jurisdiction.[775] It could be said, however, that this rule was functionally the same in both instances: Militiamen called up for a particular campaign who for whatever reason were "not well armed" returned the public arms loaned to them when they were discharged from that service—which occurred at the end of that campaign. Whereas poor Militiamen also returned the public arms loaned to them when they were discharged from their service—which occurred at the end of their membership in the Militia altogether. Obviously, though, a tension existed between application of the rule in the two different circumstances. If substantial numbers of poor Militiamen had not received public firearms slowly but surely in the course of their normal Militia service over the years, because such arms were unavailable, they could not have been issued public arms all at once in some emergency, because sufficient stocks of such arms would then surely have been lacking.

2. In any event, many of those Militiamen who did not furnish themselves with their very own firearms and ammunition personally possessed—for longer than just during their actual service in the field—the publicly owned arms issued to them.

a. This is clear enough in the general case:

> • [1727, 1732, 1734, 1738, 1740, 1744, 1748, 1753, 1757, 1758, 1759, 1761, 1762, 1764, 1766, 1769, and 1772] "[W]hereas it may be needful, in time of danger, to arm part of the militia, not otherwise sufficiently provided, out of his majesty's magazine, and other stores, within this colony, * * *
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> " * * * if any person or persons, so to be armed out of his majesty's stores * * * , shall detain or imbezzle any arms, accoutrements, or ammunition, which shall be delivered to him * * * , when he shall be thereunto required, it shall and may be lawful * * * to cause to be imprisoned such person or persons, till he or they have made satisfaction for the arms, accoutrements, or ammunition * * * detained or imbezzled."{EN-1236}
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> • [1777] "The soldiers of such militia, if not well armed and provided with ammunition, shall be furnished with the arms and ammunition of the county, and any deficiency in these may be supplied from the publick magazines, or if the case admit not that delay, by impressing arms and ammunition of private property, which ammunition, so far as not used, and arms, shall be duly returned, as soon as they may be spared. And any person embezzling any such publick or private arms,

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[775] *See post*, at 492-495.

> or not delivering them up when required by his commanding officer, shall * * * be committed to prison without bail or mainprize, there to remain till he deliver or make full satisfaction for the same[.]"{EN-1237}
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> • [1782] "WHEREAS sundry arms and accoutrements belonging to the public are in the hands of individuals, who have neglected to return them to the proper officers; and it is necessary that such arms and accoutrements should be recovered as speedily as possible:
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> " * * * [I]f * * * any person possessing any such public arms or accoutrements, shall be convicted of having failed to deliver them up * * * , such person shall * * * be liable to the penalty of twenty pounds[.]"{EN-1238}
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> • [1782] "[T]he governor shall cause to be delivered to the * * * commanding officers of the militia of such counties as are most exposed to the incursions of the enemy, and to the officers of the militia of the city of Williamsburg, and borough of Norfolk, such a number of arms as he may think necessary, not less than sufficient to arm three tenths of their militia, * * * and [the commanding officer of the Militia] shall deliver the same to such of the militia as are first to be called on duty * * * ; who, on having served their tour of duty, shall return their arms, in good order, * * * to be delivered in like manner to such of the militia as stand next in rotation.
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> * * * * *
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> " * * * [E]very militia-man to whom arms shall be delivered * * * , who shall neglect or refuse to return the same * * * , shall forfeit and pay the sum of twelve pounds; and on failing so to do * * * , every such militia-man shall be obliged to serve in the continental army the term of three years or during the war."{EN-1239}

(1) Of singular significance is that most of these statutes explicitly described themselves as "making provision *against Invasions and Insurrections*" (1727 through 1772) or "providing *against Invasions and Insurrections*" (1777); and justified their mandates as generally "needful, *in time of danger*" (1727 through 1772) or specifically warranted in "such counties *as are most exposed to the incursions of the enemy*" (1782).

The tone of urgency sounded most ringingly in the preamble to the statute of 1727, which declared that:

> [W]HEREAS the frontiers of this dominion, being of great extent, are exposed to the invasions of foreign enemies, by sea, and incursions of *Indians* at land, and great dangers may likewise happen by the insurrections of negros, and others; for all which, the militia * * * is the most ready defence. * * * And it being reasonable, that such services as shall be performed by any part of the * * * militia, be rewarded at the public charge[. . .]{EN-1240}

Thus, unsurprisingly, this statute not only allowed for "arm[ing] part of the militia, not otherwise sufficiently provided, out of his majesty's magazine", but also "paid by the public" various wages "to the officers and soldiers which shall be drawn out into actual service", on the condition that "every horseman shall find and provide himself with a horse * * * , arms, and ammunition; and every foot soldier shall find and provide himself with a foot soldier's arms, and ammunition."{EN-1241}

(2) As urgent as was the danger "Invasions and Insurrections" posed, however, these statutes did not make public arms available to everyone. Rather, their purpose was "to arm *part* of the militia, *not otherwise sufficiently provided*, out of his majesty's magazine" (1727 through 1772), or to furnish "[t]he soldiers of such militia, *if not well armed and provided with ammunition*, * * * with the arms and ammunition of the county" (1777). The remainder of the Militiamen would be "otherwise sufficiently provided" and "well armed" *by their own efforts and through their own resources*, as the Militia laws applicable to normal times required. Thus, these statutes constituted supplementary measures designed to meet sudden, sharp, and short-term emergencies.

The statute of 1782 (quoted above) exemplifies the limited nature of the Virginia's reliance on public arms, even in the most pressing emergency to arise during the entire *pre*-constitutional era. *First*, the Governor was authorized to deliver arms only to "such counties as are *most* exposed to the incursions of the enemy, and * * * the city of Williamsburg, and borough of Norfolk"—those less or not so "exposed" having to get along with what arms they already possessed. *Second*, although the statute required the supply to be "not less than sufficient to arm three tenths of their militia", it did *not* command the Governor to arm the whole, even in those few most-threatened areas. Rather, he was to furnish arms only "to such of the militia as are first to be called on duty * * * ; who, on having served their tour of duty, shall return their arms, in good order, * * * to be delivered in like manner to such of the militia as stand next in rotation." Plainly enough, arming three-tenths of the Militia in a few Counties, one City, and a Borough would not suffice to arm the remaining seven-tenths in those places—particularly in the eventuality of an invasion or insurrection in which *all or most* of the local Militia would likely be called forth *instanter*. And, of course, it would arm no one else anywhere else in the Commonwealth to any degree. Presumably, the General Assembly settled on this formula because it knew that no greater amount of public arms needed to be supplied, inasmuch as many Militiamen had already provided themselves with suitable arms; or the amount of public arms available was sufficient only to supply a minority of Militiamen in a few selected areas; or both.

(3) Most revealingly, these statutes themselves presumed that many Militiamen to whom public arms had been distributed would maintain personal possession of that equipment under conditions in which their behavior would *not*

be closely monitored by their officers. The statutes imposed penalties on "any person * * * [who] shall detain or imbezzle any [public] arms, accoutrements, or ammunition" (1727 through through 1772); "any person embezzling any * * * publick or [impressed] private arms, or not delivering them up when required by his commanding officer" (1777); "individuals, who have neglected to return * * * to the proper officers" "sundry arms and accoutrements belonging to the public" (1782); and "every militia-man to whom arms shall be delivered * * * who shall neglect or refuse to return the same" (1782). But if an unscrupulous Militiaman could have improperly "detain[ed]" the equipment entrusted to him, let alone "imbezzle[d]" it outright, he must have had, not only personal possession, but also quite unscrutinized and undisturbed possession over an indefinite period of time. Certainly, any such villain could not have been required to make a strict accounting for the arms both when they were handed out and when they should have been turned in immediately after he had completed his service—or else so much "detain[ing] or imbezzl[ing]" could never have gone on that serious statutory penalties had to be created (and maintained for over half a century) in order to suppress and punish such misbehavior. Even if only lax scrutiny characterized the process of distributing and then collecting these public arms, why were not the caretakers of public armories and magazines held to account when the equipment for which they were ultimately responsible turned up missing? (The statutes made no provision for inquiry into their behavior, let alone punishment for their maladministration.) Obviously, then, the burden of returning public arms to public magazines rested squarely on the shoulders of the Militiamen to whom those arms had been distributed. Which means that they must have possessed—and generally been considered justified in possessing—those arms at some times and in some places not connected with their performance of Militia duties other than the basic duty personally to possess a firearm.

b. Private individuals' long-term personal possession of public arms was even clearer where Militiamen who were rated too poor to purchase their own firearms were concerned:

> • [1755, 1757, 1759, 1762, 1766, and 1771] "And if * * * any soldier inlisted * * * is so poor, as not to be able to purchase * * * arms * * * then [the county] court shall * * * immediately * * * depute some person to send for the same to England by the first opportunity, and to levy the charge * * * in the next county levy; which arms so to be sent for, shall be marked with the name of the county; and if any person shall presume to buy or sell any such arms, * * * then * * * every person so buying or selling shall forfeit and pay the sum of six pounds * * * ; and all arms purchased by any county and delivered to any poor soldier, * * * shall on his death or removal out of the county, be delivered to the chief officer of the militia in the county * * * , to be by such officer delivered to

any other poor soldier * * * adjudged unable to provide himself with arms[.]"{EN-1242}

• [1775] "[I]f it be certified * * * that any soldier enlisted is so poor as not to be able to purchase the arms [required for service in the Militia] * * * , then such arms shall * * * be procurred so soon as may be, at the expense of the publick. And if any person shall presume to sell or buy any arms thus provided, he shall forfeit and pay the sum of six pounds; and all arms so purchased and delivered to any such poor soldier shall on his death, or removal out of the county, be delivered to the chief officer of the militia in the county, or to the captain of the company to which such poor soldier did belong, to be * * * delivered to any other poor soldier * * * adjudge[d] unable to provide himself with arms[.]"{EN-1243}

• [1777] "If any soldier be certified to the court martial to be so poor that he cannot purchase such arms, the said court shall cause them to be procured at the expense of the publick, to be reimbursed out of the fines on the delinquents of the county, which arms shall be delivered to such poor person to be used at musters, but shall continue the property of the county; and if any soldier shall sell or conceal such arms, the seller or concealer, and purchaser, shall each of them forfeit the sum of six pounds. And on the death of such poor soldier, or his removal out of the county, such arms shall be delivered to his captain, who shall * * * deliver the same to such other poor soldier as the [next court-martial] shall order.

"And if any poor soldier shall remove out of the county, and carry his arms with him, he shall incur the same penalty as if he had sold such arms; and if any persons concerned in selling or concealing such arms shall be sued for the said penalty, and * * * shall fail to make payment, he shall suffer * * * corporal punishment * * * , not exceeding thirty nine lashes."{EN-1244}

• [1784 and 1785] "If any private shall make it appear to the satisfaction of the court * * * appointed for trying delinquencies * * * that he is so poor that he cannot purchase the arms * * * required, such court shall cause them to be purchased out of the money arising from delinquents. The arms so purchased, shall * * * be delivered to the captain of the company to which such poor private may belong, who shall deliver such arms to the private, but they shall continue the property of the county; and if any private shall sell or conceal the same, the seller, concealer, and purchaser, shall each forfeit and pay four pounds * * * . And on the death, disability, or exemption of such poor private, or his removal out of the county, such arms, shall be delivered to the commanding officer of the company, who shall make report thereof to the next court * * * , and deliver the same to such other poor private as they shall direct. And if any poor private shall remove out of the county, and carry such arms with him, he shall incur the same penalty as if he had sold them. And if any person concerned in selling, purchasing, concealing or

> removing such arms shall be prosecuted * * * , and upon conviction shall fail to make instant payment, or give security to pay the same * * * , he shall suffer such corporal punishment as the court * * * may think fit, not exceeding thirty-nine lashes.[776] * * * And to the end that such arms may be known, the commanding officer shall cause to be stamped or engraved on them, the name of the county, together with the number of the regiment to which they may belong."{EN-1245}
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> • [1787] "[T]he governor with the advice of council, shall apply the money * * * appropriated to the purchase of arms, in procuring such artillery, small arms, accoutrements and ammunition, as may to him * * * seem proper; and the small arms so procured shall be distributed to the different companies in proportion to the number of their militia. Every private receiving such arms and accoutrements shall hold the same subject to the like rules, penalties and forfeitures, as are prescribed for a poor private in and by the [Militia] act [of 1785.]"{EN-1246}

These arms were purchased with public funds from "the next county levy" (1755 through 1771), "at the expense of the publick" (1775 and 1777), or "out of the money arising from delinquents" (1784 and 1785). For that reason, they were to "continue the property of the county" (1784, 1785, and 1787)—and even to be "marked with the name of the county" (1755 through 1771), or "stamped or engraved" with "the name of the county, together with the number of the regiment to which they may belong" (1784 and 1785). Yet they were actually "delivered to [the] poor soldier" (1755 through 1771, 1775, 1777, 1784, 1785, and 1787). Inasmuch as he lacked the rights of an owner, though, a poor Militiaman could neither "buy or sell any such arms" (1755 through 1771, and 1775), nor "sell or conceal such arms" (1777, 1784, 1785, and 1787), nor "remove out of the county, and carry his arms with him" (1777, 1784, 1785, and 1787). And upon his "death or removal out of the county" (1755 through 1771, 1775, and 1777), or his "death, disability, or exemption * * * or * * * removal out of the county" (1784, 1785, and 1787), the arms had to be "delivered to the chief officer of the militia" (1755 through 1787). Then, however, they were once again "delivered to any other poor soldier * * * unable to provide himself with arms" (1755 through 1787).

Thus, in practice, these public arms were as much in a poor soldier's personal possession throughout his enlistment in the Militia as if he had actually owned them. Certainly they were not subject to constant control or oversight by Militia officers—otherwise, Virginia's legislators would not have considered it necessary explicitly to prohibit poor soldiers from selling or concealing them, or removing them out of their Counties. Moreover, the arms were not treated as a separate public stock, because, as soon as one poor soldier had no further need of

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[776] The Act of 1785 deleted the qualification "not exceeding thirty-nine lashes".

them, they were distributed to another poor soldier on the selfsame terms of personal possession.

True enough, public arms were distributed to poor soldiers in order to serve public purposes relating to the Militia. One statute even mandated specifically that they were "to be used at musters" (1777). Yet obviously they also were implicitly intended to be used for each and every other possible Militia activity—one of which was the basic duty of personal possession of a firearm suitable for Militia service. And no statue ever explicitly precluded the use of Militia firearms for other purposes. Under those circumstances, how and why could poor soldiers, necessarily in possession of such firearms at all times, and usually under only their own supervision, have been easily prevented from, or fairly punished for, putting these arms to other uses—such as hunting, target shooting, or personal self-defense—as long as those poor soldiers always kept their arms "well fixed" and regularly appeared with them at musters, training, and service in the field? Certainly target shooting was an obvious preparation for Militia service; and self-defense *was* such service through the execution of the laws at the individual level. From very early on, too, the close connection between hunting and Militia service was recognized, as in a statute from 1632 which provided "that any man be permitted to kill deare or other wild beasts or fowle in the common woods, forests, or rivers * * * that thereby the inhabitants may be trained in the use of theire armes".{EN-1247}

G. The constitutional significance of Militiamen's personal possession of arms. That most Militiamen owned—and if they did not own at least continuously possessed in their places of abode—the firearms, ammunition, and accoutrements they brought to their Militia service provides an important insight into the meaning of the Second Amendment's command that "the right of the people to keep and bear Arms, shall not be infringed".

Distinguishably from most Militiamen, members of Virginia's regular Armed Forces and Militiamen who received public arms "in time of danger" were supposed to surrender them to public officials upon the completion of their service. Indeed, on one occasion, in 1775 Virginia specified

> [t]hat the militia or volunteers to be employed, if not well armed, shall be furnished with arms out of such as belong to the county or corporation, to be returned as soon as they shall be discharged from the service[,]

and even required some of her "soldiers, either of regulars or minute-men," to take an oath to that effect:

> *I * * * swear, that I will be faithful and true to the colony and dominion of Virginia; that I will serve the same to the utmost of my power, in defence of the just rights of America, against all enemies whatsoever; that I will,*

> *to the utmost of my abilities, obey the lawful commands of my superiour officers, * * * **and lay down my arms peaceably, when required to do so, either by the General Convention or General Assembly of Virginia**.*{EN-1248}

(At that time, along with Virginia's regular troops, "each minute-man * * * to be enlisted" was to be "furnished with proper arms at the publick expense", and only "until such c[ould] be provided" was he to "bring into service the best gun that he c[ould] procure".{EN-1249})

In contrast, Militiamen who owned and possessed *their own* arms were *never* compelled to surrender them to public officials, even when some of them were properly exempted from part or all of their Militia duties because of disability, superannuation, removal from the jurisdiction, or any other reason (except, of course, conviction of some crime the punishment of which included disarmament). *No statute purporting to impose such a general surrender ever saw the light of day in Virginia, in Rhode Island, or in any other Colony or independent State during the pre-constitutional era*. True enough, poor Militiamen who received arms from the government also returned those arms to their Militia officers as soon as their own service in the Militia ended.[777] But, although they never attained actual legal title to the arms the public supplied, while their service continued these poor Militiamen were never deprived of personal possession of those arms, except perhaps to turn them over to other Militiamen for the performance of those Militiamen's service (as, for example, in the case of rotation in duty{EN-1250}). So, save for those unavoidable (and presumably short) periods of time during which Militia officers transferred possession from one poor Militiaman to another, a public firearm used for this purpose never left the personal custody of *some* Militiaman required to employ it as *his own* firearm in the fulfillment of *his own* Militia duties.

All this, of course, was the result of a *statutory* structure, in Virginia as elsewhere throughout *pre-*constitutional America. But when the Constitution incorporated into its federal system "the Militia of the several States" *as they existed during those times*, every member of every one of "the Militia of the several States", unless properly exempted according to constitutional principles, thereafter became and remains today subject to a *constitutional duty* at least to possess, if not also actually to own, a firearm, ammunition, and accoutrements suitable in some manner for Militia service. And, howsoever he may lawfully acquire that equipment, every member of any of "the Militia of the several States" enjoys at least a constitutional right to possess it in order to perform that constitutional duty. Thus, although every soldier in the regular Armed Forces today *can* constitutionally be required to take an oath to "lay down my arms peaceably, when required to do so" by public officials, and *can* legally be compelled to surrender whatever arms he has

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[777] *See ante*, at 492-495.

been issued even without such an oath, because the Armed Forces lack any constitutionally guaranteed permanent existence,[778] *no* member of "the Militia of the several States" can ever be required either to take such an oath or to make such a surrender—certainly of the arms he owns as his personal property, and arguably of any public arms he possesses in order to perform his Militia duties (unless other arms are simultaneously substituted for them).

[778] *Contrast* U.S. Const. art. I, § 8, cls. 12 and 13, *with* art. I, § 8, cls. 15 and 16, *and* art. II, § 2, cl. 1.

CHAPTER NINETEEN

If her *pre*-constitutional Militiamen could not acquire firearms of military grade, Virginia required them to use whatever readily available arms were at all suitable for their Militia service.

As the preceding Chapters of this study have proven beyond any reasonable doubt, *pre*-constitutional Virginia required most of her Militiamen to purchase their own firearms, ammunition, and accoutrements directly or indirectly through the free market; supplied such equipment to those men too poor to buy it for themselves; and ordered just about every Militiaman, whatever his financial status, to maintain personal possession of those arms in his own place of abode at all times. But *exactly what sort of arms* were these, in those days—and therefore *exactly what sort of arms* would they be today, in the hands of revitalized "Militia of the several States"?

A. Firearms suitable for "soldiers". The nature of the arms Virginia's *pre*-constitutional Militia were required to carry can be deduced from the service to which those were to be put. From the earliest days, Virginians aimed at being thoroughly armed:

> • [1643] "[M]asters of every family shall bring with them to church on Sondays one fixed and serviceable gun with sufficient powder and shott[.]"{EN-1251}

> • [1659 and 1662] "That every man able to beare armes have in his house a fixt gunn two pounds of powder and eight pound of shott at least which are to be provided by every man for his family[.]"{EN-1252}

But "masters of every family" and "every man" in the community were required "to beare armes", and their arms were required to be "fixed and serviceable", *for precisely what purposes*?

To this question, Virginians always knew the answer: Firearms in every man's place of abode would conduce, not only to each individual's, or to each isolated family's, but also and especially to *the entire community's*, self-defense. Throughout the *pre*-constitutional era, Virginia's Militiamen were thoroughly armed in order, first and foremost, to provide the most extensive possible *military and police protection* to the community. And the Constitution still embodies this central purpose of each of "the Militia of the several States" in the power it delegates to Congress "[t]o provide for calling forth the Militia to execute the Laws of the

Union, suppress Insurrections and repel Invasions"[779]—the first being almost exclusively a police function, the third being primarily a military function, and the second exhibiting the characteristics of the first, the third, or both, depending upon circumstances.

Although an armed establishment, Virginia's Militia was not a "standing army", because its members were "*citizen*-soldiers"—citizens, first and foremost; soldiers, second. Their ultimate loyalty was always to the people, because they *were* the people. This, in stark contrast to the members of a "standing army" who—as soldiers, first and foremost; citizens, perhaps not at all—too often throughout history have centered their loyalties on some "leader", or on the army itself, because they viewed themselves as separate from, independent of, and somehow superior, and therefore possibly antagonistic, to the people.

Moreover, although her statutes commanded almost every able-bodied adult free male to be armed, Virginia was neither "a garrison state", nor "a *para*-military police state", but instead what Article 13 of her own Declaration of Rights in 1776 called "a free state"—and "a free state" precisely because she always maintained "a well regulated militia, composed of the body of the people, trained to arms". In every American Colony and independent State, Militiamen were never regular "Troops", a distinction upon which the Constitution still insists.[780] Which is why Virginia contrasted "a well regulated militia, composed of the body of the people, trained to arms" at all times, with "standing armies, in time of peace". Not because the two establishments performed radically different functions—for, at base, both were agents of physical coercion, often employed in the same circumstances. But instead because their employment resulted in radically different political consequences—the Militia being then (as well as now) what Article 13 described as "the proper, natural, and safe defense of a free state"; whereas "standing armies" were then (and still are) "dangerous to liberty".[781]

Nonetheless, although primarily citizens, Virginia's Militiamen "trained to arms" did function as "soldiers" part of the time. Which is why her statutes often denoted them as such:

> • [1676] "[E]ach county * * * is required to furnish its perticular soldiers * * * with good and well fixt guns and other armes[.]"{EN-1253}
>
> • [1684] "FOR the encouragement of the inhabitants * * * of Virginia, to provide themselves with arms and ammunition, for the defence of this * * * country, and that they may appear well and

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[779] U.S. Const. art. I, § 8, cl. 15.

[780] *Compare and contrast* U.S. Const. art. I, § 10, cl. 3 *with* art. I, § 8, cls. 15 and 16; art. II, § 2, cl. 1; *and* amend. II.

[781] *See post,* Chapters 47 through 49.

compleatly furnished when commanded to musters and other * * * service * * * .

" * * * [E]very trooper [in the Militia] * * * shall furnish and supply himself with * * * all arms * * * fitt and compleat for a trooper, and * * * every foot soldier, shall furnish and supply himselfe, with a * * * musquet * * * fitt for a soldier, * * * and shall continually keep their armes well fixt, cleane and fitt for * * * service."{EN-1254}

• [1705] "That every ffoot soldier [in the Militia] be provided with a firelock, muskett or fusee well fixed * * * , and that every soldier belonging to the horse be provided with * * * a case of good pistolls well fixed * * * and * * * have at his usuall place of abode a well fixed carabine[.]"{EN-1255}

• [1723] "[E]very soldier [in the Militia] belonging to the horse, be provided with * * * a case of pistols, * * * and shall keep at his place of abode, a well fixed carbine * * * . And * * * every foot soldier be provided with a firelock, musquet, or fuzee, well fixed[.]"{EN-1256}

• [1738] "Every horse-man shall be furnished with a * * * carbine or fuzee, * * * a case of pistols * * * and every footman shall be furnished with a firelock, musket, or fuzee, well fixed, a bayonet fitted to the same [.]

* * * * *

" * * * That eighteen months time be * * * allowed to each soldier to furnish and provide himself with arms and ammunition, * * * so as every soldier, during the said eighteen months, do appear at all musters, with such arms as he is already furnished with."{EN-1257}

• [1755] "[E]very person * * * inlisted * * * shall be armed and accoutred * * * ; every horseman shall be furnished with a * * * carbine * * * , a case of pistols * * * : And every footman shall be furnished with a firelock well fixed, a bayonet fitted to the same * * * .

* * * * *

" * * * [I]t shall * * * be lawful, for the * * * chief officer of the militia in the county, to order all soldiers listed therein, to go armed to their respective parish churches.

* * * * *

" * * * That twelve months time be * * * allowed to each soldier, to furnish and provide himself with arms and ammunition * * * so as such soldier do appear at all musters, during the said twelve months, with such arms as he hath, and is already furnished with[.]"{EN-1258}

• [1757, 1759, 1762, 1766, and 1771] "Every soldier [in the Militia] shall be furnished with a firelock well fixed, a bayonet fitted to the same[.]

* * * * *

> " * * * [I]t shall * * * be lawful for the * * * chief officer of the militia in the county, to order all soldiers inlisted therein to go armed to their respective parish churches.
>
> * * * * *
>
> " * * * [T]welve months shall be * * * allowed to each soldier, * * * to furnish and provide himself with arms and ammunition * * * , so that such soldier do appear at all musters during the said twelve months, with such arms as he hath and is already furnished with[.]"{EN-1259}
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> • [1777] "Every * * * soldier [in the Militia] shall appear at his * * * muster-field * * * armed * * * with a rifle * * * or a good firelock and bayonet[.] * * *
>
> " * * * Every * * * soldier shall be allowed six months after his * * * enrollment to provide such arms or ammunition as he had not at the time."{EN-1260}
>
> • [1784 and 1785] "Every * * * soldier [in the Militia] shall appear at his respective muster-field * * * armed * * * with a good clean musket * * * ; provided, that the militia of [certain] counties * * * may have good rifles[.]"{EN-1261}

All of these statutes drew the same straight line, in terms of "good and well fixt guns" *for "soldiers"* (1676)—a "musquet * * * *fitt for a soldier*" (1684)—and "a firelock, muskett or fusee well fixed" or "a case of good pistolls well fixed * * * and * * a well fixed carabine" (1705); "a case of pistols * * * and * * * a well fixed carbine", or "a firelock, musquet, or fuzee, well fixed" (1723); "a firelock, musket, or fuzee, well fixed" (1738); "a firelock well fixed" (1755, and 1757 through 1771); "a rifle * * * or a good firelock" (1777); and "a good clean musket" or "good rifles" (1784 and 1785) *for every "soldier" or "trooper"*. In this context, "well fixt" and "well fixed" meant properly made and maintained for a particular purpose.[782] From the very beginning, that purpose was *military service*—as when "every trooper" and "every foot soldier" were commanded "continually [to] keep their armes well fixt, cleane and fitt *for* * * * *service*"; and the ultimate end for which "every trooper" and "every foot soldier" was to be so armed was "*the defence of this* * * * *country*" (1684).

Virginia's Militiamen were not to be just parade-ground soldiers, or least of all ornamental "honor guards" for governors or other public officials, mustered merely to march in period costume with flags and dummy firearms at patriotic ceremonies. To the contrary: Throughout the *pre-*constitutional period, the emphasis was always on the Militia's preparation for actual combat:

> • [1672 and 1674] "[A]s against all tymes of danger it ought to be the care of all men to provide that *their armes and habiliments for war*, be alwayes kept fixed and fitt for service[.]"{EN-1262}

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[782] *See ante*, at 408.

> • [1740] "WHEREAS, during the present war, it will be necessary, that the militia * * * should be kept under stricter discipline, more frequently trained and exercised, and better armed; *the better to enable them to contend with regular troops*[.]"{EN-1263}

Thus, in 1775, a statute that provided for raising both regular soldiers and Militiamen established the same requirements for each group with respect to their arms:

> [T]he soldiers to be enlisted shall, at the expense of the publick, be furnished each with one good musket and bayonet, cartouch box, or pouch * * * ; and, until such musket can be provided, that they shall bring with each of them the best gun, of any sort, that can be procured; and that such as are to act as rifle-men bring with them each one good rifle, to be approved by their captain, for the use of which he shall be allowed at the rate of twenty shillings a year[.]
>
> * * * * *
>
> * * * [E]ach minute-man so to be enlisted shall be furnished with proper arms at the publick expense, and until such can be provided shall bring into service the best gun that he can procure; and for every good rifle, to be approved by the respective captains, there shall be allowed to the owner making use of the same at the rate of twenty shillings a year[.]{EN-1264}

Obviously, this statute itself implicitly defined "proper arms" for a Militiaman as the "one good musket and bayonet, cartouch box, or pouch" to be furnished to a regular soldier, because: (i) no other definition appeared in the enactment; and (ii) in lieu of such arms, both a Militiaman and a soldier could have substituted "the best gun[s]" they could have "procure[d]", particularly "good rifle[s]".

So, the conclusions are inescapable that: (i) Virginia considered her Militiamen to be *real* "soldiers". (ii) Their "service" was to a great degree *military* service, no different in principle and sometimes in practice from the service of regular troops. And therefore, (iii) ideally *Militiamen were to be equipped at all times* ***with firearms specifically suitable for real soldiers in actual military service***.

B. Statutory standards for firearms. The foregoing would be true even had Virginia's statutes commanded no more than that "soldiers" in her Militia be equipped simply with firearms and ammunition "fitt", "proper", "good", or "well fixt" for their Militia service. But the statutes went beyond such generalities, and specified the types, qualities, and quantities of arms Militiamen were to acquire, keep, and bear.

1. At first, as in 1643, Virginia's legislators presumed that men would know what was required without being told: "[M]asters of every family shall bring with

them to church on Sondays one fixed and serviceable gun with sufficient powder and shott[.]"{EN-1265} Then the lawmakers set out, with increasing exactitude, what Militiamen should possess at all times:

> • [1659 and 1662] "That every man able to beare armes have in his house a fixt gunn, two pounds of powder and eight pound of shott at least[.]"{EN-1266}
>
> • [1676] "[E]ach county * * * is required to furnish its perticular soldiers with two pounds of powder and six pounds of shott a man with good and well fixt guns[.]"{EN-1267}
>
> • [1684] "[E]very trooper of the respective counties * * * shall furnish and supply himself with * * * all arms * * * , fitt and compleat for a trooper, and * * * every foot soldier, shall furnish and supply himselfe, with a * * * musquet and other furniture fitt for a soldier, and that each trooper and foot souldier, be provided with two pounds of powder, and eight pounds of shott[.]"{EN-1268}
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> • [1705] "[E]very ffoot soldier be provided with a firelock, muskett or fusee well fixed, a good sword and cartouch box, and six charges of powder * * * , and that besides those each foot soldier have at his place of abode two pounds of powder and eight pounds of shott * * * , and * * * every soldier belonging to the horse be provided with * * * a case of good pistolls well fixed, sword and double cartouch box, and twelve charges of powder * * * , and that besides those each soldier belonging to the horse have at his usuall place of abode a well fixed carabine, * * * two pounds of powder and eight pounds of shott[.]"{EN-1269}
>
> • [1723] "That every soldier belonging to the horse, be provided with * * * a case of pistols, cutting sword, or cutlace, and double cartouch box, and six charges of powder, * * * and shall keep at his place of abode, a well fixed carbine * * * , one pound of powder, and four pounds of shot * * * . And that every foot soldier be provided with a firelock, musquet, or fuzee, well fixed, and bayonet fitted to such musquet or fuzee, or a good cutting sword or cutlace, a cartouch box, and three charges of powder, * * * and shall keep at his place of abode, one pound of powder, and four pounds of shot[.]"{EN-1270}
>
> • [1738] "Every horse-man shall be furnished with a * * * carbine or fuzee, * * * a case of pistols, cutting sword or cutlass, double cartouch-box, and six charges of powder, * * * and shall keep at his place of abode, one pound of powder, and four pounds of ball * * * . And every footman shall be furnished with a firelock, musket, or fuzee, well fixed, a bayonet fitted to the same, or a cutting sword or cutlass, a cartouch-box, and three charges of powder, * * * and shall also keep at his house, one pound of powder, and four pounds of ball[.]"{EN-1271}

• [1755] "[E]very horseman shall be furnished with a * * * carbine * * * , a case of pistols, cutting sword, double cartouch box, and six charges of powder, * * * and shall keep at his place of abode, one pound of powder and four pounds of ball * * * : And every footman shall be furnished with a firelock well fixed, a bayonet fitted to the same, a cutting sword, a double cartouch box, and three charges of powder, * * * and shall also keep at his place of abode, one pound of powder and four pounds of ball[.]"{EN-1272}

• [1757, 1759, 1762, 1766, and 1771] "Every soldier shall be furnished with a firelock well fixed, a bayonet fitted to the same, a double cartouch-box, and three charges of powder, * * * and shall also keep at his place of abode one pound of powder and four pounds of ball[.]"{EN-1273}

• [1775] "[E]very militia man * * * shall furnish himself with a good rifle, if to be had, or otherwise with a * * * common firelock, bayonet, pouch, or cartouch box, three charges of powder and ball, * * * and shall constantly keep by him one pound of powder and four pounds of ball[.]"{EN-1274}

• [1777] "Every * * * soldier [in the Militia] shall appear * * * armed * * * with a rifle and tomahawk, or good firelock and bayonet, with a pouch and horn, or a cartouch or cartridge box, and with three charges of powder and ball; and * * * shall constantly keep one pound of powder and four pounds of ball[.]"{EN-1275}

• [1784 and 1785] "Every * * * soldier [in the Militia] shall appear * * * armed, equipped, and accoutred * * * with a good clean musket, carrying an ounce ball, and three feet eight inches long in the barrel, with a good bayonet and iron ramrod well fitted thereto, a cartridge box properly made, to contain and secure twenty cartridges fitted to his musket * * * ; and moreover, * * * shall have * * * one pound of good powder and four pounds of lead; including twenty blind cartridges; * * * provided, that the militia of the counties westward of the Blue Ridge, and the counties below adjoining thereto, shall not be obliged to be armed with muskets, but may have good rifles with proper accoutrements in lieu thereof."{EN-1276}

2. Overall, these statutes made clear that, as least ideally, Virginia's Militiamen were to acquire, keep, and bear firearms, ammunition, and accoutrements suitable for military duty:

a. With respect to Militia cavalrymen ("troopers" or "horsemen"), the statutes from 1705 through 1755 delineated sets of arms peculiar to that service: namely, "a case of [that is, two] pistols", a "carbine", a "double cartouche box", several "charges of powder", and a "cutting sword". Neither ordinary hunting nor any sport in which firearms might have been involved in those days called for this particular mix of equipment, or even would have found it useful.

b. The statutory requirements for Militia infantrymen ("soldiers" or "footmen") were directed at military service, too. The simple specification of a "musquet * * * *fitt for a soldier*" in 1684 presumed that Virginians knew what such a standard entailed. In any event, by definition, a "musquet * * * *fitt for a soldier*" was not a firearm usable solely for hunting or other sport, or likely to be one designed primarily for those purposes. In 1705, the statute defined how a firearm would be "fitt for a soldier": namely, a "firelock, muskett or fusee well fixed, [and] a good sword". The "good sword" made up for the absence of a bayonet, for which many "firelock[s], muskett[s] or fusee[s]" readily available to common Virginians at that time may not have been fitted. But the requirement of "a good sword" indicated that the "firelock, muskett or fusee" was not intended to be used simply for hunting or sport. The statutes of 1723 and 1738 modified the Militiamen's table of equipment to include "a firelock, musquet, or fuzee, well fixed, and bayonet fitted to such musquet or fuzee, *or* a good cutting sword or cutlace". By then, the standard was to be a firearm originally designed or properly modified to take a bayonet, with a "cutting sword or cutlace" as an allowable substitute if such a firearm was unavailable. And in 1755, the requirement was "a firelock well fixed, bayonet fitted to the same, a cutting sword"—indicating either that all Militiamen were to appear with both bayonets and swords, or perhaps that swords could be substituted for bayonets where the latter were not to be had. In any event, throughout this period the ideal was the purely military combination of a musket with a bayonet properly fitted, with a sword serving as a substitute for or supplement to a bayonet. Then, from 1757 through 1771, the statutes mandated "a firelock well fixed, a bayonet fitted to the same", with no mention of swords. Obviously, during that period the General Assembly presumed that most Militiamen could easily acquire such a "firelock" with "bayonet fitted".

So, from the late 1600s through the early 1770s, the firearms Militiamen were supposed to acquire and bring to service in the field were either military-grade muskets already fitted with bayonets; or muskets or fusees made for the civilian market but capable of taking bayonets;[783] or firelocks of one sort or another originally designed for civilian use which could have been (and were) put to military purposes when swords made up for a lack of bayonets—but, in every instance, firearms somehow suitable for employment by soldiers.

In the 1770s and 1780s, Virginia's Militia statutes began mandating or allowing the use of rifles in the places of smoothbored muskets—but for the selfsame military purpose. The statute of 1775 called for "a good rifle, if to be had, or otherwise * * * a * * * common firelock, bayonet". And the statute of 1777 specified "a rifle and tomahawk, or good firelock and bayonet". Thus, a rifle was to

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[783] *See, e.g.*, B. Ahearn, *Flintlock Muskets in the American Revolution, ante* note 464, at 103.

mount a bayonet, if one were fitted; if not, a tomahawk was to fulfill the bayonet's function in combat at close quarters. Moreover, a rifle was preferred over "a common firelock" even when the latter carried a bayonet. In 1784 and 1785, the statutes required each Militiaman to appear with "a good clean musket, carrying an ounce ball, and three feet eight inches long in the barrel, with a good bayonet and iron ramrod well fitted thereto"; but "the militia of the counties westward of the Blue Ridge, and the counties below adjoining thereto, shall not be obliged to be armed with muskets, but may have good rifles". Obviously, the General Assembly believed that men from Virginia's back country, well practiced with their own "good rifles", and even without bayonets, could perform military duty as effectively as men with muskets and bayonets. (Presumably, these statutes did not explicitly require riflemen to supply tomahawks, swords, or other edged weapons in lieu of bayonets—but instructed them simply to bring "proper accoutrements"—because legislators understood that men from the hinterlands experienced with "good rifles" would have known what to do without prompting.)

Besides their firearms, Militiamen's accoutrements were designed for military, not sporting, purposes. Every statute throughout the period 1705 through 1785 required each man to supply: (i) a "cartouche box" or "cartridge box" to hold semi-fixed ammunition of gunpowder and lead ball, ready for loading; (ii) several "charges of powder" for quick use; or (iii) "a pouch" (to hold lead balls) "and horn" (to hold gunpowder) for riflemen. The combination of a "pouch and horn" would normally have been used by civilian riflemen, too, for hunting and sport. But a "cartouche box" was primarily, if not exclusively, an accoutrement designed for soldiers, who in that era usually depended for success in set-piece battles upon their ability to produce a high rate of fire.

c. All of Virginia's statutes from about 1660 through the *mid-*1780s commanded her Militiamen to maintain in their possession at all times amounts of gunpowder and lead shot or ball well in excess of what a typical hunter or sportsman would have been likely to have kept always ready to hand. From 1723 through 1785, for example, the requirement was "one pound of powder, and four pounds of shot", "ball", or "lead". (And even larger amounts had been required in earlier years.)

Inasmuch as the statutes of 1784 and 1785 called for "a good clean musket, *carrying an ounce ball*" for those Militiamen who armed themselves with muskets, the "four pounds of ball" those two statutes required would have provided 64 lead balls, each weighing 437.5 grains.[784] The "one pound of good powder" for which the statutes called would have produced 64 charges (main and priming), containing

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[784] One avoirdupois pound contains 16 ounces, or 7,000 grains. So "an ounce ball" contains: 7,000 ***divided by*** 16 ***equals*** 437.5 grains of lead.

109.4 grains each.[785] Because firearms using black powder as a propellant can be loaded to various levels of power, depending on their intended uses, comparisons are always somewhat speculative. Nonetheless, in 1759, the standard lead ball for a British musket measured 0.693 inches in diameter and weighed 493.0 grains; and the standard charge was 165.0 grains of powder, reduced to 109.4 grains for the lighter load of an "exercise" cartridge.[786] Presumably, the lighter American ball, propelled by the same charge of powder used in a British "exercise" load, would have produced a round more powerful in terms of kinetic energy. Similarly, the British Pattern 1776 Rifle, with a 0.615 inch bore, took a regulation charge of 110.0 grains of powder; but this was likely reduced in the field to 82.5 grains, which apparently produced a more accurate load.[787] Because its lead ball with an approximate diameter of 0.615 inches weighed about 344.6 grains, the reduced British rifle load probably approximated the American musket load.[788]

In addition to the sixty-four rounds that could have been made up from "one pound of good powder and four pounds of lead", Virginia's Militia statutes of 1784 and 1785 also required each Militiaman to possess "a cartridge box properly made, to contain and secure twenty cartridges fitted to his musket". Which means that each man possessed some eighty-four rounds available on or about his person before any fighting had started and he could have expected to receive more ammunition in the field. This was more than twice the thirty-six rounds carried by each of the British soldiers who marched with Colonel Smith and Major Pitcairn to Lexington and Concord on 19 April 1775.[789] Surely, considerations of military necessity alone controlled this matter, because such a large initial supply of ammunition far exceeded what a typical hunter or sportsman of that day would likely have carried with him (or perhaps even maintained in his home).

Thus, Virginia's *pre*-constitutional Militia statutes establish that her Militiamen's firearms were either military-grade arms in their original design, or else dual-purpose or civilian arms Militiamen could have easily put to or modified for military use. Moreover, the statutes plainly evidenced Virginia's intent to secure and improve the military effectiveness of Militiamen's arms whenever possible—first, by

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[785] One pound ***equals*** 7,000 grains, ***and divided by*** 64 ***equals*** 109.4 grains.

[786] De Witt Bailey, *Small Arms of the British Forces in America, ante,* note 428, at 247.

[787] De Witt Bailey, *British Military Flintlock Rifles, ante* note 471, at 34.

[788] If a lead ball with a diameter of 0.693 inches weighed 493.0 grains, one with a diameter of 0.615 inches weighed: $(0.615)^3$ ***divided by*** $(0.693)^3$ ***times*** 493 ***equals*** 344.6 grains. Assuming a direct proportion between the weight of the powder charge and the weight of the ball, a charge of 109.4 grains of powder behind a ball of 437.5 grains of lead should have approximated a charge of 86.2 grains of powder behind a ball of 344.6 grains of lead: 344.6 ***divided by*** 437.5 ***times*** 109.4 ***equals*** 86.2. The British load was 82.5, rather than 86.2, grains, a negligible difference.

[789] *See Letters on the American Revolution 1774-1776*, Margaret W. Wheeler, Editor (Port Washington, New York: Kennikat Press, Inc., 1968), at 197.

phasing in the use of bayonets as required equipment (from 1723 through 1757); second, by allowing or even requiring the use of rifles (from 1775 through 1785); and third, by mandating accoutrements with almost exclusively military purposes (from 1705 through 1785). In addition, the statutes throughout the 1600s and 1700s demonstrate a consistent concern for requiring, in each individual Militiaman's possession, amounts of ammunition economically justifiable only for military service.

C. "Substitute standards" allowable. If, during the *pre-*constitutional era, firearms and ammunition designed and usable *solely* for "hunting", other "shooting sports", and "personal self-defense"—and to *no* degree suitable for "military" or "police" service—had been readily available to, let alone in common usage among, Virginians and other Americans, Virginia, along with the rest of the Colonies and then independent States, would not have allowed her Militiamen to bring such firearms and ammunition to the performance of their duties. Of course, a class of firearms and ammunition not to *any* degree suitable for *any* sort of Militia service did not exist then, any more than it exists now. Moreover, although the ideal at which Virginia's Militia statutes aimed throughout the *pre-*constitutional period was for her "soldiers" to be armed with "well fixed" muskets, usually fitted with bayonets (bayonet fighting being the norm amongst the regular armed forces of that day), or "good rifles", the statutes themselves recognized that this ideal probably could not be achieved in practice, and therefore foresightfully provided for that very contingency by allowing Militiamen to equip themselves with what today might be called "substitute standards":

1. As early as 1684, the law clearly distinguished between ideality and reality:

> FOR the encouragement of the inhabitants * * * of Virginia, to provide themselves with arms and ammunition * * * and that they may appear well and compleatly furnished when commanded to musters and other * * * service * * * That *all such swords, musketts, pistolls, carbines, guns, and other armes and furniture, as the inhabitants of this country are already provided, or shall provide and furnish themselves with*, for their necessary use and service, shall * * * be free and exempted from being imprest or * * * lyable to be taken by any distresse, seizure, attachment or execution * * * .
>
> *And* * * * every trooper * * * shall furnish and supply himself with * * * all arms * * * fitt and compleat for a trooper, and * * * every foot soldier, shall furnish and supply himselfe, with a * * * musquet fitt for a soldier[.]"{EN-1277}

The second paragraph stated what was desirable—that every man should possess "all arms * * * fitt and compleat for a trooper" or a "musquet fitt for a soldier"—but

the first paragraph listed as acceptable, and guaranteed Virginians' possession of, "*all* such * * * musketts, pistolls, carbines, guns * * * *as the inhabitants of this country are already provided, or shall provide and furnish themselves with*". That is, *whatever* firearms Virginians "provide[d] and furnish[ed] themselves with" would suffice as "fitt * * * for a trooper" or "fitt for a soldier" were nothing better available.

2. In 1705, the Militia statute mandated simply "[t]hat every ffoot soldier be provided with a firelock, muskett or fusee well fixed" and every cavalryman with "a case of good pistols" and "a well fixed carabine", but explicitly allowed for no substitutions.{EN-1278} Yet, in November of that same year, the Council of Colonial Virginia complained that

> the Arms and Ammunition sent in by her Majesty for y^e^ Service of the Militia of this Country lyes now at James City and by y^e^ slow & inconsiderable sale that hath hitherto been made thereof it is very improbable that any quantity can be expected to be sold as was intended
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> * * * * *
>
> and tho the said arms are very necessary and much wanted for the defence of the Country, yet the poverty of the Inhabitants and their inability to procure the price thereof in money hath hitherto obstructed y^e^ said sale, to which the high price of y^e^ said Arms (being more than y^e^ Merchants generally demand for arms of the like kind when purchased for tobacco) hath not a little contributed[.]{EN-1279}

Apparently, then, Militiamen who could pay in tobacco, but not in money, bought their arms from private "Merchants", rather than from the government. But if their low prices were any indication, although the arms the "Merchants" sold might have been of "like kind", they were not necessarily as good as, or even uniform in type or quality in comparison to, "the Arms and Ammunition sent in by her Majesty for y^e^ Service of the Militia"—thus leading to a situation not unlike the one the statute of 1684 explicitly condoned. (Of course, it may also have been the case that many Virginians preferred lighter and handier firearms designed primarily for civilians to the heavier types produced specifically for military use.[790]) A few months later, the Councillors opined "that the late act [of 1705] for settling the militia having strictly enjoyned all persons to provide armes on a certain penalty, the due execution of that Law will oblige people to be more diligent in purchasing"{EN-1280}—but forgot that even "a certain penalty" would not necessarily result in cash-strapped Virginians' buying the government's higher-priced arms when cheaper goods were still available from "Merchants". Indeed, just a few years later, the Council finally conceded that "by reason of the extreem poverty of the Inhabitants" the government's arms "cannot be sold", and therefore ordered Militia officers "to

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[790] *See* H. Gill, Jr., *The Gunsmith in Colonial Virginia*. *ante* note 731, at 13.

deliver the[arms] out to such persons serveing in the Militia as they shall judge responsible takeing their bond for keeping their said arms in good order and to return the same or the value thereof when thereunto required".{EN-1281} Self-evidently, these "responsible" recipients of arms did not constitute the entirety, or perhaps even the majority, of Militiamen needful of firearms—leaving the rest to provide themselves from whatever mix of arms private "Merchants" could supply.

3. In 1723 and 1738, the Militia statutes allowed "[t]hat eighteen months time be given and allowed to each soldier, to furnish and provide himself with arms and ammunition, according to this act * * * —So as every soldier, during the said eighteen months, do appear at musters *with such arms as he is already furnished with*".{EN-1282} (The statute of 1705 also "allowed" "eighteen months * * * to each trooper and ffoot soldier * * * to furnish and provide himself with arms and ammunition according to [law]", but did not explicitly require that in the interim he should employ whatever other arms he happened to possess.{EN-1283})

4. In 1755 through 1771, the Militia statutes allowed

> [t]hat twelve months time be given and allowed to each soldier, to furnish and provide himself with arms and amunition, according to the directions of this act, * * * , so as such soldier do appear at all musters, during the said twelve months, *with such arms as he hath, and is already furnished with*: And if any soldier shall appear at any muster not armed and accoutred, * * * it shall and may be lawful, for the captain * * * to examine such soldier upon oath, whether he hath any, and *what arms and ammunition he really hath of his own property*, and if on such examination it shall appear, that such soldier hath *any arms or ammunition of his own property*, and hath not brought the same, or so much thereof, as this act requires, to such muster, he shall be liable to * * * penalties[.]{EN-1284}

5. In 1775, a statute for raising regular troops, Minutemen, and other Militiamen provided that

> the soldiers to be enlisted shall, at the expense of the publick, be furnished each with one good musket and bayonet, cartouch box, or pouch * * * ; *and, until such musket can be provided, that they shall bring with them the best gun, of any sort, that can be procured; and that such as are to act as rifle-men bring with them each one good rifle, to be approved by their captain*, for the use of which he shall be allowed at the rate of twenty shillings a year[.]
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> * * * * *
>
> * * * [E]ach minute-man * * * to be enlisted shall be furnished with proper arms at the publick expense, *and until such can be provided shall bring into service the best gun that he can procure; and for every good rifle, to be approved by the respective captains*, there shall be allowed to the owner making use of the same at the rate of twenty shillings a year[.]

* * * * *

* * * [I]n the present time of danger, * * * the remainder of the militia not included in the minute-men should be armed, accoutred, trained, and disciplined, *in the best manner the circumstances of the country will admit of* [.]

* * * * *

* * * [*E*]*very militia man* * * * *shall furnish himself with a good rifle, if to be had, or otherwise with a* * * * *common firelock* [.]{EN-1285}

In that same year, another statute for raising troops and Minutemen mandated that

> the soldiers to be enlisted * * * shall, at the expense of the publick, be furnished each with one good musket and bayonet, cartouch box, or pouch * * * ; *and until such musket can be provided that they bring with them the best gun of any other sort that they can procure*; * * * *and that such as are to act as riflemen bring with them one good rifle and tomahawk, each to be approved by their captain*, for the use of which guns they shall be allowed as follows, to wit: For the smooth-bores, or muskets, the rate of 20s and for the rifles * * * the same rate by the year[.]
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> * * * * *
>
> * * * [*E*]*ach minute-man who shall furnish himself with a good musket, or other gun, to be approved of by his captain*, shall be allowed by the publick ten shillings per annum, as a consideration for the use thereof[.]{EN-1286}

6. Even as late as 1784 and 1785, Virginia's Militia statutes recognized that the ideal state of armament for Militiamen could not always be met:

> Every * * * commanding officer of a company shall, within ten days after every regimental and general muster, make up * * * a return of his company, including all arms, ammunition, and accoutrements, * * * *distinguishing effective and good from non-effective and bad*[.]
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> * * * * *
>
> * * * [T]welve months * * * shall be allowed for providing the arms and accoutrements herein directed;[791] but in the mean time, *the militia shall appear at musters with, and keep by them the best arms and accoutrements they can get*.{EN-1287}

Thus, Virginia's Militia statutes evidenced the consensus in *pre*-constitutional times that what might appear at first blush to be the inhabitants' "non-military" firearms could and were to be put to Militia purposes whenever the

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[791] The Act of 1785 allowed for "two years" of grace.

need arose. Or, stated as a general principle, *in those days essentially* ***any*** *working firearm could be a "Militia-grade" firearm in Virginia, depending upon the circumstances*. The statutes established very broad standards for acceptability of firearms, because the goal was first and foremost to arm Militiamen—if necessary with whatever happened to be available—and only thereafter to standardize their arms as to type (particularly with respect to caliber and the capability to mount bayonets); then to standardize their arms as to quality; and finally to take advantage of innovations in technology (in particular, the superiority of rifles to smoothbored muskets).

The simple rule upon which the entire sequence rested—*availability equals acceptability*—was the only one the statutes always employed, because it was the only one Virginia's legislators knew always *had* to be met, inasmuch as something *un*available could hardly be acceptable; and the only one they knew almost always *could* be met, inasmuch as what was usually available was also usually at least marginally serviceable. The verbal formulae "all such * * * musketts, pistolls, carbines, guns * * * as the inhabitants of this country are already provided, or shall provide and furnish themselves with" (1684), "such arms as he is already furnished with" (1723 and 1738), "what arms and ammunition he really hath of his own property" (1755 through 1771), "the best gun, of any sort, that can be procured" (1775), "armed * * * in the best manner the circumstances of the country will admit of" (1775), "a good rifle, if to be had" (1775), "the best gun of any * * * sort that they can procure" (1775), and "the best arms * * * they can get" (1784 and 1785) were plainly all-inclusive. Moreover, the core of the statutory requirement did not change for an entire century—from 1684 to 1785—except insofar as in 1775 through 1785, if Militiamen had a practical choice, they were enjoined to obtain "the *best* gun * * * [*t*]*he*[*y*] *can procure*" and "the *best* arms * * * *they can get*" and not to appear with just anything they happened to possess at the time. Self-evidently, Virginians did not believe that many, if any, firearms were utterly unusable for Militia purposes. Rather, they knew that, although some firearms might be the best of all, and some might be better than others, something was invariably better than nothing; and it was everyone's duty to provide himself with *something*.

Nonetheless, if essentially any firearm could in principle have sufficed for Militia service even though it might not have been the best firearm among all types, or even if better firearms in its particular class were known to exist, it had to be "good" in the sense that it *actually worked*. So the later Militia statutes explicitly imposed the additional requirement that the firearms the men themselves supplied—whether rifles, muskets, "or other gun[s]"—needed "to be approved by their captain[s]" (1775), who were to "distinguish[ ] effective and good [firearms] from non-effective and bad" (1784 and 1785). The statutes did not specify "to be approved" or to be "effective and good" *for what*. The implicit practical standard, however, had to be *usability* ***at all*** *for Militia service*. Militia Captains could not have afforded to be arbitrary or punctilious in grading their men's firearms for fitness,

because their ultimate duty was to see the men armed with *something* at least marginally suitable for the task at hand and in proper working order. They had to approve what was actually available, if it were mechanically capable of functioning, because the alternative was likely for a Militiamen to bring no firearm at all into the field.

D. Superior firearms adopted when possible. If Militiamen in *pre-*constitutional Virginia were sometimes "armed * * * in the best manner the circumstances of the country will admit of" with only "the best gun[s] of any * * * sort that they c[ould] procure" (1775), sometimes their firearms were actually superior to, or at least in advance of the times in comparison with, the standard military firearms of that era. The American flintlock rifled musket (such as the so-called "Pennsylvania rifle") provides the quintessential example of this technological and tactical superiority.

In those days, for a Colonial or State Militia to be as well armed, man for man, as typical infantry in the British Empire's regular Army was not difficult in principle—not only because many good flintlocks, including the very same types the British or French Armies employed, were readily available to Militiamen,[792] but also because many Militiamen appeared in the field armed with their own rifles. These were not only the thoroughly tested products of decades of development under field conditions (albeit largely in civilian uses),[793] but also were firearms their owners knew how to employ to the best effect under battlefield conditions[794]—as at Saratoga against General Burgoyne,[795] and in the Southern campaign against General Lord Cornwallis's protégés, Major Patrick Ferguson at King's Mountain[796] and Lieutenant Colonel Banastre Tarleton at The Cowpens.[797]

For example, in 1775 Virginia enacted two statutes for raising regular troops, Minutemen, and Militia, which provided:

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[792] *See generally* Bill Ahearn, *Flintlock Muskets in the American Revolution and Other Colonial Wars* (Lincoln, Rhode Island: Andrew Mowbray Incorporated, Publishers, 2005).

[793] *See, e.g.,* Edwin N. Gewirz, "Long Rifles in the Valley of Virginia", *in Longarms in America, ante* note 468, Volume 1, at 183; Crosby Milliman, "Evolution of the Pennsylvania Rifle", *in id.* at 87; Harmon C. Leonard, "The Kentucky Rifle", *in id.* at 97.

[794] On Americans' employment of rifles in combat, *see generally* H. Peterson, *Arms and Armor in Colonial America, ante* note 465, at 192-203. That under the peculiar conditions of the times special tactics sometimes needed to be employed in order to gain the maximum advantage from rifles did not detract from their usefulness. *See* M. Stephenson, *Patriot Battles, ante* note 464, at 129-135.

[795] *See, e.g.,* Don Higginbotham, *Daniel Morgan, Revolutionary Rifleman* (Chapel Hill, North Carolina: University of North Carolina Press, 1961), Chapter V. *See also, e.g.,* John F. Luzader, *Saratoga: A Military History of the Decisive Campaign of the American Revolution* (New York, New York: Savas Beatie LLC, 2008), at 187, 243-244, 260.

[796] *E.g.,* Hank Messick, *King's Mountain: The Epic of the Blue Ridge "Mountain Men" in the American Revolution* (Boston, Massachusetts: Little, Brown & Co., 1976), especially at 31-34, 98-99, 131-133.

[797] *See, e.g.,* D. Higginbotham, *Daniel Morgan, ante* note 795, Chapters VIII and IX.

> [T]hat such as are to act as rifle-men bring with them each one good rifle, to be approved by their captain, for the use of which he shall be allowed at the rate of twenty shillings a year * * * .
>
> *And* * * * That the companies to be raised in * * * [certain] districts * * * shall consist of expert rifle-men; and shall be * * * allotted two to each regiment, to be employed as light infantry.{EN-1288}

> [T]hat such as are to act as riflemen bring with them one good rifle and tomahawk, each to be approved by their captain, for the use of which guns they shall be allowed 20[shillings] * * * by the year[.]
>
> * * * * *
>
> *And* * * * That, over and above the rifle companies belonging to the German regiment, there be raised seventeen companies of expert riflemen, in * * * [various] counties * * * which shall be allotted * * * to the respective regiments[.]{EN-1289}

If any one of these "expert rifle-men" had earlier served in an established Militia Company, he may have appeared for duty with his rifle under the previous statutory allowance "with such arms as he hath, and is already furnished with",{EN-1290} because rifles were not then even standard, let alone mandatory, Militia equipment. And if he had become truly "expert" in the use of his rifle, it was not likely through any regular Militia training, which was of limited duration and of necessity focused on drilling in rigid formations tailored to the capabilities (as well as the limitations) of the smoothbored flintlocks most Militiamen then carried. On the other hand, some Militiamen west of the Blue Ridge Mountains must have successfully incorporated the rifle, and its different tactical employment, into their training well before 1775, or legislators in that year could not have provided with any confidence for the formation and deployment of Militia "companies * * * of expert rifle-men". In any event, Virginia's recruitment of native "expert rifle-men" in 1775 and thereafter amounted to an innovation and improvement in personnel, equipment, and tactics compared to whom and what the Militia had theretofore employed, and was even then employing.

Interestingly enough, though, Virginia's enlistment of "expert rifle-men" was not entirely novel, but actually brought her forces onto at least a par with the most advanced units of the British Army in that particular. Although popular histories usually emphasize American patriots' use of rifles during the War of Independence, the British certainly appreciated the tactical advantages of such arms, and employed them widely, too, typically dispersed among their regular light infantry, as well as in the hands of their German mercenaries and AmericanTory militias.[798] Indeed, all

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[798] *See* De Witt Bailey, *British Military Flintlock Rifles, ante* note 471, at 8 *and* Chapters 4 and 5; H. Peterson, *Arms and Armor in Colonial America, ante* note 465, at 203-204.

told, the British and their native and foreign allies and auxiliaries probably carried more rifles into battle during the War of Independence than did the patriots.[799]

Whether American Militiamen in Virginia and elsewhere were the original innovators in the use of rifles in the military operations of that time and place, or were proving themselves dominant with such firearms, or were trying simply to maintain at least parity with their British opponents, their arms were not necessarily antiquated or inferior to those of the regular armed forces they faced, but were to a great degree on the very cutting edge of the firearms technology and tactics of that day.

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[799] De Witt Bailey, "British Military Small Arms in North America, 1755-1783", *in Longarms in America*, *ante* note 468, Volume 1, at 23-24; H. Peterson, *Arms and Armor in Colonial America, ante* note 465, at 218-221. The British Army missed an opportunity to take a significant lead in this field, though, by not encouraging its armorers to perfect the Ferguson or some equivalent type of breech-loading flintlock rifle. *See* De Witt Bailey, *British Military Flintlock Rifles*, *ante* note 471, Chapter 3 & Appendices 3 and 6.

CHAPTER TWENTY

Virginia's *pre*-constitutional Militia and other military laws presupposed the existence of, and relied upon, a free market in firearms, ammunition, and the services of private gunsmiths.

For more than a century, the members of Virginia's *pre*-constitutional Militia could never have been expected to bring to their service the arms specified by her Militia statutes—such as "such arms as he is *already furnished with*", "a good rifle, *if to be had*", "the best gun of any other sort *that they can procure*", or "the best arms * * * *they can get*"[800]—if no reliable source had existed from which those very arms could have been obtained. Neither could they have kept their arms "well fixed" if persons qualified to repair firearms had not been available in many communities. That source was the free market, and those persons private gunsmiths.

A. The free market in arms. A free market developed early in Virginia's history:

> [1645, 1658, and 1662] "That ffree trade be allowed to all the inhabitants * * * to buy and sell at their best advantage[.]"{EN-1291}

And—with the exception of slaves, certain persons of color, hostile Indians, and disloyal individuals[801]—that market extended to firearms and ammunition:

> [1677] "[A]ll persons have hereby liberty to sell armes and ammunition to any of his majesties loyall subjects inhabiting this colony[.]"{EN-1292}

Moreover, the trade in arms was open to nearly all Virginians without anything remotely akin to modern-day "gun control", because (had the term been in then-current usage) "gun control" in *pre*-constitutional times meant that: (i) the government required just about every free adult able-bodied male to obtain from the free market at least one firearm and ammunition suitable for Militia service; and (ii) to facilitate the latter policy, the government itself participated in and encouraged a free market in arms for its citizens. That is, the market in firearms and

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[800] *See ante*, at 509-514.

[801] *See ante*, at 365-369, *and post*, at 733-742.

ammunition was open to nearly all residents of Virginia not because her General Assembly did not "regulate" their acquisition, possession, and use of those things, but *precisely because the success of its comprehensive "regulation" of the Militia necessitated a free market*.

All of Virginia's Militia and related statutes presupposed, required, encouraged, and protected a free market in firearms and ammunition. *First*, most Militiamen had to provide their own firearms[802]—which, even with the government sometimes acting as a middleman,[803] they could not have done without a well-functioning free market. *Second*, the government obtained arms for military service from the people themselves—by purchasing firearms individuals brought to their service,[804] by paying individuals who supplied their own firearms for such service,[805] by reimbursing individuals who lost their own firearms during their service,[806] and by impressing firearms from some individuals in order to arm others[807]—none of which the government could have done if the people had not been possessed of suitable firearms that in the main they themselves had earlier acquired from the free market. *Third*, the government purchased firearms from the free market for its own use, there being no public arms manufactory in Virginia until 1775.[808] *Fourth*, in competition with private merchants,[809] the government sold its own firearms and ammunition, both new and surplus, into the free market. For example:

> • [1762] "WHEREAS * * * a large quantity of gunpowder is constantly kept in the publick magazine * * * which, being left entirely unguarded, may be of dangerous consequence * * *
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> " * * * the governor * * * [may] cause the said gunpowder * * * to be sold and disposed of for the best price that can be got[.]"{EN-1293}

> • [1764] "[W]hereas the arms, ammunition, provisions, and necessaries purchased at the publick expense, and now on hand, ought to be sold for the publick benefit: *Be it enacted* * * * , That the commanding officer of each of the companies from which the militia has been sent into service * * * shall * * * sell, for the best price that may be had for the same, all arms, ammunition, provisions, and necessaries purchased at the publick expense * * * and pay the money arising from such sale to the treasurer of this colony * * * for the use of the publick."{EN-1294}

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[802] *See ante*, at 408-423.

[803] *See ante,* at 451-454.

[804] *See ante*, at 437.

[805] *See ante*, at 432-435.

[806] *See ante*, at 435-436.

[807] *See ante*, at 437-439.

[808] *See ante*, at 456, *and post*, at 521.

[809] *See ante*, at 451-454.

> • [1764] "WHEREAS there are considerable quantities of military stores * * * in the public magazine in * * * Williamsburg, which are of little use or value, and in a short time will be rendered entirely useless, if they continue there: *Be it therefore enacted* * * * , that [certain named individuals] * * * are * * * appointed commissioners * * * and * * * , after having carefully examined into the condition of the arms and other military stores * * * , to sell and dispose of such of them as they shall judge unnecessary to retain * * * for publick use, or which may be destroyed or rendered useless by continuing there any longer[.]"{EN-1295}

Thus, Virginians of the *pre-*constitutional era found it perfectly compatible with—indeed, necessary for—public safety to distribute "a large quantity of gunpowder" and "considerable quantities of military stores" from "the publick magazine" into private hands through the free market. On the other hand, the firearms the General Assembly presumed that ordinary Virginians could sell outright, or loan to the government in the course of their military service, could be expected to be "in proper order and kind, and fit for the service"—that is, *firearms suitable for the* ***military*** *applications of the times*.{EN-1296} So no real distinction existed between "public" and "private" when it came to the propriety of ordinary citizens' possessing large quantities of firearms and ammunition of military capability. The political theory that subtends modern "gun control"—namely, that all firearms, and particularly the most modern military firearms, in the government's possession are invariably "good", but the same (or even any) firearms in the hands of private individuals are presumptively "bad"—had no currency in *pre-*constitutional Virginia, and had it circulated would have attained no credence. That was because most "ordinary citizens" then were members of the Militia, and thereby direct participants in the government, themselves personally wielding the ultimate Power of the Sword. So the rights enjoyed by Virginians to a thoroughly free market in arms were not simply, or even primarily, "*individual* rights", but instead were fundamentally "the rights *of an individual in and on behalf of his community*": rights necessary for the individual, not only so that he could defend himself against isolated aggression, but especially so that all individuals together would have access to the arms necessary for their community's collective self-defense.

B. Reliance on private gunsmiths. During the *pre-*constitutional period, many firearms would not have become available in Virginia at all had local or regional gunsmiths not produced them. And the members of Virginia's Militia could never have kept their arms "well fixed"—as the statutes required them to do—if persons qualified to repair firearms had not been available in many communities.

At least two hundred twelve gunsmiths have been identified as having worked in Virginia between 1608 and 1800.[810] Their skills were so important to the

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[810] H. Gill, Jr., *The Gunsmith in Colonial Virginia, ante* note 731, at 69-108.

community, and so beyond the ability of the government to harnass in any other way, that gunsmiths were not only encouraged to provide, but even regularly impressed into, public service:

> • [1633] "THE necessitie of the present state of the country requiringe, *It is thought fitt*, That all gunsmiths * * * be compelled to worke at theire trades and not suffered to plant tobacco or corne or doe any other worke in the ground—And the commissioners in the several parts of this colony, shall take care * * * that they have good payment made unto them for theire worke[.]"{EN-1297}

> • [1672 and 1676] "[F]or as much as against all tymes of danger it ought to be the care of all men to provide that their armes and habiliments for war, be alwayes kept fixed and fitt for service, and that armourers and smyths may be encouraged to worke, *It is enacted* * * * that the commissioners * * * assertaine the rates for the worke of armourers and smyths and such artificers; and for the prevention of the great trouble that usually accrues to artificers in collecting severall small parcells in payment for worke done, * * * the artifficers to be paid entire by the counties and the countyes reimburst by the persons for whome the worke was done; and that the said artificers may not delay people which repaire to them with their armes be strictly enjoyned under a fine to be imposed by the said commissioners to lay aside all other worke to goe about this of armes."{EN-1298}

> • [1692] "Complaint being made to th[e Governor and his Council] by the Comand[rs] in Chief of this Colony, that the Souldiers under their Comands cannot get their Guns fixt, the Smiths refuseing to worke for Tobacco, and for that the same may be of very bad Consequence in these times of danger, It is Ordered that the respective Smiths in this Colony doe without delay fix all Armes * * * brought them by any of the Souldiers of this Countrey, keepe an account of the Worke done and for whom, and returne the same to the next Gen[ll] Assembly that then such care may be taken for payment thereof, as shall be found fitt."{EN-1299}

> • [1705, 1727, 1732, 1734, 1738, 1740, 1744, 1748, 1753, 1757, 1758, 1759, 1761, 1762, 1764, 1766, 1769, and 1772] "[U]pon any invasion of the enemy by sea or land, or upon any insurrection, the governor * * * have full power to levy, raise, arm and muster such a number of forces out of the militia * * * as shall be thought requisite and needfull * * * .
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> * * * * *
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> " * * * That it shall and may be lawfull by warrant * * * to impress any smith * * * or artificer whatsoever, which shall be thought usefull for the fixing of arms * * * .
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> * * * * *

> " * * * That every smith * * * imprest * * * and employed about fixing of arms * * * shall be paid and allowed by the public * * * fifty pounds of tobacco[[811]] per day[.]"{EN-1300}

During the first years of the War of Independence, when imports from Britain were largely cut off and trade with France and other foreign countries was sporadic and uncertain, Virginia was particularly dependent upon local private gunsmiths to manufacture new firearms and to repair existing ones. The Commonwealth's major private manufactory of firearms was the Rappahannock Forge, located in Falmouth.[812] In 1776, Virginia's Committee of Safety contracted for the forge's maximum output over the ensuing year. Even so, the forge proved to be a risky business. In 1777, the General Assembly exempted from Militia service "persons concerned in iron or lead works, or persons solely employed in manufacturing fire arms".{EN-1301} In 1778 it prohibited recruiting officers for Virginia's regular Armed Forces from "enlist[ing] any artificer employed by contract in writing for hire in the publick manufactories of fire arms, or at any iron works, nor any indented apprentice in such manufactory or work, nor any imported servant, without leave in writing from the manager of such manufactory or work".{EN-1302} Yet in 1777 it had allowed for the impressment of "any unnecessary number of waggons or horses" "employed at any lead, copper, or iron works", which had embarrassed the forge's operations.{EN-1303} Worse yet, by 1780 the forge's efficiently had been seriously compromised by a lack of necessary workers and equipment. And in 1781 it closed down as the result of British General Lord Cornwallis's military operations in the region. The only other relatively large facility for manufacturing firearms in Virginia at that time—the public State Gun Factory at Fredericksburg—opened in 1775, operated through 1780, but failed by 1783.[813]

Not surprisingly, then, the shortage of gunsmiths during that period remained sufficiently critical that Thomas Jefferson, as Governor of Virginia, in 1781 directed his Commissioner of War "[t]o find some proper person to send out to collect gunsmiths".[814] And the Commonwealth's dependence on the free market remained so nearly complete, that even in October of 1784, three years after the British surrender at Yorktown, the General Assembly "authorized and required [the Governor] to purchase on the best terms he can, either in this country or by importation, * * * as many thousand stand of arms and accoutrements * * * with

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[811] The Acts from 1757 through 1772 substituted "four shillings" as the rate of pay.

[812] *See* H. Gill, Jr., *The Gunsmith in Colonial Virginia, ante* note 731, at 34-38, 125-127; B. Ahearn, *Flintlock Muskets in the American Revolution, ante* note 464, at 148, 150.

[813] H. Gill, Jr., *The Gunsmith in Colonial Virginia, ante* note 731, at 38-41; B. Ahearn, *Flintlock Muskets in the American Revolution, ante* note 464, at 149. The other twelve States relied primarily on purchases of arms in the free market, rather than public manufacture. *See* H. Peterson, *Arms and Armor in Colonial America, ante* note 465, at 180-188.

[814] *Quoted in* H. Gill, Jr., *The Gunsmith in Colonial Virginia, ante* note 731, at 43-44 (footnote omitted).

the words 'Virginia militia' engraved thereon, as the money which from time to time may be appropriated for that purpose will purchase".{EN-1304}

Thus, a thoroughly free market in firearms and ammunition—which enabled average Virginians to acquire firearms suitable for Militia service, and to keep them in working order in their personal possession at all times—was not just incidental, but instead was integral, to the *pre*-constitutional Militia. Virginia never even questioned, let alone dispensed with or attempted to suppress, a free market in arms, but instead always relied upon it. The existence of a vibrant free market was the practical presupposition underlying Virginia's Militia laws. More than that, the free market actually made the Militia a workable establishment, because without an efficient means to place arms in common Virginians' hands, and to keep those arms in working order, it would have been a "militia" in name only.

CHAPTER TWENTY-ONE

Virginia enlisted, organized, armed, trained, commanded, and deployed her *pre*-constitutional Militia on a Local basis.

In 1776, Article 13 of Virginia's Declaration of Rights stated "[t]hat a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state". And in 1791, the Second Amendment reiterated that position in its assertion that "[a] well regulated Militia", predicated upon "the right of the people to keep and bear Arms", is "necessary to the security of a free State". At those times, these were anything but novel and merely theoretical political principles.

From her inception as a Colony, Virginia claimed and exercised the power to marshal "the body of [her] people" in her Militia. In principle, this power reached *every* adult, male or female, free or in whatever condition of bondage—although in practice it was applied almost exclusively to able-bodied free White males within the range of sixteen to sixty years of age.[815] This was why, after more than one hundred years of the most practical experience possible, Virginians could declare with assurance that "a well regulated militia * * * is the * * * *safe* defence of a free state"—because, being "composed of the body of the people", "a well regulated militia" is not a "standing arm[y]", which (the Declaration of Rights warned) "in time of peace, should be avoided, as dangerous to liberty". Indeed, "[a] well regulated Militia" is "necessary to the security of a free State" precisely because it consists of WE THE PEOPLE in arms, and thereby renders large "standing armies, in time of peace" unnecessary and any argument for raising them impolitic, impertinent, and in the final analysis improper.

Yet, although in *pre*-constitutional Virginia (as well as elsewhere throughout America in that era) the Militia was a force as massive as the population of able-bodied adult free males itself, it was not an agglomeration of armed robots, ruled "from the top down" according to some early variant of *das Führerprinzip*. To the contrary: For Virginians, "a *well regulated* militia" was one "settled" by a Colonial or State statute but *organized on the basis of Local communities*—the County, the City, and the Borough.

Virginians knew that the ultimate purpose of "a well regulated militia" is the "*defence* of a *free* state". "[D]efence" is primarily conducted where what is worth

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[815] *See ante*, Chapter 16, *and post*, at 611-614.

defending is located. And the "defence *of a free state*" aims at the security *of the people themselves—all* of the people, not just a few factions and other special interests—*where they live*. Not just *where* they happen to live, either, but especially *how* they desire to live. "[A] free state" is one in which the people live their own lives as they choose to live them: to enjoy the fruits that derive from what the Declaration of Independence described as "the pursuit of Happiness". And men of reason and good will, if afforded the opportunity, will invariably choose prosperity over poverty, and therefore peace over war, and therefore defense over aggression. Thus, the purpose of the "defence of a free state" is to secure for the people the ability to live peaceful, prosperous lives. *Of course*, then, "a well regulated militia * * * is the * * * *natural* * * * defence of a free state". For "natural" means "[p]roduced or effected by nature"[816]—and it is the nature of the people in "a free state" to defend themselves, as part and parcel of self-government. In a like vein, "natural" means "within the scope of human reason or experience", such as "a natural law"[817]—and in a "free state" rational people conversant with political philosophy and history recognize their right and duty under "the Laws of Nature and of Nature's God" to organize within their own communities for the purpose of defending themselves collectively, with the fullest manifestation of such organization being "a well regulated militia". Moreover, "natural" imports "having an "essential" and "characteristic" relationship[818]—and the self-evidently "essential" and "characteristic" relationship between "a well regulated militia" and "a free state" centers on the people, because the people are the constituents of both "a free state" and the Militia. And *of course* "a well regulated militia * * * is the *proper* * * * defence of a free state", not simply because it is "[f]it; accommodated; adapted; suitable; [and] qualified" for that purpose, but because it is truly "[p]eculiar" to that purpose[819]—in the sense that "a well regulated militia" is "not common" to the defense of any other type of "state" but instead uniquely suitable for and the product of "a free state".[820] This is because, being composed of "the body of the people, trained to arms", "a well regulated militia" "pertains to the constitution", "belongs to [the] natural character", "[c]onforms to the order, laws, or actual facts", and "[c]onforms to the truth or reality" of "a free state" in a manner that no other institution can.[821] Thus, "[a] well regulated Militia" is an essential part of a free

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[816] S. Johnson, *Dictionary*, *ante* note 50, definition 1, in both the First (1755) and the Fourth (1773) Editions.

[817] *Webster's Revised Unabridged Dictionary, ante* note 11, at 964, definition 3. *Accord, Webster's New International Dictionary, ante* note 330, at 1630, definition 4.

[818] *Webster's Revised Unabridged Dictionary, ante* note 11, at 964, definition 1. *Accord, Webster's Third New International Dictionary, ante* note 330, at 1506, definition 4.

[819] *See* S. Johnson, *Dictionary, ante* note 50, definitions 5 and 1, in both the First (1755) and the Fourth (1773) Editions.

[820] *See id.*, definition 1, in both the First (1755) and the Fourth (1773) Editions.

[821] *See Webster's Revised Unabridged Dictionary, ante* note 11, at 964, definitions 1, 2, and 4. *Accord, Webster's New International Dictionary, ante* note 330, at 1983, definitions 2 and 4.

people's way of life, because, as the Second Amendment declares, it is "*necessary* to the security of a free State", not simply in the practical sense of "[n]eedful, indispensably requisite",[822] but especially in the philosophical sense of not only being "[c]onsonant" with and "[d]erived from [the] nature of "a free state", but also "carrying with [it] as natural an evidence as self-evident truths themselves".[823] That being so, "a well regulated Militia" must be organized and must operate primarily on a *Local* basis, because that is where "the people" who comprise both "a free state" and "a well regulated militia"—as well as the places, the things, and the way of life they seek to protect—are to be found, and therefore where their ultimate defense must be mounted.

In *pre-*constitutional times, this was not merely some idle musing of political philosophers and philologists, but an appreciation that derived from decades of experience of the most seriously practical kind on the part of most Virginians. The obvious reasons for Local organization were two: *First,* the Militia was always a *governmental* establishment;[824] and the County, the City, and the Borough were Virginia's basic governmental units. So that arrangement served administrative regularity and convenience. *Second*, and more pointedly, the absolute practical necessities of the case required it:

> [1727, 1732, 1734, 1738, 1740, 1744, 1748, and 1753] "WHEREAS the frontiers of this dominion, being of great extent, are exposed to the invasions of foreign enemies, by sea, and incursions of *Indians* at land, and great dangers may likewise happen by the insurrections of negros, and others; for all which, the militia * * * is the most ready defence. And foreasmuch, as the militia of those counties, where any of the dangers aforesaid shall arise, must necessarily be first emploied, and may, by the divine assistance, be able to suppress and repel such insurrections and invasions, without obliging that of other counties to be raised[. . .]"{EN-1305}

Not surprisingly, then, every structural and operational aspect of Virginia's *pre-*constitutional Militia was Local in nature—

A. Militiamen in general. From the beginning, Virginia's Militia was "composed of the body of the people", organized in suitable units *where they lived*:

> •[1691] "In Obedience to their Ma[jesties'] Instructions Comanding that Care be taken for y^e^ easeing the Inhabitants of this

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[822] S. Johnson, *Dictionary*, *ante* note 50, definition 1, in both the First (1755) and the Fourth (1773) Editions ("necessary").

[823] N. Webster, *An American Dictionary, ante* note 15, definitions 5 and 6 ("necessary"). *Accord, Webster's New International Dictionary, ante* note 330, at 1635, definitions 2 and 7.

[824] *See ante*, Chapter 15.

Country from the trouble of goeing far to Exerciseings and Musters," the Governor and his Council "Ordered that the Comand[rs] in Cheife doe forme into Troopes of Horse & Companies of Foot all the persons fitt to beare Armes in the Severall Counties und[r] their Respective Comands Contriveing them as Conveniently together as possible, not Exceeding fifty persons at the most in a Troope, and Seventy in a foot Company[.]"{EN-1306}

• [1705] "That * * * the * * * chief officer of the militia of every county have full power and authority to list all male persons whatsoever, from sixteen to sixty years of age, within his respective county, to serve in horse or foot, * * * and to order and place * * * them under the command of such captain in the respective countys of their abode, as he shall think fitt.

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" * * * That the * * * chief officer of the militia of every county * * * make * * * a new list of all the male persons in his respective county capable * * * to serve in the militia, and to order and dispose them into troops or companys, according to the directions of the governor[.]"{EN-1307}

• [1723] "That * * * the * * * chief officer of the militia of every county, have full power and authority to list all free male persons whatsoever, from twenty-one to sixty years of age, within his respective county, to serve in horse or foot * * * and to order and place them under the command of such captain as he shall think fit."{EN-1308}

• [1723, 1738, 1755, 1757, 1759, 1762, 1766, 1771, and 1775] "[W]hereas it may happen, that the chief magistrates, and other inhabitants of the * * * city [of Williamsburg], may be listed and compelled to serve under the command of the officers of the militia, in the counties of James City, and York, respectively, without the said city; and forasmuch as the same may be very inconvenient, and may render the governor's house, public magazine, and capitol, in the said city, defenceless in times of danger, *Be it* * * * *enacted* * * * That no inhabitant of the said city, capable of serving in the militia, shall * * * be compellable to make his or their appearance at any muster of the militia * * * out of the said city[.]"{EN-1309}

• [1738] "[T]he * * * chief officer of the militia, in every county, shall list all free male persons, above the age of one and twenty years, within this colony, under the command of such captains as he shall think fit."{EN-1310}

• [1755, 1757, 1759, 1762, 1766, and 1771] "[T]he chief officer of the militia in every county[825] shall list all male persons above the age of eighteen years, and under the age of sixty years, within this colony

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[825] The Act of 1757 excepted "the county of Hampshire".

(imported servants excepted) under the command of such captain as he shall think fit [.]"{EN-1311}

• [1775] "[I]n each county within this colony * * * all free male persons, hired servants, and apprentices, above the age of sixteen, and under fifty years, except such as are * * * excepted, shall be enlisted into the militia by the commander in chief of the county, and formed into companies of not less than thirty two, nor more than sixty eight, rank and file[.]"{EN-1312}

• [1777] "[A]ll free male persons, hired servants, and apprentices, between the ages of sixteen and fifty years [with various exceptions] * * * shall, by the commanding officer of the county in which they reside, be enrolled or formed into companies of not less than thirty two, nor more than sixty eight, rank and file[.]"{EN-1313}

• [1777] "FOR forming the citizens of Williamsburg, borough of Norfolk, and the professors and students of William and Mary college, into a militia, and better disciplining them: *Be it enacted* * * * That all male persons between the ages of sixteen and fifty years, within the * * * city or borough, except the persons exempted by an [earlier Militia A]ct * * * and such of the professors and students of William and Mary college as would otherwise be part of the militia of James City county, in which the college is situate, shall, by the commanding officers of the said city and borough, be enrolled and formed into companies of not less than thirty two nor more than sixty eight, rank and file[.]"{EN-1314}

• [1784 and 1785] "[A]ll free male persons between the ages of eighteen and fifty years [with various exceptions] * * * shall be enrolled or formed into companies of five serjeants, three corporals, a drummer, and fifer, and not less than fifty-five[826], nor more than sixty-five, rank and file; and these companies shall again be formed into regiments of not more than one thousand, nor less than five hundred men, if there be so many in the county."{EN-1315}

• [1786] "[T]he * * * commanding officers in the respective counties within this commonwealth, also in the city of Williamsburg and borough of Norfolk, * * * are hereby required to enroll the militia within their several counties and corporations, into distinct companies[.]"{EN-1316}

And such Local enrollment may have been quite specific as to particular groups of individuals:

[1766 and 1771] "[T]he lieutenant or chief commanding officer of the militia in every county shall list all male persons of the people called Quakers, above the age of eighteen years, and under the age of sixty years,

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[826] The Act of 1785 provided for "three serjeants" and "not less than forty" men in each Company.

within his county, under the command of such captain as he shall think fit[.]"{EN-1317}

B. Militia officers. As with the men in the ranks, most Militia officers were residents of the Localities in which their commands existed. This, for the obvious reasons that: (i) Even more than the men, the officers needed to be intimately familiar with the environs of their commands as well as the resources available and the realism of the plans devised for defending them. (ii) The officers had to know their men, which was unlikely if they did not live amongst them. And (iii) the men would not have had the same degree of confidence in strangers as in Local residents who had attained sufficient social standing to be commissioned as Militia officers.

1. From the beginning, Virginia's Governors, as Commanders in Chief of the Militia *in loco regis*, appointed officers:

- [1699] "In Order to the Setling of the Militia in the Severall Counties * * * , His Excellency [the Governor] in Councill was pleased to Nominate and appointe the principall Officer's thereof", followed by a long list of the appointees.{EN-1318}

- [1701] "His Ex^{cy} * * * appoint[ed] Gawin Corbin * * * to be Coll: and Comand^{r} in Cheife of all y^{e} Militia horse and foot in y^{e} County of Middlesex.

  "W^{m} Tayloe * * * to be Coll: and Comand^{r} in Cheife of y^{e} County of Richmond[.]"{EN-1319}

- [1702] "[F]or the better Government of the Militia of King William County, [the Governor] * * * appoint[ed] John West to be Collonel * * * of all the Militia within y^{e} said County, William Clayborne to be Lieu^{t} Collonel, and John Waller Major, and they are * * * to transmitt to his Excellency a List * * * of such Persons * * * most fitt to be Captains and other Commissions officers of the several Troops and Companys under their command within y^{e} said County."{EN-1320}

- [1707] "Coll^{o} W^{m} Bassett is appointed Commander in Chiefe of the Militia of King W^{m} County & Coll^{o} Jn^{o} Smith Commander in Chiefe of the Militia of King and Queen County[.]"{EN-1321}

- [1715] "For the better moddling the militia of this Colony, & bringing them under a more regular Discipline, the Governor * * * appoint[ed] * * * [certain] persons to be Lieutenants of the severall Countys", followed by a long list of those selected.{EN-1322}

In the prudent exercise of their executive discretion, though, the Governors did not act arbitrarily, but instead were open to consultation with the people their appointments affected:

- [1684] "That the chief officers of the militia for the upper counties, on the * * * rivers, * * * may present to his excellency [the

Governor] the fittest and most able person to command under the captain as lieutenant of each troop, who, in the absence of the captain * * * is to command, lead, train and exercise the troope."{EN-1323}

• [1705] "His Excellency in Council was pleased to recommend to Coll^{o} W^{m} Randolph to advise with the principal Inhabitants of the French Settlement at Manican Town, who are the most proper Persons to be appointed Military Officers among them, his Excell^{cy} intending to forme a foot Company of the Refugees there settled."{EN-1324}

And aggrieved Militiamen enjoyed a right to petition the Governor and his Council to remove an abusive or incompetent commander.{EN-1325}

2. Virginia's General Assembly repeatedly required that Militia officers came from amongst the men whom they were to command:

• [1705] "That * * * the * * * chief officer of the militia of every county have full power and authority to list all male persons whatsoever, from sixteen to sixty years of age within his respective county, to serve in horse or foot, * * * and to order and place * * * them under the command of such captain in the respective countys of their abode, as he shall think fitt."{EN-1326}

Presumably, not just the men, but also their captains, would hail from "the respective countys of their abode", if only because of the impracticality of any other arrangement for command.

• [1723, 1738, 1755, 1757, 1759, 1762, 1766, and 1771] "[A]ll and every such inhabitant [of the city of Williamsburg] * * * (except the maior, recorder, and alderman * * *) shall be listed and trained [in the Militia], * * * under the command of one or more person or persons, of the principal inhabitants of the said city, as shall be thereunto commissionated by the governor[.]"{EN-1327}

• [1723 and 1738] "That every commission-officer in the militia, shall, before he acts under, or executes any such commission, in the court of his county, take the oaths appointed by law[.]"{EN-1328}

An officer would hardly have taken the oath "in the court of his county" unless that County had been the locus of his command.

• [1755, 1757, 1759, 1762, 1766, and 1771] "That * * * all county lieutenants, colonels, lieutenant colonels, and other inferior officers, bearing any commission in the militia of this colony, shall be an inhabitant of, and resident in the county of which he is, or shall be commissioned to be an officer of the militia."{EN-1329}

• [1775] "[I]n each county within this colony there shall be a county-lieutenant, colonel, lieutenant-colonel, and major, to be commissioned * * * upon the nomination of the committees [of safety] of the respective counties[.]

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> " * * * [I]f any officer, when on duty, shall misbehave, * * * the committee [of safety] of the county, city, or borough, by whom such officer was nominated, * * * shall have full power to displace and remove such officer from his post, if they shall judge it expedient for the good of the publick[.]
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> " * * * [N]othing * * * shall * * * oblige [the inhabitants of the city of Williamsburg or the borough of Norfolk] to muster or serve in the militia out of the said city or borough; but that such inhabitants shall be enlisted and trained within the limits of the said city and borough * * * under a colonel, a major, and the necessary number of captains and other officers, all of whom shall be nominated by the committees of safety of the said city and borough * * * and commissioned by the committee of safety."{EN-1330}
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> Presumably, a Local Committee of Safety would have nominated Local residents whom the Committeemen knew and trusted.
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> • [1777] "Each company shall be commanded by a captain, two lieutenants, and an ensign; each battalion by a lieutenant colonel, and major * * * , and the whole by a county lieutenant. These officers shall be resident within their county[.]"{EN-1331}
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> • [1784 and 1785] "Each company shall be commanded by a captain, a lieutenant, and an ensign; each regiment by a lieutenant colonel commandant, and two majors; and the whole by a county lieutenant * * * . These officers shall be resident within their county[.]"{EN-1332}

Even when raising a force of regular troops in 1775, the General Assembly provided that "the deputies of each district[[827]] * * * , excepting the counties of Accomack and Northampton, shall appoint one captain, two lieutenants, and one ensign, to command the company of men to be raised in such district".{EN-1333} Presumably, "the deputies" would not have appointed men they did now know, or men wholly unacquainted with their Counties, and therefore selected prominent and trustworthy County residents.

C. Militiamen's general armament. As detailed above, in terms of the firearms and ammunition generally available to Militiamen, Virginia's Militia was thoroughly Local in nature. Public arms were stored in such arsenals, magazines, and *ad hoc* arrangements as the government maintained from time to time.[828] But, as required by law during the entire *pre-*constitutional period, at least one firearm and ammunition suitable for Militia service had to repose in each and every Militiaman's possession at all times—and most firearms used for Militia service were

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[827] These "district[s]", each consisting of two or more Counties, were specially created by this statute.

[828] *See ante*, at 446-451.

private property, which Militiamen themselves purchased in the free market and thereafter held in their own hands, in their own homes, dispersed throughout their own communities to the selfsame degree that they were.[829] Because "'[p]olitical power grows out of the barrel of a gun'",[830] its locus must be where and in whose hands the guns actually are. In *pre*-constitutional Virginia, the guns were to be found in Local communities; the people who possessed and trained to use the guns were the residents of Local communities; and therefore in both principle and practice the focal points of political power were Local communities.

D. Provision of firearms and ammunition. Inasmuch as, in the final analysis, "the Sword and Soveraignty always march hand in hand",[831] that the County, the City, and the Borough throughout Virginia were also the loci for provision and distribution of public arms to Militiamen is highly significant.

1. Fines assessed against defaulting Militiamen under the Militia Acts were expended in and for the benefit of the Localities in which they arose, usually to supply firearms, ammunition, and accoutrements for Local Militia Companies.[832]

2. Other of Virginia's statutes empowered Localities to see to, or to act as intermediaries with regard to, the provision of additional arms for Militiamen's use:

> • [1643] "VPON consideration * * * of the scarsity of powder and aminition in the plantation and the difficultie in procureing the same, *It is thought fitt and enacted* that the Governour * * * do allott a barrel of powder to each countie, to be kept and preserved * * * a publique stock, for which the comander of each county is to be responsible."{EN-1334}
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> • [1656] "IT is ordered that for this present year the com'rs. of the militia in every county endeavour to provide four barrels of powder with shot proportionable for each regiment which shall be allowed the next year out of the several county levies[.]"{EN-1335}
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> • [1666] "WHEREAS there is a generall complaint of the want of ammunition for defence of the country in these times of eminent danger, *It is enacted* * * * that each county shall by their by-laws be impowered to make such provision thereof at a county charge as their severall occasions shall necessarily require."{EN-1336}
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> • [1673 and 1676] "FOR the better supply of the country with armes and ammunition, *Be it enacted* * * * , that the captaines of ffoote and horse in each county doe take a strict and perticuler account of what armes and ammunition are wanting in their severall companies and troops

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[829] *See ante*, Chapters 17 through 21.

[830] *Quotations From Chairman Mao, ante* note 28, at 61.

[831] AN ARGUMENT, Shewing, that a Standing Army Is inconsistent with A Free Government, *ante* note 27, at 7.

[832] *See ante*, at 441-443, *and post*, at 538-541 and 692-696.

* * * : *And be it further enacted* * * * , that the perticuler county courts be impowred * * * upon their respective counties to lay and raise a levy for the provideing of armes and ammunition for supplying the wants aforesaid, that is to say, muskitts and swords for the ffoote, and pistolls, swords and carbines for horse, as alsoe for every lysted souldier at the least two pounds of powder and six pounds of shott, the said armes and ammunition * * * to remaine in the hands of the officers of the militia for them to dispose of * * * as there shalbe occasion; and that those to whome distribution of armes and ammunition shalbe made doe pay for the same at a reasonable rate, to be collected by the sherriffe or collector as in the case of levyes and publique dues[.]"{EN-1337}

• [1676] "[E]ach county * * * is required to furnish its perticular soldiers with two pounds of powder and six pounds of shott a man with good and well fixt guns and other armes for the present, and for what ammunition more shall be wanting that it be provided by and at the charge of the publique[.]"{EN-1338}

• [1755, 1757, 1759, 1762, 1766, and 1771] "[I]f it shall be made appear to the court of any county, by the * * * chief commanding officer in the county, and captain of any company,[833] that any soldier inlisted in the foot, is so poor, as not to be able to purchase the arms [required by law] * * * ; then such court shall * * * immediately depute some person to send for the same to England * * * , and to levy the charge * * * in the next county levy, which arms * * * shall be marked with the name of the county[.]"{EN-1339}

• [1755, 1757, 1759, 1762, 1766, and 1771] Certain "persons * * * exempted from mustering * * * shall provide arms for the use of the county, city or borough, wherein they shall respectively reside * * * . And if they shall fail or refuse so to do, * * * the several courts of the counties, wherein the persons * * * shall reside, * * * are * * * impowered and required to levy the value of the same on each of them[.]"{EN-1340}

• [1762] "[T]he several persons herein after-mentioned shall be * * * free and exempt from appearing or mustering either at the private or general musters of their respective companies * * * : All his majesty's justices of the peace * * * (except such as * * * bear any commission as officers of the militia * * *) all persons bred to and actually practising physick or surgery, and all inspectors at the publick warehouses appointed for the inspection of tobacco * * * .

" * * * *Provided always*, That the persons so exempted * * * shall provide complete sets of arms * * * required for soldiers, for the use of the county, city or borough, wherein they * * * reside, and if they shall fail or

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[833] In 1757 and thereafter, the facts were to be "certified to the court of any county, by order of [a] court-martial".

refuse so to do, * * * the courts of the several counties, city or borough, wherein the persons * * * shall reside * * * are * * * empowered and required, to levy the value of such arms on each of them[.]"{EN-1341}

• [1766 and 1771] "[T]he several persons herein after mentioned shall be * * * free and exempt from appearing or mustering either at the private or general musters of their respective companies, that is to say, all his majesty's justices of the peace * * * (except such as * * * bear any commission as officers of the militia * * *) all persons bred to, and actually practising physic or surgery, all the people called Quakers, and all inspectors at the public warehouses, appointed for the inspection of tobacco * * * .

" * * * *Provided always*, That the persons so exempted (not being Quakers) shall provide compleat sets of arms * * * required for soldiers, for the use of the county, city or borough, wherein they * * * reside: And if they shall fail or refuse so to do, * * * the courts of the several counties, city or borough, wherein the persons * * * shall reside * * * are * * * impowered and required to levy the value of such arms on each of them[.]"{EN-1342}

• [1775] "[T]he members of his majesty's council, and the committee of safety, the president of the convention, treasurer, attorney-general, auditor, clerk of the council, clerk of the secretary's office, clerk of the general convention, and clerk of the committee of safety (each of which exempts furnishing a stand of arms for a soldier) * * * shall be exempted from * * * enlistment [in the Militia]."{EN-1343}

3. In addition, on numerous occasions Virginia's Governor and Council delivered arms to Local jurisdictions for the latters' use. For example—

• [1705] The Governor and Council arranged for "the distribution of * * * Arms and Shott" —to the number of three hundred thirty-two carbines, six hundred forty-four pistols, and eight hundred twenty muskets—"to be sent to ye several Countys for the Service of the Militia on any emergency".{EN-1344}

• [1707] "Ordered that a supply of arms & ammunition be sent to the County of New Kent and King William and lodged in such manner as may be most usefull for the defence * * * ag^{t} the Indians."{EN-1345}

• [1708] "Ordered that a barrell of powder & a proportionable quantity of Shott with thirty Musquetts and Swords be sent to Yorktown and lodged at Major Buckners for the use of the Inhabitants in case any attempt be made on that place by the Enemys Privateers."{EN-1346}

• [1738] "Whereas the Inhabitants on Sherrando River * * * have prayed for a Supply of Arms & Ammunition for their defence, It is * * * Ordered that out of his Majesties Stores there be delivered to John Lewis * * * who is hereby Approved to be a Capt over such of the Inhabitants

> as live in Beverly Mannor, Thirty Muskets & Eight pair of Pistols with a proportionable quantaty of Powder and Ball[.]"{EN-1347}

Thus, Virginians in the *pre-*constitutional era expected that, when Local governments acquired firearms and ammunition, it was for *the people's* use in those Localities. And, until the Earl of Dunmore's abortive and self-destructive attempt to suppress the patriots in 1775,[834] what they expected always came to pass. Overall, this dispersal and decentralization of arms within Virginia's Localities embodied the very opposite of the "top-down" policy of "gun control" touted today by all too many public officials, aspirants for political office, special-interest groups, members of the *intelligentsia*, and spokesmen for the big media who know next to nothing about *pre-*constitutional legal history and appear to care even less.

E. Enforcement of discipline. Wherever Militiamen served, they could conceivably misbehave. And by mandating that the initial disciplinary action addressed to such misbehavior should occur at the Local level, the statutes demonstrated where effective responsibility and authority started (and often ended).

1. Local Militia officers were authorized to punish Militiamen's misbehavior at musters and training immediately:

> • [1705] "[A]ll soldiers in horse and ffoot during the time they are in arms, shall observe and obediently perform the commands of their officer relating to their exercising according to the best of their skill, and * * * the chief officers upon the place shall * * * imprison mutineers and such soldiers as do not their dutys as soldiers at the day of their musters and training, and shall and may inflict for punishment * * * any mulct not exceeding fifty pounds of tobacco, or * * * imprisonment without bail or mainprise, not exceeding ten days."{EN-1348}

> • [1723] "[A]ll soldiers, during the time they are in arms, shall observe and obediently perform the commands of their officer, relating to their exercise, according to the best of their skill. And if any soldier * * * shall, at any * * * muster, disobey his officers' commands, or behave himself disorderly or refractorily thereat, * * * the chief commanding officer then present, [may] cause such offender to be tied neck and heels, for any time not exceeding twenty minutes. And if any such soldier shall thereafter offend, it shall and may be lawful for the said commanding officer * * * to commit such offender to the county goal, there to remain for any time not exceeding ten days[.]"{EN-1349}

> • [1738] "[I]f any soldier, during the time he is in arms at a general muster, shall refuse to perform the commands of his officer, or behave himself refractorily or mutinously, * * * the chief commanding officer, then present, [may] cause such offender to be tied neck and heels,

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[834] *See post*, at 567-597.

for any time, not exceeding five minutes: And for a second offence, at such general muster, the offender shall be * * * commit[ted] * * * to the county goal, there to remain for any time not exceeding ten days. And if any soldier, during the time he is in arms, at any private muster, shall misbehave, * * * such offender shall be * * * tied neck and heels, for any time, not exceeding five minutes, for the first offence; and for the second offence * * * commit[ted] * * * to the county goal, there to remain for any time not exceeding ten days."{EN-1350}

• [1755] "[I]f any soldier, shall at any general or private muster, refuse to perform the commands of his officer, or behave himself refractorily or mutinously, or misbehave himself at the courts martial, * * * the chief commanding officer, then present, * * * [may] fine every such soldier, * * * which fine shall be immediately paid down to such officer * * * . And in case any soldier so fined * * * shall refuse or fail to pay down his fine, or to give * * * security for paying the same * * * such officer * * * [may] commit every such soldier to the county goal, there to remain without bail or mainprize, for any time not exceeding three days[.]"{EN-1351}

• [1757 and 1759] "[I]f any soldier shall, at any general or private muster, refuse to perform the command of his officer, or behave himself refractorily or mutinously, or misbehave himself at the courts martial * * * the chief commanding officer, then present, * * * [may] cause such offender to be tied neck and heels, for any time not exceeding five minutes, or inflict such corporal punishment as he shall think fit, not exceeding twenty lashes."{EN-1352}

• [1762, 1766, 1771, and 1775] "[I]f any soldier shall at any general or private muster refuse to perform the command of his officer, or behave himself refractorily or mutinously, or misbehave himself at * * * [a] court-martial, he shall forfeit and pay the sum of forty shillings[[835]] * * * ; or * * * the chief commanding officer then present * * * [may] cause such offender to be tied, neck and heels, for any time not exceeding five minutes, and shall not inflict any other corporal punishment."{EN-1353}

• [1775] "[I]f any officer or soldier [among the Minutemen], during the time of his attendance on training duty, in battalion or companies, * * * shall refuse to obey the commands of his superiour officer, or behave himself mutinously or refractorily, or shall in any other manner transgress the rules of good order and decency, every such offender shall * * * be confined, for any time not exceeding twenty four hours, or fined, in any sum not exceeding one month's pay[.]

* * * * *

" * * * [I]f any [regular] soldier [in the Militia] shall, at any general or private muster, refuse to obey the command of his officer, or

[835] The Act of 1775 dispensed with the fine.

shall behave himself refractorily and mutinously, or misbehave himself at a court martial, * * * the commanding-officer then present * * * [may] cause such offender to be tied neck and heels, for any time not exceeding five minutes."{EN-1354}

• [1777] "If any soldier, at any muster, shall refuse to obey the command of his officer, or shall behave himself refractorily or mutinously, or misbehave himself at a court martial, the commanding officer, or court martial, may * * * put him under arrest for the day, or may cause him to be bound, neck and heels, for any time not exceeding five minutes."{EN-1355}

• [1779] "Every non-commissioned officer or private, who at any muster shall not obey the lawful commands of his superiour officer, or shall behave mutinously, riotously, get drunk or not demean himself as a non-commissioned officer or soldier, shall be put under guard for the day, and * * * shall forfeit and pay a sum not exceeding ten pounds."{EN-1356}

• [1784 and 1785] "If any non-commissioned officer or soldier, shall behave himself disobediently or mutinously when on duty, on, or before any [Militia] court or board, * * * the commanding officer, court or board may either confine him for the day, or cause him to be bound neck and heels, for any time not exceeding five minutes."{EN-1357}

Local Militia officers could also summarily punish obstreperous individuals who either were not members of the Militia at all, or who although being members were not in service at that particular time:

• [1777] "If any bystander interrupt, molest, or insult any officer of soldier while on duty, at any general or private muster, or misbehave before any court martial, the commanding officer, or court martial, may put him under arrest for the day."{EN-1358}

• [1779] "If any by-stander interrupt, molest, or insult any officer of soldier when on duty, or misbehave before any court-martial, he may be put under guard by the commanding officer for the day, and shall be fined in any sum not exceeding ten pounds."{EN-1359}

• [1784 and 1785] "If any bystander shall interrupt, molest, or insult any officer or soldier while on duty at any muster, or shall be guilty of the like conduct before any court or board * * * , the commanding officer, or such court or board, may cause him to be confined for the day."{EN-1360}

2. Other punishments for breaches of Militia regulations could be imposed later on, at Local courts-martial:

• [1705 and 1723] "That the field officers and captains of every county * * * have full power and authority to meet yearly at the court-house in their respective countys * * * in October * * * to inspect the severall lists or accounts given by the captains * * * and thereupon to

mulct every defaulter or offender therein charged, according to the merit of his default or offence * * * .

"*Provided always,* That nothing * * * be construed to give any power or authority to the said ffield officers and captains to meet or act as aforesaid at any other place or times[.]"{EN-1361}

• [1723] The "maior, recorder, and alderman * * * in the[ ] * * * court of hustings [in Williamsburg], upon the complaint of any officer * * * appointed to command the militia within the said city; and upon sufficient proof, shall and may give judgment against any person * * * listed under the command of such officer * * * for the fines which such person * * * shall be liable to, by means of his * * * not appearing, or not doing his * * * duty at any muster, or upon any other service within the said city[.]"{EN-1362}

• [1738, 1755, 1757, 1759, 1762, 1766, and 1771] "[I]t shall and may be lawful, for the field officers, and captains, of every county, * * * and they are hereby required to meet at the court-house of their counties * * * on the day next following the general muster, then and there to hold a court martial * * * , and to enquire * * * of all delinquents returned by the captains, for absence from musters, or appearing without arms and accoutrements[.[836]]"{EN-1363}

• [1755, 1757, 1759, 1762, 1766, and 1771] "[T]he colonel, major, and captains of the militia of the * * * city of Williamsburg, and borough of Norfolk, * * * shall * * * hold a court martial at the court houses of the said city and borough * * * in the same manner, and for the same purposes as the courts martial * * * held in the counties[.]"{EN-1364}

• [1762, 1766, and 1771] "[I]t shall and may be lawful to and for the courts-martial [of the city of Williamsburg] * * * to order and direct either the sergeant of the said city, or the sheriffs of the * * * counties of York and James-City, to receive and collect all such fines as shall be inflicted and ordered to be levied by them on such of the inhabitants of the said city as shall reside in their respective precincts[.]"{EN-1365}

• [1775] "[I]t shall and may be lawful for the field-officers and captains of every county * * * to meet at the courthouse of their respective counties the day next following the general muster in * * * April and October in every year, * * * then and there to hold a court-martial * * * to inquire * * * of all delinquents * * * for absence from musters, or appearing without arms, powder, or ball.

* * * * *

" * * * [T]he * * * militia officers, as well as soldiers, [in the city of Williamsburg and the borough of Norfolk] shall be liable to all the

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[836] The Acts of 1757 through 1771 substituted "without arms, powder, or ball" for "without arms and accoutrements".

penalties * * * to be inflicted on the officers and soldiers in the counties, either for neglect of duty or misbehaviour, in any respect whatsoever, to be adjudged by the courts of hustings both in the said city and borough[.]"{EN-1366}

• [1776] "[W]hereas * * * the court of Hustings in the city of Williamsburg is to have jurisdiction and to adjudge all penalties to be inflicted * * * on the militia officers and soldiers in the said city, either for neglect of duty or misbehaviour, and * * * it is difficult and inconvenient to hold such courts: For remedy whereof, * * * That courts-martial for punishing delinquents * * * in the said city shall be held by the field-officers and captains * * * , and not by the court of Hustings."{EN-1367}

• [1777] "The county lieutenant, field officers, and captains * * * shall hold a court martial at the courthouse of their county, or at, or convenient to, the place where the general muster shall be, on the day following their general muster * * * . The said court * * * shall * * * inquire * * * into all delinquencies[.]"{EN-1368}

• [1784 and 1785]"[T]he governor, with advice of council, shall have power to arrest the county lieutenant or commanding officer of a county, and all other officers, for any misconduct whatever, and upon trial and conviction, may censure or cashier them. * * * All officers under the county lieutenant or commanding officer of a county, may also be arrested by such commanding officer, and reported to the governor for trial, or at the option of such commanding officer, a general court-martial * * * may * * * be held * * * . Any non-commissioned officer or soldier offending, shall be tried by a like general court-martial, and may, on conviction, be censured or fined at the discretion of the court; and failing to make instant payment of such fine, or to give sufficient security therefor, within such time as the court may think proper, shall receive corporal punishment, not exceeding twenty lashes. * * *

" * * * [T]he commander of a county, shall on some day in * * * May and November (his general muster being over) summon all his field officers, and an equal number of the senior magistrates, and with them * * * shall form a court of enquiry, and assessment of fines * * * . The county lieutenant shall then lay before the said court, all the returns of delinquencies * * * , whereupon they shall proceed to hear and determine on them. All fines to be assessed * * * shall be collected by the sheriff of the county, upon a list thereof * * * . And should any person so charged with fines, fail to make payment, * * * the sheriff is * * * authorized to make distress and sale therefor, in the same manner as is directed in the collection of taxes."{EN-1369}

F. Use of Militia fines. An old adage recommends that one "follow the money" in order to assess where real political power, influence, and benefit lie. In *pre-*constitutional Virginia, enforcement of Militia discipline usually resulted in the

assessment of fines against defaulters.[837] And, typically, the moneys collected were allotted directly to the Militia itself or to Local governmental units to subsidize the procurement of firearms, ammunition, and accoutrements for the Localities' own Militiamen:

> • [1659 and 1662] "*BEE it enacted* that a provident supplie be made of gunn powder and shott to our owne people, and this strictly to bee lookt to by the officers of the militia, (vizt.) That every man able to beare armes have in his house a fixt gunn two pounds of powder and eight pound of shott at least which are to be provided by every man for his family * * * , and whosoever shall faile of makeing such provision to be fined ffiftie pounds of tobacco to bee laied out by the county courts for a common stock of amunition for the county."{EN-1370}
>
> • [1705 and 1723] "[T]he * * * ffield officers and captains * * * have full power and authority to order and dispose the tobaccoes which shall * * * accrew and arise upon the ffines, penaltys and fforfeitures * * * , in such manner as in their discretions shall seem best * * * for furnishing the severall troops and companys belonging to the county with necessary drums, colours, trumpets, leading staffes, partizans and halberts, and for procuring such and so many books of military dissipline as shall be thought convenient[838], and after all these for providing arms and ammunition for the countys use with the overplus."{EN-1371}
>
> • [1738] Courts-martial composed of "the field officers, and captains, of every county * * * shall have power * * * to order and dispose of all * * * fines, in the first place, for buying drums, trumpets, and trophies, for the use of the troop or company from whence the same arise; and afterwards, for supplying the militia with arms."{EN-1372}
>
> • [1738, 1757, 1759, 1762, 1766, and 1771] The fine against "the lieutenant of any county * * * failing to appoint a general muster" was to be dispersed "one moiety to our sovereign lord the king * * * for and towards the better supplying the county with arms; and the other moiety to the informer".{EN-1373}
>
> • [1740] Penalties under this statute were "[t]o be recovered * * * to the same uses" as stipulated in the statute of 1738.{EN-1374}
>
> • [1748 and 1753] "[O]ne moiety of all * * * forfeitures" assessed against delinquent Militiamen "shall go * * * for and towards the better supplying with arms that county where such offence shall be committed, and the other moiety to him or them that will inform or sue for the same".{EN-1375}

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[837] *See post*, at 666-697.

[838] The Act of 1723 dispensed with "books of military dissipline".

• [1755, 1757, 1759, 1762, 1766, and 1771] Fines imposed on persons selling or buying public arms were to be dispersed, "one moiety * * * for the use of the county, to which the arms shall belong, for the purchasing other arms, and the other moiety to the informer".

The courts-martial of every County were to "order and dispose of all * * * fines [imposed on delinquents for not performing their duties], for buying drums, trumpets and trophies for the use of the militia of the county, and for supplying the militia of the said county with arms."{EN-1376}

• [1757, 1758, 1759, 1761, 1762, 1764, 1766, 1769, and 1772] "[A]ll the fines * * * shall be one half * * * for and towards supplying with arms the militia of the county to which the offender belongs, and the other half to the informer[.]"{EN-1377}

• [1766 and 1771] "[T]he persons so exempted (not being Quakers) shall provide compleat sets of arms * * * required for soldiers, for the use of the county, city or borough, wherein they shall respectively reside: And if they shall fail or refuse so to do, * * * the courts of the several counties, city or borough * * * are hereby impowered and required to levy the value of such arms on each of them respectively."{EN-1378}

• [1775] The Militia "captains [of each Company] shall provide drums, fifes, colours, and halberds, at the publick expense, to be reimbursed out of the fines [imposed on delinquents]".

Certain fines "levied by a court-martial" in each County against officers were to be "appropriated to the purchasing arms and ammunition for the use of such as are not able to procure the same".

And "the fines imposed * * * on the chief officer for not enlisting the men in his county, and on the commanding-officer present in the county for not appointing general musters, shall be to the use of the county, for providing arms[.]"{EN-1379}

• [1777] "All fines * * * shall be appropriated, in the first place, to the payment of the salaries [of certain Militia personnel] * * * , then to reimbursing the publick treasury for any arms purchased for the poor soldiers of such county, and for drums, fifes, and colours, bought for the several companies; and if any surplus remain, it shall be laid out * * * in establishing and furnishing, for the use of their county, a magazine of small arms, field pieces, ammunition, and such other military stores as may be useful in case of invasion or insurrection."{EN-1380}

• [1784 and 1785] "[E]ach sergeant shall have a pair of moulds fit to cast balls for their respective companies, to be purchased by the commanding officer, out of the monies arising on delinquencies; * * * [and] the court[-martial] * * * appointed for trying delinquencies * * * shall cause * * * [arms for poor Militiamen] to be purchased out of the money arising from delinquents.

* * * * *

> " * * * The lieutenant or commanding officer of a county shall cause to be purchased out of the money arising from the fines, for every regiment in his county, the usual set of colours, * * * also a drum and fife for each company[.]"{EN-1381}

These requirements were taken seriously. For example, when in 1772 the Governor sought advice as to his authority "to remit certain Militia Fines", the Council "gave it as their Opinion, that all such Fines being appropriated by the Act of Assembly to particular Purposes, it was not in his Excellency's Power to remit them".{EN-1382}

G. Musters and training. If "'[p]olitical power grows out the barrel of a gun'" in an *effective* manner, it does so, not simply to the extent that the people adventitiously possess firearms, or to the extent that they know how to use the arms they possess as isolated individuals, but instead largely (if not only) to the degree that they are prepared and willing to employ those arms in a *collective and organized* fashion for a common goal. This is the lesson Virginia learned from all of her *pre-*constitutional experience: namely, "[t]hat a well regulated militia, composed of the body of the people, *trained to arms*, is the proper, natural, and safe defence of a free state".[839]

Virginia's goal was always near-universal—and, to the extent practical, comprehensive and thoroughgoing—preparedness. As early as 1688, the King instructed his Governor to

> take care that all Planters and Christian Servants be well and fitly provided with arms and that they be listed under Officers and when as often as you shall think fit mustered and trained whereby they may be in a better readiness for the Defence of our * * * Colony * * * .
>
> * * * And you are to take special Care that neither the frequency nor unreasonableness of remote Marches Musters and trainings be an unnecessary Impediment to the affairs of the Planters.{EN-1383}

And to that same end (albeit under a different Monarch), in 1701 the Governor issued a proclamation that "(for our better defence) all & Every the militia horse and foot be alwaies in readynes at an hours warning well armed and Equipt for warr".{EN-1384}

1. To approach such a high degree of readiness in a community of widely dispersed population, though, required that "the body of the people" be "trained to arms" in geographical proximity to where they lived and worked, so as to maximize their practical ability to muster and exercise on a regular basis while simultaneously minimizing the disruption of their normal lives. So, from the beginning of the

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[839] Virginia Declaration of Rights (1776) art. 13 (emphasis supplied).

Colony, musters and training of Militiamen centered in each County, City, and Borough:

> • [1632] "That the comanders of all the severall plantations, doe upon holy days exercise the men under his comand, and that the comanders yearlie doe likewise uppon the first day of December, take a muster of theire men, * * * as also of armes and munition[.]"{EN-1385}
>
> • [1682] "[T]hat twenty men well furnished with horses and all other accoutrements be raised * * * in each of * * * [certain] counties * * * . *And* * * * that each captain * * * shall once every month muster, treine, exercise, instruct and discipline the troop of soldiers under his command[.]"{EN-1386}
>
> • [1684] "[E]very collonell of a regiment within this country, shall once every yeare * * * cause a generall muster, and exercise of the regiment under his command, or oftner if occasion shall require.
>
> "And * * * every captain or commander of any troop of horse or foot company, within this country, shall once at the least in every three months, muster, traine and exercise, the troop or company under his command, to the end, they may be better fitted and enabled, for * * * service, when they shall be commanded thereunto."{EN-1387}
>
> • [1684] "[E]ach captain [of the militia for the upper Counties, on the rivers,] * * * shall once every month, at the least, muster, traine, exercise, instruct and discipline the troope under his command[.]"{EN-1388}
>
> • [1703] Recognizing that "the most effectual means for the defence of this Colony depends upon the well ordering and disciplining the Militia", the Governor ordered the "Commanders in cheif of each County * * * to appoint a Gen^{ll} Muster of all the Militia under their respective commands, and take especial care & give strict directions that all Persons serving in the Militia be well provided with arms & ammunition according to Law. And * * * to give directions to the Captains of each Troop & Company * * * duly to exercise their said Troops & Companys once every three weeks, and to take care that all Persons without Priveledge or exemption be listed & Personally Performe their duty at the said Musters."{EN-1389}
>
> • [1704] The Governor ordered the "Commanders in Chief of the respective Countys * * * to appoint a Generall Muster of all the Militia under their respective Commands at such time and place as they shall judge most convenient, at which they are to require all Persons serving in the Militia to appear * * * then to give Orders & directions to the Captaines of the sev^{ll} Troops and Companys * * * that they duly exercise their said Troops and Companys once every moneth at the most convenient places for their meeting[.]"{EN-1390}
>
> • [1705] "That the * * * chief officer of the militia of every county once every year at least, cause a generall muster and exercise of all the

horse and ffoot in his county * * * and oftener if there be occasion, and that every captain both of horse and foot once in every three months, muster, train and exercise his troop or company, or oftener if occasion require.

"*Provided*, That no soldier in horse or foot, be fined above five times in one year for neglect in appearing."{EN-1391}

Musters of individual Companies were denominated "particular" musters, to distinguish them from the countywide, or "generall", musters. Thus, the number of possible fines delimited the extent of *mandatory* training—in this case, five musters were specified (one "generall" and four "particular"). A chief officer could call for "generall" musters "oftener if there be occasion"; and a captain could call for particular musters "oftener if occasion require[d]"—but no Militiaman could be fined for failing to attend any such additional muster.

• [1711] The Governor and his Council determined that "it is necessary the Country be put into an imediate posture of defence by training the Militia, and that the following Scheme proposed by the Governor for the more effectual prevention of the Enemy's attempts be put in execution Viz[t]

"That a General Muster of the Militia of each County be forthwith appointed and an exact account taken how they are armed & provided with ammunition.

"That the Militia of each County be divided into three parts * * * and that each of the said Divisions do meet and exercise once a Week * * * .

"That the Commanding Officers of each County shall notify to the Governor the places of Rendevouze for the respective Divisions of their Militia, and shall likewise appoint a place of Gen[ll] Rendevouze for the whole Militia of the County upon an Alarm[.]"{EN-1392}

Interestingly, to the Governor,"training the Militia" included not only "exercis[ing]" the men but also taking an inventory of their arms and planning for their deployment during "an Alarm".

• [1712] The Governor "Ordered that for preventing any sudden Attempts of * * * [certain] Indians, at least a Troop or Company of the Militia in each of the Frontier Countys be drawn together and exercised once a Week untill further Order."{EN-1393}

• [1723] "[T]o the end, the militia of this * * * colony and dominion, being settled and armed, * * * may be the better fitted for service, *Be it* * * * *enacted* * * * That the * * * chief officer of the militia of every county, once every year at least, cause a muster and exercise of all the troops and companies in his county, at one or more place or places, or oftner, if there shall be occasion:—And that every captain, once in every three months, muster, train, and exercise his troop or company, or

oftner, if occasion require. *Provided,* that no officer or soldier be fined above five times in one year."{EN-1394}

• [1723, 1738, 1755, 1757, 1759, 1762, 1766, and 1771] "[N]o inhabitant of the * * * city [of Williamsburg], capable of serving in the militia, shall hereafter to compellable to make * * * appearance at any muster of the militia * * * out of the said city: But all and every such * * * inhabitants (except the maior, recorder, and alderman of the said city) shall be listed and trained, * * * under the command of one or more person or persons, of the principal inhabitants of the said city[.]"{EN-1395}

• [1738] "[F]or the better training and exercising the militia, and rendering them more serviceable, *Be it* * * * *enacted*, That every captain shall, once in three months, or oftner, if required, muster, train, and exercise his troop or company: And the * * * chief commanding officer in every county, shall cause a general muster and exercise of all the troops and companies within his county, to be made in the month of September, every year"—"so that no person be fined above five times a year for * * * failure" to "appear[ ] at muster, compleatly armed and accoutred".{EN-1396}

• [1740] "[E]very captain, once in every two months, or oftner, if required, shall muster, train, and exercise his troop or company: And the * * * chief commanding officer in every county, shall cause a general muster and exercise of all the troops and companies within his county to be made, in the months of March and September, in every year, or oftner, if there shall be occasion"; and "officers and soldiers * * * offending against the[se] directions * * * shall, for every offence, incur * * * penalties", "so that no person be fined above eight times in any year".

This, however, was a special wartime measure, enacted "that the militia * * * should be kept under stricter discipline, more frequently trained and exercised, * * * the better to enable them to contend with regular troops"; and, upon a "proclamation of peace, this act, as to so much thereof, as relate[d] to the disciplining and exercising the militia, [was to] be * * * repealed and made void".{EN-1397}

• [1755] "[E]very captain shall once in three months, and oftner if thereto required, by the * * * chief commanding officer in the county, muster, train and exercise his troop or company, and the * * * chief commanding officer in the county, shall cause a general muster and exercise of all the troops and companies within his county, in the months of March and September yearly[.]

* * * * *

" * * * *Provided*, That no person be fined above six times in the year for any particular default[.]"{EN-1398}

• [1757 and 1759] "And for the better training and exercising the militia, and rendering them more serviceable, *Be it* * * * *enacted* * * * , That every captain shall, once in three months, and oftner if thereto

required by the * * * chief commanding officer in the county, muster, train, and exercise his company, and the * * * chief commanding officer in the county shall cause a general muster and exercise of all the companies within his county, * * * in the months of March or April, and September or October, yearly[.]

* * * * *

" * * * *Provided,* That no person be fined above six times in the year for any particular default."{EN-1399}

• [1762, 1766, and 1771] "[T]he * * * chief commanding officer, of the militia of the several counties of this colony, and also of the city of Williamsburg and borough of Norfolk, shall cause a general muster of the several companies of their militia once only in every year, * * * in the months of March or April[.]"{EN-1400}

• [1775] "[T]here shall be a private muster of the several companies in each county once a fortnight, except in the months of December, January, and February * * * and moreover, there shall be a general muster in every county, in the months of April and October in each year[.]"{EN-1401}

• [1776] "[W]hereas, by the * * * ordinance [of 1775], it is * * * ordered, that there shall be a private muster of the several companies of each county once a fortnight, which, from experience, is found burthensome: *Be it* * * * *ordained* * * * That there shall be a private muster of the several companies in each county or corporation once in four weeks, and no oftener."{EN-1402}

• [1777] "There shall be a private muster of every company once in every month, except the months of January and February, at such convenient time and place as the captain * * * shall appoint, and a general muster in each county at a convenient place, near the centre of the county, on some day in the months of April and October, in every year, to be appointed by the county lieutenant[.]"{EN-1403}

• [1777] "[T]he militia of the said city [of Williamsburg] and borough [of Norfolk], with the professors and students of the * * * college, shall be mustered, trained, and employed, at the same times, and in the same manner, and * * * shall be armed with the same weapons * * * as the militia of a county[.]"{EN-1404}

• [1779] "[I]n every county where there are more than one battalion, there shall be a muster of each battalion in the months of March and October in every year, to be appointed by the county lieutenant, * * * at, or as near the centre of the districts of such battalions as may be."{EN-1405}

• [1780] "[E]very captain appointed to command such part of the * * * militia as are * * * directed to hold themselves in readiness, shall once in every fortnight call them together at some convenient place

> within their respective counties, for the purpose of training and disciplining them[.]"{EN-1406}
>
> • [1784] "There shall be a private muster of every company once in every three months, at such convenient time and place as the captain * * * shall appoint; a muster of each regiment, on some day in the month of March or April, in every year, to be appointed by the commanding officer thereof, at a convenient place, near the centre of the regiment; and a general muster of the whole on some day in the month of October or November, in every year, to be appointed by the county lieutenant * * * at a convenient place near the centre of the county * * * . Every officer and soldier shall appear at his respective muster-field on the day appointed, by eleven o'clock in the forenoon, armed, equipped, and accoutred[.]"{EN-1407}
>
> • [1785] "There shall be a private muster of every company once in two months, except December and January, at such convenient time and place as the captain * * * shall appoint; a muster of each regiment on some day in the month of March or April, in every year, to be appointed by the commanding officer thereof, at a convenient place, near the centre of the regiment; and a general muster of the whole on some day in the month of October or November, in every year, to be appointed by the county-lieutenant * * * at a convenient place near the centre of the county * * * . Every officer and soldier shall appear at his respective muster-field on the day appointed, by eleven o'clock in the forenoon, armed, equipped, and accoutred[.]"{EN-1408}

The annual burden of required musters and exercises varied widely over the years, reflecting different levels of perceived danger: five under the laws enacted in 1684, 1705, 1723, and 1738; six for 1755, 1757, 1759, and 1784; seven for 1785; eight for 1740; eleven for 1776; twelve for 1682, 1684, 1704, and 1777; seventeen for 1703; twenty for 1775; twenty-four for 1780; fifty-two for 1711 and 1712; and even one on each "holy day[ ]" and "uppon the first day of December" pursuant to the law of 1632. As in 1740, the large numbers of musters in certain years were intended "the better to enable the[Militia] to contend with regular troops" (although that, of course, was inevitably one major purpose of all Militia training at all times). In any event, the annual pattern was always the same: one or two "general" musters of all the Militia Companies in each County, and several "particular" (sometimes called "private") musters for each individual Company—as the statutes of 1777, 1784, and 1785 explicitly required, but as must always have been the actual practice, "at a convenient place, near the centre of the county" for the general, and at some "convenient time and place" for the particular, musters. Within this pattern, the emphasis lay on the particular musters—for (i) it was obviously more convenient to assemble individual Militia Companies for training according to flexible schedules that took into account the men's economic and social burdens than to aggregate all of a County's Companies for a general muster

on some rigid timetable; and (ii) much, if not most, of what Militiamen needed to learn could be taught in exercises at the Company level. Moreover, in light of the geographical proximity of some Companies to each other, nothing would have prevented, and propinquity would have encouraged, two or more Companies' holding joint musters or special exercises if their Captains considered it meet.

This consistent pattern evidences that, for more than a century, Virginians were willing to base their "homeland security" on the beliefs: *First*, that their Militia should and could be adequately trained at the Local level, as to both general musters (for all the Companies within a County as a whole) and particular musters (within each Company's own area). *Second*, that the return the community received in terms of preparedness from Militia training conducted along those lines constituted a fair exchange for the amount of time, effort, and expense such training required. Only in exigent circumstances were Militia musters on a larger scale employed—such as the organization of highly trained Minutemen by so-called "districts".[840]

2. In some circumstances, special consideration for particular Militia units might have been deemed appropriate, as in one instance in 1699 when, because "some difficulties ha[d] arisen in the Settlem^{t} of the Militia of New Kent County, therefore for the better and more speedy accommodation thereof, His Excellency [the Governor] * * * Order[ed] that upon [a certain date] * * * a generall Muster sh[ould] be had of all the Militia in that County, * * * where his Excellency himself w[ould] be personally p^{r}sent".{EN-1409}

Or particularized consideration might have come into play because of the peculiar needs of certain units that related to their special equipment—the most obvious example being the use by some Militiamen of rifled rather than smoothbored muskets. For instance, towards the end of the *pre-*constitutional period, Militia statutes provided that:

> • [1775] "[E]very militia man * * * shall furnish himself with a good rifle, if to be had, or otherwise with a * * * common firelock, bayonet, pouch, or cartouch box, [and] three charges of powder and ball[.]"{EN-1410}
>
> • [1777] "Every * * * soldier shall appear at his respective muster-field * * * armed and accoutred * * * with a rifle and tomahawk, or good firelock and bayonet, with a pouch and horn, or a cartouche or cartridge box, and with three charges of powder and ball[.]"{EN-1411}
>
> • [1784 and 1785] "[T]he militia of the counties westward of the Blue Ridge, and the counties below adjoining thereto, shall not be obliged

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[840] *See post*, at 559-563.

> to be armed with muskets, but may have good rifles with proper accoutrements in lieu thereof."{EN-1412}

Those Militiamen who armed themselves with rifled muskets not only utilized a procedure for loading their firearms different from that common to men carrying smoothbored muskets, but also must have practiced (and probably themselves devised) special tactics by which they could have taken advantage of their rifles' relatively great range and accuracy, while minimizing the disadvantages they faced from the extra time normally required to load, coupled with the general absence of bayonets fitted to, such arms.[841]

3. Naturally, a modicum of central direction was mandatory in all of this, because every Militiaman's basic training needed to be reasonably uniform:

> • [1728] "The Governor proposing * * * in what manner the Militia may be rendred most usefull * * * had prepared a form of exercise as well for the horse as the foot, but that it was necessary to have some person to train and instruct them therein, so as being once disciplin'd in one uniform method of exercise, they may be more usefull when there shall be occasion to call together the Troops of several Counties for the defence of the Countrey; It is the opinion of the Council that the most effectual way to render the Militia serviceable will be to appoint an Adjutant to go into the several Counties, and to instruct the officers as well as Souldiers in the form of exercise prepared for them[.]"{EN-1413}

> • [1752] The Governor and his Council, "upon the Death of * * * [the] late Adjutant, taking under Consideration, the great Advantage of an Adjutant to this Country, in instructing the Officers and Soldiers in the Use and Exercise of their Arms in bringing the Militia to a more regular Discipline, and fitting it for Service, besides polishing and improving the meaner people, and finding by Experience the Insufficiency of one, fully to discharge a Business of so much Importance, it was * * * agreed to divide the Colony into four Districts [each consisting of several counties], and the following Gentlemen were nominated and approved of * * * , Viz, Thomas Bentley[,] * * * William Fitzhugh * * * [,] George Muse * * * [, and] George Washington[.]"{EN-1414}

> • [1784 and 1785] "[T]he plan of major general baron Steuben * * * for forming and disciplining the troops of the United States, shall be the guide for the militia of this commonwealth * * * . It shall be the duty of every commander of a county regiment and company, at every of their respective musters, to cause the militia to be exercised and trained, agreeable to the said plan * * * ; and for this purpose the said officers are * * * authorized to order the most expert and fit officer in their respective companies to perform that duty."{EN-1415}

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[841] *See, e.g.,* D. Higginbotham, *Daniel Morgan, ante* note 795, at 119-155.

Even this training was to be performed in and for the Counties, however.

H. Command and deployment. The purpose of organizing, arming, and training the Militia was to provide Virginia with actual defense—which required that Militiamen be called forth, led to, and deployed in the field for intelligence, military, and police duties. At least in the initial stages of active service, command of the Militia was largely a Local prerogative. This was a matter of necessity.

1. During the *pre*-constitutional era, the ability to gather intelligence of impending danger was extremely limited. Methods of communication were slow and uncertain. Warnings of threats often consisted of only whatever observations could be made on the spot by Militiamen assigned to "the Watch" (at night), "the Ward" (during the day), and "the Rangers" (on the frontiers):

> • [1624 and 1632] "[T]here be dew watch kept by night."{EN-1416}
>
> • [1682] "[E]very captain * * * shall at the least once in every fourteen daies range and scout about the frontiers of the county for which they serve, and in such other places as shall be most likely for the discovery of the enemy[.]"{EN-1417}
>
> • [1684] "[E]very captain [of the militia for each of the upper counties, on the rivers,] * * * shall once every weeke (and oftner if occasion shall require) range and scout * * * in such * * * places as shall be most likely for the discovery of the enemy[.]"{EN-1418}
>
> • [1699, 1700, 1701, 1703, 1704, and 1705] The Governor and Council "require[d] the Commanders in Chief of the Militia of * * * [various] Counties * * * that they do provide and appoint sufficient persons * * * to look out upon the Sea Coast * * * ; which persons appointed * * * if they See any Ship or Vessel upon the Sea, are diligently to take notice of and observe their Courses and Actions and particularly if any Boat or boats be sent on Shoar; and if there appears any Suspicion of their being Pyrates, that they doe immediately give notice thereof to the next Commission [Commissioned] Officer of the Militia, and he is forthwith to intimate the same to the Commander in Cheif of the Militia in that County where he resides; who is * * * directed to take such care and give such Orders as shall be necessary for the defence of his County, and for the pursueing and app^{r}hending such suspicious Person's, * * * and also to give immediate notice to the Commanders in Cheif of the Militia in the other Counties bordering upon the Sea, that they may also be p^{r}pared to defend themselves and to pursue and app^{r}hend the said suspicious Person's[.]"{EN-1419}
>
> Evidently, in today's jargon the men performing these duties could have been described as comprising an "*anti*-terrorism early warning network", "pyrates" being the quintessential "international terrorists" of that era.

> • [1709] "Ordered that the Commanding Officers of the Militia in * * * [certain] Countys * * * appoint fitt persons to be Lookouts in those Countys and take care that they diligently attend that Service in the usual Station with Suitable directions to them for giving Alarms upon discovery of an Enemy."{EN-1420}
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> • [1727, 1732, 1734, 1738, 1740, 1744, 1748, 1753, 1757, 1758, 1759, 1761, 1762, 1764, 1766, 1769, and 1772] "[F]or the better discovery of the approach of enemies by sea.
>
> " * * * That in each of * * * [certain] counties * * * , at such times and places as the governor * * * shall * * * direct, one man be appointed by the chief officer of the militia, residing in each of the said counties, respectively: Which men shall keep a constant look-out to seaward, by night and by day, and diligently observe the courses and motions of all such ships or vessels, as they * * * shall discover upon the coast: And if, upon such observation, such person shall suspect the said ships or vessels to belong to an enemy, he shall immediately give notice thereof, to the next field officer in his county; who is thereupon to transmit an account * * * to the governor * * * and the county lieutenant, or to the chief commanding officer of the militia in the said county."{EN-1421}

Rather than being outmoded, though, the *pre*-constitutional practices of "rang[ing] and scout[ing]", keeping "constant look-out * * * by night and day", "diligent[ ] observ[ation]", and "immediate[ ] * * * notice" of the least suspicion that something may be amiss provide a good summary of an intelligence officer's duties in any era.[842] Technology may have made rapid advances since the late 1700s, but the fundamental task of the Watch, the Ward, and even "ranging" has remained constant. *Le plus ça change le plus c'est la même chose.*

2. Once some danger had become apparent and imminent, and an "alarm" had been sounded, the responsibility and prerogative for marshaling an immediate defense and assuming command of whatever forces might be available in that vicinity always devolved in the first instance upon Virginia's Local Militia officers.

a. Again, practical constraints rendered this unavoidable. In the nature of things, any danger would have arisen in a particular geographical area—perhaps within several Localities at once; but, even so, in each one the residents would have been affected where they lived and worked. For that reason, Virginia's goal was that "all & Every the Militia horse and foot be alwaies in readynes at an hours warning well armed and Equipt for warr".{EN-1422} Yet even Militiamen apprised of an "alarm" at once, and fully prepared to move out at a moment's notice, could not have mustered and marched very far in that amount of time, especially across rough

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[842] Further details on the Rangers appear *post*, at 563-564.

countryside or during inclement weather. With men spread throughout the area at their normal occupations, to be alerted only by slow and uncertain communications, the rapid assembly of large numbers from distant Companies was always problematic. So "readynes" in any Locality inevitably depended largely upon the forces available on the ground then and there. Moreover, Local "readynes" in terms of men and their equipment alone was not enough. Someone on the spot had to exercise the authority to call forth, command, and deploy the Militia at the earliest possible moment. Therefore, just as Militiamen were enlisted and trained Locally, and their officers selected from among Local residents, so too was the initial command of Militia Companies in times of danger entrusted to Local officers:

> • [1684] "[U]pon discovery, notice or advice of the approach or attempt of an enemy, the * * * captain [of the militia troop for each of the upper counties, on the rivers,] * * * is hereby required to give speedy advice thereof to the governour * * * , and in the mean time to attend the motion of the enemie, only unless the enemie dureing that time shall first commit some act of hostility, either in burning or in forcible entering into our houses, or by killing, maiming or carrying away any of the inhabitants, and then in such case to engage and destroy them, if he see cause[.]
>
> * * * * *
>
> " * * * [U]pon the incursion, invasion or inroad of any Indian enemie into [certain Counties] * * * , it shall and may be lawfull to and for the militia officers * * * (as the emergency or occasion shall require) to put the souldiers under their command, into a posture of war and defence for the safeguard of the counties[.]"{EN-1423}
>
> • [1691] The Lieutenant Governor and the Council "Ord^{r}d that upon the [watchmen's] least notice of the approach of any Forreign Indians, or French they Imediatly send to the next Militia Officer, who is forthwith to rayse the Militia under his Comand, and to give Notice to the other Offic^{rs} of that County who are all to rayse the Soldiers under them to resist or repell any of Our said Enemies, and the said * * * Officers are to give Speedy Notice to the Comander in Cheif of that County and to follow such Ord^{rs} and Comands as they shall receive from him, and in case there be occasion for any Assistance the Comand^{r} in Cheif is to rayse soe many of the Militia of the Adjacent Counties as he shall think fitt and cause them to march to the assistance where Occasion shall be, and the said Comander in Cheif of the said Counties forthwith to give an account of the same to the Gov^{r} * * * and observe such Ord^{rs} and Comands as he shall receive from him".{EN-1424}
>
> • [1699] The Governor and his Council "Ordered, that * * * in Case of any Incursion or Invasion the next Comicon officer of the Militia, upon Notice thereof, Shall * * * raise Such and Soe many Men and armes as Shall be Sufficient to oppose the Invador's, untill they Shall receive further direccons therein from His Excellency or the Commander in Cheif

of the Militia in the County where such men Shall be raised, unto whom, every Such Comicon [officer] Shall imediately * * * dispatch Severall Expresses with particular accounts thereof."{EN-1425}

• [1727, 1732, 1734, 1738, 1740, 1744, 1748, and 1753] "[E]very officer of the militia, to whom notice shall be given of any invasion or insurrection, shall have full power and authority, * * * and is hereby required, forthwith to raise the militia under his command, and to send immediate intelligence to the county-lieutenant, * * * and to the next militia officer in the same county, informing them at the same time in what manner he intends to proceed; and shall, in the mean time, keep the militia, under his command, under arms, until he receives orders from his superior officer. And every county lieutenant * * * to whom such intelligence shall be given * * * shall forthwith dispatch an express to the governor * * * , notifying the danger * * * . And until orders shall arrive from the governor, shall draw together the militia of his county, in such place or places, as he shall judge most convenient for opposing the enemy."{EN-1426}

• [1755] "[E]very officer of the militia, to whom notice shall be given of any invasion or insurrection, shall raise the militia under his command, and send intelligence to the county lieutenant * * * and shall * * * immediately proceed to oppose the enemy, according to * * * orders * * * , and such county lieutenant * * * shall give immediate notice to the officers of the militia of the next adjacent counties, of such invasion or insurrection, and the situation and circumstances of the enemy, according to the best of his information and judgment; and such officer to whom such notice shall be given, if not the chief commanding officer in the county, shall give immediate notice to his commanding officer, * * * who shall immediately raise the militia of his county, and march part thereof, (not exceeding two thirds) against such enemy, if the circumstances of the case shall require it * * * ; and such commanding officer shall cause the remaining part of his militia not so marched, to remain in arms in the county, for the defence and protection thereof, until he shall receive orders from the governor[.]"{EN-1427}

• [1757, 1758, 1759, 1761, 1762, 1764, 1766, 1769, and 1772] "[E]very officer of the militia, to whom notice shall be given of any invasion or insurrection, shall raise the militia under his command, and send intelligence to the county lieutenant, or * * * the chief commanding officer in the county, and shall moreover immediately proceed to oppose the enemy according to the orders he shall receive * * * , and such * * * chief commanding officer shall give immediate notice to the officers of the militia of the next adjacent counties of such invasion or insurrection, and the situation and circumstances of the enemy according to the best of his information and judgment; and such officer to whom such notice shall be given, if not the chief commanding officer of the county, shall give

immediate notice to his commanding officer * * * , who shall immediately raise the militia of his county and march part thereof, not exceeding two-thirds, against such enemy, if the circumstances of the case shall require it * * * ; and such commanding officer shall cause the remaining part of his militia, not so marched, to remain in arms in the county for the defence and protection thereof, until he shall receive orders * * * . And every * * * chief commanding officer in any county to whom such intelligence shall be given * * * shall forthwith dispatch an express to the governor * * * , notifying the danger, and * * * the strength and motions of the enemy[.]"{EN-1428}

• [1776] "[W]here it shall be necessary to call on duty the militia of any colony [*sic,* in the context 'county' must have been meant], upon an invasion or insurrection within the same, or any county adjoining, the commanding-officer shall have full power and authority to order into service such part of the militia of his said county as to him shall seem necessary[.]"{EN-1429}

• [1784 and 1785] "If a sudden invasion shall be made into any county in this commonwealth, or in case of an insurrection in any county, the county lieutenant is hereby authorized and required to order out the whole, or such part of his militia as he may think necessary, and in such manner as he may think best, for repelling or suppressing such invasion or insurrection, and shall call on the lieutenants or commanding officers of the adjacent counties for such aid as he may think necessary, who shall forthwith * * * furnish the same."{EN-1430}

b. In some cases, because of special circumstances, not only was Local command the order of the day, but also Militiamen could refuse to march out of their communities without direction from the Governor or their own Local officials:

• [1723, 1738, 1755, 1757, 1759, 1762, 1766, and 1771] "[W]hereas it may happen, that the chief magistrates, and other inhabitants of the * * * city [of Williamsburg], may be listed and compelled to serve under the command of the officers of the militia, in the counties of James City, and York, * * * ; and forasmuch as the same may be very inconvenient, and may render the governor's house, public magazine, and capitol, in the said city, defenceless in times of danger, *Be it* * * * *enacted* * * * , That * * * such persons * * * listed and trained [in the Militia of the city of Williamsburg], shall not be compelled to go out of the said city, on any military service, without the express order of the governor * * * or, in his absence, the order of the * * * maior, recorder, and aldermen[.]"{EN-1431}

• [1775] "[N]othing in this ordinance * * * shall extend * * * to the inhabitants of the city of Williamsburg or borough of Norfolk, so as to oblige them to * * * serve in the militia out of the said city or borough"; and "without * * * [the] orders and directions [of the Courts of Hustings

in the City of Williamsburg and the Borough of Norfolk] neither of the * * * militias [of those Localities] shall at any time be obliged to march out of the said city or borough".{EN-1432}

c. Of course, some provision was always made for ordering out the Militia *en masse*, as for instance in:

> • [1748 and 1753] "[U]pon any invasion of an enemy by sea or land, or upon any insurrection, the governor * * * have full power and authority to levy, raise, arm, and muster, such a number of forces, out of the militia of this colony, as shall be thought needful for repelling the invasion, or suppressing the insurrection, or other danger, and the same to lead, conduct, march, transport and employ, * * * as well within the several counties and places to which they belong, as into any other counties or places within this dominion[.]"{EN-1433}
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> • [1775] "[T]he * * * committee of safety * * * shall * * * have full power and authority to call forth into actual service any detachments or companies of minute-men, or any parts of the militia from any district or county within this colony, having regard to the convenience and vicinity of such district or county to the place of immediate danger, and also to the internal security of such district or county.
>
> * * * * *
>
> "*Provided always*, That the militia at large of any county shall not be called into actual service, except in cases of the most urgent and imminent danger, nor continued, on any pretence whatever, longer on duty than their places can be supplied by minute-men, to be drawn from the most convenient districts. * * *
>
> "And whereas, till the forces are raised and embodied, it may be necessary to the security of the country that the militia and volunteer companies should be called into service, * * * the said committee of safety shall have full power and authority to call into service, in cases of danger, * * * so many volunteer companies, and such parts of the militia, as they may think necessary for the defence and security of any part of the country[.]"{EN-1434}
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> • [1784 and 1785] "[W]hereas, it is necessary that adequate powers be vested in the executive for calling forth the militia and resources of the state, in cases of invasion or insurrection, or upon any probable prospect of such invasion or insurrection;
>
> " * * * That the governor, with advice of the council, be authorized and empowered, on any such invasion or insurrection, or probable prospect thereof, to call forth such a number of militia, and from such counties as they may deem proper."{EN-1435}

Obviously, the extreme circumstances of an invasion, widespread insurrection, or other "most urgent and imminent danger" would necessarily have required a response greater than a few Local Militia Companies could have provided. Yet it

was not unlikely—and the statutes plainly foresaw—that "any probable prospect of [an] invasion or insurrection" would have been discovered, reported, and at least initially resisted by Local Militiamen no matter how extensive and intense the invasion or insurrection might then have been or might later have become.

3. Virginia's *pre*-constitutional Militia also performed "police" functions at the Local level.

a. The Militia were always authorized and available to be called forth to suppress adventitious criminal behavior, particularly when it rose to the level of tumult, riot, or insurrection. For instance, in 1682, Virginia's Deputy Governor issued a Proclamation "prohibiting all riotous and tumultuous meetings":

> Whereas many riotous tumultuous and ungoverned Inhabitants of Glocer[r] County, have contrary to ye Peace * * * invaded the rights and properties of many of the Inhabitants of the said County, by cutting up all plants on Plantations were they come, to the ruin and destruction of many of his Majesties Subjects, highly tending to the subversion of Governm[t] for preservation whereof and to the intent the peace of the Country may be entirely preserved by a timely suppression of all tumults and riotous disorders, I doe * * * strictly command all and every the * * * Inhabitants of this * * * Colony well and truly to demean and behave themselves quietly, peaceably and obediently in all respects answerable * * * to the well being and safety of each other, and if any * * * Inhabitants shall presume to persist or goe forward in their riotous, tumultuous and ruinous disorders in Gloc[r] or any * * * Inhabitantns of any County or Counties in this Colony shall be soe evilly bent to enter into any such like combinations and evill practices; I doe * * * command all officers both Civill and Military in * * * Virginia, to use their utmost case, industry & circumspection, according to the authority by Law placed in them to prevent and suppress, all such meetings and riotous actings for the preservation of his Majesties peace of this Colony, and rights and properties of the Inhabitants thereof[.]

And he "Ordered * * * the Commanders of the respective Counties, to Command to armes such a number of the militia horse and foot of their Counties, as they shall find convenient for the preservation of the peace * * * and from time to time to keep in armes such numbers of horse and foot as they shall find the Exigency of the affaire requires".{EN-1436} Plainly, the authority to call forth the Militia "for the preservation of * * * [the] peace of this Colony, and rights and properties of the Inhabitants thereof" made the Militia in principle into an ubiquitous, almost universal "police force"—which, doubtlessly, is why the very first (and, one must presume, most likely) purpose for which Congress may "provide for calling forth the

Militia" in "the Service of the United States" is "to execute the Laws of the Union".[843]

b. In *pre*-constitutional Virginia, though, the Militia's "police powers" were primarily directed, not at the adventitious depredations of ordinary criminals, but towards the then-continuous problem of controlling her large population of slaves, who (not without just reason) posed the distinct and ever-present danger of "riotous, tumultuous and ruinous disorders". The purpose of Virginia's "slave patrols" was to maintain order among the bondsmen in the immediate vicinity of the plantations on which they labored, and to uncover and suppress conspiracies aimed at revolt or escape. These patrols were, in effect, the earliest form of regular Local police, albeit specifically directed towards the slaves, rather than executing the laws against just any transgressors. Today, "slave patrols" are generally recognized as forerunners of modern "police forces"—and for good reason, as the first such force in modern form was created only in 1845, in New York City, for the not dissimilar purpose of maintaining control over what were then perceived to be socially disruptive elements in the population.[844] This new force (as well as every other similar "law-enforcement agency" which has emulated it thereafter, even unto this very day) was not part of the Militia, though—no doubt because it would have been problematic for the politically dominant classes in society to suppress other segments of the community through an institution in which those segments participated on an equal legal basis with everyone else, and perhaps on a favorably unequal numerical basis.

Obviously, because patrollers had to operate where the slaves actually lived and worked, the patrols were always entirely Local matters:

> • [1727, 1732, 1734, 1738, 1740, and 1744] "Commanding officer[s] of the militia, in any county within this dominion * * * are * * * impowered, * * * as there shall be occasion, to appoint and direct such and so many of the militia of their respective counties, to be drawn out, and to patrole in such places as such commanding officer shall think fit to direct, and from time to time, to cause to be relieved by other parties, for dispersing all unusual concourse of negroes, or other slaves, and for preventing any dangerous combinations which may be made amongst them at such meetings: Which said parties, so sent out to patrole, * * * shall have full power and authority to take up any slaves which they shall find convened together * * * to deliver to the next constable, in order to be dealt with[.]"{EN-1437}
>
> • [1738] "[T]he chief officer of the militia, in every county, * * * [may] appoint an officer, and four men, of the militia, at such times and

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[843] U.S. Const. art. I, § 8, cls. 15 and 16.

[844] *See, e.g.,* David A. Sklansky, "The Private Police", 46 *U.C.L.A. Law Review* 1165 (1999), at 1207-1208.

seasons as he shall think proper, to patrol, and visit all negro quarters, and other places suspected of entertaining unlawful assemblies of slaves, servants, or other disorderly persons. And such patrollers shall have full power and authority, to take up any such slaves, servants, or disorderly persons, * * * unlawfully assembled, or any other, strolling about from one plantation to another, without a pass from his or her master, mistress, or overseer, and to carry them before the next justice of the peace * * * : And in case one company of patrollers shall not be sufficient, to order more companies, consisting of the same number."{EN-1438}

• [1754, 1755, 1757, 1759, 1762, 1766, and 1771] "[T]he chief officer of the militia * * * in every county * * * is hereby required * * * to appoint an officer, and so many men of the militia as to him shall appear to be necessary, not exceeding four, once in every month, or oftener if * * * required * * * , to patrol and visit all negroe quarters, and other places suspected of entertaining unlawful assemblies of slaves, servants, and other disorderly persons, and such patrolers shall have power and authority to take up any such slaves, servants, or disorderly persons * * * unlawfully assembled, or any other strolling about from one plantation to another, without a pass from his or her master, mistress, or overseer, and to carry them before the next justice of the peace * * * : And in case one company of patrolers shall not be sufficient, to order more companies for the same service[.]"{EN-1439}

• [1775] "[T]he commanding-officer of the militia of every county, of the city of Williamsburg, and borough of Norfolk, shall appoint so many patrollers, as he may think fit[.]"{EN-1440}

• [1777, 1784, and 1785] "[I]t shall and may be lawful for the chief officer of the militia in every county * * * , yearly, to appoint an officer, and so many men of the militia as to him shall appear to be necessary, not exceeding four, once in every month, or oftener, if thereto required * * * , to patrol and visit all negro quarters, and other places suspected of entertaining unlawful assemblies of slaves, servants, or other disorderly persons, * * * unlawfully assembled, or any others strolling about from one plantation to another, without a pass from his or her master, mistress, or owner, and to carry them before the next justice of the peace * * * .

"And in case one company of patrollers shall not be sufficient, to order more companies for the same service[.]"{EN-1441}

c. A closely related "police" function that Militiamen—and, indeed, sometimes all armed Virginians—performed was to appear with their arms in their hands at their churches on days of worship. The purpose of this regulation was "to prevent any Surprize * * * when the Slaves are most at Liberty & have the greatest Opportunity for that purpose".{EN-1442} As with "the slave patrols", the requirement

that men attended church fully armed operated Locally, because churches were Local establishments:

> • [1619] "All persons whatsoever upon the Sabaoth daye shall frequent divine service and sermons both forenoon and afternoon, and all suche as beare arms shall bring their pieces swordes, poulder and shotte."{EN-1443}
>
> • [1632] "ALL men that are fittinge to beare armes, shall bringe their peices to the church uppon payne for every effence[.]"{EN-1444}
>
> • [1643] "[M]asters of every family shall bring with them to church on Sondays one fixed and serviceable gun with sufficient powder and shott[.]"{EN-1445}
>
> • [1736] The Lieutenant Governor "strictly Charge[d] and Command[ed], That all Persons serving in the Militia, who shall during the * * * Holy-Days, repair to their Parish Churches or Chappels, do take with them their Arms, Ammunition, and Accoutrements".{EN-1446}
>
> • [1738, 1755, 1757, 1759, 1762, 1766, and 1771] "[I]t shall and may be lawful, for the chief officer of the militia, in every county, to order all persons listed therein, to go armed to their respective parish churches[.]"{EN-1447}
>
> • [1775] "[T]he * * * chief officer[ ] of the militia, shall and may order the other officers and soldiers under him to go armed to their parish churches on Sundays, and to any licensed meeting-houses, whenever he judges it necessary."{EN-1448}

Unlike "the slave patrols", though, which consisted of small units specially formed for the task, this duty applied at first to every free adult male Virginian capable of bearing arms, and later on to every Virginian enlisted in the Militia. Nonetheless, it was less of a burden, because Virginians were simply taking their firearms along with them in the course of one of their normal activities, rather than performing a special duty that interfered with their regular routines of work and family life.

I. Specialized Militia units. Virginia never established a so-called "select militia"—that is, a group of individuals, far less in number than all of the eligible men within the jurisdiction, who were singled out to constitute "the militia", while everyone else remained "unorganized". Yet Virginia did make various selections *within* her Militia. These specialized units did not purport to supersede the Militia, but instead subsisted as integral parts of it, alongside the regular formations in which most Militiamen were enlisted. Thus, although their existence does not support the false notion that "a well regulated militia" can be comprised exclusively of small "select" units, it does point out that "a well regulated militia" can be sufficiently flexible in organization to combine a number of different units designed and assigned to perform different tasks, given different training, and provided with

different equipment. Revealingly, too, even the special Militia units that Virginia did create remained basically Local in their formation and operation, in keeping with standard Militia practice.

1. Minutemen. The most famous of these special units was "the Minutemen". The purpose of this establishment was eminently practical:

> [1775] "[I]t is judged necessary, for the better protection of the country in times of imminent danger, that certain portions of the militia throughout the whole colony should be regularly enlisted, under the denomination of minute-men, and more strictly trained to proper discipline than hath been hitherto customary, and, to this end, * * * the whole colony should be divided into proper and convenient districts[with each such district to be composed of two or more specified counties, cities, and the borough of Norfolk.]"{EN-1449}

a. This description renders obvious, though, that the Minutemen were part and parcel of the Militia, because they were constituted from "certain portions of the militia throughout the whole colony". And having come from within the main body of the Militia, to that main body did Minutemen return:

> • [1775] "And as well for the ease of the minute-men, as that they may be returned in regular rotation to the bodies of their respective militias, *Be it farther ordained*, That after serving twelve months sixteen minute-men shall be discharged from each company * * * , and the like number at the end of every year, beginning with those who stand first on the roll, and who were first enlisted[.]"{EN-1450}
>
> • [1776] "[F]or as much as the minute company in the city of Williamsburg, by the frequent enlistments of the privates into the regular service, is reduced to so small a number that the same cannot be again completed: *Be it therefore ordained* * * * , That the remaining minute-men in the said city shall be discharged, and from that service return to be enlisted with the militia thereof."{EN-1451}
>
> • [1776] "[W]hereas the minute companies formerly raised in this country are already greatly reduced by enlistments into the regular service, and are likely to be more so by future enlistments, so that there remains little prospect of their answering the purposes of their institution, and moreover it will tend to weaken the militia of this commonwealth, and may create discontents, if such broken companies of minute-men continue exempt from militia duty, * * * all the minute battalions, companies, and parts of companies, throughout this state shall be totally dissolved and discharged, and the said minute-men shall thereafter be considered as militia, and be subject to all such rules and regulations * * * established for the better training and disciplining the militia; and the captains of each minute company shall * * * receive of each man in their respective

companies all such arms and accoutrements as have been provided at the publick expense[.]"{EN-1452}

b. As with everyone else in the Militia, Minutemen were recruited and approved for service in Local jurisdictions:

> • [1775] "[W]ithin * * * [one particular] district * * * there shall be forthwith raised one regiment, consisting of six hundred and eighty men, from the ages of sixteen to fifty, to be divided into ten companies, sixty eight each rank and file * * * .
>
> " * * * [W]ithin each of the other districts there shall be immediately enlisted one battalion, consisting of five hundred men rank and file, from the ages of sixteen to fifty, to be divided into ten companies of fifty men each[.]"
>
> Committees of Safety in the various Counties were to appoint deputies who "shall settle the number of minute-men to be enlisted in each county".{EN-1453}
>
> • [1775] "[T]he several officers appointed for that purpose shall immediately proceed to enlist the minute-men within their respective counties, city, or borough; and the said officers shall not go into any other county, city, or borough, to complete their quotas, until the officers in such other county, city, or borough, have completed their quotas, nor, in that case, without the permission of the committee [of safety] of such other county, city, or borough, in writing, first had and obtained."{EN-1454}
>
> • [1775] "[T]he committee [of safety] of each county, city, and borough, shall appoint one certain place of rendezvous within their county, city, or borough, whither the captain, and other officers, * * * shall resort with their men * * * . And if it shall appear to such committee that the company is complete, of able and proper men, and that they have been regularly enlisted, * * * the said committee shall grant to the captain a certificate[.]"{EN-1455}

Officers in the Minutemen, too, could be chosen Locally: In 1775, Committees of Safety in the various Counties were authorized to appoint deputies who "shall proceed to the choice of the several officers".{EN-1456}

c. The Minutemen's training was far more rigorous than that of ordinary Militiamen. But all of it took place at the Local level:

> [1775] "[M]inute-men in each respective district * * * shall be * * * formed into separate battalions, and shall be kept in training * * * for twenty successive days * * * ; and, after performing such battalion duty, the several companies of each battalion shall in their respective counties be mustered, and continue to exercise four successive days in each month,

> except December, January, and February,[845] at such times and places as shall be appointed by their respective captains * * * .
>
> "*And* * * * in order to render them the more skilful and expert in military exercise and discipline, the several companies of minute-men shall twice in every year, after the exercise of the twenty days, be again embodied, and formed again into distinct battalions within their districts, and shall at each meeting continue in regular service and training for twelve successive days, at such convenient places within each district as shall be appointed * * * and at * * * stated times [in May and October.]"{EN-1457}

In comparison, in that year regular Militiamen were required to attend only eighteen or twenty particular (or private) musters and two general musters, each of one day's duration—which musters also were to occur Locally "in each county" and "in every county".{EN-1458}

d. Not surprisingly, either, as with other units in Virginia's Militia, command and deployment of her Minutemen devolved upon Local officers:

> [1775] "That every officer of the minute-men receiving notice from any other officer of the minute-men, in any other county than that wherein the regular forces are stationed, of any invasion or insurrection, shall forthwith raise the men under his command, and send intelligence to the commanding-officer of the minute-men of that county, and also the commanding-officer of the militia, or, being himself commanding-officer of the minute-men of that county, shall immediately raise the men under his command, and proceed to oppose the enemy, taking care to despatch intelligence to the commanding-officer of the district, and also to the officer of the minute-men in the next adjacent county, who is to proceed in the same manner * * * . And the commanding-officer of the militia receiving such intelligence shall immediately summon a council of his field-officers and captains, to consider and determine whether it is necessary to march his militia, or what part thereof, to the place of danger[.]"{EN-1459}

e. Interestingly enough, the substance of the Minutemen's selection, training, and especially deployment was not something that suddenly appeared among Virginia's Militia only in the 1770s. Quite the contrary. In fact, if not in name, the Minutemen had numerous precursors. For example, special selections of men especially fit for the most arduous Militia duty can be found as early as 1702, when the Governor ordered that, "whereas by an order of Councill [in 1701] * * * y^{e} * * * Commanders in chief of each Respective County * * * were ordered to

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[845] This was amended that same year to include February among the months for required training.

returne a List of y^e^ names of every fifth man within their * * * troops and Companys being young Brisk fitt and able to go out to war upon any Emergent occasion[,] * * * a New List of y^e^ said fifth man be taken[.]"{EN-1460} Extra extensive training had often been required during periods of heightened danger:

> • [1711] The Governor and his Council determined "that it is necessary the Country be put into an imediate posture of defence by training the Militia, and that the following Scheme proposed by the Governor for the more effectual prevention of the Enemy's attempts be put in execution Viz^t^
>
> "That a General Muster of the Militia of each County be forthwith appointed and an exact account taken how they are armed & provided with ammunition.
>
> "That the Militia of each County be divided into three parts * * * , and that each of the said Divisions do meet and exercise once a Week[.]"{EN-1461}

> • [1712] Fearing an attack of the Tuscaruros, the Governor and Council "[o]rdered that for preventing any sudden attempts of the said Indians, at least a Troop or Company of the Militia in each of the Frontier Countys be drawn together and exercised once a Week[.]"{EN-1462}

And being prepared for immediate deployment had been required of Militiamen on numerous occasions:

> • [1709] Concerned with a possible attack by French privateers, the Governor and Council "[o]rdered that the Commanders in Cheif of the Militia * * * forthwith appoint Masters of the Militia * * * for training & exerciseing the Soldiers and that they take particular Care that the said Soldiers be provided with arms and ammunition according to Law & have their arms constantly well fixed & themselves in a readiness to draw together on an hours warning, hereby strictly chargeing all * * * Officers to take particular notice of any person who on this Occasion shall prove deficient in their duty that they may be punished according to Law And * * * that the Commanding Officers [o]f the Militia in * * * [certain] Countys * * * appoint fitt persons to be Lookouts * * * and take care that they diligently attend that Service[.]"{EN-1463}

> • [1736] Anticipating an attack by the Spanish, the Governor and Council "[o]rdered that the * * * Chief Commanding Officer of the Millitia in the Several Countys do forthwith give directions to the Officers of the Several Troops and Companys * * * to Examine how the said Troops and Companys are Armed and provided with ammunition and to Require every person oblig'd to serve in the Millitia to furnish himself with such Arms and Ammunition as the Law Enjoyns and also to be in a readiness upon the first Notice of an Invasion to parade to a Convenient place in each County * * * thence to March where the appearance of danger shall require[.]"{EN-1464}

• [1743] Concerned with maintaining "the best posture of Defence upon the * * * uncertain State of Public Affairs", the Governor's Council advised "that all Commanding Officers in their several respective Counties be advertiz'd to keep themselves prepar'd & in readiness against any Attempt that may be made upon this Colony from any Quarters whatsoever & to see that the Militia be kept under good Order & Discipline & that they be provided with Arms & Ammunition as the Law directs[.]"{EN-1465}

• [1745] Apprised of a possible attack by the French, the Governor "acquainted [his Council] that he sent the necessary Orders to the Commanding Officers of the lower Counties to have the Militia in Readiness and to keep a constant diligent Look Out[.]"{EN-1466}

2. Rangers. Another special category of Militiamen which saw significant service was "the Rangers". In essence, Rangers were peripatetic scouts—the verb "to range" means "[t]o rove over or through" and "[t]o rove at large; to wander without restraint or direction; to roam"[846]—who adopted and perfected the stealthy, slashing style of warfare that subsequently became commonplace among *guerrilleros*, irregulars, and partisans.[847] Necessarily, they were organized and operated on a Local basis, because most "ranging" took place across Virginia's so-called "frontier counties":

• [1711] "[T]he commander in chief * * * is impowered * * * to constitute and appoint * * * lieutenants or commanders of the rangers for the * * * frontiers; each of which * * * shall choose out and list * * * able bodyed men, with horses and accoutrements, arms and ammunition, residing as near as conveniently may be, to that frontier station for which he shall be lieutenant of the rangers, to serve under him as their commander. But if such lieutenant cannot find a sufficient number of able bodyed men, furnished and provided * * * , to serve voluntarily under him, * * * it shall * * * be lawfull for the commander in chief of the militia

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[846] *Webster's Revised Unabridged Dictionary, ante* note 11, at 1188, definitions 5 (transitive verb) and 1 (intransitive verb). *Accord, Webster's Third New International Dictionary, ante* note 330, at 1880, definition 2a; *Webster's New International Dictionary*, *ante* note 330, at 2060, definition 4.

[847] *See* Thomas Church, *The Entertaining History of King Philip's War, Which Began in the Month of June, 1675, As Also of Expeditions More Lately Made Against the Common Enemy, and Indian Rebels, in the Eastern Parts of New England: With Some Account of the Divine Providence Towards Col. Benjamin Church* (Newport, Rhode Island: Solomon Southwick, 1772). Originally published in 1716, Church's *History* described the Ranger tactics Americans early developed and employed in their frontier wars. Probably the most famous of American Rangers, Robert Rogers, recounted his own later experiences in irregular warfare in the *Journals of Major Robert Rogers: Containing An Account of the several Excursions he made under the Generals who commanded upon the Continent of North America, during the late War* (London, England: J. Millan, 1765). Rogers set down his classic "Rules for Ranging" in 1757. *See, e.g.,* Jennifer Quasha, *Robert Rogers: Rogers' Rangers and the French and Indian War* (New York, New York: The Rosen Publishing Group, Inc., 2002), Appendix, at 90-99. For a Hollywood production, the 1940 Metro-Goldwyn-Mayer film *Northwest Passage* (starring Spencer Tracy and Robert Young) captures rather well the raw essence of the Rangers' grueling style of frontier warfare. Unfortunately, Rogers himself remained a Loyalist during the War of Independence. *See* T. Allen, *Tories, ante* note 610, at 175-177, 182.

in the same county * * * to order and impress out of the militia of that county, so many able bodyed men, furnished * * * , residing next to that frontier station, as shall make up the number [required.]"{EN-1467}

• [1711 and 1712] "For the better protection of the Inhabitants of this Colony against the Incursions of Indians" the Governor and his Council "Ordered that ten men & an Officer out of each of the Frontier Countys be appointed to Range three days in a Week above the Inhabitants, and that the said party be from time to time relieved by a like number, with power to the Commanding Officers of the Militia * * * to augment the number of the said Rangers, as the cause of danger shall require."{EN-1468}

• [1713] The Governor and Council decided "that twenty five men of the Militia of each of * * * [certain] Countys be ordered out to range four days in a Week, and so reliev'd from time to time by detachments of the like number, during the present danger".{EN-1469}

• [1713] "The Governor * * * upon divers late Alarms on the Frontiers * * * Ordered fifty men of the Militia of Surry, and the like number of the Militia of Prince George to range out in the woods for the space of six days, * * * and that in case these Detachments should discover any thing * * * , the said detachments be weekly relieved by others of the like number[.]"{EN-1470}

• [1755] "That * * * a sum of money not exceeding two thousand pounds * * * be laid out for and in the raising and maintaining three compa[n]ies of men * * * to be employed as rangers, for the protection of the subjects in the frontiers of this colony * * * . And in case the * * * men, cannot be raised, by such as will voluntarily enlist * * * , it shall * * * be lawful for the * * * chief officer of the militia of each of * * * [certain] counties * * * to draft out of the militia * * * such and so many young men * * * who have not wives or children, as will make up the * * * number, to be employed in the said service."{EN-1471}

• [1787] "[T]he governor * * * shall be empowered to order out into actual service from time to time, so many scouts and rangers in any of the counties on the western frontier * * * , the expence whereof shall be defrayed out of the funds provided * * * for the support of government."{EN-1472}

Interestingly, too, Rangers performed more than typically military Militia duty—as in 1716, when "some discoverys ha[d] lately been made by the Rangers of a Passage over the great mountains to the westward of this Colony and * * * [the Governor] intended * * * to send a greater Body of the Rangers upon further discoverys which * * * m[ight] be of great advantage to this Country".{EN-1473}

3. Other specialized units. Virginia employed various other forms of selective service within her Militia, all of which always operated initially at the Local level. For example—

a. By reason of their likely physical condition, young men were sometimes singled out for duties more intensive than those demanded of the average Militiaman:

> • [1701] The Governor required "all and every the Coll^{s} & Comad^{rs} in Cheife of Each Respective County * * * to returne * * * a List of the names of Every fifth man wthin their respctive Troopes and foot Comp^{as} being Persons young, brisk, fit, & able (upon any Emerg^{t} occasion) to go out to warr and * * * to forme the same into Distinct Troopes and foot Comp^{as} Each Troope not to Exceed thirty able men well mounted armed and Equipt and Each foot Comp^{a} not to Exceed fifty able men well armed and equipt".{EN-1474}
>
> • [1703] The Governor commanded the commanders in chief of the Militia in each County "to cause the Captains under their respective commands [to] draw out every fifth man in their several Troops and Companys being young & able to go out to warr upon any emergent occasion, which said fifth men * * * shall have liberty from among themselves to name their own officers".{EN-1475}
>
> • [1784 and 1785] Although these Militia statutes required that "all free male persons between the ages of eighteen and fifty years [with certain exceptions] * * * be enrolled", they also recognized that "it will be of great utility and advantage in establishing a well disciplined militia, to annex to each regiment a light company, to be formed of young men, from eighteen to twenty-five years old, whose activity and domestic circumstances will admit of a frequency of training, and strictness of discipline, not practicable for the militia in general, and returning to the main body on their arrival at the latter period, will be constantly giving thereto a military pride and experience, from which the best of consequences will result"—and therefore provided that "the governor * * * shall * * * for each county, appoint and commission for each regiment therein [certain officers] * * * of the most proper persons therefor, for a light company * * * . The captain * * * shall * * * enroll * * * a sufficient number of young men * * * . And as the men of such light company shall * * * arrive at the age of twenty-five years, * * * the county lieutenant * * * shall order them to be enrolled in the [regular] company whose districts they may respectively live in, and deficiencies shall be supplied by new enrollments."{EN-1476}

All of these men came from the ranks of regular Militia Companies. In the first two instances, they were presumably the fittest to fight at first (although the rest of the Militiamen would surely have fought, too, if the circumstances of any "warr" or

other "emergent occasion" had so warranted); and, presumably too, as they grew older and less lithe these men reverted to the regular Militia Companies in their communities. In the second two instances, the young men were to form essentially "demonstration units", in order to prove and practice what could be done by way of extensive training, then to return to the Militia's regular ranks, "giving thereto a military pride and experience, from which the best of consequences w[ould] result" for everyone else. So, plainly, these were not "select militia", but instead well-considered selections from within the Militia for the purpose of rendering the Militia as a whole more effective than otherwise.

b. Selection might also be made on the basis of particular duty or branch of service:

> • [1727, 1732, 1734, 1738, 1740, 1744, 1748, and 1753]. "And forasmuch as it is necessary, that a sufficient number of men be appointed, for guarding the batteries erected in the several rivers, within this dominion, and for assisting in that better managing the great guns there mounted, in times of danger,
>
> " * * * it shall and may be lawful, to and for the governor * * * to appoint and assign such a number of the militia, residing next to the several batteries, respectively, as he shall think fit, to attend the said batteries * * * : Which said militia, so assigned for the service aforesaid, shall * * * be exempted from all private musters, except at the said battery only[.]"{EN-1477}
>
> • [1757, 1758, 1759, 1761, 1762, 1764, 1766, 1769, and 1772] "[T]o the end a sufficient number of men may be appointed for guarding the batteries erected in the several rivers of this dominion, and to assist in the better managing the great guns there mounted, when occasion shall be, *It is hereby* * * * *enacted*, That it shall * * * be lawful for the governor * * * to appoint and assign such a number of the militia as he shall think fit to attend the said batteries, * * * which number of the militia shall be drafted out of any of the militia of the county by the commanding officer of such county in which such battery is or shall be erected, and shall be exempted from all private musters, except at such battery only during their attendance at such battery[.]"{EN-1478}
>
> • [1782] "WHEREAS experience hath proved the great utility of cavalry in this state, as well to controul the operations of the enemy, as to give extent and efficacy to those of our own troops:
>
> " * * * *Be it enacted* * * * , That every sixteenth man of the militia shall be formed into a body of cavalry * * * , that is to say, the lieutenant or commanding officer of the militia in every county, shall call a general muster * * * and shall propose to the militia of his county, that such as incline to act as horsemen * * * give in their names to such lieutenant or commanding officer. * * *

> " * * * [T]he field officers of each battalion, with the approbation of the * * * commanding officer of the county, shall nominate proper persons to command the cavalry * * * who shall be commissioned by the governor. The officers * * * shall call the said horsemen once in every month, to some convenient place in each county, for the purpose of training and disciplining. The said cavalry shall be exempt from attendance in all other private musters[.]"{EN-1479}

c. As a matter of practical necessity,[848] the equipment particular Militiamen carried sometimes served as the basis for special selection:

> [1775] "That * * * there be raised seventeen companies of expert riflemen, in * * * the counties of Bedford and Loudoun, each two companies; in the counties of Albemarle, Amhurst, Berkeley, Botetourt, Buckingham, Charlotte, Culpeper, Dunmore, Fauquier, Halifax, Orange, Pittsylvania, and Prince Edward, each one company[.]"{EN-1480}

d. And in order to heighten *esprit de corps* and morale, Virginia even organized parts of her Militia into special units on the basis of ethnicity:

> [1775] "That of the six regiments to be levied * * * , one of them shall be called a German regiment, to be made up of German and other officers and soldiers, as the committees [of safety] of the several counties of Augusta, West Augusta, Berkeley, Culpeper, Dunmore, Fincastle, Frederick, and Hampshire (by which committees the several captains and subaltern officers of the said regiment are to be appointed) shall judge expedient."{EN-1481}

J. Independent Companies. Independent Companies could fairly be considered the very quintessence of Local organization in the Militia. Although during the *post*-constitutional period Virginia's Militia statutes dealt explicitly and extensively with what were then called "volunteer companies",{EN-1482} Virginia's *pre*-constitutional Militia statutes contained far less information about such Companies than did Rhode Island's.[849] Not, however, because Independent Companies were insignificant in Virginia. Rather, in her time of greatest need, Independent Companies forged to the forefront of her defenses against British oppression. Formed entirely by Local people "from the bottom up" on their own initiatives at the apogee of a political crisis, Independent Companies provided conclusive evidence of the truly self-governmental nature and essentially democratic character of the Militia.

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[848] *See ante*, at 514-515.

[849] *See ante*, at 224-234.

The crisis began in the 1760s, and intensified over the next decade. The first step that eventually led to the mobilization of Independent Companies in Virginia against the British was the formation of voluntary "Associations" across America in opposition to the Stamp Act. For example, in 1766 citizens of Westmoreland County, Virginia, declared that

> [r]ouzed by Danger and alarm'd at Attempts foreign & domestic [to] reduce the People of this Country to a State of abject and detestable slavery by destroying that free and happy constitution of Government under which they have hitherto lived,—We who subscribe this Paper have associated & do bind ourselves to each other, to God and to our Country, by the firmest Tyes that Religion and Virtue can frame, most sacredly and punctually to stand by, and with our Lives & Fortunes to support, maintain and defend each other * * * .
>
> * * * * *
>
> * * * If any Attempt shall be made upon the Liberty or Property of any Associator for any Action or Thing to be done in consequence of this Agreement, we do most solemnly bind ourselves * * * at the utmost risk of our Lives and Fortunes to restore such Associate to his Liberty, and to protect him in the enjoyment of his Property.[850]

At least implicitly, these Virginians were contemplating and accepting the possibility of armed resistence to British authority. For their mutual pledge—that "[i]f any Attempt shall be made upon the Liberty or Property of any Associator for any Action or Thing to be done in consequence of this Agreement, we do most solemnly bind ourselves * * * at the utmost risk of our Lives and Fortunes to restore such Associate to his Liberty, and to protect him in the enjoyment of his Property"—would have been incapable of fulfillment unless these patriots had been willing and able to oppose force with force. And at least able to do so they surely were, if the Militia statutes in operation since 1738 had been enforced in Westmoreland County.{EN-1483}

By 1774, "Associations" formed to resist British oppression had blossomed into a general movement. Perhaps the most influential of these from any single Colony was produced by the first of Virginia's Conventions, on 6 August of that year.[851] After the Continental Congress adopted on 20 October what came to be treated as "*the* Association", that body assumed titular leadership of the movement. "The Association" sought to boycott British trade by a non-importation, non-consumption, and non-exportation agreement amongst the inhabitants of the

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[850] Resolutions of the Westmoreland Association in Defiance of the Stamp Act (27 February 1766), *reprinted in* R. Scribner, *Revolutionary Virginia*, *ante* note 318, Volume I, at 23 and 24.

[851] *See id.,* Volume I, at 230-235.

Colonies,[852] as a means "[t]o obtain redress of * * * grievances, which threaten destruction to the lives, liberty, and property of his majesty's subjects, in North America".[853] The mechanism of enforcement was ostracism of those who sided with Britain, whether individuals or political entities:

> * * * That a committee be chosen in every county, city, and town, by those who are qualified to vote for representatives in the legislature, whose business it shall be attentively to observe the conduct of all persons touching this association; and when it shall be made to appear, to the satisfaction of a majority of any such committee, that any person within the limits of their appointment has violated this association, that such majority do forthwith cause the truth of the case to be published in the gazette; to the end, that all such foes to the rights of British-America may be publicly known, and universally contemned as the enemies of American liberty; and thenceforth we respectively will break off all dealings with him or her.[854]

> * * * And we do further agree and resolve, that we will have no trade, commerce, dealings or intercourse whatsoever, with any colony or province, in North-America, which shall not accede to, or which shall hereafter violate this association, but will hold them as unworthy of the rights of freemen, and as inimical to the liberties of their country.[855]

As one careful student of these events has pointed out, although "the Association" may have been authorized and encouraged "from the top down" through the Continental Congress, it was to be organized and enforced "from the bottom up" in every County, City, and Town, thereby of necessity leaving the details of its day-to-day administration for the people themselves to settle, according to the requirements of their own peculiar situations, through committees—some of them denoted "Committees of Safety", others designated "Committees of Observation"—formed in hundreds of Localities throughout the Colonies.[856] (In Virginia, such committees were composed on average of some twenty-one members.[857]) So, to the extent that "the Association" embodied political power, it was the people's own power, because they themselves exercised it. And if "the Association" was legitimate, it was because the people themselves actually enforced it in each of the Colonies, not simply because the Continental Congress had

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[852] *Journals of the Continental Congress, ante* note 42, Volume I (5 September to 26 October 1774), at 75-80.

[853] *Id.*, Volume I, at 76.

[854] The Association, ¶ 11, *in Journals of the Continental Congress, ante* note 42, Volume I, at 79.

[855] The Association, ¶ 14, *in Journals of the Continental Congress, ante* note 42, Volume I, at 79.

[856] *See* T. Breen, *American Insurgents, American Patriots, ante* note 447, Chapters 6 and 7.

[857] *Id.* at 200.

promulgated it originally—for the Continental Congress could have recommended such action for all of the Colonies only under the aegis of the people themselves, it having no authority of its own under British law. Nonetheless, as a practical matter, protection of the Local committees remained a problem, if the regularly constituted British authorities and their Loyalist supporters tried to suppress them. To intimidate recalcitrant Loyalists within and outside of public office, the patriots needed to cast the long, dark shadow of physical force throughout their communities.[858]

In Virginia, though, a major difficulty immediately intruded itself. The Colony's then-latest Militia Act, originally enacted in and thereafter continued with various revisions and amendments from 1738, had expired in 1773.{EN-1484} So, on 10 May 1774, Virginia's House of Burgesses (which along with the Governor's Council formed her General Assembly) resolved that the Militia Act "which expired on the twentieth Day of *July* last past ought to be revived"; and a bill for that purpose was presented.[859] On 26 May 1774, however, Virginia's Royal Governor, John Murray, the Earl of Dunmore, dissolved the House of Burgesses, supposedly because he "*ha*[*d*] *in* [*his*] *hand a Paper published by the Order of your House, conceived in such Terms as reflect highly upon* [*that is, disparage*] *his Majesty and the Parliament of* Great Britain; *which makes it necessary for me to dissolve you; and you are dissolved accordingly*".[860] Dunmore then repeatedly prorogued the Assembly until June of 1775, so that no new Militia Act (or any other legislation) could be enacted.[861] This was in keeping with the high-handed attitudes of America's British overlords, evidenced in the charge against King George III in the Declaration of Independence that "[h]e has forbidden his Governors to pass Laws of immediate and pressing importance".

Patriotic Virginians, however, were not of a mind to tarry, pending the full formalities of a new statute, when their security was at stake—for their enemies were anything but inactive. On 24 December 1774, Dunmore had warned Lord Dartmouth, the British Secretary of State for the Colonies, that

> [t]he associations * * * recommended by the people of this colony, and adopted by what is called the continental congress, are now enforcing throughout this country, with the greatest rigour. A committee has been chosen in [e]very county, whose business it is to carry the association of the congress into execution; which committee assumes an authority to inspect the books, invoices, and all other secrets of the trade

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[858] *See, e.g., id.* at 193-196.

[859] JOURNALS of the HOUSE *of* BURGESSES of VIRGINIA, *ante* note 318, at 84-85, 88-89.

[860] *Id.* at 132.

[861] *Id.* at 165-171, 173.

> and correspondence of merchants; to watch the conduct of every inhabitant, without distinction; and to send for all such as come under their suspicion into their presence, to interrogate them respecting all matters which, at their pleasure, they think fit objects of their inquiry; and to stigmatise * * * such as they find transgressing, what they are now hardy enough to call the laws of the congress; which stigmatising is no other than inviting the vengance of an outrageous and lawless mob to be exercised upon the unhappy victims. Every county [in Virginia], besides, is now arming a company of men, whom they call an independent company, for the avowed purpose of protecting their committees, and to be employed against government, if occasion require. The committee of one county has proceeded so far as to swear the men of their independent company to execute all orders which shall be given them from the committee of their county.
>
> As to the power of government which your lordship * * * directs should be exerted to counteract the dangerous measures pursuing here, I can assure your lordship that it is entirely disregarded, if not wholly overturned.
>
> * * * * *
>
> Independent companies, &c. so universally supported, who have set themselves up superior to all other authority, under the auspices of their congress, the laws of which they talk of in a stile of respect, and treat with marks of reverence, which they never bestowed on their legal government, or the laws proceeding from it, I can assure your lordship, that I have discovered no instance where the interposition of government, in the feeble state to which it is reduced, could serve any other purpose than to suffer the disgrace of a disappointment, and thereby afford matter of great exultation to its enemies, and encrease their influence over the minds of the people.[862]

Even as Lord Dartmouth pondered these dire tidings in England, Virginians were preparing themselves for trouble at home.[863] For example, on 17 January 1775, the Fairfax County Committee of Correspondence

> RESOLVED, that the defenceless state of this country renders it indispensably necessary that a quantity of ammunition should be immediately provided; and as the same will be for the common benefit, protection, and defence, of the inhabitants thereof, it is but just and reasonable that the expenses incurred in procuring the same should be defrayed by a general and equal contribution. It is therefore recommended

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[862] *Reprinted in* R. Scribner, *Revolutionary Virginia*, *ante* note 318, Volume III, at 66-67 (footnote omitted).

[863] The tumultuous events of 1775 are put into context and well chronicled in Ivor Noël Hume, *1775: Another Part of the Field* (London, England: Eyre & Spottiswoode (Publishers) Ltd., 1966).

> that the sum of three shillings * * * be paid, by and for every tithable person in this county, to the sheriff, or such other collector as may be appointed, who is to render the same to this committee, with a list of the names of such persons as shall refuse to pay the same, if any such there be.[864]

Actually, Northhampton County had assumed jurisdiction over the Militia within its territory about a month earlier; but Fairfax County was the first to impose an actual tax for such purposes.[865] In fact, though, the "general and equal contribution" that Fairfax County mandated was nothing new in substance. From the very beginning, Virginians had been assessed taxes for the purchase of, or themselves been required to supply, arms for their Militia. Procedurally novel was that, with Virginia's central government wracked by internal dissensions, *Local* governments took the initiative in this regard.

Lord Dunmore was thinking along the very same lines as the Fairfax County Committee of Correspondence. Anxious to disarm his opponents by depriving them of ammunition, he suddenly and secretly dispatched British marines to remove the Colony's store of gunpowder from the magazine in the Capital at Williamsburg. On 3 March 1775 he rationalized this foray to the public on the grounds that

> [a]lthough I consider myself, under the authority of the crown, the only constitutional judge, in what manner the munition, provided for the protection of the people of this government, is to be disposed of for that end; yet for * * * removing from the minds of his majesty's subjects the groundless suspicions they have imbibed, I think proper to declare that the apprehensions which seemed to prevail throughout this whole country of an intended insurrection of the slaves, who had been seen in large numbers, in the night time, about the magazine, and my knowledge of its being a very insecure depositary, were my inducements to that measure, and I chose the night as the properest season, because I knew the temper of the times, and the misinterpretations of my design which would be apt to prevail if the thing should be known. * * * But, whenever the present ferment shall subside, and it shall become necessary to put arms into the hands of the militia, for the defence of the people against a foreign enemy or intestine insurgents, I shall * * * exert my best abilities in the service of the country.{EN-1485}

So, Dunmore expected Virginians to believe, it was not preëmptively to disarm the patriots, but instead to thwart a threat from rampaging slaves that he sequestered the very gunpowder Virginians would have needed to put down a supposed

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[864] *Reprinted in* R. Scribner, *Revolutionary Virginia, ante* note 318, Volume II, at 242 (footnote omitted).

[865] *See id.*, Volume II, at 243 note 1.

"intended insurrection" among the bondsmen! And Dunmore "chose the night" for this maneuver—even though that was when "slaves * * * had been seen in large numbers", presumably knew what was happening, and could possibly have intercepted the movement of the powder—because, under cover of darkness, he could prevent "misinterpretations of [his] design" by keeping the transfer a secret from the common Virginians upon whom he would have had to call to put down a slave rebellion! Yet he also admitted that he would "put arms into the hands of the militia" only when "the present [political] ferment shall subside", thus evidencing his belief that the existing "ferment" was far more dangerous to himself and his supporters than any imagined attack by "a foreign enemy or intestine insurgents".

With the Royal Governor running amok and the House of Burgesses stymied, patriots assembled in a Convention in which, on 23 March 1775, they

> [r]esolved that a well regulated Militia composed of Gentlemen and Yoemen is the natural Strength and only Security of a free Government: that such a Militia in this Colony would forever render it unnecessary for the Mother Country to keep among us for the purpose of our Defence any standing Army of mercenary Forces, always subversive of the Quiet, and dangerous to the Liberties of the People; and would obviate the Pretext of taxing us for their Support:
>
> That the Establishment of such a Militia is at this Time peculiarly necessary by the State of our Laws for the protection and Defence of the Country, some of which are already expired and others will shortly do so; and that the known Remissness of Government in calling us together in a Legislative Capacity renders it too insecure in this time of Danger and Distress to rely[ ] that Opportunity will be given of renewing them in General Assembly, or making any provision to secure our inestimable Rights & Liberties from those further Violations with which they are threatened.[866]

Two days later,

> [t]he Convention then took into their Consideration * * * [a Committee's] Plan for embodying, arming and disciplining the Militia, which * * * was unanimously agreed to, as follows[:]
>
> The Committee propose that * * * the Colony diligently * * * put in Execution the Militia Law passed in the Year 1738 * * * which has become in force by the Expiration of all subsequent Militia Laws.

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[866] *Reprinted in id.*, Volume II, at 366 (footnote omitted). The Virginia Convention, first convoked in August of 1774, was composed primarily of the members of the House of Burgesses, who had been effectively displaced from participation in the titular government by Lord Dunmore's intransigeance. *See id.*, Volume I, at 219-222.

> The Committee are further of Opinion that, as from the Expiration of the * * * latter Laws, and various other Causes, the legal and necessary disciplining of the Militia has been much neglected, and a proper Provision of Arms and Ammunition has not been made, to the evident Danger of the Community in Case of Invasion or Insurrection, that it be recommended to the Inhabitants of the several Counties of this Colony that they form one or more voluntier Companies of Infantry and Troops of Horse in each County and be in constant training and Re[a]diness to act on any Emergency.
>
> * * * * *
>
> That each Company of Infantry consist of sixty eight Rank and File * * * ; That every man be provided with a good Rifle if to be had, or otherwise with a Common Firelock, Bayonet and Cartouch Box; and also with a Tomahawk, one pound of Gunpowder, and four pounds of Ball at least fitted to the Bore of his Gun; that he be cloathed in a hunting Shirt by Way of Uniform; and that all endeavour as soon as possible to become acquainted with the military Exercise for Infantry appointed to be used by his Majesty in the Year 1764.
>
> That each Troop of Horse consist of thirty exclusive of Officers: That every Horseman be provided with a good Horse, * * * with pistols * * * , a Carbine or other short Firelock * * * , and one pound of Gunpowder and four pounds of Ball at the least * * * .
>
> That in order to make a further & more ample Provision of Ammunition it be recommended to the Committees of the several Counties that they collect from their Constituents in such Manner as shall be most agre[e]able to them so much money as will be sufficient to purchase half a pound of Gunpowder, one pound of Lead, necessary Flints and Cartridge paper, for every Titheable person in their County * * * . And it is earnestly recommended to each Individual to pay such proportion of the Money necessary for these purposes as by the respective Committees shall be judged requisite.[867]

Well aware that the Local Committees of Correspondence were supporters and to some degree agents of the Continental Congress, which itself was the focal point for unification of patriots throughout America, on 28 March 1775 Dunmore attempted to suppress Virginians' further participation in that assembly:

> Whereas certain Persons, stiling themselves Delegates of several of his Majesty's Colonies in America, having presumed, without his

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[867] *Reprinted in id.*, Volume II, at 374-375 (footnotes omitted). As the historians who compiled the documents in *Revolutionary Virginia* correctly pointed out, the Militia Act of 1738 was *not* force in 1775, and the Convention's invocation of it could have amounted to no more than a recommendation that the Act be consulted as the source of standards for arming and training Independent Companies. *See id.*, Volume II, at 379 note 8.

> Majesty's Authority or Consent, to assemble together at Philadelphia * * * have thought fit * * * to resolve * * * that another Congress should be held * * * , unless Redress of certain pretended Grievances be obtained * * * and to recommend that all the Colonies in North America should chuse Deputies to attend such Congress, I * * * require all Magistrates and other Officers to use their utmost Endeavours to prevent any such Appointments of Deputies, and to exhort all Persons whatever within this Government [that is, Virginia] to desist from such an unjustifiable Proceeding[.]{EN-1486}

Reading the dire signs of the times in Dunmore's exhortations, patriotic Virginians continued to prepare for the worst. For example, on 18 April 1775 the "Gentlemen Volunteers" who comprised Independent Companies in Albemarle County agreed that

> We * * * volunteers * * * for the county of Albemarle, do most Solemnly bind ourselves by the sacred ties of virtue, Honor & love to our Country, to be at all times ready to execute the command of the [County C]ommittee [of Correspondence], in defence of the rights of America (unless incapacitated) * * * .
>
> * * * We resolve should we fall or fly back on being called into service to be held unworthy the rights of freemen & as inimical to the cause of America[.]
>
> * * * * *
>
> * * * We oblige ourselves to obey the commands of the officers by ourselves elected from the Inlisted Volunteers, to Muster four times in the year or oftener If necessary. To provide Gun[,] shotpouch, powder horn[, and] to appear on Duty in a hunting shirt.[868]

(These men could confidently invoke "ties of virtue, Honor, & love to our Country" because—being drawn from the same Locality, with much the same experiences in life, and often with close familial interrelationships—they all knew and trusted one another.) On 29 April 1775, "officers and special deputies of fourteen companies * * * , consisting of upwards of six hundred well armed and disciplined men, friends of constitutional liberty and America", rendezvoused at Fredericksburg, Virginia, and upon dispersing broadcast the following statement:

> considering the just rights and Liberty of America to be greatly endangered by the violent and hostile proceedings of an arbitrary Ministry, and being firmly resolved to resist such attempts at the utmost hazard of our lives and fortunes, [we] do now pledge ourselves to each

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[868] *Reprinted in id.*, Volume III, at 48.

> other to be in readiness, at a moment's warning, to re-assemble, and, by force of arms to defend the laws, the liberty, and rights of this, or any sister colony, from unjust and wicked invasion.[869]

On 3 May 1775, the Committee of Correspondence of Amelia County met—

> It appearing to this committee, that the militia of this county, since the expiration of the late militia laws, hath been totally neglected; and it being indispensably necessary, for the internal security of the county, that the same be properly and regularly disciplined, and that patrollers in every neighbourhood be constantly kept on duty:
>
> *Resolved*, that application be made to the Lieutenant of this county, to direct forthwith a general muster of the militia of the county; that he do his utmost to carry into execution the law made in the year 1738, for embodying and disciplining the militia of this colony; that he give all the countenance and encouragement in his power to the officers who are recruiting or embodying independent companies, agreeable to the resolution of the Convention of the 25th day of March last.[870]

That same day, the Committee for New Kent County

> *Resolved*, that * * * [then-recent events] make it particularly necessary for the inhabitants of this county to prepare for their defence, against any dangers that may ensue * * * , by keeping their arms in the best order, and the greatest readiness, to act on any occasion.
>
> *Resolved*, that it be recommended to the inhabitants of this county immediately to form a company of volunteers, * * * ready to act on any emergency, as may be found necessary.[871]

Then, on 16 May 1775, the Committee for the western portion of Augusta County

> *resolved*, that the recommendation of the Richmond convention, of the [25]th of last March,[[872]] relative to the embodying, arming, and disciplining the militia, be immediately carried into execution with the greatest diligence in this county, [and]
>
> * * * * *
>
> *Ordered*, That the standing committee be directed to secure such arms and ammunition as are not employed in actual service, or private property, and that they get the same repaired, and deliver them to such

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[869] *Reprinted in id.,* Volume III, at 70-71.

[870] *Reprinted in id.,* Volume III, at 83 (footnotes omitted).

[871] *Reprinted in id.*, Volume III, at 85 (footnote omitted).

[872] *See ante,* at 573-574.

> captains of independent companies as may make application for the same[.][873]

Meanwhile, realizing that his bluster has done nothing to abate, but rather had exacerbated, the people's dissatisfaction with his régime, on 6 May 1775 Dunmore tried to poison Virginians' hearts and minds against their most ardently patriotic leaders by traducing the latter as seditious agitators, violent *para*-military rebels, and even terrorists:

> [A] certain Patrick Henry * * * and a Number of deluded Followers, have taken up Arms, chosen their Officers, and styling themselves an Independent Company, have marched out of their County * * * and put themselves in a Posture of War; and have written and dispatched Letters to divers Parts of the Country, exciting the People to join in these outrageous and rebellious Practices, to the great Terrour of all his Majesty's faithful Subjects, and in open Defiance of Law and Government; and have committed other Acts of Violence, * * * whence it undeniably appears, that there is no longer the least Security for the Life or Property of any Man: Wherefore I * * * strictly charg[e] all Persons, upon their Allegiance, not to aid, abet, or give Countenance to, the said Patrick Henry, or any other Persons concerned in such unwarrantable Combinations; but, on the Contrary, to oppose them and their Designs by every Means; which Designs must, otherwise, inevitably involve the whole Country in the most direful Calamity, as they will call for the Vengeance of offended Majesty and the Insulted Laws, to be exerted here, to vindicate the constitutional Authority of Government.{EN-1487}

That Henry and his adherents had formed "an Independent Company" to oppose him could hardly have surprised Dunmore, because those patriots—and several generations of their forebears in Virginia—had learned their martial independence in her Militia's school, through their personal experience of Local recruitment, organization, training, command, and deployment. Virginia's Militiamen had long enjoyed explicit statutory authority to act on their own initiatives whenever danger threatened:

> • [1727, 1732, 1734, 1738, 1744, 1748, and 1753] "[E]very officer of the militia, to whom notice shall be given of any insurrection or invasion, shall have full power and authority * * * forthwith to raise the militia under his command, and to send immediate intelligence * * * to the chief commanding officer residing in the county, and to the next militia officer in the same county, informing them at the same time in what manner he intends to proceed; and shall, in the mean time, keep the

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[873] *Reprinted in* R. Scribner, *Revolutionary Virginia*, *ante* note 318, Volume III, at 138-139.

> militia, under his command, under arms, until he receives orders from his superior officer. And every * * * chief commanding officer in any county, to whom such intelligence shall be given of any insurrection or invasion, shall forthwith dispatch an express to the governor, * * * notifying the danger; and shall therewith signify, in the best manner he can, the strength and motions of the enemy. * * * And until orders shall arrive from the governor, shall draw together the militia of his county, in such place or places, as he shall judge most convenient for opposing the enemy."{EN-1488}
>
> • [1757, 1758, 1759, 1761, 1762, 1764, 1766, 1769, and 1772] "[E]very officer of the militia, to whom notice shall be given of any invasion or insurrection, shall raise the militia under his command, and send intelligence * * * to the chief commanding officer in the county, and shall moreover immediately proceed to oppose the enemy according to the orders he shall receive * * * , and such * * * chief commanding officer shall give immediate notice to the officers of the militia of the next adjacent counties of such invasion or insurrection, and the situation and circumstances of the enemy according to the best of his information and judgment; and such officer to whom such notice shall be given, if not the chief commanding officer of the county, shall give immediate notice to his commanding officer * * * , who shall immediately raise the militia of his county and march part thereof, not exceeding two-thirds, against such enemy, if the circumstances of the case shall require it * * * ; and such commanding officer shall cause the remaining part of his militia, not so marched, to remain in arms in the county for the defence and protection thereof, until he shall receive orders * * * . And every * * * chief commanding officer * * * to whom such intelligence shall be given * * * shall forthwith dispatch an express to the governor * * * , notifying the danger, and * * * the strength and motions of the enemy[.]"{EN-1489}

Implicit in this was the further authority, even under the British "constitution", to act with complete autonomy if confronted by an "insurrection" of rogue public officials, including no less than the Governor himself.[874] For once the officials went wrong, only the people themselves could set things right. Thus, Virginia's patriots were not bound to abide by or acquiesce in Governor Dunmore's commands, after they had concluded that his edicts would be nothing but additions to what the Declaration of Independence later denounced as "a long train of abuses and usurpations, pursuing invariably the same Object [that] evince[d] a design to reduce them under absolute Despotism". Neither did they need to "dispatch an express to the governor * * * , notifying the danger, and * * * the strength and motions of the enemy"—when the Governor and his minions themselves

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[874] *See* W. Blackstone, *Commentaries on the Laws of England*, *ante* note 142, Volume 1, at 143-144, *and* Volume 4, at 81-82.

constituted "the enemy". The patriots' preparations for self-defense comprised the only notice he could have expected or deserved.

Temporizing, on 6 June 1775 Lord Dunmore dispatched to the House of Burgesses a written message in which he attempted to allay the Burgesses' concerns:

> *The removing, by my Order, fifteen half Barrels of the King's* Powder ** * * from the public* Magazine, *has * * * given great uneasiness to the People. * * * The* Magazine *was represented to me as a very insecure Depository and from Experience I find it so, all the Arms which have been kept there being now taken away * * * ; but * * * I do promise you that as soon as I see the* Magazine *in a proper State for securing the Powder and other public Stores, I will replace it * * * .*[875]

Unsatisfied by these evasive assurances, the very next day the House again resolved that the Militia Act of 1738, "which hath been continued and amended by several other Acts and which expired on the twentieth Day of *July*, 1773, ought to be revived"; and a bill for that purpose was introduced two days later.[876]

Aware that he had not dispelled the "*great uneasiness*" which his behavior had "*given * * * to the People*", on 8 June 1775 Dunmore—admitting that he and his family were fearful of the "*constant danger of falling sacrifices to the blind and unmeasurable fury which has so unaccountably seised upon the minds and understanding of great numbers of People*"—announced that he had "*fixed* [*his*] *residence * * * on board his Majesty's Ship the* Fowey", a British man-of-war.[877] Yet only two days thereafter, a letter from the fugitive but still fulminating Dunmore was read to the House, peremptorily demanding that the Burgesses "*disarm*[ ] *all independent companies, or other bodies of Men raised and acting in defiance of lawful authority*", and "*oblig*[*e*] *those who have taken any of his Majesty's public store of Arms to deliver them up immediately*".[878] The Burgesses did not comply.

Instead, on 14 June 1775, a committee reported to the House on "the Causes of the late disturbances and Commotions" that were "occasioned by the Governor's removing some Powder from the public Magazine" in Williamsburg.[879] The evidence that had been collected was all of a piece:

> It * * * appears by the Testimony of *John Dixon*, * * * Mayor of the City of *Williamsburg*, That in the Opinion of the Inhabitants the Militia of the

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[875] JOURNALS of the HOUSE *of* BURGESSES of VIRGINIA, *ante* note 318, at 194-195.

[876] *Id.* at 200-201, 209.

[877] *Id.* at 206.

[878] *Id.* at 215.

[879] *Id.* at 231.

City being on a different footing and having heard of an independent Company established at *Norfolk*, were desirous of forming one in *Williamsburg*. That such Company was accordingly formed * * * the said *Dixon* never heard [the Governor] disapproved of it, that * * * while the Governor was out on the *Indian* Expedition, [an official] directed the Keeper of the Public Magazine, to furnish the Company with Muskets. * * *

It *also* appears by the Testimony of *Joseph Hutchings* Colonel of the Militia of the Borough of *Norfolk*, that some years ago the inhabitants judging it would be a means of their greater Security, proposed raising an independent Company, that by their being more regularly trained, they might be more capable of acting upon an Emergency. That some time afterwards his Excellency Lord *Dunmore* being at *Norfolk*, the said *Hutchings* informed him of the intention of the inhabitants and asked his advice how to act as to granting Commissions, the Company intending to choose their own Officers that his Lordship highly commended the proposal[,] advised the said *Hutchings* to encourage and grant Commissions to such Officers as might be chosen and expressed his Wishes that the example might be followed throughout the Country; and that about two Years afterwards his Lordship was again at *Norfolk* when the Company was completely formed and Regimented and having drawn them up his Lordship marched through the lines in order to review them and again expressed great satisfaction.

* * * * *

It *appears* from the Testimony of *Hugh Hamilton* of the County of *Westmoreland* * * * [t]hat * * * independent Companies [have been] formed in his and the neighboring Counties * * * for the Defence of the Colony * * * . That in his County the Gentlemen, have been at proper pains to preserve Order. And it has been recommended to the Militia to acquire a knowledge of the military Exercise. That the people * * * have been very orderly and that he never saw any Commotion before the Powder was taken from the Magazine. That there was an alarm concerning the Slaves prior to this transaction, which was greatly increased by the Report of the Governor's intention to declare them free. * * *

It *appears* from the Testimony of *Thomas Mitchell* of the County of *Louisa* * * * [t]hat no independent Company was formed in the said County until the eighth of *May* 1775 * * * and it is his opinion that the said Company was raised with a view to put the Colony into a state of Defence, but believes it would assist their Committee, if called on. * * *

It *appears* from the Testimony of *James Lyle* and *Robert Donald* of the County of *Chesterfield* * * * [t]hat no independent Company was formed in *Chesterfield* till a few Weeks ago, and that they were intended for the general Defence of the Country, and not * * * designed for the Protection of the Committee, or to be under their Direction, but * * *

would protect the Committee if required. That the inhabitants were quiet and peaceable prior to the Removal of the Powder, and were greatly alarmed and exasperated at the Governor's Declaration of giving Freedom to the Slaves, since which uncommon diligence has been used in training the independent Company and the Militia to Arms, but the People have always behaved themselves orderly, paying the greatest Regard to the prudent Advice of their Officers. * * *

It *appears* from the Testimony of *Thomas Hodge* and *James Robinson* of *King George* County, *Charles Yates* and *Henry Mitchell* of *Spotsylvania*, and *Robert Gilchrist* and *Patrick Kennon* of *Caroline*, * * * [t]hat Committees have been established to inforce the Resolutions of the General Congress, and independent Companies formed to learn the Use of Arms, at different Periods. * * * They * * * believe the Defence of the Colony was the first and principal Motive. That some of the independent Company of *Spotsylvania* have acted under the direction of their Committee, but the *Caroline Company* refused to inlist unless they were to be solely under the Direction of Officers of their own choosing. That there never was any Commotions among the People, till after the Powder was removed from the Magazine, in Consequence of that transaction there was a great Assemblage of armed men at *Fredericksburg* and adjacent places, but they were very orderly and peaceable, and upon the advice of a Council they appointed, and some of the Delegates of this Colony, they all retired to their respective Homes. * * *

It *appears* from the Testimony of *Archibald Ritchie* of the County of *Essex* * * * [t]hat the Voluntier Company in the County of *Essex* was formed about three Weeks ago, not merely for protecting the Committees, but believes they would be so if required. That previous to the Seizure of the Powder the State of the Colony * * * was a general Acquiescence in the Resolves of the provincial and General Congress, and that in Consequence thereof, no Commotion happened in that County. * * *

It *appears* from the Testimony of *Charles Duncan* of the County of *Chesterfield* * * * [t]hat a Voluntier Company in the said County was formed * * * solely for putting the Country into a posture of Defence without any Regard to the protection of the Committee. That the state of the Colony before the Removal of the Powder, was peaceable and orderly, and a strict Compliance with the Resolves of the continental and provincial Congress, was * * * the Cause of maintaining that good order so little to be expected in a County deprived of so essential a part of its laws. That the removal of the Powder certainly occasioned the Commotions complained of * * * .

It *appears* by the Testimony of *Archibald Bryce* of the County of *Henrico* * * * [t]hat the independent Company of *Henrico* has not been formed above six Weeks, and * * * the principal Design of their Institution was to put the Colony in a proper state of Defence. That he

> knew of no Commotions in the County before the seizure of the Powder * * * .
>
> It *appears* by the Testimony of *Thomas Montgomery* of the County of *Prince William*, That previous to the Powders being seised, Committees of Correspondence and of Observation to carry into effect the Resolutions of the Congress, Voluntier Companys were formed, Military Discipline was taught, Arms and Ammuntion were industriously procured. That upon the Report of the Governor's having seised the Powder, many People marched to *Fredericksburg*, where * * * it was determined in Consultation, they should return to their respective Homes. * * * That the independent Company was formed in that County about *September*, and its design was to protect the Colony, in General, and the County in particular, and that * * * this institution would aid the Execution of the Resolutions of the Committee * * * .
>
> It *appears* by the Testimony of *Archibald Govan, Thomas Evans, John Johnson* and *George Braickenridge* of the County of *Hanover*, That * * * [i]n *November* a Committee, in conformity to a Regulation of the Congress, was chosen, to carry into execution the American Association, an Independent Company enlisted, but not embodied. * * * That as to Commotions * * * , none have occurred except in one instance, which proceeded from the Governor's seising the Powder, which was heightened and encreased by his threatening to enfranchise the Slaves; That those Causes induced the Independent Company to choose their Officers and march out about twenty Miles towards *Williamsburg* * * * . That * * * the Independent Companies were formed to put the Country into a state of defence, yet they suppose they would have aided the Committee. * * *
>
> It *appears* * * * from the Testimony of *Andrew Sprowle*, *Archibald Cambpell* and *James Ingram* of the County of *Norfolk* and *Samuel Donaldson* of the County of *Nansemond,* * * * [t]hat the Town of *Norfolk* as yet, has no independent Company but one formed before the existence of Committees, with the approbation of the Governor, and under his Commission; in *Nansemond* County an independent Company was formed in *May* last, not for the avowed purpose of protecting Committees, but in Conformity to the direction of the last Convention. That before the Seizure of the Powder a general acquiescence under the Resolutions of the General and Provincial Congress, marked the political Character of this Colony * * * .[880]

This provides, not merely a catalogue of dry facts, but beyond that a compendium of important principles—

- Independent Companies were formed so that Virginians might "learn the Use of Arms" and "acquire a knowledge of the military Exercise".

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[880] *Id.* at 233-237.

• This knowledge was of practical necessity. For, "by their being more regularly trained, the[people] might be more capable of acting upon an Emergency".

• Through such preparedness, Independent Companies "would be a means of the[people's] greater Security".

• Moreover, the purpose of forming Independent Companies was entirely defensive, not at all aggressive. The "design was to protect the Colony, in General, and the County in particular"; they were "intended for the general Defence of the Country"; "the defence of the Colony was the first and principal Motive"; and "the principal Design * * * was to put the Colony in a proper state of Defence".

• Even Governor Dunmore himself had approved of Independent Companies—when he apparently had imagined that they might have served his own purposes. For during their early formation, Virginians had "never heard [the Governor] disapproved of [them]"; and on at least one occasion "his Lordship * * * [had] review[ed]" one Independent Company "and * * * expressed great satisfaction".

• Far from being the cause of the then-recent "disturbances and Commotions", the formation and mobilization of Independent Companies were the people's natural responses to Dunmore's doubly rogue behavior in office. For in one County there was "never * * * any Commotion before the Powder was taken from the Magazine". In another County "the inhabitants were quiet and peaceable prior to the Removal of the Powder, and were greatly alarmed and exasperated at the Governor's Declaration of giving Freedom to the Slaves, since which uncommon diligence has been used in training the independent Company and the Militia to Arms". And in yet another County "the Governor's seising the Powder, which was heightened and encreased by his threatening to enfranchise the Slaves", had "induced the Independent Company to choose their Officers and march out".

Patriotic Virginians well understood that these were not isolated instances of Dunmore's overreaching, but instead integral, coördinated parts of what might have proven to be a simple, but very effective scheme for suppressing rebellion: On the one hand, depriving the people of ammunition would have rendered them defenseless against Dunmore's regular troops; while, on the other hand, arming the slaves would have put into the field under the Royal standard masses of men animated by the strongest possible personal emotions of hatred and vengeance to destroy not only the institution of slavery but also the persons of their former masters, as well as

the strongest possible material incentives to appropriate their masters' property as the spoils of civil war.[881]

• That the underlying problem was the people's well-justified fear of oppression by the central Colonial government doubtlessly counseled them to demand Local control of their Independent Companies—so that they "refused to inlist unless they were to be solely under the Direction of Officers of their own choosing". And,

• Confronted by Lord Dunmore's intransigeance, freedom-loving Virginians had no choice but to transfer their political allegiances to other governmental institutions of their own making—namely, the Continental Congress, Virginia's Convention, and the Local Committees of Correspondence and Observation. And, having done so, they had no choice but to employ their Independent Companies to protect those bodies against retaliation from Dunmore, and otherwise to assist them in their operations. That is, the Independent Companies took the first steps in implementing the principle "that whenever any government shall be found inadequate or contrary to the[true] purposes [of government], a majority of the community hath an indubitable, unalienable, and indefeasible right, to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal".[882]

On 19 June 1775, in an address to Governor Dunmore, the Burgesses exhaustively disputed the charges he had communicated to Lord Dartmouth some six months theretofore:[883]

> [Y]*ou were pleased to inform your noble Correspondent* [Lord Dartmouth], *that "every County in this Colony was arming a Company of Men, whom they call an independent Company, for the avowed Purpose of protecting their Committees, and to be employed against Government, if Occasion required; and that the Committee of one County had proceeded so far as to swear the Men of their independent Company to execute all Orders which should be given them from their Committee.*["] *These, my Lord, are things entirely without our Knowledge, and upon the strictest inquiry, we are convinced they deserve no Credit. There were a few Companies of Gentlemen formed, who were desirous of perfecting themselves in Military Exercise, but we find not more than six or*

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[881] As matters turned out during the War of Independence, the intestine conflict between Patriots and Loyalists (or Tories) in the Middle and Southern Colonies was often brutal in the extreme. *See, e.g.,* Thomas B. Allen, *Tories: Fighting for the King in America's First Civil War* (New York, New York: HarperCollins Publishers, 2010). One can easily imagine how much more horrific the fighting might have been had the British pressed to the limit Dunmore's plan to arm the slaves.

[882] Virginia Declaration of Rights (1776) art. 3.

[883] *See ante*, at 570-571.

seven throughout the whole Colony, which consists of fifty one Counties. This was designed to distinguish them from the Militia at large; the first, and most considerable of these, was instituted for the better Protection of the Inhabitants of Norfolk *Borough, and afterwards received your Lordship's Approbation * * * ,That these Companies were connected with the Committees, or that they were ever designed to act against, or in any sort to interfere with, what you are pleased to call Government, we do not know, or believe, but, on the Contrary, we are verily persuaded that they were always ready and willing to exert themselves to support the Laws, and his Majesty's Government, to the utmost of their Power.*

* * * * *

How the Proceedings of the General Convention, in the Month of March last [*i.e.*, in 1775] *may have been represented, we know not; but * * * it is to be presumed in no very favourable light. These Meetings, my Lord, unless it can be supposed that a whole Country could entirely lose sight of its Security and most essential Interests, were rendered absolutely necessary, first by the dissolution, and afterwards by repeated Prorogations, of the General Assembly. Upon Enquiry into the State of the Colony, it was found that there had been almost a total inattention to the proper training and disciplining of our Militia. Various subsequent Acts of our Legislature, amendatory of the Law of 1738, had expired; the Act providing against Invasions and Insurrections was near expiring, and it was uncertain whether an opportunity would be given the General Assembly to revive it. Taking a further view of our situation, it was found that our Inhabitants were exposed to the Incursions of a barbarous and savage Enemy. From the best Accounts received from* Great Britain, *there was too much Reason to be convinced that his Majesty's Ministry was prosecuting the most vigorous and arbitrary Measures towards subjugating the Continent of* America *to their despotic Rule; which Measures, it is more probable, had been suggested from hence, and the other Colonies: That a Scheme, the most diabolical, had been meditated, and generally recommended, by a Person of great Influence, to offer Freedom to our Slaves, and turn them against their Masters. The Convention, to guard against these Dangers not clearly seen into before that time, recommended a strict attention to the Militia Law of 1738; but thinking this defective in many essential Points, considering that under this Law the whole Militia were not obliged to exercise so frequently as might be necessary, it was recommended that voluntier Companies should be formed in each County, for the better Defence and Protection of the whole Country. These Proceedings, according to an unusual Style, * * * have been represented as designed to oppose Government; whereas * * * Nothing was farther from the Intentions of the Convention. * * * But if it is expected that they should sit down supinely, and submit to Yokes which neither they nor their Forefathers were able to bear, they must acknowledge that they have the sensibility of Feelings of Freemen, actuating them to a proper and justifiable Defence of those Rights which are guaranteed by the Laws and Principles of the* [*British*] *Constitution.*

* * * * *

*The Inhabitants of this Country * * * could not be strangers to the many Attempts in the Northen Colonies to disarm the People, and thereby depriving them of the only Means of defending their Lives and Property. We know * * * that the like Measures were generally recommended by the Ministry, and that the Export of Powder from* Great Britain *had been prohibited. Judge then how very alarming a Removal of the small Stock which remained in the public Magazine, for the Defence of the Country, and the striping the Guns of their Locks, must have been to any People, who had the Smallest Regard for their Security.*

* * * * *

** * * It appears, that during this general uneasiness an Account was received from the Northward of the Engagement at Concord; the General* [that is., Thomas Gage] *it seems, had sent an armed Force to seize a Provincial Magazine. This * * * increased the Apprehensions of our People, as it held out to them an additional Proof that the steps you had taken formed a Part of that general System adopted to render the Colonies defenceless. If upon such Alarms, when the Minds of People were fretted to an extreme Degree, some irregularities were committed, the Causes may be found in those extraordinary Attempts to stretch the Powers of Government so much beyond their ancient and constitutional Limits.*

* * * * *

*The Occasion and Design of forming Independent Companies at first, and the Rise of Voluntier Companies afterwards, we have already explained, and cannot see the Necessity of abolishing them. They are not designed to interfere with * * * the exercise of the legal and constitutional Powers of your Government, which we would wish to have supported on all Occasions; and are of Opinion that the Laws in force are competent to that End. But, if it is expected that the Country should again be thrown into a defenceless State, Self-Preservation, the first Law of Nature, forbids it*[.][884]

Here, too, important principles stand out—

• First and foremost, Virginians rightly understood their community's own self-preservation to be the highest law: "[*I*]*f it is expected that the Country should again be thrown into a defenceless State, Self-Preservation, the first Law of Nature, forbids it.*" This, of course, accorded perfectly with the fundamental principle of Anglo-American law, long-established at that time, that "[s]elf-defence * * * , as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society".[885]

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[884] JOURNALS of the HOUSE *of* BURGESSES of VIRGINIA, *ante* note 318, at 255-261 (footnotes omitted).

[885] W. Blackstone, *Commentaries on the Laws of England*, *ante* note 142, Volume 3, at 4.

• The people themselves were the ultimate source of their own security: "*These Meetings* [*of the General Convention*] * * * *, unless it can be supposed that a whole Country could entirely lose sight of its Security and most essential Interests, were rendered absolutely necessary*[.]"

• The people would always support a *true* "government"—that is, one acting justly in their best interests: "*That these* [*Independent*] *Companies * * * were ever designed to act against, or in any sort to interfere with, what you are pleased to call Government, we do not know, or believe, but, on the Contrary, we are verily persuaded that they were always ready and willing to exert themselves to support the Laws, and his Majesty's Government, to the utmost of their Power.*"

• But Virginians could not properly defend themselves, because no Militia was settled by statute at the time: "*Upon Enquiry into the State of the Colony, it was found that there had been almost a total inattention to the proper training and disciplining of our Militia. Various subsequent Acts of our Legislature, amendatory of the Law of 1738, had expired; the Act providing against Invasions and Insurrections was near expiring, and it was uncertain whether an opportunity would be given the General Assembly to revive it.*"

• Virginia's Colonial legislature was unable to act in the public interest: "*These Meetings* [*of the General Convention*] * * * *, unless it can be supposed that a whole Country could entirely lose sight of its Security and most essential Interests, were rendered absolutely necessary, first by the dissolution, and afterwards by repeated Prorogations, of the General Assembly.*"

• Parliament, too, was affirmatively acting against the people's interests: "*From the best Accounts received from* Great Britain, *there was too much Reason to be convinced that his Majesty's Ministry was prosecuting the most vigorous and arbitrary Measures towards subjugating the Continent of* America *to their despotic Rule*[.]"

• In particular, the people would not acquiesce in their own disarmament—especially the attempts at home and abroad to cut off their supplies of ammunition, which were recognized as key steps in a systematic scheme of oppression: "*The Inhabitants of this Country * * * could not be strangers to the many Attempts in the Northen Colonies to disarm the People, and thereby depriving them of the only Means of defending their Lives and Property. We know * * * that the like Measures were generally recommended by the Ministry, and that the Export of Powder from* Great Britain *had been prohibited.*" And "*an Account was received from the Northward of the Engagement at Concord; the General* [that is, Thomas Gage] *it seems, had sent an armed Force to seize a Provincial Magazine.*"

• Under these trying circumstances, forming Independent Companies was the most effective, if not the only practical, way of quickly raising a sufficiently large and trained force through the deployment of which the people could protect themselves against the dangers threatening them: "*The Convention, to guard against these Dangers not clearly seen into before that time, recommended a strict attention to the Militia Law of 1738; but thinking this defective in many essential Points, considering that under this Law the whole Militia were not obliged to exercise so frequently as might be necessary, it was recommended that voluntier Companies should be formed in each County, for the better Defence and Protection of the whole Country.*"

• The people's reasonable perceptions of usurpation and tyranny by rogue public officials justified *extra*-legal action on their part: "*If upon such Alarms, when the Minds of People were fretted to an extreme Degree, some irregularities were committed, the Causes may be found in those extraordinary Attempts to stretch the Powers of Government so much beyond their ancient and constitutional Limits.*"

• If the formation of Independent Companies was arguably irregular, the irregularity was excusable, and even justifiable, because it was necessary to defend the rights of free men: "*These Proceedings, according to an unusual Style, * * * have been represented as designed to oppose Government; whereas * * * Nothing was farther from the Intentions of the Convention. * * * But if it is expected that they should sit down supinely, and submit to Yokes which neither they nor their Forefathers were able to bear, they must acknowledge that they have the sensibility of Feelings of Freemen, actuating them to a proper and justifiable Defence of those Rights which are guaranteed by the Laws and Principles of the* [*British*] *Constitution.*"

• Once formed, the Independent Companies would not be disbanded, because they would continue to be useful, particularly in support of a true "government": "*The Occasion and Design of forming Independent Companies at first, and the Rise of Voluntier Companies afterwards, we have already explained, and cannot see the Necessity of abolishing them. They are not designed to interfere with * * * the exercise of the legal and constitutional Powers of your Government, which we would wish to have supported on all Occasions*[.]"

So, the evident lesson this episode teaches is that, in *pre*-constitutional Virginia, ***when the normal political institutions failed, the people deemed themselves entitled to organize Militia Companies for their own collective self-defense and in aid of whatever just government they could then establish. And the rump officialdom of the previously established, but then discredited, government could claim and was accorded no say in the process.***

Meanwhile, and with good reason, the Burgesses were intent upon ensuring that public arms and ammunition would be supplied for the people's own use and would remain subject to their own control. On 17 June 1775, they prepared an Address to the Governor on that score:

> *We * * * beg leave to inform your Lordship, that the Public Magazine is now repaired, and in fit condition for the Reception of Arms and Ammunition.*
>
> *We therefore request your Lordship will * * * order the Powder, lately removed from thence, to be returned * * * ; We further * * * inform your Lordship, that it appears * * * that there are no Arms therein fit for service. At this critical time, * * * when you Excellency assures us of the great probability of an* Indian *Invasion, at a time too when an Insurrection of our Slaves may be encouraged, merely from a Notoriety of a total Deficiency in our public Stores of Arms and Ammunition, it is a Duty we owe to our Country and ourselves to remind your Lordship, that the Legislature of this Colony have long since made ample Provision for the purchase of Arms and Ammunition, and established a competent Fund for that purpose, by granting to his Majesty one shilling and three pence Sterling upon the Tonnage of all Vessels trading to this Country. * * * But * * * this House, finding a total inattention in Government to this important Provision, altho' it must have appeared essential more than twelve Months ago, and still observing that no means are pursued to supply a Deficiency so alarming, now conceive it to be their Duty, not only to represent this Grievance to your Lordship, but also request that you will * * * order that two thousand Stand of Arms, five Tuns of Powder, and twenty Tuns of Lead, at the least, with a sufficient Quantity of other Military Stores, be immediately provided for the Defence of this Colony, in Case of an Invasion or Insurrection, and that the same be lodged in the Public Magazine.*[886]

On 20 June 1775, Lord Dunmore responded quite positively in the negative:

> *As the Care Custody and disposal of publick Stores of Ammunition belong alone to the Kings Representative, I cannot consent to return the Powder, lately removed from the Magazine, to* Williamsburg, *which, experience has demonstrated to me, is an improper place for the residence of the Governor, therefore as I could not attend to its preservation, I could not confidently depend upon its being in security there: the Powder in question besides * * * belonged to one of His Majesty's Ships; I am therefore in a particular manner accountable for it; but * * * I shall be ready to apply it, if I find it wanted for the Protection of the Colony.*
>
> *The duty upon the Tonnage of all Vessels trading to this Colony has been applied * * * towards the regular and necessary charges of Government,*

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[886] JOURNALS of the HOUSE *of* BURGESSES of VIRGINIA, *ante* note 318, at 250.

> *which without this fund could not have been supported and therefore requires it all. This Colony has hitherto been preserved from Invasion and Insurrection by the Care and attention of Government; * * * So it exposes the injustice of your present attempt, if it does not induce you to forbear others, of bringing your legal and Constitutional Government, at this unhappy Conjuncture, into discredit among the People.*
>
> *As to your request that I order a certain quantity of Arms, Powder and other Military Stores to be provided;—When you have complied with the requisition Submitted to your consideration * * * offering to concur in any measure proper for my Security * * * ; and when the legal executive Power of Government is restored, and I may with certainty rely that Arms Powder and other Military Stores Will be employed no otherwise than as I shall direct, who as his Majesty's Representative have the sole Authority in the Case, then I shall be happy, with the means you furnish me, to provide everything * * * which may be requisite for securing the Inhabitants of* Virginia *from Invasion and Insurrection.*[887]

In reply, on 21 June 1775 both the Council and the House of Burgesses wrote to Governor Dunmore, rehearsing his contention

> *that Experience hath shewn the Insecurity of the Magazine, and that, as the Palace* [that is, the Governor's residence] *hath hitherto been respected, you thought it improper to give any other Orders, than that the Arms belonging to the King * * * may still remain, in the Palace; and that they may, on no account be touched without your express Permission.*

But, they dissented,

> [t]*hough these Arms * * * may be considered, in some sort as belonging to his Majesty, as the supreme Head of this Government and that they are properly under* [the Governor's] *Direction, yet * * * they were originally provided, and have been preserved, for the Use of the Country, in Cases of Emergency.*
>
> * * * * *
>
> ** * * We must * * * once more entreat your Excellency to order the Arms to be removed to the public Magazine.*[888]

So, in *pre*-constitutional Virginia, even arms the formal title to which resided in the government were to be held at and for the service of the people, not as the exclusive property of public officials or the governmental apparatus. The people enjoyed a beneficial interest in the arms; public officials were merely trustees and custodians;

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[887] *Id.* at 270-271.

[888] *Id.* at 273.

and therefore the arms were to be kept where the people could immediately gain possession of them whenever the people decided that they were needed for the people's own purposes.

In their letter of 21 June, the Councillors and Burgesses also emphasized

> *that the important Business of this Assembly hath been much impeded by your Excellency's removal from the Palace. * * * There are several Bills of the last importance to this Country, now ready to be presented to your Excellency for your Assent*[889]

—and one of the "*Bills of the last importance*" then under consideration proposed the revival of the Militia Act, likely the very last action of the General Assembly that Dunmore desired to approve.

The next day, however, recognizing the hopelessness of trying to enact new legislation that would strengthen the people's hand against the recalcitrant Governor, the House of Burgesses "*Ordered*, that the Committee of the whole House, to whom the Bill, to revive an Act, intituled *An Act for the better regulating and disciplining the Militia*, was committed, be discharged from proceeding upon the said Bill", and "that the said Bill do lie upon the Table".[890] This was a realistic assessment of the situation, in light of a letter from Dunmore, read that same day, in which he stated that

> *I have already declared my intentions in regard to the Arms at the Palace; and I conceive the Council and House of Burgesses are interfering in a Matter which does not belong to them. * * **
>
> ** * * I know of no Bills of importance which, if I were inclined to risk my Person again among the People, the Assembly have to present to me, nor whether they be such as I could assent to.*[891]

Certainly a bill to revive the Militia Act (or enact a new one) would never have received the Governor's assent, because *disarming, disorganizing, and ultimately dividing the people against themselves* to the maximum possible extent was his obvious goal. This behavior, too, smacked of the same arrogance and disdain for his subjects that led King George III to earn the indictment in the Declaration of Independence that "[h]e has refused his Assent to Laws, the most wholesome and necessary for the public good".

Finally, on 24 June 1775, the House of Burgesses

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[889] *Id.*

[890] *Id.* at 275 (footnote omitted).

[891] *Id.* at 276.

> *Resolved*, that the unreasonable delays thrown into the Proceedings of this House by the Governor, and his evasive Answers to the sincere and decent Addresses of the Representatives of the People, give us great reason to fear, that a dangerous attack may be meditated against the unhappy People of this Colony; it is therefore our Opinion that they prepare for the preservation of their property, and their inestimable rights and liberties, with the greatest care and attention.[892]

The House then adjourned, for the last time; and the Royal Government of Virginia came to an end.

During this period, one historian observed, Virginia's "militia system, fallen into decay * * * , was replaced by volunteer companies of minute-men * * * . Several of them were organized before the end of 1774, and by the summer of 1775 thirty or more existed".[893] Actually (as the foregoing discussion explains), patriots in the House of Burgesses wanted to revive and maintain Virginia's Militia in 1774 according to an expansion of the basic pattern set in 1738, but were prevented from doing so by Governor Dunmore's refusals to coöperate. Rather than having "fallen into decay" through legislators' inadvertence or insouciance, or because of its own obsolescence, Virginia's Militia was obstructed in its revitalization by a single rogue public official, for the very purpose of oppressing the Colony. Yet the obstruction blocked only one path—for the Militia then reappeared in the form of Independent Companies spontaneously formed by the people in Local communities. Virginia's Militia was not somehow "replaced" by Independent Companies, but instead Independent Companies became the vehicles by means of which the people on their own initiative maintained the continuity of their Militia even in the temporary absence of enabling legislation.

When patriotic Virginians were once again in a position to enact such legislation, they quickly revitalized their Militia as a whole, with Independent Companies of volunteers as integral components. On the 19th of July, 1775, Virginia's Convention—having finally superseded the impotent General Assembly under the revolutionary conditions then extant—"Resolved, that a sufficient armed Force be immediately raised and embodyed, under proper Officers for the Defence and protection of this Colony".[894] An "Ordinance" to this effect was subsequently enacted.[895] It provided for normal Militia and Minutemen, as well as regular soldiers, and specified that "the several volunteer companies, raised in pursuance

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[892] *Id.* at 281.

[893] H. Eckenrode, *The Revolution in Virginia, ante* note 644, at 109-110 (footnote omitted).

[894] *Reprinted in* R. Scribner, *Revolutionary Virginia*, *ante* note 318, Volume III, at 319 (footnote omitted).

[895] The Convention styled this measure an "Ordinance", rather than an "Act", because technically only the House of Burgesses—still in nominal existence, but rendered legally impotent by the Governor's refusal to coöperate with it—could pass an "Act". *See id.*, Volume III, at 324 note 6.

of the resolutions of a former convention,[896] shall be disbanded, as soon as the battalions in the several districts where the said volunteer companies respectively reside are fully and completely embodied".{EN-1490}

At the same time, the Convention enacted an Ordinance appointing a general Committee of Safety. As the Editors of Virginia's *Statutes at Large* described the situation,

> [t]he regal government * * * was TOTALLY DISSOLVED;—no other form had then been adopted;—the militia laws had been suffered to expire;—and the revenues of the crown were in the hands of its late officers, from which they were not extracted until a late period. Thus the fathers of the revolution, when they dared that hazardous enterprize, found themselves without a government,—without men,—and without money. Indeed, they had nothing to support them, in the awful contest, but their own virtue and talents, and a firm reliance on the SOVEREIGN DISPOSER OF ALL EVENTS. The progress of the revolution shows with what facility all these difficulties were surmounted.
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> One of the first measures adopted by the American people to resist the encroachments of the government of Great Britain, was a system of self-denial, generally called the *Continental Association*, or non-importation agreement. To enforce this, the General Congress had recommended the appointment of *Committees of Safety* in the several colonies. But the number of committeemen as well as their duration in office being unlimited, the Convention of Virginia gave them a more distinct organization. A General Committee of Safety was appointed by the convention, who were invested with the supreme executive powers of government. County committees were elected by the freeholders of the several counties and corporations; from which district committees were deputed. On these committees devolved the appointment of the captains and subaltern officers of the regulars and minute men, and the general superintendence of the recruiting service. So practically useful had the General Committee of Safety been found, that their powers were transferred to the Governor and Council, and continued long after the adoption of the constitution [of Virginia]. These committees constituted the *executive* department of the government. The *legislative* was formed by delegates to the convention, annually elected by the freeholders of the several counties, and corporations, by law, entitled to send burgesses to the general assembly. A *judiciary*, consisting of three judges appointed by the convention, and five members of each county committee, commissioned by the general committee of safety, was appointed to decide on cases arising under the ordinance "for establishing a mode of punishment for the enemies of America in this colony."[{EN-1491}] The

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[896] This referred to the Convention's Resolution of 25 March 1775. *See ante*, at 573-574.

> *militar*y was composed of regulars, minute-men, or certain portions of the militia, more strictly trained, and the main body of the militia, newly organized.[897]

Among other authority, Virginia's Committee of Safety was delegated

> full power and authority to call forth into actual service any detachments or companies of minute-men, or any parts of the militia from any district or county within this colony, having regard to the convenience and vicinity of such district or county to the place of immediate danger, and also to the internal security of such district or county[; and]
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> full power and authority to call into service, in cases of danger, to be judged by the said committee, so many volunteer companies, and such parts of the militia, as they may think necessary for the defence and security of any part of the country; and shall appoint some fit and able person, or persons, to command the same, as need may require.{EN-1492}

Thus, Independent Companies in Virginia in 1774 and 1775 filled in until, while, and even after her normal Militia could be properly settled, regulated, mobilized, and deployed—just as Independent Companies could and should be utilized today as part of the process of revitalizing "the Militia of the several States".[898] Then (as would be the case today, too) these Companies were not "vigilante" outfits or some species of *Freikorps*. To the contrary, they sought guidance from, and were controlled by, the superior governmental authorities they considered legitimate. For instance, on 3 August 1775, the Convention received "a Letter from the Officers of the Voluntier Companies in Williamsburg, requesting that some certain Line for their Conduct might be laid down, lest in their Zeal to serve their Country, they might precipitate their Countrymen into unnecessary Calamities"—to which two days later the the Convention responded, "that this Convention doth applaud the Zeal of the Gentlemen Officers and Voluntiers in the City of Williamsburg and do recommend that they keep themselves on the defensive, exerting their utmost Endeavours & Vigilance to discover and defeat any hostile Attempts of the Enemies of this Country".[899] In some cases, of course, the times being what they were, an Independent Company might go too far, and be reprimanded by the Convention, as when "the Voluntier Company" in Brunswick County attempted to compel a local merchant and his associates "to enlist as Soldiers therein under pain of incurring the Displeasure of the * * * Company and

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[897] W. Hening, *The Statutes at Large, ante* note 643, Volume IX, Preface, at [4-5] (footnotes omitted).

[898] *See post*, Chapter 44.

[899] *Reprinted in* R. Scribner, *Revolutionary Virginia*, *ante* note 318, Volume III, at 393 and 401 (footnote omitted).

of being treated as Enemies to the Country", and the Convention "wr[o]te to the commanding officer * * * requiring them to desist from a further prosecution of th[os]e Measures".[900] But generally, until the Militia were fully revitalized and regular troops raised, the Convention relied on Independent Companies, as on 14 August 1775, when it "[r]esolved, that the Committee for the * * * City [of Williamsburg] and the Committees of York and James City be desired to pay particular Attention to the Subject and if Lord Dunmore or any other Person shall land or attempt to Land any armed Troops in their Neighbourhood, that they immediately request the Assistance of the Voluntier Companies now in the City to repel such Troops by Force, and if need be, to call in the Assistance of other Voluntier Companies or Militia for effecting that purpose".[901]

Confronted with this defiance, on 7 November 1775 a desperate Lord Dunmore—drafting his bombastic Proclamation behind the wooden walls and cannon of the British man-of-war H.M.S. *William*—

> determine[d] to execute Martial Law, and cause the same to be executed throughout this Colony: and to the end that Peace and good Order may the sooner be restored, * * * require[d] every Person capable of bearing Arms, to resort to His Majesty's Standard, or be looked upon as Traitors to His Majesty's Crown and Government, and thereby become liable to the Penalty the Law inflicts upon such Offenses; such as forfeiture of Life, confiscation of Lands, &c. &c.{EN-1493}

A more extensive assault of that nature on Americans' liberties brought down on King George III the execration that "[h]e has affected to render the Military independent of and superior to the Civil power".

Even more desperately, Dunmore also tried to arm the slaves against their masters, thus attempting to bring about in his own interest the very slave revolt that he had earlier claimed it was his intent to forestall:

> And I do hereby further declare all indented Servants, Negroes, or others, (appertaining to Rebels), free that are able and willing to bear Arms, they joining His Majesty's Troops as soon as may be, for the more speedily reducing this Colony to a proper Sense of their Duty, to His Majesty's Crown and Dignity.{EN-1494}

No less than George Washington himself believed that, by emancipating and arming the slaves and indentured servants, Dunmore could have become "the most

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[900] *Reprinted in id.*, Volume III, at 413.

[901] *Reprinted in id.*, Volume III, at 440 (footnote omitted).

formidable enemy America has".[902] But, although Dunmore did enlist hundreds of runaway slaves in a so-called "Ethiopian Regiment",[903] his efforts eventually came to naught. As did King George III's—albeit not before the Declaration of Independence had denounced him for "ha[ving] incited domestic insurrections amongst us".

Even more unfortunately for Dunmore, decisive numbers of the Virginians "capable of bearing Arms" turned out to be patriots who shunned "His Majesty's Standard". And within less than a month, "the good people" of Virginia—refusing sheepishly to bow to "martial law"—instead declared that

> the earl of Dunmore, by his many hostile attacks upon the good people of this colony, and attempts to infringe their rights and liberties, by his proclamation declaring freedom to our servants and slaves, and arming them against us, by seizing our persons and properties, and declaring those who opposed such his arbitrary measures in a state of rebellion, hath made it necessary that an additional number of forces be raised for our protection and defence[.]{EN-1495}

The progression in Dunmore's decrees is revealing: *First*, he tried to impose political control "from the top down", relying on "all Magistrates and other Officers" in the governmental apparatus. *Second*, when that did not suffice, he expanded his call for help, "charging all Persons" to "oppose the[patriots] and their Designs by every Means", and threatening recalcitrant Virginians with "the Vengeance of offended Majesty and the Insulted Laws". *Third*, when even that bluster and bluff proved unavailing, he sought at last to marshal "from the bottom up" the "'[p]olitical power [that] grows out of the barrel of a gun'",[904] by summoning to his side "every Person capable of bearing Arms". At that point, Dunmore discovered the dearth of power he actually wielded—that his authority depended utterly upon the common people's voluntary support—and that the people did not have to accede to his paper commands, because they exercised the real power, embodied in steel and lead, to disregard and frustrate them. The people could and did "just say *No!*", perhaps not easily but nonetheless unequivocally. Thus, Dunmore learned the hard way that freedom-loving people in a Militia built "from the bottom up" would not mechanically take orders "from the top down" that they understood to be in aid of usurpation and tyranny directed against themselves. Indeed, such inevitable and inexorable disobedience—proven in the crucible of her own struggle for independence against Britain—is precisely the reason that Virginia adopted the

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[902] *Quoted in* M. Kranish, *Flight from Monticello*, *ante* note 644, at 79.

[903] *Id.* at 76-77.

[904] *Quotations From Chairman Mao, ante* note 28, at 61.

constitutional principle that "a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state".[905]

K. An exemplar of federalism in action. The evident conclusion to be derived from all of this historical experience is that Virginia's Militia was a practical exemplar of the truest and most worthwhile "federalism", because its membership, leadership, training, command, deployment, and in an emergency even self-mobilization were organized and operated "from the bottom up", with their foundations resting securely—not on charismatic "leaders" or self-styled élites, factions, or special-interest groups—but instead on the ordinary men resident within Local communities. Inasmuch as in the final analysis "'[p]olitical power grows out of the barrel of a gun'", and those who wield political power are the true sovereigns in any community, the thoroughly decentralized structure of Virginia's Militia—always and everywhere "composed of the body of the people, trained to arms"—vested sovereignty in *the people themselves* in the most direct and efficacious manner possible. *The people themselves* had the numbers, the armaments, the organization, the training, the physical possession of most of the property, and the legal authority in over one hundred years of Militia statutes and practices sufficient to protect themselves as individuals and their Commonwealth as a whole from all enemies, both foreign and domestic—whether the immediate danger took the form of an invading army, marauding pirates, hostile Indians, rioters, or homegrown rogue public officials infesting the highest levels of their government.

[905] Virginia Declaration of Rights (1776) art. 13.

CHAPTER TWENTY-TWO

Virginia granted various exemptions from service in her *pre*-constitutional Militia, based upon eminently practical considerations.

Although Virginia's General Assembly asserted an overarching authority to compel every able-bodied adult free male within her territory to serve in her Militia, it allowed Militiamen various exemptions from fulfillment of that duty. Yet, although no "inherent right" to any exemption was ever recognized, exemptions were never simply arbitrary in nature, either. Rather, the legislature's operating principle was that every exemption had to be consistent with both the structure of the Militia as "composed of the body of the people, trained to arms", and the purpose of the Militia as "the proper, natural, and safe defence of a free state".[906] That is, *every exemption served some purpose of the Militia*.

So, first and foremost, exemptions could not be, and never were, suffered to undermine the Militia either in its fundamental principle of organization, by denying the near-universal duty of service, or in its practical deployment in the field, by removing too many otherwise eligible men from the pool of those immediately available for service. Of equal importance, though, a lack of exemptions could not be suffered to overly weaken normal domestic society by calling forth too many men too often for too much service. The degree to which the near-universal duty needed to and could be enforced depended upon the actual dangers confronting the community balanced against its ability to muster forces sufficient to deal with those dangers while simultaneously maintaining "the home front" in a condition not too far removed from normalcy. As the General Assembly declared as early as 1629, "every commander of the severall plantations appointed by commission from the governor shall have power and authoritie to levy a partie of men out of the inhabitants of that place *soe many as may well be spared without too much weakening of the plantations* and to imploy these men against the Indians".{EN-1496} *Pre*-constitutional Virginia, after all, was not a "garrison state". Her society did not exist in order to supply a reason for and to support with blood and treasure her Militia. Rather, the Militia existed in order to protect the society which had settled it. The people's safety and welfare were the ends, the institution designed to secure them the means—"the proper, natural, and safe defence of a free state", to be sure; but withal only an instrument to that end. Nonetheless, the Militia consisted, not of just

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[906] Virginia Declaration of Rights (1776) art. 13.

some small portion of society, but of its vital core and most active component: "the body of the people". Unless the totality of the Militia were to be called forth upon every occasion that warranted the appearance of any Militiamen in the field, regular processes of selection for, and excusal from, actual service were absolutely necessary. Calls for volunteers, acceptance of substitutes, impressment, and rotation served as means for affirmative selection, depending on circumstances.[907] Exemptions constituted forms of negative selection from service that released certain men from particular duties otherwise incumbent upon them.

All exemptions shared several characteristics: *First,* exemptions had specific practical justifications sounding in real social utility. They were intended to serve important *public* purposes, not the parochial and ephemeral special and *anti*-social interests of politically or economically influential factions. *Second,* although exemptions were sufficiently extensive to achieve their particular ends, the total of all exemptions was sufficiently limited not to endanger the Militia's overall readiness. For example, it might have been politically popular for the legislature to exempt from actual service every Militiaman (say) younger than twenty-two and older than twenty-five years of age, and to require even the men in that range of ages to muster for training only once a year. Such a policy, however, would implicitly have subverted the fundamental conception that near-universal duty was the foundation of Militia service—and therefore would have been bad in legal principle. And it would inevitably have proven disastrous in practice, too—because, even if such a small pool of Militiamen might have sufficed for the community's defense when such exemptions were first allowed, over ensuing years the extent of those exemptions would have precluded the training and seasoning of enough other men to enable the Militia to field a force large and competent enough to deal with seriously elevated threats, particular if they arose very suddenly. *Third*, exemptions were sometimes more formal than substantive. For example, some individuals who were excused from personally appearing at Militia musters on account of their positions as governmental officials were likely to be high-ranking officers in the Militia who probably would have attended musters voluntarily, and in any event would have commanded Militia units in the field. *Fourth*, exemptions were always subject to change—being granted, expanded, contracted, or withdrawn as circumstances demanded. No one could claim an "inherent" or "vested" right, privilege, or immunity in any exemption.

The basic categories of exemptions from Militia service available in *pre*-constitutional Virginia included *gender, race or condition of servitude, age, physical disability, public office or private occupation, provision of a substitute, payment of fines, and conscientious objection*. Virginia also afforded her Militiamen time to comply with

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[907] *See ante*, at 369-375; 382-391; 346-363 and 375-382; *and* 392-400.

certain requirements, which amounted to temporary exemptions. But Virginia enacted no general exemption—or, perhaps more descriptively put, no general exclusion—from Militia service for individuals who had returned to society after having been convicted of criminal behavior.

A. Gender. That the political, economic, and social positions and activities of women in *pre-*constitutional Virginia differed decidedly from those of men decisively influenced the legislature with regard to how it structured her Militia. The General Assembly never explicitly abjured a power to call forth adult able-bodied free women for some kind of service in, with, or for the Militia, at least in situations of direst necessity. Indeed, any such abjuration would have been incredible on its face, in that, in true situations of *direst* necessity, everyone who is not a pacifist or a coward will fight for his or her freedom whether ordered to do so by public officials or not, because the alternative of sheepish submission to murder, rapine, and subjugation is suicidal and dishonorable. In any event, as dangerous as conditions sometimes became in *pre-*constitutional Virginia, situations of *direst* necessity never actually arose—as proven by the General Assembly's consistent implicit exemption of women from almost all types of Militia duty throughout that entire period.

1. This broad exemption appeared in two forms.

a. Virginia's Militia statutes and other legislation providing for military duties called explicitly upon "men" or "male persons" to serve, with no mention or even intimation of women as being eligible. For example,

> • [1644] "[P]ersons * * * may remove and dispose of themselves for their best advantage and convenience, Only in places of danger it shall not be lawfull for any to seat or inhabitt without ten sufficient men at the least, and arms and ammunition accordingly[.]"{EN-1497}
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> • [1705] "[T]he * * * chief officer of the militia of every county have full power and authority to list all male persons whatsoever, from sixteen to sixty years of age, within his respective county, to serve in horse or foot[.]"{EN-1498}
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> • [1723] "[T]he * * * chief officer of the militia of every county, have full power and authority to list all free male persons whatsoever, from twenty-one to sixty years of age, * * * to serve in horse or foot[.]"{EN-1499}
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> • [1738] "[T]he * * * chief officer of the militia, in every county, shall list all free male persons, above the age of one and twenty years, within this colony, under the command of such captains as he shall think fit."{EN-1500}
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> • [1755, 1757, 1759, 1762, 1766, and 1771] "[T]he chief officer of the militia in every county shall list all male persons, above the age of eighteen years, and under the age of sixty years, within this colony

(imported servants excepted) under the command of such captain, as he shall think fit[.]"{EN-1501}

• [1775] "[A]ll free male persons, hired servants, and apprentices, above the age of sixteen, and under fifty years, except such as are * * * excepted, shall be enlisted into the militia by the commander in chief of the county[.]"{EN-1502}

• [1777] "[A]ll free male persons, hired servants, and apprentices, between the ages of sixteen and fifty years [with various exceptions] * * * shall, by the commanding officer of the county in which they reside, be enrolled or formed into companies[.]"{EN-1503}

• [1784 and 1785] "[A]ll free male persons between the ages of eighteen and fifty years [with various exceptions] * * * shall be enrolled or formed into companies[.]"{EN-1504}

b. When Virginia's Militia statutes did use the inclusive term "persons", the contexts showed that, other than in some perhaps not impossible yet predictably quite extraordinary case, "persons" always referred to "men". For example,

[1705] "That * * * the * * * chief officer of the militia of every county have full power and authority to list all male persons whatsoever, from sixteen to sixty years of age within his respective county * * * .

"*Provided* * * * That nothing * * * shall * * * give any power or authority * * * to list any person that shall be, or shall have been of her majesty's councill in this colony, or any person that shall be, or shall have been speaker of the house of burgesses, or any person that shall be, or shall have been her majesty's attorney general, or any person that shall be, or shall have been a justice of the peace within this colony, or any person that shall have born any military commission within this colony as high as * * * captain, or any minister, or the clerk of the councill for the time being, or the clerk of the general court for the time being, or any county court clerk during his being such, or any parish clerk or school-master during his being such, or any overseer that hath four or more slaves under his care, or any constable during his being such, or any miller who hath a mill in keeping, or any servant by importation, or any slave[.]"{EN-1505}

This statute precluded "list[ing] *any* person" whom it specifically identified by public office or private occupation. But the only "persons" whom the statute required to be "list[ed]" in the first place were "all *male* persons whatsoever". So, all of the "persons" specifically identified must have been taken to have been men, and only men, because only male "persons" were possibly needful of such exemptions. Indeed, because at this time women were never elected or appointed to the public offices that some of these "persons" held, and except in rare instances did not carry on the private occupations of others of these "persons", the "persons'" gender was implicit in their offices or occupations. Conceivably, of course, the widow of a miller might

have continued to operate the mill with the aid of children, servants, or hirelings, and therefore might properly have been designated a "miller" herself. Yet even if every one of these public offices and private occupations might have been held or carried on by women, the statute's generic exemption—as well as its primary reference to "all male persons whatsoever"—prevented any such women from being "list[ed]". And obviously no one in the *pre-*constitutional era would ever have contended that, absent an explicit statutory prohibition, any female "servant by importation" or "slave" would or should have been considered eligible in principle for "list[ing]" in the Militia.

> • [1723] "[T]he * * * chief officer of the militia of every county * * * [shall] list all free male persons * * * .
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> " * * * *Provided nevertheless,* That nothing * * * shall * * * compel any person or persons that shall be, or shall have been, of his Majesty's council in this colony, speaker of the house of burgesses, secretary of this colony, judge of the court of vice-admiralty, his Majesty's attorney-general, a justice of the peace, or any person that shall have born any military commission * * * as high as * * * captain, or the clerk of the council, for the time being, or the clerk of the general court, for the time being, or any county court clerk, during his being such, personally to appear at any musters: But that all, and every the persons aforesaid, * * * are * * * required to find and provide one able-bodied white man * * * who shall constantly appear and exercise at all musters.
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> " * * * *Provided nevertheless,* That nothing * * * shall * * * cause to be listed, any minister of the church of England, or the president, masters, professors, or students, of the college of William and Mary, during the time of their being such; or any person being emploied as an overseer, and having four or more slaves under his care; or any miller, having a mill under his charge and keeping; or the founders, keepers, or any other persons emploied in or about any iron, copper, or lead work, or any mine, during the time of their being so emploied; or any free Negro, Mulatto, or Indian."{EN-1506}
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> • [1738] "[T]he * * * chief officer of the militia, in every county, shall list all free male persons * * * .
>
> " * * * *Provided always*, That nothing * * * shall * * * compel any persons herein after-mentioned, to a personal attendance at musters: that is to say, Such as are, or shall have been, members of his majesty's council, speaker of the house of burgesses, secretary, receiver-general, auditor, judge of the court of vice-admiralty, attorney-general, clerk of the council, clerk of the house of burgesses, clerk of the secretary's office, a justice of the peace, clerk of any county court, or any person that shall have borne any military commission as high as * * * captain, or any of the people commonly called Quakers, Yet all the[se] persons * * * are * * * required to send one able-bodied man, not being a convict, or man and horse, armed and accoutred, * * * constantly to appear, and exercise at musters.

> " * * * *Provided also*, That nothing * * * shall * * * enable any * * * chief officer of the militia, to list or cause to be listed, any of the ministers of the church of England, the president, masters, or professors, and students, of the college of William and Mary, during the time of their being such, any overseers residing on the plantation where the slaves under their care are worked, all millers, having the charge and keeping of any mill, nor the founders, keepers, or other persons emploied in or about any iron, copper, or lead work, or any other mine, during the time of their being so emploied; who are * * * exempted from being any ways concerned in the militia."{EN-1507}

In their first provisos, these statutes exempted various "persons", not from being "list[ed]", but from having "personally to appear at any musters", and as a condition of such exemption required each of those "persons" "to find and provide one able-bodied white *man*", or "to send one able-bodied *man*, not being a convict, or *man* and horse", as a personal substitute. So, even if women could conceivably have been among the "persons" to whom the exemption from personally appearing at musters had applied, that exemption would nonetheless have required a man to appear in an exempted woman's place. In their second provisos, the statutes also exempted "other persons" from being "list[ed]" at all. The only "persons" who could have been "list[ed]", however, were "free *male* persons" So, once again, even if women could conceivably have been included in principle among the "other persons" to whom this exemption had applied, in practice the exemption would have been unnecessary.

> [1755, 1757, 1759, 1762, 1766, and 1771] "[T]he chief officer of the militia in every county shall list all male persons * * * (imported servants excepted) under the command of such captain, as he shall think fit * * * .
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> " * * * *Provided always*, That nothing * * * shall * * * compel any persons hereafter mentioned, to muster, that is to say, such as are members of the council, speaker of the house of Burgesses, receiver general, auditor, secretary, attorney general, clerk of the council, clerk of the secretary's office, ministers of the church of England, the president, masters or professors, and students of William and Mary college, the mayor, recorder, and Aldermen of the city of Williamsburg, and borough of Norfolk, the keeper of the public goal, any person being *bona fide*, an overseer over four servants or slaves, and actually residing on the plantation where they work, and receiving a share of the crop or wages, for his care and pains, in looking after such servants and slaves: Any miller having the charge and keeping of any mill, and founders, keepers, or other persons employed in or about any copper, iron or lead mine, who are all hereby exempted from being inlisted, or any other way concerned in the militia[.]
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> * * * * *

> " * * * That the several persons herein after exempted from mustering (except ministers of the church of England, the president, masters or professors, and students of William and Mary college, the keeper of the public goal, overseers and millers, and all workers in any mine whatsoever) shall provide arms for the use of the county, city or borough, wherein they * * * reside * * * that is to say, each councillor * * * : The speaker of the house of Burgesses * * * : The receiver general, auditor, and secretary * * * : The attorney general * * * : The clerk of the council, and clerk of the secretary's office * * * : The mayor, recorder, and aldermen of the city of Williamsburg, and borough of Norfolk[.]"{EN-1508}

These statutes exempted various "persons" either from having to muster, albeit on the condition that they would supply arms to their Local governments for the Militia's use; or from being "inlisted". The only individuals who were ever "listed", though, were "male persons". And only "male persons" were ever required to muster, because: (i) Only "male persons" were ever "listed * * * under the command of [some] captain". (ii) "[E]very captain" regularly "muster[ed] * * * his troop or company". And therefore (iii) no one who was not so "listed"under such a "captain" could possibly be mustered.{EN-1509} So, even if women could conceivably have been among the "persons" to whom these exemptions had applied, the exemptions would have be pointless as to them, because the statutes did not require women to appear at musters or to be "inlisted" in any event.

Similarly, Virginia's Militia statutes of 1775, 1777, 1784, and 1785 set out exemptions from enlistment in the Militia for individuals: (i) in various public offices—none of whom were described generically as "persons", and in none of which women would likely ever have served in that era; and (ii) in certain private occupations, some of which—such as "millers", "persons concerned in iron works", and "persons solely employed in manufacturing fire arms"—a few women could conceivably have followed. Even if women could have been found in such offices or occupations, however, they could not possibly have been the beneficiaries of exemption from enlistment, because each of these statutes specified that only "free *male* persons" were to be enlisted in the first place, and as a consequence of their enlistment required to muster.{EN-1510}

Other statutes also treated the term "persons" as including only "men". For example,

> • [1740] "[T]he justices of the peace * * * [may] raise and levy such able-bodied men as do not follow or exercise any lawful calling or employment, or have not some other lawful and sufficient support and maintenance, to serve * * * as soldiers * * * .
>
> " * * * *Provided always*, That nothing * * * shall extend to the taking or levying any person to serve as a soldier, who hath any vote in the

election of * * * burgesses * * * ; or who is * * * an indented or bought servant."{EN-1511}

• [1754] "[T]he chief officer of the militia * * * in every county * * * is hereby required * * * to appoint * * * men of the militia * * * once in every month, or oftener if * * * required * * * , to patrol and visit all negroe quarters, and other places suspected of entertaining unlawful assemblies of slaves, servants, and other disorderly persons[.]"{EN-1512}

• [1754] "WHEREAS his majesty has been pleased to send instructions * * * to raise and levy soldiers for carrying on the present expedition against the French on the Ohio; * * * and * * * that there are * * * able bodied persons, fit to serve * * * , who follow no lawful calling or employment.

" * * * [T]he justices of the peace of every county and corporation within this colony * * * , upon application made to them, by any officer or officers appointed or impowered to enlist men, * * * [may] raise and levy such able bodied men, as do not follow or exercise any lawful calling or employment, or have not some other lawful and sufficient support and maintenance, to serve * * * as soldiers in the present expedition[.]"{EN-1513}

2. Yet if Virginia's statutes did not explicitly include women fully within the Militia alongside men, they did not absolutely exclude all women from the performance of all Militia duties, either. Instead, women who were the heads of their households were required to assume the financial burdens arising out of defaults in Militia service on the parts of their minor sons or servants:

• [1755, 1757, 1759, 1762, 1766, and 1771] "[T]he fines and penalties incurred by infants and servants for the breach or neglect of their duty in any particular service * * * required, of them, shall be paid by the parent, guardian, or master, respectively[.]"{EN-1514}

Plainly, in this and any like statute, "parent, guardian, *or master*" must have been taken to include *both* men *and* women, as the General Assembly could never have intended either for women who were the sole surviving "parent[s]" or "guardian[s]" of male "infants" to be mulcted for the minors' misbehavior, while women who had exclusive control of male "servants" could escape the financial consequences of their charges' misconduct; or for male "servants" to shirk their duties in the Militia without penalty simply because the heads of the households in which they lived and to whom they were subject happened to be women.

• [1775] "[A]ll fines and penalties incurred by infants and servants, for breach or neglect of duty in any particular service * * * required of them, shall be paid by the parent, guardian, or master, of such infant or servant[.]"{EN-1515}

• [1777] "Every officer failing to furnish himself with one pound of powder shall forfeit and pay ten shillings, and the same for failing to

> furnish himself with four pounds of ball; and every soldier failing therein shall likewise be liable for the same penalties, which penalties, where incurred by infants, shall be paid by the parent or guardian, and where incurred by servants shall be paid by the master[.]"{EN-1516}

To be sure, the liabilities connected with Militia service which might have been imposed on these women were only financial in substance and vicarious in legal character—but they nonetheless derived from the selfsame source, and were as legally enforceable and costly, as the liabilities to which men were exposed in those regards.

3. In sum, any assertion that women played no part whatsoever in Virginia's *pre-*constitutional Militia is inaccurate. Their involvement was narrow, their general exemption from duty broad—but the former was as real as the latter. Virginia eventually described her "well regulated militia" as "composed of the body of the people, trained to arms".[908] And, as her Militia statutes specified without exception throughout the entire *pre-*constitutional era, those "people, trained to arms" *under the compulsion of law* were "*male* persons" *only*. Women—either as a class in general or as individuals in particular instances—were *never* statutorily required to be "trained to arms" themselves. Yet some of them *did* participate in the Militia by being held financially responsible for some men in their own households who were required to be "trained to arms" and who defaulted on their Militia duties. So, as to these women, Virginia *did* require fulfillment of a vicarious duty to be "trained to arms". Therefore, Virginia's "well regulated militia" was not defined, in operation at least, as being composed exclusively of men. That Virginia's General Assembly had the undoubted right and the power to hold women who were heads of their households financially responsible for failing to supervise and control the behavior of their minor sons and servants in relation to the performance of those individuals' Militia duties proves that women were subject to *some* Militia duties at that time, and so could be made subject to *some* duties, too, in revitalized "Militia of the several States" today. And if to *some* duties, why not to others, or even to all? That, of course, is largely a political question for which only a political answer in the future is possible.[909]

B. Condition of servitude or race. From the very beginning, Virginia discriminated against people of color, whether bond or free, not just in relation to service in the Militia and other military duty, but also with respect to their very possession of arms for any purpose: As in the declaration of 1639 that "ALL persons except negroes to be provided with arms and amunition or be fined".{EN-1517} This is hardly surprising, inasmuch as "'[p]olitical power grows out of the barrel of a

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[908] Virginia Declaration of Rights (1776) art. 13.

[909] *See, e.g.*, Kingsley Browne, *Co-Ed Combat: The New Evidence That Women Shouldn't Fight The Nation's Wars* (New York, New York: Sentinel, 2007).

gun'",[910] and during the *pre-*constitutional era even free Negroes and other people of color were "considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them".[911] For example, in 1705 the General Assembly decreed that no "negro, mulatto or Indian, shall * * * bear any office, ecclesiasticall, civill or military, or be in any place of public trust or power, within * * * Virginia".{EN-1518} In 1723, it declared that "no free negro, mullatto, or indian whatsoever, shall * * * have any vote at the election of burgesses, or any other election whatsoever".{EN-1519} In 1748, it ordained that, "whereas * * * negroes, mulattos, and Indians, are commonly of such base and corrupt principles, that their testimony cannot be depended upon", therefore "no free negroe, mulatto, or Indian, shall be admitted or sworn a witness, in any cause whatsoever, except against or between negroes, mulattos, or indians".{EN-1520} And in that same year it ordered that, "if any negroe, mulattoe, or Indian, bond or free, shall at any time, lift his, or her hand, in opposition to any christian, not being a negroe, mulattoe, or Indian, he, or she so offending, shall * * * receive thirty lashes on his, or her bare back, well laid on".{EN-1521} Such discrimination carried over into the Militia, too.

1. Slaves were *always* exempted—or perhaps more descriptive of the effect, excluded—from the Militia, for two self-evident reasons: *First*, because "a well regulated militia" in *pre-*constitutional Virginia was "composed of the body *of the people*", slaves could take no part in the Militia inasmuch as, being *un*free themselves, they were not among "the people" who formed "a *free* state". "[N]either the class of persons who had been imported as slaves nor their descendants, whether they had become free or not, were * * * acknowledged as a part of the people".[912] *Second*, because "a well regulated militia" in *pre-*constitutional Virginia was "composed of the body of the people, *trained to arms*", slaves could take no part in the Militia inasmuch as the bondsmen's thoroughgoing personal disarmament was the preëminent and absolutely necessary "badge and incident" of slavery. As Blackstone pointed out,

> [t]wo precautions are * * * advised to be observed in all prudent and free governments: 1. To prevent the introduction of slavery at all: or, 2. If it be already introduced, not to intrust those slaves with arms; who will then find themselves an overmatch for the freemen.[913]

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[910] *Quotations From Chairman Mao*, *ante* note 28, at 61.

[911] Scott v. Sandford, 60 U.S. (19 Howard) 393, 404-405 (1857) (opinion of Taney, C.J.).

[912] *Id.* (19 Howard) at 407.

[913] *Commentaries on the Laws of England*, *ante* note 142, Volume 1, at 416.

So, in 1705, slaves were explicitly exempted from the Militia:

> That * * * the * * * chief officer of the militia of every county have full power and authority to list all male persons whatsoever * * * .
>
> *Provided nevertheless*, That nothing * * * shall * * * give any power or authority to any * * * chief officer whatsoever, to list * * * any slave, but that all and every such person * * * be exempted from serving in either horse or foot.{EN-1522}

Thereafter, the slaves' exclusion was implicit in the requirement (described above) that only "*free* male persons" were to be enlisted in the Militia.

To be sure, the power of impressment that Virginia's General Assembly wielded over her free citizens was broad and unrestrained enough to sweep slaves within its ambit—and might have been exercised for that purpose, just as other Colonies and independent States exercised their powers of impressment to incorporate slaves into their Militia under carefully controlled conditions.{EN-1523} But Virginia never found herself in circumstances sufficiently dire to render that policy necessary. Indeed, during the *pre-*constitutional era, Virginia never relaxed any of the disabilities her military laws imposed with regard to slaves. For example,

> [1777] "[W]hereas several negro slaves have deserted from their masters, and under pretence of being free men have enlisted as soldiers: For prevention whereof, *Be it enacted*, that it shall not be lawful for any recruiting officer within this commonwealth to enlist any negro or mulatto into the service of this or either of the United States, until such negro or mulatto shall produce a certificate from some justice of the peace for the county wherein he resides that he is a free man."{EN-1524}

2. If slaves were always subject to an absolute debarment out of necessity, free people of color were exempted out of social prejudice: Sometimes they were exempted altogether, while at most other times they were formally listed but usually required to perform servile labor rather than to muster as soldiers on equal terms with White Virginians:

> • [1691] "Council Order the Militia Officers not to list the following persons, * * * Negroes[.]"{EN-1525}
>
> • [1723] "That * * * the * * * chief officer of the militia of every county, have full power and authority to list all free male persons whatsoever * * * .
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> * * * * *
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> " * * * *Provided nevertheless,* That nothing * * * shall * * * cause to be listed * * * any free Negro, Mulatto, or Indian.

" * * * *Provided always*, That such free Negros, Mulattos, or Indians, as are capable, may be listed and emploied as drummers or trumpeters: And that upon any invasion, insurrection, or rebellion, all free Negros, Mulattos, or Indians, shall be obliged to attend and march with the militia, and to do the duty of pioneers, or such other servile labour as they shall be directed to perform.

" * * * [I]f * * * any free Negro, Mulatto, or Indian, other than as before excepted, shall presume to appear at any muster whatsoever, the party so offending, shall for every such offence, forfeit and pay one hundred pounds of tobacco[.]"{EN-1526}

• [1738] "[T]he * * * chief officer of the militia, in every county, shall list all free male persons * * * .

* * * * *

" * * * [E]very person * * * listed, (except free mulattos, negros and Indians,) * * * shall be armed * * * .

" * * * [A]ll such free mulattos, negros, or Indians, as are * * * listed, * * * shall appear without arms; and may be emploied as drummers, trumpeters, or pioneers, or in such other servile labour, as they shall be directed to perform."{EN-1527}

• [1755, 1757, 1759, 1762, 1766, and 1771] "[T]he chief officer of the militia in every county shall list all male persons * * * within this colony (imported servants excepted)[.]

* * * * *

" * * * [E]very person * * * inlisted, (except * * * free Mulattoes, negroes and Indians) and placed or ranked in the horse or foot, shall be armed and accoutred[.]

* * * * *

" * * * [A]ll such free mulattoes, negroes and Indians, as are * * * listed, * * * shall appear without arms, and may be employed as drummers, trumpeters or pioneers, or in such other servile labor, as they shall be directed to perform."{EN-1528}

• [1777] "[A]ll free male persons, hired servants, and apprentices * * * (except [various individuals] * * *) shall * * * be enrolled or formed into companies * * * . The free mulattoes * * * shall be employed as drummers, fifers, or pioneers."{EN-1529}

Virginia's Militia statutes of 1775, 1784, and 1785 made no such distinctions as to duties, based on race, with respect to "all free male persons" who were to be "enlisted into the militia" or "enrolled or formed into companies"—the only exemptions set out therein being for individuals who filled certain public offices and engaged in various private occupations, and racially neutral in form.{EN-1530} To be sure, at that time no free persons of color would likely have held any of the public offices the statutes identified; yet some might have been found, along with White men (or possibly women), in such private occupations as "overseers of four

tithables residing on a plantation", "millers", "persons concerned at iron or lead works", or "persons solely employed in repairing or manufacturing fire arms".

But if Virginia's later Militia statutes could have been read so as to include free men of color in her Militia, racial discrimination among free American men persisted, even after ratification of the Constitution, in the General Government's very first Militia statute in 1792: "[E]ach and every free able-bodied *white* male citizen of the respective states * * * of the age of eighteen years, and under the age of forty-five years * * * shall * * * be enrolled in the militia".[914] This statute would not have precluded the States from listing Negro male citizens in their Militia, because ultimately the Militia are "the Militia *of the several States*", each of which retains jurisdiction concurrent with Congress over her Militia's regulation. Nonetheless, such colored Militiamen would presumably have been exempt from marching if the Militia had been "call[ed] forth" pursuant to some Congressional statute "to execute the Laws of the Union, suppress Insurrections and repel Invasions",[915] because Congress had specified in the Act of 1792 that it wanted only "free able-bodied *white* male citizen[s]" to form the "Part of th[e Militia] as m[ight then] be employed in the Service of the United States".[916]

Today, of course, exemptions, exclusions, or other forms of discrimination predicated purely upon an individual's race or some previous condition of servitude would be unconstitutional, as to both the States and Congress.

C. Age. As with exemptions based on gender, exemptions based on age were implicit. The General Assembly never doubted its authority to, and often did, summon for Militia or other military duty *every* able-bodied free man who could perform *some* useful service. But, for practical reasons, it always stipulated a particular range of ages within which men were subject to call. Men of ages above or below that range were understood to be wholly exempt. For example,

> • [1632] "ALL men that are fittinge to beare armes, shall bringe their peices to the church[.]"{EN-1531}
>
> • [1639] "ALL persons except negroes to be provided with arms and amunition or be fined[.]"{EN-1532}
>
> • [1659 and 1662] "[T]hat a provident supplie be made of gunn powder and shott to our owne people, and this strictly to bee lookt to by the officers of the militia, (vizt.)That every man able to beare armes have in his house a fixt gunn two pounds of powder and eight pound of shott at least which are to be provided by every man for his family[.]"{EN-1533}

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[914] *An Act more effectually to provide for the National Defence by establishing an Uniform Militia throughout the United States*, Act of 8 May 1792, CHAP. XXXIII, § 1, 1 Stat. 271, 271 (emphasis supplied).

[915] U.S. Const. art. I, § 8, cl. 15.

[916] U.S. Const. art. I, § 8, cl. 16.

> • [1705] "[T]he * * * chief officer of the militia of every county [shall] have full power and authority to list all male persons whatsoever, from sixteen to sixty years of age within his respective county, to serve in horse or foot[.]"{EN-1534}
>
> • [1723] "[T]he * * * chief officer of the militia of every county * * * [shall] list all free male persons whatsoever, from twenty-one to sixty years of age, * * * to serve in horse or foot[.]
>
> * * * * *
>
> " * * * [N]othing in this act * * * shall hinder or debar any captain from admitting any able-bodied white person, who shall be above the age of sixteen years, to serve in his troop or company, in the place of any person required by this act to be listed."{EN-1535}

The contrast between the statutes of 1705 and 1723 is particularly enlightening. Under the Act of 1723, able-bodied men between sixteen and twenty-one years of age were exempted from Militia duty formerly required under the Act of 1705 *unless they voluntarily chose to serve as substitutes*. Obviously, in both 1705 and 1723 the General Assembly believed that able-bodied men from sixteen to twenty-one years of age *could* serve in the Militia. So the partial exemption of men between sixteen and twenty-one in 1723 was merely a matter of policy. And in later years the policy varied:

> • [1738] "[T]he * * * chief officer of the militia, in every county, shall list all free male persons, above the age of one and twenty years, within this colony, under the command of such captains as he shall think fit.
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> * * * * *
>
> " * * * [T]he field officers, and captains, of every county, * * * are * * * required to meet at the court-house of their counties * * * to hold a court martial; which said court shall * * * enquire of the age and abilities of all persons listed, and to exempt such as they shall judge incapable of service[.]"{EN-1536}
>
> Here, *no upper age limit at all was specified*—the ultimate purpose of such a limit being perhaps better served by the requirement for Militia officers' individualized inquiries into the actual "abilities of all persons listed", whatever their ages happened to be. Moreover, the lower limit of twenty-one was not arbitrary, but evidenced less a concern with the abilities of the men below that age—for in that regard little difference could have existed between most men of (say) twenty as opposed to twenty-one years of age—and more a concern for safeguarding minors from hazardous duty.

• [1755, 1757, 1759, 1762, 1766, and 1771] "[T]he chief officer of the militia in every county[917] shall list all male persons, above the age of eighteen years, and under the age of sixty years, within this colony (imported servants excepted) [.]"{EN-1537}

• [1775] "[A]ll free male persons, hired servants, and apprentices, above the age of sixteen, and under fifty years, except such as are * * * excepted, shall be enlisted into the militia by the commander in chief of the county[.]"{EN-1538}

• [1777] "[A]ll free male persons, hired servants, and apprentices, between the ages of sixteen and fifty years [with various exceptions] * * * shall, by the commanding officer of the county in which they reside, be enrolled or formed into companies[.]"{EN-1539}

• [1780] "[T]hree thousand men shall be forthwith raised for the purpose of completing this state's quota of continental forces * * * . The several counties and corporations within this commonwealth [with certain exceptions] * * * shall for this purpose each of them furnish * * * after their militia shall have been laid off into divisions * * * one fifteenth man of such of their militia as exceed the age of eighteen years, including all the commission and non-commissioned officers under the age of fifty years[.]"{EN-1540}

• [1780] "[A]ny person enlisting a soldier between eighteen and fifty years of age, of able body, sound mind, at least five feet four inches high, and not being a deserter * * * , to serve during the war in the troops of this state in continental service, or a soldier in any of the aforesaid troops, shall be exempted from all future drafts and all musters of the militia, except in case of an insurrection or actual invasion of this state, and then shall be subject to serve within the state only."{EN-1541}

• [1782] "[T]he rector, professors, masters and tutors * * * in [Liberty Hall] academy, and in all other seminaries and public schools, and also all students thereof, under the age of twenty-one years, shall be * * * exempted from military duty."{EN-1542}

• [1784 and 1785] "[A]ll free male persons between the ages of eighteen and fifty years [with various exceptions] * * * shall be enrolled or formed into companies[.]"{EN-1543}

Inasmuch as none of Virginia's Militia statutes ever mandated the listing of "male persons" under sixteen or over sixty years old, those ages evidently set the outer bounds to what Virginia's legislators of the *pre-*constitutional era believed was reasonable, in terms of the average man's presumed abilities at various stages of life to perform the duties required of him. Otherwise, the different ranges adopted from

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[917] The Act of 1757 "except[ed] the county of Hampshire".

time to time for different purposes—no specific limits of age (1632, 1639, 1659, and 1662); *or* sixteen to sixty (1705), eighteen to sixty (1755, 1757, 1759, 1762, 1766, and 1771), and twenty-one to sixty, with sixteen to twenty allowed for volunteers as substitutes (1723); *or* sixteen to fifty (1775 and 1777) and eighteen to fifty (1780, 1784, and 1785); *or* simply over eighteen (1780) or over twenty-one (1738 and 1782)—reflected flexible legislative policies rather than fixed physiological boundaries. Contractions at either end of the range were never overly extensive, though, because they would have adversely affected the total pool of men eligible for Militia service. And to create narrow exemptions for specific purposes when and where necessary within a large pool of available men was safer than to discover in times of "alarm" that the pool was too small because too narrow ranges of age had been adopted for the initial stage of listing.

If below or above the statutory limits on ages, free males could not be *formally* listed. Presumably, the lower boundary of sixteen years was sufficiently firm as a matter of religious precepts and social *mores* that boys known to be below that age were never allowed to volunteer for Militia duty. The upper boundary of fifty or sixty years, however, could not have imposed an insuperable bar to volunteers above those ages. For certainly, throughout the *pre*-constitutional era, Militia officers in not insignificant numbers were more than fifty or even sixty years old. And nothing suggests that the statutory limits on listing men of such ages were ever applied absolutely to exclude such men from service in the ranks when they were physically able to perform their duties.

Interestingly, too, no limitation based on age ever excused the father or guardian of a minor male, or the master of a servant, from being required to pay the fines incurred as a result of the boy's or the servant's defaults in his Militia duties.[918] So even some superannuated men who could perform no Militia service in their own persons remained vicariously subject to some Militia duties.

Today, revitalized "Militia of the several States" should surely prohibit the listing of anyone below some *fixed* minimum age—most likely sixteen years—which disallowance could be relaxed only in the event of an actual invasion, massive natural disaster, or other calamity. At the other extreme, a merely *suggested* maximum age—most likely sixty years—should be set, with any individual above that age allowed to volunteer for service, subject to a Militia board of inquiry's assessment of his actual suitability for duty.[919]

D. Disability. In the final analysis, the real value of lower and upper limits on the ages of individuals to be listed in the Militia was that those boundaries provided rough estimates as to the men's physical abilities to perform the duties

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[918] *See ante*, at 428-432.

[919] *See post*, at 948-950.

required of them. Virginia's statutes went further, of course, and specified that only *actually able-bodied* "male persons" were wanted in the service:

> • [1632] "ALL men that are fittinge to beare armes, shall bringe their peices to the church[.]"{EN-1544}
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> • [1644] "[I]n places of danger it shall not be lawfull for any to seat or inhabitt without ten sufficient men at the least, and arms and ammunition accordingly[.]"{EN-1545}
>
> • [1659 and 1662] "[E]very man able to beare armes have in his house a fixt gunn two pounds of powder and eight pound of shott at least[.]"{EN-1546}
>
> • [1691] The Governor and his Council "Ordered that the Comand[rs] in Cheife doe forme into Troopes of Horse & Companies of Foot all the persons fitt to beare Armes in the Severall Counties", but that "the Comand[rs] in Cheife take Care that all the Soldiers und[r] their Comands be well furnished with Armes and Amunition according to Law, but where any of the persons Listed for Soldiers appeare to them not to be fitt, that they leave them out."{EN-1547}
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> • [1705] "[T]he * * * chief officer of the militia of every county * * * [shall] list all male persons whatsoever, from sixteen to sixty years of age within his respective county, to serve in horse or foot, as in his discretion he shall see cause and think reasonable, having regard to the ability of each person, he appoints to serve in the horse[.]
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> * * * * *
>
> "*And* * * * the * * * chief officer of the militia of every county * * * [shall] make * * * a new list of all the male persons * * * capable * * * to serve in the militia, and to order and dispose them into troops or companys, according to * * * the respective circumstances of the ability of the persons listed[.]"{EN-1548}
>
> • [1723] "[T]he * * * chief officer of the militia of every county * * * [shall] list all free male persons whatsoever, from twenty-one to sixty years of age, * * * to serve in horse or foot; having regard to the ability of each person[.]
>
> * * * * *
>
> " * * * [N]othing * * * shall hinder or debar any captain from admitting any able-bodied white person, who shall be above the age of sixteen years, to serve in his troop or company, in the place of any person required * * * to be listed."{EN-1549}
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> • [1738] "[T]he * * * chief officer of the militia, in every county, shall list all free male persons, above the age of one and twenty years, within this colony[.]
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> * * * * *
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> " * * * [T]he field officers, and captains, of every county, * * * [shall] meet at the court-house of their counties * * * to hold a court

> martial; which said court shall * * * enquire of the age and abilities of all persons listed, and to exempt such as they shall judge incapable of service[.]"{EN-1550}
>
> • [1755, 1757, 1759, 1762, 1766, and 1771] "[T]he chief officer of the militia in every county[920] shall list all male persons, above the age of eighteen years, and under the age of sixty years * * * (imported servants excepted)[.]
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> * * * * *
>
> " * * * [T]he field officers and captains * * * [shall] meet at the court-house of their counties, * * * the day next following the general muster in September, every year, * * * to hold a court martial, * * * to enquire of the age and abilities of all persons listed, and to exempt such as they shall adjudge incapable of service[.]"{EN-1551}
>
> • [1775] "[T]he field-officers and captains of every county * * * [shall] meet at the courthouse of their respective counties the day next following the general muster in * * * April and October in every year * * * to hold a court-martial * * * to inquire of the age and abilities of all persons enlisted, and exempt such as they shall adjudge incapable of service[.]"{EN-1552}
>
> • [1777] The chief Militia officers "shall hold a court martial * * * on the day following their general muster"; and the "court * * * shall have power to exempt all persons enrolled whom, from age or inability, they may adjudge incapable of service[.]"{EN-1553}

Although Virginia's Militia statutes expressed the standard for physical eligibility in the very general terms of men who were "fittinge to beare armes", "sufficient", "able to beare armes", "fitt to beare Arms", "capable * * * to serve", or just "able-bodied", they were not prone to any significant degree of arbitrary or capricious enforcement. For only after individuals had been enlisted would Militia officers have "exempt[ed] such as they * * * adjudge[d] incapable of service"—the officers' decisions to have been made presumably on the basis of their close personal observations of the individuals' abilities, coupled with the officers' own knowledge of what would likely have been required of their Militiamen in the field. No competent Militia Captain would have been expected to have intentionally undermined the strength of his own Company—thereby perhaps elevating the risk to his own life and limbs in the Company's next deployment in active service—by stubbornly or stupidly seeking to exclude capable, or especially to include incapable, men.

Moreover, no exemption of the grounds of disability was necessarily permanent. For example,

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920 The Act of 1757 "except[ed] the county of Hampshire".

> [1787] "[W]here the courts martial shall exempt any of the militia on account of bodily infirmity from duty, they may again direct such persons to be enrolled when able to do duty."{EN-1554}

Finally, no personal physical disability ever excused the father or guardian of a minor male, or the master of a servant, from being required to pay the fines incurred by the boy's or the servant's defaults in his Militia duties.[921] So, even some men completely exempted from personal service perforce of their own disabilities still retained a modicum of duty in the Militia through financial liabilities.

E. Public offices and private occupations. Virginia considered the performance of some public offices and private occupations so important to the community that she exempted from certain Militia duties the men performing those services. That *exemptions* from Militia service were required at all for these individuals proves that, otherwise, they would have been considered members of, and required to serve in, the Militia, to the fullest extent mandated by law, perforce simply of their being able-bodied "free male persons". But, in these cases, exemptions made eminently good sense. For, although "a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state",[922] it is neither the full embodiment nor the purpose of "a free state". Neither is it capable, by itself alone, of maintaining "a free state" in operation in the normal course of human events. Civil government and essential private enterprises are necessary, too. The Militia would actually prove detrimental to the "safe defence of a free state" if its demands for manpower seriously undermined the efficacy of government or the provision of vital private services. So limitations on the Militia's ability to impress men out of civil pursuits must be established.

1. Public offices. In *pre*-constitutional Virginia, exemptions from Militia duties on the basis of public office were either complete or conditional.

a. From time to time, men with complete exemptions were simply not "listed" at all in the Militia:

> • [1691] "Council Order the Militia Officers not to list * * * persons * * * in Commission of Peace[,] * * * Readers[,] Clerks[.]"{EN-1555}
>
> • [1755, 1757, 1759, 1762, 1766, and 1771] "[N]othing * * * shall * * * compel any persons hereafter mentioned, to muster, that is to say, such as are members of the council, speaker of the house of Burgesses, receiver general, auditor, secretary, attorney general, clerk of the council, clerk of the secretary's office, * * * the mayor, recorder, and Aldermen of

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[921] *See ante*, at 428-432.

[922] Virginia Declaration of Rights (1776) art. 13.

> the city of Williamsburg, and borough of Norfolk, the keeper of the public goal * * * who are all hereby exempted, from being inlisted, or any way concerned in the militia, during the time they shall continue in such station or capacity."{EN-1556}
>
> • [1775] "[T]he keeper of the publick jail * * * shall be exempted from * * * enlistment [in the Militia]."{EN-1557}
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> • [1777] "FOR forming the citizens of this commonwealth into a militia, and disciplining the same for defence thereof, *Be it enacted* * * * That all free male persons, hired servants, and apprentices, between the ages of sixteen and fifty years (except the governour and members of the council of state, members of the American congress, judges of the superiour courts, speakers of the two houses, treasurer, attorney general, commissioners of the navy, auditors, clerks of the council of state, of the treasury, and of the navy board, * * * postmasters, keepers of the publick jail and publick hospital, * * * and military officers or soldiers, whether of the continent or this commonwealth, all of whom are exempted from the obligations of this act) shall * * * be enrolled or formed into companies[.]"{EN-1558}
>
> • [1784 and 1785] "[A]ll free male persons between the ages of eighteen and fifty years, except the members of the council of state, members of the American congress, judges of the superior courts, speakers of the two houses of assembly, treasurer, attorney general, auditors and their clerks, solicitor general and his clerks, clerks of the council of state and treasury, register of the land-office, his deputy and clerks, custom-house officers, all inspectors of tobacco, * * * post-masters, keepers of the public gaol and public hospital, * * * all of whom are exempted * * * , shall be enrolled or formed into companies[.]"{EN-1559}

Nonetheless, what appeared to be an absolute exemption in law was not always so in fact, because many of the individuals who were excused from being "listed" or otherwise participating in the Militia on account of their holding public offices were often officers in the Militia, too. For example, in 1755 through 1771 the Militia Acts required certain public officials, otherwise "exempted from mustering", to "provide arms for the use of the county, city, or borough, wherein they * * * reside": "each councillor *not being an officer of the militia*"; "[t]he speaker of the house of Burgesses, *not being an officer of the militia*"; "[t]he receiver general, auditor, and secretary, *not being* * * * *officer*[s] *of the militia*"; "[t]he attorney general, *not being an officer of the militia*"; "[t]he clerk of the council, and clerk of the secretary's office, *not being officers of the militia*"; and "[t]he mayor, recorder, and aldermen of the city of Williamsburg, and borough of Norfolk, * * * *not being officers of the militia*".{EN-1560} And in 1762 through 1771 the Militia Acts exempted "from appearing or mustering" all Justices of the Peace, "*except such as* * * * *bear any commission as officers of the militia*".{EN-1561} Obviously, many men who held these

positions also must have held or been expected to hold commissions in the Militia, or such statutory provisions would have been unnecessary.

b. Sometimes, as in 1692, exemptions were granted only from the requirement to appear at musters:

> It being represented to this Board [that is, the Governor and his Executive Council], that in some of the Counties in this Colony Counstables are Compelled to Musters, being listed Soldiers, It is hereby declared that it is reasonable Counstables and headboroughs should be Exempted, and it is therefore Ordered that for the future they be Exempted from Musters, dureing the time they remain in the said Offices.{EN-1562}

c. Sometimes, exemptions from Militia duty on the basis of an individual's public office were conditional, with fulfillment of the condition being the measure of the man's Militia duty:

> • [1705] "[N]othing * * * shall * * * give any power or authority to any * * * chief officer * * * to list any person that shall be, or shall have been of her majesty's councill in this colony, or any person that shall be, or shall have been speaker of the house of burgesses, or any person that shall be, or shall have been * * * attorney general, or any person that shall be, or shall have been a justice of the peace within this colony, or any person that shall have born any military commission within this colony as high as * * * captain, * * * or the clerk of the councill for the time being, or the clerk of the general court for the time being, or any county court clerk during his being such, or any parish clerk * * * during his being such, * * * or any constable during his being such, * * * but that all and every such person * * * be exempted from serving either in horse or foot. * * *
>
> " * * * [F]or as much as severall of the persons exempted * * * , though they be of sufficient ability to find and keep a serviceable horse and horse arms, and such men whose personal service may not only be usefull, but necessary upon an insurrection or invasion * * * will perhaps account themselves free from provideing and keep the same at the places of their abode, which is not intended:
>
> "*Be it therefore enacted* * * * That the persons of a councellor, of a speaker of the house of burgesses, of a justice of the peace, of an attorney-general, and of a captain or an higher officer in the militia, are exempted from being listed and serving * * * , merely for the dignity of the office * * * held, and that notwithstanding * * * all and every such person or persons, and also the clerk of the councill, the clerk of the general court, and every county court clerk shall provide and keep * * * at their respective places of abode a troopers horse, furniture, arms and ammunition * * * , and to produce or cause the same to be produced in

the county where they respectively reside yearly, and every year at the generall muster * * * , upon pain of forfeiting for every neglect * * * twenty shillings current money of Virginia.

"And in case of any rebellion or invasion shall also be obliged to appear * * * and serve in such stations as are suitable for gentlemen * * * , under the same penaltys as any other person or persons, who * * * are injoyned to be listed in the militia[.]"{EN-1563}

The care with which these exemptions were fashioned appears in the distinctions made in this statute and the statutes of 1723 and 1738 (quoted immediately below) between "any person that shall be, or shall have been" in some office, on the one hand, and an individual in some office "for the time being" or "during his being [in] such [office]", on the other hand.

• [1723] "[N]othing * * * shall * * * compel any person or persons that shall be, or shall have been, of his Majesty's council * * * , speaker of the house of burgesses, secretary of this colony, judge of the court of vice-admiralty, his Majesty's attorney-general, a justice of the peace, or any person that shall have born any military commission * * * as high as * * * captain, or the clerk of the council, for the time being, or the clerk of the general court, for the time being, or any county court clerk, during his being such, personally to appear at any musters: But that all, and every the persons aforesaid * * * are * * * required, to find and provide one able-bodied white man, a good horse, and such trooper's accoutrements * * * , who shall constantly appear and exercise at all musters."{EN-1564}

• [1738] "[N]othing * * * shall * * * compel any persons herein after-mentioned, to a personal attendance at musters: that is to say, Such as are, or shall have been, members of his majesty's council, speaker of the house of burgesses, secretary, receiver-general, auditor, judge of the court of vice-admiralty, attorney-general, clerk of the council, clerk of the house of burgesses, clerk of the secretary's office, a justice of the peace, clerk of any county court, or any person that shall have borne any military commission as high as * * * captain * * * : Yet all the persons aforesaid, shall * * * send one able-bodied man, not being a convict, or man and horse, armed and accoutred, * * * constantly to appear, and exercise at musters.

* * * * *

" * * * [E]very person exempted from personal appearance only, failing to send an able bodied man, or man and horse, * * * in his room, to be trained and exercised, shall pay the same fine as is * * * inflicted for not appearing at musters."{EN-1565}

• [1755, 1757, 1759, 1762, 1766, and 1771] "[N]othing * * * shall * * * compel any persons hereafter mentioned, to muster, that is to say, such as are members of the council, speaker of the house of Burgesses,

receiver general, auditor, secretary, attorney general, clerk of the council, clerk of the secretary's office, * * * the mayor, recorder, and Aldermen of the city of Williamsburg, and borough of Norfolk, the keeper of the public goal, * * * who are all hereby exempted, from being inlisted, or any way concerned in the militia, during the time they shall continue in such station or capacity.

* * * * *

" * * * *And* * * * the several persons * * * exempted from mustering, (except * * * the keeper of the public goal * * *) * * * shall provide arms for the use of the county, city or borough, wherein they * * * reside in the following manner; that is to say, each councillor not being an officer of the militia, four complete sets of arms * * * for a foot soldier: The speaker of the house of Burgesses not being an officer of the militia, four compleat sets of arms * * * : The receiver general, auditor, and secretary, not being a councillor or officer of the militia, each four compleat setts * * * : The attorney general, not being an officer of the militia, two compleat sets * * * : The clerk of the council, and clerk of the secretary's office, not being officers of the militia, each two compleat sets * * * : The mayor, recorder, and aldermen of the city of Williamsburg, and borough of Norfolk, (* * * not being officers of the militia) each two compleat sets[.]"{EN-1566}

In contradistinction to the statutes of 1705 through 1738, the statutes of 1755 through 1771 exempted only men who actually held certain public offices at the time, not those who once had been public officials. Moreover, although the former men were not required personally to appear at regular musters, the statutes presumed that some, perhaps even all, of them were "officers of the militia"—and therefore doubtlessly would have appeared unless their other public duties precluded them from doing so.

•[1762, 1766, and 1771] "[T]he several persons herein aftermentioned shall be * * * free and exempt from appearing or mustering either at the private or general musters of their respective companies * * * : All his majesty's justices of the peace within this colony, who have qualified themselves for their offices by taking the oaths by law appointed * * * and who are really and *bona fide* acting justices of their respective counties (except such as * * * bear any commission as officers of the militia in their respective counties) * * * shall not be subject or liable to any fine, forfeiture or penalty, for absenting themselves from the same.

" * * * *Provided always,* That the persons so exempted from mustering shall provide complete sets of arms * * * for soldiers, for the use of the county, city or borough, wherein they shall respectively reside[.]

* * * * *

" * * * [E]very person so exempted shall always keep in his house or place of abode such arms, accoutrements, and ammunition, as are * * * required to be kept by the militia of this colony * * * : And such

> exempts shall also, in case of any invasion or insurrection, appear with their arms and ammunition * * * and shall then be incorporated with * * * the other militia[.]"{EN-1567}
>
> Again, the care with which this exemption was drafted is noteworthy: "who have qualified themselves for their offices by taking the oaths by law appointed * * * and who are really and *bona fide* acting justices of their respective counties". Revealing, too, is that these exempted individuals were, "in case of any invasion or insurrection, to appear with their arms and ammunition * * * and shall then be incorporated with * * * *the other* militia"—plainly indicating that the statutes considered them to be *within* the Militia at all times, notwithstanding their partial exemptions.
>
> • [1775] "[T]he members of his majesty's council, and the committee of safety, the president of the convention, treasurer, attorney-general, auditor, clerk of the council, clerk of the secretary's office, clerk of the general convention, and clerk of the committee of safety (each of which exempts furnishing a stand of arms for a soldier) * * * shall be exempted from * * * enlistment [in the Militia]."{EN-1568}

So, in each of these cases, an exemption did not amount to a complete immunity. The persons exempted on the basis of their public offices from the duty personally to appear at regular Militia musters were still subject to other Militia duties: to maintain arms "at their respective places of abode" and appear "in case of any rebellion or invasion" (1705); to provide a substitute (1723 and 1738); to supply arms for the Militia (1755, 1757, 1759, 1762, 1766, 1771, and 1775); or to supply arms for the Militia, maintain personal arms "in [their] house[s] or place[s] of abode", and appear "in case of any invasion or insurrection" (1762, 1766, and 1771). Had they failed to fulfill any of these conditions, they would have forfeited their exemptions.

d. Exemptions based on public offices also could benefit individuals who performed certain special functions within the Militia. For example, Militiamen who served in "the slave patrols"[923] were sometimes granted exemptions from appearing at regular musters:

> [1738 and 1754] "[S]uch patrollers shall be exempted from attendance at private musters * * * for those years in which they shall be emploied in that service."{EN-1569}

Even more often, the Militiamen who served as their Companies' clerks (and as a consequence of that office always attended musters) received special exemptions peculiar to them:

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[923] *See ante*, at 339-343 and 392-395, *and post*, at 718-723.

• [1705] "[E]very captain of a troop of horse or ffoot company within this colony be permitted and allowed to take one of the soldiers under his command to be clerk to his troop or company, and that such clerk in consideration of his service in that respect be excused from carrying or appearing in arms at any muster, generall or particular, except in case of a rebellion or invasion[.]"{EN-1570}

• [1723] "[E]very captain of a troop or company * * * be permitted and allowed to take one of the soldiers under his command, to be clerk to his troop or company: And that such clerk * * * be excused from carrying arms at any muster, except in case of a rebellion, or an invasion[.]"{EN-1571}

• [1738] "[E]very captain shall have power to appoint a clerk, to his troop or company, who shall keep the muster-rolls, and attend all musters with the same; and such clerk shall be exempted from appearing at arms, in all such musters."{EN-1572}

• [1755, 1757, 1759, 1762, 1766, and 1771] "Every captain shall have power to appoint a clerk to his troop or company, who shall keep the muster-rolls, and attend all musters with the same, and such clerk shall be exempted from mustering but shall appear with arms[924] at all such musters."{EN-1573}

Inasmuch as "slave patrollers" and Company clerks were unquestionably *in* the Militia, and were granted their exemptions precisely because of their services *for* the Militia, these exemptions were plainly not a means to differentiate men who were not members of the Militia at all from men who were, but to excuse some men within the Militia from some Militia duties otherwise incumbent upon them, in consideration for other duties those men performed beyond the norm. That is, these exemptions presupposed continuous Militia membership and even a degree of service in excess of that expected of Militiamen in general.

2. Private occupations. Exemptions, both complete and conditional, were extended to men who followed certain important private occupations, too.

a. Complete exemptions were allowed for a number of occupations the reasons for the promotion of which are self evident:

• [1691] "Council Order the Militia Officers not to list * * * Physicians[,] Chirurgeons[,] * * * Ferrymen[.]"{EN-1574}

• [1705] "[N]othing * * * shall * * * give any power or authority to any * * * chief officer * * * to list any person that shall be * * * any minister, * * * or any * * * school-master during his being such, or any overseer that hath four or more slaves under his care, * * * or any miller

[924] The Act of 1757 substituted "arms, powder, and ball" for "arms" *simpliciter*.

who hath a mill in keeping, or any servant by importation, or any slave, but that all and every such person * * * be exempted from serving either in horse or foot."{EN-1575}

These exemptions were narrowly drafted so as solely to benefit those whose *actual* occupations *at the time* benefitted the community—thus, a "school-master *during his being such*", "any overseer *that hath four or more slaves under his care*", and a "miller *who hath a mill in keeping*". This specificity was, moreover, hardly accidental; for carefully confined exemptions of this type appeared again and again in subsequent statutes.

• [1723] "[N]othing * * * shall * * * cause to be listed, any minister of the church of England, or the president, masters, professors, or students, of the college of William and Mary, during the times of their being such; or any * * * overseer * * * having four or more slaves under his care; or any miller, having a mill under his charge and keeping; or the founders, keepers, or any other persons emploied in or about any iron, copper, or lead work, or any other mine, during the time of their being so emploied[.]"{EN-1576}

• [1738] "[N]othing * * * shall * * * cause to be listed, any of the ministers of the church of England, the president, masters, or professors, and students, of the college of William and Mary, during the time of their being such, any overseers residing on the plantation where the slaves under their care are worked, all millers, having the charge and keeping of any mill, nor the founders, keepers, or other persons emploied in or about any iron, copper, or lead work, or any other mine, during the time of their being so emploied; who are hereby exempted from being any ways concerned in the militia."{EN-1577}

• [1738] "[N]o person, who shall be emploied as a sailor or seaman, on board any ship or vessel, within this colony, shall, during the time he is in actual pay, on board such ship or vessel, be compelled to serve in the militia in any county, city, or borough, where such person is an inhabitant."{EN-1578}

• [1755, 1757, 1759, 1762, 1766, and 1771] "[N]othing * * * shall * * * compel any persons hereafter mentioned, to muster, that is to say, such as are * * * ministers of the church of England, the president, masters or professors, and students of William and Mary college, * * * any person being *bona fide*, an overseer over four servants or slaves, and actually residing on the plantation where they work, and receiving a share of the crop or wages, for his care and pains, in looking after such servants and slaves: Any miller having the charge and keeping of any mill, and founders, keepers, or other persons employed in or about any copper, iron or lead mine, who are all hereby exempted, from being inlisted, or any way concerned in the militia, during the time they shall continue in such station or capacity.

* * * * *

" * * * [T]he several persons * * * exempted from mustering, (except ministers of the church of England, the president, masters or professors, and students of William and Mary college, * * * overseers and millers, and all workers in any mine whatsoever) shall provide arms for the use of the county, city or borough, wherein they * * * reside[.]"{EN-1579}

• [1775] "[A]ll clergymen and dissenting ministers, the president, professors, students, and scholars, of William and Mary college, * * * all overseers of four tithables residing on a plantation, and all millers, and persons concerned in iron works, shall be exempted from * * * enlistment [in the Militia]."{EN-1580}

But, that same year, this allowance was qualified by the restriction that "no dissenting minister, who is not duly licensed by the general court, or the society to which he belongs, shall be exempted from bearing arms in the militia of this colony".{EN-1581}

• [1777] "FOR forming the citizens of this commonwealth into a militia, and disciplining the same for defence thereof, *Be it enacted* * * * , That all free male persons, hired servants, and apprentices, between the ages of sixteen and fifty years (except * * * all ministers of the gospel licensed to preach according to the rules of their sect, who shall have previously taken * * * an oath of fidelity to the commonwealth, * * * millers, except in the counties of Accomack and Northhampton, persons concerned in iron or lead works, or persons solely employed in manufacturing fire arms, * * * all of whom are exempted from the obligations of this act) shall * * * be enrolled or formed into companies[.]"{EN-1582}

• [1781] "[E]very artificer actually and necessarily employed at any iron works in this state, shall be exempted from all military duty, during the time they are so employed; and * * * waggons or other carriages with their teams and drivers, as are also actually and necessarily employed at such works, shall be exempted from all impresses for publick service during such employment[.]"{EN-1583}

That this particular statute was enacted and then twice continued in the same year not only demonstrates the practical importance the General Assembly attached to this exemption but also emphasizes that it was a special privilege, not in any sense an "inherent right".

• [1783 and 1786] "[F]or * * * encouragement of pilots to do their duty, *Be it enacted*, That every branch pilot * * * is hereby exempted from, militia duty, during the time he shall act as a pilot."{EN-1584}

• [1784 and 1785] "[A]ll free male persons between the ages of eighteen and fifty years, except * * * all professors, tutors, and students at the university of William and Mary,[925] and other public seminaries of

[925] The Act of 1785 deleted "students".

> learning, all ministers of the gospel, licensed to preach according to the rules of their sect, who shall have previously taken * * * an oath of fidelity to the commonwealth, * * * millers, persons concerned at iron or lead works, or persons solely employed in repairing or manufacturing fire arms, all of whom are exempted from the obligations of this act, shall be enrolled or formed into companies[.]"{EN-1585}

Obviously, the social utility of exemptions from Militia duty for individuals in these occupations—and the absence of a perceived need for exemptions to the benefit of individuals in other occupations—depended upon the General Assembly's assessment of economic and social conditions at the time. In the nature of things, to gauge the accuracy of these assessments after the fact is difficult. But not impossible—for the importance of Virginia's lead mines, as a prime example, was proven by the attempt of the British during the War of Independence to shut them down.[926]

Unlike exemptions relating to public office, the validity of which in any particular case was the plainest matter of public record, exemptions based upon private occupations had to be strictly policed in order to ferret out and eliminate unqualified or even fraudulent claimants. Thus the specificity in the statutes: "persons emploied in or about any iron, copper, or lead work, or any other mine, *during the time of their being so employed*" (1738); "during the time [a sailor] is *in actual pay, on board* [*a*] *ship or vessel*" (1738); "no dissenting minister, *who is not duly licensed by the general court, or the society to which he belongs*" (1775); "every artificer *actually and necessarily employed* at any iron works" (1781); "every branch pilot * * * *during the time he shall act as a pilot*" (1783 and 1786); and "persons *solely employed in manufacturing fire arms*" (1777) or "*in repairing or manufacturing firearms*" (1784 and 1785). Apparently, this problem was particularly acute in the case of purported "overseers" of slaves. For, not only did several of the Militia Acts address the subject in general terms—"having four or more slaves under his care" (1723); "residing on the plantation where the slaves under their care are worked" (1738); and "any person being *bona fide*, an overseer over four servants or slaves, and actually residing on the plantation where they work, and receiving a share of the crop or wages, for his care and pains, in looking after such servants and slaves" (1755, 1757, 1759, 1762, 1766, and 1771)—but also one Act specifically provided that,

> [1756] "whereas it is expected, that many persons will, to avoid being drafted as soldiers, * * * enter themselves as overseers, by which means they may be deemed not a part of the militia: *Be it enacted* * * * , That no person not having been bona fide an overseer * * * shall be exempted from being drafted in the militia[.]"{EN-1586}

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[926] *See* Merrill D. Peterson, *Thomas Jefferson and the New Nation, A Biography* (New York, New York: Oxford University Press, 1970), at 193-194.

b. In some cases, exemptions from Militia duty for individuals in certain private occupations were specifically defeasible upon the individual's failure to meet their conditions:

> • [1705] "[N]othing * * * shall * * * give any power or authority to any colonel * * * to list * * * any overseer that hath four or more slaves under his care * * * .
>
> "*Provided always,* That if any overseer that is by this act exempted from being listed shall appear at any muster, either of horse or foot, he shall appear in arms fit for exercise, and shall perform his duty as other private soldiers do, on pain of paying * * * [a] fine[.]"{EN-1587}
>
> • [1723] "[N]othing * * * shall impower or enable any colonel * * * to list * * * any person being employed as an overseer, and having four or more slaves under his care; or any miller, having a mill under his charge and keeping[.]
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> * * * * *
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> " * * * [I]f an exempted overseer, or miller * * * shall presume to appear at any muster whatsoever, the party so offending, shall for every such offence, forfeit and pay one hundred pounds of tobacco, and shall immediately give security to the * * * commanding officer, for paiment of the same[.]"{EN-1588}
>
> • [1738] "[N]othing * * * shall impower or enable any colonel * * * to list * * * any overseers residing on the plantation where the slaves under their care are worked, [and] all millers, having the charge and keeping of any mill[.]
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> * * * * *
>
> " * * * [I]f any exempted overseer, or miller, shall presume to appear at any muster, or in any muster field whatsoever, on the day on which such muster shall be appointed; the party so offending, shall, for every such offence, forfeit and pay ten shillings, or one hundred pounds of tobacco; to be assessed upon him by the next court-martial[.]"{EN-1589}
>
> • [1755] "[N]othing * * * shall * * * compel any persons hereafter mentioned, to muster, that is to say, such as are * * * any person being *bona fide*, an overseer over four servants or slaves, and actually residing on the plantation where they work, and receiving a share of the crop or wages, for his care and pains, in looking after such servants and slaves: Any miller having the charge and keeping of any mill[.]
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> * * * * *
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> " * * * [I]f any exempted overseer or miller, shall presume to appear at any muster, or in any muster-field whatsoever, on the day on which such muster shall be appointed, the party so offending, shall for every such offence forfeit and pay ten shillings, to be assessed upon him by the next court martial[.]"{EN-1590}

• [1757, 1759, 1762, 1766, and 1771] "[N]othing * * * shall * * * compel any person hereafter mentioned to muster, that is to say, such as are * * * any person being bona fide an overseer over four servants or slaves, being tithables, and actually residing on the plantation where they work, and receiving a share of the crop or wages for his care and pains in looking after such servants and slaves; [and] any miller having the charge and keeping of any mill[.]

* * * * *

" * * * [I]f any exempted overseer or miller shall presume to appear at any muster, or in any muster-field whatsoever on the day on which such muster shall be appointed, the party so offending shall, for every such offence, forfeit and pay twenty shillings, to be assessed upon him by the next court-martial[.]"{EN-1591}

• [1775] "[A]ll overseers of four tithables residing on a plantation, and all millers * * * shall be exempted from * * * enlistment [in the Militia].

* * * * *

" * * * [I]f any exempted miller or overseer shall presume to appear at any muster of the militia or minute-men, or in any muster-field, on the day on which such muster shall be appointed, the party so offending shall forfeit and pay twenty shillings, to be assessed upon him by the next court-martial[.]"{EN-1592}

Inasmuch as overseers and millers were granted exemptions *specifically because of their work*, they were expected to be *actually at* their work, not lounging in idleness at Militia musters—and if they did so turn up, their exemptions from regular duty *ipso facto* become void. Meaning that their exemptions never excluded them from the Militia in the first place, but merely excused them from certain duties only so long as Militia service in fact interfered with the performance of their occupations (which could never have been the case when they personally showed up on the muster-field). Self-evidently, if their exemptions had excluded them from the Militia entirely, these individuals could never have been subjected to Militia fines assessed by courts-martial, and particularly to physical punishment, when they violated the conditions set for their exemptions. Thus, because violations of their exemptions were tried under Militia law, those exemptions must have been the means to establish what their duties within the Militia were, not licenses that absolved them of all such duties.

c. In other cases, exemptions did not apply during "alarms":

• [1730 and 1748] "[A]s a further encouragement to adventurers in iron-works, *Be it enacted* * * * That all persons whatsoever, which * * * shall be emploied in and about the building and carrying on such iron-work, or the cutting of wood, making of coal, raising of oar, or any other thing necessary, for the carrying on, and compleating such design, during

> the time of their being so emploied, be exempted from serving in the militia, at any general or private muster, except in the case of an invasion, insurrection, or rebellion."{EN-1593}
>
> •[1783] "That the acting inspectors of tobacco at the several ware-houses be * * * exempt from militia duty, except in case of actual invasion or insurrection."{EN-1594}

That these individuals were exempt from Militia duty "except in the case of an invasion, insurrection, or rebellion" establishes that they were always members of the Militia in principle, their particular service in practice depending upon circumstances.

Revealing in this regard is the Militia statute of 1762 (continued in 1766 and 1771), which provided that

> the several persons herein after-mentioned shall be * * * free and exempt from appearing or mustering either at the private or general musters *of their respective companies* * * * : All * * * persons bred to and actually practising physick or surgery * * * .
>
> " * * * [T]he persons so exempted from mustering shall provide complete sets of arms * * * for soldiers, for the use of the county, city or borough, wherein they * * * reside[.]
>
> * * * * *
>
> " * * * [E]very person so exempted shall always keep in his house or place of abode such arms, accoutrements, and ammunition, as are * * * required to be kept by the militia of this colony * * * : And such exempts shall also, in case of any invasion or insurrection, appear with their arms and ammunition * * * and shall then be incorporated with * * * *the other* militia[.]"{EN-1595}

That these individuals were excused from appearing at musters "of *their* respective companies" indicates that the statutes deemed them to be members of certain "companies", and therefore of the Militia. And that, when they were required to appear, the statutes ordered them to "be incorporated with * * * *the other* militia" renders that construction certain.

3. Exemption a matter of legislative policy. Inasmuch as every exemption from Militia service in *pre-*constitutional Virginia was always a matter of legislative grace alone, not the product of any "inherent right" *ab initio* or the source of any "vested right" after having once been granted, any exemption could be withheld, amended, or withdrawn entirely whenever in the legislators' judgment the conditions that justified it never or no longer obtained. Thus, Virginia's Militia Acts

never explicitly exempted Sheriffs from regular service as Militiamen.[927] Although her Militia Act of 1705 exempted "any constable during his being such",{EN-1596} subsequent statutes did not mention Constables at all. (This was not because the General Assembly did not extend favors to Constables "for their encouragement to perform their duty", such as declaring them "exempted from the paiment of all public, county, and parish levies, for their own persons, during their continuance in their office".{EN-1597}) And although in 1738 the Militia Act specified that

> the * * * chief officer of the militia, in every county, shall list all free male persons, above the age of one and twenty years * * * .
>
> * * * *Provided always,* That nothing * * * shall * * * compel any persons herein after-mentioned, to a personal attendance at musters: that is to say, Such as are, or shall have been, members of his majesty's council, speaker of the house of burgesses, secretary, receiver-general, auditor, judge of the court of vice-admiralty, attorney-general, clerk of the council, clerk of the house of burgesses, clerk of the secretary's office, a justice of the peace, clerk of any county court, or any person that shall have borne any military commission as high as * * * captain, or any of the people commonly called Quakers: Yet all the persons aforesaid, shall * * * send one able-bodied man, not being a convict, or man and horse, armed and accoutred, * * * constantly to appear, and exercise at musters{EN-1598}

—nonetheless in 1740 a statute repealed this exemption: "That all and every person and persons, who, by the act made in [1738] * * * are directed to be listed, shall be obliged to give their personal attendance at all musters".{EN-1599} As the title of the Act of 1740—"*An Act, for the better security of the Country* ***in the present time of Danger***"[928]—implied, this was but a temporary measure; for the Act was to continue only "for three years * * * and no longer", and in any event to be "repealed and made void" "if the present war [with France] shall be ended before the expiration of" that time.{EN-1600} The nature of the repeal of the exemption—fixed in temporal extent and conditioned upon events—rather starkly emphasized the legislature's plenary power over the matter, with respect even to the highest public officials as well as conscientious objectors in the Colony.

Similarly, although *bona fide* overseers, millers, and men employed in iron works had generally been broadly exempted from Militia duties in early years, the General Assembly later restricted or repealed these allowances:

> • [1775] "[O]verseers, heretofore exempted, shall be obliged to furnish themselves with arms and ammunition, in the same manner as the militia men, and * * * to act as [slave] patrollers when thereto required

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[927] *See ante*, at 324-326

[928] ***Bold-faced emphasis*** supplied.

by the commanding-officer of the militia of the county, or corporation, wherein they reside[.]"{EN-1601}

This change was hardly surprising, though, as perhaps no one would have known the habits of slaves and the lay of the land around their places of habitation as well as overseers.

• [1776] "WHEREAS by an ordinance * * * all overseers of four tithables residing on a plantation, and all millers, are exempted from being enlisted into the militia of their respective counties, which said exemption of overseers and of millers residing in the counties of Accomack and Northhampton * * * hath been found incovenient and unnecessary: *Be it therefore ordained* * * * , That all overseers * * * and all millers residing in the counties of Accomack and Northhampton, shall be enlisted into the militia[.]"{EN-1602}

• [1780] "[S]o much of the militia law as exempts millers and persons employed in iron works (except iron works belonging to the publick) shall be * * * repealed."{EN-1603}

In the same way, an exemption for persons connected with William and Mary College was first established, then soon abolished:

• [1775] "[T]he president, professors, students, and scholars, of William and Mary college * * * shall be exempted from * * * enlistment [in the Militia]."{EN-1604}

• [1777] "FOR forming the citizens of Williamsburg, borough of Norfolk, and the professors and students of William and Mary college, into a militia, and better disciplining them: *Be it enacted* * * * , That all male persons between the ages of sixteen and fifty years, within the * * * said city or borough, except the persons exempted by an [earlier Militia A]ct * * * and such of the professors and students of William and Mary college as would otherwise be part of the militia of James City county, in which the college is situate, shall * * * be enrolled and formed into companies * * * .

" * * * And the militia of the said city and borough, with the professors and students of the said college, shall be mustered, trained, and employed, * * * and * * * shall be armed with the same weapons * * * as the militia of a county[.]"{EN-1605}

The exemption was reinstated in 1784, however, so "[t]hat all free male persons between the ages of eighteen and fifty years, except * * * all professors, tutors, and students at the university of William and Mary, and other public seminaries of learning * * * shall be enrolled [in the Militia]"{EN-1606}—only to be amended once again in 1785, to limit it solely to "all professors, and tutors at the University of William and Mary, and other public seminaries of learning".{EN-1607}

4. Exempted offices and occupations integral to Militia service. That performance of the tasks connected with these public offices and private

occupations could be substituted for certain types of Militia service illustrates the acceptance and application within every aspect of Virginia's *pre-*constitutional society of the fundamental principle that everyone owed a duty of *some* personal service to the community. In the first instance, this duty was to be fulfilled through actual Militia service, because "a well regulated militia * * * is the proper, natural, and safe defence of a free state".[929] But exemptions from some aspects of actual service were granted to those individuals who performed certain other, purely civilian functions. The criterion for any such exemption was that function's practical necessity in relation to the purposes of the Militia.

F. Time to comply with statutory requirements. With respect to the basic requirement that Militiamen should furnish themselves with firearms and ammunition at least minimally suitable for service from the free market if they were capable of doing so,[930] Virginia's Militia statutes typically provided exemptions in the form of periods of grace—from as short as six months to as long as two years—during which Militiamen were expected to expend their best efforts at compliance:

> • [1705] "That eighteen months time be given and allowed to each trouper and ffoot soldier not heretofore listed to furnish and provide himself with arms and ammunition[.]"{EN-1608}
>
> • [1723 and 1738] "That eighteen months time be given and allowed to each soldier, to furnish and provide himself with arms and ammunition * * * —So as every soldier, during the said eighteen months, do appear at all musters with such arms as he is already furnished with."{EN-1609}
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> • [1740] "[I]t shall * * * be lawful, to and for the several courts martial, * * * to excuse and acquit any soldier, who [s]hall not, within twelve months from the passing of this act, be furnished and provided with arms * * * and whom they, in their consciences, shall believe and adjudge to be unable to furnish and provide the same[.]"{EN-1610}
>
> • [1755, 1757, 1759, 1762, 1766, and 1771] "That twelve months time be given and allowed to each soldier, to furnish and provide himself with arms and ammunition * * * , so as such soldier do appear at all musters, during the said twelve months, with such arms as he hath, and is already furnished with[.]"{EN-1611}
>
> • [1775] "[T]he soldiers shall be allowed six months after enlisting to provide themselves with arms, and in the mean time shall bring with them such arms as they have[.]"{EN-1612}

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[929] Virginia Declaration of Rights (1776) art. 13.

[930] *See ante*, Chapters 17 through 20.

• [1777] "Every officer and soldier shall be allowed six months after his appointment or enrollment to provide such arms or accoutrements as he had not at the time."{EN-1613}

• [1784 and 1785] "That twelve months after the commencement of this act[931] shall be allowed for providing the arms and accoutrements herein directed; but in the mean time, the militia shall appear at musters with, and keep by them the best arms and accoutrements they can get."{EN-1614}

Today, exemptions of this kind could prove to be particularly useful in revitalized "Militia of the several States", in which, because of the States' large populations, only a relatively few adult able-bodied individuals would be needed for active service most of the time, with the remainder held in reserve. Thus, various levels of reserves could be defined by different lengths of time allowed for their compliance with such requirements as providing personal information preliminary to enlistment, obtaining firearms and other necessary equipment, and undergoing training.

G. Exceptional cases. Some exemptions dealt with exceptional cases. For example, those who personally served in, obtained a recruit for, or captured a deserter from the Continental Army during the War of Independence were granted limited exemptions from future military service:

• [1777] "WHEREAS it is of the greatest moment to the cause of America that the continental army be speedily completed, *Be it therefore enacted* * * * , That any two of the militia of any county, city, or borough, who shall * * * procure one able bodied soldier, other than an apprentice or servant, within the time of his conviction or indenture, and those employed in the publick manufacture of fire arms, to serve for * * * three years, or during the present war, in either of the first nine battalions raised within this commonwealth, * * * shall be exempted from all draughts whatever, and from attending private and general musters in the respective militia to which they belong, which exemption shall continue during the term for which such recruit shall be enlisted, * * * provided that the number of soldiers so enlisted shall not exceed the twentieth part of the militia of each county, city, or borough[.]"{EN-1615}

• [1777] "WHEREAS it is indispensably necessary that the regiments of infantry raised * * * , on continental establishment, be speedily recruited * * * : *Be it therefore enacted* * * * , That * * * the said regiments * * * be completed by recruits or draughts[.]

* * * * *

"*It is farther enacted*, That * * * a number of men shall be draughted from the single men of the militia of the several counties, and

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[931] The Act of 1785 allowed for "two years" of grace.

the city of Williamsburg, * * * above eighteen years of age, who have no child, in * * * [certain] proportions * * * , and each man so draughted shall * * * be compelled to serve one year, or find an able bodied man to serve in his room * * * . And as well such draughts, as those who enlist * * * , shall after such service be exempted from all other draughts for the regular service, for so long a time after their discharge as they shall have actually served."{EN-1616}

• [1780] "That three thousand men shall be forthwith raised for the purpose of completing this state's quota of continental forces * * * ; and if any division [of the Militia] shall * * * fail to deliver a recruit * * * the * * * commanding officer * * * shall * * * draft an able bodied man by fair and impartial lot out of such division, to serve in the continental army * * * ; who may nevertheless be permitted to procure an able bodied man in his room; and any person who * * * shall enlist an able bodied soldier to serve in his stead during the war, shall * * * be exempted from all future drafts, except in case of actual invasion[.]"{EN-1617}

• [1780] "[A]ny person enlisting a soldier between eighteen and fifty years of age, of able body, sound mind, at least five feet four inches high, and not being a deserter * * * , to serve during the war in the troops of this state in continental service, or a soldier in any of the aforesaid troops, shall be exempted from all future drafts and all musters of the militia, except in case of an insurrection or actual invasion of this state, and then shall be subject to serve within the state only."{EN-1618}

• [1781] "[A]s an inducement * * * to persons for apprehending deserters, * * * any militia-man who shall apprehend and deliver an able-bodied deserter to any officer of the continental army or of the troops of this state, * * * or if the deserter be a militia-man shall deliver him to the commanding officer of the battalion or regiment from whence he deserted * * * , in either case it shall be considered as having thereby performed a tour of militia duty."{EN-1619}

An unique situation arose with respect to Virginians who refused to prove their allegiance to the Commonwealth's new patriotic government:

[1777] "WHEREAS allegiance and protection are reciprocal, and those who will not bear the former are not entitled to the benefits of the latter, Therefore *Be it enacted* * * * , that all free born male inhabitants of this state, above the age of sixteen years, except imported servants during the time of their service, shall * * * take and subscribe * * * [a prescribed] oath or affirmation [of allegiance] * * * .

* * * * *

" * * * [T]he chief commanding officer of the militia * * * is * * * directed forthwith to cause * * * recusants [that is, persons who refused to take the oath or affirmation] to be disarmed.

> " * * * [T]he person so disarmed shall, nevertheless, be obliged to attend musters, but shall be exempted from the fines imposed for appearing * * * without arms, accoutrements, and ammunition."{EN-1620}

Those whose own conduct admitted their disloyalty remained titular members of the Militia, as evidenced by their continuing "oblig[ation] to attend musters". They were, however, more spectators than participants—being present but having been deprived of the instruments through which the Militia exercised political power. The statutory exemption merely recognized, as justice demanded, that the community could not both disallow them to possess arms and punish them for being disarmed.

Revealingly, this statute reduced disloyal White citizens to the same inferior status the Militia Acts reserved for people of color:

> [1738, 1755, 1757, 1759, 1762, 1766, and 1771] "[A]ll * * * free mulattos, negros, or Indians, as are * * * listed, * * * shall appear without arms; and may be emploied as drummers, trumpeters, or pioneers, or in such other servile labour, as they shall be directed to perform."{EN-1621}

Indeed, the status of disloyal citizens was lower than that of free people of color and even some slaves, because other than during service in the Militia individuals in the latter two classes *could* be armed under certain circumstances, whereas disloyal White citizens were completely disarmed.[932]

H. Provision of substitutes and selective drafts. As explained above, in *pre-*constitutional Virginia men required to perform some Militia or other military duty were often allowed to provide substitutes or furnish arms in lieu of their own personal service.[933] This license amounted to a complete exemption. Similarly, impressments were often made on a selective basis.[934] The statutory criteria for selection constituted implicit exemptions for those men outside of the set of potential draftees.

I. Payment of fines. Virginia subjected her Militiamen to fines for various derelictions of duty.[935] In practice, in any particular case a Militiaman's payment of a fine amounted to the purchase of an *ad hoc* exemption from personally performing the underlying duty, at the individual's election. Moreover, Virginia's statutes often limited the number of times a fine could be imposed for some specific default, thereby exempting a Militiaman's further refusals to serve in that manner. Thus—

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[932] *See post*, at 733-746.

[933] *See ante*, at 382-391 and 419-423.

[934] *See ante*, at 375-382.

[935] *See post*, at 666-697.

1. The statutory allowance for imposition of only a single fine for a Militiaman's multiple refusals to serve in certain special capacities in effect provided an exemption from that duty after the initial refusal:

> • [1705 and 1723] "[F]orasmuch as some difficulty hath been found in procuring some soldiers to be willing to serve as serjeants, corporals, drummers or trumpeters, all of them absolutely necessary in troops and companys: For prevention of the like in time to come,
>
> "*Be it enacted* * * * , That whatsoever soldier shall refuse to take upon him, act in and execute any of the said places and offices in the troop or company wherein he is listed, being known to be capable and thereunto appointed by his captain, shall for such his refusall be fined five hundred pounds of tobacco, which being once paid, he shall thereafter be exempted from being fined for any such refusall."{EN-1622}
>
> • [1738] "Every soldier refusing to serve as a serjeant, corporal, drummer, or trumpeter, being thereto appointed by his captain, shall pay fifty shillings, or five hundred pounds of tobacco, at his election; but such person shall be fined but once for such refusal."{EN-1623}

2. In effect, the statutory immunity from fines greater in number than the number of mandatory musters exempted Militiamen from attending whatever extra musters their officers might have scheduled:

> • [1705 and 1723] "That the * * * chief officer of the militia of every county once every year at least, cause a generall muster and exercise of all the horse and ffoot in his county * * * and oftener if there be occasion, and that every captain both of horse and foot once in every three months, muster, train, and exercise his troop or company, or oftener if occasion require.
>
> "*Provided*, That no soldier in horse or foot, be fined above five times in one year for neglect in appearing."{EN-1624}
>
> • [1738] "[E]very captain shall, once in three months, or oftner, if required, muster, train, and exercise his troop or company: And the * * * chief commanding officer, in every county, shall cause a general muster and exercise of all the troops and companies within his county * * * in the month of September, every year.
>
> * * * * *
>
> " * * * Every person listed to serve in the horse, shall pay seven shillings and six pence, or seventy five pounds of tobacco: And every person listed in the foot, shall pay five shillings, or fifty pounds of tobacco, at their election, for not appearing at muster, compleatly armed and accoutred; so that no person be fined above five times a year for such failure."{EN-1625}
>
> • [1740] "[E]very captain, once in every two months, or oftner, if required, shall muster, train, and exercise his troop or company: And

the * * * chief commanding officer, in every county, shall cause a general muster and exercise of all the troops and companies within his county to be made, in the months of March and September, in every year, or oftner, if there shall be occasion: And the officers and soldiers respectively offending against th[is] direction * * * shall, for every offence, incur * * * penalties * * * ; so that no person be fined above eight times in any year."{EN-1626}

• [1755] "[E]very captain shall once in three months, and oftner if thereto required, by the * * * chief commanding officer in the county, muster, train and exercise his troop or company, and the * * * chief commanding officer in the county, shall cause a general muster and exercise of all the troops and companies within his county, to be made in the months of March and September yearly[.]

* * * * *

" * * * [E]very soldier, either of the horse or foot, failing to appear at such muster, shall forfeit and pay ten shillings, for every such failure. *Provided*, That no person be fined above six times in the year for any particular default[.]"{EN-1627}

• [1757, 1759, 1762, 1766, and 1771]"[E]very captain shall, once in three months, and oftner if thereto required by the * * * chief commanding officer in the county, muster, train, and exercise his troop or company, and the * * * chief commanding officer in the county shall cause a general muster and exercise of all the troops and companies within his county, to be made in the months of March or April, and September or October, yearly[.]

* * * * *

" * * * [E]very soldier failing to appear at such muster shall forfeit and pay ten shillings, for every such failure. *Provided*, That no person be fined above six times in the year for any particular default."{EN-1628}

This put a check on officers whom their men considered over-zealous with respect to training. For although officers could call for an indeterminate number of extra musters at their discretion, the statutes required their men to attend only a fixed number of specified musters. So the availability of implicit exemptions from any additional musters provided a means for democratic control over the peculiar rigors with which particular officers might have attempted to discipline their men.

Approaching and during the crisis of the War of Independence, though, explicit limitations of this kind were dropped, because the statutes lodged no discretion in Militia officers to call for extra musters on their own recognizance, and therefore no exemption in favor of the men's nonappearance at such musters was necessary as a check on possible martinets:

• [1775] "[T]here shall be a private muster of the several companies in each county once a fortnight, except in the months of

December, January, and February, * * * and moreover, there shall be a general muster in every county, in the months of April and October in each year[.]

* * * * *

" * * * [A]nd every soldier not appearing, or appearing without proper arms, [will pay a fine of] five shillings; or for not bringing with him three charges of powder and ball, three shillings[.]"{EN-1629}

• [1777 and 1779] "There shall be a private muster of every company once in every month, except the months of January and February, * * * and a general muster in each county * * * in the months of April and October, in every year[.]

* * * * * *

" * * * For failing to appear at any general or private muster, properly armed or accoutred, every captain shall forfeit forty shillings, * * * every non-commissioned officer or soldier five shillings."{EN-1630}

• [1784] "There shall be a private muster of every company once in every three months * * * ; a muster of each regiment * * * in the month of March or April, in every year * * * ; and a general muster of the whole * * * in the month of October or November, in every year[.]

* * * * *

" * * * [A] non-commissioned officer or soldier, for failing to attend at any muster with the arms, ammunition and equipments, as directed * * * shall forfeit and pay ten shillings[.]"{EN-1631}

• [1785] "There shall be a private muster of every company once in two months, except December and January * * * ; a muster of each regiment * * * in the month of March or April, in every year * * * ; and a general muster of the whole * * * in the month of October or November, in every year[.]

* * * * *

" * * * [A] non-commissioner officer or soldier, for failing to attend at any muster with the arms, ammunition and equipments, as directed * * * shall forfeit and pay ten shillings[.]"{EN-1632}

J. Conscientious objection. *Pre-*constitutional Virginia granted members of certain religious sects, as long as they remained such, statutory exemptions from the duties personally to be armed and to appear at musters. Nonetheless, these individuals were required to be formally "inlisted" in the Militia, and directly or indirectly to provide substitutes if they refused to serve in the field themselves:

• [1738] "[N]othing * * * shall * * * compel any persons herein after-mentioned, to a personal attendance at musters: that is to say, Such as are * * * any of the people commonly called Quakers: Yet all the persons aforesaid, shall * * * send one able-bodied man, not being a convict, or man and horse, armed and accoutred, * * * constantly to appear, and exercise at musters."{EN-1633}

• [1755] "[E]very person * * * inlisted, (except the people commonly called Quakers * * *) and placed or ranked in the horse or foot, shall be armed and accoutred[.]"{EN-1634}

• [1766 and 1771] "[T]he several persons herein after mentioned shall be * * * free and exempt from appearing or mustering either at the private or general musters of their respective companies * * * , that is to say, * * * all the people called Quakers * * * ; and they shall not be subject or liable to any fine, forfeiture or penalty, for absenting themselves from * * * musters of their respective counties.

* * * * *

" * * * [T]he * * * chief commanding officer of the militia in every county shall list all male * * * Quakers, above the age of eighteen years, and under the age of sixty years, * * * under the command of such captain as he shall think fit; and if upon any invasion or insurrection the militia of the counties to which such Quakers belong, shall be drawn out into actual service, and any Quaker so inlisted shall refuse to serve or provide an able and sufficient substitute in his room, * * * every Quaker so refusing * * * shall forfeit and pay the sum of ten pounds * * * which sum shall be applied * * * towards providing a substitute in the room of the Quaker * * * .

" * * * *Provided always*, That the number of Quakers required * * * to serve or find substitutes * * * shall not exceed the proportion the whole number of Quakers bear to the whole number of the other militia, upon the muster rolls of the * * * county.

" * * * *Provided also* * * * , That no Quaker shall be exempted from appearing at musters * * * until he shall produce * * * a testimonial or certificate * * * that he is * * * *bona fide* one of the people called Quakers * * * ; and if at any time any person calling himself a Quaker shall be excommunicated or excluded from the said society, * * * the same [shall] * * * be certified to the * * * chief officer of the militia of the county, and thereupon the person so excluded shall be deprived of the exemption from appearing at musters[.]"{EN-1635}

• [1775] "[A]ll quakers, and the people called Menonists, shall be exempted from serving in the militia, agreeable to the several acts of the general assembly * * * made for their relief and indulgence in this respect."{EN-1636}

• [1777] "[Q]uakers and menonists who shall be * * * draughted shall be discharged from personal service, and * * * the field officers and justices who attend the draught shall * * * procure, upon the best terms they can, proper substitutes to serve in their stead, and to adjust and divide the charge thereof among all the * * * quakers and menonists in the county, in proportion to the number of tithables in the family of or belonging to each member[.]"{EN-1637}

• [1780] "[A]ny Quaker or Menonist who shall be * * * drafted, shall be discharged from personal service, and * * * the commanding officer * * * is * * * required to employ any two or more discreet persons, to procure on the best terms they can, a proper substitute or substitutes to serve in his or their room, and to adjust and divide the charge thereof among all the * * * Quakers or Menonists, in the division to which such draft belongs, in proportion to their assessable property[.]"{EN-1638}

• [1781] "[W]here any quaker or menonist shall be allotted to any division of the militia, who is to perform the succeeding tour of duty, he shall not be compelled personally to serve the same, but * * * the commanding officer of the militia of * * * [the] county * * * [may] cause to be levied on all the society of quakers and menonists in such county according to their assessable property * * * such sum * * * of money as he shall think sufficient to procure a substitute for each quaker or menonist whose tour of duty it is, and the money when collected shall be deposited in the hands of the commissioners of the money tax, who shall pay the same * * * to such substitute * * * as may be employed for such quaker or menonist, and the overplus (if any) shall be returned to the said quakers or menonists in equal proportion to their different advancements or credited in their next money tax[.]"{EN-1639}

• [1782] "[W]here any quaker or menonist shall be drafted * * * he shall not be compelled to serve, but shall pay * * * fourteen pounds[.]"{EN-1640}

• [1782] "[W]here any quaker or menonist shall be subjected to a tour of duty in consequence of the militia or invasion law, such quaker or menonist shall not be compelled to perform such duty, but the * * * commanding officer of the militia, shall * * * procure a substitute upon the best terms possible, * * * and the consideration agreed to pay him * * * shall in the first instance be against the estate of each quaker or menonist so draughted * * * , to be levied on their lands, goods, and chattels * * * ; and i[f] any of the said quakers or menonists so draughted, shall not have sufficient property on which a levy can be made, then * * * such substitute money, shall be levied on the property of all the quakers and menonists in the * * * county, that are subject to militia service, each to pay in proportion to his taxable property."{EN-1641}

• [1784] "[A]ll the people called quakers are hereby exempted from attending private or general musters in their respective counties.

" * * * *Provided always,* * * * That no quaker shall be exempted from appearing at musters * * * until he shall produce * * * a testimonial or certificate * * * that he is really and bona fide of the people called quakers, and is acknowledged and received by them as a member of their society. And if at any time any person calling himself a quaker, shall be excommunicated or excluded from the said society, * * * the person so

> excluded shall be deprived of the exemption from appearing at musters[.]"{EN-1642}

So, even these conscientious objectors were actual members of the Militia, simply being excused from certain types of service upon their compliance with various conditions.

Conscientious objection, moreover, was no "inherent right" or otherwise "vested right". For example,

> [1784 and 1785] "[T]his act shall not be construed to deprive the people called quakers of any privilege granted to them by an act of assembly [enacted in 1784], intituled, 'An act to exempt quakers from attending musters.'[936] *Provided also*, That the governor, with advice of council, shall have power to suspend the operation thereof in the counties on the western waters, so long as they may think proper."{EN-1643}

And if conscientious objection were recognized in "the Militia of the several States" today, it would not be a constitutional right, either.[937]

K. Commission or suspicion of some crime. In *pre-*constitutional Virginia, no general exemption, exclusion, or other disqualification existed with respect to individuals who had been convicted—let alone who had merely been charged with the commission or simply suspected—of some crime. In only one instance this study has uncovered did Virginia's Militia statutes ever stipulate that someone actually convicted of a crime could not serve in a particular capacity in the Militia:

> [1738] "[N]othing * * * shall * * * compel any persons herein after-mentioned, to a personal attendance at musters: that is to say, Such as are, or shall have been, members of his majesty's council, speaker of the house of burgesses, secretary, receiver-general, auditor, judge of the court of vice-admiralty, attorney-general, clerk of the council, clerk of the house of burgesses, clerk of the secretary's office, a justice of the peace, clerk of any county court, or any person that shall have borne any military commission as high as * * * captain, or any of the people commonly called Quakers: Yet all the persons aforesaid, shall * * * send one able-bodied man, *not being a convict*, or man and horse, armed and accoutred, * * * constantly to appear, and exercise at musters."{EN-1644}

And even this statute did not preclude "a convict" from serving *on his own behalf*, rather than as a substitute for someone else—for the statute mandated that "the * * * chief officer of the militia, in every county, shall list all free male persons, above

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[936] The Act of 1785 referred sweepingly to "any privilege granted the[Quakers] by any former law".

[937] *See post*, at 969-973.

the age of one and twenty years, within this colony",{EN-1645} in which category "a convict" who had completed his sentence and returned to society would have been included.

Moreover, in only a single instance this study has found did one of Virginia's statutes affirmatively disarm any White citizen while simultaneously requiring him to serve in the Militia:

> [1777] "WHEREAS allegiance and protection are reciprocal, and those who will not bear the former are not entitled to the benefits of the latter, Therefore *Be it enacted* * * * , that all free born male inhabitants of this state, above the age of sixteen years, except imported servants during the time of their service, shall * * * take and subscribe * * * [a prescribed] oath or affirmation [of allegiance] * * * .
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> * * * * *
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> "*And be it farther enacted* * * * , That * * * the court of every county * * * shall appoint some of their members to make a tour of the county, and tender the oath or affirmation * * * to every free born male person above the age of sixteen years, except as before excepted; and * * * in the certificate * * * returned * * * shall be mentioned the names of such as refuse. And * * * the * * * chief commanding officer of the militia * * * is * * * directed forthwith to cause such recusants to be disarmed.
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> " * * * ***[T]he person so disarmed shall, nevertheless, be obliged to attend musters, but shall be exempted from the fines imposed for appearing * * * without arms, accoutrements, and ammunition***."{EN-1646}

Distinguishably, the Militia statutes that allowed conscientious objections for Quakers and Menonites implicitly recognized that those people disarmed themselves voluntarily as a consequence of their religious scruples. And even the statutes that required "all * * * free mulattos, negros, or Indians, as are * * * listed [in the Militia], * * * [to] appear without arms * * * [to] be emploied as drummers, trumpeters, or pioneers, or in such other servile labour, as they shall be directed to perform",{EN-1647} did not prevent all of those individuals from possessing arms in other situations—and neither did any other statute.[938]

Revealingly, all of this was not because convicts who returned to society were free from all serious disabilities in their political and economic lives. To the contrary: In 1705, the General Assembly decreed that

> no person whatsoever, already convicted, or which hereafter shall be convicted in * * * England[,] in this or any other her majestys dominion, colonies, islands, territorys or plantations, or in any other kingdom,

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[938] *See post*, at 736-738.

> dominion or place, belonging to any foreign prince or state whatsoever, of treason, murther, fellony, blasphemy, perjury, forgery, or any other crime whatsoever, punishable by the laws of England, this country, or other place wherein he was convicted with the loss of life or member, * * * shall * * * bear any office, ecclesiasticall, civill or military, or be in any place of public trust or power, within * * * Virginia[.]{EN-1648}

And in 1748, the General Assembly ordained that

> no person that hath been, or hereafter shall be convicted of any felonious crime * * * shall be capable to obtain * * * [a] licence [to practice law as an attorney in various courts]: And where any person, convicted of any felonious crime, shall obtain a license, the judges of the general court, upon proof * * * shall * * * supersede his license.{EN-1649}

Yet disabilities of this kind did not extend to service in the Militia—including, most importantly, each individual's duty personally to possess firearms, ammunition, and accoutrements suitable for that service.[939] This, in contrast to the contemporary situation, in which convictions of an increasingly wide range of "crimes" or other infractions automatically results in the perpetrators' usually permanent losses of various rights to possess firearms.[940]

L. Exemptions as a means for organizing the Militia. Exemptions under Virginia's *pre-*constitutional laws were not exclusions *from*, but special conditions for defining by limitation certain types of service *within*, her Militia. If, absent their particular exemptions, the parties would normally have been listed in the Militia, they were considered still to be members of the Militia. For instance:

> [1762, 1766, and 1771] "That * * * the several persons herein after-mentioned shall be * * * free and exempt from appearing or mustering either at the private or general musters of their respective counties * * * : All his majesty's justices of the peace, * * * all persons bred to and actually practicing physick or surgery,[941] and all inspectors at the public warehouses appointed for the inspection of tobacco * * * .
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> * * * * *
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> " * * * [E]very person so exempted[942] shall always keep in his house or place of abode such arms, accoutrements, and ammunition, as are * * * required to be kept by the militia * * * : And such exempts shall also, in case of any invasion or insurrection, appear with their arms and

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[939] *See ante*, Chapters 17 through 19.

[940] *See post*, at 981-1014.

[941] Here, the Act of 1766 added the words "all the people called Quakers".

[942] Here, the Act of 1766 added the words "(not being a Quaker)".

> ammunition * * * and shall then be incorporated with * * * the other militia[.]"{EN-1650}

That men in these offices or occupations were, "in case of any invasion or insurrection", to be "incorporated with * * * *the other* militia" evidences the General Assembly's belief that they were always Militiamen, but merely subject to less-extensive duties than those "other militia". Of course, the situation of women in this structure was *sui generis*, because of their peculiar legal status. The general exemption for women was only implicit, in the Militia statutes' specific call for "male persons" only. Yet, if the adjective "male" had not been included in the statutes, women could have been impressed into the Militia along with men. For nothing else in the statutes precluded their application to both men and women indiscriminately.[943]

In strict legal parlance, some exemptions constituted *rights*: For example, individuals with disabilities enjoyed a right to exemption on the ground that their satisfactory service was simply impossible—which right was indefeasible as long as they suffered from their disabilities. And because the Militia statutes called for "male persons", women enjoyed a right not to be impressed for regular duty—but only a partially defeasible right, inasmuch as some women were required to pay the Militia fines imposed upon their minor sons or servants; or perhaps a totally defeasible right, inasmuch as all adult able-bodied women *could* have been drafted in an emergency had the General Assembly chosen to amend the Militia statutes or to enact the necessary new legislation. Some exemptions constituted *privileges*: For example, men exempted perforce of their public offices or private occupations were not compelled to appear at regular musters, but (other than overseers and millers) could have turned out had they so desired. And under the Militia statute of 1723, able-bodied free men from sixteen to twenty-one years of age were exempted from being listed, but could have offered themselves as substitutes for men over twenty-one years, at their own election. Some exemptions constituted *immunities*: For example, under every Militia act, men whose ages were less than some lower limit, or more than some upper limit, could not be listed at all. Some exemptions constituted *duties*: For example, at times overseers and millers not only were exempted from being listed, but also were affirmatively prohibited from attending musters. And some exemptions actually involved associated *liabilities*: For example, although free Negroes, Mulattoes, and Indians were often exempted from the requirement to keep and bear arms, they were usually compelled to serve the Militia in the lowly positions of musicians, pioneers, and servile workers. In any event, whether exempted on the grounds of gender, age, race, disability, public office or private occupation, or conscientious objection—and whether his or her

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[943] *See ante*, at 601-607.

exemption was absolute or conditional—***everyone*** *in the community who was arguably capable of serving in the Militia was "organized" in* ***some*** *way*. For Virginia always coupled an exemption with particular duties incumbent upon the parties exempted—such as the parties' supplying firearms to the Militia; or with conditions to or for the exemption—such as the parties' providing substitutes; or with limitations to the exemption—such as the parties' appearing fully armed in the field during insurrections or invasions. Only in the cases of physically disabled adults and children under sixteen years of age did the relevant exemptions apply absolutely—no doubt on the recognition that disabled adults simply could not, and children should not, serve at all. *Never* did *pre-*constitutional Virginia—whether by means of exemptions or otherwise—purport to create an "*un*organized militia" composed of vast numbers of individuals with no duties whatsoever, other than to do nothing most of the time, as is the all-too-typical statutory pattern for neglect of the Militia today.[944] So exemptions in Virginia's *pre-*constitutional Militia laws could never undergird a plausible argument, let alone supply a precedent, for such contemporary statutes.

Virginia's experience with exemptions did not rationalize an "unorganized militia" then and could not rationalize one now, because she limited exemptions to such as were reasonably necessary to achieve a very specific public purpose *while at the same time not unduly weakening the Militia*. In the recruitment of her regular troops, distinguishably, Virginia's statutes were far more selective than they were with respect to enlisting her Militia:

> • [1775] "[T]o prevent the enlistment of such men as are unfit for service, * * * the committee [of safety] of each county, city, and borough, shall appoint one certain place of rendezvous * * * wither the captain, and other officers, of each company * * * shall resort with their men * * * . And if it shall appear to such committee that the company is complete, of able and proper men, * * * the said committee shall grant to the captain a certificate[.]"{EN-1651}
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> • [1775] "[T]he soldiers to be raised shall be enlisted on the terms following, to wit: That they shall continue in the service so long as may be judged necessary by the general congress, or by the general convention or general assembly of this colony, but not be compelled to continue more than two years[.]
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> * * * * *
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> "*Provided always*, That no recruiting officer shall be allowed to enlist into the service * * * any man unless he be five feet four inches high, healthy, strong made, and well limbed, not deaf, or subject to fits."{EN-1652}

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[944] *See* Code of Virginia §§ 44-1, 44-4, 44-75.1(A), and 44-88.

> • [1780] "[A]ny person enlisting a soldier between eighteen and fifty years of age, of able body, sound mind, at least five feet four inches high, and not being a deserter * * * , to serve during the war in the troops of this state in continental service * * * , shall be exempted from all future drafts and musters of the militia, except in the case of an insurrection or actual invasion of this state, and then shall be subject to serve within the state only."{EN-1653}

It should occasion no surprise either that the standards for selection of these regular troops—"five feet four inches high, healthy, strong made, and well limbed, not deaf, or subject to fits"—were more exacting than those which Militiamen were required to meet; or that such strict standards were applied at the initial stage of recruitment—"to prevent the enlistment of such men as are unfit for service"—not as criteria for subsequent exemptions of men already listed. For Virginia's Militia recruited *everyone who could reasonably be recruited*: "the body of the people, trained to arms", as distinguished from relatively small "standing armies" of picked men. Virginia's Militia was far less choosy than her regular forces in terms of its standards for enlistment, because, in the final analysis, the Militia was primarily concerned, not with developing a purely military efficacy among an highly selective group, but instead with maximizing political, legal, and military power and authority among "the body of the people" as "the proper, natural, and safe defence of a free state".[945]

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[945] Virginia Declaration of Rights (1776) art. 13.

CHAPTER TWENTY-THREE

Virginia enforced her *pre*-constitutional Militia laws in numerous ways, particularly through the imposition of fines on defaulters.

Legal mandates are one thing, enforcement of them another. Being more than mere compilations of hortatory rhetoric, Virginia's *pre*-constitutional Militia statutes provided many means to enforce their requirements.

A. Actual compliance always the goal. One historian has contended that "[t]he lack of militia court martial records before the first half of the eighteenth century prevents any determination of whether the [Virginia] militia laws were really enforced. By the middle of the century, however, the laws were being enforced."[946] Of course, that Virginia's early Militia laws might have been only laxly enforced cannot detract from their being the official embodiments of the settled political, legal, and social policy of that era, from their character as *laws*, or from their unique status as the controlling sources of the *pre*-constitutional *legal* definition of "well regulated Militia".[947] But even the earliest history is not nearly as vague as the source just quoted suggests. To the contrary, from the earliest days Virginia's official records evidenced a settled intent and repeated efforts on the part of the Colony's government to ensure that her Militia laws were being made obligatory in actual fact, as well as in legal principle, and as thoroughly and effectively as possible.

The underlying justification for legal compulsion and penalties was the necessity to organize Virginia's residents in order to enable the community to defend itself and all of its component parts, down to families and even individuals, against violent attacks from whatever source. Rather than "each for himself", the rule was "all for one and one for all". As one statute commanded in 1632, "THE adoiyninge plantations, shall assist the frontiers or theire neighbours, uppon alarums, the default to be severelie censured, and false alarums punished".{EN-1654} Naturally, then, public officials' primary concern throughout the *pre*-constitutional period was to see to it that the men eligible for Militia service were in fact as adequately armed and accoutred as possible. Not just in 1702 did the Governor "ask[ ] y^{e} advice of y^{e} Councill what was most proper [to] be done for Making y^{e}

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[946] H. Gill, Jr., *The Gunsmith in Colonial Virginia, ante* note 731, at 12.

[947] On the last of these points, *see ante*, at 63-81.

Militia more Effectuall * * * being he had observed at all y^e^ Musters he had been at y^t^ not one fourth of y^e^ men were Armed and Accounted [accoutered] for Service".{EN-1655}

1. Assessment of the situation. Obviously, the first step in enforcement of the Militia laws had to be, and in fact was, to determine the extent of the citizenry's compliance with them. This process was well in hand long before the *mid-*1700s:

> • [1673 and 1676] "FOR the better supply of the country with armes and ammunition, *Be it enacted* * * * , that the captaines of ffoote and horse in each county doe take a strict and perticuler account of what armes and ammunition are wanting in their severall companies and troops, and represent the same into their respective colonells, at the next county courts * * * , but if there by not any colonell of horse within the county, then the captains of horse to represent their said wants imediately to the county court, into which courts at their next session following the colonells aforesaid are * * * enjoyned to retorne and represent the wants of the militia in their said county as they shall receive the same from their subordinate officers[.]"{EN-1656}
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> • [1684] "His Excellency [the Governor] having under consideration the present unsetled condition of the militia, and being desirous, It may be put into y^e^ best and most suitable way and meanes for * * * y^e^ Countries safety, * * * It's therefore ordered, that Letters be writt unto the militia officers of every respective County forthwith to render to his Excellency y^e^ condition of their militia, what number they consist of, both horse and foot, as likewise how furnished with armes, and the names of all the militia officers in each respective County[.]"{EN-1657}
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> • [1690] The Lieutenant Governor and Council "Ord^r^d that the Respective Comand^rs^ in Cheife, doe * * * return an account * * * of the Severall Captaines of Horse and Foot, and the Number of Souldi^rs^ under every of their Comands, and how furnished".{EN-1658}
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> • [1691] The Lieutenant Governor, through the county Sheriffs, ordered all the "Comanders in Chiefe of the respective Counties" to "return an acco^t^ of the Powder in yo^r^ County, and the Names of the persons in whose possession the same is, and take Care that none be disposed of, but according to * * * Ord^rs^"; and also required "the respective Cap^ts^ of Horse, Dragoones and foot * * * to return * * * an Exact List of the Names of the Souldiers under their Comand, how armed, and what Colours, Trumpetts and Drums belongs to each Troope and Company, * * * and whether there be any persons fitt to beare Armes within their respective precincts, not Listed, their Names, and in what quallity they are Capable to Serve, And * * * that they take all possible Care the Souldiers under their comands be furnished with Horses Armes and Amunition according to Law".{EN-1659}

• [1695] "His Ex^{y} [the Governor] Ordered the Severall Comanders in Cheife of this Colony to Inspect the State of the Militia and to se how Armed & to returne account thereof."{EN-1660}

• [1699] The Governor and his Council "[o]rdered, that all Commanders in Cheif of the Militia, which have not already made returne of the Muster Roll of the Militia under their Command do forthwith returne the same to the Councill Office at James Citty".{EN-1661}

• [1700] The Governor and his Council "[o]rdered that the Commander in Cheif of ye Militia in y^{e} severall Countyes do deliver y^{e} Muster Rolls of all y^{e} men under their Command unto y^{e} Clerkes of their respective County Courts".{EN-1662}

• [1701] The Governor and his Council "require[d] all & Every y^{e} Colls and Comand^{rs} in Cheife of Each and Every County * * * Imediately to Issue out orders to y^{e} sev^{ll} officers und^{r} their Command to return a true and perfect List of y^{e} sev^{11} troops of horse & Companies of foot under their respective Commands, & how & in what they are fitted & Equipt wth Armes an Amunition Setting the same down in Distinct Columns".{EN-1663}

• [1702] The Governor ordered "y^{e} * * * Collonells and Commanders in chief of every respective County * * * to examine and enquire * * * how their said troops and Companys are now armed".{EN-1664}

• [1703] "And to the end the State of the Militia * * * may be better known", the Governor ordered the commanders in chief of the Militia in each County "to provide * * * copys of the Muster Rolls of every Troop and Company under their respective commands according to the Specimen * * * sent [to them]", and "to cause dilligent enquiry to be made & an exact acco^{t} taken of all arms, Powder and Shott within their respective Countys, and of what quality the said arms are".{EN-1665}

• [1705] "That the * * * chief officer of the militia of every county be required * * * to make * * * a new list of all the male persons in his respective county capable * * * to serve in the militia, * * * and the respective circumstances of the ability of the persons listed, to the end each trooper or ffoot soldier may be thereby guided to provide and furnish himself with such arms and ammunition and within such time as this act * * * directs."{EN-1666}

• [1711] "[I]t is necessary the Country be put into an imediate posture of defence by training the Militia, and that the following Scheme proposed by the Governor for the more effectual prevention of the Enemy's attempts be put in execution Viz^{t}

"That a General Muster of the Militia of each County be forthwith appointed and an exact account taken how they are armed & provided with ammunition."{EN-1667}

2. Education of the populace. At the same time, the government took care to acquaint Virginia's residents with their specific duties under her Militia laws, and to premonish them that those laws would be enforced:

> • [1690] The Governor and his Council "Ord^{r}d that the Comand^{rs} in Cheife of the Militia * * * Doe Cause the Acts for Settlement of the Militia and for Providing of Armes to be twice a yre read at the head of every Troope & Company[.]"{EN-1668}
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> • [1691] "[Y]^{e} Cap^{ts} of y^{e} militia are hereby required to cause y^{e} Severall Laws about y^{e} Militia to be read twice every year at y^{e} head of their troop or Company[.]"{EN-1669}
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> • [1692] "Whereas it is of absolute Necessity for their Ma[jesties'] Service and Security of this Countrey that all the Inhabitants be well provided with Armes and Amunition, and Severall good Laws made to that End in this Colony, as also by the said Laws great Care taken that noe Souldiers Armes should be Imprest or taken away from him upon any pretence whatsoever, Notwithstanding all which severall persons have failed to provide themselves with Armes and Amunition as by the said Laws are enjoyned and required, as also of makeing their appeareances at Musters * * * , It is therefore * * * Ordered that the Comand^{rs} in Chief of their Ma^{s} Forces of this Colony doe take Care that the Laws for provideing of Armes and Amunition and appeareing at Musters be duely put in Execution on all those who have been formerly listed Souldiers and had time to be provided with Armes * * * ; And that the aforesaid Laws may be made publick that soe noe person or persons may plead for Excuse they did not know them, It is Ordered that the Comanders in Chief doe forthwith cause them together with this Order to be published in each respective County Court within their precincts, and at the head of every Troope and Foot Company under their respective Comands."{EN-1670}
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> • [1699] "Ordered, that the Commander in Cheif of the Militia in the severall Counties do give notice to all Persons under their Command * * * that as soon as possible they do provide themselves with Armes on pain of being fined as the Law in that Case doe provide."{EN-1671}
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> • [1702] Because "repeated advices * * * g[a]ve ground to Believe y^{t} a warr either is or will speedily be declared", the Governor commanded "y^{e} Collonell and Commanders in Cheif of all & every y^{e} Countys * * * that they cause each troop and Company under their Respective Commands to be duly Mustered and Exercised by y^{e} Cap^{ts} thereof once in every fortnight and y^{t} they also give strict Charge and directions to y^{e} Captains of such troops and Companys to take especiall care that all Persons without Priveledge or Exemption be listed and personally performe their dutys at y^{e} said Musters".{EN-1672}
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> • [1702] The Governor ordered the "Cl[er]ks of every County Court * * * to give to y^{e} Command^{r} in chief of y^{e} Melitia in their

respective Countys a true Copy of * * * [the statute] for y^e^ better strengthning the Frontiers and discovering y^e^ approaches of an Enemy which said Commanders in chief are * * * Required to give Copys of y^e^ same to every Cap^t^ under their respective Comands and y^e^ said Cap^ts^ are required to give copys thereof to each Commission officer * * * and to cause y^e^ same to be published at every perticular Muster that so none may pretend Ignorance of their duty on such an Occasion". {EN-1673}

• [1732] "Ordered that 300 Copies of the Law concerning the Militia be forthwith printed & dispers'd among the sev^l^ Officers for their better direction in their duty[.]"{EN-1674}

• [1736] "That a proclamation issue for enforcing the due execution of the Laws for regulating the Militia & appointing Patrols for the better preventing the Insurrections of Negroes[.]"{EN-1675}

• [1763] "[O]rder'd that a Proclamation issue for the more effectual putting in Execution the Laws concerning the Militia".{EN-1676}

• [1775] "[T]his ordinance shall, by command of each colonel [in the Militia], be publickly read at the head of his regiment, as soon as the same is embodied and formed, and once in six months thereafter, under the penalty of one hundred pounds * * * ; and the same shall also be publickly read at every meeting of a battalion of the minute-men in each district, and at every general muster, by the order of the colonel, county-lieutenant, or chief officer then present, under the penalty of one hundred pounds[.]"{EN-1677}

• [1777] "This act shall be read to every company of the militia, by order of the captain * * * , at the first muster next succeeding every general muster, on penalty of five pounds for every omission."{EN-1678}

• [1779] "[T]his act shall be publickly read at the head of each company by the captain * * * thereof, within one month after receiving the same, under the penalty of five pounds."{EN-1679}

• [1781] "[F]or the due promulgation of this act and the better information of the militia, *Be it* * * * *enacted,* That such a number of printed copies of this act * * * as the governor may deem necessary, shall be with all possible expedition transmitted to each county in this commonwealth for the use of the militia officers therein, and shall by such officers be read to their respective militias at every general and petty muster. Each county lieutenant failing therein shall for every offence forfeit * * * five thousand pounds of tobacco; each field officer three thousand; and each captain two thousand pounds of tobacco."{EN-1680}

• [1784 and 1785] "That the plan of major general baron Steuben * * * for forming and disciplining the troops of the United States, shall be the guide for the militia of this commonwealth * * * . It shall be the duty of every commander of a county regiment and company, at every of their

> respective musters, to cause the militia to be exercised and trained, agreeable to said plan, under pain of being arrested and tried for breach of their duty; and for this purpose the said officers are * * * authorized to order the most expert and fit officer in their respective companies to perform that duty. And to the end that a general knowledge thereof may be diffused, the executive is * * * required, to have a sufficient number of copies of the said plan printed * * * , to afford to every commissioned officer of the militia, one".{EN-1681}

3. Enforcement of the laws. Also from the earliest days, Virginia's government endeavored to put the requirements of her Militia statutes into actual practice as quickly, strictly, and extensively as circumstances allowed:

> • [1676] *An act providing for the supply of armes and ammunition*, enacted in 1673, was ordered to "be putt into strict and effectual execution".{EN-1682}

> • [1690] "His Hono^{r} the L^{t} Gov^{r} acquainting this Board [that is, the Council] that in his travell thro the Country, he observed the Militia was not in Such Condicon as it ought, * * * this Board takeing into their Considerations that the Law * * * [of] 1684 * * * Entituled an Act for the better Supply of Armes and Amunition doth fully provide for the Same, Doe Order that the Respective Comand^{rs} in Cheife in this Government, doe take care to put the said Act in Effectual Execution."{EN-1683}

> • [1690] The Governor and his Council "Ord^{r}d that the Comand^{rs} in Cheife of the Militia * * * Doe Cause the Acts for Settlement of the Militia and for Providing of Armes to be twice a yre read at the head of every Troope & Company and use their utmost endeavours to put the same in Execution against all Such as are of ability to Comply with the performance of the same, and that all fines of Delinquents be Imployed for the buying of Drums, Armes and Amunition * * * , and that the Offic^{rs} at the heads of their Companies acquaint the Soldiers that all fines be Imployed as before is Expressed."{EN-1684}

> • [1691] "[Y]^{e} Cap^{ts} of y^{e} militia are hereby required * * * to return to y^{e} Comanders in Cheif all Such Soldiers as shall not be provided with armes and amunicon according to Law, and all Such as shall not appear at their Muster with armes, and y^{e} Comanders in Cheif are to cause Such delinquents to be fined as y^{e} Law provides, and to cause y^{e} fines to be imployed for y^{e} buying armes amunicion &c as y^{e} Law directs and y^{e} Sherrives of y^{e} Severall Counties are hereby Strictly required to Collect all Such fines as shall be turn'd to him and on refusall to distrain for them as y^{e} Law provides."{EN-1685}

> • [1691] The Governor and his Council "Ordered that the respective Comanders in Cheife in this Colony, doe forthwith issue their

Orders, requireing that all fines on delinquent Souldiers be levied according to Law, and disposed of, as is directed".{EN-1686}

• [1692] "It being represented to [the Governor and his Council] * * * that the fines on delinquent Soldiers in Severall Countyes in this Colony, have not been putt to the uses the Law directs, It is therefore Ordered that the Law * * * be both duely observed and performed".{EN-1687}

• [1701] The Governor and Council "required [all Militia officers] to take speciall Care y^t^ y^e^ Law's for their [men's] appearance at Musters & being armed & Equipt according to Law und^r^ y^e^ fines & Penalties therein Contained be put in Due & Effectuall Execution".{EN-1688}

• [1701] The Governor did "strictly Charge and Comand all & Every the Colls and Comd^rs^ in Cheif of Each and every Co^ty^ * * * y^t^ they Cause Each & Every Troope of horse and Comp^a^ of Foot und^r^ their Respective Comand to be duly Muster'd & Exercised once every fortnight and y^t^ they take especiall Care y^t^ all and Every Person belonging to their sever^ll^ Troopes and foot Comp^as^ do personally appear and perform their duty w^th^out Exemption or Priviledge and all and every Coll^s^ and Comand^rs^ in Cheif are hereby Required and enjoyned to take Especially Care that at Every such time of must^rs^ y^t^ all & Every Respective Souldier appear well armed and equipt for warr and that all and Every the Laws in y^t^ Case * * * have their due observance and be put in Effectuall Execution by punishing the delinquents as the Law Enjoynes".{EN-1689}

• [1703] "[W]hereas the most effectual means for the defence of this Colony depends upon the well ordering and disciplining the Militia," the Governor "require[d] the Collonels & Commanders in cheif of each County * * * to appoint a Gen^ll^ Muster of all the Militia under their respective commands, and take especial care & give strict directions that all Persons serving in the Militia be well provided with arms & ammunition according to Law. And the s^d^ Coll^os^ & Command^rs^ in chief are at the said General Musters to give directions to the Captains of each Troop & Company under their command duly to exercise their said Troops & Companys once every three weeks, and to take care that all Persons without Priveledge or exemption be listed & Personally Performe their duty at the said Musters".{EN-1690}

• [1705] "[T]o the end no wilfull and obstinate defaulter or offender * * * may escape the penalty inflicted by this act for his default or offence,

"*Be it enacted* * * * , That all captains of troops and foot companys * * * be required, and every one of them is hereby strictly required and injoyned, at every muster (generall or particular) to take * * * an exact account in writing of every such default or offence made or committed in his troop or company, by whom the default or offence was made or done, and at what time, and to sign the same with his own hand and deliver it

* * * within a month after the taking to the * * * chief officer of the militia of the county whereunto he belongs, for such further proceeding thereupon as the persons * * * impowered to inquire into the merit of the said defaults or offences shall judge reasonable in the pursuance of, and according to the tenor and true intent and meaning of this act.

"*And be it further enacted* * * * , That the field officers and captains of every county * * * have full power * * * to inspect the severall lists or accounts * * * and thereupon to mulct every defaulter or offender * * * according to the merit of his default or offence[.]"{EN-1691}

• [1706] "Ordered that a Proclamation be issued requiring * * * That * * * the Chiefe officer of the Militia residing in each County do forthwith give notice to y^e^ respective Troops & Companys under their Command to be ready upon the first alarm of the Enemy to meet * * * and afterwards proceed for repulsing the enemy according as the said Chief officer shall direct, And that all persons serving in the militia be in areadiness with arms and ammunitions, and provisions to march for y^e^ defense of the Country."{EN-1692}

• [1706] "[T]he late act for settling the militia [in 1705] having strictly enjoyned all persons to provide armes on a certain penalty, the due execution of that Law will oblige people to be more diligent in purchasing[.]"{EN-1693}

• [1709] "Ordered that the Commanders in Cheif of the Militia * * * appoint Masters of the Militia * * * for training & exerciseing the Soldiers and that they take particular Care that the said Soldiers be provided with arms and ammunition according to Law & have their arms constantly well fixed & themselves in a readiness to draw together on an hours warning, hereby strictly chargeing all the said Officers to take particular notice of any person who on this Occasion shall prove deficient in their duty that they may be punished according to Law[.]"{EN-1694}

• [1723] "[T]o the end, no wilfull and obstinate defaulter or offender may escape the penalty * * * for his default or offence, *Be it enacted* * * * , That all captains of troops and companies * * * be required * * * at every muster, to take * * * an exact account in writing, of every such default or offence made or committed in his troop or company, by whom the said default or offence was made or done, and at what time, * * * and deliver it * * * to the field officers and captains, at their next meeting for the fining offenders.

" * * * *And be it further enacted* * * * , That the field officers and captains of every county * * * have full power * * * to inspect the several lists or accounts * * * and thereupon to fine every defaulter or offender therein charged[.]"{EN-1695}

• [1727] When certain Quakers "complain[ed] of divers fines levied upon them for not attending at the Musters of the Militia", it was held that "they ought * * * not to be relieved".{EN-1696}

Obviously, the fines must have been being enforced with such burdensome effects as to cause the Quakers to complain.

• [1736] A proclamation issued, "requiring * * * all and every the County Lieutenants, as well as other Subordinate Officers of the Militia, to cause private Musters to be made, of the several Troops and Companies under their Command, at such Times and Places as they shall judge most convenient, for the Listing, Training, and Exercising all such Persons as by Law ought to serve therein.

"And, to the End all Persons oblig'd to serve in the Militia, and who ought to be furnished with Arms and Ammunition, as the Law directs, may no longer be excused from this necessary part of their Duty, * * * That the * * * Chief Commanding Officer, residing in each County, * * * do take care, that a Court Martial be appointed and held * * * and to cause to be fined, all Persons whatsoever, who shall have absented themselves from General or Private Musters, or shall have appeared there not Armed and Accoutred as the Act of Assembly doth direct and require."{EN-1697}

• [1738 and 1755] "[E]very captain * * * shall duly make a list of all the persons upon his muster-roll, who * * * do not appear at any of the * * * musters, armed and accoutred * * * ; and return the same * * * to the court-martial, to which he belongs.

* * * * *

" * * * [T]he field officers, and captains, of every county, * * * are hereby required to meet at the court-house of their counties * * * to hold a court martial; which * * * shall have power * * * to enquire of the age and abilities of all persons listed, and to exempt such as they shall judge incapable of service; and of all delinquents * * * for absence from musters, or appearing without arms and accoutrements; and to order * * * fines * * * to be levied upon all delinquents[.]"{EN-1698}

• [1755] The Lieutenant Governor ordered "all the County Lieutenants * * * to muster, and keep their Militia in proper Order, so that they may be in Readiness to resist and repel any * * * invasion, and that they appoint proper Places for their Rendezvous"; and "commanding Officers of the Frontier Counties, to keep a strict Lookout, and have a Number of their Militia on the Watch, by Way of Patrolers, and immediately to send [the Lieutenant Governor] Advice if any Number of Men shall appear in Arms on our Frontiers, and to give a proper Alarm to the neighboring Counties, that we may be in a condition of defending our Country from any Insults."{EN-1699}

• [1757, 1759, 1762, 1766, and 1771] "[E]very captain * * * shall duly make a list of all persons upon his muster-roll who * * * do not

appear at any of the * * * musters, armed, and with powder and ball * * * and return the same * * * to the next court martial * * * .

" * * * *And be it further enacted* * * * , That * * * the field officers and captains of every county * * * are * * * required to meet at the court house * * * the day next following the general muster in September or October every year,[948] * * * to hold a court martial * * * to enquire of the age and abilities of all persons inlisted, and to exempt such as they shall adjudge incapable of service, and of all delinquents * * * for absence from musters or appearing without arms, powder, or ball; * * * and to order * * * fines * * * to be levied upon all delinquents[.]"{EN-1700}

• [1762] "[T]he County Lieutenant * * * was requir'd * * * to put the Town of York in as defensible a State as possible and to keep the Militia of the County on the most respectable Footing."{EN-1701}

• [1772] When Virginia's Governor "informed the Board [that is, the Council], that he had been applied to, to remit certain Militia Fines" and "ask[ed] their advice", "the Board gave it as their Opinion, that all such Fines being appropriated by the Act of Assembly to particular Purposes, it was not in his Excellency's Power to remit them".{EN-1702} So fines *were* being collected and applied exclusively to statutory purposes.

• [1775] "[E]very captain * * * shall make return of all delinquencies in his company, either at general or private musters, to the next court-martial; and the better to enable him to do so, the senior serjeant * * * shall act as clerk, and call over the roll at each muster. * * *

"*And be it farther ordained*, That * * * the field-officers and captains of every county * * * [shall] meet at the courthouse * * * the day next following the general muster in * * * April and October in every year * * * to hold a court-martial * * * to inquire of the age and abilities of all persons enlisted, and exempt such as they shall adjudge incapable of service, and of all delinquents * * * for absence from musters, or appearing without arms, powder, or ball."{EN-1703}

• [1777] "Each captain shall, at every muster, * * * note down the delinquencies occurring in his company, and make return thereof to the next court martial[.]"{EN-1704}

• [1784 and 1785] "At every muster, each captain or commanding officer, shall call his roll, examine every person belonging thereto, and note down all delinquencies * * * , and make return thereof at the next regimental or general muster to the * * * commanding officer of his regiment, including those which may occur on that day. * * * *Provided*, That the commanding officer of a county or of a regiment, shall not be obliged to extend their roll calls, or individual examinations beyond the

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[948] In 1762, 1766, and 1771, "the general muster" was required to be held in March or April of every year.

officers, unless they observe some apparent necessity therefor. * * * Every * * * commanding officer of a company shall, within ten days after every regimental and general muster, make up * * * a return of his company, including all arms, ammunition, and accoutrements, * * * distinguishing effective and good from non-effective and bad, noting therein such as have died, removed, been exempted or added, and all persons within the bounds of his company not on his roll, who ought to be enrolled."{EN-1705}

B. A variety of punishments and penalties available. Being essentially a *para*-military establishment throughout the *pre*-constitutional era, Virginia's Militia employed a wide variety of means to enforce discipline among its members.

1. Corporal punishment. Not surprisingly, precisely because it was a *para*-military establishment, Virginia's Militia was always authorized to inflict physical punishments on certain defaulters:

• [1619] "All persons whatsoever upon the Sabaoth daye shall frequent divine service and sermons both forenoon and afternoon, and all suche as beare arms shall bring their pieces swordes, poulder and shotte. And every one that shall transgresse this lawe shall forfeite three shillings a time to the use of the churche, all lawful and necessary impediments excepted. But if a servant in this case shall willfully neglecte his M[aste]r's comande he shall suffer bodily punishmente."{EN-1706}

• [1632] "ALL men that are fittinge to beare armes, shall bringe their peices to the church uppon payne for every effence, yf the mayster allow not thereof to pay 2 lb. of tobacco, * * * and the servants to be punished."{EN-1707}

• [1643] "[M]asters of every family shall bring with them to church on Sondays one fixed and serviceable gun with sufficient powder and shott vpon penalty of ten pounds of tobacco for every master of a family so offending * * * , and servants being commanded and yet omitting shall receive twenty lashes on his or theire bare shoulders, by order of the county courts where he or they shall live."{EN-1708}

• [1723] "[I]f an exempted overseer, or miller, or any free Negro, Mulatto, or Indian, other than as * * * excepted, shall presume to appear at any muster whatsoever, the party so offending, shall for every such offence, forfeit and pay one hundred pounds of tobacco, and shall immediately give security to the * * * commanding officer, for paiment of the same * * * . And each person failing to pay, or give security, * * * shall * * * be tied neck and heels * * * for any time not exceeding twenty minutes.

* * * * *

" * * * [A]ll soldiers, during the time they are in arms, shall observe and obediently perform the commands of their officer, relating to their exercise, according to the best of their skill. And if any soldier * * *

shall, at any such muster, disobey his officers' commands, or behave himself disorderly or refractorily thereat, * * * the chief commanding officer then present, * * * [may] cause such offender to be tied neck and heels, for any time not exceeding twenty minutes."{EN-1709}

• [1738] "[I]f any soldier, during the time he is in arms at a general muster, shall refuse to perform the commands of his officer, or behave himself refractorily or mutinously, * * * the chief commanding officer, * * * [may] cause such offender to be tied neck and heels, for any time, not exceeding five minutes * * * . And if any soldier, during the time he is in arms, at any private muster, shall misbehave, * * * such offender shall * * * be tied neck and heels, for any time, not exceeding five minutes[.]"{EN-1710}

• [1755] "[I]f any inferior officer or soldier, during the time the militia shall be employed for suppressing any invasion or insurrection, * * * shall disobey the lawful commands of his superior officer, or behave himself refractorily, or shall be guilty of prophane swearing, drunkenness, or any other such like offence, every person so offending, shall * * * suffer such corporal punishment, not extending to life or member, as by a court martial * * * shall be inflicted or imposed.

" * * * *Provided always*, That no such person shall be adjudged * * * to receive more than twenty lashes, for any one of the said offences[.]"{EN-1711}

• [1755, 1757, 1758, 1759, 1761, 1762, 1764, 1766, 1769, and 1772] "[I]f any officer or soldier, during the time the militia shall be employed, for suppressing any invasion or insurrection * * * , shall desert the said service, or raise any mutiny or sedition, in the troop or company to which he belongs, or any other troop or company in the said service,[949] or coming to the knowledge of any such mutiny or intended mutiny, shall not give information thereof, to his commanding officer, and use his utmost endeavour to suppress the same, shall suffer such corporal punishment, as shall be inflicted on him by a court martial * * * , not extending to life or member. And every person holding correspondence with, or giving intelligence to the enemy, during the time such militia is employed, for suppressing such invasion and insurrection, shall suffer death, as in cases of felony, without benefit of clergy, upon being thereof lawfully convicted before the general court of this colony."{EN-1712}

• [1757, 1758, 1759, 1761, 1762, 1764, 1766, 1769, and 1772] "[I]f any inferior officer or soldier during the time the militia shall be employed for suppressing any invasion or insurrection * * * shall disobey the lawful commands of his superior officer, or behave himself refractorily, every officer so offending shall pay such fine, not exceeding fifty pounds;

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[949] The Acts of 1757 through 1772 referred simply to "the company", rather than "the troop or company".

and every soldier so offending shall pay such fine, not exceeding five pounds, as by a court martial * * * shall be imposed; and if any soldier shall fail or refuse to pay down such fine immediately * * * or give sufficient security to pay the same within three months, then such soldier shall receive thirty-nine lashes on his bare back well laid on; and if any inferior officer or soldier during the time the militia shall be employed as aforesaid, shall be guilty of prophane swearing, drunkenness, or any other the like offence, every person so offending shall * * * pay five shillings for every offence, so that the same at any one time doth not exceed twenty shillings; and if any soldier shall fail to pay the same, or give security as aforesaid, he shall for every of the said offences receive five lashes on his bare back well laid on, so that the same at any one time doth not exceed twenty lashes."{EN-1713}

• [1757 and 1759] "[I]f any soldier shall, at any general or private muster, refuse to perform the command of his officer, or behave himself refractorily or mutinously, or misbehave himself at the courts martial * * * the chief commanding officer, then present, * * * [may] cause such offender to be tied neck and heels, for any time not exceeding five minutes, or inflict such corporal punishment as he shall think fit, not exceeding twenty lashes."{EN-1714}

• [1762, 1766, 1771, 1775, and 1777] "[I]f any soldier shall at any general or private muster refuse to perform the command of his officer, or behave himself refractorily or mutinously, or misbehave himself at * * * [a] court-martial, * * * it shall and may be lawful to and for the chief commanding officer then present to cause such offender to be tied, neck and heels, for any time not exceeding five minutes, and shall not inflict any other corporal punishment[950]."{EN-1715}

• [1775] "[E]very officer or militia man, and every officer and minute-man, who shall refuse, or unreasonably delay, conforming to * * * [certain] directions [with respect to invasions or insurrections], in every particular, shall, for every refusal or delay, forfeit and pay the several sums following * * * [then enumerating the fines] * * * .

"*Provided*, That * * * every private soldier, or minute-man, refusing or neglecting to pay the same, or to give security to pay the same in one month after conviction, shall be subject to such corporal punishment as may be inflicted by a court-martial, not extending to life or member."{EN-1716}

• [1777] "If any soldier be certified to the court martial to be so poor that he cannot purchase * * * arms, the said court shall cause them to be procured at the expense of the publick, to be reimbursed out of the fines on the delinquents of the county, which arms shall be delivered to

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[950] The Acts of 1775 and 1777 omitted the language "and shall not inflict any other corporal punishment".

such poor person to be used at musters, but shall continue the property of the county; and if any soldier shall sell or conceal such arms, the seller or concealer, and purchaser, shall each of them forfeit the sum of six pounds. * * *

"And if any poor soldier shall remove out of the county, and carry his arms with him, he shall incur the same penalty as if he had sold such arms; and if any persons concerned in selling or concealing such arms shall be sued for the said penalty, and * * * shall fail to make payment, he shall suffer such corporal punishment as the court[-martial] * * * shall think fit, not exceeding thirty nine lashes."{EN-1717}

• [1781] "[A]ny militia-man deserting while in actual service with public arms, shall, upon conviction before a court-martial, suffer death, or such other punishment as the said court shall inflict. And every militia-man deserting without public arms, shall suffer such punishment, not touching life or member, as a court-martial shall direct[.]"{EN-1718}

• [1784] "Any non-commissioned officer or soldier offending, shall be tried by a * * * court-martial, and may, on conviction, be censured or fined at the discretion of the court; and failing to make instant payment of such fine, or to give sufficient security therefor, * * * shall receive corporal punishment, not exceeding twenty lashes."{EN-1719}

• [1784 and 1785] "If any private shall make it appear to the satisfaction of the court * * * appointed for trying delinquencies * * * that he is so poor that he cannot purchase the arms * * * required, such court shall cause them to be purchased out of the money arising from delinquents. * * * [A]nd if any private shall sell or conceal the same, the seller, concealer, and purchaser, shall each forfeit and pay four pounds * * * . And if any poor private shall remove out of the county, and carry such arms with him, he shall incur the same penalty as if he had sold them. And if any person concerned in selling, purchasing, concealing or removing such arms shall be prosecuted for the penalty, and upon conviction shall fail to make instant payment, or give security to pay the same * * * , he shall suffer such corporal punishment as the court * * * may think fit, not exceeding thirty-nine lashes.[951]

* * * * *

" * * * If any noncommissioned officer or soldier, shall behave himself disobediently or mutinously when on duty, on, or before any [Militia] court or board, * * * the commanding officer, court or board may * * * cause him to be bound neck and heels, for any time not exceeding five minutes."{EN-1720}

2. Imprisonment. Militia officers also were authorized to punish their men's misbehavior with imprisonment:

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[951] The Act of 1785 omitted the limitation "not exceeding thirty-nine lashes".

• [1705] "[A]ll soldiers in horse and ffoot during the time they are in arms, shall observe and obediently perform the commands of their officer relating to their exercising according to the best of their skill, and * * * the chief officers upon the place * * * may imprison mutineers and such soldiers as do not do their dutys as soldiers at the day of their musters and training, and * * * may inflict for punishment for every such offence * * * the penalty of imprisonment without bail or mainprise, not exceeding ten days.

" * * * [I]f any soldier either in horse or foot upon occasion of an incursion, invasion, insurrection or rebellion, or other alarm or surprise, shall be summoned * * * and shall fail to appear * * * , such soldier shall for such his offence * * * suffer three months imprisonment, without bail or mainprise."{EN-1721}

• [1723] "[A]ll soldiers, during the time they are in arms, shall observe and obediently perform the commands of their officer, relating to their exercise, according to the best of their skill. And if any soldier * * * shall, at any * * * muster, disobey his officers' commands, or behave himself disorderly or refractorily thereat, * * * the chief commanding officer then present, * * * [may] cause such offender to be tied neck and heels, for any time not exceeding twenty minutes. And if any such soldier shall thereafter offend, it shall * * * be lawful * * * to commit such offender to the county goal, there to remain for any time not exceeding ten days; and * * * the said offender shall not be thence discharged, until he hath paid and satisfied all fees due, and accustomed for sherifs or goalers to take, upon any commitments and discharges."{EN-1722}

• [1738] "[I]f any soldier, during the time he is in arms at a general muster, shall refuse to perform the commands of his officer, or behave himself refractorily or mutinously, * * * the chief commanding officer, then present, * * * [may] cause such offender to be tied neck and heels, for any time, not exceeding five minutes: And for a second offence, * * * the offender shall be punished by * * * the field officers and captains, * * * who are hereby impowered * * * to commit the offender to the county goal, there to remain for any time not exceeding ten days. And if any soldier, during the time he is in arms, at any private muster, shall misbehave, * * * such offender shall be punished by any field officer then present * * * [who may] cause such offender to be tied neck and heels, for any time, not exceeding five minutes, for the first offence; and for the second offence, the * * * commission-officers * * * [may] commit such offender to the county goal, there to remain for any time not exceeding ten days. And in either case, of commitment to the county goal, the offender * * * shall not be thence discharged, until the lawful fees for commitment, imprisonment, and discharge, be fully satisfied and paid."{EN-1723}

• [1755] "That * * * a sum of money not exceeding two thousand pounds * * * be laid out for and in the raising and maintaining three compa[n]ies of men * * * to be employed as rangers, for the protection of the subjects in the frontiers of this colony * * * . And in case the * * * men, cannot be raised, by such as will voluntarily enlist * * * chief officer[s] of the militia * * * [may] draft out of the militia * * * such and so many young men * * * who have not wives and children * * * . And if any person so drafted shall refuse to serve * * * , every person so refusing shall forfeit and pay the sum of ten pounds * * * , and in case of failure in paying down the same, * * * such person shall * * * be committed to goal, there to remain until he shall agree to enter into the said service, or pay the said penalty[.]"{EN-1724}

• [1755] "[I]n case the * * * [required] number of men cannot be raised, by such as will voluntarily inlist in the * * * service * * * , it shall and may be lawful, for the field officers and captains of the militia * * * to draft out of the militia of their counties * * * such and so many of their militia, who have not wives or children, * * * to be employed in the * * * service * * * . And if any person so drafted, shall refuse to serve * * * or find and provide some other able person to serve in his room, every person so refusing shall forfeit and pay the sum of ten pounds * * * , and in case of failure in paying down * * * or giving sufficient security * * * then such person shall * * * be committed to goal, there to remain until he shall agree to enter into the * * * service, or provide another * * * , or pay or give security[.]"{EN-1725}

• [1755] "[I]f any soldier, shall at any general or private muster, refuse to perform the commands of his officer, or behave himself refractorily or mutinously, or misbehave himself at the courts martial, * * * it shall and may be lawful * * * for the chief commanding officer, then present, to fine every such soldier, if an horseman, any sum not exceeding ten shillings, and if a footman, not exceeding seven shillings and six pence, which fine shall be immediately paid down * * * ; but in case any such offender shall not be able to pay down such fine immediately, then he shall give good security * * * for the payment of the same in three months. And in case any soldier so fined * * * shall refuse or fail to pay down his fine, or to give such security * * * , then it shall and may be lawful * * * to commit every such soldier to the county goal, there to remain without bail or mainprize, for any time not exceeding three days, and the offender * * * so committed, shall not be thence discharged, until the lawful fees for commitment, imprisonment, and discharge, shall be fully paid and satisfied."{EN-1726}

• [1757, 1758, 1759, 1762, 1766, 1769, and 1772] "And whereas it may be necessary in time of danger to arm part of the militia, not otherwise sufficiently provided out of his majesty's magazine, and other stores within this colony, *Be it* * * * *enacted* * * * , That if any person or

persons so armed * * * shall detain or embezzle any arms or ammunition to him or them delivered for the public service, and shall not produce and re-deliver the same when ordered and required so to do, * * * [the] chief commanding officer * * * [may] commit such offender to prison, there to remain until he shall make satisfaction for the arms or ammunition by him detained or embezzled."{EN-1727}

• [1775] "[I]f any officer or soldier [among the Minutemen], during the time of his attendance on training duty, in battalion or companies, * * * shall refuse to obey the commands of his superiour officer, or behave himself mutinously or refractorily, or shall in any other manner transgress the rules of good order and decency, every such offender shall * * * be confined, for any time not exceeding twenty four hours[.]"{EN-1728}

• [1777] "If any soldier, at any muster, shall refuse to obey the command of his officer, or shall behave himself refractorily or mutinously, or misbehave himself at a court martial, the commanding officer, or court martial, may * * * put him under arrest for the day[.]"{EN-1729}

• [1777] "The soldiers of * * * [the] militia, if not well armed and provided with ammunition, shall be furnished with the arms and ammunition of the county, and any deficiency in these may be supplied from the publick magazines, or if the case admit not that delay, by impressing arms and ammunition of private property, which ammunition, so far as not used, and arms, shall be duly returned, as soon as they may be spared. And any person embezzling any such publick or private arms, or not delivering them up when required by his commanding officer, shall * * * be committed to prison without bail or mainprize, there to remain till he deliver or make full satisfaction for the same, unless he be sooner discharged by the court of his county."{EN-1730}

• [1779] "Every non-commissioned officer or private, who at any muster shall not obey the lawful commands of his superiour officer, or shall behave mutinously, riotously, get drunk or not demean himself as a non-commissioned officer or soldier, shall be put under guard for the day[.]"{EN-1731}

• [1784 and 1785] "If any noncommissioned officer or soldier, shall behave himself disobediently or mutinously when on duty, on, or before any [Militia] court or board, * * * the commanding officer, court or board, may * * * confine him for the day[.]"{EN-1732}

Local Militia officers could also summarily punish obstreperous individuals who were not members of the Militia (or, if members of the Militia, were for one or another reason not in service at that time):

• [1777] "If any bystander interrupt, molest, or insult any officer of soldier while on duty, at any general or private muster, or misbehave

before any court martial, the commanding officer, or court martial, may put him under arrest for the day."{EN-1733}

• [1779] "If any by-stander interrupt, molest, or insult any officer of soldier when on duty, at any general or private muster, or misbehave before any court martial, he may be put under guard by the commanding officer for the day[.]"{EN-1734}

• [1784 and 1785] "If any bystander shall interrupt, molest, or insult any officer or soldier while on duty at any muster, or shall be guilty of the like conduct before any [Militia] court or board * * * , the commanding officer, or such court or board, may cause him to be confined for the day."{EN-1735}

3. Drafts into the regular Armed Forces. During the War of Independence, Virginia (along with all of the other States) fielded not only "a well regulated militia", but also her own regular "Troops", as well as dispatching men to serve the United States in the Continental Army.[952] Sometimes, disobedient Militiamen were disciplined by being drafted as State "Troops" or as Continental soldiers:

• [1779] "If any non-commissioned officer or soldier [in the Militia] shall refuse to march when ordered into actual service according to his tour of duty, or find an able bodied man in his room, or shall while in service, mutiny, or desert, and thereof shall be convicted before a court-martial, such offender shall serve as a regular soldier in the troops of this state six months[.]"{EN-1736}

• [1780] "WHEREAS a dangerous invasion of South Carolina now threatens * * * that state, and the troops engaged in its defence may be overpowered by superiour numbers, if timely aid be not sent to them. And as it is incumbent upon this state, on every principle of policy and good neighbourhood, to assist our friends and fellow citizens in distress, as speedily and effectually as possible, *Be it enacted* * * * , That two thousand five hundred infantry be forthwith called into service, in legal rotation, from * * * [certain] counties, and in * * * [certain] proportions[.]

* * * * *

" * * * If any non-commissioned officer or soldier shall fail to attend when summoned, not having a just and reasonable excuse, or refuse to march when ordered into actual service according to his tour of duty, or find an able bodied man in his room, or shall while in service, mutiny or desert, * * * such offender shall serve as a regular soldier in the troops of the state for eight months".{EN-1737}

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[952] The distinctions between "Militia" and "Troops" of the States, on the one hand, and the "Army" of the United States, on the other hand, were carried over into the Constitution. *Compare* U.S. Const. art. I, § 8, cls. 12, 15, and 16, *with* art. II, § 2, cl. 1, *and with* art. I, § 10, cl. 3.

• [1780] "[W]hereas it has been a practice of many tradesmen to entice their apprentices to enlist as soldiers, and to sell them as substitutes for large sums of money; *Be it enacted*, That if any tradesman or other person to whom any infant is, or shall be bound as an apprentice, shall directly or indirectly take or receive, or agree to take or receive any money or other gratuity in consideration of such apprentice, his enlisting as a soldier or sailor in any corps whatsoever, every such tradesman or person so offending, * * * being an able bodied man under the age of fifty years, * * * shall be deemed a soldier to serve in this state's quota of continental troops during the war[.] * * *

"And whereas a practice has prevailed of enlisting men for small bounties and afterwards selling them * * * for higher bounties * * * ; *Be it enacted*, That every person guilty of such offence, shall be subject to the same penalties as tradesmen and others enlisting or selling their apprentices[.]"{EN-1738}

• [1781] "Every militia-man ordered into actual service, who shall refuse and neglect to appear at the time and place of rendezvous appointed for the company, corps or detachment to which he belongs, without a reasonable excuse, or produce an able-bodied substitute to serve in his room (but no person shall be admitted as a substitute except he belongs to the militia of the same county, and if it shall come to such substitute's tour of duty before he returns, then the person employing him shall be obliged to serve in his room or procure a second substitute) shall * * * be declared a regular soldier for six months[.]"{EN-1739}

• [1782] "[T]he governor shall cause to be delivered to the * * * commanding officers of the militia of such counties as are most exposed to the incursions of the enemy, and to the officers of the militia of the city of Williamsburg, and borough of Norfolk, such a number of arms as he may think necessary, not less than sufficient to arm three tenths of their militia * * * ; who, on having served their tour of duty, shall return their arms, in good order, * * * to be delivered in like manner to such of the militia as stand next in rotation.

* * * * *

" * * * [E]very militia-man to whom arms shall be delivered * * * , who shall neglect or refuse to return the same * * * , shall forfeit and pay the sum of twelve pounds; and on failing so to do, or giving security * * * , every such militia-man shall be obliged to serve in the continental army the term of three years or during the war."{EN-1740}

Statutes of this type are of no little importance, because they exemplify how, during the *pre*-constitutional era, the power to draft (or impress) men into any armed force was lodged exclusively in the States in three ways: (i) for their Militia, which always were institutions based on near-universal, compulsory service; (ii) for their own "Troops", which usually were composed of volunteers, but could be augmented by selective drafts from the Militia; and (iii) for soldiers whom the States

drafted to serve in the Army of the United States. This tripartite structure should be maintained today, under the Constitution.[953]

4. Fines. Usually, Virginia's *pre-*constitutional Militia enforced discipline by levying fines against defaulters.

a. Virginia's Militia laws imposed fines upon essentially every conceivable type of dereliction of duty by her Militiamen:

> • [1619] "All persons whatsoever upon the Sabaoth daye shall frequent divine service and sermons both forenoon and afternoon, and all suche as beare arms shall bring their pieces swordes, poulder and shotte. And every one that shall transgresse this lawe shall forfeite three shillings a time to the use of the churche, all lawful and necessary impediments excepted."{EN-1741}
>
> • [1632] "ALL men that are fittinge to beare armes, shall bringe their peices to the church uppon payne for every effence, yf the mayster allow not thereof to pay 2 lb. of tobacco, to be disposed by the church-wardens, who shall levy it by distresse[.]"{EN-1742}
>
> • [1639] "ALL persons except negroes to be provided with arms and amunition or be fined[.]"{EN-1743}
>
> • [1643] "[M]asters of every family shall bring with them to church on Sondays one fixed and serviceable gun with sufficient powder and shott vpon penalty of ten pounds of tobacco for every master of a family so offending[.]"{EN-1744}
>
> • [1659 and 1662] "*BEE it enacted* that a provident supplie be made of gunn powder and shott to our owne people, and this strictly to bee lookt to by the officers of the militia, (vizt.) That every man able to beare armes have in his house a fixt gunn two pounds of powder and eight pound of shott at least which are to be provided by every man for his family * * * , and whosoever shall faile of makeing such provision to be fined ffiftie pounds of tobacco[.]"{EN-1745}
>
> • [1666] "WHEREAS the officers of the militia have complained that divers refractory persons have in contempt of the authority impowring them, and to the ruyne of all military discipline refused to appeare upon the dayes of exercise * * * , *It is enacted* * * * that every person soe neglecting to appeare, shall for every such neglect be amerced and fined one hundred pounds of tobacco[.]"{EN-1746}
>
> • [1673 and 1676] "FOR the better supply of the country with armes and ammunition, *Be it enacted* * * * , that the captaines of ffoote and horse in each county doe take a strict and perticuler account of what armes and ammunition are wanting in their severall companies and troops

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[953] *See post*, Chapter 49.

* * * : *And be it further enacted* * * * , that the perticuler county courts be * * * impowred upon their respective counties to lay and raise a levy for the provideing of armes and ammunition for supplying the wants aforesaid, that is to say, muskitts and swords for the ffoote, and pistolls, swords and carbines for horse, as alsoe for every lysted souldier at the least two pounds of powder and six pounds of shott, the said armes and ammunition * * * to remaine in the hands of the officers of the militia for them to dispose of the same as there shalbe occasion; and that those to whome distribution of armes and ammunition shalbe made doe pay for the same at a reasonable rate * * * ; and if any court or courts shall faile in their duty to provide, within one yeare after such presentment made by the officers of the militia * * * of their wants * * * , for the full supplying thereof * * * , be fined tenn thousand pounds of tobacco[.]"{EN-1747}

• [1682] "[E]ach captain * * * shall once every month muster, treine, exercise, instruct and discipline the troop or soldiers under his command on paine to forfeite five hundred pounds of tobacco in caske for each time he shall neglect such muster or exercise * * * . And that every captain * * * shall at the least once in every fourteen daies range and scout about the frontiers of the county * * * and in such other places as shall be most likely for the discovery of the enemy under paine of forfeiting for every time he shall neglect such ranging and scouting one thousand pounds of tobacco in caske. And that every soldier that shall neglect or omitt to appeare at such muster, shall forfeite one hundred pounds of tobacco in caske, and for not scouting and rangeing * * * two thousand pounds of tobacco and caske for every such default[.]"{EN-1748}

• [1684] "[E]very trooper, failing to supply himselfe * * * with * * * arms and furniture, and not * * * keeping the same well fixt, shall forfeite four hundred pounds of tobacco * * * , and every foot souldier soe failing to provide himselfe, * * * and not keeping the same well fixt, shall forfeit two hundred pounds of tobacco".{EN-1749}

• [1705] " * * * [T]he persons of a councellor, of a speaker of the house of burgesses, of a justice of the peace, of an attorney-general, and of a captain or an higher officer in the militia, are exempted from being listed and serving * * * , merely for the dignity of the office * * * held, and that notwithstanding * * * all and every such person or persons, and also the clerk of the councill, the clerk of the general court, and every county court clerk shall provide and keep * * * at their respective places of abode a troopers horse, furniture, arms and ammunition * * * , and to produce or cause the same to be produced in the county where they respectively reside yearly, and every year at the generall muster * * * , upon pain of forfeiting for every neglect * * * twenty shillings current money of Virginia.

"And in case of any rebellion or invasion shall also be obliged to appear * * * and serve in such stations as are suitable for gentlemen * *

* , under the same penaltys as any other person or persons, who * * * are injoyned to be listed in the militia * * * .

* * * * *

" * * * That whatsoever trooper or ffoot soldier shall fail to appear * * * , or appearing shall not be furnished and provided with arms and ammunition * * * for muster and exercise, or shall not keep at his place of abode what * * * he is directed there to have and bring into the field with him all and singular the arms and ammunition * * * when thereunto specially required, such trooper or ffoot soldier shall for his neglect in any of the premises, be fined one hundred pounds of tobacco, every time he is warned or appointed to appear.

* * * * *

" * * * [A]ll soldiers in horse and ffoot during the time they are in arms, shall observe and obediently perform the commands of their officer relating to their exercising according to the best of their skill, and * * * the chief officers upon the place * * * shall * * * inflict for punishment for every * * * offence, any mulct not exceeding fifty pounds of tobacco * * * .

" * * * [I]f any soldier either in horse or foot upon occasion of an incursion, invasion, insurrection or rebellion, or other alarm or surprise, shall be summoned * * * and shall fail to appear * * * , such soldier shall * * * be fined ten pounds current money * * * .

"And forasmuch as some difficulty hath been found in procuring some soldiers to be willing to serve as serjeants, corporals, drummers or trumpeters, all of them absolutely necessary in troops and companys: For prevention of the like in time to come,

"*Be it enacted* * * * , That whatsoever soldier shall refuse to take upon him, act in and execute any of the said places and offices in the troop or company wherein he is listed, being known to be capable and thereunto appointed by his captain, shall * * * be fined five hundred pounds of tobacco[.]"{EN-1750}

•[1723] "[I]f an exempted overseer, or miller, or any free Negro, Mulatto, or Indian, other than as * * * excepted, shall presume to appear at any muster whatsoever, the party so offending, shall for every such offence, forfeit and pay one hundred pounds of tobacco, and shall immediately give security to the * * * commanding officer, for paiment of the same * * * .

* * * * *

" * * * [W]hatsoever soldier shall fail to appear * * * , or appearing, shall not be furnished and provided with arms and ammunition * * * for muster and exercise, or shall not keep at his place of abode, what * * * is directed, such soldier, for every such failure, shall be fined one hundred pounds of tobacco.

* * * * *

" * * * [E]very captain of a troop or company, who shall fail to appear at any muster * * * , or appearing, fail and neglect to exercise the troop or company under his command, * * * for every such offence, shall be fined two hundred pounds of tobacco. And every lieutenant, cornet, or ensign, who shall at any time fail to appear at any such muster, and perform his duty thereat, shall forfeit and pay one hundred pounds of tobacco for every such offence.

* * * * *

" * * * [I]f any soldier, upon occasion of an incursion, invasion, insurrection, or rebellion, or other alarm or surprize, * * * shall fail to appear, such soldier shall be fined for his failure, the sum of ten pounds, current money * * * .

" * * * [I]f any officer shall fail or neglect to appear on occasion of any such incursion, invasion, insurrection, or rebellion, or other alarm, every such officer, so offending, shall be fined the sum of twenty pounds, current money, for every such failure.

" * * * [F]orasmuch, as some difficulty hath been found in procuring some soldiers * * * to serve as serjeants, corporals, drummers, or trumpeters, all of them absolutely necessary in troops and companies: For prevention of the like in time to come, *Be it enacted* * * * That whatsoever soldier shall refuse to take upon him, act in, and execute any of the said places and offices, in the troop or company wherein he is listed, being known to be capable, and thereunto appointed by his captain, shall for such his refusal be fined five hundred pounds of tobacco[.]"{EN-1751}

•[1738] "[F]or settling the fines to be inflicted upon all persons who shall fail to do their duty, * * * and on all other delinquents * * * , *Be it* * * * *enacted* * * * , That the several persons herein after mentioned, for such failure, shall forfeit and pay the sums following, respectively, * * * The lieutenant of any county, * * * failing to appoint a general muster, * * * shall pay ten pounds for every failure * * * . Every colonel, lieutenant-colonel, or major, failing to appear at such general muster, or court[-martial], shall pay forty shillings. Every captain, who shall fail to muster and exercise his troop or company * * * shall pay twelve shillings for every failure. And every captain failing to appear at the court martial, or general muster, shall pay twenty shillings for every failure. And every lieutenant who fails to appear at muster, shall pay ten shillings for every failure. And every cornet, or ensign, seven shillings and six pence. And every captain * * * , failing to return a list of the persons who shall not appear at musters, or shall appear without his arms or accoutrements, shall pay fifty shillings. Every soldier refusing to serve as a serjeant, corporal, drummer, or trumpeter * * * shall pay fifty shillings, or five hundred pounds of tobacco, at his election * * * . Every person listed to serve in the horse, shall pay seven shillings and six pence, or seventy five pounds of tobacco: And every person listed in the foot, shall pay five shillings, or fifty pounds of tobacco, at their election, for not appearing at muster,

compleatly armed and accoutred * * * . And every clerk of a court-martial failing to deliver the orders of the court to the sheriff of the county * * * shall forfeit all the salary or allowance for his service, as clerk, for that year.

* * * * *

" * * * [E]very person exempted from personal appearance only, failing to send an able bodied man, or man and horse, * * * in his room, to be trained and exercised, shall pay the same fine * * * inflicted for not appearing at musters. And every person ordered to go to church armed, failing to do his duty therein, shall pay five shillings. And every person ordered to patrol, and failing so to do, * * * shall pay ten shillings, for every failure. * * *

* * * * *

" * * * *And* * * * if any sheriff shall refuse to receive the orders of any court-martial offered to him * * * , or to collect and levy the fines therein mentioned; such sheriff * * * shall be fined, for such refusal, fifty pounds current money[.]"{EN-1752}

• [1748 and 1753] "[I]f any officer of the militia, who upon occasion of any invasion or insurrection, shall receive any orders or instructions, from the governor or commander in chief for the time being, or from any other his superior officer, either for calling together the soldiers, or marching them to any particular place, shall neglect or refuse to execute such orders and instructions, in the best manner he is capable, every such officer so neglecting or refusing, shall respectively, forfeit and pay the sum following, that is to say, every lieutenant of a county, the sum of fifty pounds, every colonel, lieutenant colonel, or major, thirty pounds, and every captain, lieutenant, cornet, or ensign, twenty pounds; and every soldier who shall be summoned to appear, upon any such occasion, and shall fail so to do, or shall fail to bring with him his arms and accoutrements, together with one pound of powder, and four pounds of ball, shall forfeit and pay the sum of ten pounds[.]"{EN-1753}

• [1754] "[I] the chief officer of the militia, residing in any county, shall fail to appoint patrollers, * * * such officer shall forfeit and pay the sum of five pounds; and every person appointed to patrol * * * , failing to do his duty therein, shall pay the sum of five shillings for every failure[.]"{EN-1754}

• [1755] "That * * * a sum of money not exceeding two thousand pounds * * * be laid out for and in the raising and maintaining three compa[n]ies of men * * * to be employed as rangers * * * . And in case the * * * men, cannot be raised, by such as will voluntarily enlist * * * chief officer[s] of the militia [in certain counties] * * * [may] draft out of the militia * * * such and so many young men * * * who have not wives and children * * * . And if any person so drafted shall refuse to serve * *

* , every person so refusing shall forfeit and pay the sum of ten pounds[.]"{EN-1755}

• [1755] "[I]n case the * * * [required] number of men cannot be raised, by such as will voluntarily inlist in the * * * service * * * , it shall and may be lawful, for the field officers and captains of the militia * * * to draft out of the militia of their counties * * * such and so many of their militia, who have not wives or children, * * * to be employed in the * * * service * * * . And if any person so drafted, shall refuse to serve * * * or find and provide some other able person to serve in his room, every person so refusing shall forfeit and pay the sum of ten pounds[.]"{EN-1756}

• [1755] "[I]f it shall be made to appear to the court of any county, * * * that any soldier inlisted in the foot, is so poor, as not to be able to purchase the arms [required for service in the Militia] * * * ; then such court shall * * * depute some person to send for the same to England * * * ; and if any person shall presume to buy or sell any such arms, * * * then and in such case, every person so buying or selling, shall forfeit and pay the sum of six pounds * * * .

" * * * [T]he several persons * * * exempted from mustering * * * shall provide arms for the use of the county, city or borough, wherein they shall respectively reside * * * . And if they shall fail or refuse so to do, * * * then * * * the several courts of the counties * * * are * * * required to levy the value of the same on each of them respectively.

* * * * *

" * * * [I]f any soldier, shall at any general or private muster, refuse to perform the commands of his officer, or behave himself refractorily or mutinously, or misbehave himself at the courts martial, * * * the chief commanding officer, then present, * * * [may] fine every such soldier, if a horseman, any sum not exceeding ten shillings, and if a footman, not exceeding seven shillings and six pence, which fine shall be immediately paid down to such officer; but in case any such offender shall not be able to pay down such fine immediately, then he shall give good security * * * for the payment of the same in three months.

* * * * *

" * * * [P]ersons * * * failing to do their duty * * * shall forfeit and pay the several sums following * * * ; that is to say, the lieutenant of any county or the chief commanding officer there, failing to appoint a general muster * * * [twice] in every year, * * * shall for every such failure, forfeit and pay the sum of twenty pounds; every county lieutenant, colonel, lieutenant colonel and major failing to appear at every * * * general muster, or at the court martial, shall forfeit and pay ten pounds for every such failure; every captain who shall fail to muster and exercise his troop or company * * * shall forfeit and pay forty shillings, for every time he shall so fail to muster and exercise; and every captain failing to appear at every general muster and court martial, shall forfeit and pay five pounds, for every such failure; every lieutenant who shall fail to appear at

any muster, shall forfeit and pay twenty shillings, for every such failure; and every coronet and ensign ten shillings, for every such failure; and every captain, or in his absence the lieutenant, failing to return a list of the persons who shall not appear at musters, or shall appear without arms and accoutrements, shall forfeit and pay ten pounds, for every such failure; every clerk failing to appear with arms shall pay ten shillings, for every such failure; every soldier refusing to serve as a serjeant, corporal, drummer or trumpeter * * * shall pay five shillings, for every muster that he shall so refuse; every person inlisted to serve in the horse, appearing at muster without a serviceable horse * * * [and] carbine * * * , shall pay five shillings, for every such failure: and such persons appearing at muster * * * without holsters, a case of pistols, cutting-sword, double cartouch-boxes, and six charges of powder and ball shall pay five shillings, for every such failure; and every person listed to serve in the foot, appearing at such muster without a firelock well fixed, and a bayonet fitted to the same, shall pay three shillings, for every such failure; and every such person appearing * * * without a cutting-sword, a double cartouch-box, and three charges of powder and ball shall pay three shillings, for every such failure; and every soldier, either of the horse or foot, failing to appear at such muster, shall forfeit and pay ten shillings, for every such failure. *Provided*, That * * * every soldier ordered to go armed to church, neglecting so to do, shall pay five shillings, for every such failure; and every clerk of a court martial failing to deliver the orders of the court martial to the sheriff * * * shall forfeit fifty pounds.

" * * * [E]very officer of the militia * * * shall at all times he acts on duty, at any private or general muster appear well armed, * * * under the penalty of ten shillings for every time that every such officer shall appear without * * * arms. * * *

" * * * And the same fines and penalties shall be paid by the officers and soldiers of the militia, in the city of Williamsburg, and borough of Norfolk, in case of their failing or refusing to do, and perform the several services, and to appear armed and accoutred in the same manner, as is * * * required, of the officers and soldiers of the militia, of the several counties[.]

* * * * *

" * * * [T]he fines and penalties incurred by infants and servants for the breach or neglect of their duty in any particular service * * * required, of them, shall be paid by the parent, guardian or master, respectively; and if the breach or neglect of such servants is not occasioned by their master's influence or direction, then the fines incurred by them, and so paid by the master, shall be repaid to the master by the further service of such servant, after the time they are bound to serve is expired * * * .

" * * * [I]f any sheriff shall refuse to receive the orders of any court martial * * * , or to collect and levy the fines * * * , such sheriff * * * shall be fined for every such refusal, one hundred pounds[.] * * *

" * * * [E]very commission officer in the militia, shall before he acts under or executes any such commission * * * take the oaths appointed by law * * * . And every person accepting a commission in the militia, who shall neglect or refuse to qualify himself * * * by taking * * * the oaths * * * shall forfeit and pay the sum of five pounds.

* * * * *

" * * * [I]f the chief officer of the militia in any county shall fail to appoint patrollers, * * * such officer shall forfeit and pay the sum of five pounds, and every person appointed to patrol, * * * failing to do his duty therein, shall pay the sum of five shillings for every failure * * * . And in like manner the chief officer of the militia, in the * * * city of Williamsburg, or borough of Norfolk, shall appoint all the persons of their militia, to patrol * * * ; which officers and patrollers, shall be subject to the same fines and penalties * * * in the case of patrollers in the counties."{EN-1757}

• [1755] "[I]f any officer of the militia, who upon occasion of any invasion or insurrection, shall receive any orders or instructions * * * either for calling together the soldiers, or marching them to any particular place, shall neglect or refuse to execute such orders and instructions, in the best manner he is capable, every such officer so neglecting or refusing, shall respectively forfeit or pay the sums following, that is to say, every lieutenant of a county, the sum of two hundred pounds; every colonel, the sum of two hundred pounds; every lieutenant colonel, the sum of two hundred pounds; every major, the sum of one hundred pounds; every captain, the sum of seventy five pounds; every lieutenant, the sum of fifty pounds; every cornet or ensign, the sum of twenty five pounds; every quartermaster, serjeant, or corporal, twenty pounds. And every soldier who shall be summoned to appear upon any such occasion, and shall fail so to do, or shall fail to bring with him his arms and accoutrements, together with one pound of powder and four pounds of ball, shall forfeit and pay the sum of twenty pounds[.]

* * * * *

" * * * [I]f any inferior officer or soldier, during the time the militia shall be employed for suppressing any invasion or insurrection, * * * shall disobey the lawful commands of his superior officer, or behave himself refractorily, or shall be guilty of prophane swearing, drunkenness, or any other such like offence, every person so offending, shall pay such fine * * * as by a court martial * * * shall be inflicted or imposed.

" * * * *Provided always*, That no such person shall be adjudged to pay more than the sum of five pounds * * * for any one of the said offences[.]"{EN-1758}

• [1757, 1759, 1762, 1766, and 1771] "[I]f it shall be certified to the court of any county, by order of the court-martial, that any soldier inlisted in * * * [a Militia] company is so poor as not to be able to purchase the arms * * * [required of a Militiaman], then such court shall * * * immediately * * * depute some person to send for the same to Great-Britain * * * ; and if any person shall presume to buy or sell any such arms, * * * then, and in such case, every person so buying or selling shall forfeit and pay the sum of six pounds * * * .

" * * * [T]he several persons * * * exempted from mustering * * * shall provide arms for the use of the county, city, or borough, wherein they shall respectively reside * * * . And if they shall fail or refuse so to do, * * * then * * * the several courts of the counties * * * are * * * required to levy the value of the same on each of them respectively.

* * * * *

" * * * [P]ersons * * * failing to do their duty * * * shall forfeit and pay the several sums following * * * : The lieutenant of any county * * * failing to appoint a general muster * * * [twice] in every year, * * * shall for every such failure forfeit and pay the sum of twenty pounds; every county lieutenant, colonel, lieutenant-colonel, and major failing to appear at every * * * general muster, or at the court-martial shall forfeit and pay ten pounds for every such failure; every captain who shall fail to muster and exercise his company * * * shall forfeit and pay forty shillings for every time he shall so fail to muster and exercise, and every captain failing to appear at every general muster and court-martial shall forfeit and pay five pounds for every such failure; every lieutenant who shall fail to appear at any muster shall forfeit and pay twenty shillings for every such failure; and every ensign ten shillings for every such failure; and every captain * * * failing to return a list of the persons who shall not appear at musters, or shall appear without arms, powder and ball, shall forfeit and pay ten pounds for every such failure; every clerk failing to appear with arms, powder and ball, * * * shall pay ten shillings for every such failure; every soldier refusing to serve as a serjeant, corporal or drummer * * * shall pay five shillings for every muster he shall so refuse; and every soldier appearing at muster without a firelock well fixed, and a bayonet fitted to the same, shall pay three shillings for every such failure, and for appearing at muster without a double cartouch-box shall pay one shilling, and without three charges of powder shall pay two shiilings [*sic*] for every such failure, and every soldier failing to appear at muster shall forfeit and pay ten shillings for every such failure. * * * Every soldier ordered to go armed to church neglecting so to do shall pay five shillings for every such failure; and every clerk of a court-martial failing to deliver the orders of the court-martial to the sheriff * * * shall forfeit and pay fifty pounds.

" * * * [E]very officer of the militia * * * shall at all times that he acts on duty at any private or general muster, appear well armed, * * *

under the penalty of ten shillings for every time that every such officer shall appear without * * * arms * * * .

" * * * [T]he same fines and penalties shall be paid by the officers and soldiers of the militia in the city of Williamsburg and borough of Norfolk, in case of their failing or refusing to do and perform the several services, and to appear armed and with powder, in the same manner as is * * * required of the officers and soldiers of the militia of the several counties.

* * * * *

"[I]f any exempted overseer or miller shall presume to appear at any muster, or in any muster-field whatsoever on the day on which such muster shall be appointed, the party so offending shall, for every such offence, forfeit and pay twenty shillings * * * ; and * * * the fines and penalties incurred by infants and servants for the breach or neglect of their duty in any particular service * * * required of them, shall be paid by the parent, guardian, or master, respectively; and if the breach or neglect of such servants is not occasioned by their masters influence or direction, then the fines incurred by them and so paid by the master, shall be repaid to the master by the further service of such servant, after the time they are bound to serve is expired * * * .

" * * * [I]f any sheriff shall refuse to receive the orders of any court martial offered to him, * * * or to collect and levy the fines * * * , such sheriff * * * shall be fined for every such refusal, one hundred pounds * * * .

" * * * [E]very commission officer in the militia, shall, before he acts under or executes any such commission * * * take the oaths appointed by law * * * . And every person accepting a commission in the militia, who shall neglect or refuse to qualify himself * * * by taking * * * the oaths * * * shall forfeit and pay the sum of five pounds.

* * * * *

" * * * [I]f the chief officer of the militia in any county, shall fail to appoint patrollers * * * such officer shall forfeit and pay the sum of five pounds, and every person appointed to patrol * * * failing to do his duty therein shall pay the sum of five shillings, for every such failure * * * ; and in like manner the chief officer of the militia in the * * * city of Williamsburg and borough of Norfolk, shall appoint all the persons of their militia to patrol within the said city and borough, or within half a mile of the limits thereof * * * , which officers and patrollers shall be subject to the same fines and penalities * * * [as] in the case of patrollers in the counties."{EN-1759}

•[1757, 1758, 1759, 1761, 1762, 1764, 1766, 1769, and 1772] "[A]ny officer receiving information of any invasion or insurrection from any officer of an adjacent county * * * that shall refuse to raise his militia, and call a council of his field officers and captains, for the determination of what is necessary to be done on such information, shall forfeit and pay

the sum of two hundred pounds, and every officer summoned to such council * * * that shall refuse to attend * * * shall forfeit and pay the sum of fifty pounds.

" * * * [I]f any officer of the militia who upon occasion of any invasion or insurrection, shall receive any orders or informations * * * either for calling together the soldiers or marching them to any particular place, shall neglect or refuse to execute such orders or instructions in the best manner he is capable, every such officer so neglecting or refusing, shall respectively forfeit and pay the sums following, that is to say, every lieutenant of a county the sum of two hundred pounds; every colonel the sum of two hundred pounds; every lieutenant colonel the sum of two hundred pounds; every major the sum of one hundred pounds; every captain the sum of seventy five pounds; every lieutenant the sum of fifty pounds; every ensign the sum of twenty five pounds; every serjeant or corporal twenty pounds; and every soldier who shall be summoned to appear upon any such occasion and shall fail so to do, or shall fail to bring with him his arms, with one pound of powder and four pounds of ball, or shall refuse to march, shall forfeit and pay the sum of twenty pounds[.]

* * * * *

" * * * [I]f any inferior officer or soldier during the time the militia shall be employed for suppressing any invasion or insurrection * * * shall disobey the lawful commands of his superior officer, or behave himself refractorily, every officer so offending shall pay such fine, not exceeding fifty pounds; and every soldier so offending shall pay such fine, not exceeding five pounds, as by a court martial * * * shall be imposed; * * * and if any inferior officer or soldier during the time the militia shall be employed as aforesaid, shall be guilty of prophane swearing, drunkenness, or any other like offence, every person so offending shall * * * pay five shillings for every offence, so that the same at any one time doth not exceed twenty shillings[.]

* * * * *

" * * * [T]o the end a sufficient number of men may be appointed for guarding the batteries erected in the several rivers of this dominion, and to assist in the better managing the great guns there mounted, when occasion shall be, *It is hereby further enacted*, That it shall * * * be lawful for the governor * * * to appoint and assign such a number of the militia as he shall think fit to attend the said batteries, * * * which number of the militia shall be drafted out of any of the militia of the county by the commanding officer of such county in which such battery is or shall be erected, and shall be exempted from all private musters, except at such battery only during their attendance at such battery; and if any soldier drafted * * * shall refuse to enter upon the said service, or shall refuse to obey the commands and orders of the commanding officer at such battery, every soldier so offending shall forfeit and pay three pounds, * * * for every such refusal[.]"{EN-1760}

• [1762, 1766, and 1771] "[T]he several persons herein aftermentioned shall be * * * free and exempt from appearing or mustering either at the private or general musters of their respective counties * * * : All his majesty's justices of the peace * * * (except such as * * * bear any commission as officers of the militia * * *) all persons bred to and actually practising physick or surgery, and all inspectors at the publick warehouses appointed for the inspection of tobacco; and they shall not be subject or liable to any fine, forfeiture or penalty, for absenting themselves from the same.

"* * * *Provided always*, That the persons so exempted from mustering shall provide complete sets of arms * * * required for soldiers, for the use of the county, city or borough, wherein they * * * reside; and if they shall fail or refuse so to do, * * * then * * * the courts * * * are hereby empowered and required, to levy the value of such arms on each of them respectively.

* * * * *

" * * * [E]very person so exempted shall always keep in his house or place of abode such arms, accoutrements, and ammunition, as are * * * required to be kept by the militia * * * ; and if he shall fail or refuse so to do he shall forfeit and pay the sum of five pounds * * * : And such exempts shall also, in case of any invasion or insurrection, appear with their arms and ammunition * * * , and be subject to * * * the same fines, forfeitures and penalties, for non-appearance or misbehaviour, * * * as the other militia * * * .

" * * * [I]f any soldier shall at any general or private muster refuse to perform the command of his officer, or behave himself refractorily or mutinously, or misbehave himself at * * * [a] court-martial, he shall forfeit and pay the sum of forty shillings current money[.]"{EN-1761}

• [1766] "[I]t shall and may be lawful for the chief officer of the militia in each county * * * to appoint an officer and * * * men of the militia * * * once in every month, or oftener if * * * required * * * , to patrol and visit all negro quarters and other places suspected of entertaining unlawful assemblies of slaves, servants, or other disorderly persons * * * .

" * * * [I]f the chief officer of the militia, in any county, shall fail to appoint patrollers * * * , such officer shall forfeit and pay the sum of ten pounds; and every person appointed to patrol * * * , failing to do his duty * * * , shall pay the sum of twenty shillings for every failure[.]"{EN-1762}

• [1766 and 1771] "The * * * chief commanding officer of the militia in every county shall list all male persons of the people called Quakers, above the age of eighteen years, and under the age of sixty years, within his county, under the command of such captain as he shall think fit; and if upon any invasion or insurrection the militia * * * to which such Quakers belong, shall be drawn out into actual service, and any Quaker so inlisted shall refuse to serve or provide an able and sufficient

substitute in his room, if thereto required * * * every Quaker so refusing * * * shall forfeit and pay the sum of ten pounds[.]"{EN-1763}

• [1775] "[E]very officer of minute-men who shall absent himself either from battalion duty or the private musters, in their counties, * * * shall be subject to the following fines, to wit: The colonel, for every day's absence from battalion duty thirty shillings; the lieutenant-colonel, twenty five shillings; the major, twenty shillings; a captain, twelve shillings; a lieutenant, eight shillings; an[ ] ensign, six shillings; a serjeant, five shillings; a corporal, drummer, and fifer, four shillings; and each private minute-man three shillings; an adjutant, twenty shillings; a quarter-master, twelve shillings; and a serjeant-major, six shillings. And for non-attendance at private musters, * * * the officers and minute-men shall, for every day's absence, be subject to the following fines, to wit: a captain, twelve shillings; a lieutenant, eight shillings; an[ ] ensign, six shillings; a serjeant, five shillings; a corporal, drummer, and fifer, four shillings; and each private minute-man three shillings. * * * And if any officer or soldier [among the Minutemen], during the time of his attendance on training duty, in battalion or companies, * * * shall refuse to obey the commands of his superiour officer, or behave himself mutinously or refractorily, or shall in any other manner transgress the rules of good order and decency, every such offender shall or may be * * * fined, in any sum not exceeding one month's pay, as shall be determined by the judgment of a court-martial * * * .

* * * * *

" * * * [E]very officer of the minute-men receiving notice from any other officer of the minute-men * * * of any invasion or insurrection, shall forthwith raise the men under his command, and send intelligence to the commanding-officer of the minute-men of that county, and also the commanding-officer of the militia, or, being himself commanding-officer of the minute-men of that county, shall immediately raise the men under his command, and proceed to oppose the enemy, taking care to despatch intelligence to the commanding-officer of the district, and also to the officer of the minute-men in the next adjacent county, who is to proceed in the same manner as the officer first receiving such intelligence is directed to do.

* * * * *

" * * * [E]very officer or militia man, and every officer and minute-man, who shall refuse, or unreasonably delay, conforming to the above directions, in every particular, shall, for every refusal or delay, forfeit and pay the several sums following, to wit: Every lieutenant of a county the sum of two hundred pounds, every colonel two hundred pounds, every lieutenant-colonel (either of the minute-men or militia) the sum of two hundred pounds, every major of the minute-men or militia the sum of one hundred pounds, every captain the sum of seventy five pounds, every lieutenant the sum of fifty pounds, every ensign the sum of

ten pounds, every serjeant and corporal the sum of five pounds; and every soldier or minute-man failing to appear, and not bringing with him his arms, shall forfeit and pay the sum of five pounds.

* * * * *

" * * * [E]very county-lieutenant * * * failing to appoint a general muster * * * shall forfeit and pay one hundred pounds; and every colonel, lieutenant-colonel, or major, failing to appear with their proper arms at any general muster, shall forfeit and pay ten pounds; and every captain failing to muster and exercise his company * * * shall forfeit and pay forty shillings for every neglect; and failing to appear at any general muster, shall forfeit and pay fifty shillings. Every lieutenant failing to appear at any muster twenty shillings, and every ensign, for the like failure, the sum of twenty shillings; and every soldier not appearing, or appearing without proper arms, five shillings; or for not bringing with him three charges of powder and ball, three shillings; or failing to bring into the field, when required by his commanding officer, one pound of powder, and four pounds of ball, five shillings. And every captain * * * , failing to return the list of the persons who shall not appear at muster to the courts-martial, or who shall appear without proper arms, powder, and ball, shall forfeit and pay ten pounds * * * .

* * * * *

" * * * [E]very officer of the militia * * * shall, at all times that he acts on duty, at any private or general muster, appear armed in the following manner, that is to say: every county lieutenant, colonel, lieutenant-colonel, and major, with a sword, and every captain and lieutenant with a fire-lock and bayonet, and a sword, and three charges of powder and ball; every ensign with a sword; every serjeant and corporal with a sword and halberd, under the penalty of twenty shillings * * * .

" * * * [T]he soldiers shall be allowed six months after enlisting to provide themselves with arms, and in the mean time shall bring with them such arms as they have, under the penalty of five shillings, to be inflicted by a court-martial * * * .

" * * * [A]ll fines and penalties incurred by infants or servants, for breach or neglect of duty in any particular service by this ordinance required of them, shall be paid by the parent, guardian, or master, of such infant or servant; and if the breach or neglect of such servants is not occasioned by their masters influence or direction, then the fines incurred by them, and so paid by their masters, shall be repaid to their masters, by the farther service of such servants after the times they are bound to serve are expired.

"*And* * * * if any collector, appointed by a court-martial, shall refuse to collect the fines imposed by such court-martial, * * * he shall forfeit and pay one hundred pounds; and if any collector refuses, or unreasonably delays, to pay all fines by him collected * * * , he shall forfeit and pay double the amount thereof.

* * * * *

" * * * [T]his ordinance shall, by command of each colonel, be publickly read at the head of his regiment, as soon as the same is embodied and formed, and once in six months thereafter, under the penalty of one hundred pounds, to be paid by such colonel for every neglect; and the same shall also be publickly read at every meeting of a battalion of the minute-men in each district, and at every general muster, by the order of the colonel, county-lieutenant, or chief officer then present, under the penalty of one hundred pounds, to be paid by any such officer for every neglect."{EN-1764}

•[1775] "[E]ach minute-man who shall furnish himself with a good musket, or other gun, to be approved of by his captain, shall be allowed by the publick ten shillings per annum, as a consideration for the use thereof, and shall be liable to a fine of twenty shillings for not appearing with the same when called on duty.

* * * * *

" * * * [N]o dissenting minister, who is not duly licensed * * * , shall be exempted from bearing arms in the militia * * * ; and * * * overseers, heretofore exempted, shall be obliged to furnish themselves with arms and ammunition, in the same manner as the militia men, and shall be obliged to act as patrollers when thereto required by the commanding officer of the militia of the county, or corporation, wherein they reside; and if any militia man, or overseer, shall neglect or refuse so to do, he or they so refusing shall be liable to a fine of five shillings for every neglect or refusal[.]"{EN-1765}

•[1777] "[T]he captains * * * shall have power to order * * * their serjeants * * * to give notice to every person belonging to the company of the time and place of * * * [each] general or private muster * * * ; and if any serjeant, so appointed, shall fail in his duty, he shall forfeit and pay forty shillings for every such failure. * * * If any soldier be certified to the court martial to be so poor that he cannot purchase * * * arms [required of Militiamen], the * * * court[-martial] shall cause them to be procured at the expense of the publick, * * * which arms shall be delivered to such poor person to be used at musters, but shall continue the property of the county; and if any soldier shall sell or conceal such arms, the seller or concealer, and purchaser, shall each of them forfeit the sum of six pounds. * * *

"And if any poor soldier shall remove out of the county, and carry his arms with him, he shall incur the same penalty as if he had sold such arms * * * .

" * * * Every captain * * * shall, at every general muster, make up and report to his county lieutenant a state of the company last assigned to him, noting therein such as are dead, removed, or exempted, and adding the names of such persons, not already enrolled, as are within the extent of his company, and ought to be enrolled; and, on failure to make such

report, shall forfeit five pounds. For failing to qualify himself to a commission at the first or second court which shall be held, after accepting the same, every officer shall forfeit five pounds. For failing to enrol the militia, or to appoint a general muster, the county lieutenant * * * shall forfeit one hundred pounds. For not appointing a private muster, the captain * * * shall pay forty shillings. For failing to appear at any general muster properly armed, or at any court martial, every county lieutenant and field officer shall pay ten pounds. For failing to appear at any court martial, every captain shall pay forty shillings. For failing to appear at any general or private muster properly armed or accoutred, every captain shall forfeit forty shillings, every lieutenant or ensign twenty shillings, every non-commissioned officer or soldier five shillings. For not returning to the next court martial a true list of delinquents in his company, every captain * * * shall forfeit ten pounds. Every officer failing to furnish himself with one pound of powder shall forfeit and pay ten shillings, and the same for failing to furnish himself with four pounds of ball; and every soldier failing therein shall likewise be liable for the same penalties, which penalties, where incurred by infants, shall be paid by the parent or guardian, and where incurred by servants shall be paid by the master, who, if such delinquency were without his influence or direction, may retain so much out of the hire of such servant, or be compensated by farther service, to be ascertained by the county court.

* * * * *

" * * * [I]t shall * * * be lawful for the chief officer of the militia in every county * * * , yearly, to appoint an officer, and so many men of the militia as to him shall appear to be necessary * * * , to patrol and visit all negro quarters, and other places suspected of entertaining unlawful assemblies of slaves, servants, or other disorderly persons * * * .

" * * * And every commanding officer of the militia failing to appoint patrollers * * * shall forfeit and pay the sum of fifty pounds; and every person appointed to patrol * * * , and failing to do his duty, shall forfeit and pay the sum of twenty shillings for every such failure * * * .

* * * * *

"This act shall be read to every company of the militia, by order of the captain * * * , at the first muster next succeeding every general muster, on penalty of five pounds for every omission."{EN-1766}

• [1777] "[F]or the more speedy and certain completion of the * * * new battalions, every county, city, and borough [with certain exceptions] * * * , in case the * * * officers by them appointed * * * shall not * * * enlist the quota of men allotted to [them]* * * , shall make up such deficiency by draughts * * * from their respective militias * * * .

" * * * And every commanding officer failing to summon the field officers and magistrates [for that purpose] * * * shall forfeit and pay five hundred pounds; and every field officer and magistrate failing to attend * * * shall for each failure * * * forfeit and pay the sum of one hundred

pounds * * * over and above the fines already imposed by the militia and invasion laws."{EN-1767}

• [1779] "Every commanding officer of a battalion for refusing or neglecting to turn out, train, and exercise his battalion, or for refusing or neglecting to perform any of the other duties required by the * * * [Militia] acts; or who shall neglect to examine the returns and levy the fines upon delinquents, shall forfeit and pay the sum of two hundred and fifty pounds. Every county lieutenant or next commanding officer, the sum of two hundred and fifty pounds. Every other field officer, the sum of one hundred pounds. Every captain, the sum of fifty pounds. And every lieutenant or ensign, the sum of twenty five pounds. Every non-commissioned officer or private who shall neglect or refuse to attend any general or private muster * * * shall forfeit and pay the sum of three pounds for every offence, except as is excepted by the * * * [Militia] acts. Every non-commissioned officer or private, who at any muster shall not obey the lawful commands of his superiour officer, or shall behave mutinously, riotously, get drunk or not demean himself as a non-commissioned officer or soldier, * * * shall forfeit and pay a sum not exceeding ten pounds. * * * Every field officer or inferiour commissioned officer refusing or neglecting to obey the lawful commands of his superiour officer, misbehaving when on duty, or not demeaning himself as an officer, * * * upon conviction of any such offence, shall be fined at the discretion of * * * [the] court[-martial]. * * * And * * * if at any time it shall be necessary to call the militia together for the purpose of drafting men for the continental army or any other purpose, the officers and soldiers shall be subject to the same fines and penalties for not appearing * * * as for not appearing at general musters. * * *

" * * * [T]his act shall be publickly read at the head of each company by the * * * commanding officer thereof, within one month after receiving the same, under the penalty of twenty pounds."{EN-1768}

• [1780] "[W]hereas it has been a practice of many tradesmen to entice their apprentices to enlist as soldiers, and to sell them as substitutes for large sums of money; *Be it enacted*, That if any tradesman or other person to whom any infant is, or shall be bound as an apprentice, shall directly or indirectly take or receive, or agree to take or receive any money or other gratuity in consideration of such apprentice, his enlisting as a soldier or sailor in any corps whatsoever, every such tradesman or person so offending, not being an able bodied man under the age of fifty years, shall forfeit and pay double the sum of money or worth of such other gratuity so taken, received, or agreed for * * * .

"And whereas a practice has prevailed of enlisting men for small bounties and afterwards selling them * * * for higher bounties * * * ; *Be it enacted*, That every person guilty of such offence, shall be subject to the same penalties as tradesmen and others enlisting or selling their apprentices[.]"{EN-1769}

• [1781] "[F]or the due conviction of all such delinquents [that is, deserters], a court-martial shall * * * be held * * * under the penalty of ten thousand pounds of tobacco on such county lieutenant or commanding officer neglecting to order the same, and of five thousand pounds of tobacco upon every member of such court failing to attend[.]

* * * * *

" * * * [F]or the due promulgation of this act and the better information of the militia, *Be it* * * * *enacted,* That such a number of printed copies of this act * * * as the governor may deem necessary, shall be with all possible expedition transmitted to each county in this commonwealth for the use of the militia officers therein, and shall by such officers be read to their respective militias at every general and petty muster. Each county lieutenant failing herein shall for every offence forfeit and pay the sum of five thousand pounds of tobacco; each field officer three thousand; and each captain two thousand pounds of tobacco.

"*And be it farther enacted,* That all the penalties inflicted by the [existing laws to regulate and discipline the militia and to provide against invasions and insurrections] * * * shall cease, and in lieu thereof there shall be inflicted an additional penalty in the proportion of ten for one upon every officer, non-commissioned officer and private, for neglect or failure of duty therein prescribed[.]"{EN-1770}

• [1782] "[T]he governor shall cause to be delivered to the * * * commanding officers of the militia of such counties as are most exposed to the incursions of the enemy, and to the officers of the militia of the city of Williamsburg, and borough of Norfolk, such a number of arms as he may think necessary * * * ; who, on having served their tour of duty, shall return their arms, in good order, * * * to be delivered in like manner to such of the militia as stand next in rotation.

" * * * [T]he penalties and forfeitures for every neglect of duty in any officer of the militia, or militia-man, whether of the cavalry or infantry, shall be the same * * * as is directed and prescribed by [the Militia Act of 1777] * * * .

" * * * [E]very militia-man to whom arms shall be delivered * * * , who shall neglect or refuse to return the same * * * , shall forfeit and pay the sum of twelve pounds[.]"{EN-1771}

• [1784 and 1785] "Any officer ordered * * * to give * * * notices [of general and private musters], failing therein, shall, for every offence, forfeit and pay five pounds; and every sergeant so failing, shall forfeit and pay one pound for every such failure * * * . If any private shall make it appear to the satisfaction of the court[-martial] * * * appointed for trying delinquencies * * * , that he is so poor that he cannot purchase the arms * * * required, such court shall cause them to be purchased out of the money arising from delinquents. The arms so purchased * * * the captain of the company to which such poor private may belong * * * shall deliver * * * to the private, but they shall continue the property of the county;

and if any private shall sell or conceal the same, the seller, concealer, and purchaser, shall each forfeit and pay four pounds * * * . And if any poor private shall remove out of the county, and carry such arms with him, he shall incur the same penalty as if he had sold them.

* * * * *

" * * * [T]he commanding officer of the militia in every county, shall * * * in every year, appoint an officer, and so many men of the militia as to him shall appear necessary * * * to patrole and visit all negro quarters, and other places suspected of entertaining unlawful assemblies of slaves, servants, or other disorderly persons * * * . And every commanding officer failing to appoint patrollers * * * shall forfeit and pay ten pounds; and every person appointed to patrole, failing to do his duty, shall forfeit and pay twenty shillings for every such failure * * * .

* * * * *

" * * * [T]he following forfeitures and penalties shall be incurred for delinquencies, viz. By the county lieutenant or commanding officer of a county, for failing to take any oath, to summon any court or board, to attend any court or board, to transmit any recommendation of an officer * * * to the governor, to deliver any commission * * * , to appoint a general muster, to attend such muster armed as required, to report delinquencies, to make a general return of his militia to the governor * * * shall, for each and every such offence or neglect, forfeit and pay twenty pounds; failing to send into actual service any militia called for by the governor, or to turn out his militia upon an invasion or insurrection of his county, fifty pounds: By a lieutenant colonel commandant[954], for failing to take any oath, to attend any court or board, to appoint a regimental muster, to give notice of a general muster, to examine his regiment, to report delinquencies, or to make any return as directed * * * , he shall forfeit and pay for each and every offence or neglect, ten pounds; failing to call forth from his regiment, with due dispatch, any detachment of men and officers, armed and equipped, as shall * * * be required by the commanding officer, on any call from the governor, invasion of, or insurrection in his county, or requisition of a neighbouring county, twenty-five pounds: By a major [955] for failing to take any oath, to attend any court or board, to attend any muster armed * * * , he shall for each and every such offence or neglect, forfeit and pay eight pounds; failing to repair to his rendezvous when summoned upon any call of the governor, invasion of or insurrection in the county, or requisition of the commander of a neighbouring county, he shall forfeit and pay sixteen pounds: By a captain, for failing to take any oath, to attend any court, to enroll his company, to appoint private musters, to give notice of a general or

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[954] In the Act of 1785, this position was filled by a Colonel.

[955] In the Act of 1785, this position was filled by a Lieutenant Colonel or a Major.

regimental muster, to attend any muster armed, to call his roll, examine his company, and report delinquencies, to make any return as is directed * * * he shall forfeit and pay for each and every such offence and neglect, six pounds; failing to call forth such officers and men, as the commanding officer shall * * * order from his company, upon any call from the governor, invasion of or insurrection in the county, or requisition from an adjacent county, or failing on any such occasion to repair to the place of rendezvous, he shall forfeit and pay twelve pounds: By a subaltern officer, for failing to take any oath, to attend any court or muster armed as directed, for each of the said offences he shall forfeit and pay three pounds; failing to repair to his place of rendezvous armed as required, when ordered upon any call from the governor, invasion of or insurrection in the county, or requisition from a neighbouring county, he shall forfeit and pay six pounds. * * * By a non-commissioned officer or soldier, for failing to attend at any muster, with the arms, ammunition, and equipments, as directed * * * , he shall forfeit and pay ten shillings; failing to repair to his rendezvous, when ordered upon any call from the governor, invasion of or insurrection in the county, or requisition from a neighbouring county, he shall forfeit and pay two pounds."{EN-1772}

• [1786] "[A]ny officer of the militia, called into actual service, neglecting or refusing to do his duty, shall * * * be amerced at the discretion of a court martial, that is to say, a county lieutenant in any sum not exceeding one hundred and fifty pounds; a colonel or lieutenant colonel not exceeding one hundred pounds; a major not exceeding seventy five pounds; a captain not exceeding fifty pounds; a lieutenant or ensign in any sum not exceeding forty pounds; and non-commissioned officers or privates in like manner refusing or neglecting shall also be fined * * * in any sum not exceeding twenty pounds each[.]"{EN-1773}

b. All of these fines, of course, were assessed against members of the Militia for neglect of or refusal to perform various affirmative duties. Fines were also assessed, though, against individuals whom the statutes exempted from most Militia duties, but who nonetheless chose not to avail themselves of those exemptions:

• [1705] "[I]f any overseer * * * exempted from being listed shall appear at any muster, either of horse or foot, he shall appear in arms fit for exercise, and shall perform his duty as other private soldiers do, on pain of paying the fine inflicted * * * upon such persons as do not provide troopers, arms and other accoutrements."{EN-1774}

• [1723] "[I]f an exempted overseer, or miller * * * shall presume to appear at any muster whatsoever, the party so offending, shall for every such offence, forfeit and pay one hundred pounds of tobacco, and shall immediately give security to the * * * commanding officer, for paiment of the same[.]"{EN-1775}

> • [1738, 1755, 1757, 1759, 1762, 1766, 1771, and 1775] "[I]f any exempted overseer or miller, shall presume to appear at any muster, or in any muster-field whatsoever, on the day on which such muster shall be appointed; the party so offending, shall, for every such offence, forfeit and pay ten shillings, or one hundred pounds of tobacco;[956] to be assessed upon him by the next court martial[.]"{EN-1776}

These fines might at first appear perverse, because they penalized individuals who waived what seemed to be personal statutory benefits. That, however, would be a superficial assessment of the situation. At base, the ostensibly personal benefits these exemptions provided actually embodied and facilitated fulfillment of particularly important duties to the community, for the diligent performance of which the individuals were granted exemptions from other duties in the Militia that would have been imposed upon them. In any largely agricultural society in *pre*-constitutional times, a mill—along with the skilled miller who operated it—was central to economic activity. So millers were exempted from normal Militia duties, because the timely performance of their functions was vital to economic "homeland security". Their operations of their mills were accepted as the equivalent (or perhaps more than the equivalent) of any normal duties they might have performed as rank-and-file Militiamen. Similarly, in a community where agriculture was largely based upon large plantations worked by slave labor, overseers were central, not only to promote economic activity, but also to police the slaves. Militia "slave patrols" were mounted for general oversight of the bondsmen.[957] But, in the nature of things, these patrols could not maintain the close watch over the slaves that was necessary in order to maintain proper surveillance, enforce discipline, and maximize productivity on a day-to-day and even an hour-by-hour basis. Overseers did that. So, for overseers to appear at Militia musters contradicted the very purposes of their exemptions, and to some significant degrees jeopardized the community's economic, and even physical, security. Thus, millers and overseers were granted exemptions *to work at their trades in the public interest*, not to forsake their work by attending musters as idle spectators for their own personal amusement—and they were justifiably punished if they indulged in the latter activity at the expense of the former.

Of course, troublesome spectators in general fared no better than millers and overseers who proved derelict in their particular duties:

> [1779] "If any by-stander interrupt, molest, or insult any officer of soldier when on duty, or misbehave before any court-martial, he * * * shall be fined in any sum not exceeding ten pounds."{EN-1777}

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[956] The fine was restricted to ten shillings in 1755, then raised to twenty shillings in 1757.

[957] *See ante*, at 339-343 and 392-395, *and post*, at 718-723.

(Actually, this was not the worst of such spectators' possible worries, as they could have been arrested, as well as merely fined, for their misbehavior.[958]) These irksome "by-stander[s]" might have included individuals exempted from Militia service in the Locality, because they were too old, too young, not able-bodied, or merely transient. They might have included individuals not required to participate in musters at all, such as women, people of color (except those who were "to be emploied as drummers or trumpeters" or "to do the duty of pioneers, or * * * other servile labor"),{EN-1778} or perhaps Militiamen from jurisdictions other than those which were conducting the private musters or courts-martial at issue. Or they might have included individuals who enjoyed some specific statutory exemptions from mustering, such as public officials or practitioners of some critical trade or profession (other than millers and overseers). In any event, the seriousness of Militia training required that their interference be punished.

c. Although misbehavior was adjudicated and fines were assessed through Militia courts-martial, normal civil proceedings usually were employed to collect those judgements:

> • [1643] "[M]asters of every family shall bring with them to church on Sondays one fixed and serviceable gun with sufficient powder and shott vpon penalty of ten pounds of tobacco for every master of a family so offending to be disposed of by the churchwardens who shall leavy it by distresse[.]"{EN-1779}
>
> • [1691] The Governor and his Council ordered that "y^e^ Comanders in Cheif are to cause * * * delinquents to be fined as y^e^ Law provides * * * and y^e^ Sherrives of y^e^ Severall Counties are * * * Strictly required to Collect all Such fines as shall be turn'd to him and on refusall to distrain for them as y^e^ Law provides".{EN-1780}
>
> • [1705] "That the severall fines and penaltys * * * which the * * * ffield officers * * * shall * * * order and direct, be levyed by distress and sale of the goods and chattles belonging to the defaulter or offender by warrant * * * to the sheriff (in case the defaulter or offender refuse to pay the same in specie * * * without further process)[.]"{EN-1781}
>
> • [1723] "[W]here any person on whom any fine shall be laid or assessed * * * shall fail or refuse to pay the same to the sheriff, in specie, * * * the sheriff * * * [may] levy the same by distress and sale of the offender's goods * * * . And if * * * the sheriff * * * can find no goods whereon to make distress, * * * the sheriff * * * [shall] cause the body of the said offender to be committed to the county goal, without bail or mainprize, until he shall satisfy the same fine, and all fees incident, in the same manner, as in executions served at common law."{EN-1782}

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[958] *See ante*, at 663-664.

• [1738] "[F]or settling the fines to be inflicted upon all persons who shall fail to do their duty, * * * and on all other delinquents * * * , *Be it* * * * *enacted* * * * , That the several persons herein after mentioned, for such failure, shall forfeit and pay * * * [certain] sums * * * : To be recovered, with costs, by action for debt, or information, in any court of record, in this colony[.]"{EN-1783}

• [1748 and 1753] After listing the fines applicable to officers and soldiers in the Militia for various derelictions of duty, these statutes provided that "one moiety of all which forfeitures shall go * * * for and towards the better supplying with arms that county where such offence shall be committed, and the other moiety to him or them that will inform or sue for the same, to be recovered with costs, by action of debt, or information, in any court of record wherein the same shall be cognizable".{EN-1784}

• [1755] "[I]f it shall be made to appear to the court of any county * * * that any soldier inlisted in the foot, is so poor, as not to be able to purchase the arms [required of a Militiaman] * * * ; then such court shall * * * depute some person to send for the same to England * * * ; and if any person shall presume to buy or sell any such arms * * * , then and in such case, every person so buying or selling, shall forfeit and pay the sum of six pounds, to be recovered with costs by information before the court of the county to which the arms shall belong, or in the court of the county wherein the offender or offenders shall reside[.]

* * * * *

" * * * [T]he field officers and captains of every county * * * [shall] hold a court martial * * * to enquire * * * of all delinquents * * * : And such court shall * * * order the fines * * * to be levied upon all delinquents * * * . And after the holding of every * * * court[-martial], * * * the sheriff of the county * * * [shall] demand and receive the money or tobacco * * * charged, of the [delinquents] * * * and in case of nonpayment * * * levy the same by distress and the sale of the goods of the person refusing according to the directions of the laws now in force, enabling the sale of goods distrained for rent; and where any delinquent shall remove out of the county, before he hath paid and satisfied all fines laid on him, * * * and shall not leave sufficient effects in the county, to satisfy the same, then the * * * clerk shall send copies of the * * * orders against such delinquents to the sheriff of the county, into which he or they shall be removed, and such sheriff is * * * required to collect, levy and account for the same * * * .

* * * * *

" * * * [T]he fines and penalties incurred by infants and servants for the breach or neglect of their duty in any particular service * * * shall be paid by the parent, guardian or master, respectively; and if the breach or neglect of such servants is not occasioned by their master's influence or direction, then the fines incurred by them and so paid by the master,

shall be repaid to the master by the further service of such servant, after the time they are bound to serve is expired; which shall be determined by the county court or court of Hustings, in the city of Williamsburg or borough of Norfolk, wherein either of the parties reside, upon complaint made to them thereof, by such master.

* * * * *

" * * * [T]he fine * * * imposed on the * * * chief commanding officer of the militia, for neglecting to order general musters, * * * shall * * * be recovered with costs by action of debt or information, in any court of record."{EN-1785}

• [1757, 1759, 1762, 1766, and 1771] "[I]f it shall be certified to the court of any county, by order of the court-martial, that any soldier inlisted in * * * [a Militia] company is so poor as not to be able to purchase the arms [required of a Militiaman] * * * , then such court shall * * * immediately * * * depute some person to send for the same to Great-Britain * * * ; and if any person shall presume to buy or sell any such arms, * * * then, and in such case, every person so buying or selling shall forfeit and pay the sum of six pounds, to be recovered, with costs, by information, before the court of the county to which the arms shall belong, or in the court of the county wherein the offender or offenders shall reside[.]

* * * * *

" * * * [T]he field officers and captains of every county * * * shall * * * order the fines * * * to be levied upon all delinquents * * * : And * * * the sheriff of the county * * * is * * * required to demand and receive the money * * * charged of the [delinquent] * * * , and in case of non-payment * * * to levy the same by distress and sale of the goods of the person refusing, according to the directions of the laws now in force enabling the sale of goods distrained for rent; and where any delinquent shall move out of the county before he hath paid and satisfied all fines laid on him * * * and shall not leave sufficient effects in the county to satisfy the same, then the * * * clerk shall send copies of the * * * orders against such delinquents to the sheriff of the county into which he or they shall be removed, and such sheriff is hereby impowered and required to collect, levy and account for the same in the manner herein before directed.

* * * * *

" * * * [T]he fines and penalties incurred by infants and servants for the breach or neglect of their duty in any particular service * * * shall be paid by the parent, guardian, or master, respectively; and if the breach or neglect of such servants is not occasioned by their masters influence or direction, then the fines incurred by them and so paid by the master, shall be repaid to the master by the further service of such servant, after the time they are bound to serve is expired, which shall be determined by the county court, or the court of Hustings in the city of Williamsburg or

borough of Norfolk, wherein either of the parties reside, upon complaint made to them thereof by such master.

* * * * *

" * * * [T]he fine * * * imposed on the * * * chief commanding officer of the militia for neglecting to order general musters * * * shall and may be recovered with costs, by action of debt or information, in any court of record."{EN-1786}

• [1757, 1758, 1761, 1762, 1764, 1769, and 1772]. "[A]ll the fines inflicted by this act, and not otherwise directed, shall be one half * * * for and towards supplying with arms the militia of the county to which the offender belongs, and the other half to the informer, to be recovered with costs by action of debt or information in any court of record within this dominion."{EN-1787}

• [1766 and 1771] "[T]he * * * chief commanding officer of the militia in every county shall list all male persons of the people called Quakers, above the age of eighteen years, and under the age of sixty years, within his county * * * ; and if upon any invasion or insurrection the militia of the counties to which such Quakers belong, shall be drawn out into actual service, and any Quaker so inlisted shall refuse to serve or provide an able and sufficient substitute in his room, * * * every Quaker so refusing * * * shall forfeit and pay the sum of ten pounds; to be recovered before any justice of the peace of the county, upon the complaint of such * * * chief officer, and to be levied by distress and sale of the estate of the Quaker so refusing[.]"{EN-1788}

• [1775] "[T]he court-martial of each county and corporation shall * * * appoint a collector of all fines to be assessed at each sitting of such court * * * ; and in case of non-payment * * * , to levy the same by distress and sale of the goods of the person refusing, according to the laws enabling the sale of goods distrained for rent."{EN-1789}

• [1777] "[A]ll fines shall be collected by the sheriff of the county, who shall have power to levy the same in like manner * * * as in the case of execution by *fieri facias*; and on failing * * * or refusing to make such collection, shall be held accountable for the same, to be recovered with costs, before any court of record, by action, to be brought in the name of the members of * * * [the] court martial[.]"{EN-1790}

• [1782] "[E]ach class or district [of the Militia in each county] * * * shall * * * enlist * * * one man * * * to serve as a soldier in the continental army for three years or during the war, * * * or pay a sum equal to one eighth part of the taxes payable by the several persons of which such class shall consist * * * to such person as they * * * shall appoint to receive the same * * * . And in case of failure of the payment of such sum or delivering such soldier * * * the collector of each district * * * [shall] levy the sums due from the * * * delinquents * * * by distress

and sale of their goods and chattels, in the same manner as is by law directed in the case of county or parish levies[.]"{EN-1791}

• [1784 and 1785] "All fines to be assessed by virtue of this act, shall be collected by the sheriff of the county * * * . And should any person so charged with fines, fail to make payment * * * , the sheriff is * * * authorized to make distress and sale therefor, in the same manner as is directed in the collection of taxes."{EN-1792}

In some instances, fines were assessed in principle against individuals, but collected in practice from the groups to which those individuals belonged, not unlike a tax:

• [1780] "[A]ny Quaker or Menonist who shall be * * * drafted, shall be discharged from personal service, and * * * the commanding officer * * * is * * * required to employ any two or more discreet persons, to procure on the best terms they can, a proper substitute or substitutes to serve in his or their room, and to adjust and divide the charge thereof among all the * * * Quakers or Menonists, in the division to which such draft belongs, in proportion to their assessable property, and to authorize the sheriff of the county * * * to levy such charge by distress in case of any member refusing or neglecting to make payment[.]"{EN-1793}

• [1781] "[W]here any quaker or menonist shall be allotted to any division of the militia, who is to perform the succeeding tour of duty, he shall not be compelled personally to serve the same, but * * * the commanding officer * * * [may] cause to be levied on all the society of quakers and menonists in such county according to their assessable property, by warrant * * * directed to the sheriff * * * , such sum * * * of money as he shall think sufficient to procure a substitute for each quaker or menonist whose tour of duty it is, and the money when collected shall be deposited in the hands of the commissioners of the money tax, who shall pay the same * * * to such substitute * * * as may be employed for such quaker or menonist, and the overplus (if any) shall be returned to the said quakers or menonists in equal proportion to their different advancements or credited in their next money tax * * * . Any sheriff * * * failing to perform his duty * * * shall forfeit and pay five thousand pounds of tobacco * * * . The fines thus recovered shall go towards satisfying the quakers or menonists who shall be aggrieved thereby, and the overplus towards enlisting a soldier to serve in the continental army."{EN-1794}

• [1782] "[W]here any quaker or menonist shall be subjected to a tour of duty in consequence of the militia or invasion law, such quaker or menonist shall not be compelled to perform such duty, but the * * * commanding officer of the militia, shall * * * procure a substitute upon the best terms possible, * * * and the consideration agreed to pay him * * * shall in the first instance be against the estate of each quaker or

> menonist so draughted * * * , to be levied on their lands, goods, and chattels * * * ; and i[f] any of the said quakers or menonists so draughted, shall not have sufficient property on which a levy can be made, then * * * such substitute money, shall be levied on the property of all the quakers and menonists in the said county, that are subject to the militia service, each to pay in proportion to his taxable property."{EN-1795}

d. In addition to punishing past defaulters and deterring future derelictions of duty—

(1) A fine could actually benefit the individual paying it. As explained heretofore, in certain instances an individual Militiaman could choose to pay a fine as a means of effectively granting himself an exemption from some routine or extraordinary duty.[959] (Of course, no one sought such a self-generated exemption by submitting to corporal punishment or imprisonment, when those were possible penalties for misbehavior.) Such practical exemptions-in-fact were not free to the Militiamen who employed them; but presumably in any particular instance the value of the benefit exceeded its cost.

(2) Besides being of value to some Militiamen as individuals, fines served not only the disciplinary but also the pecuniary interests of the Militia as a whole, because the proceeds were applied to the purchase of firearms, ammunition, and other necessary equipment for Local units:

> • [1659 and 1662] "*BEE it enacted* that a provident supplie be made of gunn powder and shott to our owne people, and this strictly to bee lookt to by the officers of the militia, (vizt.) That every man able to beare armes have in his house a fixt gunn two pounds of powder and eight pound of shott at least which are to be provided by every man for his family * * * , and whosoever shall faile of makeing such provision to be fined ffiftie pounds of tobacco to bee laied out by the county courts for a common stock of amunition for the county."{EN-1796}
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> • [1666] "WHEREAS the officers of the militia have complained that divers refractory persons have in contempt of the authority impowring them, and to the ruyne of all military discipline refused to appeare upon the dayes of exercise * * * , *It is enacted* * * * that every person soe neglecting to appeare, shall for every such neglect be amerced and fined one hundred pounds of tobacco, to be disposed of by the militia to the use of the regiment[.]"{EN-1797}
>
> • [1684] "[E]very trooper, failing to supply himselfe * * * with * * * arms and furniture, and not * * * keeping the same well fixt, shall forfeite four hundred pounds of tobacco * * * , for the use of the county in which the delinquent shall live, towards the provideing of colours,

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[959] *See ante*, at 635-638.

drums and trumpetts therein, and every foot souldier soe failing to provide himselfe * * * , and not keeping the same well fixt, shall forfeit two hundred pounds of tobacco * * * for the use aforesaid[.]"{EN-1798}

• [1690] The Governor and his Council "Ord^{r}d * * * that all fines of Delinquents be Imployed for the buying of Drums, Armes and Amunition * * * and that the Offic^{rs} at the heads of their Companies acquaint the Soldiers that all fines shall be [so] Imployed[.]"{EN-1799}

• [1691] "[Y]^{e} Comanders in Cheif are to cause * * * delinquents to be fined as y^{e} Law provides, and to cause y^{e} fines to be imployed for y^{e} buying armes amunicon &c as y^{e} Law directs[.]"{EN-1800}

• [1691] The Governor and his Council "Ordered that the respective Comanders in Cheife in this Colony, doe forthwith issue their Orders, requireing that all fines on delinquent Souldiers be levied according to Law, and disposed of, as is directed[.]"{EN-1801}

• [1692] "It being represented to [the Governor and Council] * * * that the fines on delinquent Soldiers * * * have not been putt to the uses the Law directs, It is therefore Ordered that the Law * * * be both duely observed and performed".{EN-1802}

• [1705] "[T]he * * * ffield officers and captains have full power and authority to appoint and imploy a clerk to attend them * * * , and to allow the said clerk such sallary for his said service, and for providing necessary books and paper for their use as in their discretion they shall think fit and reasonable, and to pay the same out of the penaltys and fines accrewing by th[e Militia] act.

" * * * [T]he * * * ffield officers and captains * * * have full power and authority to * * * dispose the tobaccoes which shall * * * accrew and arise upon the ffines, penaltys and fforfeitures * * * for paying * * * a clerk * * * , and for furnishing the severall troops and companys belonging to the county with necessary drums, colours, trumpets, leading staffes, partizans and halberts, and for procuring * * * books of military dissipline * * * , and after all these for providing arms and ammunition for the countys use with the overplus."{EN-1803}

• [1723] "[T]he * * * field officers and captains have full power and authority to appoint and employ a clerk to attend them at their meetings * * * and to allow the said clerk such salary * * * as in their discretion they shall think fit and reasonable, and to pay the same out of the penalties and fines accruing by this act.

" * * * [T]he * * * field officers and captains * * * have full power and authority to order and dispose of the fines, penalties, and forfeitures * * * for paying * * * a clerk, * * * and for furnishing the several troops and companies belonging to the county, with necessary drums, colours, trumpets, leading-staffs, partizans, and halberts, and after all those, for providing arms and ammunition for the county's use."{EN-1804}

• [1738] "[T]he field officers, and captains, of every county, * * * [shall] meet at the court-house of their counties * * * to hold a court martial * * * and to order and dispose of all * * * fines, in the first place, for buying drums, trumpets, and trophies, for the use of the troop or company from whence the same arise ; and afterwards, for supplying the militia with arms.

* * * * *

" * * * And, for settling the fines to be inflicted upon all persons who shall fail to do their duty, * * * and on all other delinquents * * * , *Be it further enacted* * * * , That * * * [certain] persons * * * , for such failure, shall forfeit and pay [certain] sums * * * ; one moiety * * * for and towards the better supplying the county with arms; and the other moiety to the informer, for his proper use."{EN-1805}

• [1748 and 1753] After setting out a list of fines for various breaches of duty by officers and soldiers in the Militia, the legislature mandated that "one moiety of all which forfeitures shall go * * * for and towards the better supplying with arms that county where such offence shall be committed, and the other moiety to him or them that will inform or sue for the same".{EN-1806}

• [1755] "[I]f * * * any soldier inlisted in the foot, is so poor, as not to be able to purchase the arms [required of a Militiaman] * * * ; then * * * [the county] court shall * * * send for the same to England * * * ; and if any person shall presume to buy or sell any such arms * * * , every person so buying or selling, shall forfeit and pay the sum of six pounds, * * * one moiety whereof shall be to, and for the use of the county, to which the arms shall belong, for the purchasing other arms, and the other moiety to the informer[.]

* * * * *

" * * * [S]uch court[-martial] shall and may * * * order the fines inflicted by this act * * * to be levied upon all delinquents * * * , and to order and dispose of all such fines, for buying drums, trumpets and trophies for the use of the militia of the county, and for supplying the militia of the said county with arms.

* * * * *

" * * * [T]he fine * * * imposed on the * * * chief commanding officer of the militia, for neglecting to order general musters, shall be one moiety to the informer, and the other to and for the use of the county, for providing arms[.]"{EN-1807}

• [1757, 1759, 1762, 1766, and 1771] "[I]f * * * any soldier inlisted in * * * [a Militia] company is so poor as not to be able to purchase the arms [required of a Militiaman,] * * * [the county] court shall * * * immediately * * * send for the same to Great-Britain * * * ; and if any person shall presume to buy or sell any such arms, * * * every person so buying or selling shall forfeit and pay the sum of six pounds, *

* * one moiety whereof shall be to and for the use of the county to which the arms shall belong for the purchasing other arms, and the other moiety to the informer[.]

* * * * *

" * * * [I]t shall and may be lawful for the field officers and captains of every county * * * to hold a court martial, which court shall have power * * * to order the fines inflicted by th[e Militia] act * * * to be levied upon all delinquents * * * , and to order and dispose of all such fines for buying drums and trophies for the use of the militia of the county, and for supplying the militia of the said county with arms[.]

* * * * *

" * * * [T]he fine * * * imposed on the * * * chief commanding officer of the militia for neglecting to order general musters, shall be one moiety to the informer and the other to and for the use of the county for providing arms[.]"{EN-1808}

• [1757, 1758, 1759, 1761, 1762, 1764, 1766, 1769, and 1772] "[A]ll the fines inflicted by this act, and not otherwise directed, shall be one half * * * for and towards supplying with arms the militia of the county to which the offender belongs, and the other half to the informer[.]"{EN-1809}

• [1775] "[T]he captain of each company shall * * * appoint one drummer and one fifer, who shall be paid for their attendance * * * ; and the said captains shall provide drums, fifes, colours, and halberds, at the publick expense, to be reimbursed out of the fines * * * .

" * * * [E]very officer of the militia * * * shall, at all times he acts on duty, at any private or general muster, appear armed * * * , under the penalty of twenty shillings; and the said fines to be levied by a court-martial, and appropriated to the purchasing arms and ammunition for the use of such as are not able to procure the same.

* * * * *

" * * * [T]he fines imposed * * * on the chief officer [of the Militia] for not enlisting the men in his county, and on the commanding-officer present in the county for not appointing general musters, shall be to the use of the county, for providing arms[.]"{EN-1810}

• [1777] "If any soldier * * * be so poor that he cannot purchase * * * arms [required of Militamen], the * * * court[-martial] shall cause them to be procured at the expense of the publick, to be reimbursed out of the fines on the delinquents of the county * * * .

" * * * Each captain shall appoint a drummer and fifer to his company, and also shall provide a drum, fife, and colours for the same, at the publick expense, to be reimbursed out of the fines on the delinquents of his county.

* * * * *

> "All fines * * * shall be appropriated, in the first place, to the payment of the salaries [of certain Militia personnel] * * * , then to reimbursing the publick treasury for any arms purchased for the poor soldiers of such county, and for drums, fifes, and colours, bought for the several companies; and if any surplus remain, it shall be laid out by the court martial in establishing and furnishing, for the use of their county, a magazine of small arms, field pieces, ammunition, and such other military stores as may be useful in case of invasion or insurrection."{EN-1811}
>
> •[1784 and 1785] "If any private shall make it appear to the satisfaction of the court * * * appointed for trying delinquencies * * * , that he is so poor that he cannot purchase the arms herein required, such court shall cause them to be purchased out of the money arising from delinquents.
>
> * * * * *
>
> " * * * Every person belonging to the * * * light companies, shall wear while on duty, such caps and uniforms as the executive shall direct, to be purchased by the commanding officer of the county, out of the monies arising on delinquents."{EN-1812}

These provisions were not simply hortatory, but instead declaratory and compulsory. For example, when in 1772 Virginia's Governor "informed the Board [that is, the Council], that he had been applied to, to remit certain Militia Fines" and "ask[ed] their advice", "the Board gave it as their Opinion, that all such Fines being appropriated by the Act of Assembly to particular Purposes, it was not in his Excellency's Power to remit them".{EN-1813}

e. In sum, throughout the *pre-*constitutional era, Virginia Militia's relied heavily on fines—imposed on essentially every conceivable category of default and misbehavior—in order to maintain discipline. True enough, from time to time complaints arose that a Militia Act "hath proved very ineffectual, whereby the colony is deprived of its proper defence in time of danger"—but one need simply compare the degree of reliance on fines in the Act of 1738 about which this very complaint was registered{EN-1814} to the degree of such reliance in the Act of 1755 in which the complaint served as a preamble and through which the problem was to be rectified{EN-1815} in order to conclude that Virginia's legislators never doubted that the exaction of fines could effectively enforce discipline in her Militia. Of course, in times of extreme crisis, when the performance of Militia duties entailed the greatest personal risk, all too many individuals might have sought—and apparently did seek—to shirk their responsibilities. This led, however, not to legislators' denial of the efficacy of fines in principle, but to their multiplication of the fines' severity—as in 1781, when a statute mandated "[t]hat all the penalties inflicted by the [then-existing laws to regulate and discipline the militia and for providing against invasions and insurrections] * * * shall cease, and *in lieu thereof*

there shall be inflicted an additional penalty in the proportion ***of ten for one*** *upon every officer, non-commissioned officer and private, for neglect or failure of duty*".{EN-1816}

The use of fines simply made much too good sense ever to be questioned. *First*, fines were relatively easy to impose and collect—by courts-martial initially, then through normal judicial processes with which everyone was familiar. *Second,* fines were more objective, predictable, and therefore just than corporal punishment or imprisonment, because in most cases (at least where the fines were paid) exactly the same statutorily defined penalty would be imposed for the same offence, every time. *Third*, fines were very flexible instruments of discipline—for, depending upon the degree of deterrence or punishment desired, they could be made light or heavy; as circumstances changed, they could be altered; if errors occurred in the determination of alleged defaulters' guilt, they could be remitted in full (which could never happen when corporal punishment or imprisonment was imposed as a penalty); and in many cases they could serve as the prices that Militiamen voluntarily paid for exemptions from routine duties. *Fourth*, fines were eminently practical, because they helped to make the Militia self-financing, by hypothecating to its use the moneys collected—thus compelling defaulters to do their duty in a direct and tangible manner even when, and in fact because, they had earlier failed to do their duty in another way (a result impossible of achievement through corporal punishment or imprisonment).

So, if (as Virginia concluded on the basis of both political theory and practical experience) "a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state",[960] then fines must be among, if not in the forefront of, the means most "proper, natural, and safe" to guarantee that the Militia always remain "well regulated". Indeed, the use of fines to impose Militia discipline must be part of the historical—and now the constitutional—definition of "a *well regulated* militia".[961]

5. Other judicial remedies. The Militia's reliance on the civil courts was not restricted to the collection of fines. In addition, normal judicial processes were employed to recover arms that were misappropriated by Militiamen or others:

> [1784 and 1785] "If any private shall make it appear to the satisfaction of the court * * * appointed for trying delinquencies * * * , that he is so poor that he cannot purchase the arms * * * required, such court shall cause them to be purchased out of the money arising from delinquents. The arms so purchased * * * shall continue the property of the county * * * . And if any person concerned in selling, purchasing, concealing or removing such arms shall be prosecuted for the penalty, and

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[960] Virginia Declaration of Rights (1776) art. 13.

[961] *See ante*, at 63-81.

> * * * shall fail to make instant payment, or give security * * * , he shall suffer * * * corporal punishment * * * . And the * * * commanding officer * * * may recover any arms so sold, concealed, or removed, by action or petition in detinue or trover, with costs."{EN-1817}

And resort to the courts was had in order to recover the costs of arms that should have been provided to the Militia as the *quid pro quo* for exemptions from mustering that were granted to certain categories of individuals:

> • [1757, 1759, 1762, 1766, and 1771] "[T]he several persons * * * exempted from mustering (except ministers of the church of England, the president masters or professors, and students of William and Mary college, the keeper of the public goal, overseers and millers, and all workers in any mine whatsoever) shall provide arms for the use of the county, city, or borough wherein they * * * reside, in the following manner, that is to say: Each counsellor, not being an officer of the militia, four compleat sets of arms * * * for a soldier; the speaker of the house of burgesses, not being an officer of the militia, four compleat sets * * * ; the receiver-general, auditor, and secretary, not being a counsellor or officer of the militia, each four compleat sets * * * ; the attorney-general, not being an officer of the militia, two compleat sets * * * ; the clerk of the council and clerk of the secretary's office, not being officers of the militia, each two compleat sets * * * ; the mayor, recorder, and aldermen of the city of Williamsburg and borough of Norfolk, * * * not being officers of the militia, each two compleat sets * * * . And if they shall fail or refuse so to do, * * * the several courts of the counties wherein the[se] persons * * * shall reside * * * are * * * impowered and required to levy the value of the same on each of them respectively."{EN-1818}
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> • [1762] "[T]he several persons herein after-mentioned shall be * * * free and exempt from appearing or mustering either at the private or general musters of their respective counties * * * : All his majesty's justices of the peace * * * (except such as * * * bear any commission as officers of the militia * * *) all persons bred to and actually practising physick or surgery, and all inspectors at the publick warehouses appointed for the inspection of tobacco; and they shall not be subject or liable to any fine, forfeiture or penalty, for absenting themselves from the same.
>
> " * * * *Provided always*, That the persons so exempted * * * shall provide complete sets of arms * * * required for soldiers, for the use of the county, city or borough, wherein they * * * reside; and if they shall fail or refuse so to do * * * then * * * the courts * * * are * * * required, to levy the value of such arms on each of them respectively."{EN-1819}
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> • [1766 and 1771] "[T]he several persons herein after mentioned shall be * * * free and exempt from appearing or mustering either at the private or general musters of their respective counties * * * , that is to say, all his majesty's justices of the peace * * * (except such as * * * bear any

> commission as officers of the militia * * *) all persons bred to, and actually practising physic or surgery, all the people called Quakers, and all inspectors at the public warehouses, appointed for the inspection of tobacco; and they shall not be subject or liable to any fine, forfeiture or penalty, for absenting themselves from * * * musters * * * .
>
> " * * * *Provided always*, That the persons so exempted (not being Quakers) shall provide compleat sets of arms * * * required for soldiers, for the use of the county, city or borough, wherein they * * * reside: And if they shall fail or refuse so to do * * * then * * * the courts * * * are hereby impowered and required to levy the value of such arms on each of them respectively."{EN-1820}

C. Limitations on punishments. The imposition of fines and other penalties on Militiamen who were somehow derelict in the performance of their duties was never arbitrary or capricious. Neither were punishments imposed without affording the putative defaulters their opportunities for explanation, excuse, and exculpation. The basic principle of evidentiary due process in this regard was stated very early on:

> [1619] "All persons whatsoever upon the Sabaoth daye shall frequent divine service and sermons both forenoon and afternoon, and all suche as beare arms shall bring their pieces swordes, poulder and shotte. And every one that shall transgresse this lawe shall forfeite three shillings a time to the use of the churche, *all lawful and necessary impediments excepted*."{EN-1821}

Later, "lawful and necessary impediments" were explicitly set out in statutes, or left to alleged defaulters to raise and courts-martial to judge the reasonableness thereof on an *ad hoc* basis. All of them, though, were in that era (and remain today) familiar matters of legal common sense:

1. Statute of limitations. One such device was a limitation on the time for which the assessment of a fine could be delayed:

> [1705 and 1723] "That nothing * * * be construed to give any power or authority to the ffield officers and captains * * * to mulct any defaulter or offender for any default or offence whatsoever * * * which hath been made or done above a year[.]"{EN-1822}

Such a limitation does not appear in any of the later Militia Acts, obviously because Virginia's General Assembly considered it unnecessary—which indicates that the penalties imposed by those Acts were to a satisfactory degree timely enforced, so that few Militiamen could justifiably complain of being prosecuted for stale claims. For example, the Militia Act of 1738 dealt with two types of derelictions of duty. The first involved an immediate summary punishment:

> [E]very captain shall, once in three months, or oftner, if required, muster, train, and exercise his troop or company: And the county lieutenant, * * * in every county, shall cause a general muster and exercise of all the troops and companies within his county, to be made in the month of September, every year. And if any soldier, during the time he is in arms at a general muster, shall refuse to perform the commands of his officer, or behave himself refractorily or mutinously, it shall and may be lawful, to and for the chief commanding officer, then present, to cause such offender to be tied neck and heels, for any time, not exceeding five minutes: And for a second offence * * * the offender shall be punished by the sentence of the majority of the field officers and captains, then present; who are hereby impowered * * * to commit the offender to the county goal, there to remain for any time not exceeding ten days.{EN-1823}

If these penalties were not enforced by the appropriate officer or officers "then present", they could not be enforced later on. The second type of default involved punishment after a hearing by a court-martial:

> [E]very captain * * * shall duly make a list of all the persons upon his muster roll, who * * * do not appear at any of the * * * musters, armed and accoutred, * * * and return the same * * * to the court-martial, to which he belongs.
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> * * * * *
>
> * * * [T]he field officers, and captains, of every county * * * are hereby required to meet * * * on the day next following the general muster, then and there to hold a court martial; which * * * shall have power * * * to enquire * * * of all delinquents returned by the captains, for absence from musters, or appearing without arms and accoutrements; and to order the fines * * * to be levied upon all delinquents * * * . And after the holding of such court, the clerk shall make out copies of all their orders, and deliver the same, within one month next following the said court, to the sheriff of the county; who is * * * required to demand and receive the money or tobacco therein charged, of the persons made chargeable therewith[.]{EN-1824}

The court-martial immediately followed a general muster, and "then and there" heard complaints that arose out of derelictions of duty at that general muster or at the private musters that followed the preceding general muster. Obviously, if penalties for misbehavior at those musters were not enforced at that court-martial, they could not be enforced at a subsequent one. This was the pattern followed in the Militia Acts of 1755, 1757, 1759, 1762, 1766, 1771, 1775, and 1777.{EN-1825}

On the other hand, a Militia Act passed in 1779 emphasized the General Assembly's determination that liability for defaults and offences should not be allowed to lapse because of the accident that the event at issue occurred when one

statute was in force, but a later court-martial could impose a fine only under the aegis of a superseding statute. Referring to earlier Acts "'for regulating and disciplining the militia'" and "'for providing against invasions and insurrections'", the Act of 1779 mandated that "[t]he said recited acts as far as they come within the perview of this act, stand hereby repealed, provided that any court-martial which may be held by virtue of this act, shall proceed upon all delinquencies committed or done before the passing of this act according to the said recited acts, and determine accordingly".{EN-1826} And to the end that offenses would not escape adjudication through mere procedural snags, a Militia Act passed in 1781 (and reaffirmed on this point in 1782) provided that

> whereas there are many difficulties in bringing delinquent officers of the militia to punishment; *It is* * * * *enacted*, That any militia officer either on duty or not, for crimes relating to the duties of his office may be arrested in the same manner as is allowed by the law-martial, and when arrested shall be tried within the number of days prescribed by the continental articles of war, * * * and if the rank of the delinquent officer shall make it impossible to get a court-martial for his trial * * * , the governor * * * shall order a court-martial to be appointed out of the militia at large within any reasonable time, for the trial of the offender.{EN-1827}

2. Double jeopardy. This is an old principle in English law. As described by Blackstone,

> the plea of *auterfois acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence. And hence it is allowed as a consequence, that when a man is once fairly found not guilty upon an indictment, or other prosecution, he may plead such acquittal in bar of any subsequent accusation for the same crime. * * *
>
> * * * [T]he plea of *auterfois convict*, or a former conviction for the same identical crime, though no judgment was ever given, or perhaps will be, * * * is a good plea in bar to an indictment. And this depends upon the same principle as the former, that no man ought to be twice brought in danger of his life for one and the same crime.[962]

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[962] *Commentaries on the Laws of England, ante* note 142, Volume 4, at 329-330 (footnote omitted). *See also* W. Hawkins, *A Treatise of The Pleas of the Crown, ante* note 434, Book II, Chapter XXXV, § 1, at 368, *and* Chapter XXXVI, § 10, at 377. Of course, this principle is now incorporated in the clause of the Fifth Amendment to the Constitution which provides: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb".

Although not all of the rules of English common law were adopted throughout the American Colonies,[963] this tenet did become part of Virginia's general law.[964] So it should not be surprising to find that various of Virginia's Militia Acts explicitly applied it, too:

> • [1755] "[I]f any inferior officer or soldier, during the time the militia shall be employed for suppressing any invasion or insurrection, * * * shall disobey the lawful commands of his superior officer, or behave himself refractorily, or shall be guilty of prophane swearing, drunkenness, or any such like offence, every person so offending, shall pay such fine* * * as by a court martial * * * shall be * * * imposed.
>
> " * * * *Provided always*, That no such person shall * * * be subject to a second trial for the same offence, after he hath been once condemned or acquitted thereof."{EN-1828}

> • [1757, 1758, 1759, 1761, 1762, 1764, 1766, 1769, and 1772] "[I]f any inferior officer or soldier during the time the militia shall be employed for suppressing any invasion or insurrection * * * shall disobey the lawful commands of his superior officer, or behave himself refractorily, every officer so offending shall pay such fine, not exceeding fifty pounds; and every soldier so offending shall pay such fine, not exceeding five pounds, as by a court martial * * * shall be imposed; * * * and if any inferior officer or soldier during the time the militia shall be employed as aforesaid, shall be guilty of prophane swearing, drunkenness, or any other like offence, every person so offending shall upon conviction thereof before a court martial * * * pay five shillings for every offence * * * . And no person shall be subject to a second trial for the same offence, after he hath been once condemned or acquitted thereof."{EN-1829}

3. Maximum number of fines allowable for the same type of offense. Perhaps peculiar to the Militia statutes were limitations on the number of times a Militiaman might be fined for the same type of default in duty:

> • [1705] "That the * * * chief officer of the militia of every county once every year at least, cause a generall muster and exercise * * * , and that every captain * * * once in every three months, muster, train and exercise his troop or company, or oftener if occasion require.
>
> "*Provided*, That no soldier in horse or foot, be fined above five times in one year for neglect in appearing.
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> * * * * *
>
> "And forasmuch as some difficulty hath been found in procuring some soldiers to be willing to serve as serjeants, corporals, drummers or

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[963] *See* W. Blackstone, *Commentaries on the Laws of England, ante* note 142, Volume 1, at 106-107.

[964] *See* Arthur P. Scott, *Criminal Law in Colonial Virginia* (Chicago, Illinois: University of Chicago Press, 1930), at 81-82, 102.

trumpters, all of them absolutely necessary in troops and companys: For prevention of the like in time to come,

"*Be it enacted* * * * , That whatsoever soldier shall refuse to take upon him, act in and execute any of the said places and offices in the troop or company wherein he is listed, being known to be capable and thereunto appointed by his captain, shall for such his refusall be fined five hundred pounds of tobacco, which once being paid, he shall thereafter be exempted from being fined for any such refusall."{EN-1830}

• [1723] "[T]o the end, the militia * * * may be the better fitted for service, *Be it* * * * *enacted* * * * , That the * * * chief officer of the militia of every county, once every year at least, cause a muster and exercise of all the troops and companies in his county * * * —And that every captain, once in every three months, muster, train, and exercise his troop or company, or oftner, if occasion require. *Provided*, that no officer or soldier be fined above five times in one year.

* * * * *

" * * * And forasmuch, as some difficulty hath been found in procuring some soldiers to be willing to serve as serjeants, corporals, drummers, or trumpeters, all of them absolutely necessary in troops and companies: For prevention of the like in time to come, *Be it enacted* * * * , That whatsoever soldier shall refuse to take upon him, act in, and execute any of the said places and offices, in the troop or company wherein he is listed, being known to be capable, and thereunto appointed by his captain, shall, for such his refusal, be fined five hundred pounds of tobacco; which being once paid, he shall thereafter be exempted from being fined for any such refusal."{EN-1831}

• [1738] "Every soldier refusing to serve as a serjeant, corporal, drummer, or trumpeter * * * shall pay fifty shillings, or five hundred pounds of tobacco, at his election; but such person shall be fined but once for such refusal. Every person listed to serve in the horse, shall pay seven shillings and six pence, or seventy five pounds of tobacco: And every person listed in the foot, shall pay five shillings, or fifty pounds of tobacco, at their election, for not appearing at muster, compleatly armed and accoutred; so that no person be fined above five times a year, for such failure."{EN-1832}

• [1755, 1757, 1759, 1762, 1766, and 1771] "[Certain] persons * * * failing to do their duty * * * shall forfeit and pay * * * [certain] sums * * * . *Provided*, That no person be fined above six times in the year for any particular default[.]"{EN-1833}

As explained heretofore, this limitation functioned as a control which rank-and-file Militiamen could invoke against overzealous Militia officers.[965]

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[965] *See ante*, at 635-638.

In some instances, however, the sequence of penalties a statute imposed made it impossible for any single individual to commit more than two offences of a certain kind at any one time:

> • [1723] "[I]f any solider * * * shall, at any * * * muster, disobey his officers' commands, or behave himself disorderly or refractorily thereat, it shall * * * be lawful for the chief commanding officer * * * to cause such offender to be tied neck and heels, for any time not exceeding twenty minutes. And if such soldier shall thereafter offend, it shall * * * be lawful * * * to commit such offender to the county goal, there to remain for any time not exceeding ten days[.]"{EN-1834}

> • [1738] "[I]f any soldier, during the time he is in arms at a general muster, shall refuse to perform the commands of his officer, or behave himself refractorily or mutinously, it shall * * * be lawful, to and for the chief commanding officer * * * to cause such offender to be tied neck and heels, for any time, not exceeding five minutes: And for a second offence, at such general muster, the offender shall be punished by the sentence of the majority of field officers and captains, then present; who are * * * impowered * * * to commit the offender to the county goal, there to remain for any time not exceeding ten days. And if any soldier, during the time he is in arms, at any private muster, shall misbehave, as aforesaid, such offender shall be punished by any field officer then present; or * * * by * * * a majority of the commission officers, then present * * * [who] are * * * impowered to cause such offender to be tied neck and heels, for any time, not exceeding five minutes, for the first offence; and for the second offence, the majority of the commission officers, then present, are * * * impowered * * * to commit such offender to the county goal, there to remain for any time not exceeding ten days."{EN-1835}

In another instance, the procedure employed might preclude more than a single offence of a certain type at any one time:

> [1755] "[I]f any soldier, shall at any general or private muster, refuse to perform the commands of his officer, or behave himself refractorily or mutinously, or misbehave himself at the courts martial, * * * it shall * * * be lawful * * * for the chief commanding officer, then present, to fine every such soldier, if an horseman, any sum not exceeding ten shillings, and if a footman, not exceeding seven shillings and six pence, which fine shall be immediately paid down to such officer; but in case any such offender shall not be able to pay down such fine immediately, then he shall give good security to such officer, for the payment of the same in three months. And in case such soldier so fined * * * shall refuse or fail to pay down his fine, or to give such security * * * , then it shall * * * be lawful, for such officer * * * to commit every such soldier to the county goal, there to remain without bail or mainprize, for any time not exceeding three days, and the offender * * * shall not be

> thence discharged, until the lawful fees for commitment, imprisonment, and discharge, shall be fully paid and satisfied."{EN-1836}

In yet other instances, though, an indefinite number of punishments for an indefinite number of offences was apparently possible (although perhaps the very severity of the punishments would have deterred any but the hardiest or most reckless defaulter):

> [1757, 1759, 1762, 1766, and 1771] "[I]f any soldier shall, at any general or private muster, refuse to perform the command of his officer, or behave himself refractorily or mutinously, or misbehave himself at the courts martial * * * , it shall and may be lawful to and for the chief commanding officer, then present, to cause such offender to be tied neck and heels, for any time not exceeding five minutes, or inflict such corporal punishment as he shall think fit, not exceeding twenty lashes."{EN-1837}

4. Extensions of time to comply with statutory requirements. As to the most important particular of "a well regulated militia"—namely, having Militiamen suitably armed at all times—Virginia's General Assembly looked in the first instance to individual members of the Militia to provide their own firearms, ammunition, and accoutrements at their own expense through the free market.[966] But legislators also recognized that everyone could not always meet such requirements immediately, either because particular individuals sometimes lacked sufficient money in hand to purchase that equipment, or because some or all of the equipment was not always readily available in the marketplace. So the Militia Acts and officials' enforcement of them routinely mitigated the requirement by allowing the men various periods of grace in which to comply, before the statutory penalties for noncompliance would be invoked:

> • [1692] "It is * * * Ordered that the Comand^rs^ in Chief of their Ma^s^ Forces of this Colony doe take Care that the Laws for provideing of Armes and Amunition and appeareing at Musters be duely put in Execution on all those who have been formerly listed Souldiers and had time to be provided with Armes & c. [*et cetera*] but for that some persons have been lately listed who have not had time to be provided with Armes & c none being to be had but from England. It is Ordered that they be Exempted, and they are hereby Exempted from the penalty of the Law relateing thereto till after a Fleete of Ships hath gon from hence for England, and a return from thence made hither, it not being reasonable any person should be fined till after it hath been possible for him to be provided[.]"{EN-1838}

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[966] *See ante*, Chapters 17 through 20.

• [1705] "That eighteen months time be given and allowed to each trouper and ffoot soldier not heretofore listed to furnish and provide himself with arms and ammunition * * * & that no trooper or foot soldier be fined for appearing without or not having the same at his place of abode untill he hath been eighteen months listed[.]"{EN-1839}

• [1723] "That eighteen months time be given and allowed to each soldier, to furnish and provide himself with arms and ammunition, according to this act; and that no soldier be fined for appearing without, or not having the same at his place of abode, until he hath been listed eighteen months, * * * [s]o as every soldier, during the said eighteen months, do appear at all musters with such arms as he is already furnished with."{EN-1840}

• [1738] "That eighteen months time be * * * allowed to each soldier to furnish and provide himself with arms and ammunition * * * : And that no soldier be fined for appearing without, or not having the same at his place of abode, until he hath been listed eighteen months * * * ; so as every soldier, during the said eighteen months, do appear at all musters, with such arms as he is already furnished with."{EN-1841}

• [1755, 1757, 1759, 1762, 1766, and 1771] "[E]very * * * officer shall have twelve months allowed him after his promotion to such office, for the furnishing the arms [required] * * * , but in the mean time shall appear with such of the * * * arms, as he already hath. * * *

" * * * That twelve months time be given and allowed to each soldier, to furnish and provide himself with arms and amunition, * * * and that no soldier be fined for appearing without, or not having the same at his place of abode, until he hath been inlisted twelve months, * * * so as such soldier do appear at all musters, during the said twelve months, with such arms as he hath, and is already furnished with[.]"{EN-1842}

• [1775] "[T]he soldiers [in the Militia] shall be allowed six months after enlisting to provide themselves with arms, and in the mean time shall bring with them such arms as they have[.]"{EN-1843}

• [1777] "Every officer and soldier shall be allowed six months after his appointment or enrollment to provide such arms or accoutrements as he had not at the time."{EN-1844}

• [1784 and 1785] "[T]welve months after the commencement of this act[967] shall be allowed for providing the arms and accoutrements herein directed; but in the mean time, the militia shall appear at musters with, and keep by them the best arms and accoutrements they can get."{EN-1845}

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967 The Act of 1785 allowed for "two years" of grace.

Important to observe here is that the limits on applications of the statutory penalties were themselves circumscribed in order to maximize the Militia's preparedness at every moment by taking full advantage of the resources then available in individuals' hands: "[s]o as every soldier * * * do appear * * * with such arms as he is already furnished with", "in the mean time shall bring with them such arms as they have", and "shall * * * keep by them the best arms * * * they can get". Limitations on the penalties wisely provided incentives for Militiamen to put to public use whatever arms they privately possessed or might obtain—thus rewarding them for fielding *some* arms that could temporarily serve the purpose at least marginally, rather than penalizing them for not already possessing or immediately acquiring arms particularly suitable for Militia service when they might not have been economically able to do so.

5. Sickness or other disability. Even for a normally able-bodied individual, the proof of a temporary physical disability was a valid excuse for a failure to perform Militia duty:

> • [1682] "[E]ach captain * * * shall once every month muster, treine, exercise, instruct and discipline the troop of soldiers under his command on paine to forfeite five hundred pounds of tobacco in caske for each time he shall neglect such muster or exercise unless occasioned by sickness."{EN-1846}
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> • [1755, 1757, 1759, 1762, 1766, and 1771] "[W]here any person is returned a delinquent to a court martial, and shall not be able by reason of sickness, or other real disability to attend such court, to give in his reasonable excuse for such delinquency; it shall and may be lawful, for the succeeding court martial * * * wherein such person shall be returned a delinquent, upon such reasonable excuse then offered, to remit such fine or fines levied by the preceeding court-martial on such person[.]"{EN-1847}
>
> • [1776] "[W]here any soldier of the militia shall fail to appear at musters through sickness, the captain * * * of such company * * * shall and may hear any evidence offered on behalf of such person failing to attend, and admit the excuse, if to him it shall seem just[.]"{EN-1848}
>
> • [1777] "Each captain shall, at every muster, * * * note down the delinquencies occurring in his company, and make return thereof to the next court martial; but where any person is disabled by sickness from attending, the captain, * * * being satisfied thereof by testimony on oath * * * , shall not note down such non-attendance."{EN-1849}

6. Financial or other economic inability to comply. Because Virginia's Militiamen were generally required to obtain their own firearms, ammunition, and accoutrements in the free market by their own efforts and at their own expense,[968]

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[968] *See ante*, Chapters 17 through 20.

situations could arise in which particular individuals, through no fault of their own, simply could not afford to purchase the necessary equipment. In these cases, their penury provided an immunity from the fines that would otherwise have been inflicted on them—and, indeed, justified the provision of arms to such poor Militiamen at public expense. Similarly, if for whatever reason arms were simply not readily available for purchase in or maintenance through the marketplace, a Militiaman would be excused for not having obtained them. Thus—

> • [1690] "[A]s to the Militia the Comand^{rs} in Cheife * * * have used all their Endeavours to have the Soldiers armed pursuant to an Act of Assembly * * * which Inflicts fines on those that did not furnish themselves with Armes and a Certaine quantity of Amunition, but that many of the Foot Soldiers were soe Indigent by reason of the Low price of their onely Comodity Tob[acco] and now these times the same lyeing by some of them unsold for want of Shipps to Carry it away, that it was impossible for the Foot Sold^{rs} all Compleately to furnish themselves with Swords and Amunition by reason of their Indigency and those that were able could not have it for pay, it not being in the Country, And it appearing * * * that the offic^{rs} of the Militia have all along pressed the Soldiers to Equipe themselves according to Law, but for the reasons aforesaid could not accomplish it[.]"{EN-1850}
>
> • [1692] "It is * * * thought fitt and accordingly Ordered that the Comand^{rs} in Chief * * * doe take Care that the Laws for provideing of Armes and Amunition and appeareing at Musters be duely put in Execution on all those who have been formerly listed Souldiers and had time to be provided with Armes * * * but for that some persons have been lately listed who have not had time to be provided with Armes * * * none being to be had but from England. It is Ordered that they be Exempted * * * from the penalty of the Law relateing thereto till after a Fleete of Ships hath gon from hence for England, and a return from thence made hither, it not being reasonable any person should be fined till after it hath been possible for him to be provided[.]"{EN-1851}
>
> • [1692] "Complaint being made * * * by the Comand^{rs} in Chief * * * that the Souldiers under their Comands cannot get their Guns fixt, the Smiths refuseing to worke for Tobacco, and for that the same may be of very bad Consequence in these times of danger, It is Ordered that the respective Smiths in this Colony doe without delay fix all Armes shall be brought them by any of the Souldiers * * * , keepe an account of the Worke done and for whom, and returne the same to the next Gen^{ll} Assembly that then such care may be taken for payment thereof, as shall be found fitt."{EN-1852}
>
> • [1740] "[I]t shall * * * be lawful, to and for the several courts martial, * * * to excuse and acquit any soldier, who [s]hall not, within twelve months from the passing of this act, be furnished and provided

with arms * * * and whom they, in their consciences, shall believe and adjudge to be unable to furnish and provide the same, from the fines and forfeitures inflicted * * * for want thereof[.]"{EN-1853}

• [1755, 1757, 1759, 1762, 1766, and 1771] "[I]f it shall be made to appear to the court of any county, by the * * * chief commanding officer in the county, and captain of any company,[969] that any soldier inlisted in the foot, is so poor, as not to be able to purchase the arms [statutorily required of Militiamen] * * * ; then such court shall * * * send for the same to England, * * * and * * * levy the charge thereof in the next county levy[.]"{EN-1854}

• [1775] "[E]very militia man * * * shall furnish himself with a good rifle, if to be had, or otherwise with a * * * common firelock * * * and shall constantly keep by him one pound of powder and four pounds of ball, to be produced whenever called for by his commanding officer.

"*Provided always*, That no person shall be subject to the penalties * * * inflicted, for the not providing or producing the quantity of powder required, who shall make it appear to the court-martial that he has used his best endeavours to procure such powder, and hath not been able to do so; also, if it be certified by a court-martial that any soldier enlisted is so poor as not to be able to purchase the arms aforesaid, then such arms shall * * * be procured as soon as may be, at the expense of the publick."{EN-1855}

• [1777] "If any soldier be certified to the court martial to be so poor that he cannot purchase * * * arms, the said court shall cause them to be procured at the expense of the publick, to be reimbursed out of the fines on the delinquents of the county[.]"{EN-1856}

• [1784 and 1785] "If any private shall make it appear to the satisfaction of the court[-martial] * * * appointed for trying delinquencies * * * , that he is so poor that he cannot purchase the arms * * * required, such court shall cause them to be purchased out of the money arising from delinquents."{EN-1857}

7. Other reasonable excuses. Being highly realistic and eminently practical people, Virginians during the *pre-*constitutional era recognized that unpredictable and even unique circumstances could provide justifiable excuses for individuals' failures to perform their Militia duties. So Virginia's statutes allowed for the acceptance in mitigation of punishment of essentially *any* reasonable explanation for a default:

• [1705 and 1723] "And to the end that no wilfull and obstinate defaulter or offender * * * may escape the penalty * * * for his default or offence,

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[969] The Act of 1757 and its continuations thereafter required that the matter of financial disability "shall be certified to the court of any county, by order of the court-martial".

"*Be it enacted*, * * * That all captains of troops and foot companys * * * be * * * strictly required and injoyned, at every muster (generall and particular) to take or cause to be taken an exact account in writing of every * * * default or offence made or committed in his troop or company * * * .

* * * * *

"And because severall persons may happen to be charged with default or offence * * * who are not wilfully guilty thereof, or may have a fair and just excuse for their not complying with this act—

"For remedy in such cases,

"*Be it enacted* * * * , That whensoever any soldier charged with a default or offence * * * can and doth shew forth to the * * * ffield officers and captains * * * such matter and cause that he ought not to be fined for the same as they shall judge reasonable, and be convinced withall before he be actually fined, it shall be lawfull for the * * * ffield officers and captains * * * to admit of such soldiers excuse and to lay no mulct or ffine upon him for such default or offence[.]"{EN-1858}

Central was these statutes' explicit concern—reiterated in other language in subsequent Militia Acts—that "no *wilfull and obstinate* defaulter or offender * * * escape", or (on the other hand) that those "*not wilfully* guilty" or with "a *fair and just* excuse" not be punished, and that a putative offender's judges should accept in exoneration any "matter and cause" that appeared "reasonable" to them. Virginia's Militia inflicted punishments, not on the basis of strict liability, but as a consequence of some intentional dereliction of duty. (Of course, inasmuch as a "reasonable excuse" was an affirmative defense to an admitted failure to perform some duty, the burden of proof in every case lay on the offender.)

• [1738] "[T]he field officers, and captains, of every county, * * * [shall] meet at the court-house of their counties * * * to hold a court martial; which said court shall * * * enquire * * * of all delinquents * * * for absence from musters, or appearing without arms and accoutrements; and to order the fines * * * to be levied upon all delinquents, who shall not make out some just excuse for not performing their duty[.]"{EN-1859}

• [1755, 1757, 1759, 1762, 1766, and 1771] "[I]t shall and may be lawful for the field officers and captains of every county * * * to meet at the court-house of their counties, * * * the day next following the general muster * * * every year, * * * to hold a court martial, * * * to enquire * * * of all delinquents returned by the captains, for absence from musters, or appearing without arms and accoutrements. * * * And such court shall and may * * * order the fines inflicted by this act * * * to be levied upon all delinquents who shall not make out some just excuse, for not performing their duty[.]

* * * * *

" * * * [P]ersons * * * failing to do their duty * * * shall forfeit and pay the several sums following * * * ; that is to say, the lieutenant of

any county, * * * failing to appoint a general muster * * * [twice] in every year, not having a reasonable excuse, shall for every such failure, forfeit and pay the sum of twenty pounds[.]"{EN-1860}

• [1775] "[E]very officer of minute-men who shall absent himself either from battalion duty or the private musters, in their counties, without sufficient excuse, to be judged of and allowed by a court-martial, shall be subject to * * * fines * * * . And for non-attendance at private musters, without a sufficient excuse, * * * the officers and minute-men shall * * * be subject to * * * fines * * * .

"*Provided always*, That the commanding officer or captain of any company may, when occasion shall require, give leave of absence to any inferiour officer or minute-man; but they shall not be entitled to pay during such absence.

* * * * *

" * * * [E]very officer or militia man, and every officer and minute-man, who shall refuse, or unreasonably delay, conforming to * * * [certain] directions [with respect to invasions or insurrections], in every particular, shall, for every refusal or delay, forfeit and pay [certain] sums * * * .

* * * * *

" * * * [E]very captain * * * failing to return the list of persons who shall not appear at muster to the courts-martial, or who shall appear without proper arms, powder, and ball, shall forfeit and pay ten pounds; provided, if the person so failing shall, at the next court-martial, or in the case of his inability to attend at the succeeding court-martial, offer a reasonable excuse for any such delinquencies, such excuse shall and may be admitted, and the party complained of discharged of all and every the penalties aforesaid."{EN-1861}

• [1777] "The court[-martial] * * * shall * * * inquire * * * into all delinquencies * * * , and where no reasonable excuse for the same is made to appear to them, shall give judgment for the penalties * * * . But if it shall appear to the * * * court martial that any person fined for * * * delinquency was unable to attend the court, by which he was fined, and had reasonable excuse for the delinquency, such fine shall be remitted."{EN-1862}

• [1777] "[F]or the more speedy and certain completion of * * * new battalions, every county, city, and borough [with certain exceptions] * * * , in case the * * * officers by them appointed * * * shall not * * * enlist the quota of men allotted to [them] * * * , shall make up such deficiency by draughts, to be taken from their respective militias * * * .

" * * * And every commanding officer failing to summon the field officers and magistrates [for that purpose] * * * shall forfeit and pay five hundred pounds; and every field officer and magistrate failing to attend *

* * shall for each failure, without a sufficient excuse, forfeit and pay the sum of one hundred pounds[.]"{EN-1863}

• [1777] "The several divisions of the militia of any county shall be called into duty by regular rotation * * * ; and every person failing to attend when called on, or to send an able bodied man in his room, shall, unless there be good excuse, be considered as a deserter, and suffer accordingly."{EN-1864}

• [1780] "If any non-commissioned officer or soldier [in the Militia] shall fail to attend when summoned, not having a just and reasonable excuse, or refuse to march when ordered into actual service according to his tour of duty, or find an able bodied man in his room, * * * such offender shall serve as a regular soldier in the troops of the state eight months[.]"{EN-1865}

• [1781] "Every militia-man ordered into actual service, who shall refuse and neglect to appear * * * without a reasonable excuse, or produce an able-bodied substitute to serve in his room * * * shall * * * be declared a regular soldier for six months, and shall * * * be delivered to a continental officer for that purpose * * * . And for the due conviction of all such delinquents, a court-martial shall * * * be held * * * , under the penalty of ten thousand pounds of tobacco on such county lieutenant or commanding officer neglecting to order the same, and of five thousand pounds of tobacco upon every member of such court failing to attend without a reasonable excuse."{EN-1866}

8. Authority of the Militia to inquire into the circumstances of possible incapacities and defaults. Naturally, where evidence of an intentional dereliction of duty was determinative of the propriety of fining a Militiaman, Militia officers were authorized to investigate the situation. As just explained, such an investigation could have been requested by an alleged defaulter himself, seeking to prove that he had a "reasonable" excuse for his neglect of duty. But Militia officers and courts-martial were also authorized to conduct inquiries on their own initiatives:

• [1684] The Governor and his Council "ordered, that Letters be writt unto the militia officers of every respective County forthwith to render to his Excellency y^{e} condition of their militia, what number they consist of, both horse and foot, as likewise how furnished with armes[.]"{EN-1867}

• [1690] "Ordered, that the Respective Comand^{rs} in Cheife, should as soone as Conveniently they Could, return an acco^{t} * * * of the Severall Cap^{ts} of Horse and Foot, and the numb^{r} of Soldiers under every of their Comands, and how furnished[.]"{EN-1868}

• [1691] The Lieutenant Governor ordered the sherriffs to inform "the respective Cap^{ts} of Horse, Dragoones and foot within yo^{r} County, to return * * * an Exact List of the Names of the Souldiers under their

Comand, how armed, and what Colours, Trumpetts, and Drums belongs to each Troope and Company, * * * and whether there be any persons fitt to beare Armes within their respective precincts, not Listed, their Names, and in what quallity they are capable to Serve[.]"{EN-1869}

• [1695] "His Ex^y [the Governor] Ordred the Severall Comanders in Cheife * * * to Inspect the State of the Militia and to se how Armed & to returne account thereof."{EN-1870}

• [1704] The Governor "require[d] the respective Collonels and Commanders in Chief to cause exact Lists to be taken of those Persons that shall appear at the * * * General Musters unprovided of Armes and Ammunition, and to transmitt the same * * * that directions may be given for Levying the fines imposed on them[.]"{EN-1871}

• [1705 and 1723] "[A]ll captains of troops and foot companys * * * [are] strictly required and injoyned, at every muster (generall and particular) to take * * * an exact account in writing of every * * * default or offence made or committed in his troop or company, by whom the default or offence was made or done, and at what time[.]"{EN-1872}

• [1738] "[T]he field officers, and captains, of every county, * * * are hereby required to meet at the court-house of their counties * * * to hold a court-martial; which said court shall have power * * * to enquire of the age and abilities of all persons listed [in the Militia], and to exempt such as they shall judge incapable of service; and of all delinquents returned by the captains[.]"{EN-1873}

• [1755, 1757, 1759, 1762, 1766, and 1771] "That twelve months time be given and allowed to each soldier, to furnish and provide himself with arms and amunition, * * * and that no soldier be fined for appearing without, or not having the same at his place of abode, until he hath been inlisted twelve months, * * * so as such soldier do appear at all musters, during the said twelve months, with such arms as he hath, and is already furnished with: And if any soldier shall appear at any muster not armed and accoutred, * * * the captain * * * [may] examine such soldier upon oath, whether he hath any, and what arms and ammunition he really hath of his own property, and if on such examination it shall appear, that such soldier hath any arms or ammunition of his own property, and hath not brought the same, or so much thereof, as this act requires, * * * he shall be liable to the penalties * * * although he hath not been inlisted twelve months[.]"{EN-1874}

• [1784 and 1785] Each of the "officers, non-commissioned officers, and privates, shall constantly keep the[ir] * * * arms, accoutrements and ammunition ready to be produced whenever called for by his commanding officer. * * * At every muster, each captain * * * shall call his roll, examine every person belonging thereto, and note down all delinquencies occurring therein[.]

* * * * *

" * * * [T]he governor, with advice of council, shall have power to arrest the * * * commanding officer of a county, and all other officers, for any misconduct whatsoever, and upon trial and conviction, may censure or cashier them. * * * All officers under the * * * commanding officer of a county, may also be arrested by such commanding officer, and reported to the governor for trial, or * * * a general court-martial * * * . Any non-commissioned officer or soldier offending, shall be tried by a like general court-martial * * * . For obtaining the necessary evidence for the trials aforesaid, the governor or commanding officer of the county * * * shall issue his summons, and any person so summoned, failing to attend, shall forfeit and pay [certain sums.]"{EN-1875}

9. Discretion to remit a punishment. Finally, a concern for providing elementary due process of law compelled Virginia's *pre*-constitutional Militia to make some allowances for corrections of erroneous sentences on appeal, and for grants of clemency. For example,

• [1781] "Every sentence * * * where the trial shall be before the court-martial of the county and the officer tried shall be a field officer, shall be transmitted to the governor * * * , who may either approve or disapprove the same, according to the custom of the law-martial, but where the officer tried shall be under the rank of a field officer, in that case the * * * commanding officer of the county where the trial shall be, shall have the power to approve or disapprove the sentence[.]"{EN-1876}

• [1786] "[A]ny officer of the militia, called into actual service, neglecting or refusing to do his duty, shall forfeit his commission, and moreover be amerced at the discretion of a court martial * * * ; and non-commissioned officers or privates in like manner refusing or neglecting shall also be fined * * * : *Provided always*, That the penalties and forfeitures herein imposed on field officers, captains and subalterns, in case of failure or refusal as aforesaid, shall be subject to the approbation of the executive with power to remit or enforce the same."{EN-1877}

CHAPTER TWENTY-FOUR

Virginia's laws provided members of her *pre*-constitutional Militia with various privileges and immunities necessary to protect them in the performance of their duties.

Virginia's *pre*-constitutional Militia Acts and related laws required her citizens to fulfill various duties, some—such as mustering with arms to defend the community during periods of "alarm"—rather onerous and dangerous. To impose such duties equitably required that Militiamen be provided with corresponding statutory privileges and immunities that enabled them to fulfill, or protected them against liability for the faithful performance of, their duties.

A. Personal possession of arms. Because the basic duty of all Militiamen (other than conscientious objectors) was personally to possess at all times firearms, ammunition, and accoutrements suitable for their Militia service, and because the duty of most Militiamen (other than those who were impoverished) was to supply themselves at their own expense with this equipment as their own property,[970] from the earliest days Virginia's legislators enacted statutory protections for arms in private possession:

> • [1684] "FOR the encouragement of the inhabitants * * * of Virginia, to provide themselves with arms and ammunition, for the defence of this * * * country, and that they may appear well and compleatly furnished when commanded to musters and other * * * service, which many persons have hitherto delayed to do, for that their arms have been imprest and taken from them * * * *it is hereby enacted*, That all such swords, musketts, pistolls, carbines, guns, and other armes and furniture, as the inhabitants of this country are already provided, or shall provide and furnish themselves with, for their necessary use and service, shall * * * be free and exempted from being imprest or taken from him or them, * * * neither shall the same be lyable to be taken by any distresse, seizure, attachment or execution[.]"{EN-1878}
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> • [1705] "[F]or the encouragement of every soldier in horse or ffoot to provide and furnish himself * * * and his security to keep his horse, arms and ammunition, when provided,
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> "*Be it enacted* * * * , That the musket or ffuzee, the sword, cartouch box and ammunition of every ffoot soldier, and the horse, * * *

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[970] *See ante*, Chapters 17 through 19.

> the carbine, pistolls, sword, cartouch box and ammunition of every trooper provided and kept in pursuance of this act to appear and exercise withall be free and exempted at all times from being impressed upon any account whatsoever, and likewise from being seized or taken by any manner of distress, attachment, or writt of execution, and that every distress, seizure, attachment or execution made or served upon any of the premises, be unlawfull and void, and that the officer or person that presumes to make or serve the same be lyable to the suit of the party greived, wherein double damages shall be given upon a recovery."{EN-1879}
>
> • [1723, 1738, 1755, 1757, 1759, 1762, 1766, and 1771] "[F]or an encouragement of every soldier to provide and furnish himself, according to the directions of this act, and his security to keep his horse, arms, and ammunition, when provided, *Be it enacted* * * * , That the horses[971] and furniture [972], arms and ammunition, provided and kept, in pursuance of this act, be free and exempted at all times from being impressed upon any account whatsoever; and likewise, from being seized or taken by any manner of distress, attachment, or writ of execution. And that every distress, seizure, attachment, or execution, made or served upon any of the premises, be unlawful and void: And that the officer or person that presumes to make or serve the same, be liable to the suit of the party grieved: wherein double damages shall be given upon a recovery."{EN-1880}
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> • [1775] "[A]ll arms of the militia shall be exempted from executions or distresses[.]"{EN-1881}
>
> • [1777] "All arms and ammunition of the militia shall be exempted from executions and distresses at all times[.]"{EN-1882}
>
> • [1784 and 1785] "All arms, ammunition, and equipments of the militia, shall be exempted from executions and distresses at all times[.]"{EN-1883}

Thus, Militia firearms, ammunition, and accoutrements were a very special kind of personal property, from dispossession of which Militiamen enjoyed a broad immunity. The government could not seize their arms for any reason other than perhaps the commission of some serious crime, because the government itself by statute commanded them permanently to possess those arms. And private parties could not seize those arms even in satisfaction of legitimate, judicially determined debts, because the statutes disallowed such takings. The obvious principles behind all this were that: (i) Virginia imposed upon her citizens the duty to keep arms. Therefore (ii) she could neither herself prevent, nor allow let alone aid others to frustrate, the fulfillment of that duty. But instead, (iii) she had to facilitate the

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[971] The Acts after 1723 did not include "horses".

[972] The Acts after 1755 did not include "furniture".

fulfillment of that duty against all interference, from public officials as a matter of course, and from private parties invoking the government's powers to settle private disputes. That is, "gun control" in *pre-*constitutional Virginia meant securing firearms firmly under the control of the common Virginians who owned them.[973]

B. At musters and training. As arms were the basic tools of the Militia, musters and training were the basic operations in which the proper use of those tools was learned, practiced, and perfected. So, not surprisingly, in order to encourage and to the extent possible guarantee the appearances of Militiamen at musters and training, Virginia's Militia Acts protected their going to, attending, and returning from those activities:

> • [1738, 1755, 1757, 1759, 1762, 1766, and 1771] "[E]very person going to, attending at, or returning from muster, shall be privileged and exempted from arrests, and being served with any other process, in any civil action or suit."{EN-1884}
>
> • [1775] "[A]ll officers and soldiers shall be exempted from arrests in civil cases, during their continuance at, going to and returning from musters."{EN-1885}
>
> • [1777] "[T]he militia shall be exempted * * * [in] their persons from arrests in civil cases, while going to, continuing at, or returning from, any muster or court martial".{EN-1886}
>
> • [1784 and 1785] Militiamen "shall be exempted" in "their persons from arrests in civil cases, while going to, continuing at, or returning from musters".{EN-1887}

C. In actual service. The personal possession of arms by and training of Virginia's Militiamen were not simply activities undertaken for their own value, but were the necessary preliminaries to actual service in the field. So if Militiamen's performance of the former duties warranted the extension to them of various legal privileges and immunities, certainly their performance of the latter also merited at least similar statutory protections. Not surprisingly, then, Virginia's Militia Acts and related statutes immunized her Militiamen from certain liabilities during their actual service:

> • [1756, 1757, 1758, 1759, 1761, 1764, 1766, 1769, and 1772] "[W]hen the militia of any county shall be drawn out into actual service, by virtue of this act, and of the several acts concerning invasions and insurrections,[974] every officer and soldier of such militia shall be

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[973] Interestingly enough, Virginia's laws still provide that "every householder shall be entitled to hold exempt from creditor process * * * [o]ne firearm, not to exceed $3,000 in value". Code of Virginia § 34-26(4b).

[974] The Acts of 1757 and thereafter omitted the phrase "and of the several acts concerning invasions and insurrections".

> exempted from all process in any cause or suit whatsoever (other than for some criminal matter) and his estate privileged from all executions, attachments and distresses whatsoever; and that if any suit shall be depending in any court whatsoever, in which any officer or soldier so drawn out as aforesaid, shall be a party, either plaintiff or defendant, the same shall be stayed, and no proceedings be had or taken therein, during the time such officer or soldier shall continue in such service."{EN-1888}
>
> • [1784 and 1785] Militiamen "shall be exempted * * * [in] their persons from arrests in civil cases * * * while in actual service".{EN-1889}

It would hardly have been equitable to have exposed Militiamen to the enforcement of civil judgments or to the vicissitudes of other civil judicial proceedings against which they could not have defended themselves because they were far away or otherwise unavailable, fulfilling their statutory duties to perform actual Militia service in the field. Plainly, too, the claims of individual civil litigants for damages or other judicial relief against Militiamen needed always to be subordinated in time to Virginia's more pressing claims for the latters' services in the common defense, by staying all civil proceedings during the performance of such services. The very theory of the Militia demanded then, as it does even now, that securing the common defense should always take precedence over the welfare of particular individuals. And because most civil litigants were probably themselves also members of the Militia, postponing their private claims under these circumstances could easily have been justified as simply enforcing another element of their own Militia duties.

D. In service on "the slave patrols". In Virginia, one peculiar kind of Militiamen's active service in the field was their participation in "slave patrols".[975] For example,

> [1727, 1732, 1734, 1738, 1740, and 1744] "[W]hereas, great danger may happen to the inhabitants of this dominion, from the unlawful concourse of negros, during the Christmas, Easter, and Whitsuntide holidays, wherein they are usually exempted from labour.
>
> " * * * [I]t shall and may be lawful, to and for the county-lieutenant, or other commanding officer of the militia, in any county within this dominion, * * * from time to time, as there shall be occasion, to appoint and direct such and so many of the militia of their respective counties, to be drawn out, and to patrole in such places as such commanding officer shall think fit to direct, and from time to time, to cause to be relieved by other parties, for dispersing all unusual concourse of negroes, or other slaves, and for preventing any dangerous combinations which may be made amongst them at such meetings: Which

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[975] *See ante*, at 339-343 and 392-395.

> said parties, so sent out to patrole, * * * shall have full power and authority to take up any slaves which they shall find convened together, contrary to the directions of * * * *An act directing the trial of slaves committing capital crimes; and for the more effectual punishing conspiracies and insurrections of them; and for the better government of negros, mulattos, and Indians, bond or free* [1723]: And such slaves so taken up, to deliver to the next constable, in order to be dealt with as the said act directs."{EN-1890}

Service in the patrols was an important duty, because (until the Civil War put paid to the Peculiar Institution) rebellious slaves were always considered—and not without good reason—a mortal threat, not just to particular planters, but to the community as a whole.[976] Service in the patrols was also potentially hazardous for the patrollers themselves. For the statutory authorization "to take up any slaves which they shall find convened together * * * and to deliver to the next constable, in order to be dealt with" required patrollers to arrest and detain unruly bondsmen—which surely would have involved violent confrontations if the slaves resisted or attempted to escape in order to evade punishment. And in such circumstances any slave involved in "dangerous combinations" who was even vaguely conversant with the law would have known that resistance and escape were his best alternatives. For, typical of the harshness of the penal codes pertaining to slaves during that era, the Acts of 1723 and 1748 directed "[t]hat if any number of negros, or other slaves, exceeding five, shall at any time * * * consult, advise, or conspire, to rebel or make insurrection, or shall plot or conspire the murder of any person or persons whatsoever, every such consulting, plotting, or conspiring, shall be adjudged and deemed felony; and the slave or slaves convicted thereof * * * shall suffer death".{EN-1891} And, upon being apprehended by "the slave patrol", "every slave committing such offense, as, by the laws, ought to be punished with death, or loss of member, shall be forthwith committed to the common goal of the county, * * * there to be safely kept".{EN-1892} So, in such situations, the slaves' submission would have been tantamount to suicide.

Had the slaves resisted arrest for any violation of the laws, though, some would probably have been injured, maimed, or killed. The slaves' owners would then have sought damages, in one of two ways. *First*, from the General Assembly, pursuant to the allowance that,

> if in the dispersing of any unlawful assemblies, pursuit of rebels or conspirators, or seizing the arms and ammunition of such [negros, mulattos, or Indians] as are prohibited * * * to keep the same, any slave

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[976] *See, e.g.,* S. Horton, *Slave Patrols, ante* note 648, at 158-161; *Slono: Documenting and Interpreting a Southern Slave Revolt*, Mark M. Smith, Editor (Columbia, South Carolina: University of South Carolina Press, 2005); Herbert Aptheker, *American Negro Slave Revolts* (New York, New York: International Publishers, 50th Anniversary Edition, 1993). *See generally* K. Stamp, *The Peculiar Institution, ante* note 392, Chapters III and IV.

> shall happen to be killed or destroied, the court of the county where such slave shall be killed, upon application by the owner of such slave, and due proof thereof made, shall put a valuation in money, upon such slave so killed, and certify such valuation to the next session of assembly, that the said assembly may be enabled to make a suitable allowance thereupon to the master or owner of such slave.{EN-1893}

Or second, through the statutorily reserved right to bring suit against the individuals who killed a slave. For the Acts of 1723 and 1748 were not to be

> construed, deemed, or taken, to defeat or barr the action of any person or persons, whose slave or slaves shall happen to be killed by any other person whatsoever * * * . But that all and every owner or owners of such slave or slaves, shall and may bring his or her action, for recovery of damages for such slave or slaves so killed[.]{EN-1894}

This right, though, was apparently conditioned on a slave's being killed in a situation that did not involve "the dispersing of any unlawful assemblies, pursuit of rebels or conspirators, or seizing the arms and ammunition of such [negroes, mulattos, or Indians] as are prohibited * * * to keep the same"—because, in the latter situation, the General Assembly was "to make a suitable allowance to the master".

In addition, had they been negligent in the control of their slaves, the owners themselves could have been fined:

> • [1723] "[W]hereas many inconveniences have arisen, by the meetings of great numbers of negros and other slaves: For prevention thereof, * * * no meetings of negros, or other slaves, be allowed, on any pretence whatsoever * * * . And * * * every master, owner, or overseer of any plantation, who shall, knowingly and willingly, permit any such meetings, or suffer more than five negros or slaves, other than the negros or slaves belonging to his, her, or their plantations or quarters, to be and remain upon any plantation or quarter, at any one time, shall forfeit and pay the sum of five shillings, or fifty pounds of tobacco, for each negro or slave, over and above such number, that shall at any time * * * so unlawfully meet or assemble * * * : To be recovered, with costs, before any justice of the peace of the county where such offence shall be committed."{EN-1895}
>
> • [1748] "[T]o prevent the inconvenience arising by the meetings of slaves, *Be it* * * * *enacted* * * * , That if any master, mistress, or overseer of a family, shall knowingly permit or suffer any slave, not belonging to him, or her, to be and remain upon his, or her plantation, above four hours at one time, without leave of the owner or overseer of such slave,

> he, or she, so permitting, shall forfeit and pay one hundred and fifty pounds of tobacco, for every such offence; and every owner, or overseer, of a plantation, who shall so permit, or suffer more than five negros, or slaves, other than his, or her own, to be and remain upon his, or her plantation, or quarter, at any one time, shall forfeit and pay five shillings, or fifty pounds of tobacco, for each negroe, or slave above that number * * * , recoverable, with costs, before any justice of the peace of the county where such offence shall be committed."{EN-1896}

Others involved in prohibited conduct might also have been fined:

> • [1723 and 1748] "[I]f any white person, free negro, mulatto, or Indian, shall * * * be found in company with * * * slaves, at any * * * unlawful meetings, * * * or harbor or entertain any negro or other slave whatsoever, without the consent of their owners, he, she, or they, so offending * * * shall forfeit and pay the sum of fifteen shillings, or one hundred and fifty pounds of tobacco * * * : To be recovered, with costs, before any justice of the peace; and upon failure to make present paiment, shall have and receive, on his, her, or their bare backs, for every such offence, twenty lashes, well laid on."{EN-1897}

Moreover, certain public officials who neglected or failed in their duties to deal with such illegal activities could have been fined, too:

> • [1723 and 1748] "[E]very justice of the peace of any county wherein * * * unlawful meetings shall happen, upon his own knowledge, or upon information thereof to him made, * * * shall forthwith issue his warrant to apprehend all such persons, who so met or assembled, and cause such offenders to be brought before him * * * —And that every such justice, who shall fail in his duty herein, shall forfeit and pay the sum of fifty shillings, or five hundred pounds of tobacco, for every such offence.
>
> " * * * [E]very sheriff, under-sheriff, or constable, who, upon his or their own knowledge, or upon information thereof to him or them made, of any * * * unlawful meetings, * * * shall fail forthwith to endeavour to suppress and disperse the same, and to carry the offenders before some justice of the peace, in order for the said offenders to receive due punishment, the sheriff, for every offence by him committed, shall forfeit and pay the sum of fifty shillings, or five hundred pounds of tobacco * * * . And the under sheriff, or constable, failing to perform his or their duty herein, for every offence by him or them committed, shall forfeit and pay twenty shillings, or two hundred pounds of tobacco[.]"{EN-1898}

So negligent overseers, owners, and public officials, and White persons who participated along with slaves in prohibited activities, would have had strong

incentives to claim that arrests effected by the slave patrols were wrongful, and to bring legal actions against the individual patrollers on that basis.

To limit such claims, Virginia's Militia statutes extended rather broad immunity from liability to patrollers who acted within their authority:

> [1755, 1757, 1759, 1762, 1766, 1771] "[I]f any action shall * * * be brought in any court of this colony, against any person or persons appointed to patrol * * * , for any matter or thing done by him or them in the execution of their duty as patrollers, it shall and may be lawful to, and for every person and persons against whom such action or suit shall be brought, to plead the general issue, and give the special matter in evidence on the trial, and if any judgment shall be given for the defendant, or if the plaintiff shall become non-suit, or discontinue his suit, then the defendant shall recover treble costs."{EN-1899}

This immunity was not, of course, absolute, in the sense that it completely excused the patrollers from having to answer complaints lodged against them in court. Here, terms used in *pre-*constitutional judicial procedure that are far from familiar today need to be defined. As Blackstone explained,

> [T]HE *general* issue * * * is what traverses, thwarts, and denies at once the whole declaration; without offering any special matter whereby to evade it. * * * These pleas are called the general issue, because, by importing an absolute and general denial of what is alleged in the declaration, they amount at once to an issue; by which we mean a fact affirmed on one side and denied on the other.
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> FORMERLY the general issue was seldom pleaded, except when the party meant wholly to deny the charge alleged against him. But when he meant to distinguish away or palliate the charge, it was always usual to set forth the particular facts in what is called a *special* plea; which was originally intended to apprize the court and the adverse party of the nature and circumstances of the defence, and to keep the law and the fact distinct. And it is an invariable rule, that every defence, which cannot be thus specially pleaded, may be given in evidence, upon the general issue at the trial. But, the science of special pleading having been frequently perverted to the purposes of chicane and delay, the courts have of late in some instances, and the legislature in many more, permitted the general issue to be pleaded, which leaves everything open, the fact, the law, and the equity of the case; and have allowed special matter to be given in evidence at the trial. * * *
>
> * * * SPECIAL pleas, *in bar* of the plaintiff's demand, are very various, according to the circumstances of the defendant's case. As, * * * in trespass, that the defendant did the thing complained of in right of some office which warranted him so to do[.]

* * * * *

> SPECIAL pleas * * * always advance some new fact not mentioned in the declaration; and then they must be averred to be true * * * [.] This is not necessary in pleas of the general issue; those always containing a total denial of the facts before advanced by the other party, and therefore putting him upon the proof of them.[977]

So the immunities set up in the Militia statutes fit the pattern of "SPECIAL pleas, *in bar* of the plaintiff's demand, * * * that the defendant did the thing complained of in right of some office which warranted him so to do"—pointing up that service in the Militia was a form of "public office".[978] Yet the patroller still had to establish the defense that his action was taken not merely under color of the statute (although that circumstance was obviously necessary), but particularly in actual pursuance of the law.

On the other hand, if the patroller successfully interposed that defense, then the complainant suffered a monetary penalty: namely, "if any judgment shall be given for the defendant, or if the plaintiff shall become non-suit, or discontinue his suit, then the defendant shall recover treble costs." This placed the burden squarely on the complaining party to establish that the Militiaman had not been acting under the aegis of the statute at all (perhaps because he did not belong to a "slave patrol" at the time), or had acted in excess of the authority the statute delegated to him.

E. General legal immunity. Militiamen who participated in "slave patrols" were not the sole beneficiaries of legal immunities applicable to their service. Rather, Virginia's laws provided rather extensive protection across the board:

> [1755, 1757, 1758, 1759, 1761, 1762, 1764, 1766, 1769, and 1772] "[I]f any officer [in the Militia] shall be sued for any thing by him done, in pursuance of this act, it shall and may be lawful, for such officer, to plead the general issue, and give the special matter and this act in evidence."{EN-1900}

Although these statutes applied in terms only to "any officer", if an officer could not have been successfully sued for giving an order that had been justifiable under the law, then presumably any Militiaman who had faithfully carried out that order would have been entitled to assert a derivative immunity for himself, too.

Importantly, all of these immunities were *statutory* in nature. None derived from "common law" (that is, from judicial decisions purporting to enforce some part

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[977] *Commentaries on the Laws of England, ante* note 142, Volume 3, at 305-306, 309.

[978] *See post*, at 844-845.

of the *lex non scripta*)[979]—showing once again that the judiciary exercised no special supervisory authority over the Militia.[980]

[979] On the differences at the time between these two sources of law, *see* W. Blackstone, *Commentaries on the Laws of England, ante* note 142, Volume 1, at 63-92.

[980] *See ante,* at 108-113, 319.

CHAPTER TWENTY-FIVE

Virginia's *pre*-constitutional Militia laws embodied the very antitheses of contemporary "gun control".

In modern times, so-called "gun control"—by which term its proponents ultimately intend the systematic disarming of the general populace, leaving only the regular Armed Forces and various politically reliable "law-enforcement agencies" in possession of firearms—has become a contentious, even raucous, issue. Yet, as a general proposition, "gun control" is not a novel idea. Throughout American history, some form of "gun control", enforced by law, has always existed. But "gun control" in *pre*-constitutional Virginia was quite the opposite of contemporary "gun control". Specifically, in Virginia (as well as in all but one of the other Colonies and then all of the independent States) during that era, comprehensive "gun control" was the subject of numerous Militia Acts, all of which aimed, not at bringing about the wholesale disarmament of the people, but instead at insuring that every able-bodied, free, and adult male White Virginian (and other Americans elsewhere) personally possessed at all times at least one firearm, ammunition, and accoutrements suitable for Militia service. To be sure, other forms of "gun control" also existed in that era. All of them, however, were aimed at, or at least consistent with, the same goal: maintaining "homeland security" by seeing to it that those who were loyal to the community were always adequately armed, and that those who were disloyal were denied access to arms or affirmatively disarmed whenever that course of action proved necessary.

A. Controls aimed at securing adequate stocks of ammunition. As a practical matter, it would have been useless for Virginia to require her citizens to possess firearms without also taking steps to maintain within her own territory adequate stocks of ammunition—primarily, gunpowder and lead—always available for the people's immediate use. These measures were of two sorts: control over trade in and restrictions on the purely private use of ammunition. The goal in both instances was, not to constrict the supply of ammunition in common Virginians' hands, but instead to maximize it.

1. Limiting the exportation of ammunition. In the earliest days, when almost all ammunition had to be imported—usually from abroad, at great expense and with significant delays—Virginia's regulations aimed at preventing traders from exporting ammunition that was needed at home:

> • [1690] The Council "Ordered that * * * [certain public officials] doe not permitt any powder or Shott to be exported out of this

Colony, Except by Such persons who bring the same in and Carry it out for their Necessary defence and that upon the arrivall of every Shipp they inquire what powder and Shott is brought in, and for whom, and Order that the same not be disposed of till further Order."{EN-1901}

• [1690] The Council, "Considering the small quantity of powder and Shott in this Colony, and that there is noe likelyhood at present to receive a Supply, and to the End, that [the ammunition], now in the Country, may not be Imbezelled nor Sold to the Indians, Doe Order that the Sheriffs of * * * [certain] Counties do each in his County make diligent inquiry what Powder Shott and Armes is [in] the possession of any Indian Traders, Merchants or others in the said County * * * and safely to secure the same till further Order[.]"{EN-1902}

• [1691] "On Consideration of the Great want of Powder and Shott in this Country for the defence thereof, as also that * * * all persons are forbidden selling any to the Indians, unless small quantities to our Neighbouring Indians. And to the End the Inhabitants * * * may (if possible) provide themselves with some," the Lieutenant Governor and the Council "Ord^{r}d that the Collect^{rs} demand and take an account (of the Severall Masters of Shipps and Vessels they shall Enter) of all Powder Shott and Armes brought into this Colony, and permitt them to deliver it to the Severall persons to whom it belongs, of whom an account thereof will be required when occasion shall offer, for * * * this Countrys Service."{EN-1903}

2. Suppressing the wastage of ammunition at home. Besides restricting the exportation of ammunition, Virginia's early lawmakers also sought to restrain her citizens' profligate domestic use of the limited supplies available:

• [1624 and 1632] "That no commander of any plantation do either himselfe or suffer others to spend powder unnecessarily in drinking or entertainments, &c."{EN-1904}

• [1656, 1658, and 1662] "WHEREAS it is much to be doubted, That the comon enemie the Indians, if opportunity serve, would suddenly invade this collony to a totall subversion of the same, and whereas the only means for the discovery of their plotts is by allarms, of which no certainty can be had in respect of the frequent shooting of gunns in drinking, whereby they proclaim, and as it were, justifie that beastlie vice spending much powder in vaine, that might be reserved against the comon enemie, *Be it therefore enacted* that what person or persons soever shall * * * shoot any gunns at drinkeing (marriages and ffuneralls onely excepted,) that such person or persons so offending shall forfeit 100 lb. of tobacco to be levied by distresse[981] * * * and to be disposed of by the

[981] The Act of 1662 permitted shooting only at "buryalls", and raised the fine for impermissible shooting to two hundred pounds of tobacco.

militia in amunition towards a magazine for the county where the offence shall be committed."{EN-1905}

• [1658] "THAT the Lord's day be kept holy, and * * * that no * * * shooteing in gunns * * * tending to the prophanation of that day, which duty is to be taken care of by the ministers and officers of the severall churches * * * , and the partie delinquent to pay one hundred pounds of tobacco or layd in the stocks[.]"{EN-1906}

Obviously, these laws presumed that significant amounts of ammunition—as well as firearms in which it could be employed—were lodged in private hands and subject to private control (and perhaps wastage). And the laws' evident purpose was not to deprive common Virginians of ammunition, but instead to restrain frivolous expenditures of it, so as to maintain the maximum amount in private possession in readiness to be employed in the community's defense.

B. Controls aimed at maximizing "homeland security". The fundamental purpose of Virginia's *pre-*constitutional Militia was to organize, arm, and train the people for their own self-defense against whatever enemies might threaten them. The necessary corollary of the principle that the people should be equipped with and thoroughly trained to arms was that the community's enemies, both external and internal, should be denied arms if they sought to acquire them, and otherwise disarmed if at all possible.

1. External enemies. Other than the French and to a lesser degree the Spanish, and usually of more immediate concern because of their proximity, Indians were *pre-*constitutional Virginians' main external enemies—"external" because, although the Indians and Virginians of European origin often lived in close physical proximity, the two groups considered each other to be separate and actually or potentially hostile polities. Yet the relationship between Virginians and neighboring Indians was always somewhat ambiguous. Some Indians proved friendly, some hostile; and the allegiances of many Indians were often subject to sudden change. So, depending upon circumstances, Virginia followed two distinct policies with respect to arming Indians, sometimes prohibiting their acquisition of firearms, sometimes facilitating it.

a. Prohibitions against supplying hostile Indians with arms. In the early days, it was generally the policy to prevent most Indians from acquiring and keeping any firearms at all, so as to maintain the martial superiority of Europeans on that score. Not surprisingly, in light of the serious danger that well-armed hostile Indians might have posed, rather severe restrictions and penalties were inflicted on those who violated this prohibition:

• [1633 and 1639] "*IT is ordered and appoynted*, That yf any person or persons shall sell or barter any gunns, powder, shott, or any armes or amunition unto any Indian or Indians within this territorie, the said

person or persons shall forfeite to publique uses all the goods and chattells that he or they then have to theire owne use, and shall also suffer imprisonment duringe life[.]"{EN-1907}

• [1643] "[I]f any servant running away [from his master] * * * shall carrie either peice, powder and shott, And leave either all or any of them with the Indians, * * * shall suffer death[.]"{EN-1908}

• [1643 and 1658] "*BE it* * * * *enacted* * * * , that what person or persons soever shall sell or barter with any Indian or Indians for peece, powder and shott and being thereof lawfully convicted, shall forfeit his whole estate * * * . And whereas * * * divers persons do entertaine Indians to kill deare or other game, And do furnish the said Indians with peeces, powder and shott, by which great abuse, not onely the Indians (to the great indangering of the collony) are instructed in the vse of ovr arms, But have opportunity given to them to store themselves as well with arms as powder and shott, Be it therefore enacted, That what person or persons soever within the collony, shall lend any Indian either peece, powder and shott, It shall be lawfull for any person meeting with any such Indian so furnished, to take away either peece, powder or shott, so as such person taking away either peece, powder or shott do carrie the same to the comander of the county, * * * which said comander is hereby authorized to give possession to the informer either of the peece, powder or shott so brought before him, And the said commander is further required, to make a strict inquiry and examination to find out such person that did lend or give such peece, powder or shott to the Indians * * * , And * * * the party delinquent * * * shall forfeit two thousand pounds of tobacco * * * , And * * * such delinquent for his second offence shall forfeit his whole estate[.]"{EN-1909}

• [1654 and 1658] "TO prevent the disorderly imploying of Indians with gunns vnder the pretence of being their servants, *It is inacted*, That noe person shall dare to imploy such Indian servants with gunns unless they have allowance from the county court where they live or from the Governour and Councill."{EN-1910}

• [1665] "WHEREAS there was formerly a law in force prohibiting the sale of armes, ammunition, or guns to the Indians, which upon consideration of the said Indians being furnished by the Dutch was omitted; It being then thought impolitick to debarre ourselves from soe greate an advantage as might accrue to us by the Indian trade, when we could not prevent their supply; yet since those envious neighbours are now * * * removed from us, and the trade now likely to be in our hands, and none to furnish them besides ourselves, who in these times of eminent danger have scarce ability to furnish our owne people, *It is therefore enacted* * * * that the sale of armes, gunpowder, and shott be wholly prohibited; and that whoever * * * shall by himself or any other sell or barter powder, shott, gun or ammunition to any Indian, shalbe fined ten thousand

pounds of tobacco or suffer two yeares imprisonment without bayle or mainprize for the first offence, and for the second to be proceeded against as ffellons."{EN-1911}

• [1675] "WHEREAS the country by sade experience have found that the traders with Indians by their avirice have soe armed the Indians with powder, shott and gunns, that they have beene thereby imboldened, not only to fall upon the ffronteer plantations murthered many of our people and allarmed the whole country, but to throw us into a chargeable and most dangerous warr, * * * *Bee it enacted* * * * , that if any person or persons whatsoever * * * shall presume to trade, truck, barter, sell or utter, directly or indirectly, to or with any Indian any powder, shott or armes * * * shall suffer death without benefitt of clergye, and shall forfeite his or their whole estates * * * . *And be it further enacted* * * * , that if any person or persons whatsoever * * * shalbe found within any Indian towne or three miles without the English plantations with powder, shott or other armes and ammunition, except one gunn and tenn charges of powder and shott for his necessary use, although he or they be not actually tradeing, trucking, bartering, selling or uttering to or with the Indians, * * * shalbe adjudged guilty of selling and suffer accordingly."{EN-1912}

• [1676] "[A]ll such Indians shall be accounted and prosecuted as enemies that either already have, or hereafter shall foresake theire usuall and accustomed dwelling townes without license * * * , as alsoe all such Indians as shall refuse upon demand to deliver up into the hands of the English all such armes and ammunition of what kind or nature soever (bowes and arrows onely excepted) and alsoe to deliver such hostages as shall from time to time be required of them[.]"{EN-1913}

• [1705] "[I]f any person whatsoever, shall * * * entertain or employ any *Tuscarora*, or other Indian, not being a servant or slave, to hunt or kill deer; or furnish them with guns, powder, or shot, to hunt * * * upon any lands * * * patented, and belong to any of her majesty's subjects within * * * Virginia, he, she, or they * * * shall forfeit and pay to the person or persons upon whose land such Indian shall be found * * * the sum of one thousand pounds of tobacco * * * .

" * * * [M]oreover, when any person shall find any such Indian shooting, ranging, or hunting upon his land, * * * it shall be lawful for such person to take away the gun, powder, and shot, which he shall find upon such Indian, and to keep and convert the same to his own use * * * .

" * * * *Provided nevertheless*, That nothing * * * shall * * * extend to the Pamunkey or Chickahominy Indians, or to the Indians on the Eastern shore, hunting or ranging as heretofore they have been accustomed to do."{EN-1914}

• [1705] "[T]he Indians tributary to this government, shall have and enjoy their wonted conveniences of oistering and fishing, and of

gathering, on the lands belonging to the English, * * * things, not useful to the English, upon a license first had from a justice of the peace * * * .

" * * * *Provided always* * * * , That the said Indians shall not bring with them any guns, ammunition, or offensive weapons, but tools only for their use[.]"{EN-1915}

• [1707 and 1708] "[T]hat [no] person whatsoever presume * * * to furnish * * * [any Tuscaruro or other foreign Indian] wth Gunns, Powder or Shott * * * under Paine of being prosecuted for the same wth the utmost Severity of the Law."{EN-1916}

b. Permission for supplying friendly Indians with arms. Of course, because not all Indians were hostile, and too strict a policy of attempting to deny firearms to them not only generated continuous friction between possibly friendly tribes and the Colonists but also restricted mutually beneficial commerce among the two groups, *pre-*constitutional Virginia often allowed Indians to trade for and to possess, and even specially protected some of them in their ownership of, arms:

• [1659] "WHEREAS there is an act in force prohibiting the lending of gunns or ammunition to the Indians, by vertue of which many quarrells have arisen between English and Indians caringe their owne gunns, which might, vnless prevented, prove a disturbance of the peace now made between the two nations, *It is enacted* * * * that it shall be lawfull for the Indians to make vse of their owne gunns and amunition without the lett or molestation of any person or persons whatsoever within theire owne limitts."{EN-1917}

• [1659] "WHEREAS it is manifest that the neighbouringe plantations both of English and fforrainers do plentifully furnish the Indians with gunns, powder & shott, and do thereby drawe from vs the trade of beaver to our greate losse and their profitt, and besides the Indians being furnished with as much of both gunns and ammunition as they are able to purchase, *It is enacted*, That every man may freely trade for gunns, powder and shott: It derogateing nothing from our safety and adding much to our advantage[.]"{EN-1918}

• [1661] "CONSIDERING the great use and benefit the countrey may enjoy from the Chesskoiack Indians being kindly used by us, and being sensible that with the few gunns they have amongst them they cannot prejudice us being a small inconsiderable nation, *It is ordered* * * * to shew other Indians how kind wee are to such who are obedient to our laws that the said Chiskoiack Indians quietly hold and enjoy the land they are now seated upon, and have the free use of the gunns they now have[.]"{EN-1919}

• [1677] "*IT is ordered* that all persons have hereby liberty to sell armes and ammunition to any of his majesties loyall subjects inhabiting this colony, and that the Indians of the Easterne shore have like and

equall liberty of trade or otherwayes with any other our ffriends and neighbouring Indians."{EN-1920}

• [1677] "FORASMUCH as the totall prohibition of tradeing with Indians is experimented and found hurtfull and prejudiciall to his majesties colony and the inhabitants thereof; *Bee it* * * * *enacted* * * * , that all Indians whatsoever being in amity and ffriendship with us from henceforth shall have free and full liberty to come in amongst us and bring in any comodityes whatsoever to the severall places and at the severall tymes hereafter sett downe, * * * , and to trade with, sell or truck, for the same with the English, resorting thither, but noe where else for any comodityes whatsoever, and that such marts or ffaires continue fforty dayes and noe longer[.]"

But this Act also provided that "it shall not be lawfull or permitted any Indian or Indians resorting to or meeting at any those aforesaid marts or ffaires to travell with or carry armes, or appeare there armed, except only the carrying home such armes or ammunition as they shall then and there purchase, and shalbe found registered in the clarkes booke, for which they shall have with them his certificate[.]"{EN-1921}

Presumably, though, nothing prevented these Indians from carrying their firearms about after they had returned to their homes.

• [1680 and 1691] The statute of 1680 allowed "a free and open trade for all persons att all tymes and places with our freindly Indians", whereas the statute of 1691 permitted trade "with all indians whatsoever".{EN-1922}

• [1705] "That there be a free and open trade for all persons, at all times, and at all places, with all Indians whatsoever."{EN-1923}

• [1752] "[W]hereas many evil disposed persons, under pretence of the * * * [Nottoway] Indians being indebted to them, do frequently dispossess them of their guns, blankets, and other apparel, to their great impoverishment, for prevention whereof, *Be it enacted* * * * , That if any person or persons shall * * * , under any pretence whatsoever, take from any of the said Indians their guns, blankets, or other apparel, such person or persons so offending, shall forfeit and pay to the Indian or Indians so injured, the sum of twenty shillings current money, for every such offence * * * ; and if the offender be a slave, he shall * * * receive, on his or her bare back, twenty five lashes well laid on * * * ; and if any free person or persons shall trade or deal with the said Indians, for their guns, blankets, or other apparel, the person or persons so trading or dealing * * * shall forfeit and pay the like sum of twenty shillings, for every such offence, and if such offender be a slave, he shall * * * receive, on his or her bare back, twenty five lashes."{EN-1924}

2. Internal enemies. *Pre-*constitutional Virginia also counted among the threats to her "homeland security" various internal enemies, whom she naturally sought to disarm.

a. Criminals. Among professional criminals of that era, pirates were the most feared and dangerous. For, in the common opinion of the time,

> the crime of *piracy*, or robbery and depredation upon the high seas, is an offence against the universal law of society; a pirate being * * * *hostis humani generis*.[982] As therefore he has renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him: so that every community hath a right, by the rule of self-defence, to inflict that punishment upon him, which every individual would in a state of nature have been otherwise entitled to do, for any invasion of his person or personal property.
>
> BY the antient common law, piracy, if committed by a subject, was held to be a species of treason, being contrary to his natural allegiance: and by an alien to be felony only: but now * * * it is held to be only felony in a subject.[983]

And, of course, conviction of "felony" in that era always entailed the forfeiture of all of the perpetrator's personal property, including any arms he may have possessed, as well as usually his execution.[984]

So hardly surprising was Virginia's determination, while piracy remained a problem, to disarm even those individuals who had ostensibly given up involvement in that crime and been effectively pardoned:

> [1718] "[A] Pirate Ship and Sloop being lately Cast away * * * Severall of the said Pirates have Since come into this Colony with Certificates from the Governor of N^{o} Carolina of their Surrendering to him, but in regard their Travelling about the Country with their Arms and keeping together in Considerable Numb^{rs} give Great Suspicion, that they design to betake themselves again to Piracy * * * ; It is therefore ordered by the Governor * * * that a Proclamation be prepared requiring all Persons who have been concerned in any Piracys, and who Shall come into this Colony immediately upon their Arrival, to deliver up their Arms to the first Justice of the Peace or Milletary Officer, and prohibiting them to Associate in any Greater Numbers than three in one Company And that in Case any be found going armed, or in Greater Numbers * * * ,

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[982] "Enemy of the human race".

[983] W. Blackstone, *Commentaries on the Laws of England, ante* note 142, Volume 4, at 71 (footnotes omitted).

[984] *See ante*, at 145 and 272-273, *and post*, at 983-985 and 990.

> That the Justices of the Peace Cause them to be taken up and put in Prison till they give Security for their good behaviour."{EN-1925}

This action by the Governor was, of course, in keeping with the long-established procedure for requiring a "Surety for keeping the Peace" from individuals whose behavior demonstrably threatened a breach of the peace.[985] And probably no better example of persons rightfully subject to such control could be imagined than ostensibly former pirates who because they were "Travelling about the Country with their Arms and keeping together in Considerable Numb[rs] give Great Suspicion, that they design to take themselves again to Piracy".

b. Slaves and other persons of color. If pirates were but occasional enemies of the community, slaves were permanent ones—and because of their large numbers and dispersion throughout the land, and their antagonism not only towards their masters but also to the society that countenanced their bondage, were potentially far more dangerous if they rose in rebellion than were any conceivable pirates' raids.

(1) Towards the close of the *pre*-constitutional period, Blackstone had warned that

> [t]wo precautions are * * * to be observed in all prudent and free governments: 1. To prevent the introduction of slavery at all: or, 2. If it be already introduced, not to intrust those slaves with arms; who will then find themselves an overmatch for the freemen.[986]

Having lived with slavery since the *mid*-1600s, Virginians had taken such an admonition to heart decades earlier.

(a) From early on, Virginians—taking into account the old adages "in unity there is strength" and "strength lies in numbers"—had been careful to prohibit slaves from freely associating amongst themselves, or with free persons of questionable motives, in large groups under circumstances in which rebellions or other plots might be proposed, planned, or perpetrated:

> • [1680] "WHEREAS the frequent meeting of considerable numbers of negroe slaves under pretence of feasts and burialls is judged of dangerous consequence; for prevention whereof for the future, *Bee it enacted* * * * that * * * it shall not be lawfull for any negroe or other slave * * * to goe or depart from of[f] his masters ground without a certificate from his master, mistris or overseer, and such permission not to be granted but upon perticuler and necessary occasions; and every negroe or slave soe offending not haveing a certificate * * * shalbe sent to the next constable,

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[985] *See ante*, at 303-307 (example in Rhode Island).

[986] *Commentaries on the Laws of England*, *ante* note 142, Volume 1, at 416.

who is * * * required to give the said negroe twenty lashes on his bare back well layd on, and soe sent home to his said master, mistris or overseer. * * * *And* * * * if any negroe or other slave shall absent himself from his masters service and lye hid and lurking in obscure places, comitting injuries to the inhabitants, and shall resist any person or persons that shalby any lawlfull authority be imployed to apprehend and take the said negroe, that then in case of such resistance, it shalbe lawfull for such person or persons to kill the said negroe or slave soe lying out and resisting[.]"{EN-1926}

• [1682 and 1705] "[F]or the further better preventing * * * insurrections by negroes or slaves, *Bee it* * * * *enacted* * * * , that noe master or overseer knowingly permitt or suffer, without the leave or licence of his or their master or overseer, any negroe or slave not properly belonging to him or them, to remaine or be upon his or their plantation above the space of four houres at any one time, * * * upon paine to forfeite * * * the summe of two hundred pounds of tobacco in cask for each time soe offending[.]"{EN-1927}

• [1705 and 1709] "*And* * * * *be it enacted* * * * , That no slave * * * go from off the plantation and seat of land where such slave shall be appointed to live, without a certificate of leave in writing * * * from his or her master, mistress, or overseer: And if any slave shall be found offending herein, it shall be lawful for any person or persons to apprehend and deliver such slave to the next constable * * * who is hereby * * * required, without further order or warrant, to give such slave twenty lashes on his or her bare back, well laid on[.]"{EN-1928}

Violators of this statute were threatened with being "prosecuted according to the Strictest Severity & Rigor of the Common Law as such Disobedience requires".{EN-1929}

• [1723] "WHEREAS the laws now in force, for the better ordering and governing of slaves * * * are found insufficient to restrain their tumultuous and unlawful meetings, or to punish the secret plots and conspiracies carried on amongst them * * *

" * * * *Be it enacted*, * * * That if any number of negros, or other slaves, exceeding five, shall at any time hereafter consult, advise, or conspire, to rebel or make insurrection, or shall plot or conspire the murder of any person or persons whatsoever, every such consulting, plotting, or conspiring, shall be adjudged and deemed felony; and the slave or slaves convicted thereof * * * shall suffer death, and be utterly excluded the benefit of clergy, and of all laws made concerning the same.

* * * * *

" * * * [W]hereas many inconveniences have arisen, by the meetings of great numbers of negros and other slaves: For prevention thereof, *Be it enacted* * * * , That * * * no meetings of negros, or other slaves, be allowed, on any pretence whatsoever * * * [except in certain

cases]. And that every master, owner, or overseer of any plantation, who shall, knowingly or willingly, permit any such meetings, or suffer more than five negros or slaves, other than the negros or slaves belonging to his, her, or their plantations or quarters, to be and remain upon any plantation or quarter, at any one time, shall forfeit and pay the sum of five shillings, or fifty pounds of tobacco, for each negro or slave, over and above such number, that shall at any time * * * so unlawfully meet and assemble * * * .

" * * * *Provided always*, That nothing * * * shall be construed to restrain the negros, or other slaves, belonging to one and the same owner, and seated at distant quarters or plantations, to meet, by the license of such owner, or his or her overseer, at any of the quarters or plantations to such owner belonging; nor to retrain the meeting of any number of slaves, on their owner's or overseer's business, at any public mill, so as such meeting be not in the night, or on a Sunday; nor to restrain their meeting on any other lawful occasion, by the license, in writing, of their master, mistress, or overseers; nor to prohibit any slaves repairing to and meeting at church to attend divine service * * * .

" * * * *And be it further enacted* * * * That if any white person, free negro, mulatto, or Indian, shall at any time * * * be found in company with any such slaves, at any such unlawful meetings, * * * or harbor or entertain any negro, or other slave whatsoever, without the consent of their owners, he, she, or they, so offending, * * * shall forfeit and pay the sum of fifteen shillings, or one hundred and fifty pounds of tobacco, * * * and upon failure to make present payment, shall have and receive, on his, her, or their bare backs, for every such offence, twenty lashes, well laid on. And every negro, mulatto, or indian slave, who shall come or assemble to such unlawful meetings, shall * * * , for every such offence, have and receive, on his or her bare back, any number of lashes, not exceeding thirty-nine."{EN-1930}

(By the late 1700s, a "mulatto" was defined as "every person who shall have one-fourth part or more of negro blood".{EN-1931})

•[1748] "Whereas it is absolutely necessary, that effectual provision should be made for the better ordering and governing of slaves, free negroes, mulattoes, and Indians, and detecting and punishing their secret plots, and dangerous combinations * * *

" * * * BE *it enacted*, * * * That if any negroe, or other slaves, shall at any time consult, advise, or conspire, to rebel or make insurrection, or shall plot, or conspire the murder of any person, or persons whatsoever, every such consulting, plotting, or conspiring, shall be adjudged and deemed felony, and the slave or slaves convicted thereof * * * shall suffer death, and be utterly excluded all benefit of clergy.

* * * * *

" * * * [T]o prevent the inconveniences arising by the meetings of slaves, *Be it* * * * *enacted* * * * , That if any master, mistress, or overseer

> * * * shall knowingly permit or suffer any slave, not belonging to him, or her, to be and remain upon his, or her plantation, above four hours at one time, without leave of the owner or overseer of such slave, he, or she, so permitting, shall forfeit and pay one hundred and fifty pounds of tobacco, for every such offence; and every owner, or overseer, of a plantation, who shall so permit, or suffer more than five negroes, or slaves, other than his, or her own, to be and remain upon his, or her plantation, or quarter, at any one time, shall forfeit and pay five shillings, or fifty pounds of tobacco, for each negroe, or slave above that number * * * .
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> " * * * [I]f any white person, free negroe, mulattoe, or Indian, shall at any time be found in company with slaves, at any unlawful meeting, or shall harbour, or entertain any slave, without the consent of his, or her owner, such person * * * shall forfeit and pay fifteen shillings, or one hundred and fifty pounds of tobacco, * * * or, on failure of present payment, shall receive on his, or her, bare back, twenty lashes, well laid on * * * : And every slave, present at any unlawful meeting, shall * * * receive any number of lashes, not exceeding thirty nine.
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> " * * * [I]f any slave shall presume to come, and be upon the plantation of any person whatsoever, without leave in writing, from his, or her owner, or overseer, not being sent upon lawful business, it shall be lawful for the owner, or overseer of such plantation, to give, or order, such slave ten lashes, on his, or her bare back, for every such offence.
>
> " * * * [N]o slave shall go from the plantation, or seat of land whereon he, or she, is appointed to live, without a certificate of leave, in writing, from his, or her owner, or overseer, or by their express order[.]"{EN-1932}

- [1785] "No slave shall go from the tenements of his master or other person with whom he lives, without a pass, or some letter or token whereby it may appear that he is proceeding by authority of his master, employer, or overseer: If he does, it shall be lawful for any person to apprehend and carry him before a justice of the peace, to be * * * punished with stripes or not, in his discretion.

> " * * * [U]nlawful assemblies, trespasses, and seditious speeches, by a slave or slaves, shall be punished with stripes, at the discretion of a justice of the peace[.]"{EN-1933}

(b) To render impotent rebellions and other crimes that could not be prevented, Virginia prohibited slaves and free people of color as well from, and punished them for, possessing firearms (or other weapons), except under one or another form of close supervision by their masters or public officials:

- [1639] "ALL persons except negroes to be provided with arms and amunition or be fined[.]"{EN-1934}

• [1680] "[I]t shall not be lawfull for any negroe or other slave to carry or arme himselfe with any club, staffe, gunn, sword or any other weapon of defence or offence[.]"{EN-1935}

• [1705 and 1709] "That no slave go armed with gun, sword, club, staff, or other weapon * * * : And if any slave shall be found offending herein, it shall be lawful for any person or persons to apprehend and deliver such slave to the next constable or head-borough, who is hereby * * * required, without further order or warrant, to give such slave twenty lashes on his or her bare back, well laid on, and so send him or her home[.]"{EN-1936}

Violations of this statute were to be "prosecuted according to the Strictest Severity & Rigor of the Common Law as such Disobedience requires".{EN-1937}

• [1723] "[N]o negro, mulatto, or Indian whatsoever; (except as hereafter excepted,) shall * * * presume to keep, or carry any gun, powder, shot, or any club, or other weapon whatsoever, offensive or defensive; but that every gun, and all powder and shot, and every such club or weapon * * * found or taken in the hands, custody, or possession of any such negro, mulatto, or Indian, shall be taken away; and * * * be forfeited to the seisor and informer, and moreover, every such negro, mulatto, or Indian, in whose hands, custody, or possession, the same shall be found, shall * * * receive any number of lashes, not exceeding thirty-nine, well laid on, on his or her bare back, for every such offence.

" * * * *Provided nevertheless*, That every free negro, mullatto, or indian, being a house-keeper, or listed in the militia, may be permitted to keep one gun, powder, and shot; and that those who are not house-keepers, nor listed in the militia * * * , who are now possessed of any gun, powder, shot, or any weapon, offensive or defensive, may sell and dispose thereof, at any time before the last day of October next ensuing. And that all negros, mullattos, or indians, bond or free, living at any frontier plantation, be permitted to keep and use guns, powder, and shot, or other weapons, offensive or defensive; having first obtained a license for the same, from some justice of the peace of the county wherein such plantations lie * * * upon the application of such free negros, mullattos, or indians, or of the owner or owners of such as are slaves[.]"{EN-1938}

• [1748] "[N]o negroe, mulattoe, or Indian whatsoever, shall keep, or carry any gun, powder, shot, club, or other weapon, whatsoever, offensive, or defensive, but all and every gun, weapon, and ammunition, found in the custody or possession of any negroe, mulattoe, or Indian, may be seized by any person, and * * * be forfeited to the seizor, for his own use; and moreover, every such offender shall * * * receive * * * any number of lashes, not exceeding thirty nine, on his, or her bare back, well laid on, for every such offence.

> " * * * *Provided nevertheless*, That every free negroe, mulattoe, or Indian, being a house keeper, may be permitted to keep one gun, powder, and shot: And all negroes, mulattoes, and Indians, bond or free, living at any frontier plantation, may be permitted to keep and use guns, powder, shot, and weapons, offensive, or defensive, by license, from a justice of peace, of the county wherein such plantations lie, to be obtained upon the application of free negroes, mulattoes, or Indians, or of the owners of such as are slaves[.]"{EN-1939}
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> • [1785] "No slave shall keep any arms whatever, nor pass unless with written orders from his master or employer, or in his company with arms, from one place to another. Arms in possession of a slave contrary to this prohibition, shall be forfeited to him who will seize them."{EN-1940}

Revealingly, as draconian as these statutes were, in the *post*-constitutional period the discrimination against people of color became even worse. For example:

> [1832] "No free negro or mulatto shall be suffered to keep or carry any firelock of any kind, any military weapon, or any powder or lead; and any free negro or mulatto who shall so offend, shall * * * forfeit all such arms and ammunition to the use of the informer; and shall moreover be punished with stripes * * * , not exceeding thirty lashes. And [an earlier Act] * * * authorizing justices of the peace, in certain cases, to permit slaves to keep and use guns or other weapons, powder and shot; and so much of th[at] * * * act as authorizes the county and corporation courts to grant licenses to free negroes and mulattoes to keep or carry any firelock of any kind, any military weapon, or any powder or lead, * * * are hereby repealed."{EN-1941}

(c) During the period surrounding the War of Independence, Virginians refused to consider the wholesale enrollment of slaves for service in their Militia or the recruitment of slaves for their regular Armed Forces. Doubtlessly, this reluctance stemmed in no small measure from the attempt by the truculent Lord Dunmore, Virginia's last Royal Governor, to recruit Virginians' slaves in aid of suppression of Virginia's patriots. On 7 November 1775, Dunmore issued a proclamation,"declar[ing] all indented Servants, Negroes, or others, (appertaining to Rebels), free that are able and willing to bear Arms, they joining His Majesty's Troops as soon as may be, for the more speedily reducing this Colony to a proper sense of their Duty".{EN-1942} His obvious intent was to mobilize the large numbers and presumed desires for vengeance of freed bondsmen to provide "an overmatch for the freemen" then in rebellion against the Crown. And Virginians plainly understood that to be his plan—and his anticipation of success in that endeavor to be not without foundation—when they referred to Dunmore's proclamation as one important ground for increasing their military exertions in order to win their independence from Great Britain:

> WHEREAS the earl of Dunmore, by his many hostile attacks upon the good people of this colony, and attempts to infringe their rights and liberties, by his proclamation declaring freedom to our servants and slaves, and arming them against us, by seizing our persons and properties, and declaring those who opposed such his arbitrary measures in a state of rebellion, hath made it necessary that an additional number of forces be raised for our protection and defence[.]{EN-1943}

Besides redoubling their own efforts, Virginians in arms against the British also threatened with dire punishment every one of their own slaves who took up arms against them:

> [1775] "[I]f any slave, or slaves, shall be hereafter taken in arms against this colony, or in the possession of any enemy, through their own choice, the committee of safety shall have full power and authority to transport such slave, or slaves, to any of the foreign West India islands, there to be disposed of by sale, and the money arising from such sale to be laid out in the purchase of arms and ammunition, or otherwise applied to the use of this colony, as the committee of safety shall judge most proper; and in case such slaves, so taken in arms, or in the possession of any enemy, cannot be transported with convenience to this colony, the same shall be disposed of for the use of this colony, or returned to the owner or owners of such slaves, or otherwise dealt with according to an act of assembly for punishing slaves committing capital offenses, as the committee of safety may judge most proper."{EN-1944}

And they refused to enlist any persons of color in their own Armed Forces, without official proof that the volunteers were in fact free men:

> [1777] "And whereas several negro slaves have deserted from their masters, and under pretence of being free men have enlisted as soldiers: For prevention whereof, *Be it enacted*, that is shall not be lawful for any recruiting officer within this commonwealth to enlist any negro or mulatto into the service of this or either of the United States, until such negro or mulatto shall produce a certificate from some justice of the peace for the county wherein he resides that he is a free man."{EN-1945}

(2) From the foregoing can be extracted two principles of *pre-*constitutional "gun control" in Virginia that appertained or related to the Peculiar Institution:

• *A right to possess arms could be denied on the basis of an individual's condition of servitude*. Personal disarmament was an unavoidable "badge and incident of slavery", enforced by law, which could be mitigated in particular instances only by the permission of a slave's master or of some public official.

•*A right to possess arms could be denied simply on the basis of an individual's race, irrespective of his actual condition of servitude*. As, for example, the statutes of 1723 and 1748 (quoted above) demonstrate, many free persons of color were prohibited from possessing firearms, doubtlessly at least in part as an expedient means to simplify enforcement of the strict prohibition against possession of any weapons by slaves. For if, in general, no (or very few) persons of color could lawfully have possessed firearms, vanishingly few slaves could ever have hoped to succeed in openly violating the law, because the combination in plain sight of a colored person's race and his possession of a firearm was *prima facie* evidence of his guilt. And, in a society economically dependent upon slavery, this glaring discrimination against free people of color was all too easily rationalized by the notion that all people of color were "a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them".[987]

Yet, as to free people of color, the discriminatory policy was not particularly well thought out. Throughout the Eighteenth Century, basically "all free male persons whatsoever" (if able-bodied and not specially exempted for one reason or another) were listed in Virginia's Militia.{EN-1946} But free male persons of color listed in the Militia were generally "emploied [only] as drummers or trumpeters" or "were obliged * * * to do the duty of pioneers, or * * * other servile labour", rather than to perform standard military duties as foot soldiers or cavalry in regular Militia Companies.{EN-1947} Between 1723 and 1748, free persons of color were permitted to possess no more than one firearm and ammunition, either because they were housekeepers—that is, "master[s] of a family",[988] or because they were listed in the Militia, or because they were "living at any frontier plantation". Presumably, though, possession of a firearm by these people was allowed for purposes of personal self-defense alone, because under the Militia Act of 1738 "all such free mulattos, negros, or Indians, as are or shall be listed, * * * shall appear [for their Militia service] without arms".{EN-1948} (Although the Militia Act of 1723 was not explicit on this point, that was probably how it, too, was actually applied.{EN-1949}) This explicit limitation was necessary, because free persons of color listed in the Militia could possess firearms perforce simply of that listing, but legislators did not want them to perform Militia duty with firearms (perhaps because they did not want them well trained in the efficient use of arms). After 1748, though, only free persons of color who were housekeepers, or who "liv[ed] at any frontier plantation" and were licensed by a Justice of the Peace, were permitted to possess firearms. But

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[987] Scott v. Sandford, 60 U.S. (19 Howard) 393, 404-405 (1857) (opinion of Taney, C.J.).

[988] Then, as now, "housekeeper" was defined as "householder; master of a family", and "householder" was defined as "master of a family". S. Johnson, *Dictionary, ante* note 50, in both the First (1755) and the Fourth (1773) Editions. *See, e.g., Webster's New International Dictionary, ante* note 330, at 1207.

certainly some of them were also listed in the Militia. So the express prohibition against persons of color appearing for their Militia service with arms had to be continued in the Militia Acts from 1755 through 1771.{EN-1950}

One must wonder, however, what sense inhered in distinctions amongst and even discrimination against free people of color who were listed in the Militia but not housekeepers, those who were both housekeepers and listed in the Militia, those who were housekeepers but not listed in the Militia, and those who were "living at any frontier plantation", when it came to who should be armed. Surely it was sensible to allow all housekeepers—and especially all persons who "liv[ed] at any frontier plantation"—to be armed, in order to protect their families, even if they were not listed in the Militia. But it would have been even more sensible to have allowed every person of color who was listed in the Militia, housekeeper or not and wherever he happened to live, to be armed, in order to maximize the entire community's ability to protect itself.

Interestingly, the class of housekeepers who were not listed in the Militia doubtlessly included widows and some single women, as well as some superannuated or otherwise not-able-bodied men. That all of these individuals in such disfavored groups as Negroes, Mulattoes, and Indians were apparently permitted to be armed under the statutes of 1723 and 1748 indicates that essentially *no* otherwise innocent housekeeper, male *or female*, *or of any race*, was to be disarmed under color of law. For nothing in Virginia's *pre*-constitutional history suggests that White women, or old or infirm White men, were ever systematically disarmed; and the statutes of 1723 and 1748 expressly permitted non-White housekeepers (implicitly of all descriptions) to arm themselves. So, statutory disarmament of any free Virginians must have applied almost exclusively to single male individuals of color who neither were housekeepers nor "liv[ed] at any frontier plantation".

Today, of course, "gun control" of Virginia's *pre*-constitutional variety could still be imposed on individuals justifiably sentenced to "slavery [ ]or involuntary servitude * * * as a punishment for crime whereof the party shall have been duly convicted".[989] But no "gun control" of that type could be imposed upon any innocent individual simply on the basis of his race.[990]

(3) These statutes cast in sharp relief the practical distinctions Virginians made between people held in slavery (and those subject to related racial discrimination) and the Militia during the *pre*-constitutional era. *First*, slaves (and even free people in league with them) could not freely associate, let alone organize themselves; whereas, in complete contrast, the Militia was the total association and organization of the community. *Second*, slaves (and even most free people of color)

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[989] U.S. Const. amend. XIII, § 1. *See post*, at 749-749, 993-998, and 1011-1013.

[990] *See* U.S. Const. amend. XIV, § 1.

could not possess firearms without special permission and supervision; whereas, in contrast, in the Militia everyone except conscientious objectors was required personally to possess at least one firearm, ammunition, and accoutrements at all times. *Third*, slaves (and, again, free people of color) could not or would not be trained to arms, even under strict supervision; whereas, "a well regulated militia" was, by definition, "composed of the body of the people, *trained to arms*".[991]

c. Disloyal citizens. In the hierarchy of *pre-*constitutional Virginians' domestic enemies, arguably the most dangerous were disloyal citizens, because they undermined the community's political cohesion in a manner beyond the capacity of any other enemies. No inducement would have encouraged any large number of Virginians to take up arms on behalf of hostile Indians or rebellious slaves, let alone to aid common criminals. But, under the confusion and allure of subversive political doctrines and promises, some Virginians might have separated themselves into mutually antagonistic factions, jeopardizing everyone's security, prosperity, and even independence. So the disloyal could not be allowed to exercise exactly the same rights loyal citizens enjoyed. The private possession of arms being central to the community's defense, on more than one critical occasion Virginia's legislators mandated the disarmament of disloyal citizens.

(1) During the French and Indian War, American Catholics (disparaged as "Papists" in the idiom of that day) were suspected of disloyalty throughout the Colonies, not just because France was largely a Catholic country and the British Empire predominately Protestant, but perhaps more importantly because all Catholics presumably opposed the established Church of England and the Protestant monopoly over the British Crown.[992] For that reason, a statute enacted in Virginia in 1756 prescribed that,

> WHEREAS it is dangerous at this time to permit Papists to be armed, * * * it shall, and may be lawful, for any two or more justices of the peace, who shall know, or suspect any person to be a Papist, * * * to tender to such person * * * the oaths appointed by act of parliament to be taken * * * ; and if such person * * * shall refuse to take the said oaths, * * * or shall refuse, or forebear to appear * * * for the taking the said oaths, * * * such person * * * shall be * * * liable and subject to all and every the penalties, forfeitures, and disabilities hereafter in this act mentioned.
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> * * * And for the better securing the lives and properties of his majesty's faithful subjects, * * * no Papist, or reputed Papist so refusing,

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[991] Virginia Declaration of Rights (1776) art. 13 (emphasis supplied).

[992] *See, e.g.,* W. Blackstone, *Commentaries on the Laws of England, ante* note 142, Volume 1, at 210-217.

> or making default * * * , shall, or may have, or keep in his house or elsewhere, or in the possession of any other person to his use, or at his disposition, any arms, weapons, gunpowder or ammunition, (other than such necessary weapons as shall be allowed to him, by order of the justices of the peace * * * , for the defence of his house or person) and that any two or more justices of the peace * * * may authorise and impower any person or persons in the day-time, with the assistance of the constables * * * to search for all arms, weapons, gunpowder or ammunition, which shall be in the house, custody, or possession of any such Papist, or reputed Papist, and seize the same for the use of his majesty and his successors * * * .
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> * * * [E]very Papist, or reputed Papist, who shall not, within the space of ten days after such refusal, or making default * * * , discover and deliver * * * to some of his majesty's justices of the peace, all arms, weapons, gunpowder or ammunition, which he shall have in his house or elsewhere, or which shall be in the possession of any person to his use, or at his disposition, or shall hinder or disturb any person or persons, authorised * * * to search for, and seize the same; that every such person so offending * * * shall be committed to the goal of the county wherein he shall commit such offence, * * * there to remain without bail or mainprize for the space of three months, and shall also forfeit and lose the said arms, and pay treble the value of them to the use of his majesty and his successors * * * .
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> * * * *Provided always*, That if any person who shall have refused or made default * * * shall desire to submit and conform * * * and shall * * * in open court take the said oaths, * * * he shall from thenceforth be discharged of and from all disabilities and forfeitures[.] {EN-1951}

Interestingly, the sanctions with respect to possession of arms imposed against presumptively disloyal Catholics at this point in time were rather less severe than those meted out to slaves throughout the *pre-*constitutional era—perhaps indicating that the charge of Catholics' disloyalty partook more of religious-historical form than of real political substance, whereas no one ever seriously doubted that slaves in no small numbers were quite likely to revolt if afforded the opportunity and allowed to acquire the means. Catholics who refused to take the prescribed oaths were required to disclose the existence and surrender all of the firearms and ammunition in their possession and subject to their control, and to submit to searches of their property for arms and seizures of such arms as were found—or be committed to jail, suffer expropriation of their arms, and be fined triple the arms' value. They were, however, not entirely disarmed, even if they were believed to be disloyal. For the statute permitted them to retain "such necessary weapons as shall be allowed * * * by order of the justices of the peace * * * for the defence of * * * house or person"—the imperative "*shall* be allowed" indicating that

the Justices perhaps lacked discretion to make no such allowance at all, but certainly not precluding them from determining in any particular case what might have constituted "*necessary* weapons" for purposes of some individual's personal defense. Moreover, any Catholic could have avoided all of the statute's prohibitions and penalties simply by taking the prescribed loyalty oaths.

(2) During the War of Independence, the problem of disloyalty arose again, albeit without openly religious overtones. And, once more, disarmament was prescribed or enforced as part of the penalty. For instance, in 1776, Virginia's Convention decreed "[t]hat if any free person or persons shall in any manner, or by any device, ways, or means, aid, abet, or assist the enemy, he, she, or they, so offending, * * * shall forfeit all his, her, or their estates, real and personal, to the use of the commonwealth, and moreover be imprisoned * * * , not extending beyond the continuance of the present war with Great Britain".{EN-1952} Although this Ordinance did not provide in so many words for confiscation of disloyal individuals' firearms, it was accompanied in operation by a mandated "test oath"—and those refusing to take this oath were stripped of their arms and ammunition (but usually received some financial compensation for their losses).[993]

Then, in 1777, Virginia's General Assembly provided that,

> WHEREAS allegiance and protection are reciprocal, and those who will not bear the former are not entitled to the benefits of the latter, * * * all free born male inhabitants of this state, above the age of sixteen years, except imported servants during the time of their service, shall * * * , take and subscribe * * * [a prescribed] oath or affirmation [of allegiance] * * * .
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> * * * * *
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> * * * [T]he court of every county * * * shall appoint some of their members to make a tour of the county, and tender the oath or affirmation to every free born male person above the age of sixteen years, except as before excepted; and * * * in the certificate * * * returned * * * shall be mentioned the names of such as refuse. And * * * the * * * chief commanding officer of the militia * * * is * * * directed forthwith to cause such recusants to be disarmed.
>
> *Provided*, That the person so disarmed shall, nevertheless, be obliged to attend musters, but shall be exempted from the fines imposed for appearing * * * without arms, accoutrements, and ammunition.
>
> * * * [E]very person above the age before mentioned, except as before excepted, refusing or neglecting to take and subscribe the oath or affirmation aforesaid, shall, during the time of such neglect or refusal, be incapable of holding any office in this state, serving on juries, suing for any

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[993] *See* H. Eckenrode, *The Revolution in Virginia, ante* note 644, at 118-119, 136-137.

> debts, electing or being elected, or buying lands, tenements, or hereditaments.{EN-1953}

Revealingly, under this statute disloyal citizens were impressed with many of the most degrading "badges and incidents" of slavery and related racial discrimination. First and foremost, they were disarmed, yet required to attend Militia musters without arms—in precisely the same way that free people of color were.{EN-1954} In addition, just as were slaves, they were deprived of other important attributes of citizenship, including the rights to vote, to hold public office, to serve on juries, to petition the courts for legal relief, and to own real property. Thus, this statute emphasized (if emphasis were needed) that *armed* service in the Militia—and, implicitly, the right to keep and bear arms for and in that service—was of the highest political and legal stature.

This form of "gun control" and associated losses of rights were not the worst punishments that threatened disloyal Virginians during the War of Independence, however. For, in 1781, the General Assembly decreed that,

> WHEREAS in this time of public danger, it is necessary to invest the executive with the most ample powers, both for the purpose of strenuous opposition to the enemy, and also to provide for the punctual execution of the laws, on which the safety and welfare of the commonwealth depends[,] * * * [t]he governor, with the advice of the council, is * * * empowered to apprehend or cause to be apprehended and committed to close confinement, any person or persons whatsoever, whom they may have just cause to suspect of disaffection to the independence of the United States or of attachment to their enemies, and such person or persons shall not be set at liberty by bail, mainprize or *habeas corpus*. The governor, with the advice of council, is also * * * empowered, if necessary, to send within the enemy's lines, any person or persons who hath or have heretofore refused to take the oaths of allegiance, unless such refusal shall have arisen from religious scruples or other reasons equally satisfactory, and whom they shall have good cause to suspect, do still continue inimical to the independence of the United States; and also any person or persons having been previously convicted by testimony on oath before the said executive of disaffection to the government, giving any person or persons at the least twenty days notice of such banishment, that he or they may have an opportunity to dispose of his or their property, which they are hereby permitted to do. And any person refusing to go when so ordered, or returning after having so gone within the enemy's lines, shall be adjudged guilty of felony and shall suffer death without benefit of clergy. * * * If any person or persons shall make opposition by force to laws for the express purpose of calling men into the field for the defence of this state, he or they shall be considered as civilly dead as to his or their property, which shall go and descend to his or their

> next heir, or be distributed among his or their next of kin according to law; every such person shall also incur and suffer all the pains, penalties and forfeitures of a premunire.{EN-1955}

Thus,

• Any person disaffected to the independence of the United States was to be committed to "close confinement"—and of course disarmed during that confinement.

• Any person who refused without good reason to take the oaths of allegiance or who had been convicted of disaffection was to be deprived of his citizenship entirely and banished by being "sen[t] within the enemy's lines", having first been afforded an opportunity to dispose of his property (doubtlessly at distress prices)—so he could not depart with any arms that he might have possessed. This was only fitting, though, because, [w]hen the citizens at large govern for the public good * * * in such a state the profession of arms will always have the greatest share in the government",[994] and therefore those who are legitimately stripped of their citizenship can expect to suffer dispossession of their arms.

• Any disaffected person refusing to leave Virginia, or returning after entering the enemy's lines, was to be put to death—besides which punishment mere disarmament was trivial. And,

• Any person temerarious enough forcibly to oppose the laws for calling men to military service—including, presumably, Virginia's Militia laws—was to be deprived of every personal legal claim to his property, including arms, and to "suffer all the pains, penalties and forfeitures of a premunire".

This threat of being subject to "all the pains, penalties, and forfeitures of a premunire" is perhaps the most interesting of all, because today it is the most unfamiliar. Under old English law, persons guilty of the offense of "*praemunire*" were to "be put out of the king's protection, their lands and goods forfeited to the king's use, and they [themselves] * * * attached by their bodies to answer to the king and his council". Moreover, "such [a] delinquent * * * c[ould] bring no action for any private injury, how atrocious soever; being so far out of the protection of the law, that it w[ould] not guard his civil rights, nor remedy any grievance which he as an individual m[ight] suffer. And no man, knowing him to be guilty, c[ould] with safety give him comfort, aid, or relief."[995]

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[994] Aristotle, *Politics,* Book III, Chapter VII, *in* A TREATISE ON GOVERNMENT OR, THE POLITICS OF ARISTOTLE, *ante* note 73, at 79.

[995] W. Blackstone, *Commentaries on the Laws of England, ante* note 142, Volume 4, at 112, 118 (footnote omitted). *See* W. Hawkins, *A Treatise of The Pleas of the Crown, ante* note 434, Book I, Chapter XIX, §§ 45 through 47, at 55. A conviction under "*praemunire*", then, shared many characteristics with outlawry. *See* Blackstone, *ante*, Volume 1, at 142; Volume 3, at 283-284; *and* Volume 4, at 314-315.

Although archaic and rather severe in practice, in principle "*praemunire*" would be a peculiarly appropriate and deserved charge to level against contemporary "gun controllers". For under *pre-*constitutional Anglo-American law, "[t]o obtain an exclusive patent for the sole making or importation of gunpowder or arms, or to hinder others from importing them, [wa]s * * * a *praemunire*".[996] In this light, many of the unconstitutional "hind[rances]" that modern rogue officials, at the instigation of various malign factions and special-interest groups, have set up against common Americans' dealing in firearms and ammunition amount to rather obvious violations of this principle of "*praemunire*"—enforceable through the Constitution's incorporation of "the Militia of the several States" and its guarantee of "the right of the people to keep and bear Arms", as explained in this study.

In addition, the principles of "*praemunire*" could be invoked against the Federal Reserve System's emission of paper currency, irredeemable in either silver or gold. For, during *pre-*constitutional times, "the offence of acting as a broker or agent in any usurious contract, where above ten *per cent.* interest is taken", and "all unwarrantable undertakings by unlawful subscriptions, then commonly known by the name of bubbles", were violations of "*praemunire*".[997] So, because a loan of fictitious currency is necessarily an "usurious contract" at an arguably infinite rate of interest (the currency loaned having been created out of nothing), the entire Ponzi scheme of modern central banking, and the huge variety of corrupt financial manipulations, "bail outs", and other "bubbles" it facilitates, all amount to violations of this principle of "*praemunire*"—again, enforceable through the Constitution.[998]

Finally, the principles of "*praemunire*" could interdict various schemes for subordinating the United States to some foreign nation or to some regional or global *supra-*national government. For, since the days of King Edward I, "introducing a foreign power into th[e] land, and creating *imperium in imperio*", was "the original meaning of the offence * * * call[ed] *praemunire*".[999] So, every rogue public official whoring for some foreign power or plumping for the erection of a so-called "New World Order" to which the United States would be subordinated is chargeable with violating this fundamental principle of "*praemunire*". In this instance, *"praemunire"* could be enforced through the Declaration of Independence as well as the Constitution—namely, that: (i) The Declaration asserts the right of each State, and of their association in the United States, to those "separate and equal station[s]" "among the powers of the earth" "to which the Laws of Nature and of Nature's God entitle them"; whereas, subordination of any of the States, let alone the United

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[996] W. Blackstone, *Commentaries on the Laws of England, ante* note 142, Volume 4, at 116.

[997] *Id.*, Volume 4, at 115, 117.

[998] *See* E. Vieira, Jr., *Pieces of Eight, ante* note 39, Volume 2, at 1401-1524.

[999] W. Blackstone, *Commentaries on the Laws of England, ante* note 142, Volume 4, at 114.

States as a whole, to some foreign nation or to a *supra*-national government would necessarily obliterate such "separate and equal station[s]". And (ii) the Constitution requires the United States to "guarantee to every State in th[e] Union a Republican Form of Government",[1000] "one constructed on th[e] principle, that the Supreme Power resides in the body of the people" of those very States;[1001] whereas, allowing a foreign state or some *supra*-national government to exercise any political influence, let alone actual legal sway over the United States, in whole or in part, would necessarily transfer some, or in the event of the erection of a true "world government" even all, of "the Supreme Power" from Americans to foreigners.

Today, "gun control" of Virginia's *pre*-constitutional variety could still be imposed on individuals guilty of certain types of disloyalty. For example, if an individual were "convicted of Treason * * * on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court",[1002] he could justifiably be sentenced to "slavery * * * as [the] punishment for [the] crime whereof * * * [he] shall have been duly convicted",[1003] and thereby totally disarmed for the duration of his sentence, because Congress could "declare the Punishment of Treason" to be "slavery", and the preëminent "badge and incident" of slavery is a slave's disarmament.[1004] Of course, in the exercise of its discretion, Congress also could punish "Treason" simply by imposing lifetime disarmament on the perpetrator, without any other "badge and incident" of slavery. To be sure, consistently with the Eighth Amendment, Congress may not "declare [any] Punishment of Treason" under color of which "excessive fines [are] imposed, [ ]or cruel and unusual punishments inflicted" (although one must wonder what could constitute an "excessive fine[ ]" when the Constitution explicitly allows for "Attainder of Treason" and "Forfeiture * * * during the Life of the Person attainted").[1005] But, inasmuch as (i) slavery existed throughout America when the Eight Amendment was ratified and was not abolished or its mere existence in any way hindered pursuant to it, and (ii) the Thirteenth Amendment was ratified after the Eighth Amendment and to the extent of any inconsistency between the two repeals or qualifies it—therefore "slavery * * * as a punishment for crime" cannot be deemed in principle always either to impose "excessive fines" or to inflict "cruel and unusual punishments". In practice however, the imposition of "slavery * * * as a[n *excessive*] punishment for [*relatively minor*] crime[s]" could conceivably violate the Eighth

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[1000] U.S. Const. art. IV, § 4.

[1001] *See* Chisholm v. Georgia, 2 U.S. (2 Dallas) 419, 457 (1793) (opinion of Wilson, J.).

[1002] U.S. Const. art. III, § 3, cl. 1.

[1003] U.S. Const. amend. XIII, § 1.

[1004] *Compare* U.S. Const. art. III, § 3, cl. 2 *with* W. Blackstone, *Commentaries on the Laws of England, ante* note 142, Volume 1, at 416.

[1005] *Compare and contrast* U.S. Const. art. III, § 3, cl. 2 *with* amend. VIII.

Amendment, because "it is a precept of justice that punishment for crime should be graduated and proportioned to the offense",[1006] and therefore that Amendment should bar "all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged".[1007]

C. Internal police regulations to prevent the misuse of otherwise legitimate arms. Finally, some "gun control" arising in the very earliest days in *pre*-constitutional Virginia, which no reasonable individual would consider at all controversial today, aimed at the protection of private property, the promotion of personal safety, and the maintenance of public propriety. For example,

> • [1639] "NOT to shoot or hunt on other men's land that is seated and bounds marked under penalty of 40[shillings] but may pursue deer and shoot on their own land."{EN-1956}
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> • [1643, 1645, 1658, and 1662] "WHEREAS the rights and interests of the inhabitants are very much infringed by hunting and shooting of divers men vpon their neighbours lands and dividents contrary to the priviledges granted to them by their patents, whereby many injuries do dayly happen to the great damage of the owners of the land whereon such hunting or shooting is vsed, *It is therefore enacted* * * * that if any planter or person shall hunt or shoot vpon or within the precincts or lymitts of his neighbour or other divident without leave first obtained for his soe doing, and having been warned by the owner of the land to forbear hunting and shooting as aforesaid, he or they soe offending shall forfeit for everie such offence foure hundred pounds of tobacco * * * —Notwithstanding it shall and may be lawfull for any person or planter to hunt and shoot upon any divident of land not being planted or seated without any restraint or penalty, Provided that the lymitts of everie divident be bounded with certain and noted marks. Provided also that it shall be lawfull for any person having shott a deare or other game without the lymitts of any man's land to pursue the said deare or game into the divident of another man, and freely to carry away the same without any trespass against the owner or proprietor of the said land and without incurring the penalty of this * * * act."{EN-1957}
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> • [1643] "*Be it* * * * *enacted* * * * , for the better observation of the Saboth and for the restraint of divers abuses committed in the collony by vnlawfull shooting on the Sabbath day * * * , vnles it shall be for the safety of his or their plantations or corne fields or for defence against the Indians, he or they so offending shall forfeit for his or their first offence * * * if he be a freeman the quantity of twenty pounds of tobacco, and if a servant to be punished at the discretion of his master, And if masters of

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[1006] Weems v. United States, 217 U.S. 349, 367 (1910).

[1007] O'Neil v. Vermont, 144 U.S. 323, 339-340 (1892) (Field, J., dissenting).

any such servants be remisse and negligent in the punishing of his servant for the offence * * * he shall be liable to the forfeiture of twenty pounds of tobacco[.]"{EN-1958}

CHAPTER TWENTY-SIX

The Resolution of the Continental Congress of 18 July 1775 provides an excellent summary of the major principles of "the Militia of the several States" as the Founding Fathers understood them from their own personal experience.

A complete study of all of the *pre*-constitutional Militia and related statutes of all of the original Thirteen Colonies other than Pennsylvania, and then of all of the independent States, would confirm each and every one of the conclusions set out heretofore for Rhode Island and Virginia.[1008] Such an undertaking would prove both tedious and unnecessary for the average student of these matters, though, inasmuch as the Continental Congress—a body that, perhaps more than any other at the time, was in a position to develop an overview of the situation as comprehensive as it was accurate—provided an adequate summary in its Resolution of 18 July 1775:

> The Congress resumed the report of the Committee for putting the Militia into a proper state of defence and after debating the same by paragraphs came to the following resolutions:
>
> *Resolved*, That it be recommended to the inhabitants of all the united English Colonies in North America, that all able bodied effective men, between sixteen and fifty years of age in each colony, immediately form themselves into regular companies of Militia, to consist of one Capt[n], two lieutenants, one ensign, four serjeants, four corporals, one clerk, one drummer, one fifer, and about 68 privates.
>
> That the officers of each company be chosen by the respective companies.
>
> That each soldier be furnished with a good musket, that will carry an ounce ball, with a bayonet, steel ram-rod, worm, priming wire and brush fitted thereto, a cutting sword or tomahawk, a cartridge-box, that will contain 23 rounds of cartridges, twelve flints and a knapsack.
>
> That the Companies be formed into Regiments or Battalions, officered with a Colonel, lieutenant Colonel, two Majors, an Adjutant, and Quarter Master.

[1008] *See generally as the minimum resource necessary for such research* The Selective Service System, *Backgrounds of Selective Service, Military Obligation: The American Tradition, A Compilation of the Enactments of Compulsion From the Earliest Settlements of the Original Thirteen Colonies in 1607 Through the Articles of Confederation 1789*, Special Monograph No. 1, Volume II (14 Parts) (Washington, D.C.: Government Printing Office, 1947).

That all officers above the Rank of a captain, be appointed by their respective provincial assemblies or conventions, or in their recess, by the committees of safety appointed by s[d] assemblies or conventions.

That all officers be commissioned by the provincial Assemblies or conventions, or in their recess by the committees of safety appointed by s[d] Assemblies or conventions.

That all the Militia take proper care to acquire military skill, and be well prepared for defence by being each man provided with one pound of good gun powder, and four pounds of ball, fitted to his gun.

That one fourth part of the Militia in every Colony, be selected for minute men, of such persons as are willing to enter into this necessary service, formed into companies and Battalions, and their officers chosen and commissioned as aforesaid, to be ready on the shortest notice, to march to any place where their assistance may be required, for the defence of their own or a neighbouring colony; And as these minute men may eventually be called to action before the whole body of the militia are sufficiently trained, it is recommended that a more particular and diligent attention be paid to their instruction in military discipline.

That such of the minute men, as desire it, be relieved by new draughts as aforesaid, from the whole body of the Militia, once in four months.

As there are some people, who, from religious principles, cannot bear arms in any case, this Congress intend no violence to their consciences, but earnestly recommend it to them, to contribute liberally in this time of universal calamity, to the relief of their distressed brethren in the several colonies, and to do all other services to their oppressed Country, which they can consistently with their religious principles.

That it be recommended to the assemblies or Conventions in the respective colonies to provide, as soon as possible, sufficient stores of ammunition for their colonies; Also that they devise proper means for furnishing with Arms, such effective men as are poor and unable to furnish themselves.

That it be recommended to each Colony to appoint a committee of safety, to superintend and direct all matters necessary for the security and defence of their respective colonies, in the recess of their assemblies and conventions.

That each colony, at their own expence, make such provision by armed vessels or otherwise, as their respective assemblies, conventions, or committees of safety shall judge expedient and suitable to their circumstances and situations, for the protection of their harbours and navigation on their sea coasts, against all unlawful invasions, attacks, and depredations, from cutters and ships of war.

That it be recommended to the makers of arms for the use of the Militia, that they make good substantial muskets, with barrels three feet and half in length, that will carry an ounce ball, and fitted with a good

> bayonet and steel ram-rod, and that the making such arms be encouraged in these United Colonies.
>
> Where in any colony a militia is already formed under regulations approved of by the convention of such colony, or by such assemblies as are annually elective, we refer to the discretion of such convention or assembly, either to adopt the foregoing regulations in the whole or in part, or to continue their former, as they, on consideration of all circumstances, shall think best.[1009]

This Resolution rather neatly encapsulates the most important principles of the *pre*-constitutional Militia, including:

- *Near-universal service*—by "all able bodied effective men, between sixteen and fifty years of age in each colony".
- *Local organization*—in small "regular companies of Militia", usually of less than one hundred members.
- *Local selection of officers*—either "chosen by [the people themselves in] the[ir] respective [Militia] companies" by direct democracy or "appointed by the[people's own] respective provincial assemblies or conventions" according to the Republican Principle.[1010]
- *Universal training*—"[t]hat all the Militia take proper care to acquire military skill".
- *Selective assignments to particular duties*—that "a more particular and diligent attention be paid to the[ ] instruction in military discipline" of such parts of the Militia as "may eventually be called to action before the whole body of the militia are sufficiently trained". That is, selections from within the Militia for particular duties, rather than the creation of a "select militia" for all duties.
- *The duty of every Militiaman (other than conscientious objectors) to keep and bear serviceable arms*—so that "each soldier [will] be furnished with a good musket" and "provided with * * * good gun powder, and * * * ball, fitted to his gun".
- *The duty of public officials to arm those Militiamen incapable of arming themselves*—by "devis[ing] proper means for furnishing with Arms, such effective men as are poor and unable to furnish themselves"—and for all other Militiamen to equip themselves with arms at their own expense.

[1009] *Journals of the Continental Congress*, *ante* note 42, Volume II (May 10 to September 20, 1775), at 187-190 (footnote omitted).

[1010] "A republic" is "a government in which the scheme of representation takes place". *The Federalist* No. 10 (James Madison).

• *Primary reliance on the free market for the production of arms*—with the government proposing standards with which private manufacturers should comply.

• *The duty of public officials to promote a vigorous free market in arms suitable for Militia service*—so that "the making of * * * arms [will] be encouraged" throughout America.

• *The importance of ammunition*—recognizing that, because arms without ammunition are of limited utility, public officials are obliged to ensure that the Militia have access to "sufficient stores of ammunition" at all times.

• *Rotation in service*—that Militiamen selected for special service "be relieved by new draughts * * * from the whole body of the Militia" on some regular basis.

• *Limited exemption from Militia duties for conscientious objectors*—who must perform "all * * * services" other than bearing arms "which they can consistently with their religious principles".

• *Recognition of the States' concurrent and even superior authority over the Militia*—so that the States retain "the discretion * * * either to adopt * * * [Congressional] regulations in the whole or in part, or to continue their [own regulations] * * * , as they, on consideration of all circumstances, shall think best", so long as all of these regulations are mutually compatible. And, of particular importance today,

• *The need for special institutions capable of overseeing "homeland security" in each of the States at all times*—such as "a committee of safety, to superintend and direct all matters necessary for the security and defence of the[ ] respective" States "in the recess of their assemblies and conventions".

Part Three

CONCLUSIONS

A good militia is of such importance to a nation, that it is the chief part of the constitution of any free government. For though as to other things, the constitution be never so slight, a good militia will always preserve the publick liberty. But in the best constitution that ever was, as to all other parts of government, if the militia be not upon the right foot, the liberty of that people must perish.

Andrew Fletcher

The quotation on the preceding page is taken from A DISCOURSE OF GOVERNMENT WITH RELATION TO MILITIAS (Edinburgh, Scotland: M. Cooper, 1755 reprint of the 1688 edition), at 41.

CHAPTER TWENTY-SEVEN

The *pre*-constitutional Militia statutes of the Colonies and independent States establish at least seventeen fundamental principles that define the constitutional structure and service of revitalized "Militia of the several States".

In order to draw definitive conclusions as to what the Constitution's provisions concerning "the Militia of the several States" actually mean and how they should be applied today, this study has painstakingly "review[ed] the background and environment of the period in which that constitutional language was fashioned and adopted",[1011] has "place[d the reader] as nearly as possible in the condition of the [Founding Fathers]",[1012] and has "recall[ed] the contemporary or then recent history of the controversies on the subject" that still "were fresh in the memories of those who achieved our independence and established our form of government".[1013]

With this exception: That, having analyzed in detail the *pre*-constitutional Militia statutes of Rhode Island and Virginia, as typical examples of the laws that all but one of the original Thirteen Colonies and then all of the independent States adopted during that era—in order to determine "[w]hat * * * those who framed and adopted [the Constitution] underst[oo]d [its] terms to designate and include",[1014] "th[e] sense in which [the words were] generally used by those for whom the instrument was intended",[1015] "the common understanding" "when the Constitution was adopted",[1016] "the common parlance of the times in which the Constitution was written",[1017] and the "accepted meaning [of the words] in that day"[1018]—this study has established that *there were* ***no*** *"controversies on the subject"*

[1011] Everson v Board of Education, 330 U.S. 1, 8 (1947). *Accord, e.g.*, Pollock v. Farmers' Loan & Trust Company, 157 U.S. 429, 558 (1895); Maxwell v. Dow, 176 U.S. 581, 602 (1900); Grosjean v. American Press Company, 297 U.S. 233, 245-249 (1936).

[1012] *Ex parte* Bain, 121 U.S. 1, 12 (1887). *Accord, e.g.,* South Carolina v. United States, 199 U.S. 437, 450 (1905).

[1013] Boyd v. United States, 116 U.S. 616, 625 (1886).

[1014] Pollock v. Farmers' Loan & Trust Company, 157 U.S. 429, 558 (1895).

[1015] Ogden v. Saunders, 25 U.S. (12 Wheaton) 213, 332 (1827) (Marshall, C.J., dissenting).

[1016] Ohio *ex rel.* Popovici v. Agler, 280 U.S. 379, 383 (1930).

[1017] United States v. South-Eastern Underwriters Association, 322 U.S. 533, 539 (1944). *Accord*, Gibbons v. Ogden, 22 U.S. (9 Wheaton) 1, 190 (1824).

[1018] Scott v. Sandford, 60 U.S. (19 Howard) 393, 418 (1857).

at all. Rather, the *pre-*constitutional Militia statutes embodied a remarkable unanimity with respect to the principles and practices that everyone knew as characterizing "[a] well regulated Militia"[1019] among "the Militia of the several States"[1020] in those days.

Now, having parsed and analyzed these *pre-*constitutional Militia statutes, this study can set down with legal-historical certainty at least seventeen fundamental constitutional principles of "the Militia of the several States" on the basis of which the relevant provisions of the original Constitution and the Bill of Rights can be correctly construed and should be applied. To be sure, these are not the only principles that could be drawn from the compendious *pre-*constitutional record. But they are worthy of being singled out, because they will prove to be the most useful for devising a program for revitalization of "the Militia of the several States" today—which, after all, is the practical purpose of this entire exercise. These principles are:

> ✳ *"[T]he Militia of the several States" are based upon each person's individual and especially the community's collective rights, powers, privileges, immunities, and duties of self-defense under "the Laws of Nature and of Nature's God".*
>
> ✳ *Each of "the Militia of the several States" must always be identified as "the Militia" of a particular State, and by no other name.*
>
> ✳ *"[T]he Militia of the several States" must always be strictly differentiated from the regular "Army and Navy of the United States" and from the "Troops, or Ships of War" that the States may "keep * * * in time of Peace" "with[ ] the Consent of Congress".*
>
> ✳ *"[T]he Militia of the several States" are governmental establishments, not private institutions.*
>
> ✳ *"[T]he Militia of the several States" perform the critically important political function of enforcing popular sovereignty both in ordinary and especially in extraordinary times.*
>
> ✳ *"[T]he Militia of the several States" consist of separate and independent establishments which must always exist in each and every State throughout the United States.*
>
> ✳ *Congress, the States, and in default thereof WE THE PEOPLE themselves must ensure that each and every one of "the Militia of the*

[1019] U.S. Const. amend. II.

[1020] U.S. Const. art. II, § 2, cl. 1.

several States" is fully organized, armed, disciplined, and trained at all times.

✳ *Near-universal membership, compulsory participation, and reasonable equality in individuals' burdens of service are necessary characteristics of "the Militia of the several States".*

✳ *Service in each of "the Militia of the several States" is subject only to limited exemptions, all of which in principle must be consistent with the fundamental standards of "[a] well regulated Militia" and in application must advance "the common defence" and "the general Welfare".*

✳ *Because the ultimate goal of "homeland security" must be WE THE PEOPLE'S own political freedom and economic well-being, and because that goal can be attained only by THE PEOPLE'S own participation where THE PEOPLE actually reside in Local communities, "the Militia of the several States" must be organized and controlled "from the bottom up", not "from the top down".*

✳ *Unless specifically exempted, all members of "the Militia of the several States" must acquire and thereafter at all times must maintain—and must be supported by public officials in their maintenance of—personal possession (and usually their own private ownership) of firearms, ammunition, and accoutrements suitable for their Militia service.*

✳ *Every individual possibly eligible to be a member of "the Militia of the several States" may acquire, possess, and own as of right any firearms, ammunition, and accoutrements suitable for any type of Militia service.*

✳ *Every individual possibly eligible for service in "the Militia of the several States" must enjoy untrammeled access to a free market in which to obtain whatever firearms, ammunition, and accoutrements may prove useful for any type of Militia service.*

✳ *Every member of "the Militia of the several States" must be trained to participate in the provision of some aspect of "homeland security" for his particular State and Locality as well as for the United States as a whole.*

✳ *"[T]he Militia of the several States" are vested with the constitutional authority and responsibility to, and therefore must, provide every type of protection—whether political, economic, or social in character—that may be "necessary to the security of a free State" in every*

State, for the United States as a whole, and ultimately for WE THE PEOPLE under whatever form of government they may establish.

✳ *The primary method for enforcing discipline as well as raising revenue within revitalized "Militia of the several States" should be the imposition of fines for their members' failures, neglects, or refusals to perform their duties.*

✳ *Under present conditions, raising Independent Companies composed of volunteers on a Local basis provides the best means to begin revitalization of "the Militia of the several States".*

In Chapters 28 through 44, each of these principles will be explained, evaluated, and applied to modern conditions.

CHAPTER TWENTY-EIGHT

"[T]he Militia of the several States" are based upon each person's individual and especially the community's collective rights, powers, privileges, immunities, and duties of self-defense under "the Laws of Nature and of Nature's God".

Blackstone's *Commentaries* provided Americans of the Founding Era with a clear explanation of the law as it related to

> [T]HE *defence* of one's self, or the mutual and reciprocal defence of such as stand in the relations of husband and wife, parent and child, master and servant. In these cases, if the party himself, or any of these his relations, be forcibly attacked in his person or property, it is lawful for him to repel force by force; and the breach of the peace, which happens, is chargeable upon him only who began the affray. For the law, in this case, respects the passions of the human mind; and (when external violence is offered to a man himself, or those to whom he bears a near connection) makes it lawful in him to do himself that immediate justice to which he is prompted by nature, and which no prudential motives are strong enough to restrain. It considers that the future process of law is by no means an adequate remedy for injuries accompanied with force; since it is impossible to say, to what wanton lengths of rapine or cruelty outrages of this sort might be carried, unless it were permitted a man immediately to oppose one violence with another. ***Self-defence therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society.***[1021]

Blackstone, of course, was for Americans but the last in a long line of legal commentators who held that self-defense arises out of Natural Law or natural reason.[1022]

[1021] *Commentaries on the Laws of England*, *ante* note 142, Volume 3, at 3-4 (footnote omitted) (***bold-face emphasis*** supplied).

[1022] *See, e.g.,* David B. Kopel, Paul Gallant, & Joanne D. Eisen, "The Human Right of Self-Defense", 22 *Brigham Young University Journal of Public Law* 43 (2008), at 60-96, *describing and quoting from the teachings of* Giovanni de Legnano, Francisco de Vitoria, Pierino Belli, Francisco Suarez, Alberico Gentili, Hugo Grotius, Samuel Pufendorf, Emer de Vattel, and Jean-Jacques Burlamaqui. As this article explains, however, the United Nations Organization and influential political forces and special-interest groups aligned with it are now concerting their efforts drastically to limit, if not to eliminate, the right of self-defense with firearms for private

From this, Americans in that time naturally drew several important conclusions directly applicable to their Militia:

> *First,* that self-defense is *the* ***ultimate*** *law of society*, because it is "the primary law of nature".
>
> *Second*, that self-defense is *an* ***unconditional*** *right, privilege, and immunity*, because "it is not, neither can it be in fact, taken away by the law of society". As such, self-defense comes within the "unalienable Rights" with which "all men * * * are endowed by their Creator".
>
> *Third,* that each and every individual, as the beneficiary of an unconditional right, privilege, and immunity superior to "the law of society", requires no permission from any public official (or anyone else, for that matter) to engage in self-defense.
>
> *Fourth*, that, as an unconditional and unalienable right, self-defense is entitled to receive support from public officials' exercise of whatever governmental powers may prove to be necessary and proper to provide for its full recognition, implementation, and effectuation through "the law of society". For, as the Declaration asserted, it is "*to secure these rights*, [that] Governments are instituted among Men, deriving their just powers from the consent of the governed".[1023]
>
> *Fifth*, that the *full* recognition, implementation, and effectuation of the right of self-defense requires extrapolation, from the familial to the social level, of Blackstone's teaching that every man is entitled to defend not only himself but also "those to whom he bears a near connection"—so that the right of self-defense is understood clearly and applied completely in *both* of its aspects: namely, the individual, or personal; and especially the collective, or political. And,
>
> *Sixth*, that the exclusive purpose of and justification for self-*defense*—individual or collective—are, as that term itself imports, always *defense*, never aggression.

A. The primacy of the collective right and duty of self-defense. Most of "the good People of the[ ] Colonies" who believed that the Declaration of Independence derived its authority from "the Laws of Nature and of Nature's God" understood self-defense to be, not simply a personal right, but also *a personal duty*, with a firm theological foundation under and compulsion behind it. For inasmuch as "Nature's God" gives every human being life in order to serve His purposes, and

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individuals everywhere throughout the world. The evident goal of this cabal is to supplant "the primary law of nature"—and, by extension, the entire corpus of the "law of nature"—with "the law of [their] society".

[1023] Emphasis supplied.

inasmuch as "all men * * * are endowed by their Creator with * * * [an] *unalienable* Right[ ] * * * [to] Life", not only may no one wantonly deprive another human being of that person's life, but also must each beneficiary of God's gift of life defend his own life against aggressors rather than suffer it to be needlessly extinguished and God's purpose in granting it to be blasphemously thwarted. For example, a sermon delivered in 1747 in Philadelphia admonished the congregants that "[h]e that suffers his life to be taken from him by one that hath no authority for that purpose, when he might preserve it by defense, incurs the Guilt of self murder since God hath enjoined him to seek the continuance of his life, and Nature itself teaches every creature to defend himself".[1024] Of course, some Americans of that era believed that, out of charity towards an aggressor, an individual might choose to forgo his personal right of self-defense in some instances; and others were outright pacifists, for whom self-defense was always impermissible. Yet the vast majority of "the good People" knew that the choice to eschew self-defense in some or all purely personal situations could never be available when and where an individual was bound in justice to defend himself, someone else, or his community as a whole.

In contrast, in the political realm self-defense was not simply an unconditional personal right and perhaps a duty for Americans taken as individuals, but also was their unconditional *and unavoidable* collective right and duty taken together as a single society, all the members of which "bear[ ] a near connection" of interdependence and mutual reliance to one another. The political philosophy to which "the good People" adhered taught them in no uncertain terms that

> [n]o man can divest himself so far of his liberty as to submit to an arbitrary power, who is to treat him absolutely according to his fancy. This would be renouncing his own life, which he is not master of; it would be renouncing his duty, which is never permitted: *and if thus it be with regard to an individual who should make himself a slave, much less hath an intire nation that power which is not to be found in any of its members*.[1025]

In keeping with this precept, the Declaration of Independence asserted that, "when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce the[good People] under absolute Despotism, it is their right, *it is their duty*, to throw off such Government, and to provide new Guards for their future security".[1026] This, because "the Laws of Nature and of Nature's God

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[1024] *Quoted in* Don B. Kates, Jr., "Handgun Prohibition and the Original Meaning of the Second Amendment", 82 *Michigan Law Review* 204 (1983), at 230 note 109. *See also, e.g., Westminster Larger Catechism* (1648), Questions Nos. 134 through 136.

[1025] Jean-Jacques Burlamaqui, THE PRINCIPLES OF POLITIC LAW: BEING A SEQUEL TO THE Principles of NATURAL LAW, Thomas Nugent, Translator (London, England: J. Nourse, 1752), Part I, Chapter VII, § 2, ¶ XXIII, at 52 (emphasis supplied).

[1026] Emphasis supplied.

always entitle the[good People]" in the first instance "to assume among the powers of the earth" a "separate and equal station", and to "institute[ ]" governments that "deriv[e] their just powers from the consent of the governed". So, in the final analysis, "the good People" are always accountable under those "Laws" for dealing with the consequences of the failure of any "Form of Government" they have established and empowered—or even simply allowed—to act in their name and by dint of their authority. For that authority is not theirs to abuse or to permit to be abused by others, having been delegated to them for the sole purpose of seeing to it that they order their society in compliance with "the Laws of Nature and of Nature's God". Thus, when any degenerate "Form of Government" finally devolves into such a sump of oppression that its "evils" are no longer "sufferable", political self-defense becomes no longer optional but imperative.

Moreover, "the good People" realized that simply being imperative in political principle would never guarantee that their right and duty of self-defense against oppression could always be invoked in a timely and efficacious manner in practice. After all, by the time oppression had become intolerable to the people, the oppressors' iron sway, efficiency, and ruthlessness would have approached their apogees, too. Nothing would then dissuade such evil rulers from attempting to apply whatever force might be necessary to deny "the good People" the opportunity to exercise their right of self-defense to the least degree, let alone in a decisive manner. Then what?

Were self-defense truly a right, an effective remedy against its denial would always be available. For "[a] right without a remedy * * * may be said not to exist".[1027] So "'every right, when withheld, must have a remedy, and every injury its proper redress'".[1028] Certainly every legally literate American who lived in the *pre*-constitutional era would have dismissed as an absurd self-contradiction, and rank political effrontery, the contention that self-defense (as Blackstone held) cannot be "taken away by the law of society" but that nevertheless "the law of society" could withhold adequate means to put self-defense into practice under whatever circumstances might necessitate it, for individuals or for the community as a whole—and that therefore "the good People" were hapless, helpless, and hopeless in the face of usurpers and tyrants who scoffed at "the Laws of Nature and of Nature's God".

Although Americans of that time were unfamiliar with the epigram "'[p]olitical power grows out of the barrel of a gun'",[1029] they knew in their own

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[1027] United States *ex rel.* Von Hoffman v. City of Quincy, 71 U.S. (4 Wallace) 535, 554 (1867). *Accord*, Poindexter v. Greenhow, 114 U.S. 270, 303 (1885).

[1028] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803), *quoting* W. Blackstone, *Commentaries on the Laws of England*, *ante* note 142, Volume 3, at 109.

[1029] *Quotations From Chairman Mao*, *ante* note 28, at 61.

idiom that "the Sword and Soveraignty always march hand in hand";[1030] and, knowing that, they appreciated full well that the only effective remedy for a thoroughgoing denial of men's right of political self-defense was to be found in the barrels of the guns available to them. Yet, although arms would be necessary in such circumstances, even the barrels of many guns would not suffice in and of themselves. For, confronted by usurpers and tyrants deploying "standing armies" and *para*-militarized police forces, or by hordes of foreign invaders, armed individuals in isolation or in small groups would likely prove feckless. In the very situations that required it most, then, *armed political self-defense had to be organized among "the good People" in some collective, cohesive, coördinated, and consistent fashion*, in keeping with the maxim that "God favors the big battalions". So, throughout the *pre*-constitutional period, Americans settled and regulated Colonial and then State Militia for this purpose. Their Militia embodied and exemplified in action the principle that self-defense for a self-governing community depends upon self-reliance, self-help, and full participation amongst, for, and by "the good People" themselves.

From the very first, what came to be denoted "*well regulated* militia"[1031] throughout America were always compulsory in nature, collective in action, and committed to preserving their communities' security. Of course, participation in the Militia was a multifaceted individual duty for each adult able-bodied free male, because the whole must always be composed of the sum of its parts. Each individual's duty, though, was never to be fulfilled in isolation, separate from and independent of everyone else's, but instead was a component of an unified organization in which everyone worked in unison for an unitary purpose. And because the basic principles of the Militia have never changed since then, each individual's participation in "the Militia of the several States" today must be measured by, and satisfy, the selfsame duty.

So, because "the right of the people to keep and bear Arms" must conduce to the organization and operation of "[a] well regulated Militia", which itself serves the collective purpose of ensuring "the security of a free State",[1032] that one "right" embraces as necessary components both an individual right and two collective rights: namely, (i) the individual "right" of each one among "the people" "to keep * * * Arms" of a certain kind in his personal possession and "to * * * bear [those] Arms" in his own hands for certain purposes ; (ii) the collective right of all the individuals who comprise "the people" to exercise "the right * * * to keep and bear Arms" in concert within "well regulated Militia"; and (iii) those individuals' further

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[1030] AN ARGUMENT, Shewing, that a Standing Army Is inconsistent with A Free Government, *ante* note 27, at 7.

[1031] *E.g.,* Virginia Declaration of Rights (1776) art. 13 (emphasis supplied).

[1032] U.S. Const. amend. II.

collective right to direct their efforts in the Militia exclusively towards "the security of [the] free State[s]" in which they live. These rights also entail corresponding duties: (i) Every person has a collective duty to assist everyone else in providing for "the security of a free State" in which they all live. (ii) To fulfill this duty, every able-bodied adult has a collective duty to serve with others in "[a] well regulated Militia". And (iii) to perform this function, every such person (not a conscientious objector) has an individual duty "to keep and bear Arms" in his own private possession.

Self-evidently, too, these collective rights and duties are of a status superior to the corresponding individual rights and duties. For, inasmuch as "a free State" is the only place in which men can fully enjoy the "unalienable Rights" of "Life, Liberty and the pursuit of Happiness", the foundational collective right and duty to "secur[e] * * * a free State" subserve the ultimate purpose of America's entire constitutional enterprise. From this combination of right and duty derives the collective organizational right and duty of free men to serve in "well regulated Militia". And from this derives the individual instrumental right and duty "to keep and bear Arms". Each individual enjoys "the right * * * to keep and bear [his own] Arms", not simply so that he can defend himself, but so that all individuals can act in concert in "well regulated Militia" to preserve their communities as "free State[s]". Thus, nothing could be more erroneous—and even destructive of the purpose of the Second Amendment as well as the Militia Clauses of the original Constitution—than the notions that not only does "the right of the people to keep and bear Arms" embrace an "individual right to possess and carry weapons in case of confrontation", "having nothing whatever to do with service in a militia", but also individual self-defense is "the *central component* of the right itself".[1033]

As with all half-baked ideas, though, the mental oven from which this one emerged contains some crumbs of legal substance. *Of course* the possession of "Arms" suitable for collective service in "[a] well regulated Militia" also provides each individual with the means to defend himself personally. So, *of course* "the right * * * to keep and bear Arms" is instrumental for both an individual and a collective purpose. But this is only part of the recipe that must be consulted. The important ingredient is the insight that a right and even a duty "to keep and bear Arms" solely for the individual purpose of personal self-defense could never guarantee, and would not even go very far towards, fulfillment of the collective purposes of fielding "[a] well regulated Militia" and thereby guaranteeing "the security of a free State" through community self-defense. Worse yet, a "right * * * to keep and bear Arms" for the purpose of individual self-defense "having nothing whatever to do with service in a militia" would in principle preclude a "right of the people to keep and

[1033] District of Columbia v. Heller, 554 U.S. 570, 592, 593, 599 (2008) (Scalia, J., for the Court).

bear Arms" for community self-defense. For, if an individual may be called upon to protect his community *at the cost of his own life*, then whatever "right * * * to keep and bear Arms" he may enjoy for purposes of personal self-defense must be subordinate to his duty "to keep and bear Arms" in order to participate in collective self-defense. Whereas, if an individual's "right * * * to keep and bear Arms" "ha[s] nothing whatever to do with service in a militia", then the duty of community self-defense through "[a] well regulated Militia" must be subordinate to the right of personal self-defense—which necessarily would mean that the clause "[a] well regulated Militia, being necessary to the security of a free State" has no operative effect (that is, no legal consequence), but amounts merely to some sort of vapid constitutional "window dressing". Not only would this conclusion contradict the rule that, "'[i]n expounding the Constitution * * * , every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added'",[1034] but also it would make an indigestible historical, political, and philosophical hash out of the Second Amendment, the Militia Clauses of the original Constitution, and even the Declaration of Independence.

Thus, the essence of the Militia—and of all the rights, powers, privileges, immunities, *and especially duties* pertaining to the Militia, including "the right of the people to keep and bear Arms"—derives from the people's *collective* right of self-defense, to which each individual's personal right of self-defense necessarily contributes, but is not superior.

B. Defense the sole purpose of the Militia. Although confusion about the relationship between "individual" and "collective" self-defense, on the one hand, and "the Militia of the several States", on the other hand, may sometimes be possible, no confusion is even plausible when it comes to application of the term "defense" to the Militia. By constitutional definition, "the right of the people to keep and bear Arms", "[a] well regulated Militia", and "a free State" are incapable of and inimical to aggressive purposes:

1. As to "a free State", the Declaration of Independence teaches that "the good People" ought not to "throw off" by force even an oppressive "Government" until it has demonstrated its aggressive intent beyond any doubt through "a long train of abuses and usurpations, pursuing invariably the same Object[, which] evinces a design to reduce them under absolute Despotism"—and they are at length "constrain[ed]" by unavoidable necessity "to alter their former Systems of Government".

[1034] Williams v. United States, 289 U.S. 553, 572-573 (1933), *quoting* Holmes v. Jennison, 39 U.S. (14 Peters) 540, 570-571 (1840) (opinion of Taney, C.J.). *Accord*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803). *See also* Griswold v. Connecticut, 381 U.S. 479, 490-491 (1965); Myers v. United States, 272 U.S. 52, 151-152 (1926); Knowlton v. Moore, 178 U.S. 41, 87 (1900); Blake v. McClung, 172 U.S. 239, 260-261 (1898).

2. The Constitution explicitly declares that one of its purposes is "the common *defence*", not any form of aggression.[1035] And because "the genius and character of our institutions are peaceful", even the power of Congress "[t]o declare War" "[is] not conferred * * * for the purposes of aggression or aggrandizement".[1036]

3. The Constitution also makes plain that aggression is foreign to "the Militia of the several States". For Congress may "provide for calling forth the Militia" to "be employed in the Service of the United States" for three purposes only: "to execute the Laws of the Union, suppress Insurrections and repel Invasions"[1037]—each of which is entirely defensive. Execution of "the Laws of the Union" cannot constitute aggression against anyone, because those "Laws" consist of (i) the Declaration of Independence—which aims at "secur[ing]" men's "unalienable Rights", (ii) the Constitution—which aims at "secur[ing] the Blessings of Liberty",[1038] and (ii) "the Laws of the United States which shall be made in Pursuance" of the Constitution explicitly[1039] and the Declaration implicitly, and therefore must be consistent in purpose with both. And, by definition, those who foment "Insurrections" and launch "Invasions" are the aggressors, not those who "suppress * * * and repel" them.

4. Finally, because "the right of the people to keep and bear Arms" is the instrument upon which "[a] well regulated Militia" depends, and the purpose of "[a] well regulated Militia" is to provide "the security of a free State", that "right" allows for no aggressive exercise by "the people", either individually or collectively.

[1035] Preamble (emphasis supplied). *Accord*, U.S. Const. art. I, § 8, cl. 1.

[1036] *Compare* U.S. Const. art. I, § 8, cl. 11 *with* Fleming v. Page, 50 U.S. (9 Howard) 603, 614 (1850).

[1037] U.S. Const. art. I, § 8, cls. 15 and 16.

[1038] U.S. Const. preamble.

[1039] *See* U.S. Const. art. VI, cl. 2.

CHAPTER TWENTY-NINE

Each of "the Militia of the several States" must always be identified as "the Militia" of a particular State, and by no other name.

The establishments that the Constitution denotes collectively in one place as "the Militia of the several States"[1040] and in other places simply as "the Militia"[1041] must always be identified in precisely those words. And in any particular case, a single member of that group—which the Second Amendment describes as "[a] well regulated Militia"—must always be identified as "the Militia of [some State]", such as "the Militia of Rhode Island" or "the Militia of Virginia". No "Militia" should ever be called, either collectively or individually, "the National Guard", "the State Guard", "the Home Guard", "the State Defense Force", or by some other fanciful title without *pre-*constitutional provenance. To insist on this is not simply a semantic quibble, but instead a necessity if the Constitution is to be enforced with exactitude.

No one has any idea what names such as "National Guard", "State Guard", and so on mean historically or legally in relation to "the Militia of the several States", because not one of those names appears in the Constitution, in the Articles of Confederation, or especially in any of the *pre-*constitutional Militia statutes upon which both the Articles and the Constitution drew for the meaning of the term "Militia". All of those names were quite unknown to Americans of that era—*for no* pre*-constitutional Militia statute ever referred to the institution it regulated as anything but a "Militia"*. Thus, any definition given to any such name at any time subsequent to the ratifications of the original Constitution and the Bill of Rights is at least *extra-*constitutional, if not *non-*constitutional or even *un-*constitutional. Unless, of course, the name at issue is to be treated as a perfect synonym for "Militia", no more and no less.

In that case, however, no justifiable purpose can be served by substituting the new name for the term "Militia" in the first place. At best, confusion is generated. For, if "Militia" is replaced by some other term with no clear *pre-*constitutional origin that proves beyond doubt the strict equivalence of the two nouns, then the unavoidable conclusion must be —or at least the inference useful

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[1040] U.S. Const. art. II, § 2, cl. 1.

[1041] U.S. Const. art. I, § 8, cls. 15 and 16; *and* amend. V.

to some political factions or controversialists inevitably will be—that the new term denotes an entity somehow different from a true constitutional "Militia". If so, the questions will arise: What is that new entity? What is its origin? What are its characteristics? And, most important, *what is its legitimacy*? Whatever the answers to the first three queries, the response to the fourth must be "none at all". If in any degree truly *new*, the entity can have *no* legitimacy, because it does not derive from the Constitution—and "[t]he government * * * of the United States", in any of its parts, "can claim no powers which are not granted to it by the constitution".[1042]

Conversely, if the new name is supposed to mean nothing more or less than "Militia" in the unadulterated and undiluted constitutional sense, then why not simply use the term "Militia", and thereby avoid all equivocation, doubt, and possibility of error? Or something worse than mere error: One need recall, for example, only how the Judiciary has rationalized an intellectually infinite (albeit dishonest) expansion of the power of Congress "[t]o regulate Commerce * * * among the several States"[1043] by misapplying that clause as if it read "[t]o regulate [whatever affects] Commerce * * * among the several States", even though the phrase "whatever affects" (or any other words to that effect) nowhere appear in the Constitution, and even though the subjects of the purported "regulat[ions of whatever affects] Commerce" themselves never travel or are transported "among the several States", or never move very far within a single State, or even never constitute or participate in "Commerce" at all.[1044]

Although to date the overall result has not been quite as grotesque, the attempt to substitute the term "National Guard" for the constitutionally proper name "Militia" has injected terminological incoherence into this area of law. For the Militia are not in any sense uniquely a "*National* Guard", because they are "the Militia *of the several States*" which can be called forth and "employed in the Service of the United States" only for three defined, and therefore limited, National purposes.[1045] Otherwise, at all times they protect their own individual States. Thus, not surprisingly, in practice this substitution of names has created all sorts of intractable problems. For example, in 1903 Congress purported to divide the Militia into "the organized militia, to be known as the National Guard", and "the remainder to be known as the Reserve Militia".[1046] In 1916, Congress purported to

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[1042] Martin v. Hunter's Lessee, 14 U.S. (1 Wheaton) 304, 326 (1816). *Accord, e.g.,* Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 477 (1939); *Ex parte* Quirin, 317 U.S. 1, 25 (1942).

[1043] U.S. Const. art. I, § 8, cl. 3.

[1044] *See, e.g.*, United States v. Wrightwood Dairy Company, 315 U.S. 110, 118-119 (1942), *and especially* Wickard v. Filburn, 317 U.S. 111, 121-129 (1942).

[1045] U.S. Const. art. II, § 2, cl. 1 (emphasis supplied) *and* art. I, § 8, cls. 15 and 16.

[1046] *Compare and contrast* An Act To promote the efficiency of the militia, and for other purposes, Act of 21 January 1903, CHAP. 196, § 1, 32 Stat. 775, 775, *with An Act more effectually to provide for the National Defence by establishing an Uniform Militia throughout the United States*, Act of 8 May 1792, CHAP. XXXIII, § 1, 1 Stat.

"divide[the Militia] into three classes, the National Guard, the Naval Militia, and the Unorganized Militia", and to designate these three collectively as "the militia of the United States".[1047] Today, Congress claims that the so-called "militia of the United States" is composed of two "classes": namely, "the organized militia, which consists of the National Guard and the Naval Militia"; and "the unorganized militia", which consists of everyone else potentially subject to duty in "the militia of the United States".[1048] Apparently, the impossibility of a "militia *of the United States*" under a Constitution that recognizes only "the Militia *of the several States*", and delegates no power to the General Government to create any other form of "Militia", has not dawned on modern lawmakers.[1049] Neither have lawmakers noticed the impossibility of "*un*organized militia" under a Constitution which

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271, 271, *and with* Revised Statutes of the United States (1873-1874), TITLE XVI, THE MILITIA, § 1625, 18 Stat. 285, 285.

[1047] An Act For making further and more effectual provision for the national defense, and for other purposes, Act of 3 June 1916, CHAP. 134, § 57, 39 Stat. 166, 197.

[1048] 10 U.S.C. § 311.

[1049] *See* U.S. Const. art. II, § 2, cl. 1 *and* art. I, § 8, cls. 15 and 16. *Contrast* U.S. Const. art. I, § 8, cls. 12 and 13. In fairness to latter-day Members of Congress, this terminological error or confusion has not cropped up only from 1916 to today. *See An Act to regulate the pay of the non-commissioned officers, musicians and privates of the Militia of the United States, when called into actual service, and for other purposes*, Act of 2 January 1795, CHAP. IX, § 1, 1 Stat. 408, 408 ("the militia of the United States, when called into actual service"); *An Act directing a Detachment from the Militia of the United States*, Act of 9 May 1794, CHAP. XXV, 1 Stat. 367; *An Act authorizing a detachment from the Militia of the United States*, Act of 24 June 1797, CHAP. IV, 1 Stat. 522; *An Act directing a detachment from the Militia of the United States, and for erecting certain Arsenals,* Act of 3 March 1803, CHAP. XXXII, 2 Stat. 241; *An Act authorizing a detachment from the Militia of the United States,* Act of 18 April 1806, CHAP. XXXII, 2 Stat. 383; *An Act authorizing a detachment from the Militia of the United States,* Act of 30 March 1808, CHAP. XXXIX, 2 Stat. 478; *An Act to authorize a detachment from the Militia of the United States,* Act of 10 April 1812, CHAP. LV, 2 Stat. 705; An Act Making appropriation for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and two, Act of 2 March 1901, CHAP. 803, 31 Stat. 895, 903 ("[f]or the continuance of the Army War College * * * for investigation and study in the Army and militia of the United States").

One presumes, though, that from 1795 to 1812 Members of Congress were referring to "the United States" in the then-familiar collective sense of each and every State allied in the Union, as opposed to the unitary sense of the General Government. That is, "the United States" was taken, not as a singular, but as a *plural*, noun, as it is in the original Constitution. *See* U.S. Const. art. I, § 9, cl. 8, *and* art. III, § 3, cl. 1. *See also* U.S. Const. amends. XI and XIII, which evidence the continuation of this usage for some seventy-seven years. If so, "the militia of the United States" would have meant the aggregation of the Militia of each of the States composing the United States, that is, "the Militia of the several States". This seems to be the most plausible interpretation, because the Act of 1795 refers to "*the Militia of the United States, when called into actual service*", which plainly draws upon the constitutional language, "the Militia of the several States, when called into * * * actual Service". *See* U.S. Const. art. II, § 2, cl. 2.

In 1901, conversely, Members of Congress may have been thinking of the "militia of the United States" as the Militia that could be "call[ed] forth" to "be employed in the Service of the United States"—that is, the "Part" of "the Militia of the several States" that could come under the direct control of the General Government for one or more of the three purposes the Constitution enumerates. *See* U.S. Const. art. I, § 8, cls. 15 and 16; *and* art. II, § 2, cl. 1. After all, the statutory language "the Army and militia of the United States" can hardly be taken to employ the phrase "of the United States" in two different senses at the same time—referring to "the United States" as an unified collective in relation to the "Army" (because there is no such thing as an "Army of the several States"), but implicitly referring to "the United States" as "the several States" in relation to the "militia". Of course, although a less likely reading, the collective sense of "the United States" could have been intended, too, inasmuch as "the Army * * * of the United States" *is* "the Army of the several States" in their unified capacity as "the United States".

empowers Congress only "[t]o *provide for organizing* * * * the Militia", and in which "[a]ffirmative words are * * * negative of other objects than those affirmed".[1050]

In sum, no more justification exists or could exist—whether in constitutional law, in American history, or in common sense—for statutorily renaming "the Militia of the several States" or any part thereof "the National Guard" than for renaming the President of the United States "the Leader" or for renaming Congress "the Supreme Soviet of America". Indeed, the only purpose for such verbal transmogrifications would be for their proponents to assert, somehow as a consequence of their linguistic legerdemain alone, powers for "the Leader" or for "the Supreme Soviet" different from—and doubtlessly in gross excess of—the powers the Constitution actually confers upon the President or Congress. Or, in the case of the Militia, characteristics significantly different from those the Militia exhibited in *pre-*constitutional times and that the original Constitution and the Second Amendment adopted—and therefore characteristics that would seriously detract from the ability of the Militia to perform the functions the Amendment declares to be "necessary to the security of a free State".

[1050] *Compare* U.S. Const. art. I, § 8, cl. 16 (emphasis supplied) *with* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803).

CHAPTER THIRTY

"[T]he Militia of the several States" must always be strictly differentiated from the regular "Army and Navy of the United States" and from the "Troops, or Ships of War" that the States may "keep * * * in time of Peace" "with[ ] the Consent of Congress".

For good reason, the Constitution makes sharp distinctions among "the Militia of the several States",[1051] "the Army and Navy of the United States"[1052] (variously denoted as "Armies",[1053] "a Navy",[1054] and "the land and naval Forces"[1055]) and the "Troops, or Ships of War" that the States may not "keep * * * in time of Peace" "without the Consent of Congress".[1056] And Americans can disregard or blur these distinctions only at their peril.

A. "[T]he Militia of the several States" not parts of the regular Armed Forces of the Union or of the States. Contrary to the widespread misconception that the contemporary statutory National Guard is the continuation of, or (even more implausibly) the successor to, the constitutional "Militia of the several States",[1057] the National Guard is actually an adjunct or reserve component of the regular Armed Forces, and in one aspect arguably part of the "Troops" that the States may "keep * * * in time of Peace" "with[ ] the Consent of Congress"—and therefore is constitutionally disqualified from being any part of "the Militia of the several States" at all.[1058] More importantly, for numerous constitutional reasons,

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[1051] U.S. Const. art. II, § 2, cl. 1; art. I, § 8, cls. 15 and 16; *and* amends. II and V.

[1052] U.S. Const. art. II, § 2, cl. 1.

[1053] U.S. Const. art. I, § 8, cl. 12.

[1054] U.S. Const. art. I, § 8, cl. 13.

[1055] U.S. Const. art. I, § 8, cl. 14 *and* amend. V.

[1056] U.S. Const. art. I, § 10, cl. 3.

[1057] *See generally, e.g.,* Michael D. Doubler & John W. Listman, Jr., *The National Guard: An Illustrated History of America's Citizen-Soldiers* (Washington, D.C.: Brassey's, Inc., 2003). In particular, *see* R. Wright, Jr., *The Continental Army, ante* note 396, APPENDIX A, at 429-430, which links various units of the National Guard to the *pre*-constitutional Militia, even describing these as "U.S. Army Units Dating From the Revolution", without apparent awareness of the constitutional impossibility of any unit in "the Militia of the several States" being in its inception or thereafter becoming part of the Army of the United States.

[1058] *See generally* AN ACT To revise, codify, and enact into law, title 10 of the United States Code, entitled "Armed Forces", and title 32 of the United States Code, entitled "National Guard", Act of 10 August 1956, Pub. L. 1028, 70 Stat. 1126, *printed as* Title 32, United States Code, *in* 70A Stat. at 596-617. For an historical overview of the National Guard and various "State Guards", "Home Guards", and "State Defense Forces" with pretensions to be or which have been passed off as "Militia", *see* Barry M. Stentiford, *The American Home*

"the Militia of the several States" are not, and can never be, any part of the National Guard or any other component of the regular Armed Forces.

1. The *extra-* and even *supra-*constitutional status of "the Militia of the several States" denied to the regular Armed Forces. That the Militia *pre-*existed the Constitution, the Union under the Articles of Confederation, and even the States as independent polities is of great consequence in understanding their political and legal position—

a. Explaining why "the right of the people to keep and bear Arms, shall not be infringed", the Second Amendment took care to emphasize that "[a] well regulated Militia[is] necessary to the security of a free State".[1059] That *this is the* ***only*** *instance in the original Constitution and the Bill of Rights, other than in the Preamble, in which WE THE PEOPLE expressly set forth the purpose of a constitutional right, power, privilege, immunity, or disability* proves how supremely important they considered—and wanted everyone else, down through the ensuing ages, to be aware of—the inextricable historical, legal, and operational relationship among "[a] well regulated *Militia*", "the *security* of a *free* State", and "the right of *the people* to keep and bear Arms", as Americans understood all of those concepts when they ratified the Bill of Rights in 1791, and had understood them for generations before that.[1060] Moreover, when the Second Amendment referred to "*a* free State" it attested to THE PEOPLE'S belief that *any and every* "free State" *always, without exception*, needs "[a] well regulated Militia" to provide true "security". That belief long preëxisted the original Constitution, as well as the Second Amendment. For the actual "Militia of the several States" which THE PEOPLE came to incorporate as integral and permanent parts of the Constitution's federal structure were not institutions newly

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Guard: The State Militia in the Twentieth Century (College Station, Texas: Texas A&M University Press, 2002). Although useful in many respects, this particular study does not review the *pre-*constitutional history of the Militia, or come to grips with the constitutional problems the statutes from 1903 onwards raise. For example, referring to various "State Defense Forces" (which the book ambiguously treats as "militia" although many if not most of them lack the constitutional characteristics necessary for that appellation), the author opines that these forces "continue to prepare for the day when the National Guard again leaves the states for distant battlefields, while attempting to develop new reasons for existing in the event that the entire National Guard never leaves. As such, they represent the latest chapter in a long struggle over the proper role for militia in the United States." *Id.* at 241. Evidently the author never considered that the Constitution has already determined "the proper role for militia in the United States", and that therefore no "long struggle" to define that "role" was ever necessary in the past or is necessary now. So, to the extent that some "long struggle" has gone on, at least one side in that contest has been promoting *un*constitutional action all along, and apparently will continue to do so until the American people finally demand that the Constitution be enforced in these particulars.

[1059] The Amendment could have expressly linked the Militia with the preservation of "a Republican Form of Government", too—for the Constitution implies no less. *See post*, at 890-893, 921-922, 1038-1040, 1301-1307, 1451-1453, and 1497-1499.

[1060] The Constitution does delegate to Congress the authority "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries". Art. I, § 8, cl. 8. There, however, "[t]o promote the Progress of Science and useful Arts" is the *power*, "securing * * * the exclusive Right" the sole *means* by which to exercise it. No actual *purpose* is stated, unless it be the implicit expectation that "promot[ion of] the Progress of Science and useful Arts" will redound to society's benefit.

invented for that purpose in 1788 or 1791. Rather, they were the very "well regulated Militia" in which THE PEOPLE and their forebears had personally participated for more than a century theretofore. The belief had prompted the action; and the action had confirmed the belief. Thus, ***the necessity of the Militia in America's constitutional system is not the product of the Constitution itself or of THE PEOPLE'S desire to experiment in a novel manner in matters of "homeland security", but instead a fundamental principle of American political philosophy, applied and proven in practice in the crucible of extensive historical experience, which subtends and supports the Constitution—upon which the Constitution depends—and without which the Constitution would be, not simply defective, but actually incapable of performing its purpose***. Indeed, the Militia enjoy an *extra*-constitutional status, because they do not depend upon the Constitution for their definition—rather, the Constitution cannot be properly construed without importing that definition from the Militia's *pre*-constitutional legal history. And the Militia enjoy even a *supra*-constitutional status, because (having been governmental institutions long before anyone even imagined the Constitution) they do not depend upon the Constitution for their legitimacy—rather, the legitimacy of the Constitution depended in the first instance upon the success of the Declaration of Independence, to which the Militia contributed in no small measure. For, at the minimum, "the militia played a very important role in the War of American Independence. Its political functions probably were indispensable, and as a military institution, supported by state troops, it continued to meet its traditional colonial responsibilities for local defense and for providing a general emergency reserve."[1061] Even today, the Constitution continues to depend upon the Militia, because the Constitution is the supreme law of the Union; the Union is composed of the several States; each of the States must be "a free State"; and "[a] well regulated Militia" is "necessary to the security of a free State", and therefore to the security of all of the States, of the Union, and of the Union's supreme law.[1062]

b. In stark contrast to the Militia, *never* did WE THE PEOPLE affirm, or even suggest, that the "Armies", "Navy", or "Troops, or Ships of War" to which the original Constitution referred were in 1788, or might thereafter become, "necessary to the security of a free State", or inevitably and unavoidably "necessary" for any other purpose. Or that such establishments ought to be integral and permanent parts of the federal system. This could hardly have been accidental. Beyond any possible doubt, THE PEOPLE—who had just successfully waged the War of

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[1061] R. Wright, Jr., *The Continental Army*, *ante* note 396, at 183. Observe, though, how this author, who certainly should know better, refers to the Militia in the *singular*, rather than the constitutional plural.

[1062] In response to the objection that none of the several States now fields a true Militia, one need only point to the parlous state of "constitutional law" (or even *any* satisfactory "rule of law") in America to appreciate the truth of the analysis set out in the text. The Constitution having temporarily lost its "necessary" protector, *of course* this country is slipping into *anti*-constitutional chaos.

Independence—were acutely aware of the usefulness of "Armies", a "Navy", and "Troops, or Ships of War" for prosecuting armed conflicts. That they did not consider and declare this usefulness indispensably "necessary" reflected their fear, quite justified by political theory as well as their own experiences, that any regular standing "Armies", "Navy", or "Troops, or Ships of War"—in which professional soldiers, not "the people" generally, bore "Arms"—could or would likely be *inimical* to Americans' liberties. That is, not "necessary", but actually *antagonistic*, "to the security of a free State". And the more effective such forces were in purely military terms, the more dangerous they would become in political terms.

c. This concern was shared not just by every American patriot of the founding era who was conversant with *pre-*constitutional Anglo-American law, history, and political philosophy. As even Blackstone himself had observed:

> THE military state includes the whole of the soldiery; or, such persons as are peculiarly appointed among the rest of the people, for the safeguard and defence of the realm.
>
> IN *a land of liberty it is extremely dangerous to make a distinct order of the profession of arms.* In absolute monarchies this is necessary for the safety of the prince, and arises from the main principle of their constitution, which is that of governing by fear: but in free states the profession of a soldier, taken singly and merely as a profession, is justly an object of jealousy. In these no man should take up arms, but with a view to defend his country and it's laws: he puts not off the citizen when he enters the camp; but it is because he is a citizen, and would wish to continue so, that he makes himself for a while a soldier. The laws therefore and constitution of these kingdoms [that is, England, Scotland, and Ireland] know no such state as that of a perpetual standing soldier * * *.[1063]

> TO prevent the executive power from being able to oppress, * * * it is requisite that the armies with which it is entrusted should consist of the people, and have the same spirit with the people * * * . ***Nothing then, according to these principles, ought to be more guarded against in a free state, than making the military power, when such a one is necessary to be kept on foot, too distinct from the people.***[1064]

Inasmuch as "[a] well regulated Militia" can *never* be "distinct from the people", because "the people" themselves comprise it, and inasmuch as "[n]othing * * * ought to be more guarded against in a free state" than standing armies that form "a distinct order of the profession of arms", hardly surprising is the Second

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[1063] *Commentaries on the Laws of England*, *ante* note 142, Volume 1, at 407 (emphasis supplied).

[1064] *Id.*, Volume 1, at 413-414 (emphasis supplied).

Amendment's conclusion, and constitutional command, that "[a] well regulated *Militia*" is "necessary to the security of a free State". The Amendment embodies a fundamental negative principle that underlays the Constitution: to wit, that "[i]t is against sound policy for a free people to keep up large military establishments and standing armies in time of peace, both from the enormous expenses with which they are attended and the facile means which they afford to ambitious and unprincipled rulers to subvert the government or trample upon the rights of the people".[1065] A negative principle the disregard of which, the Founders knew, is likely to be fatal to freedom—because "the Constitution [of a free State] must either break the Army, or the Army will destroy the Constitution: for it is universally true, that where-ever the [military power] is, there is or will be the Government in a short time".[1066]

2. The constitutional superiority of "the Militia of the several States" to the regular Armed Forces. Because the Constitution did not create "the Militia of the several States", but incorporated them into its federal system in the form which they had exhibited and under the legal principles which had subtended them for generations, they must be conceded a special status *within* the Constitution which is denied to the regular Armed Forces—

a. The Militia are composed of almost everyone among WE THE PEOPLE themselves, whereas the Armed Forces typically constitute only a very small segment of America's population.

b. The Constitution recognizes "the Militia of the several States" as entities that preëxisted its own ratification, and incorporates them within its federal system as permanent components which (absent a constitutional Amendment, and perhaps not even then) neither Congress nor the States, individually or collectively, may ever purport to remove. The Constitution authorizes Congress "[t]o provide for organizing, arming, and disciplining, the Militia",[1067] and "[t]o provide for calling forth the Militia" for certain purposes.[1068] But Congress is not responsible for the *existence* of the Militia, in the sense of being empowered to *create* them in the first instance, because the Militia are "the Militia *of the several States*" not "the Militia *of the United States*". And having no power to create the Militia, Congress can have no discretion not to create them, or to disband them either directly itself or indirectly by ordering (or merely encouraging and allowing) the States to take such action. Distinguishably, Congress *may* "raise and support Armies" and "provide and maintain a Navy",[1069] if it believes those establishments are "necessary and proper"

[1065] J. Story, *Commentaries on the Constitution*, *ante* note 576, Volume 2, § 1897, at 646.

[1066] AN ARGUMENT, Shewing, that a STANDING ARMY Is inconsistent with a Free Government, *ante* note 27, at 4.

[1067] U.S. Const. art. I, § 8, cl. 16.

[1068] U.S. Const. art. I, § 8, cl. 15.

[1069] U.S. Const. art. I, § 8, cls. 12 and 13.

for "the common defence".[1070] But Congress is not constitutionally required always to do so. Indeed, each newly elected House of Representatives by itself may completely prevent the "rais[ing] and support[ing of] Armies"—and thus effectively disestablish "Armies" entirely during its term in office—because "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law",[1071] "no Appropriation of Money to th[e] Use [of raising and supporting Armies] shall be for a longer Term than two Years",[1072] and "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States".[1073] The Constitution, however, grants neither to the House or the Senate individually, nor to Congress as a whole, an equivalent license to withhold all financial support from the Militia. Similarly, the Constitution provides that "[n]o State shall, without the Consent of Congress, * * * keep Troops, or Ships of War in time of Peace"[1074]—which, on the one hand, empowers Congress to refuse altogether to allow the States to raise their own regular Armed Forces; and, on the other hand, licenses the States to elect not to raise such forces even if Congress would allow them to do so (for Congress's authority is only to grant or to withhold its "Consent" with respect to an action a State proposes to be taken on her own initiative, not to compel such action in the first instance). This clause, however, does not apply to the Militia.

c. Furthermore, the Second Amendment declares that "[a] well regulated Militia" is "necessary to the security of a free State". This is the *only* instance in which the Constitution explicitly identifies *anything* as "being *necessary*" for *any* purpose. To be sure, the Constitution implies that the States, Congress, the President, and the Supreme Court are in some sense *sufficient* for the *particular* plan of federalism and limited government that it lays out—otherwise, it would not include them as permanent parts of the federal system, along with the Militia. Nonetheless, the Constitution does not deny that some *other* plan—perhaps *not* including Congress, the President, or the Supreme Court at all, or including one or more of them in some form or with some powers other than those the Constitution specifies—might not prove just as satisfactory for WE THE PEOPLE'S purposes, too. Distinguishably, when the Second Amendment asserts that "[a] well regulated Militia" is "necessary to the security of *a* free State", it speaks in terms *without exception*. *No* other plan for attaining such "security" can ever suffice.

d. The Second Amendment is also one of only two instances in which the Constitution explicitly identifies a particular means to achieve its basic goals. That

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[1070] *Compare* U.S. Const. art. I, § 8, cl. 18 *with* preamble.

[1071] U.S. Const. art. I, § 9, cl. 7.

[1072] U.S. Const. art. I, § 8, cl. 12.

[1073] U.S. Const. art. I, § 2, cl. 1.

[1074] U.S. Const. art. I, § 10, cl. 3.

"[a] well regulated Militia" is "necessary to the *security* of a *free* State" specifies such a "Militia" as the means simultaneously to "provide for the common defence * * * *and* secure the Blessings of Liberty to ourselves and our Posterity",[1075] as well as to guarantee "[t]he right of the people to be *secure* in their persons, houses, papers, and effects, against unreasonable searches and seizures"[1076]—which in the aggregate amounts to no less than effectuating the principle of the Declaration of Independence that "Governments are instituted among Men" solely in order "to secure" their "unalienable Rights" to "Life, Liberty and the pursuit of Happiness", including the acquisition and enjoyment of property. Elsewhere, the Constitution defines Congress's power "[t]o lay and collect Taxes, Duties, Imposts and Excises" as the means "to pay the Debts and provide for the common Defence and general Welfare of the United States"[1077]—again, two goals also identified in its Preamble. From which it follows that for Congress to employ the power "[t]o lay and collect Taxes" in support of exercises of its power "[t]o provide for organizing, arming, and disciplining, the Militia" would *always* be "necessary and proper",[1078] because "the security of a free State" in the broadest sense embraces maintenance of "the general Welfare" as well as "the common defence" and "the Blessings of Liberty" in their every manifestation. In contrast, nowhere does the Constitution even suggest either that an "Arm[y]" or "a Navy" is "necessary" for any purpose, let alone "to the security of a free State"; or that an "Arm[y]" or "a Navy" will always "provide for the common defence" and *simultaneously* "secure the Blessings of Liberty to ourselves and our Posterity"; or that the maintenance of an "Arm[y]" or "a Navy" will always be consistent with "the general Welfare"—or even that an "Arm[y]" or "a Navy" will not provide the rogue personnel, under color of some *ersatz* "martial law", to conduct "unreasonable searches and seizures" of "the[people's] persons, houses, papers, and effects". To the contrary: That the Constitution explicitly specifies that "no Appropriation of Money" "to raise and support Armies" "shall be for a longer Term than two Years"[1079] emphasizes that it may be "necessary and proper" for Congress (and even just the House of Representatives) to *refuse* to employ its "Power to lay and collect Taxes" to that end, in order thereby to discontinue the existence of "Armies" altogether (and presumably the existence of "a Navy", as well).

e. Finally, the Constitution delegates to Congress the power and the duty "[t]o provide for calling forth the Militia to execute the Laws of the Union".[1080] The

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[1075] U.S. Const. preamble (emphasis supplied).

[1076] U.S. Const. amend. IV (emphasis supplied).

[1077] U.S. Const. art. I, § 8, cl. 1.

[1078] *See* U.S. Const. art. I, § 8, cls. 16 and 18.

[1079] U.S. Const. art. I, § 8, cl. 12.

[1080] U.S. Const. art. I, § 8, cl. 15. On the conjunction of constitutional power and duty, *see ante*, at 50-54.

Constitution explicitly entrusts this authority and responsibility "to execute the Laws" to no institution or establishment other than the Militia, or to any person other than the President of the United States, to whom it extends a cognate power and duty to "take Care that the Laws be faithfully executed",[1081] and who it doubtlessly foresees will often perform this function with the aid of "the Militia of the several States", of which he is "Commander in Chief * * * when [they are] called into the actual Service of the United States".[1082] In contrast, nowhere does the Constitution explicitly entrust any authority or responsibility "to execute the Laws of the Union" (or any other "Laws", for that matter) to "Armies" or "a Navy", or even delegate to Congress a power that can in any straightforward manner be construed as enabling it "[t]o provide for calling forth" any "Armies" or "a Navy" for that purpose. And under the self-evident precept of *constitutional priority*, even if "Armies" and "a Navy" in principle could be assigned to perform that task safely and effectively, they should be so deployed in practice only *after* "the Militia of the several States" *in their entirety* had been "call[ed] forth" *and had failed to succeed in that endeavor*.

3. The constitutional separation of "the Militia of the several States" from the regular Armed Forces. The Constitution carefully distinguishes and separates the permanent "Militia of the several States" from the contingent "Armies", "Navy", and "Troops, or Ships of War" which it permits Congress or the States to "raise and support", "provide and maintain", or "keep".[1083] In so doing, the Constitution plainly recognizes that the Militia hold a position of priority to those institutions, as well as a position of outright superiority to every *para*-military or civilian police or other "homeland-security" agency that Congress may enjoy some power to create.[1084]

a. The Colonies' and independent States' Militia were always separate establishments, rather than simply units in the regular British, Colonial, or later State and Continental Armed Forces. Throughout the *pre*-constitutional period, some Colonial and then State statutes regulated the Colonial and State Militia without in any way affecting Colonial and State regular "Troops"; other statutes raised "Troops" without affecting the Militia; and yet other statutes both regulated the Militia and raised "Troops" without conflating the two different establishments. So, because the Constitution incorporates "the Militia of the several States" into its federal system according to principles derived from their actual existence, structure, and operation during that era, the Militia cannot be parts of the regular Armed Forces of either the several States or the United States.

[1081] U.S. Const. art. II, § 3.

[1082] U.S. Const. art. II, § 2, cl. 1.

[1083] *Compare and contrast* U.S. Const. art. I, § 8, cls. 12 through 16, and § 10, cl. 3; *and* art. II, § 2, cl. 1.

[1084] *Compare and contrast* U.S. Const. art. I, § 8, cl. 18 *and* amends. II and X.

b. As to the States in particular, the Constitution clearly differentiates between regular forces—the "Troops, or Ships of War" which "[n]o State shall, without the Consent of Congress, * * * keep * * * in time of Peace"[1085]—and "the Militia of the several States", which the States and Congress must maintain perforce of and in compliance with the Constitution at all times. In this, the Constitution follows the pattern set in the Articles of Confederation, which provided that

> [n]o vessels of war shall be kept up in time of peace by any state, except such number only, as shall be deemed necessary by the united states in congress assembled, for the defence of such state or its trade; nor shall any body of forces be kept up by any state, in time of peace, except such number only, as in the judgment of the united states, in congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such state; *but each state shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutred*[.][1086]

As with the Constitution, the Articles secured a preferred and practically permanent position for the Militia at that time, because "the Articles of this confederation shall be inviolably observed by every state * * * ; nor shall any alteration at any time * * * be made in any of them; unless such alteration be agreed to in a congress of the united states, and be afterwards confirmed by the legislatures of every state".[1087]

c. Congress's powers with respect to "the Militia" are separate and distinct from its powers that appertain to "Armies" and "a Navy", for the self-evident reason that the "Armies" and "Navy"—or, as the Constitution elsewhere describes them, "the land and naval Forces"[1088]—are "the Army and Navy *of the United States*", whereas the Militia are "the Militia *of the several States*".[1089] In one clause, the Constitution empowers Congress "[t]o raise and support Armies",[1090] in another clause "[t]o provide and maintain a Navy",[1091] and in yet two other clauses "[t]o provide for calling forth the Militia" and "[t]o provide for organizing, arming, and disciplining, the Militia".[1092] The latter two clauses are completely independent of the former two. Similarly, in one clause the Constitution delegates to Congress the authority "[t]o make Rules for the Government and Regulation of the land and

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[1085] U.S. Const. art. I, § 10, cl. 3.

[1086] Arts. of Confed'n art. VI, ¶ 4 (emphasis supplied).

[1087] Arts. of Confed'n art. XIII.

[1088] U.S. Const. art. I, § 8, cl. 14 *and* amend. V ("the land or naval forces").

[1089] U.S. Const. art. II, § 2, cl. 1 (emphasis supplied).

[1090] U.S. Const. art. I, § 8, cl. 12.

[1091] U.S. Const. art. I, § 8, cl. 13.

[1092] U.S. Const. art. I, § 8, cls. 15 and 16.

naval Forces";[1093] whereas in a separate clause it authorizes Congress "[t]o provide * * * for governing such Part of them [that is, the Militia] as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress".[1094] Not only are these powers mutually independent, but also the reserved authority of the States as to "the Appointment of the Officers, and the Authority of Training the Militia" set out in the second of them finds no counterpart in the first. Because, of course, "the land and naval Forces" are "the Army and Navy *of the United States*", whereas the Militia are "the Militia *of the several States*".[1095]

d. The President of the United States is the only constitutional officer who holds or can hold a joint command in both the Armed Forces and the Militia. In separate phrases the Constitution expressly appoints the President as "Commander in Chief" of *both* "the Army and Navy of the United States" at all times *and* "the Militia of the several States, when called into the actual Service of the United States",[1096] but only at that time. Yet his status as "Commander in Chief of the Army and Navy" is of a different order from his status as "Commander in Chief * * * of the Militia". When the President commands the "the Army and Navy of the United States" he acts as a permanent officer of the Armed Forces, not at all of the Militia; and when he commands "the Militia of the several States" he acts as a temporary officer of the Militia, not at all of the Armed Forces. This bipartite designation would be meaninglessly redundant if the Army and Navy, on the one hand, and the Militia, on the other, were simply components of the selfsame unified establishment for National defense. But "[i]t cannot be presumed that any clause in the constitution is intended to be without effect".[1097]

e. Other than with respect to the President as "Commander in Chief", the States retain exclusive authority for "the Appointment of the Officers [in the Militia]"[1098]—which means that no "Officers" in the regular Armed Forces of the United States, all of whom are "nominate[d], and by and with the Advice and Consent of the Senate * * * appoint[ed]", by the President,[1099] may command any portion of the Militia. Moreover, inasmuch as the Constitution expressly foresees

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[1093] U.S. Const. art. I, § 8, cl. 14.

[1094] U.S. Const. art. I, § 8, cl. 16.

[1095] U.S. Const. art. II, § 2, cl. 1 (emphasis supplied).

[1096] U.S. Const. art. II, § 2, cl. 1.

[1097] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803). *See also, e.g.,* Myers v. United States, 272 U.S. 52, 151-152 (1926); Knowlton v. Moore, 178 U.S. 41, 87 (1900); Blake v. McClung, 172 U.S. 239, 260-261 (1898).

[1098] U.S. Const. art. I, § 8, cl. 16. *See also* U.S. Const. amend. X.

[1099] *See* U.S. Const. art. II, § 2, cl. 2.

the possibility that only a "Part of the[Militia] * * * may be employed in the Service of the United States" at any one time,[1100] even the President's authority to command the Militia will extend only to such "Part" then "called into the *actual* Service of the United States",[1101] with the rest of the Militia remaining under the exclusive command of "Officers" appointed exclusively by the States.

f. In addition, the Constitution commands that "[n]o State shall, without the Consent of Congress, * * * keep Troops, or Ships of War in time of Peace".[1102] Yet each of the States must maintain her Militia in being at all times, even if solely with respect to "the Appointment of the Officers, and * * * training * * * according to the discipline prescribed by Congress".[1103] The existence of "the Militia of the several States" in no way depends upon "the Consent of Congress"—that is, Congress's political discretion—because the Constitution presumes the presence of the Militia as part of its federal structure at all times, irrespective of Congressmen's minds on the subject. Even if Congress neglects, fails, or refuses to fulfill its constitutional duty "[t]o provide for organizing, arming, and disciplining, the Militia",[1104] the Militia nonetheless remain in being, in the persons of WE THE PEOPLE capable of exercising "the right * * * to keep and bear Arms", who may "provide for organizing, arming, and disciplining" themselves, either through their respective State legislatures or in the final extremity on their own recognizance.

A State's "Troops, or Ships of War", therefore, are constitutionally distinct from her "Militia". As well they would have to be as a practical matter. For the Constitution provides that "[n]o State shall, without the Consent of Congress, * * * engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay".[1105] But if, "without the Consent of Congress", a State *may* "engage in War, [when] actually invaded, or in such imminent Danger as will not admit of delay", to do so she would need immediately at hand "[a] well regulated Militia * * * necessary to the security of a free State"[1106]—unless her enemy were sufficiently accommodating to allow her ample time to raise "Troops, or Ships of War" from scratch, in which case the "Danger" would hardly be so "imminent * * * as will not admit of delay".

g. The Fifth Amendment also distinguishes between "the land or naval forces", on the one hand, and "the Militia", on the other. The Amendment provides

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[1100] *See* U.S. Const. art. I, § 8, cl. 16.

[1101] U.S. Const. art. II, § 2, cl. 1 (emphasis supplied). On the critical importance of the adjective "actual", *see post*, at 871-880.

[1102] U.S. Const. art. I, § 10, cl. 3.

[1103] *Compare* U.S. Const. art. I, § 8, cl. 16 *with* art. VI, cl. 2.

[1104] *Compare* U.S. Const. art. I, § 8, cl. 16. *See ante,* at 50-54.

[1105] U.S. Const. art. I, § 10, cl. 3.

[1106] U.S. Const. amend. II.

that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of a Grand Jury, *except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger*".[1107] Self-evidently, "the land or naval forces" mentioned here are the very same "land and naval Forces" "for the Government and Regulation of [which]" the Constitution empowers Congress "[t]o make Rules"—to wit, the "Army and Navy of the United States" to which the original Constitution referred. And "the Militia" are "the Militia of the several States" and the "well regulated Militia" to which first the original Constitution and then the Second Amendment referred. For "[w]hen the same term which has been used plainly in [a particular] * * * sense in [one clause of the Constitution] * * * is also employed [in another provision] * * * , it must be understood as retaining the sense originally given to it".[1108] Moreover, the disjunctive "or" between these entities—"in the land or naval forces, *or* in the Militia"—indicates that they are of *constitutionally different* characters, "the land or naval forces" belonging to one discreet set, "the Militia" to another.

h. In sum, in four ways the Constitution treats "the Militia of the several States" as separate and distinct from, and independent of, the various "Armies", "Navy", and "Troops, or Ships of War" that it permits Congress to create, and the States to "keep" "with[ ] the Consent of Congress".

(1) "[T]he Militia of the several States" are foundational and permanent establishments of and within the Constitution's federal system, whereas the existence of any of the others is entirely contingent upon circumstances and the actions of Congress and the States in response thereto. Even if the various "Armies", "Navy", and "Troops, or Ships of War" that the Constitution mentions never came into existence, the Militia would always subsist as a matter of law. True enough, if "necessary and proper" to "establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty",[1109] Congress would be bound in duty "[t]o raise and support Armies",[1110] "[t]o provide and maintain a Navy",[1111] and to give its "Consent" for the States to "keep Troops, or Ships of War in time of Peace".[1112] But otherwise not. Conversely, the Militia are not the subjects of a Congressional power and duty to *create*—and therefore can never be the potential victims of any rightful Congressional neglect, failure, or refusal to exercise such a power and fulfill such a duty—because, by recognizing the Militia as preëxistent, the Constitution denies

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[1107] Emphasis supplied.

[1108] *See* Hepburn and Dundas v. Ellzey, 6 U.S. (2 Cranch) 445, 453 (1805).

[1109] *Compare* U.S. Const. preamble *with* art. I, § 8, cl. 18.

[1110] U.S. Const. art. I, § 8, cl. 12.

[1111] U.S. Const. art. I, § 8, cl. 13.

[1112] U.S. Const. art. I, § 10, cl. 3.

Congress any discretion in the premises. *Congress can no more refuse to recognize the existence of "the Militia of the several States" than it can refuse to recognize the existence of the States themselves.*

(2) As a matter of constitutional definition derived from the *pre-*constitutional Militia Acts, "the Militia of the several States" must enroll every able-bodied adult citizen among WE THE PEOPLE from sixteen to sixty years of age, with only a few permissible exemptions, and may enlist as well disabled or superannuated volunteers still capable of performing useful functions. For proper reasons, Congress (and in default of Congress, the States) may impose different organization and discipline upon, provide different training for, and assign different duties to different subsets within that group. Nonetheless, the Militia tend to near-universality, in that all able-bodied adult citizens, not legitimately exempted, must be organized, armed, disciplined, governed, and trained in *some* manner, and assigned *some* duty. Whereas "Armies", "a Navy", and "Troops, or Ships of War" include only those individuals whom Congress and the States for reasons of policy may designate for service. That is, the "land and naval Forces" inevitably tend to selectivity—and the greater the selectivity, the less constitutionally trustworthy such forces tend to become.

(3) Being identifiable with those among WE THE PEOPLE who are able to exercise "the right * * * to keep and bear Arms", the Militia are always potentially in being as a matter of fact—even if only in the form of individuals who on their own initiatives, in keeping with their legal duty under the Constitution and their political duty under the Declaration of Independence, have provided themselves and trained with firearms and ammunition—no matter what Congress or the States may neglect, fail, or refuse to do. Whereas "Armies" need to be "raise[d] and support[ed]", "a Navy" to be "provide[d] and maintain[ed]", and "Troops, or Ships of War" "ke[pt]" by the affirmative actions of Congress and the States.[1113]

(4) "[T]he Militia of the several States" may be brought within the General Government's temporary control for three reasons only: namely, "to execute the Laws of the Union, suppress Insurrections and repel Invasions".[1114] Then and only then, in that specifically delimited "Service", are they under the President's command,[1115] and subject to rules Congress promulgates for "governing" them.[1116] None of these reasons, however, can serve as an occasion or excuse for combining the Militia with "the Army and Navy of the United States" into the "large military establishments and standing armies" that Joseph Story denounced as "facile means"

[1113] *See* U.S. Const. art. I, § 8, cls. 12 and 13, *and* § 10, cl. 3.

[1114] U.S. Const. art. I, § 8, cl. 15.

[1115] U.S. Const. art. II, § 2, cl. 1.

[1116] U.S. Const. art. I, § 8, cl. 16.

for "ambitious and unprincipled rulers to subvert the government or trample upon the rights of the people".[1117]

i. Unfortunately, even with all of this information before it, in the early Twentieth Century Congress began thoroughly to muddle the constitutional differentiation between the "the Militia of the several States" and the regular Armed Forces:

> • In 1903 and 1908, Congress provided "[t]hat the militia * * * shall be divided into two classes—the *organized* militia, to be known as the National Guard of the State * * * or by such other designations as may be given them by the laws of the respective States * * * , and the remainder to be known as the *Reserve* Militia".[1118] This prepared the statutory groundwork for unlimited confusion thereafter, by bifurcating the Militia into two components, and assigning to each one a new name unknown in *pre-*constitutional American history and for which the Constitution provides no justification.
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> • In 1914, Congress mandated "[t]hat the land forces of the United States shall consist of the Regular Army, the organized land militia [that is, the so-called 'National Guard' of 1908] while in the service of the United States, and such volunteer forces as Congress may authorize".[1119] The Constitution, however, repeatedly distinguishes between, on the one hand, the "land * * * Forces" of the United States—which consist of the "Armies" that Congress is authorized "[t]o raise and support"; and, on the other hand, "the Militia of the several States"—which are establishments of the States that "may be employed in the Service of the United States". And it does so in a manner that absolutely precludes the conflation of the two different types of establishments.[1120] For example, that "the Militia of the several States" can be "employed in the Service of the United States" *or not*, and that the President can be the "Commander in Chief * * * of the Militia of the several States" *or not*, depending upon circumstances that lie beyond Congress's and the President's control, proves that the Militia can not be "forces of the United States"—otherwise they would *always* be "in the Service of the United States", and *always* under the President's control as

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[1117] *Commentaries on the Constitution*, *ante* note 576, Volume 2, § 1897, at 646.

[1118] An Act To promote the efficiency of the militia, and for other purposes, Act of 21 January 1903, CHAP. 196, § 1, 32 Stat. 775, 775 (emphasis supplied). *Continued*, An Act To further amend the Act entitled "An Act to promote the efficiency of the militia, and for other purposes," approved January twenty-first, nineteen hundred and three, Act of 27 May 1908, CHAP. 204, § 1, 35 Stat. 399, 399.

[1119] An Act To provide for raising the volunteer forces of the United States in time of actual or threatened war, Act of 25 April 1914, CHAP. 71, § 1, 38 Stat. 347, 347.

[1120] *Compare and contrast* U.S. Const. art. I, § 8, cls. 12 through 14 *with* art. I, § 8, cls. 15 and 16, *with* art. II, § 2, cl. 1, *and with* amend. V.

"Commander in Chief", just as are the regular Armed Forces.[1121] And that the Constitution delegates to Congress the *separate and distinct* powers "[t]o make Rules for the Government and Regulation of the land and naval Forces"[1122] and "[t]o provide for * * * governing such Part of the[Militia] as may be employed in the Service of the United States"[1123] establishes beyond peradventure that "such Part of the[Militia] as may be employed in the Service of the United States" can *never* become part of "the land forces of the United States", or else two different powers for governing them, purportedly as such, would not be necessary—and "[i]t cannot be presumed that any clause in the constitution is intended to be without effect".[1124]

• In 1916, Congress purported to mandate that "[t]he militia of the United States * * * shall be divided into three classes, the National Guard, the Naval Militia, and the Unorganized Militia"; "[t]he National Guard shall consist of the regularly enlisted militia * * * organized, armed, and equipped"; and "the Army of the United States shall consist of the Regular Army, the Volunteer Army, * * * the National Guard while in the service of the United States, and such other land forces as are now or may hereafter be authorized by law".[1125] Here, for the first time in American history, Congress set up an explicit dichotomy between an "organized" and an "unorganized" "militia"—because, from 1903 to 1916, it might have been possible to imagine that, although the National Guard was described as "the organized militia", nonetheless the so-called "Reserve Militia" was also to be in some manner "organized". In 1916, however, it became apparent that Congress actually intended to treat its power "[t]o provide for organizing * * * the Militia"[1126] as encompassing a license "[t]o provide for [un]organizing * * * the Militia" or "[t]o provide for [refusing to] organiz[e] * * * the Militia" in large part. In addition, also for the first time in American history, Congress purported to transmogrify the separate "Militia *of the several States*" (in the plural) into the constitutionally impossible unified "militia *of the United States*" (in the singular), notwithstanding that Congress's only authority in the premises is "[t]o provide * * * for governing

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[1121] *See* U.S. Const. art. I, § 8, cls. 15 and 16, *and* art. II, § 2, cl. 1.

[1122] U.S. Const. art. I, § 8, cl. 14.

[1123] U.S. Const. art. I, § 8, cl. 16.

[1124] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803).

[1125] An Act For making further and more effectual provision for the national defense, and for other purposes, Act of 3 June 1916, CHAP. 134, §§ 57, 58, and 1, 39 Stat. 166, 197, 166. This particular statute does not mention the Navy, because it was "applicable only to militia organized as a land force, and not to the Naval Militia". § 117, 39 Stat. at 212.

[1126] U.S. Const. art. I, § 8, cl. 16.

such Part of *them* as may be employed in the Service of the United States";[1127] and notwithstanding that the Constitution designates the President as "Commander in Chief * * * of the Militia *of the several States*, when called into the actual Service of the United States"—*not* "the Commander in Chief * * * of the Militia *of the United States*", even when "the Militia of the several States" *have been* "called into the actual Service of the United States".[1128] Worse yet, Congress purported under some circumstances to absorb "the militia of the United States" into "the Army of the United States", notwithstanding (as will be explained immediately below) that the Constitution requires the Militia and the Army to be separate and distinct establishments precisely so that the Militia may act as independent "checks and balances" against rogue elements in the Armed Forces.

• In 1920, Congress repeated its definition that "the Army of the United States shall consist of the Regular Army, [and] the National Guard while in the service of the United States"—adding that "[t]he Organized peace establishment, including the Regular Army, the National Guard and the Organized Reserves, shall include all of those divisions and other military organizations necessary to form the basis for a complete and immediate mobilization for the national defense in the event of a national emergency declared by Congress".[1129] Self-evidently, if "a national emergency declared by Congress" arose under circumstances that did not require "[*para*-military] execut[ion of] the Laws of the Union, suppress[ion of] Insurrections and repel[ling of] Invasions"—as many such purported "emergencies" have over the years, and as the very generality of the term "emergency" suggests—then "the Militia of the several States" *could not constitutionally* be "call[ed] forth" into "the Service of the United States" at all.[1130] So, this statute's inclusion of the National Guard in "[t]he Organized peace establishment" for such an open-ended purpose provided a further Congressional admission (if one were needed) that the National Guard is no constitutional "Militia" at all.

• Finally, in 1933, Congress completed the arguably unconstitutional fusion of its bastardized "militia of the United States" with the regular Armed Forces by: (i) defining "[t]he National Guard of each State * * *

[1127] U.S. Const. art. I, § 8, cl. 16 (emphasis supplied).

[1128] U.S. Const. art. II, § 2, cl. 1.

[1129] An Act To amend an Act entitled "An Act for making further and more effectual provision for the national defense, and for other purposes," approved June 3, 1916, and to establish military justice, Act of 4 June 1920, CHAP. 227, §§ 1 and 3, 41 Stat. 759, 759.

[1130] *See* U.S. Const. art. I, § 8, cls. 15 and 16, *and* art. II, § 2, cl. 1.

> [to] consist of members of the militia voluntarily enlisted therein, * * * organized, armed, equipped, and federally recognized"; (ii) designating "[t]he National Guard of the United States" as "a reserve component of the Army of the United States" which "shall consist of * * * federally recognized National Guard units * * * of the several States" that "in time of peace * * * shall be administered, armed, uniformed, equipped, and trained in their status as the National Guard of the several States"; and (iii) declaring "[t]hat the Army of the United States shall consist of the Regular Army, the National Guard of the United States, [and] the National Guard while in the service of the United States".[1131] Voluntary enlistment and being a component of the Army are, of course, incompatible with "Militia" status.

To be sure, an "*unconstitutional* fusion" would result only if the National Guard were treated in principle at all relevant times as somehow part of a true "Militia"—as what was then called "the National Guard" may marginally have been under color of the statutes of 1903 and 1908. From at least the statute of 1914 onwards, though, the National Guard was systematically transformed from some marginally possible albeit seriously questionable sort of "Militia" into the quite different "Troops" that a State may "keep * * * in time of Peace" only "with[ ] the Consent of Congress".[1132] Initially, the Act of 1914 declared that "the land forces of the United States shall consist of the Regular Army, [and] the organized militia [that is, the National Guard] while in the service of the United States"[1133]—which is *constitutionally impossible* for *any* "Part" of the Militia, but perhaps not for State "Troops", particularly when "the Consent of Congress" for the States to "keep" such "Troops" at all is explicitly conditioned upon service of those "Troops" within "the land forces of the United States" when summoned to that duty.[1134] In 1916, Congress provided that "the Army of the United States shall consist of the Regular Army, * * * [and] the National Guard while in the service of the United States"[1135]—again, *a constitutional impossibility* for *any* "Part" of the Militia, but not for State "Troops". In the same Act, Congress provided that "[n]o State shall maintain troops *in time of peace* other than as authorized in accordance with the organization prescribed under this Act: *Provided*, That nothing contained in this Act shall be construed as limiting the rights of the States * * * in the use of the

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[1131] AN ACT To amend the National Defense Act of June 3, 1916, as amended, Act of 15 June 1933, CHAPTER 87, §§ 5 and 1, 48 Stat. 153, 155-156, 153. *See* AN ACT Relating to the reserve components of the Armed Forces of the United States, Act of 9 July 1952, Pub. L. 476, CHAPTER 608, §§ 301, 601, and 701 through 703, 66 Stat. 481, 498, 501-502.

[1132] U.S. Const. art. I, § 10, cl. 3.

[1133] An Act To provide for raising the volunteer forces of the United States in time of actual or threatened war, Act of 25 April 1914, CHAP. 71, § 1, 38 Stat. 347, 347.

[1134] *See post*, Chapter 49.

[1135] An Act For making further and more effectual provision for the national defense, and for other purposes, Act of 3 June 1916, CHAP. 134, § 1, 39 Stat. 166, 166.

National Guard within their respective borders *in time of peace*".[1136] This evidenced Congress's recognition and intention, recited in terms obviously lifted directly from the Constitution itself—namely, in the parallel between the constitutional language "[n]o State shall, without the Consent of Congress, * * * keep Troops * * * *in time of Peace*"[1137] and the statutory language "[n]o State shall maintain troops *in time of peace* other than as authorized" by Congress—that the National Guard actually consists, not of State *Militiamen*, but of State *"Troops"*. Similarly in 1933, in that statute's declaration that "the members of *the National Guard of the United States* shall not be in the active service of the United States except when ordered thereto in accordance with law, and, *in time of peace*, they shall be administered, armed, uniformed, equipped, and trained in their status as *the National Guard of the several States*"[1138]—once again drawing upon the constitutional phraseology "in time of Peace" to differentiate between the dual status of the National Guard as forces "of the several States" as well as forces "of the United States", depending upon circumstances. The only forces that "the several States" may maintain *only* "in time of Peace", of course, are "Troops", and then *only* "with[ ] the Consent of Congress" (which the statute granted). Distinguishably, the States must maintain their Militia at *all* times, whether Congress tenders its "Consent" or not. And when "the Militia of the several States" are "call[ed] forth" for one or more of the three constitutional purposes,[1139] they are not thereby transformed into components of the regular Armed Forces "of the United States", but instead always remain Militia which are merely "employed in the Service of the United States".[1140] So "the National Guard of the several States" must consist of those "Troops" which the States may "keep" "with[ ] the Consent of Congress", upon the condition that they will be detached to become "the National Guard of the United States" "when [so] ordered * * * in accordance with law" for any presumably constitutional purpose.[1141] Moreover, such "Part[s] of th[e Militia of the several States]" which are *not* "call[ed] forth" for a legitimate constitutional purpose, and which therefore can *not* become the subjects of Congress's power "[t]o provide for "governing such "Part[s] of th[e Militia of the several States]" as are "call[ed] forth", remain under the control of their respective States, where they cannot possibly come under even the wildest extrapolation of Congress's power "[t]o make Rules for the Government and Regulation of the land

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[1136] An Act For making further and more effectual provision for the national defense, and for other purposes, Act of 3 June 1916, CHAP. 134, § 61, 39 Stat. 166, 198 (emphasis supplied).

[1137] U.S. Const. art. I, § 10, cl. 3 (emphasis supplied).

[1138] AN ACT To amend the National Defense Act of June 3, 1916, as amended, Act of 15 June 1933, CHAPTER 87, § 5, 48 Stat. 153, 156 (emphasis supplied).

[1139] U.S. Const. art. I, § 8, cl. 15.

[1140] U.S. Const. art. I, § 8, cl. 16, *and* art. II, § 2, cl. 1. *Compare and contrast* U.S. Const. art. I, § 8, cl. 14 *with* cl. 16.

[1141] *See post,* Chapter 49.

and naval Forces", and for that reason can *never* be considered *at any time or for any reason* to be any component whatsoever of "the land forces of the United States". Congress confirmed this understanding of the National Guard's dual status in 1940 and 1950.[1142] And the present version of the *United States Code* once again affirms it:

> (a) In time of peace, a State * * * may maintain no troops other than those of its National Guard and defense forces authorized by subsection (c).
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> * * * * *
>
> (c) In addition to its National Guard, if any, a State * * * may, as provided by its laws, organize and maintain defense forces. A defense force established under this section may be used within the jurisdiction concerned, * * * but it may not be called, ordered, or drafted into the armed forces.[1143]

So, inasmuch as Congress has *no constitutional authority whatsoever* to prohibit the States from maintaining "the Militia of the several States", in whole or in part, the National Guard and any so-called State "defense forces" must be, not any kind or part of a constitutional "Militia", but instead "Troops" for the "keep[ing]" of which by the States "in time of Peace" Congress has given its "Consent".[1144] And if that is true in principle, then in practice all of the conditions and controls which Congress has attached to its "Consent" for the States to "keep Troops, or Ships of War in time of Peace" in the forms of the National Guard and the Naval Militia are presumably valid, because Congress may condition its "Consent" upon whatever otherwise constitutional requirements it deems expedient,[1145] and may even permit the States to enact legislation of their own in order to implement the terms of that "Consent".[1146]

[1142] *See* AN ACT To amend section 61 of the National Defense Act of June 3, 1916, by adding a proviso which will permit States to organize military units not a part of the National Guard, and for other purposes, Act of 21 October 1940, CHAPTER 904, 54 Stat. 1206; *and* AN ACT To amend section 61 of the National Defense Act to permit the States to organize military forces, other than as parts of their National Guard units, to serve while the National Guard is in active Federal Service, Act of 27 September 1950, CHAPTER 1058, 64 Stat. 1072.

[1143] 32 U.S.C. § 109.

[1144] For example, the Virginia Defense Force is a small establishment ("with a targeted membership of at least 1,200") the "mission" of which is "to (i) provide for a[ ] * * * reserve militia to assume control of the Virginia National Guard facilities and to secure any federal and state property left in place in the event of the mobilization of the Virginia National Guard, (ii) assist in the mobilization of the Virginia National Guard, (iii) support the Virginia National Guard in providing family assistance to military dependents within the Commonwealth in the event of the mobilization of the Virginia National Guard, (iv) to provide a military force to respond to the call of the Governor in [certain] circumstances". Code of Virginia § 44-54.4. Obviously, the only connection between the Virginia Defense Force—in composition, organization, mission, and certainly pedigree—and the *pre*-constitutional Militia of Virginia is the word "Virginia".

[1145] *See* Arizona v. California, 292 U.S. 341, 345 (1934) (interstate compact).

[1146] *See* De Veau v. Braisted, 363 U.S. 144, 153-155 (1960).

Nonetheless, these developments expose some rather shady terminological double-dealings by Congress over the years, along the lines of political "bait and switch"—on the one hand, use of the verbiage "the National Guard *while in the service of the United States*", which plainly was intended to invoke the constitutional provisions applicable to the Militia,[1147] and thereby to lead the careless observer to conclude that the National Guard is somehow a proper constitutional "Militia"; and, on the other hand, use of the verbiage "[n]o State shall maintain troops in time of peace other than as authorized", which no less plainly was intended to invoke Congress's power over the States' regular "Troops" *as distinct from their true "Militia"*. Nonetheless, at the end of the day, this serpentine statutory phraseology does tend to support the basal constitutionality of the National Guard as it is now organized. For if these statutes can avoid constitutional infirmity by reasonably being construed as positioning the National Guard within the "Troops" that the States may *constitutionally* "keep" "with[ ] the Consent of Congress", and that *statutorily* may be deployed in the service of the United States without restriction to the three constitutional purposes mandated for the Militia, then they should be so interpreted.[1148] For that reason, the Supreme Court was arguably correct to characterize "[t]he [National] Guard [a]s an essential reserve component of the Armed Forces of the United States, available with regular forces in time of war"[1149]—although the Justices were apparently not perceptive enough to notice that, if the National Guard constitutes *any* "component of the Armed Forces of the United States", it cannot be *any* part of "the Militia of the several States". Yet that these statutes, even so construed, can avoid constitutional infirmity is not necessarily assured. For *the States* to "keep [*their own*] Troops" that simultaneously constitute "a reserve component of the Army *of the United States*" sets up a constitutional paradox which will require no little acumen to resolve.

One does need, moreover, to analyze these statutes with no little intellectual discrimination and skepticism. For they exhibit a distinct coloration of unconstitutional political imperialism on Congress's part. For example, a subsection of the relevant section of the *United States Code* intones that "[n]othing in this title * * * prevents [a State] from organizing and maintaining police or constabulary"[1150]—the implication being that, if it wanted to, Congress *could* "prevent[ ]" a State from so doing. But if a State's "police or constabulary" were part and parcel of her Militia, as any such "law-enforcement unit" ought to be, or were some civilian agency necessarily separate in character from both the Militia and any

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[1147] *See* U.S. Const. art. I, § 8, cl. 16 *and* art. II, § 2, cl. 1.

[1148] *See, e.g.,* Crowell v. Benson, 285 U.S. 22, 62 (1932); National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U.S. 1, 30 (1937); Lynch v. Overholser, 369 U.S. 705, 710-711 (1962); United States v. Thirty-seven (37) Photographs, 402 U.S. 363, 369 (1971).

[1149] Gilligan v. Morgan, 413 U.S. 1, 6-7 (1973).

[1150] 32 U.S.C. § 109(b).

State "Troops", then Congress would have no authority to dictate to the State whether she could or could not "organiz[e] and maintain[ ]" such an establishment. Although, if a State's "police or constabulary" were integral to her Militia, Congress could constitutionally "provide for organizing, arming, and disciplining" it, to prepare it (say) to be "call[ed] forth to execute the Laws of the Union".[1151] Only if the "police or constabulary" were separate from the State's Militia, and of such a decidedly military cast as to be considered "Troops", would Congress be entitled to dictate to the State the terms on which that "police or constabulary" could be "organiz[ed] and maintain[ed]".

4. Americans' deep and abiding suspicion of "standing armies" embodied in "the Militia of the several States". Analysis of the constitutional position of the Militia must always keep in the sharpest focus the dichotomy between the Militia and "standing armies".

a. If many and complex were the reasons for Americans in *pre-*constitutional times to develop an aversion to "standing armies",[1152] that they did so became patent in such documents as the Declaration and Resolves of the First Continental Congress in 1774, which asserted that "the keeping a standing army in several of these colonies, in time of peace, without the consent of the legislature of that colony, in which such army is kept, is against law";[1153] and the Declaration of Independence in 1776, which enumerated as grievances against King George III that "[h]e has kept among us, in times of peace, Standing Armies without the Consent of our legislatures" and "has affected to render the Military independent of and superior to the Civil power".

b. Justice Joseph Story later summarized Americans' dominant objections to "standing armies"—and identified *the Militia alone* as capable of providing the necessary "checks and balances" against their excesses:

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

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[1151] U.S. Const. art. I, § 8, cls. 16 and 15.

[1152] *See* John Shy, *Toward Lexington: The Role of the British Army in the Coming of the American Revolution* (Princeton, New Jersey: Princeton University Press, 1965), at 376-398.

[1153] *Documents Illustrative of the Formation of the Union of the American States*, *ante* note 1, at 5.

> the usurpation and arbitrary power of rulers, and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.[1154]

"[L]arge military establishments and standing armies" must inevitably work at cross-purposes to the Constitution's goals, because: (i) the exorbitant costs of what today is styled "the military-industrial complex" will always undermine "the general Welfare" without necessarily advancing "the common defence" to a compensatory degree; and (ii) the tendency for rogue elements among the regular Armed Forces to offer themselves as latter-day praetorians in service of aspiring usurpers and tyrants will always threaten "the Blessings of Liberty".[1155] So the Militia—WE THE PEOPLE exercising "[t]he right of the citizens to keep and bear arms"—must always provide the necessary and sufficient "checks and balances" against these dangers, because: (i) as taxpayers and public creditors, THE PEOPLE will oppose wasteful expenditures for "standing armies"; and (ii) as possessors of the ultimate "'[p]olitical power [that] grows out of the barrel of a gun'",[1156] THE PEOPLE will by "keep[ing] * * * arms" deter, and where deterrence fails will by "bear[ing] arms" resist and defeat, usurpers, tyrants, and their myrmidons.

c. Story's summary fairly reflected the consensus among patriotic Americans in the Founding Era. The constitutions of several of the independent States addressed the issue in precisely those terms, including:

> DELAWARE. "SEC[TION] 17. No standing army shall be kept up without the consent of the legislature; and the military shall, in all cases and at all times, be in strict subordination to the civil power."[1157]
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> MARYLAND. "[Article] XXV. That a well-regulated militia is the proper and natural defence of a free government.
>
> "XXVI. That standing armies are dangerous to liberty, and ought not to be raised or kept up, without consent of the Legislature.
>
> "XXVII. That in all cases, and at all times, the military ought to be under strict subordination to and control of the civil power."[1158]
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> MASSACHUSETTS. "Art[icle] XVII. The people have a right to keep and to bear arms for the common defence. And as, in time of peace,

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[1154] *Commentaries on the Constitution, ante* note 576, Volume 2, § 1897, at 646 (footnote omitted).

[1155] *See* U.S. Const. preamble.

[1156] *Quotations From Chairman Mao, ante* note 28, at 61.

[1157] CONSTITUTION OF DELAWARE (1792), *in* THE FEDERAL AND STATE CONSTITUTIONS COLONIAL CHARTERS AND OTHER ORGANIC LAWS OF THE UNITED STATES, Benjamin P. Poore, Compiler (New York, New York: Burt Franklin, Second Edition, 1972 Reprint of the 1924 Edition), PART I, at 279.

[1158] A DECLARATION OF RIGHTS, *and the* CONSTITUTION *and* FORM *of* GOVERNMENT, *agreed to by the Delegates of Maryland, in free Convention Assembled* (1776), A DECLARATION OF RIGHTS, *in* THE FEDERAL AND STATE CONSTITUTIONS, *ante* note 1157, PART I, at 819.

armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it."[1159]

NEW HAMPSHIRE. "[Article] XXIV. A well regulated militia is the proper, natural, and safe defence of a state.

"XXV. Standing armies are dangerous to liberty, and ought not to be raised or kept up without the consent of the legislature.

"XXVI. In all cases, and at all times, the military ought to be under strict subordination to, and governed by the civil power."[1160]

NORTH CAROLINA. "[Article] XVII. That the people have a right to bear arms, for the defence of the State; and, as standing armies, in time of peace, are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to, and governed by, the civil power."[1161]

PENNSYLVANIA. "[Article] XIII. That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power."[1162]

SOUTH CAROLINA. "[Article] XLII. That the military be subordinate to the civil power of the State."[1163]

VIRGINIA. "13. That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state; that standing armies, in time of peace, should be avoided, as dangerous to liberty; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power."[1164]

d. Other States made like declarations upon their ratifications of the Constitution of the United States, including:

[1159] CONSTITUTION OF MASSACHUSETTS (1780), PART THE FIRST, A DECLARATION OF THE RIGHTS OF THE INHABITANTS OF THE COMMONWEALTH OF MASSACHUSETTS, *in* THE FEDERAL AND STATE CONSTITUTIONS, *ante* note 1157, PART I, at 959.

[1160] CONSTITUTION OF NEW HAMPSHIRE (1784), PART I.—THE BILL OF RIGHTS, *in* THE FEDERAL AND STATE CONSTITUTIONS, *ante* note 1157, PART II, at 1282.

[1161] CONSTITUTION OF NORTH CAROLINA (1776), A DECLARATION OF RIGHTS, *in* THE FEDERAL AND STATE CONSTITUTIONS, *ante* note 1157, PART II, at 1410.

[1162] CONSTITUTION OF PENNSYLVANIA (1776), *A Declaration of the Rights of the Inhabitants of the State of Pennsylvania*, *in* THE FEDERAL AND STATE CONSTITUTIONS, *ante* note 1157, PART II, at 1542.

[1163] CONSTITUTION OF SOUTH CAROLINA (1778), *An act for establishing the constitution of the State of South Carolina, in* THE FEDERAL AND STATE CONSTITUTIONS, *ante* note 1157, PART II, at 1627.

[1164] VIRGINIA BILL OF RIGHTS (1776), *in* THE FEDERAL AND STATE CONSTITUTIONS, *ante* note 1157, PART II, at 1909.

> NEW YORK. "That the People have a right to keep and bear Arms; that a well regulated Militia, including the body of the People *capable of bearing Arms*, is the proper, natural and safe defence of a free State;
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> * * * * *
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> "That standing Armies in time of Peace are dangerous to Liberty, and ought not to be kept up, except in Cases of necessity; and that at all times, the Military should be under strict Subordination to the civil Power."[1165]
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> RHODE ISLAND. "[Article] 17*th* That the people have a right to keep and bear arms, that a well regulated militia, including the body of the people capable of bearing arms, is the proper, natural and safe defence of a free state; * * * that standing armies in time of peace, are dangerous to liberty, and ought not to be kept up, except in cases of necessity; and that at all times the military should be under strict subordination to the civil power[.]"[1166]

In her ratification, Rhode Island added that she was asserting the right of "the people * * * to keep and bear arms", the cruciality of a Militia to the "defence of a free state", and the necessity for limitations on "standing armies" "[u]nder these impressions, and declaring, that the rights aforesaid cannot be abridged or violated, and that the explanations aforesaid, are consistent with the [United States C]onstitution".[1167] This, of course, was a correct construction of the original Constitution in these particulars, and an accurate prediction of the Second Amendment: namely,

- Rhode Island declared that "the people have a right to keep and bear arms" and that "a well regulated militia, including the body of the people capable of bearing arms, is the proper, natural and safe defence of a free state"—which principles both the Second Amendment (in like verbiage) and the original Constitution (by incorporation of "the Militia of the several States" into its federal structure) affirmed. Significantly, Rhode Island found both of them embodied in the original Constitution alone.

- Rhode Island declared that "standing armies in time of peace, are dangerous to liberty, and ought not to be kept up, except in cases of necessity"—which admonition the original Constitution not only affirmed but also rendered effective, by enabling each newly elected House of Representatives to deny an "Appropriation of Money" "[t]o raise and support Armies", whenever its Members might believe that "Armies" are too

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[1165] Convention (1788), *in Documents Illustrative of the Formation of the Union of the American States*, *ante* note 1, at 1035.

[1166] *Ratification of the Constitution, by the Convention of the State of Rhode-Island and Providence Plantations* (1790), *in Documents Illustrative of the Formation of the Union of the American States*, *ante* note 1, at 1055.

[1167] *Id.*

dear or too dangerous to be kept up.[1168] The assertion in its Preamble of "the common defence" and "the general Welfare" as two of the original Constitution's goals limited the exercise of all of the General Government's powers in conformity with those standards.[1169] Nonetheless, the original Constitution repeated that limitation in almost the very same words in Congress's power "[t]o lay and collect Taxes * * * *to* * * * *provide for the common Defence and general Welfare of the United States*"—a repetition to be found nowhere else in the document.[1170] Now, "[i]t cannot be presumed that any clause in the constitution is intended to be without effect".[1171] And no one may "construe any clause of the Constitution as to defeat its obvious ends, when another construction, equally accordant with the words and sense thereof, will enforce and protect them".[1172] Therefore, *some* special purpose and effect must be assigned to this repetition—and particularly to the conjunction linking "the common Defence *and* general Welfare". Self-evidently, these words should be construed as an emphatic reminder to the Members of the House of Representatives of their plenary authority and responsibility in the premises: That "[a]ll Bills for raising Revenue shall originate in the House".[1173] That, if the "Revenue" is intended for an "Appropriation" "[t]o raise and support Armies" in excess of what is truly necessary and proper for "the common Defence", it will undermine the "general Welfare", either because it is simply wasteful, or because it may build up a huge "military-industrial complex" with interests and designs antagonistic to WE THE PEOPLE'S liberty. And therefore that WE THE PEOPLE are entitled to treat any such excessive "Appropriation" as a serious grievance, and a series of such improper "Appropriations" as components of "a long train of abuses and usurpations, pursuing invariably the same Object", which "evinces a design to reduce them under absolute Despotism" in the very same sense the Declaration of Independence employed those terms.

• Finally, Rhode Island declared that "at all times the military should be under strict subordination to the civil power"—which the Constitution also plainly required, because: (i) Although the President is "Commander in Chief of the Army and Navy of the United States",[1174] he is also required

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[1168] U.S. Const. art. I, § 8, cl. 12.

[1169] *See, e.g.,* W. Crosskey, *Politics and the Constitution, ante* note 206, Volume 1, at 374-379.

[1170] U.S. Const. art. I, § 8, cl. 1 (emphasis supplied).

[1171] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803).

[1172] Prigg v. Pennsylvania, 41 U.S. (16 Peters) 539, 612 (1842).

[1173] U.S. Const. art. I, § 7, cl. 1.

[1174] U.S. Const. art. II, § 2, cl. 1.

to "take Care that the Laws be faithfully executed",[1175] and therefore himself must recognize, and must compel all of his subordinates to recognize, the preëminent authority of Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces".[1176] And (ii) "martial law", in the sense of the general supersession of civilian law by some sort of military dictatorship or *junta*, is constitutionally impossible in America.[1177]

e. These attitudes carried over into the drafting of the Constitution of the United States. For, as Virginia's Governor Edmund Randolph reported to that State's Convention, "[w]ith respect to a standing army * * * there was not a member in the federal Convention, who did not feel indignation at such an institution".[1178] This aversion and animosity were the products, not simply of historical erudition and acumen, but of profound political prescience. For although the Founders were never exposed to modern totalitarianism, they would have agreed that "[a]ccording to the Marxist theory of the state, the army is the chief component of state power".[1179]

Against this background, the original Constitution incorporated and relied upon "the Militia of the several States", not for the practical reason that America's *pre-*constitutional Militia had always proven themselves perfectly efficient military forces (which in many instances they had not), but for the more important political reason that, being composed of WE THE PEOPLE *en masse*, the Militia promised to provide the most reliable "checks and balances" against the excesses of "standing armies" and the aspirations of usurpers and tyrants who would rely upon such forces to seize and abuse excessive political power. For, no matter how well organized, armed, and disciplined THE PEOPLE'S Militia may be, they will never function as "standing armies" in aid of usurpation and tyranny aimed at THE PEOPLE themselves. And the better organized, armed, and disciplined the Militia are, the better they can deter, and if necessary resist and overcome, "standing armies" raised by aspiring usurpers and tyrants in order to overawe THE PEOPLE.

In addition, inasmuch as properly organized Militia spread many of the costs of preparedness for emergencies amongst THE PEOPLE in the Localities in which they live through the citizenry's direct participation, they will tend to lower those costs. For, when THE PEOPLE themselves experience the total costs of preparedness palpably through personal participation—not just vicariously through their payment of taxes, the later expenditures of which revenues they cannot carefully

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[1175] U.S. Const. art. II, § 3.

[1176] U.S. Const. art. I, § 8, cl. 14.

[1177] *See post*, Chapter 48.

[1178] J. Elliot, THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *ante* note 110, Volume 3, at 401.

[1179] *Quotations From Chairman Mao, ante* note 28, at 62.

supervise—and thereby come to understand how and why those costs are being generated, and what benefits do *or do not* accrue to them from those expenditures, they will become unwilling to include in their programs for "homeland security" anything they do not recognize as truly necessary. Whereas, when massive "standing armies", *semi*-civilian "law-enforcement" bureaucracies, and a supporting financial and industrial complex organized on corporative-state lines provide the simulacrum of "homeland security", THE PEOPLE are unable to judge firsthand the real need for and burden of what almost always tend to be huge and generally profligate expenditures.

Of no less importance, when WE THE PEOPLE take upon themselves the responsibility for providing "homeland security", they will become acutely sensitive to what may be peculiarly necessary in their own Localities, unlike distant and aloof civilian and military bureaucrats who invariably consider rigid standardization the greatest *desideratum*, and unlike "standing armies" in the pay of usurpers and tyrants which count on the inability of THE PEOPLE, when unorganized, to take maximum advantage of the unique defenses their Localities afford them.

B. The constitutional imperative to maintain the distinct existences and character of "the Militia of the several States". The special constitutional position, status, and authority of "the Militia of the several States"; their separation from the "Armies", "Navy", and other "Troops, or Ships of War" that the Constitution allows; and their independence of those entities must always be recognized and scrupulously applied. This is because, "'[i]n expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added. * * * Every word appears to have been weighed with the utmost deliberation and its force and effect to have been fully understood.'"[1180] That being so, "[t]o disregard [WE THE PEOPLE'S] * * * deliberate choice of words and their natural meaning would be a departure from the first principle of constitutional interpretation".[1181] Rather, the constitutional language must be construed and applied "in such a manner, as, consistently with the words, shall fully and completely effectuate the whole objects of it".[1182]

The complex legal structure WE THE PEOPLE adopted in the Constitution plainly serves more than the merely linguistic purpose of listing various military establishments suitable to "provide for the common defence",[1183] but leaving to Congress and the States open-ended licenses to pick and choose among them,

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[1180] Williams v. United States, 289 U.S. 553, 572-573 (1933), *quoting from* Holmes v. Jennison, 39 U.S. (14 Peters) 540, 570-571 (1840) (opinion of Taney, C.J.).

[1181] Wright v. United States, 302 U.S. 583, 588 (1938).

[1182] Prigg v. Pennsylvania, 41 U.S. (16 Peters) 539, 612 (1842).

[1183] U.S. Const. preamble.

employing some while disregarding others, as mere political expediency may counsel from time to time. Here, at least six points deserve emphasis:

1. The Founding Fathers obviously "weighed with the utmost deliberation" and "fully understood" the "force and effect" of including "the Militia of the several States" as permanent components of the Constitution's federal structure, while relegating "the Army and Navy of the United States" and other "Troops, or Ships of War" to the positions of merely contingent forces of the General Government and of the States, respectively.

This surmise should hardly surprise. The unique constitutional status of the Militia reflects their identity with WE THE PEOPLE. The Constitution incorporates the Militia within its federal system because they are comprised of THE PEOPLE whose exercise of "the right * * * to keep and bear Arms" is "*necessary* to the security of a free State".[1184] And inasmuch as the States themselves cannot survive as "free" political establishments without their Militia, neither can the federal system composed of them.

2. The Constitution recognizes the separate and independent position of "the Militia of the several States" as against all other National and State military establishments, in order to reflect and preserve the Militia's institutional integrity.

a. Although, as a matter of strategy and tactics, when "call[ed] forth" the Militia may deploy alongside and in close coöperation with "the Army and Navy of the United States", as a matter of constitutional law the Militia can never be integrated into, merged with, or otherwise transformed into or treated as mere components, appendages, satellites, or "reserves" of either of the latter entities, thereby terminating the Militia's own unique existences. After all, Congress may "provide for calling forth the Militia" for three purposes only: to wit, "to execute the Laws of the Union, suppress Insurrections and repel Invasions".[1185] None of these involves their becoming integral (or even any) parts of "the Army and Navy of the United States", of any State's "Troops, or Ships of War", or of any other military or *para*-military establishment or entity. When the Militia are "call[ed] forth", they remain Militia. This is why the Constitution refers to them in such circumstances as being merely "employed *in the Service of* the United States",[1186] and "*in*[ ] *the actual Service of* the United States".[1187] These qualifications describe a contingent and conditional relationship that can never apply to the National "Armies", "Navy", or "land and naval Forces". For they are *permanently* "the Army and Navy *of the United States*", whatever services they may perform.

[1184] U.S. Const. amend. II (emphasis supplied).

[1185] U.S. Const. art. I, § 8, cl. 15.

[1186] U.S. Const. art. I, § 8, cl. 16 (emphasis supplied).

[1187] U.S. Const. art. II, § 2, cl. 1 (emphasis supplied).

b. If, even when "call[ed] forth" for constitutional purposes, "the Militia of the several States" cannot be integrated into "the Army and Navy of the United States" that the Constitution expressly recognizes, they surely cannot be conscripted into or subordinated unto any constitutionally unnamed domestic civilian police or other law-enforcement or internal-security agency of the General Government or the States. Even less may the Militia be dragooned into any military or police establishment of a foreign state or international or *supra*-national organization.

c. Similarly, the Militia cannot be forcibly integrated into any "Troops, or Ships of War" that the States may "keep" "with[ ] the Consent of Congress".[1188] Congress cannot give "Consent" to the States to employ their Militia to that end, because: (i) such employment is not one of the three constitutional purposes for which alone Congress is "[t]o provide for calling forth the Militia";[1189] and (ii) if the Militia were translated into *State* "Troops" or mustered onto *State* "Ships of War", they would not be "employed in the Service *of the United States*".[1190]

d. Moreover, even were a State "actually invaded, or in such imminent Danger as will not admit of delay", and therefore the "Consent of Congress" were not required,[1191] she could not legitimately integrate the entirety of her Militia within her own "Troops, or Ships of War". For that would deprive Congress of the very Militia the Constitution incorporated into its federal structure so that they will always be available for Congress to "call[ ] forth * * * to repel [such] Invasions"—and the States lack any authority so to interfere with the fulfillment of Congress's constitutional powers and duties.[1192] Any State "actually invaded, or in * * * imminent Danger" could employ her Militia to repel the invasion—but only as *Militia*, not as "Troops".

3. The Constitution separates "the Militia of the several States" from every other military establishment in order to fix the locus of their command, and thereby guarantee their independence.

a. The Constitution appoints the President as "Commander in Chief * * * of the Militia of the several States, when called into the actual Service of the United States",[1193] but always subject to whatever rules Congress may "provide * * * for governing such Part of them [that is, the Militia] as may be employed in the Service of United States".[1194] Otherwise, no designee of the General Government may hold

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[1188] *See* U.S. Const. art. I, § 10, cl. 3.

[1189] U.S. Const. art. I, § 8, cl. 15.

[1190] U.S. Const. art. I, § 8, cl. 16 (emphasis supplied).

[1191] *See* U.S. Const. art. I, § 10, cl. 3.

[1192] *See* U.S. Const. art. VI, cl. 2.

[1193] U.S. Const. art. II, § 2, cl. 1.

[1194] U.S. Const. art. I, § 8, cl. 16.

a commission in, or exercise command or control over, the Militia. For, even while delegating to Congress the power "[t]o provide for organizing * * * the Militia", the Constitution expressly "reserv[es] to the States respectively, the Appointment of the Officers".[1195]

b. As a consequence of this, no officer of "the Army * * * [or] Navy of the United States" may be assigned to or may himself assume command of any part of "the Militia of the several States". For all officers of "the Army and Navy" are "Officers of the United States" appointed, not by the States, but by the President "by and with the Advice and Consent of the Senate".[1196] Even the President of the United States may assert command over the Militia only in his *separate* capacity as "Commander in Chief * * * of the Militia", not as an officer of "the Army * * * [or] Navy". So, the President may exercise his command of the Militia either by himself directly or through those Militia "Officers" the States appoint, and in no other manner.

And because Congress's power "[t]o provide * * * for governing such Part of the[Militia] as may be employed in the Service of the United States" is specifically limited by the "reserv[ation] to the States respectively, [of] the Appointment of the Officers", Congress cannot direct officers of "the Army and Navy" to assume commands within the Militia under color of its power "[t]o make Rules for the Government and Regulation of the land and naval Forces".[1197] For the latter delegation of power, being of no more than "equal dignity" with the former reservation of power, cannot "be so enforced as to nullify or substantially impair" it.[1198]

c. To an even greater degree, no police, law-enforcement, internal-security, intelligence, or other civilian "Officers of the United States"[1199] may be imposed on "the Militia of the several States" as actual commanders (as opposed to advisors or observers) in any capacity. If "Officers of the United States" appointed to positions of command within *military* establishments the creation of which the Constitution expressly permits ("the Army and Navy of the United States") may not exercise command over or within the Militia, certainly such authority cannot be asserted or assumed by any "other Officers of the United States" appointed to positions of command within *civilian* establishments the creation of which the Constitution at best only impliedly allows.[1200]

[1195] U.S. Const. art. I, § 8, cl. 16.

[1196] U.S. Const. art. II, § 2, cl. 2.

[1197] U.S. Const. art. I, § 8, cl. 14.

[1198] *See* Dick v. United States, 208 U.S. 340, 353 (1908).

[1199] U.S. Const. art. II, § 2, cl. 2.

[1200] *See* U.S. Const. art. I, § 8, cl. 18 *and* art. II, § 2, cl. 2.

4. Because "Officers" of the Militia (with the sole exception of the President) always remain *State* "Officers", even when "employed in the Service of the United States", not only in principle are the Militia integrated as establishments within the Constitution's federal structure, but also in practice federalism permeates—and should always and everywhere instruct—their operations on behalf of the United States.

a. To be sure, when "in[ ] the actual Service of the United States" "Officers" of "the Militia of the several States" may be required by the President to assist officers of "the Army and Navy" in the performance of the latters' duties, and *vice versa*. Out of courtesy, comity, and prudence, Militia "Officers" may even solicit and defer to expert advice from officers of "the land and naval Forces". And for negligent, reckless, or intentional failures or refusals to follow such well-founded counsel "in time of War or public danger", Militia "Officers" may even subject themselves to courts-martial or other discipline for dereliction of duty.[1201] This, though, not because in such circumstances the Militia "Officers" have breached some obligation mechanically to "obey orders" from officers of "the Army and Navy", but because the Militia "Officers" have breached their duty personally to exercise proper initiative and judgment within the Militia when they became fully aware of, but chose to disregard, the correct course of action.

Yet, in the final analysis, *in all cases actual command of Militia forces must always remain with Militia "Officers" themselves*. They must always be authorized to *refuse* to comply with purported "orders", and to *reject* advice they consider ill advised, from any and all "Officers of the United States"—save the President, in his capacity as "Commander in Chief * * * of the Militia", and then only when the Militia are "called into the actual Service of the United States".[1202]

b. Although this independence on the part of "the Militia of the several States" may appear cumbersome and inefficient from the narrow perspective of a smoothly functioning military chain of command that operates "from the top down", it is uniquely effective for three vastly more important purposes:

(1) Independence of command maintains the separation of the Militia from "the land and naval Forces" required to preserve, protect, and promote federalism the right way: "from the bottom up". "[T]he security of a free State" for each of the several States (the most important of all "States' rights"),[1203] and "the Blessings of Liberty" for WE THE PEOPLE as individuals,[1204] can best be maintained against encroachments from politically powerful special-interest groups, unbridled electoral

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[1201] *See* U.S. Const. amend. V.

[1202] U.S. Const. art. II, § 2, cl. 1.

[1203] U.S. Const. amend. II.

[1204] U.S. Const. preamble.

majorities, rogue officials, and aspiring usurpers and tyrants working their nefarious schemes through the General Government if, during times of crisis, the States actively participate in the operations of that government in a manner that relies upon and partakes to some significant degree of their original sovereignty. Especially at such times, the States and their citizens must avoid finding themselves "on the outside", as impotent critics, opponents, and possibly victims of incompetent, malicious, or antagonistically rogue officials of the General Government. Rather, as much as possible they must position themselves "on the inside", actually exercising or supervising the exercise of *federal* authority.

The Power of the Sword is an—ultimately, the most important—attribute of sovereignty. Maintaining a military force is an exercise of the Power of the Sword. For the States, that exercise is circumscribed by the requirement that they obtain "the Consent of Congress" in order to "keep Troops, or Ships of War in Time of Peace",[1205] and by Congress's authority in the first instance "[t]o provide for organizing, arming, and disciplining, the Militia".[1206] Nonetheless, the Constitution incorporates the Militia into its federal system just as the Framers found them, as "the Militia *of the several States*". And it expressly reserves to the States, as a residue of their original sovereignty, the ability at least indirectly to exercise federal authority through their reserved powers over:

> • "the Appointment of the Officers"[1207] who are to exercise independent command, subject only to the President, whenever the Militia are "call[ed] forth * * * to execute the Laws of the Union" and to support the President when he "take[s] Care that the Laws be faithfully executed";[1208] and
>
> • "training the Militia according to the discipline prescribed by Congress",[1209] through which activity the States can guarantee that their Militia are aware of and prepared to fulfill their constitutional duties.

(2) Independence of command preserves federalism by preventing the Militia from being dragooned into schemes of usurpation and tyranny fomented or abetted by the "large military establishments and standing armies" the Founders feared and of which, in that spirit of foreboding, Justice Story warned. By expressly limiting Congress's and the President's authority over "the Militia of the several States", even while it disallows the States from "keep[ing] Troops, or Ships of War

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[1205] U.S. Const. art. I, § 10, cl. 3.

[1206] U.S. Const. art. I, § 8, cl. 16.

[1207] U.S. Const. art. I, § 8, cl. 16.

[1208] U.S. Const. art. I, § 8, cl. 15 *and* art. II, § 3.

[1209] U.S. Const. art. I, § 8, cl. 16.

in time of Peace" "without the Consent of Congress",[1210] the Constitution plainly intends the Militia to serve as "checks and balances" against the other Armed Forces it expressly allows, "the Army and Navy of the United States". If the Militia are to perform this vital function, though, they must *never* be put under the Army's or Navy's command or control. For then they would be nothing but adjuncts or appendages of the very "large military establishments and standing armies" the Constitution sets them up to deter, and may require them to oppose and even to resist with arms. And the Constitution cannot be construed in such a self-contradictory, self-defeating, even suicidal manner.

The selfsame conclusion applies with perhaps even more force to the General Government's civilian police, law-enforcement, and internal-security apparatus, as well as to those *para*-militarized police forces of the States that rogue officials of the General Government are now in the process of equipping, training, and coöpting through the Department of Homeland Security. For, as police states all over the world have demonstrated, such ostensibly "civilian" agencies are simply camouflaged forms of "large military establishments and standing armies", or at least pose dangers to the people's liberties that are equally immediate and grave.

(3) Independence of command on the part of the Militia also preserves true constitutional federalism by securing America's National independence. Here, one must speak of federalism *by exclusion*: that is, defining "federalism" to include the States and the General Government, and therefore *to exclude all other political entities*. As the Declaration of Independence asserts, the thirteen Colonies found it "necessary * * * to assume among the powers of the earth, *the separate and equal station* to which the Laws of Nature and of Nature's God entitle[d] them"; and,

> appealing to the Supreme Judge of the world for the rectitude of [their] intentions, d[id], in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be *FREE AND INDEPENDENT STATES*; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as *Free and Independent States*, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which *Independent States* may of right do.[1211]

"[T[he good People of these Colonies", in their capacity as "WE THE PEOPLE of the United States", then "ordain[ed] and establish[ed] th[e] Constitution" under the

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[1210] *Compare* U.S. Const. art. I, § 8, cl. 15 *with* § 10, cl. 3.

[1211] Emphasis supplied.

aegis of this "separate and equal station" and status as citizens of "Free and Independent States".[1212]

Having been formed on this basis, and deriving its legitimacy and authority solely from this source, the Constitution cannot possibly contain or countenance any means by which it might be twisted to negate its own validity by purporting to set the Declaration of Independence aside. Such a pernicious result cannot come about through the exercise of any power of the General Government or the States, because every officer of both the General Government and the States "shall be bound by Oath or Affirmation, to support this Constitution",[1213] not to overthrow its foundation. Neither can such a result arise through a purported "amendment" of the Constitution, because the sole power in that regard allows "Amendments *to this Constitution*" alone,[1214] not "amendments" that would purport to negate *the Declaration of Independence*, and thereby to demolish the legal basis for every constitutional provision, including the very power of amendment itself. Nor can such a result derive from any purported "treaty", because no treaty can override the Constitution[1215]—a matter which should be self-evident, inasmuch as a treaty can be ratified with merely a two-thirds vote in the Senate, whereas a constitutional Amendment requires concurrence of three-quarters of the States themselves, not just their Senators.[1216]

For these reasons, the Militia can never be dragooned into the service of any foreign states or international or *supra*-national organizations at all, and certainly not of those foreign powers, organizations, and interests that aim at destroying, compromising, or prostituting America's National independence, sovereignty, and special variety of federalism. Actions in pursuit of such alien aims:

- can never be "in[ ] the actual Service of the United States"—and therefore can never be the subject of legitimate commands to the Militia from the President as their "Commander in Chief";[1217]

- can never amount to legitimate "employ[ment] in the Service of the United States"—and therefore can never come within

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[1212] *See* U.S. Const. preamble.

[1213] U.S. Const. art. VI, cl. 3.

[1214] U.S. Const. art. V (emphasis supplied).

[1215] *See, e.g.*,Doe v. Braden, 57 U.S. (16 Howard) 635, 657 (1853); The Cherokee Tobacco, 78 U.S. (11 Wallace) 616, 620-621 (1871); Holden v. Joy, 84 U.S. (17 Wallace) 211, 242-243 (1872); Geofroy v. Riggs, 133 U.S. 258, 267 (1890); United States v. Wong Kim Ark, 169 U.S. 649, 701 (1898); Asakura v. City of Seattle, 265 U.S. 332, 341 (1924); United States v. Minnesota, 270 U.S. 181, 208 (1926); Reid v. Covert, 354 U.S. 1, 16-18 (1957) (opinion of Black, J., announcing the judgment of the Court).

[1216] *Compare* U.S. Const. art. II, § 2, cl. 2 *with* art. V.

[1217] *See* U.S. Const. art. II, § 2, cl. 1.

Congress's power "[t]o provide * * * for governing * * * [any] Part of the[Militia]";[1218] and

• can never constitute a valid purpose for "calling forth the Militia to execute the Laws of the Union"[1219]

—because, rather than "execut[ing any of] th[os]e Laws", such a deployment would constitute an attempt not simply to subvert or even negate the "Laws" ("the supreme Law of the Land" not least among them), but also to destroy "the Union" itself, and with it the grounds for *all* of its "Laws".

5. By incorporating "the Militia of the several States" as preëxisting and permanent establishments within the federal system, but treating "the Army and Navy of the United States" as merely contingent entities, the Constitution recognizes a clear hierarchy of place and authority between the Militia, on the one hand, and "the Army and Navy", on the other.

a. Being constitutionally independent of both "the Army and Navy"—as well as of all the unnamed *para*-military and civilian agencies the General Government might create—the Militia are not and can not be made subordinate to any of them. This is particularly true because the Constitution plainly intends the Militia to provide the ultimate "checks and balances" against "large military establishments and standing armies in time of peace"—or any other armed bodies—that could afford "facile means * * * to ambitious and unprincipled rulers to subvert the government or trample upon the rights of the people".[1220] For that reason, the Militia must be so "organiz[ed], arm[ed], discipline[d,] * * * govern[ed,] * * * [and] train[ed]"[1221] that:

• they are able to hold their own against, or at least to deter, rogue elements in the regular Armed Forces that might support the malign designs of "ambitious and unprincipled rulers"; and

• they enjoy absolute material superiority as against any and all *para*-military or civilian police, intelligence, and internal-security agencies of the General Government and the States that might lend themselves to such conspiracies.

b. Even more fundamentally, because in point of their constitutional lineage the Militia are antecedent and therefore superior to the Armed Forces and any *para*-military or civilian agencies, they should be organized, armed, disciplined, governed, and trained for the crucial purpose of exercising some form of on-going

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[1218] *See* U.S. Const. art. I, § 8, cl. 16.

[1219] *See* U.S. Const. art. I, § 8, cl. 15.

[1220] J. Story, *Commentaries on the Constitution*, *ante* note 576, Volume 2, § 1897, at 646.

[1221] *See* U.S. Const. art. I, § 8, cl. 16.

"constitutional supervision" over the latter entities. This, in fulfillment of the Militia's constitutional responsibilities "to execute the Laws of the Union, [and] suppress Insurrections"[1222]—both of which functions would necessarily be involved were rogue elements of the Armed Forces or civilian agencies to plot or attempt "to subvert the government or trample upon the rights of the people", and which therefore can be invoked to prevent and punish such occurrences.

6. Even if the constitutional provisions that deal with "the Militia of the several States", on the one hand, and "the Army and Navy of the United States" and the "Troops, or Ships of War" which the States may "keep" "with[ ] the Consent of Congress", on the other hand, were "of equal dignity" in all respects, "neither [set] must be so enforced as to nullify or substantially impair the other".[1223] These constitutional provisions, however, are of quite *unequal* dignity, to the Militia's distinct advantage. For "the Militia of the several States" are permanent establishments within the federal system, with a status akin to that of the States themselves, and over the continuation of which neither Congress nor any State has any control (outside of the process of amending the Constitution)—whereas, in contrast, "the Army and Navy" are institutions within the General Government the very existences of which are contingent upon action by Congress; and the "Troops, or Ships of War" which the States may "keep" "with[ ] the Consent of Congress" are Armed Forces within the States the very existences of which are contingent upon joint action by Congress and the States.

Therefore—

a. No purported "interpretation" of these provisions of the Constitution by officials of the General Government or the States can be accepted if it commands or even countenances suppression or neglect of the Militia in any substantial part—for example, on the specious grounds that the Militia can be relegated to disorganization, disarray, disuse, and general discard because "the Army and Navy of the United States", and such of their adjuncts as Congress permits the States to maintain, supposedly suffice for National defense.

Today, though, the latter errant theory finds embodiment in the basic Congressional statute purporting to deal with the Militia, which provides that:

> (a) The militia of the United States consists of all able-bodied males at least 17 years of age and * * * under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are members of the National Guard.

[1222] U.S. Const. art. I, § 8, cl. 15.

[1223] *See* Dick v. United States, 208 U.S. 340, 353 (1908).

> (b) The classes of the militia are—
>
> (1) the organized militia, which consists of the National Guard and the Naval Militia; and
>
> (2) the unorganized militia, which consists of the members of the militia who are not members of the National Guard or the Naval Militia.[1224]

Inasmuch, however, as "the National Guard and the Naval Militia" are *not* parts of the constitutional "Militia of the several States" at all, but instead are components of "the Army and Navy of the United States", the so-called "organized militia" is a deceptive misnomer.[1225] And inasmuch as the Constitution delegates to Congress the power *and the duty* "[t]o provide for organizing, arming, and disciplining, the Militia" in their entirety—*not* for "*un*organizing" them—the so-called "unorganized militia" is an oxymoron.[1226]

b. No purported "interpretation" of these provisions of the Constitution[1227] by officials of the General Government or the States can be accepted if it subordinates "the Militia of the several States" to "the Army and Navy of the United States"—for example, on the grounds of the familiar, yet fallacious contention that the National Guard is the modern Militia,[1228] or at least is the suppositious successor to the original *pre-*constitutional Militia.[1229]

The Commonwealth of Virginia supplies a contemporary example of how the latter fallacy can lead to treating members of the Militia as a mere "reserve" for the National Guard. In that State,

> [t]he militia * * * shall consist of all able-bodied citizens of the Commonwealth who are citizens of the United States and all other able-bodied persons resident in the Commonwealth who have declared their intention to become citizens of the United States, who are at least sixteen years of age and [with certain statutory exemptions] not more than fifty-five years of age. The militia shall be divided into four classes: the National Guard, which includes the Army National Guard and the Air

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[1224] 10 U.S.C. § 311. *See generally* E. Vieira, Jr., *Constitutional "Homeland Security", ante* note 3, at 50-54.

[1225] *See ante*, at 786-793. This has not escaped attention elsewhere. *See generally*, *e.g.*, S.T. Ansell, "Legal and Historical Aspects of the Militia", 26 *Yale Law Journal* 471 (1917), at 479-480; Frederick B. Wiener, "The Militia Clause of the Constitution", 54 *Harvard Law Review* 181 (1940), at 196-215; David Hardy, "The Militia Is Not the National Guard", *in* Larry Pratt, Editor, *Safeguarding Liberty: The Constitution and Citizen Militias* (Franklin, Tennessee: Legacy Communications, 1995), at 99. *Also compare and contrast* Perpich v. Department of Defense, 496 U.S. 334 (1990), *with* United States v. Miller, 307 U.S. 174 (1939).

[1226] *Compare* U.S. Const. art. I, § 8, cl. 16. *See ante*, at 50-54.

[1227] U.S. Const. art. I, § 8, cls. 12 through 16; art. I, § 10, cl. 3; *and* art. II, § 2, cl. 1.

[1228] *See* 10 U.S.C. § 311(b)(1), *quoted in the text immediately* ante.

[1229] *See*, *e.g.*, M. Doubler & J. Listman, Jr., *The National Guard, ante* note 1057, at 4; R. Wright, Jr., *The Continental Army, ante* note 396, APPENDIX A, at 429-430.

> National Guard; the Virginia Defense Force; the naval militia; and the unorganized militia.[1230]

To be sure, able-bodied individuals "who are at least sixteen years of age and * * * not more than fifty-five years of age", and who are not enlisted in the Armed Forces of the United States, do qualify as members of "the Militia of the several States", in Virginia or any other State in the Union. The Virginia National Guard and "naval militia", however, are adjuncts of the Army, Air Force, and Navy of the United States.[1231] And the Virginia Defense Force is merely a tiny appendage of and supplement to the Commonwealth's National Guard,[1232] specially authorized by Congressional statute,[1233] as it must be to satisfy the constitutional requirement that the State must receive "the Consent of Congress" as a precondition to raising such a force.[1234] As Virginia's Code specifies,

> [w]hen called to state active duty, the mission of the Virginia Defense Force shall be to (i) provide for an adequately trained organized reserve militia to assume control of Virginia National Guard facilities and to secure any federal and state property left in place in the event of the mobilization of the Virginia National Guard, (ii) assist in the mobilization of the Virginia National Guard, (iii) support the Virginia National Guard in providing family assistance to military dependents within the Commonwealth in the event of the mobilization of the Virginia National Guard, (iv) provide a military force to respond to the call of the Governor * * * .[1235]

Further differentiating the Virginia Defense Force from any part of "the Militia of the several States", Virginia's Code decrees that, although "[t]he Virginia Defense Force, to the extent authorized by the Governor and funded by the General Assembly, shall be equipped as needed for training and for state active duty", "[*m*]*embers of the Virginia Defense Force shall not be armed with firearms during the performance of training duty or state active duty, except under circumstances and in instances authorized by the Governor*".[1236] By itself alone, this disability of its members to bear arms as part of their normal active service utterly disqualifies the Virginia Defense Force as a constitutional Militia of any sort, because:

[1230] Code of Virginia § 44-1.

[1231] *See* Code of Virginia §§ 44-2, 44-3, 44-55, 44-56, 44-57, 44-58, 44-59, 44-60, and 44-62.

[1232] *See* Code of Virginia §§ 44-54.4 ("a targeted membership of at least 1,200"), 44-54.5, 44-54.6, 44-54.7, and 65.2-103.

[1233] 32 U.S.C. § 109. *See* Code of Virginia § 44-54.7.

[1234] U.S. Const. art. I, § 10, cl. 3.

[1235] Code of Virginia § 44-54.4.

[1236] Code of Virginia § 44-54.12 (emphasis supplied).

(1) The constitutional definition of "Militia" requires that every eligible citizen be armed. The Second Amendment would not command that, "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed", unless American legal history proved that "[a] well regulated Militia" is always composed of "the people" as a whole, each of them personally possessed of the necessary "Arms". Such was the case in all but one of the thirteen Colonies and then in all of the independent States from the early 1600s through the late 1780s. Specifically in Virginia, (i) her *pre*-constitutional Militia always included nearly every able-bodied free White man, not specially exempted, each of whom was required by Militia Act after Militia Act to supply himself (or, if he were penurious, to be supplied by the community) with one or more firearms, ammunition, and necessary accoutrements suitable for military use, all of which he maintained in his personal possession at home; and (ii) other of Virginia's *pre*-constitutional Armed Forces were often composed of volunteers who supplied their own personal firearms, ammunition, and accoutrements.[1237]

(2) The Constitution requires that Congress "provide for * * * arming * * * the Militia" in their entirety throughout the country, not "*dis*arming" them; and in default of sufficient Congressional action, each of the States must arm, not disarm, her own Militia; and in default of sufficient Congressional and State action, WE THE PEOPLE must arm themselves, not acquiesce in disarmament imposed on them by public officials' acts of omission, commission, or arbitrary discretion. The Virginia Defense Force, however, is not armed by Congress. It is not armed by the Commonwealth in the general course of events, either, because its members are prohibited from carrying "firearms during the performance of training duty or state active duty, except under circumstances and in instances authorized by the Governor", but as to which situations the statute provides no standards to inform, let alone control, the Governor's conduct.[1238] Presumably, too, the same statute precludes the members of the Defense Force on their own initiatives from procuring and maintaining arms in their possession at home as part of their official duties. Thus, under Virginia's own law, her Defense Force cannot qualify as "a well regulated militia", because it is not "composed of *the body of the people, trained to arms*".[1239] (Nothing in Virginia law seems to prevent or hinder members of the Virginia Defense Force from possessing firearms in their capacities as mere private citizens, though.)

(3) Notwithstanding that the Virginia Defense Force cannot possibly be a component of "the Militia of the several States", Virginia's statutes provide that:

[1237] *See ante*, Chapters 17 through 19.

[1238] *See* Code of Virginia § 44-54.12.

[1239] Virginia Declaration of Rights (1776) art. 13 (emphasis supplied).

- "[t]he National Guard, the Virginia Defense Force, the naval militia, and the unorganized militia or any part thereof may be ordered into service by the Governor in such order as he determines";[1240]

- "[t]he Governor * * * may order the[unorganized militia] out either by calling for volunteers or by draft";[1241]

- "[w]henever the Governor orders out the unorganized militia or any part thereof, it shall be incorporated into the Virginia Defense Force until relieved from service";[1242] and

- "[w]henever any part of the unorganized militia is ordered out, it shall be governed by the same rules and regulations and be subject to the same penalties as the National Guard or naval militia".[1243]

So, as a matter of fact but plainly without constitutional warrant, Virginia purports to transmogrify the largest portion of her citizens qualified for her Militia (the misnamed "unorganized militia") into a "reserve" for the National Guard, subject to a draft at her Governor's command.

(4) Although perhaps not foreseen by Virginia's legislators, the consequence of all this is nonetheless truly revolutionary. For, by reducing Virginia's Militia from what Justice Story called "the natural defence of a free country against * * * domestic usurpation of power by rulers" into part and parcel of the "large military establishments and standing armies in time of peace" that he warned could afford "facile means * * * to ambitious and unprincipled rulers to subvert the government or trample upon the rights of the people",[1244] Virginia's Code converts her Militia into a force capable of negating—indeed, turning upside down and inside out—the Second Amendment's principle that "[a] well regulated Militia" is "necessary to the security of a free State"!

c. Finally, no purported "interpretation" of these provisions of the Constitution[1245] by officials of the General Government or the States can be accepted if it licenses public officials—on the grounds that "the Army and Navy of the United States" and such of their adjuncts as the National Guard are sufficient for this country's defense—to prohibit or inhibit WE THE PEOPLE from organizing,

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[1240] Code of Virginia § 44-80.

[1241] Code of Virginia § 44-87.

[1242] Code of Virginia § 44-88.

[1243] Code of Virginia § 44-85. *But see* Code of Virginia § 44-54.4, ¶ 3.

[1244] *Commentaries on the Constitution*, *ante* note 576, Volume 2, § 1897, at 646 (footnote omitted).

[1245] U.S. Const. art. I, § 8, cls. 12 through 16; art. I, § 10, cl. 3; *and* art. II, § 2, cl. 1.

arming, disciplining, governing, and training themselves in Militia for self-defense in their own Localities, either through their own State legislatures when Congress neglects, fails, or refuses to act; or on their own initiatives when both Congress and their States are repeatedly petitioned to revitalize the Militia,[1246] but nonetheless do nothing constructive.

(1) No public official can ever prohibit or inhibit any American from advocating, working assiduously for, and organizing other individuals on behalf of legislative revitalization of "the Militia of the several States". For

- not only does the First Amendment deny Congress any power to "make * * * [any] law * * * abridging * * * the right of the people peaceably to assemble, and to petition the Government for a redress of grievances"; and

- not only does the Fourteenth Amendment apply this limitation to the States;[1247] but also,

- "[t]he very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect of public affairs and to petition for a redress of grievances";[1248]

- "[a] well regulated Militia" composed of "the people", who exercise "the right * * * to keep and bear Arms", is an indispensable component of the "Republican Form of Government" which every State in America must always maintain;[1249] and

- "[t]he United States shall guarantee to every State in th[e] Union a Republican Form of Government" in all of its particulars.[1250]

- Even more fundamentally, for individuals to organize themselves on behalf of legislative revitalization of "the Militia of the several States" amounts, not simply to their exercise of "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances", but also to *an act of self-government necessary to preserve self-government*. Unlike the right to petition, which distinguishes "the people" as suppliants on one side from "the Government" as their ostensible superior on the other, *revitalization of the Militia involves "the people's" self-assertion of their*

[1246] *See* U.S. Const. amend. I.

[1247] U.S. Const. amend. XIV, § 1, *as construed in*, *e.g.*, DeJonge v. Oregon, 299 U.S. 353, 364-365 (1937); Hague v. Committee for Industrial Organization, 307 U.S. 496, 512-513 (opinion of Roberts, J.), 519 (opinion of Stone, J.) (1939); Bridges v. California, 314 U.S. 252, 275-278 (1941).

[1248] United States v. Cruikshank, 92 U.S. 542, 552 (1876).

[1249] *See post*, at 890-893, 921-922, 1038-1040, 1301-1307, 1451-1453, and 1497-1499.

[1250] U.S. Const. art. IV, § 4.

own primary governmental authority and duty to provide directly for "the security of a free State".[1251]

(2) No matter how well-prepared "the Army and Navy of the United States", the National Guard, and various other *para*-military law-enforcement and internal-security agencies may be to fulfill their legitimate functions, no public official may fall back on that state of readiness as an excuse to prohibit or inhibit Americans from forming prototypical Militia units for self-defense in their own Localities when officeholders neglect, fail, or refuse to do so after repeated entreaties from their constituents. That public officials may have followed the Constitution with respect to the regular Armed Forces provides no justification for their disregarding the Constitution with respect to "the Militia of the several States"—let alone for coercing WE THE PEOPLE into surrendering their own constitutional rights and neglecting their own constitutional duties in that particular. This is especially true when public officials have created and lavishly equipped those "large military establishments and standing armies" that afford "the facile means * * * to ambitious and unprincipled rulers to subvert the government or trample upon the rights of the people"[1252]—and that the Militia are supposed to "check and balance", deter, and if necessary resist.

(3) The employment of any part of "the Army and Navy of the United States", or such of their adjuncts as the National Guard, either directly or as advisors to National, State, or Local police, or other *para*-military or civilian law-enforcement agencies, for the purpose of enforcing any statutory prohibition against WE THE PEOPLE'S revitalization of "the Militia of the several States" by statute, or even formation of Militia units on their own initiatives when and where public officials refuse to revitalize the Militia, would constitute the crime of *lèse-majesté* in whatever jurisdiction it took place. For, in America, "WE THE PEOPLE of the United States"[1253] are the only earthly sovereigns the Declaration of Independence and the Constitution recognize.[1254] The Declaration of Independence put itself forth "in the Name, and by the Authority of the good People of these Colonies"; and the Preamble to the Constitution attests that "WE THE PEOPLE of the United States * * * do ordain and establish th[e] Constitution". So, on the best evidence available, the testimony of America's formative documents, "[i]n our country the people are sovereign".[1255] "[T]here are *citizens*, but no *subjects*".[1256] For this reason, public officials always remain nothing more than WE THE PEOPLE'S temporary

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[1251] U.S. Const. amend. II.

[1252] J. Story, *Commentaries on the Constitution*, *ante* note 576, Volume 2, § 1897, at 646.

[1253] U.S. Const. preamble.

[1254] Fleming v. Page, 50 U.S. (9 Howard) 603, 617-618 (1850).

[1255] Afroyim v. Rusk, 387 U.S. 253, 257 (1967).

[1256] Chisholm v. Georgia, 2 U.S. (2 Dallas) 419, 456 (1793) (opinion of Wilson, J.).

representatives or agents—and as such may exercise only whatever authority THE PEOPLE have deigned to delegate to them.[1257] WE THE PEOPLE enacted the Constitution to "provide for the common defence",[1258] and determined that "[a] well regulated Militia" in which they themselves exercise "the right * * * to keep and bear Arms" is "necessary to the security of a free State".[1259] Therefore, if, due to public officials' obstructionism, the only means by which WE THE PEOPLE can fulfill their constitutional duties in "the Militia of the several States" in any particular State (or in all of them) is through self-organization, any attempt on the part of those officials to thwart such self-organization is (as lawyers say) *ultra vires*—that is, beyond those officials' powers.

(4) If that attempt takes the form of *actual armed opposition* to THE PEOPLE'S revitalization of their Militia, let alone to the Militia when revitalized, then it amounts to nothing less than "Treason". For "Treason against the United States, shall consist only of levying War against them, or in adhering to their Enemies, giving them Aid and Comfort".[1260] "WE THE PEOPLE of the United States" *are* "the United States"—everything else being merely a legal construct born of and reflecting their existence and authority. And "the Militia of the several States" not only are composed of WE THE PEOPLE but also are "necessary to the security of a free State", such that the continued existence of each State, and therefore of "the United States" as a collective, depends upon them, *in a way the Constitution attributes to no other entity it recognizes*. So, armed opposition by anyone to the Militia, or to WE THE PEOPLE in their attempts to revitalize the Militia, amounts to nothing less than armed opposition to "the United States", and thereby "Treason". Of course, not simply the rogue soldiers or police appearing in arms against the Militia would be *criminally* liable for such misbehavior. "On the contrary, * * * if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, *all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors.*"[1261]

Conversely, the Militia are incapable of committing "Treason" as the Constitution understands that term. After all, the Militia consist of all those among WE THE PEOPLE who are entitled to "the right * * * to keep and bear Arms"[1262]—a subset of THE PEOPLE most likely larger even than the subset of those who are

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[1257] *E.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheaton) 316, 404-405 (1819).

[1258] U.S. Const. preamble.

[1259] U.S. Const. amend. II.

[1260] U.S. Const. art. III, § 3, cl. 1.

[1261] *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 125-126 (1807) (emphasis supplied). *See* 18 U.S.C. §§ 241 and 242.

[1262] U.S. Const. amend. II.

entitled to vote.[1263] Therefore, the Militia are not merely agglomerations of armed "subjects", who under some imaginable circumstances could commit "treason" against their "sovereign", but are themselves the very embodiments of sovereignty itself—indeed, the highest actual embodiments of sovereignty possible under the Constitution: namely, *the Power of the Sword wielded by the sovereigns with their own hands*.

As the Founding Fathers learned from Blackstone, "treason" is that "general division of crimes * * * which amount either to a total renunciation of that allegiance, or at least to a criminal neglect of that duty, which is due from every subject to his sovereign".[1264] The contours of "allegiance", though, are not always self-evident. For example, Blackstone observed that

> allegiance is usually, and therefore most easily, considered as the duty of the people, and protection as the duty of the magistrate; and yet they are, reciprocally, the rights as well as the duties of each other. Allegiance is the right of the magistrate, and protection the right of the people.[1265]

In general, American law has tended to follow that reasoning: "Treason is a breach of allegiance, and can be committed by him only who owes allegiance either perpetual or temporary."[1266] And

> [t]he very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection. Allegiance and protected are, in this connection, reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance.[1267]

Yet, under the Constitution, Blackstone's conception of "allegiance" is multiply flawed, because—

- All "magistrates" are merely WE THE PEOPLE'S representatives, agents, and therefore subordinates, never their superiors. If THE PEOPLE owe allegiance to anything relating to magistracy, it is to the earthly laws that

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[1263] *Compare ante*, at 245-249 and 611-614 (minimum age for enrollment in Rhode Island's and Virginia's *pre*-constitutional Militia was generally 16), *with* U.S. Const. amend. XXVI, § 1 (minimum age for voters today is 18).

[1264] *Commentaries on the Laws of England*, *ante* note 142, Volume 4, at 74.

[1265] *Id.*, Volume 1, at 123.

[1266] United States v. Wiltberger, 18 U.S. (5 Wheaton) 76, 97 (1820).

[1267] Minor v. Happersett, 88 U.S. (21 Wallace) 162, 165-166 (1875).

create those positions. Of those laws, however, THE PEOPLE themselves are the ultimate authors, interpreters, and enforcers. So, in the final analysis, THE PEOPLE owe allegiance only to themselves.

• "[M]agistrates" are not the sources or guarantors of THE PEOPLE'S protection. Rather, inasmuch as "[a] well regulated Militia" is "necessary to the security of a free State" and every such Militia is "composed of the body of the people, trained to arms",[1268] in the final analysis THE PEOPLE protect themselves. Indeed, the Constitution expects that, in dire circumstances, "magistrates" will "call[ ] forth" THE PEOPLE in the Militia for very that purpose[1269]—and if "magistrates" fail, neglect, or refuse to do so, then THE PEOPLE will call themselves forth, the opposition of "magistrates" in words or deeds notwithstanding.

• Most importantly, "magistrates" can put forward no even colorable claim to be treated as "sovereigns" to whose persons common Americans perpetually owe allegiance, obedience, and personal respect according or even in analogy to the *pre-*constitutional British pattern of "Nobility" which the Constitution prohibits.[1270] In fact, depending upon public officials' behavior, exactly the contrary may and should be the case. True enough, all citizens do labor under a legal duty to obey and assist loyal officials in all *constitutional* exercises of the latters' authority. But not otherwise, because "[a]n unconstitutional act is not a law; it confers no rights; it imposes no duties * * * ; it is, in legal contemplation, as inoperative as though it had never been passed".[1271] Thus, true allegiance will require THE PEOPLE, ultimate through their Militia, to *oppose and disobey* any and all public officials who neglect let alone betray their own "Oath[s] or Affirmation[s], to support th[e] Constitution",[1272] and whose negligence or betrayals cannot be punished in some other manner in the regular course of law. That being so, no one can rightfully impute "Treason" to armed opposition by the Militia to those who, although holding offices in the General Government or the governments of the States, attempt by any means (and particularly by main force) to skirt, subvert, or pervert the Constitution and laws of the United States for malign ends.

More specifically, Blackstone exemplified as one variety of "treason" under English law

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[1268] U.S. Const. amend. II *and* Virginia Declaration of Rights (1776) art. 13.

[1269] *See* U.S. Const. art. I, § 8, cl. 15.

[1270] *See* U.S. Const. art. I, § 9, cl. 8 and § 10, cl. 1.

[1271] Norton v. Shelby County, 118 U.S. 425, 442 (1886). *Accord*, Poindexter v. Greenhow, 114 U.S. 270, 288 (1885); Huntington v. Worthen, 120 U.S. 97, 101-102 (1887); Fay v. Noia, 372 U.S. 391, 408-409 (1963).

[1272] U.S. Const. art. VI, cl. 3.

> "if a man do levy war against our lord the king in his realm." And this may be done by taking arms, not only to dethrone the king, but under pretence to reform religion, or the laws, or to remove evil counsellors, or other grievances, whether real or pretended. For the law does not, neither can it, permit any private man, or set of men, to interfere forcibly in matters of such high importance; especially as it has established a sufficient power, for these purposes, in the high court of parliament: neither does the constitution justify any private or particular resistance for private or particular grievances; though in cases of national oppression the nation has very justifiably risen as one man, to vindicate the original contract subsisting between the king and his people.[1273]

Blackstone's example—"if a man do levy war against our lord the king"—the Constitution obviously adopted, in republican form, in its definition of "Treason" as "levying War against the[United States]".[1274] But, even on the terms Blackstone drew from the monarchical context of Britain in his era, "the Militia of the several States" could never commit "Treason". This is because—

- The Militia are not composed of mere "private m[e]n, or set[s] of men", with merely "private or particular grievances". Instead, they are *governmental* entities, empowered by the Constitution itself "to execute the Laws of the Union, [and] suppress Insurrections"—and when doing so are engaged in the righting of public grievances.

- The Militia cannot "tak[e] arms * * * [to] dethrone the king", in the sense of forcibly setting aside the "sovereign". For they consist of America's true sovereigns—WE THE PEOPLE arrayed in arms—exercising the ultimate rights, powers, privileges, immunities, and duties of sovereignty.

- The Militia would never act "under pretence to reform *religion*", because: (i) The First Amendment commands that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"—a limitation the Fourteenth Amendment extends to the States and all of their institutions and officials, including the Militia.[1275] (ii) The First Amendment is one of the foremost "Laws of the Union". And (iii) Congress may "provide for calling forth the Militia", and the Militia may come forth, "to execute the Laws of the Union", not to violate them.[1276]

[1273] *Commentaries on the Laws of England*, *ante* note 142, Volume 4, at 81-82 (footnote omitted).

[1274] U.S. Const. art. III, § 3, cl. 1.

[1275] U.S. Const. amend. XIV, § 1, *as early applied in*, *e.g.*, Hamilton v. Board of Regents of the University of California, 293 U.S. 245, 262 (1934), *and* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (free exercise of religion); *and in, e.g.,* Everson v. Board of Education, 330 U.S. 1, 7-16 (1947), *and* Illinois *ex rel.* McCollum v. Board of Education, 333 U.S. 203, 209-212 (1948) (establishment of religion)

[1276] U.S. Const. art. I, § 8, cl. 15.

• The Militia cannot act under "pretence to *reform* * * * the laws", because the Constitution expressly empowers them only "to execute the Laws of the Union" *as "the Laws" actually are*, not as members of the Militia might wish "the Laws" to be.

• The Militia will never act under mere "*pretence* * * * to remove evil counsellors" in public positions. For if the "counsellors" were truly "evil" in a political sense, it would be because they were conspiring to violate or actually violating the Constitution and laws of the United States or of the several States, and therefore were criminals.[1277] Moreover, if circumstances compelled the Militia to call themselves forth, it could only be because such regularly constituted authorities as Congress, the Judiciary, and particularly the President (as the Militia's sometime "Commander in Chief") either could not act, being thwarted by "evil counsellors"; or would not act, being in league with, aiding and abetting, or sheltering those criminal "counsellors". And finally,

• In the latter case, were rogue public officials in the highest offices complicit in schemes of "national oppression", the Militia would be justified in doing whatever was necessary on their own initiative "to vindicate the original contract" for self-government among WE THE PEOPLE under the Constitution. And "risen as one man" would aptly describe how the Militia would come forth to oppose usurpation or tyranny and "execute the Laws of the Union".

Self-evidently, then, the Militia could never perform their duty as "checks and balances" against "large military establishments and standing armies", and the plots of "ambitious and unprincipled rulers to subvert the government or trample upon the rights of the people",[1278] and at the same time, through the very performance of that duty, commit "Treason" in the sense of the Constitution. Whereas, any attempt by rogue military, *para*-military, or police forces on behalf of "ambitious and unprincipled rulers" to suppress the Militia, or to prevent WE THE PEOPLE from revitalizing and maintaining their Militia, by force of arms would plainly constitute "Treason".

To be sure, these conclusions depend upon the premiss that the Militia are constitutionally entitled themselves to determine when "Treason" has clamped a stranglehold on Americans' throats—in the form of "ambitious and unprincipled rulers" attempting "to subvert the government or trample upon the rights of the people", "large military establishments and standing armies" prostituting themselves

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[1277] *See*, *e.g.*, 18 U.S.C. §§ 241 and 242.

[1278] J. Story, *Commentaries on the Constitution*, *ante* note 576, Volume 2, § 1897, at 646.

as those rulers' myrmidons, and "national oppression" parading as "government". But that entitlement is clear.

In the final analysis, it is the right and duty of WE THE PEOPLE to interpret their own Constitution.[1279] Under normal circumstances. THE PEOPLE exercise this right and fulfill this duty through "representatives" in the legislative, executive, and judicial branches of their National, State, and Local governments. In the midst of "national oppression", however, WE THE PEOPLE will have *no* (or vanishingly few) true "representatives" in "government", because most (and certainly the highest) ostensible "public officials" will be usurpers and tyrants, and the ostensible "governments" those "officials" administer will be criminal conspiracies.[1280] In such a situation, common sense dictates that the usurpers and tyrants cannot be suffered to define what constitutes "Treason", and thereby exculpate themselves and inculpate their victims.

At that point, though, WE THE PEOPLE will be unable to enforce the Constitution through exercise of the franchise. Voting will be entirely useless, because the usurpers and tyrants will control the political parties, nominate dummy candidates, and rig the voting machines. And, in any event, elections will come too infrequently to retard aggression by oppressors ready, willing, and able to deploy "large military establishments and standing armies", as well as *para*-military police forces, to suppress every manifestation of dissent as it arises. (Even Members of the House of Representatives in Congress, the National legislative branch closest to THE PEOPLE, are elected only every two years.[1281])

Yet WE THE PEOPLE will still be entitled to defend themselves, according to the principle of the Declaration of Independence that, "when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security". But to know when their country has arrived at that critical juncture, THE PEOPLE must determine *for themselves* what constitutes "Treason". And to succeed in "throw[ing] off such Government", when the outcome turns on the harsh reality that "'[p]olitical power grows out of the barrel of a gun'",[1282] THE PEOPLE must command *by themselves* the necessary force. Self-evidently, at that point in time WE THE PEOPLE'S only recourse for the accomplishment of these ends will be reliance on themselves alone, arrayed in their Militia.

[1279] *Compare* U.S. Const. preamble *with* Propper v. Clark, 337 U.S. 472, 484 (1949), *and with* W. Blackstone, *Commentaries on the Laws of England, ante* note 142, Volume 1, at 212.

[1280] *Compare* Texas v. White, 74 U.S. (7 Wallace) 700, 718-726 (1868), *with* 18 U.S.C. §§ 241 and 242.

[1281] U.S. Const. art. I, § 2, cl. 1.

[1282] *Quotations From Chairman Mao*, *ante* note 28, at 61.

In such an extremity, the Militia will provide *the most lawful means of resistance possible*, because they are *constitutionally* empowered "to execute the Laws of the Union"[1283]—among which the Constitution and the Declaration of Independence are paramount. Moreover, the Militia will provide *the most democratic form of resistance possible*, because enrollment and some sort of service in them are *mandatory* for every able-bodied, eligible citizen from sixteen to sixty years of age, and permissive even for disabled and superannuated citizens who can perform any useful function; whereas voting is merely *discretionary* even for fully competent, eligible citizens of eighteen years of age and upwards.[1284]

C. The need for "the Militia of the several States" and the Armed Forces to coöperate to the maximum degree the Constitution allows. That "the Militia of the several States" are separate from, independent of, and even constitutionally superior to, and must serve as "checks and balances" against rogues within, the Armed Forces does not mean that the two establishments are necessarily, inevitably, or inexorably antagonists or even competitors.

1. After all, the Constitution embraces both establishments—although it singles out only the Militia as "necessary to the security of a free State";[1285] and incorporates "the Militia of the several States" according to *pre-*constitutional principles from which no deviation is possible (absent an Amendment of the Constitution); whereas it permits Congress to "raise and support Armies" and "provide and maintain a Navy" upon such principles as lawmakers may find "necessary and proper" from time to time.[1286] Both the Militia and the Armed Forces share the general constitutional purpose of "provid[ing] for the common defence"[1287]—although only the Militia are explicitly entrusted with the specific authority and responsibility "to execute the Laws of the Union, suppress Insurrections and repel Invasions".[1288] And, because "Officers" in both the Armed Forces and the Militia, as "executive * * * Officers * * * of the United States and of the several States, shall be bound by Oath or Affirmation, to support th[e] Constitution",[1289] the Militia must support the Armed Forces, and the Armed Forces must support the Militia, in their constitutional existences, authorities, and activities—although the duty of the Armed Forces to support the Militia must be weightier than the duty of the Militia to support the Armed Forces, inasmuch as the

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[1283] U.S. Const. art. I, § 8, cl. 15.

[1284] *See* U.S. Const. amend. XXVI, § 1.

[1285] *Compare and contrast* U.S. Const. art. I, § 8, cls. 12 and 13 *with* art. I, § 8, cls. 15 and 16; art. II, § 2, cl. 1; *and* amend. II.

[1286] U.S. Const. art. I, § 8, cls. 12, 13, and 18.

[1287] U.S. Const. preamble.

[1288] U.S. Const. art. I, § 8, cl. 15.

[1289] U.S. Const. art. VI, cl. 3.

Second Amendment declares the Militia, *and the Militia alone*, to be "necessary to the security of a free State". Indeed, that declaration enjoins the members of the Armed Forces—past, present, and future—and their supporters in the civilian branches of the General Government always to recognize, acknowledge, and promote *the constitutional primacy of the Militia*: such that, for example, when appropriations or the distribution of equipment from the General Government's storehouses are necessary "for organizing, arming, and disciplining, the Militia" in order to make them capable of providing "the security of a free State",[1290] those appropriations or distributions should precede any appropriations or distributions for the Armed Forces.

2. In the normal course of events, "the Militia of the several States" could and should operate alongside "the Army and Navy of the United States" to "repel Invasions"—although under only their own "Officers". The situation would become drastically different, however, if an actual "Invasion[ ]" were mounted by foreign forces in league with "ambitious and unprincipled [domestic] rulers", and either: (i) the "large [domestic] military establishments and standing armies" at the beck and call of such "rulers" were treasonously conniving and coöperating with those foreign forces;[1291] or (ii) the high command of the "large [domestic] military establishments and standing armies" were so infiltrated with actual foreign agents, or so contaminated with Americans corrupted by personal loyalties to or excessive sympathies for foreign governments, that the commanders could not be expected effectively to "repel" the "Invasion[ ]". Or, although no actual "Invasion[ ]" by hostile foreign troops was under way, "ambitious and unprincipled [domestic] rulers", together with their accomplices in the high command of the "large [domestic] military establishments and standing armies", had become so dominated by foreign agents, domestic agents of foreign influence, or the fellow travelers, "useful idiots", and dupes of foreign ideologies, or so personally corrupted by foreign influences, that they were in effect operating the General Government and its Armed Forces as mere marionettes in the service and for the peculiar benefit of some foreign power. Although this would amount to an "Invasion[ ]" largely through the subversive force of foreign ideologies and influences, rather than through a large number of foreign agents and the strength of foreign arms, it would constitute a constitutionally recognized "Invasion[ ]" nonetheless—because it would violate the assertion of the Declaration of Independence that WE THE PEOPLE, first in the thirteen original States and then collectively in the United States, have "assume[d] among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them", *which*

[1290] U.S. Const. art. I, § 8, cl. 16 *and* amend. II.

[1291] *See* U.S. Const. art. III, § 3, cl. 1.

"separate and equal station" public officials can never claim any power to prostitute to the selfish interests and agendas of any foreign country.

In the normal course of events, "the Militia of the several States" also could and should operate alongside "the Army and Navy of the United States" to "suppress Insurrections"—although, once again, under only their own "Officers". This situation, too, would become decidedly different if the "Insurrection[ ]" manifested itself, not in a rising by disgruntled private citizens, but instead in an attempt by "ambitious and unprincipled rulers" and their partisans in the high command of the Armed Forces "to subvert the government or trample upon the rights of the people". Such an "Insurrection[ ]" obviously could take the form of an open and violent *coup d'état*. But it could also appear surreptitiously in subversion of the General Government by individuals who misemployed the Armed Forces in a domestic internal-security and *para*-police rôle to cow the general public into submission.

Finally, in the normal course of events "the Militia of the several States" could and should operate alongside "the Army and Navy of the United States" to "execute the Laws of the Union"—again, of course, under only their very own "Officers". Yet when "large military establishments and standing armies" afford "facile means * * * to ambitious and unprincipled rulers to subvert the government or trample upon the rights of the people", "the Laws"—the Constitution foremost among them—are being *violated*, not "execute[d]". And then the right, power, *and unavoidable duty* of the Militia in "execut[ing] the Laws" is (in Justice Story's phrase) to "resist and triumph over" the perpetrators of these violations.

3. On the other hand, it is worse than useless to contend that, *if* the Militia and heavily armed rogue elements within the regular Armed Forces *were* to become open antagonists—because those elements aligned themselves with civilian usurpers and tyrants, or sought to establish a military *junta* misruling the country under "martial law"—the Militia would prove incapable of effective resistance, and therefore the Militia are not worth maintaining and the Second Amendment is obsolete.

a. From the mouths or pens of some individuals this is a consciously subversive argument, because it aims at deluding common Americans into believing that the Militia *should* be left largely if not entirely "unorganized", and that the Second Amendment *should* be disregarded or even aggressively undermined by pervasive "gun control". Yet, if the Militia *are* incapable today of performing their constitutional duties—as the result of the failure, neglect, or refusal of rogue, incompetent, or simply insouciant public officials to see to it that the Militia are "well regulated"—then what *is* "necessary to the security of a free State" in these times? *What* has replaced the Militia? *How*? And *to what end*? Certainly no substitution has been had through the procedures of "a free State". For, according

to the Second Amendment, "[a] well regulated Militia", and *only* "[a] well regulated Militia", is "necessary to the security of a free State"—so that a constitutional Amendment would be required to establish as matters of constitutional law and fact both: (i) that "[a] well regulated Militia" is *not* "necessary" any more; and even more importantly (ii) *exactly what* must now take the place of the Militia in the provision of such "security". But, of course, no such Amendment has ever been proposed, let alone ratified.

Presumably, detractors of the Militia would argue that "security" is now being provided by the *para*-militarized national-security apparatus centered around the Department of Homeland Security, in close coöperation with the regular Armed Forces. But, if so, *what sort* of "security" is this? It cannot be "the security of a *free* State", because the Constitution declares that *such* "security" depends upon "well regulated Militia" in every State, not a central *Reichssicherheitshauptamt*. Therefore, it must be "the security of [*something other than*] a free State". So, when rogue members of the regular Armed Forces disparage the Militia as being unable to resist, or even to deter, a military take-over of this country, they should immediately be disciplined, if not cashiered, on the grounds that "the thought is father to the deed". Patriots in the Armed Forces should concern themselves with how to ensure that: (i) the Armed Forces are sufficiently governed and regulated so that rogue elements therein are exposed and expelled in a timely fashion;[1292] and (ii) the Militia are sufficiently "well regulated" to be able to detect, to deter, and if necessary effectively to resist, any and all rogue elements in the Armed Forces, whether the latter are acting in their own interests as would-be Bonapartists or in collusion with aspiring civilian usurpers and tyrants.

b. Besides being irrelevant and impertinent as a matter of constitutional law, the canard that the Militia are not worth putting into a constitutionally proper state of readiness is wrong as a matter of fact. It presumes, after all, that the Militia could *never* deter even civilian usurpation and tyranny supported by rogue elements in the Armed Forces, let alone an outright military *Putsch*. Yet, surely, the level of deterrence required depends upon the extent to which aspiring usurpers, tyrants, and Bonapartists can suborn segments of the Armed Forces at each stage of their conspiracies. In the early stages, far less deterrence would be required than later on. Indeed, if most of the Armed Forces remained loyal to the Constitution, and not only unwilling to challenge the Militia but also fully supportive of them, very little deterrence would be required at any time.

c. If the situation today is so out of hand that the Militia could never deter usurpers, tyrants, or Bonapartists acting with or through rogue elements in the Armed Forces, how did matters ever deteriorate to such a degree? And what should

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[1292] *See* U.S. Const. art. I, § 8, cl. 14.

be done to correct this condition? Were the Armed Forces always heavily salted with untrustworthy members? Or did they just recently become so? Is this corruption a consequence of their training—or lack of it, particularly with respect to constitutional law? In any event, is not at least a major part of the reason for this situation (if it were true) precisely that the Militia have been almost totally "unorganized"—or, worse yet, people who should have been members of the Militia have been enrolled as adjuncts of the Armed Forces through the National Guard—for far too long? Must not, then, a major part of the cure (if a cure is needed) be to restore the Militia, and if necessary reduce the Armed Forces, to their proper constitutional positions?

d. Denigration of the Militia as incompetent to deter, let alone to resist, rogue elements in the Armed Forces leaves out of account the successes of *guerrilla* and other forms of irregular resistance (including thoroughly organized "nonviolent action"[1293]) against well-armed tyrannies throughout the world during the last two hundred years or so.[1294] For example, America's contemporary Armed Forces depend upon the regular delivery through a complex transportation-network of gargantuan supplies of *matériel* from a huge military-industrial complex working efficiently and uninterruptedly within the domestic United States, and even drawing much of its equipment from overseas. How this dependency could be satisfied in the midst of a nationwide *guerrilla* conflict, shrewdly waged, is an open question.[1295]

e. If the threat of unconstitutional intervention into politics by rogue elements in the Armed Forces were so extensive and imminent as some observers insist—and which, if true, would indicate that the Armed Forces cannot be trusted even to police their own houses—then it would be necessary either: (i) to supply the Militia with the heavy weaponry and training sufficient to render them a reasonable match for whatever segments of the Armed Forces might turn rogue;[1296] or (ii) to disable the Armed Forces from engaging in conspiracies against the Constitution by assigning special "political officers" from the Militia to serve as liaison to, to survey, and, to supervise, and if necessary to exert extraordinary command over every unit

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[1293] *See, e.g.,* Gene Sharp, *Civilian-Based Defense: A Post-Military Weapons System* (Princeton, New Jersey: Princeton University Press, 1990); *idem*, *The Politics of Nonviolent Action, Part One, Power and Struggle* (Boston, Massachusetts: Porter Sargent Publishers, 1973); *idem, The Politics of Nonviolent Action, Part Two, The Methods of Nonviolent Action* (Boston, Massachusetts: Porter Sargent Publishers, 1973); *idem, The Politics of Nonviolent Action, Part Three, The Dynamics of Nonviolent Action* (Boston, Massachusetts: Porter Sargent Publishers, 1973).

[1294] And this, in sometimes the most adverse of circumstances. *See, e.g., The Memoirs of General Grivas*, Charles Foley, Editor (New York, New York: Frederick A. Praeger, Inc., 1964).

[1295] *See, e.g.,* T.E. Lawrence ["Lawrence of Arabia"], *The Seven Pillars of Wisdom* (Ware, England: Wordsworth Editions Limited, 1977). *See generally* Michael Korda, *Hero: The Life and Legend of Lawrence of Arabia* (New York, New York: HarperCollins Publishers, 2010); Joseph Berton, *Lawrence and the Arab Revolt: An Illustrated Guide* (Madrid, Spain: Andrea Press, 2011).

[1296] *See* U.S. Const. art. I, § 8, cl. 16.

in the Armed Forces of (say) battalion strength and higher; or (iii) to do both. Surely, the Constitution does not preclude the second of these alternatives. It "reserv[es] to the States respectively, the Appointment of the Officers [in the Militia]".[1297] So officers of the regular Armed Forces cannot be "Officers" in the Militia, or command Militia "Officers", because officers of the regular Armed Forces are "nominated, and by and with the Advice and Consent of the Senate * * * appoint[ed]", by the President, not by the States.[1298] Nothing in the Constitution, however, disallows "Officers" in the Militia from directly commanding, let alone simply overseeing the performance of their duties by, officers and men in the regular Armed Forces. Certainly no one in the Armed Forces could justifiably complain if the President as their "Commander in Chief" ordered them to accept such oversight pursuant to "Rules for the Government and Regulation of the land and naval Forces" that Congress enacted; and no one in the Militia could complain if the President seconded Militia "Officers" to such supervisory duty pursuant to regulations enacted by Congress "for governing such Part of the[Militia] as may be employed in the Service of the United States" in that manner.[1299] For, in that case, "the Service of the United States" to be performed by the Militia would be to fulfill their unique responsibility "to execute the Laws of the Union" generally with respect to the "Rules for the Government and Regulation of the land and naval Forces", and to enforce those "Rules" specifically against rogue elements in the Armed Forces by "suppress[ing] Insurrections"[1300]—a perfect concatenation of constitutional authority. Moreover, the President would be required to connect himself as the final link in that chain, in fulfillment of his own unique constitutional duty to "take Care that the Laws be faithfully executed".[1301]

D. "[T]he Militia of the several States" to be distinguishable from the Armed Forces in structure and operations. Maintaining the constitutionally proper distinction between "the Militia of the several States" and the regular Armed Forces of the United States (as well as between the Militia and such regular "Troops, or Ships of War" as Congress might give its "Consent" for the States to raise from time to time) cannot be simply a matter of distinctions in nomenclature, as important as differentiation on that score is.[1302] "[A] rose by any other name would smell as sweet"[1303] precisely because a rose is *substantively* different from all other flowers. So, because revitalized Militia are *substantively* different from the

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[1297] U.S. Const. art. I, § 8, cl. 16.

[1298] U.S. Const. art. II, § 2, cl. 2.

[1299] *See* U.S. Const. art. II, § 2, cl. 1 *and* art. I, § 8, cls. 14 and 16.

[1300] U.S. Const. art. I, § 8, cl. 15.

[1301] U.S. Const. art. II, § 3.

[1302] *See ante*, Chapter 29.

[1303] William Shakespeare, *Romeo and Juliet*, Act II, Scene 2.

regular Armed Forces (and the States' "Troops, or Ships of War, too), they must be made unmistakably distinct as well, in no less than three respects.[1304]

1. In terms of command. The Constitution explicitly provides for this. Except for the President of the United States, whom the Constitution itself appoints as "Commander in Chief * * * of the Militia of the several States",[1305] "the Appointment of [all of] the Officers" in the Militia is the exclusive prerogative of "the States respectively".[1306] And being so appointed, each of "th[os]e Officers" can also be removed perforce of the same authority, according to whatever procedures and for whatever reasons "the States respectively" may deem appropriate. For inasmuch as the Constitution delegates to the United States no power to remove any "Officers" from the Militia (other than the President himself, through the process of "Impeachment and Conviction"[1307]), and does not prohibit the States from removing such "Officers", therefore the power of removal is "reserved to the States respectively, or to the people".[1308] Indeed, even in the absence of the Tenth Amendment, the States would enjoy the plenary power to remove "Officers" from their respective Militia, because the power of "the Appointment of the Officers" is exclusive to the States; and, absent some other limitation, a constitutional power of appointment necessarily implies an allied power of removal.[1309] So "the Officers" of revitalized "Militia of the several States" not only would represent their particular States in a formal sense, but also, being subject to removal by those States, could be held strictly accountable to and closely supervised and controlled by them in the performance of their (the "Officers'") duties. Thus, in contradistinction to the officers of the regular Armed Forces, whose primary loyalty (after, presumably, their loyalty to the Constitution) would be to the General Government which appointed them, "the Officers" of the Militia would be loyal first and foremost to their respective States.

The practical consequences of this for popular self-government would be profound. Congress can enact regulations "for governing such Part of the[Militia] as may be employed in the Service of the United States";[1310] and the President, as "Commander in Chief * * * of the Militia", can issue orders to "the Officers" of the Militia under color of those regulations "when [the Militia are] called into the

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[1304] Inasmuch as Congress has seen fit to incorporate into the regular Armed Forces—in the forms of the National Guard, the Naval Militia, and various State Defense Forces—the "Troops, or Ships of War" that the States may "keep * * * in time of Peace" "with[ ] the Consent of Congress", for the sake of simplicity the following analysis will conflate those "Troops, or Ships of War" with the Armed Forces.

[1305] U.S. Const. art. II, § 2, cl. 1.

[1306] U.S. Const. art. I, § 8, cl. 16.

[1307] *See* U.S. Const. art. I, § 2, cl. 5, and § 3, cls. 6 and 7; *and* art. II, § 4.

[1308] U.S. Const. amend. X.

[1309] *See* Myers v. United States, 272 U.S. 52 (1926).

[1310] U.S. Const. art. I, § 8, cl. 16.

actual Service of the United States".[1311] But such regulations and orders as might be forthcoming would amount to no more than mere ink on paper unless and until "the Officers" carried them out. And "the Officers" should carry out regulations from Congress and orders from the President only if those regulations and orders were directed towards matters within "the *actual* Service of the United States".[1312] Any among "the Officers" who might appear at all willing to take and subsequently enforce orders not so directed the States could and should replace with new "Officers" more faithful to their "Oath[s] or Affirmation[s], to support th[e] Constitution".[1313] Thus, the constitutional structure of command would enable the Militia to engage in "negative interposition"—refusing to obey unconstitutional orders from rogue officials in the General Government—which would enforce in the most direct manner possible the principle that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people".[1314]

Furthermore, but a short step would lead from "negative interposition" to "affirmative interposition", by means of which the States could enforce the Constitution by insisting, through their Militia, that the "Commander in Chief * * * of the Militia" should punctiliously fulfill his duty to "take Care that the Laws be faithfully executed".[1315] If "the Militia of the several States" were to discover, or to be informed, that "the [supreme] Law[ ] of the Land" were being violated, then, because willful violations of the Constitution are serious crimes,[1316] it would be their duty to "make known the [fact] * * * to some * * * person in civil or military authority under the United States".[1317] For the Militia, the appropriate "person in * * * authority" to whom to report would obviously be the President, their "Commander in Chief". And such a report, coming from such a source, would amount, not to a toothless exercise of "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances",[1318] nor to a mere recommendation, but rather to *an enforceable demand*. For the Constitution imposes no limitation on *when* during the times at which they are "call[ed] forth" to be "employed in the Service of the United States" the Militia may "execute the Laws", or *what* "Laws of the Union" the Militia may "execute", or *whom* the Militia may charge with violating those "Laws" and take into custody in aid of future

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[1311] U.S. Const. art. II, § 2, cl. 1.

[1312] *See post*, at 871-880.

[1313] U.S. Const. art. VI, cl. 3.

[1314] U.S. Const. amend. X.

[1315] *See* U.S. Const. art. II, § 3.

[1316] *See, e.g.,* 18 U.S.C. §§ 241 and 242.

[1317] *See* 18 U.S.C. § 4.

[1318] U.S. Const. amend. I.

prosecution. So, if the Militia should happen to be "called into the actual Service of the United States" for any valid reason at that or some future time, they could then assert their authority "to execute [*any and all* of] the Laws of the Union" as against *anyone* known to be in violation of "th[os]e Laws"—including the President himself for any refusal on his part to "take Care that the Laws be faithfully executed" after he had been duly informed that they were being flouted. Thus, the constitutional structure of command would enable the Militia to make federalism work in a most direct and forceful way, not just "from the top down", but especially "from the bottom up".

And rightly so. For the States and WE THE PEOPLE to remain secure in their sovereignty and freedom, the forces that the Constitution declares to be "necessary to [that] security" must not behave as mere robots programmed mechanically to obey the arbitrary dictates of some latter-day American Caesar who mistakes his narrow constitutional authority as "Commander in Chief" for the unlimited power of a *Führer* or *Duce.* Because such a Caesar will likely be more of a Caligula or Nero than an Augustus or Marcus Aurelius, WE THE PEOPLE must ensure that they themselves will not prove deserving of the denunciation Marullus justly hurled at the Roman mob when it swooned in its enthusiasm to embrace Julius Caesar's tyranny: "You blocks, you stones, you worse than senseless things!"[1319] If WE THE PEOPLE are to protect themselves from the tyranny of some latter-day Caesar, they must govern themselves, and never allow themselves to be governed by others. THE PEOPLE have the means to protect themselves: "the Militia of the several States". But to employ the Militia properly, because *they are* the Militia, THE PEOPLE must think *for themselves*, and act *for themselves* upon *their own* responsibility. Ultimately, WE THE PEOPLE—and no one else—must *command* "the Militia of the several States", in the fullest sense of that verb.

2. With respect to their missions, organization, and equipment. The Constitution explicitly mandates that the Militia must be differentiated from the Armed Forces in these matters, too.

a. The Constitution delegates to Congress the power "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions".[1320] Nowhere, however, does it explicitly authorize Congress to employ the regular Armed Forces for these (or any other) purposes. Yet, although the Constitution does not expressly assign to the Armed Forces the responsibility to "repel Invasions" and "suppress Insurrections", in the nature of things they would surely be deployed in the first case, and would probably be at least mobilized in the second should an "Insurrection[ ]" become widespread and sufficiently severe.

[1319] William Shakespeare, *The Tragedy of Julius Caesar*, Act I, Scene 1.

[1320] U.S. Const. art. I, § 8, cl. 15.

Moreover, were the Armed Forces sent into the field to "suppress [such an] Insurrection[ ]", they would be required by force of circumstances to "execute the Laws of the Union" against at least the "Insurrection[ists]" until the disturbance were put down. So, it would not be unlikely that, in cases of "Invasions" and widespread "Insurrections", "the Militia of the several States" and the Armed Forces of the United States would be called upon to coöperate very closely.

Where an identity of mission and the need for concerted action were involved, in the coördinated exercise of its powers "[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States",[1321] and "[t]o raise and support Armies", "[t]o provide and maintain a Navy", and "[t]o make Rules for the Government and Regulation of the land and naval Forces",[1322] Congress might require the Militia, in preparation for being and when "call[ed] forth" "in the Service of the United States", to be organized, equipped, trained, disciplined, and governed in a fashion that was uniform with, similar to, or simply compatible with the organization, equipment, training, discipline, and governance of the regular Armed Forces. Or Congress might decide that the Militia's equipment, training, and governance needed closely to conform to that of the Armed Forces, but that their organization and internal discipline did not. Or Congress might devise some other accommodation by means of which the Militia and the Armed Forces could effectively coöperate with respect to "suppress[ing] Insurrections and repel[ling] Invasions", without sacrificing their separate identities and purposes in the process.

b. With respect to the Militia's general responsibility "to execute the Laws of the Union", though, things are decidedly different. "[T]o execute the Laws of the Union" properly in all of the situations that would not involve an "Insurrection[ ]" or an "Invasion[ ]" would require the Militia to perform duties for which much or even most of their organization, equipment, and training appropriate for "suppres[ing] Insurrections and repel[ling] Invasions" would be of little or no use, or even counterproductive. So the Militia should be organized, equipped, and trained in a manner specifically tailored for these other purposes of "law enforcement"—and, most likely, in a manner radically different from the organization, equipment, and training almost all units of the Armed Forces should receive.

In addition, even if organizing, equipping, and training the Militia in conformity with the standards of the Armed Forces to "suppress Insurrections", "repel Invasions", and "execute the Laws of the Union" in the course of "suppress[ing] Insurrections and repel[ling] Invasions" could qualify the Militia for

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[1321] U.S. Const. art. I, § 8, cl. 16.

[1322] U.S. Const. art. I, § 8, cls. 12 through 14.

"execut[ing] the Laws of the Union" in general, the Militia should not be so organized, equipped, and trained. For, if they were, their performance of those duties in that way might inure common Americans to a form of *para-*military law enforcement which would render them insufficiently wary of supposed "law enforcement" conducted by the Armed Forces. In principle, the Armed Forces should *never* be called upon "to execute the Laws of the Union" except in cases directly related to "Insurrections" and "Invasions". For, if the mere presence of "standing armies, in time of peace, should be avoided, as dangerous to liberty", and "in all cases, the military should be under strict subordination to, and governed by, the civil power",[1323] then the worst of all situations would be for a "standing army" to be licensed "to execute the Laws" on a routine basis, so that "the civil power" ended up as a matter of practice in "strict subordination to", or at least utterly dependent upon, "the military". True, the Constitution nowhere suggests that the Armed Forces should "execute the Laws of the Union" at all—and certainly not in preference to the Militia. But, until the Militia are revitalized, natural disasters, major industrial accidents, economic breakdowns, and other crises that overwhelm civilian public officials or expose them as incompetents will tend to rationalize demands that the Armed Forces step in "to maintain order". Inevitably, regular deployment of the Armed Forces in these types of situations will foster and lend credence to the claim that such authority inheres in the Armed Forces in *all* situations that might be labeled "emergencies"—indeed, that "martial law" is actually superior to the Constitution, because it can, will, and even should be enforced whenever and wherever normal constitutional methods supposedly fail to maintain the supremacy of civilian law.[1324] Obviously, nothing the Militia might do should be allowed to encourage such a development.

c. These considerations would be even more consequential when the Militia were not "employed in the Service of the United States"—that is, "execut[ing] the Laws of the Union", "suppress[ing] Insurrections", and "repel[ling] Invasions" perforce of some Congressional statute—but instead were performing other duties solely on behalf of their States. Of course, in some instances, a State's Militia might also "execute the Laws of the Union" within, suppress an "Insurrection[ ]" inside of, or repel an "Invasion[ ]" of its own State's territory, without being "call[ed] forth" by the United States for such a purpose. Each of the States may (and should) enforce "the Laws of the Union" against anyone who violates them within her own geographical limits (unless Congress has decreed that those laws are to be enforced exclusively by the General Govrernment),[1325] may protect herself against "domestic

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[1323] Virginia Declaration of Rights (1776) art. 13.

[1324] On the many fallacies lurking in such loose interpretations of "martial law", *see post,* Chapter 48.

[1325] *See* U.S. Const. art. VI, cls. 2 and 3.

Violence" on her own soil without the aid or intervention of the United States,[1326] and may even "engage in War" on her own recognizance when "actually invaded, or in such imminent Danger as will not admit of delay".[1327] In addition to deploying her own Militia in response to these perils, though, each State may employ her own Militia in whatever other ways may conduce to her "homeland security". For, other than that no State may withhold her Militia from being "call[ed] forth" and "employed in the Service of the United States" for one or more of the three enumerated purposes,[1328] the Constitution imposes no prohibition whatsoever on how any State may deploy her Militia in response to her own special needs. Rather, the Tenth Amendment stipulates that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people". The Militia are "the Militia of the several States" respectively. And the first and foremost purpose of each "well regulated Militia" must be to take whatever action may be "necessary to the security of a free State" in its own State.[1329] (After all, one can imagine that the United States might be broken up by "Insurrections", "Invasions", or some other calamities—and yet some of the States might still survive intact and independent. Surely the Constitution could not require "[a] well regulated Militia" to suffer its own State to be destroyed, simply because it had proven incapable of preventing other States, and the Union, from being destroyed.) In the nature of things, the particular needs of "homeland security" will differ—perhaps markedly so—from State to State, and even from Locality to Locality within some States. And, to the extent of those differences, the organization, equipment, and training of each State's Militia—so as to qualify it as truly "well regulated" under the circumstances—will also differ from that of every other State's Militia.

Doubtlessly, too, the organization, equipment, and training that each State's "well regulated Militia" will need to satisfy her unique requirements of "homeland security" will differ significantly from the normal organization, equipment, and training of the Armed Forces. And such differences should be maintained—not simply because it would be cumbersome in practice to attempt to prepare the Armed Forces for such a wide variety of tasks as may confront the Militia, but as a matter of fundamental political principle. Perhaps the Armed Forces could be organized, equipped, and trained to deal with all of the important problems of "homeland security" that each State could reasonably foresee. Even so, the Armed Forces should *not* be organized, equipped, and trained for such duties, because ***no State should allow her internal "homeland security" to depend upon forces which***

[1326] *See* U.S. Const. art. IV, § 4.

[1327] *See* U.S. Const. art. I, § 10, cl. 3.

[1328] *Compare* U.S. Const. art. I, § 8, cls. 15 and 16 *with* art. VI, cl. 2.

[1329] U.S. Const. amend. II.

that State herself lacks the legal authority to control. No State can expect to enjoy for long "the security of a *free* State" when *someone else, not directly responsible to the State,* supplies (and therefore can possibly withhold) that "security". Of course, it might be contended that no State would ever retain the untrammeled legal authority to control her own Militia, because, if Congress "call[ed] forth" the entirety of every State's Militia to be "employed in the Service of the United States", all of the States would be constitutionally required to comply, leaving them with no meaningful "homeland-security" forces of their own.[1330] This, however, is an extremely unlikely scenario. *First*, in delegating to Congress the power "[t]o provide * * * for governing *such Part* of the[Militia] as may be employed in the Service of the United States", the Constitution itself foresees the unlikelihood of such a complete mobilization of the Militia.[1331] *Second*, never in American history has the entirety of every State's, or even of most States', Militia been "call[ed] forth". On the other hand, many instances could be cited in which States with no "well regulated Militia" have had to depend upon the regular Armed Forces (including the so-called "federalized" National Guard) for relief and protection when some public disorder broke out or some natural disaster struck. At that point, typically, the Armed Forces took control of the situation. But in the case (say) of a widespread and profoundly catastrophic natural disaster, or a nationwide economic collapse, the Armed Forces would likely prove too small and ill-trained to provide sufficient relief and protection to all of the affected States. So the States would be bereft of *both* control *and* adequate assistance.

d. Examples of differences that should be maintained between revitalized Militia and the Armed Forces with respect to organization and equipment include the following:

- An "Independent Company" in "[a] well regulated Militia" has no equivalent within the regular Armed Forces.

- Although the requirement of service in "[a] well regulated Militia" is nearly universal, flexible exemptions from various duties allow it to be satisfied in many different ways; whereas the modern Armed Forces depend upon voluntary enlistments, and offer few exemptions from particular duties for those within their ranks. And, of course,

- Unlike members of the Armed Forces, members of "well regulated Militia" (other than conscientious objectors) are required personally to possess their own firearms, ammunition, and accoutrements at all times. The Second Amendment protects "the right *of the people* to keep and bear

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[1330] *See* U.S. Const. art. I, § 8, cl. 15 *and* art. VI, cls. 2 and 3.

[1331] *See* U.S. Const. art. I, § 8, cl. 16 (emphasis supplied).

Arms",[1332] not a right of members of the Armed Forces. So "the people" cannot be prevented from "keep[ing] * * * Arms" in their personal possession, and cannot be denied the opportunity of "bear[ing] Arms" in "well regulated Militia".[1333] In contrast, in this regard the members of the Armed Forces can claim *no* constitutional rights at all. Rather, they operate under defeasible statutory licenses. Individually, members of the Armed Forces can be disarmed at any time, for any reason, because they have no personal rights to possession, let alone ownership, of the public arms made available to them for their service. And collectively, the Armed Forces can be entirely disestablished. For example, if a newly elected House of Representatives refused to approve an appropriation for the Army, the Army would effectively cease to exist, because "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law",[1334] and "no Appropriation of Money to [raise and support Armies] * * * shall be for a longer Term than two Years".[1335]

3. With regard to ranks, uniforms, decorations, and other distinctions of service. Differentiation of the Militia from the regular Armed Forces is important in these particulars, as well.

a. The Constitution implies, and certainly allows, that ranks in the Militia should differ from ranks in the Armed Forces. Commissioned "Officers" in the Armed Forces are "nominate[d], and by and with the Advice and Consent of the Senate, * * * appoint[ed]" by the President,[1336] pursuant to such "Rules for the Government and Regulation of the land and naval Forces" as Congress may "make";[1337] whereas, "the Appointment of the Officers" in the Militia is "reserv[ed] to the States respectively".[1338] Inasmuch as the Constitution itself does not specify what particular ranks or grades should obtain in either the Armed Forces or the Militia (other than the rank of "Commander in Chief" for the President[1339]), the competence to designate all other ranks and grades arguably should rest with those who exercise the authority to make appointments—the General Government with respect to the Armed Forces; the States, with respect to the Militia. This follows not

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[1332] Emphasis supplied.

[1333] *See post*, at 1318-1353.

[1334] U.S. Const. art. I, § 9, cl. 7.

[1335] U.S. Const. art. I, § 8, cl. 12.

[1336] U.S. Const. art. II, § 2, cl. 2.

[1337] U.S. Const. art. I, § 8, cl. 14. *See also* U.S. Const. art. II, § 2, cl. 2: "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, * * * or in the Heads of Departments".

[1338] U.S. Const. art. I, § 8, cl. 16.

[1339] U.S. Const. art. II, § 2, cl. 1.

simply from the Constitution's explicit "reserv[ation to] the States respectively, [of] the Appointment of the Officers [in their Militia]", but more importantly from the reason, *promotive and protective of federalism*, for that reservation: namely, that the Militia are "the Militia *of the several States*", over which the States and WE THE PEOPLE retain *all* authority beyond the narrow set of powers delegated to Congress. So, because the authority confided to the States and THE PEOPLE in these regards is separate from and independent of the authority delegated to Congress, and because the requirements of "homeland security" will surely differ in different States, as well as go beyond the three constitutional purposes for which the Militia may be "call[ed] forth" "in the Service of the United States", for individual States to recognize and act upon a need to assign special and even unique ranks and grades within their own Militia should hardly be unexpected, unwarranted, or unwelcome.

To be sure, from 1792 onwards, Congress has construed its power "[t]o provide for organizing * * * the Militia", with nary a note of dissent from the States, as authorizing it to establish uniform ranks and grades throughout "the Militia of the several States".[1340] Constitutionally, however, this imposed nationwide uniformity can apply only to the "Part of the[Militia]" actually "call[ed] forth" "in the Service of the United States", when as a practical matter a large degree of conformity to a single pattern of organization might be required. And, historically, Congress could afford to set a pattern of organization apparently "from the top down" for this purpose, because it was actually adopting a pattern that had already been long established "from the bottom up". For generations, the Colonies and then the independent States had regulated their Militia on a very similar basis. Having been well tested in practice, the system Congress adopted could have been expected to work. And being the product of the States' own experiences, and more or less in operation in each of them, it could have been expected to draw no criticism from that quarter.

Today, though, as a consequence of the effective, albeit unconstitutional, disestablishment of the Militia from 1903 on, leading to the ubiquity of "the unorganized militia" throughout America,[1341] no pattern of organization of the Militia "from the top down" exists, and next to no actual organization of the Militia "from the bottom up" can be found in any State. Rather, from the beginning of the process by which Congress purported to supplant the true "Militia of the several States" with the National Guard, the policy has been that "the organization of the National Guard, including the composition of all units thereof, shall be the same as

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[1340] *An Act more effectually to provide for the National Defence by establishing an Uniform Militia throughout the United States,* Act of 8 May 1792, CHAP. XXXIII, §§ 3 (officers of divisions, brigades, regiments, battalions, and companies), 6 ("adjutant-general"), and 10 ("brigade-inspector"), 1 Stat. 271, 272, 273; *continued with revisions by* Revised Statutes of the United States (1873-1874), TITLE XVI, THE MILITIA, §§ 1631, 1632, 1634, and 1640, 18 Stat. 285, 286, 287.

[1341] *See ante*, at 786-793.

that which is or may * * * be prescribed for the Regular Army".[1342] So, as far as the Militia are concerned, nothing exists that needs to be changed. Instead, everything needs to be constructed anew, "from the bottom up". And setting out the constitutional principles upon which revitalization must be predicated requires no more than some relatively straightforward legal-historical research in sources which contain the answers to whatever questions may be asked.[1343] Nonetheless, the outcome of applying those principles in practice in a contemporary context cannot be easily, let alone unerringly, predicted in States with widely divergent and ever-fluid problems of "homeland security" *and no recent history of addressing such problems through any form of Militia*. Instead, because of more than a century of official neglect—or outright sabotage—of the Militia, any program for revitalization probably must begin at the Local level, and must be largely experimental, innovative, and above all flexible. The very first goal must be to reëstablish the Militia—in both concept and execution—at the Local and then the State levels, firmly in WE THE PEOPLE'S control, because that is where and how constitutional "homeland security" needs to be introduced immediately, if not sooner, in order to prepare for unavoidable economic, political, and social crises, and especially to render irrelevant or to fend off the National *para-*military police state apparatus that rogue officials in the District of Columbia are preparing to unleash when such crises break out. In this process, the General Government should stand well back out of the way, and even the States' governments should initially take a largely "hands off" approach, in order to enable THE PEOPLE themselves to figure out what works best *for them*. Only after revitalization at the Local and then the State levels has been accomplished, should the States and the General Government coöperate on the matter of further organizing the Militia along certain uniform lines in order for the Militia to perform one or more the three constitutional functions when "call[ed] forth" "in the Service of the United States".

On the one hand, the States might find that a system of ranks and units identical to that employed in the regular Armed Forces served their particular needs of "homeland security", and therefore would agree with Congress "[t]o provide for organizing * * * the[ir] Militia" on that basis. On the other hand, inasmuch as officers in the Armed Forces (other than the President in his separate capacity as "Commander in Chief * * * of the Militia") constitutionally cannot command anyone in the Militia, the States might conclude that no necessity existed for a system identical to the one the Armed Forces employed, and that some other system better served their needs—and Congress might agree to adopt that other system when the Militia were "employed in the Service of the United States". So,

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[1342] An Act for making further and more effectual provision for the national defense, and for other purposes, Act of 3 June 1916, CHAP. 134, § 60, 39 Stat. 166, 197.

[1343] *See ante*, Chapter 27.

for instance, as was traditional in *pre*-constitutional times, the States today might appoint "Captains" of "Companies" in their Militia, where neither "Captain" nor "Company" has an exact equivalent in the regular Armed Forces.[1344] To further the differentiation between revitalized Militia and the Armed Forces, the States might also restore the ranks of "Ensign" (at one time the lowest commissioned rank in the infantry) and "Cornet" (at one time the lowest commissioned rank in the cavalry). The latter point is not merely an exercise in romantic historical musing. For, in some places in America at all times, and certainly in many places under circumstances of widespread economic breakdown, cavalry of one sort or another, using horses or mules, could prove quite useful—perhaps even indispensable—to the Militia, and could easily be revived and brought up to date through the agency of "Independent Companies".[1345]

b. The Constitution also implies, and certainly allows, if it does not require, that uniforms in "well regulated Militia" be unmistakably distinguishable from those of the Armed Forces. After all, the Constitution treats "the Militia of the several States" as separate from "the Army and Navy of the United States".[1346] Moreover, because the Militia are "the Militia *of the several States*" respectively, each State should incorporate into her Militia's uniforms some unique elements of design, so that the Militia of one State can easily be differentiated from that of another. This is not merely a sartorial matter, but is most important from the political and psychological points of view. For as soon as Congress set about to eliminate the true "Militia of the several States" and substitute for them the National Guard, it was careful to provide that "[t]he National Guard of the United States shall, as far as practicable, be uniformed * * * with the same type of uniforms * * * as are or shall be provided for the Regular Army".[1347] So the continuation of such a conflation in appearance between revitalized Militia and the regular Armed Forces could lead only to continued confusion with respect to the separateness of the two establishments, and therefore should be scrupulously avoided wherever possible.

So, too, for such things as flags, medals, awards, and other items of identification and distinction. Moreover, State Militia flags and decorations should be accorded the primary positions of honor when displayed in conjunction with

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[1344] On average, a revitalized Militia "Company" would probably consist of from fifty or sixty to one hundred twenty men, although "Independent Companies" would be idiosyncratic in this regard. In contrast, depending on its type and mission, as of this writing a "platoon" in the contemporary regular Army ranges from sixteen to forty-four men, and is usually commanded by a "second lieutenant"; and a modern Army "company" ranges from sixty-two to one hundred ninety men, usually commanded by a "captain".

[1345] *See post*, Chapter 44.

[1346] U.S. Const. art. II, § 2, cl. 1.

[1347] An Act for making further and more effectual provision for the national defense, and for other purposes, Act of 3 June 1916, CHAP. 134, § 82, 39 Stat. 166, 203. "The National Guard of the United States" is the National Guard of the various States "while in the service of the United States". § 1, 39 Stat. at 166.

other flags and decorations, because they are emblematic of "the Militia of the several States", which alone among the forces protecting America enjoy constitutional permanence and are recognized as "necessary to the security of a free State".[1348]

c. The names of units in revitalized "well regulated Militia" should also be distinctly different from the names of units in the regular Armed Forces. This matter must be approached with some sensitivity, because many names and symbols of former Militia units the origins of which date from as far back as early *pre-*constitutional times have been mistakenly appropriated in one way or another by units of the National Guard. For example, the logo of the contemporary Army National Guard displays "the Embattled Farmer", leaving his plow and taking up his musket to repel the Redcoats at Concord's North Bridge on 19 April 1775. In fact, "the Embattled Farmer" and other members of the Militia of that era had no connection with anything akin to the modern National Guard. In particular, "the Embattled Farmer" was a member of a Militia "Company" in his own Town, and of the Militia of Massachusetts overall, and not subject in any way to the Continental Congress or other National authority; whereas members of the modern National Guard simultaneously profess dual loyalties, one to their States and the other to the United States, with the latter loyalty being the primary of the two such that they can be incorporated by units directly into the Army of the United States.[1349] Such incorporation, of course, is *constitutionally impossible* for units of "well regulated Militia". If the units of the contemporary National Guard claiming historical descent from the Militia were ever entitled to the names they affect, they forfeited those rights when they became parts of the National Guard; and entirely new units of the National Guard that simply appropriated those names without any historical continuity could never have justly claimed any right to them in the first place. Yet it would be unnecessary, impolitic, and in poor taste to offend National Guardsmen's *armour propre* in this regard. To revert to nomenclature scrupulously correct as a matter of historical fact would be complicated and emotionally traumatic, and would serve no vital purpose, because nothing of constitutional consequence turns on these misappropriations of mere names—as long as no one concedes that these units of the National Guard have an arguable constitutional basis for being treated as true "Militia" perforce of the pedigrees they have assumed. Revitalized Militia can always devise new names for their constituent units—and perhaps should prefer to do so, because revitalization of the Militia will be part of

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[1348] U.S. Const. amend. II.

[1349] This was first spelled out clearly in AN ACT To amend the National Defense Act of June 3, 1916, as amended, Act of 15 June 1933, CHAPTER 87, 48 Stat. 153. June of 1933, of course, is quite a bit later than June of 1788 or December of 1791 (when the ratifications of the Constitution and the Bill of Rights, respectively, were completed).

a veritable renaissance of constitutionalism, in the course of which new baptisms for units of the Militia would be highly symbolic.

4. Differentiation necessary to preserve federalism. In summation, differentiations of these kinds will preserve federalism by promoting and taking advantage of subsidiarity. The Militia are "the Militia of the several States", to be "employed in the Service of the United States" only for an expressly limited set of purposes. Most of the time, revitalized Militia will be employed in the service of their own States for whatever purposes will promote Local "homeland security". So WE THE PEOPLE in each of the States will be uniquely positioned, and most highly motivated, to determine, in the light of the peculiar dangers facing and the particular resources available to them, how best to organize, equip, train, and deploy themselves in their own "well regulated Militia". Importantly, the differentiations THE PEOPLE will make between their Militia and the Armed Forces will be scientific, because their utility will be verified or falsified through actual experimentation in Localities throughout America, rather than being arbitrarily dictated "from the top down" by some aloof "homeland-security" bureaucracy in the District of Columbia. Moreover, the solutions THE PEOPLE discover will not fall into the "one-size-fits-all" pattern typically adopted by "central planners" in some remote agency. With fifty States and hundreds of Localities confronted by their own special circumstances and problems of "homeland security", THE PEOPLE will have the inestimable advantage of numerous decentralized and independent laboratories in which to gather evidence, test hypotheses, and devise solutions custom-fitted to the situations at hand. Of course, the States will share information, so as to minimize redundancy of effort. But even if some overlap of effort will be unavoidable, its cost will be vastly offset by the flood of innovation that will come from allowing THE PEOPLE themselves to take the initiative in work they will recognize as vital to their freedom and prosperity.

By preserving federalism, differentiations between the Militia and the Armed Forces will also preserve "the security of a free State" for every State, and thereby for the Union as a whole. Even though the services the Militia can supply to the Union are limited in type, the Militia are not therefore in any sense "second-class" forces. Quite the contrary: They are *constitutionally* in the *first* class, and the *only* forces to be found there. The notion that the regular Armed Forces occupy that position is worse than simply erroneous. Because "standing armies, in time of peace" are "dangerous to liberty",[1350] they must be viewed with healthy suspicion and skepticism. They can be allowed whatever honors and prestige may be their due from the faithful performance of their constitutional duties. But they cannot be suffered to receive more honors and prestige than the only institutions that the

[1350] Virginia Declaration of Rights (1776) art. 13.

Constitution itself declares to be "necessary to the security of a free State". Clear differentiations between the Militia and the Armed Forces will emphasize the relative positions of each in the constitutional hierarchy, reminding Americans in a most visible manner which of these establishments the Constitution deems more trustworthy. The members of the Armed Forces, too, should favor such emphasis, for at least three reasons: (i) They should want to fulfill their "Oath[s] or Affirmation[s], to support th[e] Constitution"[1351] or other pledges of allegiance to the best of their abilities. (ii) They should want to be untainted with the least suspicion of disloyalty. And (iii) they should want to uncover and deter potential Bonapartists within their own ranks, for which purpose the Militia can supply the most effective prophylactic.[1352]

Therefore, inasmuch as differentiations between the Militia and the Armed Forces will serve crucial constitutional purposes, Congress should not attempt to impose uniformity between the two establishments except where it might be necessary for common deployments "in the Service of the United States", but instead should largely defer to the States' decisions on these matters.

[1351] U.S. Const. art. VI, cl. 3.

[1352] *See ante*, at 825-826.

CHAPTER THIRTY-ONE

"[T]he Militia of the several States" are governmental establishments, not private institutions.

"[T]he Militia of the several States" are erected upon, and in practice embody and effectuate, the right and the duty of collective self-defense.[1353] As Blackstone explained, self-defense is the enforcement of "immediate justice", executed out of necessity in the present in order to substitute for "the future process of law [which] is by no means an adequate remedy for injuries accompanied with force".[1354] Being inherently a "process of law"—indeed, being (in Blackstone's estimation) "the primary law of nature"—when systematically organized among the people, whether under the aegis of "the Laws of Nature and of Nature's God" or the ordinances of human positive law, collective self-defense becomes an—indeed, the primary—institution, establishment, or instrument of "government". Therefore, "the Militia of the several States" are, and must be, inherently *governmental* entities.

A. The essentially governmental nature of the Militia. Not surprisingly, "the Militia of the several States" exhibit a thoroughly and even uniquely and supremely *governmental* purpose, character, and status.

1. Governmental purpose. The Second Amendment describes "[a] well regulated Militia" as "being necessary to the security of a free State"—employing the term "free State" in the generic sense, as referring to a specific type of polity (which, of course, the original Constitution and the Bill of Rights conclusively presumed all of the first thirteen States to be). Thus, the purpose of "[a] well regulated Militia" is to provide "the security of a free State". And not in any narrow sense, but instead in a sense inclusive of every aspect of the people's political, economic, and social welfare that contributes to or derives from that "security". As the Declaration of Independence makes clear, though, to provide such security is the fundamental purpose of all true governments: namely, that "all men * * * are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness"; and that, "to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed". Inasmuch as "the pursuit of Happiness" takes within its ken *every* kind of property, as well as all things, matters, and conditions beyond

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[1353] *See ante*, Chapter 28.

[1354] *Commentaries on the Laws of England, ante* note 142, Volume 3, at 3-4.

mere property—that is, *all* of men's political, economic, and social aspirations, both temporal and spiritual, material and immaterial, pertaining to this world and to the world to come—the breadth and depth of the responsibility "to secure these rights" is awesome. The purpose of "the Militia of the several States" being the purpose of all legitimate government, and the Militia being the *only* institutions which the Constitution itself explicitly identifies as being "necessary" for that purpose (or for *any* purpose, for that matter), therefore the Militia are *thoroughly and even uniquely governmental* entities.

2. Governmental character. From their governmental purpose derives the governmental character of "the Militia of the several States". In principle, "government" is not a matter of voluntary agreements among the members of society; rather, "government" claims the right, and even the duty, to employ compulsion in situations in which no mere private individuals could legitimately do so (conscription of persons by impressment and of property by taxation being the preëminent examples). In the starkest terms, "government" is the organization and application of political power; and "'[p]olitical power grows out of the barrel of a gun'".[1355] "Government" is force—justified, perhaps, by "the Laws of Nature and of Nature's God", but force nonetheless. ***The essence of sovereignty is the sword.***

In particular, the Militia share this principal characteristic of "government", because they are themselves based upon *near-universal compulsion*, in two aspects. *First*, the basic means the Militia employ in service of "the security of a free State" is force in its most elemental form. The primary organizational and operational principle of the Militia is encapsulated in "the right of the people to keep and bear *Arms*".[1356] This "right" is primarily concerned, not with mere individual self-defense, let alone hunting or "sport shooting", but instead with the availability and use of "Arms" by "the people" themselves for military, *para*-military, and law-enforcement purposes—in the constitutional litany, "to execute the Laws of the Union, suppress Insurrections and repel Invasions".[1357] Their "right * * * to keep *and bear* Arms" explicitly presupposes that, in and through the Militia, "the people" will, in the most direct manner possible, coerce invaders, insurrectionists, and law-breakers—indeed, that in and through the Militia "the people" will apply whatever level of corrective compulsion by force of "Arms" may prove necessary to anyone and everyone who violates the laws or seeks to overthrow or subvert them. *Second*, "the right of the people to keep and bear Arms" in "[a] well regulated Militia" is not simply a "right of the people" to coerce adventitious wrongdoers as the occasion may arise, but also a *permanent, on-going duty* which the law enforces on everyone among "the people" who is capable of service in such a Militia. In practice, the Militia's authority,

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[1355] *Quotations From Chairman Mao, ante* note 28, at 61.

[1356] U.S. Const. amend. II (emphasis supplied).

[1357] U.S. Const. art. I, § 8, cl. 15.

responsibility, and ability "to execute the Laws of the Union" begins with and depends upon universal compulsion of all eligible Americans to participate in the Militia. So "the Militia of the several States" are *doubly governmental* in this critical respect: Their right to coerce is both external, applied to those who would break the law or breach the peace; and internal, applied to all law-abiding citizens who are eligible to be the Militia's members.

Because the Militia are "necessary to the security of a *free* State", and "a *free* State" is one in which "the people" govern themselves, near-universal compulsion of membership in the Militia is both unavoidable and desirable. Far from being inconsistent with self-government in a free society, compulsory participation of all eligible citizens in the Militia is the clearest manifestation of that state of affairs. Inasmuch as in "a *free* State" "the people" govern themselves, their participation in the Militia is not only an exercise of the powers, but also the indispensable evidence of the very existence, of self-government. An individual cannot claim to govern himself while simultaneously refusing to perform *in propria persona* the most important function of self-government, upon which the very "security", in every aspect, of that society (and of himself as a member) critically depends. Therefore, the citizens of a free and self-governing society, for their own political, economic, and social, as well as merely existential, self-preservation under "the Laws of Nature and of Nature's God", are *required* to form themselves into Militia through their government.

As a consequence of this, every government of a free society labors under an absolute duty to establish adequate standards and provide efficient procedures for forming, organizing, arming, disciplining, training, and deploying that society's Militia in aid of the perceived needs of "homeland security". In America particularly, because the Militia are instruments through which society and all of its members assert and exert their collective and individual rights of self-preservation under "the Laws of Nature and of Nature's God"—and because the right to "Life" is foremost among the "certain unalienable Rights" with which "all men * * * are endowed by their Creator", and which "Governments are instituted among Men" in order "to secure" through the exercise of "just powers" "deriv[ed] * * * from the consent of the governed"[1358]—therefore, all such "Governments" are required to settle and regulate Militia as a consequence of their essential nature and in fulfillment of their fundamental purpose. Indeed, for the aggregate of governmental powers to be "just" (in the sense the Declaration of Independence employs that term), *some* of those powers must be directed towards, and *none* of them may be employed to hinder (let alone prohibit), promoting, facilitating, and even (where necessary) compelling every eligible citizen's full participation in the Militia.

[1358] Declaration of Independence.

Because, as the Second Amendment declares, "[a] well regulated Militia" is "*necessary* to the security of a free State", "a free State"—simply as the consequence of its being "a free State"—not only must enjoy the power, but also must be subject to and willing to enforce the duty, to establish and permanently to maintain a Militia. And if the representatives whom WE THE PEOPLE have selected for public office fail, neglect, or simply refuse to perform their responsibilities in this regard, then WE THE PEOPLE themselves, as *self*-governors, must act independently and decisively to fill the gap as soon as possible.

3. Governmental status. From their special governmental character derives the even more remarkable governmental status of "the Militia of the several States". Yes, the Militia are permanent parts of the Constitution's federal system, no less integral and important to it than the States themselves, or Congress, the President, and the Supreme Court. And yes, to be "well regulated", the Militia must be organized, armed, disciplined, and trained pursuant to statutes enacted by Congress and the several States' legislatures.[1359] But the governmental status of the Militia consists of more than their being mere components or creatures of some level of government. Because they are composed of WE THE PEOPLE themselves, the Militia are not simply the products of some exercise of governmental authority, whether of a constitutional or statutory nature, but instead embody the very essence of that authority.

Being composed of the vast majority of the very individuals who exercise sovereignty in "a free State" through a "Republican Form of Government" characterized by popular self-government[1360]—and being organized, armed, disciplined, trained, and deployed for the very purpose of preserving that sovereignty against all enemies—the Militia must reflect, partake of, and in their actions embody the sovereignty of their members. For when WE THE PEOPLE perform the vital governmental function which in the last analysis only they themselves can perform, they must thereby constitute governmental institutions and exercise governmental authority of the very highest order. In that capacity, THE PEOPLE must form and act as the most authoritative of all governmental institutions, because *only* they, arrayed in "well regulated Militia", are "*necessary* to the security of a free State". Doubtlessly, this is why the Constitution expressly delegates to "the Militia of the several States"—*and to the Militia alone*—the power and the duty "to execute the Laws of the Union, suppress Insurrections and repel Invasions".

As members of governmental institutions exercising the very highest form of governmental authority, WE THE PEOPLE in their capacity as Militiamen qualify

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[1359] *E.g.,* U.S. Const. art. I, § 8, cl. 16.

[1360] *Compare* U.S. Const. art. IV, § 4 *with* Chisholm v. Georgia, 2 U.S. (2 Dallas) 419, 454, 456-457 (opinion of Wilson, J.), 471-472 (opinion of Jay, C.J.) (1793).

as *public officials*. For "[a]n office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties"[1361]—each element of which definition applies perfectly to all of the members of "the Militia of the several States". Members of the Militia, however, are not just "public officials" somehow of equal standing with all other "public officials". Instead, they are "public officials" who, in a crisis, are empowered and even required by "the Laws of Nature and of Nature's God", through the Declaration of Independence, to override the authority of all other "public officials": namely, "to alter or to abolish [the existing Form of Government], and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness." This authority—"to throw off [despotic] Government, and to provide new guards for the[People's] future security"—is one reason why the Militia are truly "*necessary* to the security of a free State". For when that "security" is threatened from within the body politic by rogue public officials who have seized control of most of the apparatus of government, *only* the Militia can rectify the situation.

B. The governmental nature of the Militia confirmed by American history. The chronicle of American legal history establishes beyond doubt the thoroughly governmental nature of "the Militia of the several States".

1. The Militia were first authorized perforce of Colonial charters and then were settled and periodically regulated by means of numerous Colonial and State statutes from the early 1600s through the late 1700s. With one lone exception, from the very beginning they were permanent establishments based upon the governmental principle of compulsion to service of every eligible citizen.

Most revealing in this regard are the details of that peculiar exception. During her early existence, Pennsylvania settled no Militia at all. Finally, in 1755, she enacted a statute purporting to establish a "militia" in which participation was entirely *voluntary*. Beyond any doubt, the legislators were motivated by the highest principles of religious scruple and toleration. As the statute explained, Pennsylvania had been "first settled by * * * Quakers, who, though they d[id] not * * * condemn the use of arms in others, yet [we]re principled against bearing arms themselves"; "[a]nd for them by any law to compel others to bear arms and exempt themselves would [have] be[en] inconsistent and partial." Yet the Colony contained "great numbers of people of other religious denominations * * * , some of whom ha[d] been disciplined in the art of war and conscientiously th[ought] it their duty to fight in defense of their country, their wives, their families and estates". From these people had arisen "petitions * * * , setting forth that the petitioners [we]re very willing to defend themselves and their country and desirous of being formed into

[1361] United States v. Hartwell, 73 U.S. (6 Wallace) 385, 393 (1868).

regular bodies for that purpose, instructed and disciplined under proper officers with suitable and legal authority; representing withal that unless measures of this kind [we]re taken, * * * they [could] not assemble to oppose the enemy without the utmost danger of exposing themselves to confusion and destruction." The legislators also feared that "the voluntary assembling of great bodies of armed men from different parts of the province on any occasional alarm, * * * without call or authority from the government and without due order and direction among themselves, m[ight] be attended with danger to our neighboring Indian friends and allies, as well as to the internal peace of the province." So, believing it to be unreasonable "that any should through a want of legal powers be in the least restrained from doing what they judge it their duty to do for their own security and the public good," the legislators decreed that

> it shall and may be lawful for the freemen of this province to form themselves into companies, as heretofore they have used in time of war without law, and for each company * * * to choose its own officers, * * * and present them to the governor * * * for his approbation * * * .
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> * * * And * * * as soon as the said companies * * * are formed * * * , it shall and may be lawful to and for the governor * * * , by and with the advice and consent of the [officers] * * * , to form, make and establish articles of war for the better government of the forces * * * ; which articles of war * * * shall be * * * distributed to the captains of the several companies, and by them distinctly read to their respective companies; and all and every * * * freeman who shall, after at least three days' consideration of the said articles, voluntarily sign the same in the presence of some one justice of the peace. acknowledging * * * that he has well considered thereof and is willing to be bound and governed thereby, * * * shall thenceforth be deemed well and duly bound to the observance of the said articles and to the duties thereby required, and subject to the pains, penalties, punishments and forfeitures that may therein be appointed for disobedience and other offenses.
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> Provided always, That the articles so to be made and established shall contain nothing repugnant, but be as near as possible conformable to the military laws of Great Britain * * * , the different circumstances of this province compared with Great Britain, and of a voluntary militia of freemen compared with mercenary standing troops, being duly weighed and maturely considered.
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> Provided also, That nothing in this act shall be understood or construed to give any power or authority to the governor * * * and the said officers to make any articles or rules that shall in the least affect those of the inhabitants of this province who are conscientiously scrupulous of bearing arms, either in their liberties, persons or estates, nor any other persons of what persuasion or denomination soever who have not first

> voluntarily and freely signed the said articles after due consideration * * * .
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> Provided also, That no youth under the age of twenty-one years nor any bought servant or indented apprentice shall be admitted to enroll himself or be capable of being enrolled in the said companies * * * without the consent of his or their parents or guardians, masters or mistresses, in writing under their hands first had and obtained.
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> * * * * *
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> * * * Provided also, That no * * * party of volunteers shall by virtue of this act be compelled or led more than three days' march beyond the inhabited parts of the province, not detained longer than three weeks in any garrison, without an express engagement for that purpose first voluntarily entered into * * * by every man so to march or remain in garrison.{EN-1959}

Thus, this statute attempted to bridge the divide between a true Militia based upon near-universal impressment, and a "private militia" with no inherent governmental authority, by creating "a voluntary militia of freemen" with explicit governmental approbation. This was no trivial problem, inasmuch as even the people "desirous of being formed into regular bodies" themselves had recognized that they needed *some* kind of *statutory* approval, so that their officers could exercise "legal authority" over them. Similarly, the legislators observed that, without a statute, these private groups suffered from "a want of legal powers"; their "form[ing] themselves into companies, as [t]heretofore they have used [to do] in time of war" was "without law"; and "the voluntary assembling of great bodies of armed men * * * , without call or authority from the government and without due order and direction among themselves", created serious "danger". Of course, all of these demerits could have been summed up in a succinct conclusion: namely, that "great bodies of armed men * * * without call or authority from the government and without due order and direction among themselves" could not constitute "well regulated Militia", or even any form of true "Militia" at all.

Trying to escape that conclusion, Pennsylvania's legislators licensed purely voluntary enlistments and service in their "militia of freemen". And not just to exempt conscientious objectors. Rather, *any* "persons of what persuasion or denomination soever" could refuse to join—exactly the opposite of the rule enforced everywhere else in Colonial America. And no minor or bought servant or apprentice could enter this "voluntary militia of freemen" without the written approval of his parent, guardian, master, or mistress—exactly the opposite of the rule in Colonies in which the initial age for enlistment was under twenty-one years, and servants were not exempted from Militia service. So, in effect, Pennsylvania's "voluntary militia of freemen" was a governmentally sanctioned "private militia", with the emphasis on "private", because the idiosyncratic political perspective of

each individual determined not only whether he would join, but whether he labored under any obligation to do so. Therein lurked the fallacy: namely, to assuage the religious qualms of Quakers in the legislature, Pennsylvania attempted to "regulate" her "militia" by allowing for *voluntary* enrollment alone, when the very voluntary nature of her novel system rendered her ostensible "militia" other than "*well* regulated", and even other than a true "militia" at all, because its method of organization was entirely at odds with what had always been done both in England and in the other Colonies.

The King, however, was not deceived by Pennsylvania's oxymoronic formulation of "a voluntary militia of freemen". To the contrary: In 1756, he "declare[d] his disallowance" of the statute, holding it "repealed, * * * void and of none effect".{EN-1960} And rightly so. As Blackstone pointed out, "the sole supreme government and command of the militia within all his majesty's realms and dominions * * * ever was and is the undoubted right of his majesty * * * ; and * * * both or either house of parliament cannot, nor ought to, pretend to the same".[1362] So, if the King would not accede to dictation by Parliament in such matters, of course he would not suffer the General Assembly of the mere Colony of Pennsylvania to deprive him of his right to require the compulsory enlistment of all eligible men in what ultimately was *his* Militia. And if the Royal disapproval meant (as it surely did) that Pennsylvania lacked authority to settle "a voluntary militia of freemen", then on the other hand it implicitly approved of the other twelve Colonies' long-settled reliance on near-universal impressment to fill the ranks of their Militia.

Of course, today, a recurrence of this episode could not occur, because neither Members of Congress nor any State's legislators, in organizing the Militia, could adopt or accede to such an explicitly *religious* limitation on their powers and duties. The Constitution requires that "the Militia of the several States", in keeping with *pre*-constitutional principles, be organized on the basis of near-universal and compulsory membership (other than for those very few who may be wholly exempted on such sufficient grounds as physical or mental incapacity to serve). Perforce of the original Constitution, "[t]he Senators and Representatives" in Congress "and the Members of the several State Legislatures * * * shall be bound by Oath or Affirmation, to support th[e] Constitution".[1363] And "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."[1364] Moreover, the First Amendment provides that "Congress shall make no law respecting an establishment of religion", which prohibition Section 1

[1362] *Commentaries on the Laws of England, ante* note 142, Volume 1, at 262-263.

[1363] U.S. Const. art. VI, cl. 3.

[1364] U.S. Const. art. VI, cl. 3.

of the Fourteenth Amendment extends to the States.[1365] Therefore, no legislator, without violating his "Oath or Affirmation" of office, can vote for a statute that prevents the proper organization of the Militia in order to conform to the tenets of a particular religion. Indeed, it would violate his "Oath or Affirmation" for a Member of Congress or a State legislator even to propose such a statute. (For a Member's mere proposal of such a statute in Congress, however, punishment could be forthcoming only from the House of Representatives or the Senate, as the case might be, because the mere proposal of a statute would arguably constitute nothing more than "Speech or Debate in either House", for which a Member "shall not be questioned in any other Place".[1366] A Member who actually voted for such a statute, however, would expose himself to far more serious sanctions.)

2. The Articles of Confederation required that "every state shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutred".[1367] Which every State—including, finally, Pennsylvania{EN-1961}—*had* been doing, by statute, prior to adoption of the Articles, and continued to do thereafter.

3. The Constitution recognized the Militia as preëxisting establishments of the States, which it incorporated as permanent parts of its federal structure in the form they all had assumed during the *pre*-constitutional era, and with the authority and responsibility to perform critical governmental functions "in the Service of the United States".[1368] Because they are "the Militia *of several States*",[1369] the General Government cannot abolish them, either directly, or by transmogrifying them into a constitutionally nonexistent "Militia *of the United States*", or by absorbing them within the regular Armed Forces. Because they are required to provide "Service" to the General Government in certain critical situations, the States cannot abolish them, either.[1370] And because they are "necessary to the security of a free State",[1371] in any "free State" even WE THE PEOPLE cannot abolish them in principle or practice, by abjuring or simply neglecting their own right and duty to form and participate in Militia as instruments of collective self-defense (although, if THE PEOPLE become so corrupt as to disregard their rights and duties as sovereigns, they arguably will thereby forfeit any claim to live in "a free State").

[1365] *See, e.g.,* Everson v. Board of Education, 330 U.S. 1 (1947). Of course, judicial decisions following the line of reasoning adopted in such as *Everson* are wrong in locating the source of this prohibition in the Due Process Clause of that Section of the Amendment, when its true locus is the Privileges or Immunities Clause. *See* W. Crosskey, *Politics and the Constitution, ante* note 206, Chapters XXX through XXXII. But, as folk wisdom has it, sometimes "it takes a crooked stick to beat a mad dog".

[1366] *Compare* U.S. Const. art. I, § 6, cl. 1 *with* art. I, § 5, cls. 1 and 2; *and contrast* 18 U.S.C. §§ 241 and 242.

[1367] Arts. of Confed'n art. VI, ¶ 4.

[1368] *See* U.S. Const. art. I, § 8, cls. 15 and 16, *and* art. II, § 2, cl. 1.

[1369] U.S. Const. art. II, § 2, cl. 1 (emphasis supplied).

[1370] *See* U.S. Const. art. VI, cl. 2.

[1371] U.S. Const. amend. II.

4. The Militia are the subjects of specific constitutional rights, powers, and privileges, separate from and even superior to those of the Armed Forces.[1372]

5. The Constitution explicitly assigns to—or more precisely put from the perspective of legal history, *recognizes in*—the Militia specific governmental authority and responsibility unique to them "to execute the Laws of the Union, suppress Insurrections and repel Invasions".[1373] This, in tandem with the duty—unique to him—which the Constitution imposes upon the President to "take Care that the Laws be faithfully executed",[1374] and which he may fulfill as "Commander in Chief * * * of the Militia of the several States, when called into the actual Service of the United States".[1375]

6. The Constitution requires that the Militia be "organiz[ed], arm[ed], and disciplin[ed]" pursuant to statute—either by Congress, for the purposes of "execut[ing] the Laws of the Union, suppress[ing] Insurrections and repel[ling] Invasions" "in the Service of the United States";[1376] or by the States if Congress fails, neglects, or refuses to regulate the Militia in that regard;[1377] and by the States with respect to all of those matters of specifically Local concern that do not involve "execut[ing] the Laws of the Union, suppress[ing] Insurrections and repel[ling] Invasions" "in the Service of the United States".[1378]

7. Membership in the Militia is assigned by law: The Constitution appoints the President as "Commander in Chief * * * of the Militia of the several States, when called into the actual Service of the United States".[1379] "[T]he Appointment of [all other] Officers" is "reserv[ed] to the States respectively".[1380] And all other eligible individuals, even if exempted from some duties for good and sufficient reasons consistent with "the common defence" and "the general Welfare",[1381] are required to serve in *some* manner perforce of the constitutional definition of "Militia".

8. All of this being true, not only do the Militia as institutions embody and exercise governmental authority of a constitutional and statutory stature, but also

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[1372] *Compare and contrast* U.S. Const. art. I, § 8, cls. 15 and 16 *and* amends. II and X *with* art. I, § 8, cls. 12 through 14, *and* art. II, § 2, cl. 1, *and with* amend. V. *See ante*, Chapter 30.

[1373] U.S. Const. art. I, § 8, cl. 15.

[1374] U.S. Const. art. II, § 3.

[1375] U.S. Const. art. II, § 2, cl. 1.

[1376] U.S. Const. art. I, § 8, cls. 15, 16, and 18.

[1377] *Compare* U.S. Const. art. VI, cl. 2 *with* amends. II and X.

[1378] *See* U.S. Const. amends. II and X.

[1379] U.S. Const. art. II, § 2, cl. 1.

[1380] U.S. Const. art. I, § 8, cl. 16.

[1381] U.S. Const. preamble.

WE THE PEOPLE in their capacity as members of the Militia qualify as actual *public officials*.[1382] True enough, WE THE PEOPLE, who "ordain[ed] and establish[ed] th[e] Constitution",[1383] have conferred this authority upon themselves. But to do so was part of "the Right of the People to alter or to abolish [any Form of Government], * * * and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness".[1384]

C. The supreme governmental nature of the Militia prefigured in *pre*-constitutional English law. Quite revealing in this regard is the evolution of the Militia as governmental entities from *pre*-constitutional English *statutory* law to the *post*-independence American *constitutional* law just canvassed.

1. As Blackstone explained the law of England,

> [B]Y the absolute *rights* of individuals we mean those which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is intitled to enjoy, whether out of society or in it. * * *
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> FOR the principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature; but which could not be preserved in peace without that mutual assistance and intercourse, which is gained by the institution of friendly and social communities. Hence it follows, that the first and primary end of human laws is to maintain and regulate those *absolute* rights of individuals. * * *
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> THE absolute rights of man * * * are * * * denominated the natural liberty of mankind. This natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature * * * . But every man, when he enters into society, gives up a part of his natural liberty * * * ; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish. * * * Political therefore, or civil, liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the publick. Hence we may collect that the law, which restrains a man from doing mischief to his follow citizens, though it diminishes the natural, increases the civil liberty of mankind: but every wanton and causeless restraint of the will of the subject, whether practiced by a monarch, a nobility, or a popular assembly, is a degree of tyranny.

[1382] *See ante*, at 844-845.

[1383] U.S. Const. preamble.

[1384] Declaration of Independence.

* * * * *

THE absolute rights of every Englishman (which, taken in a political and extensive sense, are usually called their liberties) as they are founded on nature and reason, so they are coeval with our form of government; though subject at times to fluctuate and change: their establishment (excellent as it is) being still human. * * * But * * * their fundamental articles have been from time to time asserted in parliament, as often as they were thought to be in danger.

* * * * *

The rights themselves, thus defined by these several statutes, consist of a number of private immunities * * * . And these may be reduced to there [*sic*, "three" was undoubtedly meant] principal or primary articles; the right of personal security, the right of personal liberty, and the right of private property: because as there is no other known method of compulsion, or of abridging man's natural free will, but by an infringement or diminution of one or the other of these important rights, the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and more extensive sense.

* * * * *

* * * But in vain would these rights be declared, ascertained, and protected by the dead letter of the laws, if the constitution had provided no other method to secure their actual enjoyment. It has therefore established certain other auxiliary subordinate rights of the subject, which serve principally as barriers to protect and maintain inviolate the three great and primary rights of personal security, personal liberty, and private property. These are,

1. THE constitution, powers, and privileges of parliament * * * .

2. THE limitation of the king's prerogative, by bounds so certain and notorious, that it is impossible he should exceed them without the consent of the people. * * * The former of these keeps the legislative power in due health and vigour, so as to make it improbable that laws should be enacted destructive of general liberty: the latter is a guard upon the executive power, by restraining it from acting either beyond or in contradiction to the laws, that are framed and established by the other.

3. A THIRD subordinate right of every Englishman is that of applying to the courts of justice for redress of injuries. Since the law is * * * the supreme arbiter of every man's life, liberty, and property, courts of justice must at all times be open * * * and the law be duly administered therein.

* * * * *

4. IF there should happen any uncommon injury, or infringement of the rights before-mentioned, which the ordinary course of law is too defective to reach, there still remains a fourth subordinate right appertaining to every individual, namely, the right of petitioning the king,

> or either house of parliament, for the redress of grievances. * * * Care only must be taken, lest, under the pretence of petitioning, the subject be guilty of any riot or tumult; * * * and, to prevent this, it is provided by * * * statute * * * that no petition to the king, or either house of parliament, for any alterations in church or state, shall be signed by above twenty persons, unless the matter thereof be approved by three justices of the peace or the major part of the grand jury, in the country; and in London by the lord mayor, aldermen, and common council: nor shall any petition be presented by more than ten persons at a time. * * *
>
> 5. THE fifth and last auxiliary right of the subject * * * is that of having arms for their defence, suitable to their condition and degree, and such as are allowed by law. Which is also declared by * * * statute * * * and is indeed a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.[1385]

An exact parallel exists between, on the one hand, Blackstone's descriptions of men's "absolute rights" and of the proper rôle of government in guaranteeing those rights, and, on the other hand, the assertions in the Declaration of Independence that "all men are endowed by their Creator with certain unalienable Rights; that among these are Life, Liberty and the pursuit of Happiness"; and "[t]hat to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed". Moreover, a close relationship exists between the five-fold English scheme of protections for men's "absolute rights" and the plan the Constitution adopted. For, following the pattern of the English political and legal system, the Constitution established three branches of government—legislative, executive, and judicial in character[1386]—the first three of Blackstone's "auxiliary subordinate rights of the subject". It recognized "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances"[1387]—the fourth of Blackstone's "auxiliary subordinate rights". And it secured "the right of the people to keep and bear Arms"[1388]—the fifth and last of those rights.

2. In the English system, however, the protections for all of "the absolute *rights* of individuals" were purely *statutory* and therefore impermanent in nature—as Blackstone described them, "asserted in parliament", and "defined by * * * several statutes", *but "subject at times to fluctuate and change"*. This was true even of "the

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[1385] *Commentaries on the Laws of England, ante* note 142, Volume 1, at 123-126, 127, 129, 140-141, 143-144 (footnote omitted).

[1386] U.S. Const. arts. I, II, and III.

[1387] U.S. Const. amend. I.

[1388] U.S. Const. art. I, § 8, cls. 15 and 16; art. II, § 2, cl. 1; *and* amend. II.

natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression"—so that, although Englishmen might "hav[e] arms for their defence", they were only "such [arms] as are allowed by law", "[w]hich is also *declared by* * * * *statute* * * * and is indeed *a public allowance, under due restrictions*" that could change, for the better or the worse, with the whims of Parliamentary majorities. In contrast, after 1776, America's law set an entirely new course.

a. The original Constitution fixed the structures, the operations, and especially the powers and disabilities of the legislative, executive, and judicial branches of the General Government, none of which, singly or in any combination, enjoys any authority to expand or contract the authority of the General Government or the States, except through the extraordinary process of amendment of the Constitution itself.[1389]

b. The First Amendment then commanded that "Congress shall make no law respecting" individuals' freedom "peaceably to assemble, and to petition the Government for a redress of grievances"—so that, now, *any* number of peaceable people may present *any* petition for "redress" as to *any* "grievances" without *anyone's* prior approval.

c. Most *radically* (in the sense of penetrating to the very root of the matter of securing Americans' "natural liberty"), the Second Amendment guaranteed "the right of the people to keep and bear Arms" for the primary purpose of forming "well regulated Militia". Indeed, WE THE PEOPLE deemed this right so vital for this purpose that they secured it *twice*: (i) By incorporating "the Militia of the several States" into its federal structure, and requiring Congress "[t]o provide for organizing, arming, and disciplining, the Militia",[1390] the original Constitution made the Militia *permanent* parts of the governmental apparatus, no less than Congress, the President, the Judiciary, and even the States themselves. So, inasmuch as every "well regulated militia" is "composed of the body of the people, trained to arms",[1391] and inasmuch as "the people" in a "*well regulated* militia" always possess their own arms in their own homes,[1392] the original Constitution recognized, protected, and provided for effectuation of "the right of the people to keep and bear Arms"—proving that, in this particular at least, "the [original] Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS".[1393] (ii) In affirming "the right of the people to keep and bear Arms", the Second Amendment

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[1389] U.S. Const. art. V *and* amend. X.

[1390] U.S. Const. art. I, § 8, cls. 15 and 16, *and* art. II, § 2, cl. 1.

[1391] Virginia Declaration of Rights (1776) art. 13.

[1392] *See post*, Chapter 38.

[1393] *The Federalist* No. 84 (Alexander Hamilton).

emphasized "the people's" ultimate independence in this regard. For, although "to * * * bear Arms" may mean more than to employ "Arms" in a purely military fashion, it surely means at least that.[1394] Therefore, inasmuch as "the right of the people to keep and bear Arms, shall not be infringed"; and inasmuch as this prohibition extends to *all* public officials;[1395] then *no* public official can deny "the people" of any State "a well regulated militia * * * composed of the body of the people, trained to arms". This amounts to nothing less than a constitutional command to both Congress and the States to secure to "the people" the "'[p]olitical power [that] grows out of the barrel of a gun'";[1396] and, if Congress and the States should default in their duties in that particular, it extends a constitutional commission to "the people" from "the people" to secure that power by and for themselves.

Moreover, in contradistinction to *pre*-constitutional English law, under the Constitution—which bans not only overt "Titles of Nobility" but consequently also any status of ignobility[1397]—"the people" are not limited to only such "arms for their defence" as public officials may imagine are "suitable to [individuals'] condition and degree". Instead, *everyone* who is eligible for the Militia (other than conscientious objectors) is to be armed as well as "trained to arms". In America, arms in the hands of "the people" are not simply "*allowable* by law", which under the old English formulation implied statutory permission and therefore possibly denial, but are *multiply required* by "the supreme Law of the Land". In addition, "the right of the people to keep and bear Arms" is not simply, as in old England, "a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression". For the Constitution extends to the Militia the authority and responsibility both "to execute the Laws of the Union"[1398] even *before* those "laws [might be] found insufficient to restrain the violence of oppression", and to employ those "Laws" precisely in order to deter and to "restrain [such] violence".

d. To maintain this new system of limited governmental powers and expansive individual rights—that is, a system of true popular sovereignty in which the people themselves control the "'[p]olitical power [that] grows out of the barrel of a gun'"—the original Constitution established and the Second Amendment confirmed a complex federal structure of interlocking "checks and balances", each of which emphasizes in one manner or another the uniquely governmental character of the Militia:

[1394] *See post*, at 1381-1386.

[1395] *See post*, at 1386-1398.

[1396] *Quotations From Chairman Mao, ante* note 28, at 61.

[1397] *See* U.S. Const. art. I, § 9, cl. 8 and § 10, cl. 1.

[1398] U.S. Const. art. I, § 8, cl. 15.

(1) The Militia are primarily and permanently institutions "of the several States", and only secondarily and contingently instruments that the General Government may "employ[ ] in the Service of the United States".[1399]

(2) Congress is explicitly delegated certain powers with respect to the Militia, because otherwise—the latter being originally and permanently *State* establishments—it would have no authority in regard to them at all, any more than it enjoys any authority over any other branches of the States' governments. This inherent disability of Congress was recognized in and carried over from the Articles of Confederation, which provided that "every state shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutred",[1400] just as the independent States (and the Colonies before them) had kept up such Militia on their own throughout the *pre-*constitutional period.

(3) Perforce of the nature of the Militia as *State* institutions, the powers of Congress with respect to them are closely confined. With respect to their employment, Congress is authorized "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions"[1401]—and for no other purpose whatsoever. With respect to their regulation, Congress is permitted "[t]o provide for organizing, arming, and disciplining, the Militia"[1402]—which regulation, in the nature of things, must be addressed to the three purposes for which the Militia may be "call[ed] forth". And with respect to the Militia's governance, Congress is allowed "[t]o provide * * * for governing such Part of them as may be employed in the Service of the United States"[1403]—which governance, also in the nature of things, can take hold only when the Militia have actually been "call[ed] forth" for one or more of the three constitutional purposes. Otherwise, Congress is powerless to employ, regulate, or govern the Militia at any time in any way for any reason. Outside of the three constitutional purposes, regulation of the Militia to serve those purposes, and governance of the Militia when "call[ed] forth" to be so "employed", the Militia are none of Congress's business. Thus, because Congress would have no power whatsoever over the Militia absent an express constitutional grant, these delegations of power are simultaneously statements of Congressional disabilities with respect to every other possible employment, regulation, and act of governance of and over the Militia.

(4) The States' powers with respect their Militia extend to everything else conceivable—all other employments, all forms of regulation related to such

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[1399] *Compare* U.S. Const. art. II, § 2, cl. 1 *with* art. I, § 8, cl. 16.

[1400] Arts. of Confed'n art. VI, ¶ 4.

[1401] U.S. Const. art. I, § 8, cl. 15.

[1402] U.S. Const. art. I, § 8, cl. 16.

[1403] U.S. Const. art. I, § 8, cl. 16.

employments, and general governance whenever the Militia are not "employed in the Service of the United States".[1404] To emphasize and secure this huge residuum of authority, the Constitution "reserv[es] to the States respectively, the Appointment of the Officers" in their Militia[1405]—including in each State even the commander in chief (or equivalent rank) for most of the time, because the Constitution empowers the President to act as "Commander in Chief * * * of the Militia of the several States" *only* "when [the Militia are] called into the *actual* Service of the United States".[1406]

(5) Finally, WE THE PEOPLE wield the ultimate "check and balance", embodied in "the right * * * to keep and bear Arms" for the purpose of maintaining "well regulated Militia" in service of "the security of a free State" in every State and the United States as a whole *at all times and under all circumstances*.[1407] Perforce of that right, THE PEOPLE can demand that Congress and the States' legislatures exercise their powers so that such Militia *always* exist, are *always* adequately prepared, and *whenever and wherever necessary* are put to their proper use. For, unlike public officials of the General Government and the States whose identities change from election to election, and who can assert no claim to authority except as a consequence of those elections, WE THE PEOPLE *always* comprise "the Militia of the several States" and *always* exercise the authority of those establishments. Even if, as the result of some catastrophe, *no elections* were held during such an extended period of time that every public office of consequence in the legislative and executive branches of the General Government and the States became vacant, and even the bureaucracies become leaderless, the Militia would nevertheless survive—and not just physically, but also in terms of their governmental authority. For the Militia could lose their authority only if WE THE PEOPLE lost theirs—which could happen only if THE PEOPLE ceased to exist as America's sovereigns.

D. The constitutional impossibility of "private militia". All of this being indisputably true, no "private militia" with legal authority under the Constitution are possible in America:

1. In the contemporary United States, the term "private militia" typically signifies an organization which, although it may not be illegal or *extra*-legal, nonetheless *exists outside of the government and makes no claim to any specifically governmental authority*. So, in American constitutional law, "private militia" is a contradiction in terms, because the Militia of *every* Colony and independent State prior to ratification of the Constitution were *public* entities, both "settled" and

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[1404] U.S. Const. amend. X.

[1405] U.S. Const. art. I, § 8, cl. 16.

[1406] U.S. Const. art. II, § 2, cl. 1 (emphasis supplied). *See post*, at 871-880.

[1407] U.S. Const. amend. II.

"regulated" *by statute*, and thereby infused with and exercising *governmental* authority. Even the "Independent Companies" that volunteers formed in large numbers in Rhode Island and to a lesser extent in Virginia sought, and received, statutory authorization to become, not separate and private *para-*military entities, but integral components of the Militia.[1408] Membership in an Independent Company brought exemption from service in a regular Militia Company into which men were impressed, but not exemption from service in the Militia. Rather, membership in an Independent Company was perhaps the highest form of such service. Today, "the Militia of the several States" have been permanently "settled" by the Constitution, and are to be "well regulated" by statutes that Congress and the States' legislatures enact. Therefore, although individual citizens may organize private associations in which they acquire and train with arms both individually and collectively where such activity is legal (as in some forms and for some purposes it should be throughout this country),[1409] such organization and training can never qualify them as "Militia" in the constitutional sense of that noun—except perhaps in the extreme circumstances in which rogue Members of Congress and State legislators obstinately refuse to enact even the most rudimentary of Militia statutes, and thereupon "the people, from whom the militia must be taken," must exercise their "right to keep and bear arms" on their own initiative, "need[ing] no permission or regulation of law for the purpose".[1410]

2. An additional and intractable problem with some "private militia" is that various of their activities may *not* be legal, and even may be intentionally illegal. "*Private* militia", after all, are by definition not necessarily directed or directable towards the *public* purpose of maintaining "the security of a free State", or even the security of any polity at all. They may, in fact, be composed of principled anarchists or unprincipled outlaws, cloaking their true purposes in a loose-fitting historical disguise.

3. "Private militia" have and can claim no independent legal, and particularly constitutional, authority of their own. In true Militia, WE THE PEOPLE never act as mere private individual in private associations, but always as the executors of governmental power, in the final analysis subject only to "the Laws of Nature and of Nature's God". In contrast, because they are not governmental entities of any kind, "private militia" are not authorized to execute the laws, except insofar as the members of such groups may justifiably defend themselves or others from aggressors, as may any individual whether he belongs to a "private militia" or not. For example—

[1408] *See ante,* at 224-234 (Rhode Island) and 567-597 (Virginia).

[1409] *See* U.S. Const. amend. IX.

[1410] Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* (Boston, Massachusetts: Little Brown and Company, 1880), at 271.

a. The Constitution does not contemplate that Congress should "provide for calling forth", or the President should command, mere private individuals or groups to perform the governmental functions of "executing the Laws of the Union, suppress[ing] Insurrections", and "tak[ing] Care that the Laws be faithfully executed".

b. The Constitution does not contemplate that specifically *police* "powers not delegated to the United States * * * nor prohibited * * * to the States" but "reserved to the States * * * or to the people" are to be exercised by private parties. Arguably, police powers might be "reserved * * * to the people" as individuals and *ad hoc* groups if all "law and order" were irretrievably broken down and every man were compelled to defend himself. This contention assumes, however, that the phrase "to the people" means "to the people *as isolated individuals*" rather than as components of some recognizable political community. For if *all* "law and order" *have* broken down beyond recall, *how* could the Constitution—which, after all, is a law—continue to apply? In any event, even were that interpretation admissible in principle, it would not be applicable in any realistically conceivable situation. For, inasmuch as the Militia are composed of "the people" *as a whole*, unless *all* of "the people" in a particular Locality were exterminated, *some* part of the Militia would necessarily survive, *with legal authority and the practical means to enforce it*. So, absent the utter destruction of that Locality, whatever remnant of the Militia continued to exist would itself constitute the surviving embodiment of "law and order", and therefore would be entitled to exercise police powers against all other individuals.

c. The Constitution does not contemplate that any powers integral to "a Republican Form of *Government*", because "necessary to the security of a free *State*", are the province of *private* parties. And finally,

d. Precisely because "the Militia of the several States" have always been and today remain *governmental* entities, "the right of the people to keep and bear Arms" guaranteed by the Second Amendment is least of all an "individual" and "private" right (addressed, for instance, primarily to personal self-defense), but first and foremost: (i) a right pertaining to WE THE PEOPLE'S collective ability to preserve a certain "Form" of government uniquely beneficial to "the *common* defence" and "the *general* Welfare";[1411] and, even more fundamentally, (ii) a right pertaining to WE THE PEOPLE'S sovereignty, in that it locates the repository of supreme legal authority through application of the general axiom, "'[p]olitical power grows out of the barrel of a gun'", modified by the specifically American corollary that the "gun" is always held *by THE PEOPLE themselves under and in conformity with "the Laws of Nature and of Nature's God"*.[1412]

[1411] *Compare* Declaration of Independence *with* U.S. Const. preamble (emphasis supplied).

[1412] *Compare Quotations From Chairman Mao, ante* note 28, at 61, *with* Declaration of Independence.

4. "Private militia" have no means—or, for that matter, no plans or even aspirations—for obtaining governmental authority. No matter how large their membership or how effective in training their members may become, they always remain *extra*-governmental entities.

5. Even in a major economic, political, or social crisis, "private militia" could never become governmental entities simply because their members happened to be organized, armed, and trained, and on the basis of such preparation somehow managed to take control over certain geographical areas by force. Soon enough, the members of any such "private militia" would be ordered to obey the directives of the regularly constituted Militia, the State or Local police, the Armed Forces, or various other agencies of the States' governments or the General Government. And even if some of those entities enjoyed no constitutional right to assume command of any portion of "the Militia of the several States", if the members of a merely "private militia" refused to comply with their directives, they could and doubtlessly would be treated as lawbreakers—and presumably correctly so, because they would enjoy no constitutional or statutory authority of their own upon which to base their disobedience.

6. On the other hand, members of "private militia" cannot be effective by emphasizing the private nature of their activities. Most members of "private militia" style themselves as patriots whose ultimate purpose is to preserve, protect, and defend popular self-government in this country. That task, however, can best be accomplished by actually participating in popular self-government within the constitutional system of "checks and balances"—which, self-evidently, becomes more critical the more the political system deviates from constitutional standards. The most important of those "checks and balances" are the *real* "Militia of the several States", because they are at once both the most powerful of all "checks and balances" and the "checks and balances" that WE THE PEOPLE themselves control.

7. As a practical matter, "private militia" cannot play a useful rôle in securing popular self-government in this country because—absent a catastrophic collapse of the economic, political, and social systems—they will be unable to recruit sufficient members, for numerous reasons: *First*, all too many Americans simply refuse to believe that any such collapse *can* occur—so, for them, "private militia" are entirely irrelevant. *Second*, most Americans expect that, if a major crisis were to break out, somehow a shadowy entity known as "the government" would successfully deal with it—they being oblivious to the likelihood, if not the certainty, that the blunders and even crimes of incompetent or rogue public officials would have been the primary causes of the crisis in the first place, and that in the midst of the crisis such officials would be intent solely upon protecting themselves and their controllers and clients in factions and other special-interest groups. *Third*, the very people who mindlessly rely on "the government" to correct the problems "the government" has engendered would surely reject the assistance of "private militia"

precisely because such organizations had no governmental authority, or any way of obtaining it. *Fourth*, many contemporary "private militia" have little to no visibility or credibility or means of establishing either of them among the general public; and some "private militia" have garnered bad reputations, for good and sufficient reasons. So, if a failure of the economic, political, or social systems so calamitous as to shake the average American's naive faith in "the government" did occur, public awareness and acceptance of "private militia" would almost surely arrive too late for a handful of such "militia" scattered here and there throughout the country to recruit, equip, train, and deploy sufficient members to bring order out of chaos even in their own Localities.

8. "Private militia" tend to focus their efforts primarily on training their few committed members in exciting *para-*military techniques and exercises, rather than focusing on the more prosaic practices of popular self-government. For that reason, they attract a surfeit of individuals whose primary desire is "to play soldier" for a few days a month, rather than to learn how to be politically effective citizens every day of the year.

9. Because of the character of some of their members, "private militia" are the targets of *agents provocateurs*, infiltrators, informers, and other operatives deployed by rogue governmental agencies and malign private special-interest groups for the purpose of entrapping the *soi-disant* "militiamen" in arguably illegal activities, particularly involving firearms. Played up for all they are worth in the major media, these entrapments and "sting" operations tar with the brush of "extremism"—and even "terrorism"—every proponent of anything to do with "militia", and provide endless grist for the mills of "gun controllers". In stark contrast, any interference with "the Militia of the several States" by rogue operatives from governmental agencies or special-interest groups would be illegal—and subject to punishment by the Militia themselves, under their constitutional authority "to execute the Laws of the Union".

10. In every imaginable set of circumstances, "private militia" would serve no useful purpose. On the one hand, where a constitutional Militia existed, almost every individual who might become a member of some "private militia" would be required by law to enroll in the constitutional Militia, in which event no plausible reason would exist to form, and vanishingly few individuals would remain to join, any separate "private militia". On the other hand, where no constitutional Militia existed, citizens' first concern should be to revitalize such a Militia in strict accordance with *pre-*constitutional principles, rather than to set up some "private militia" with no possible claim to constitutional authority.[1413]

[1413] *See* Edwin Vieira, Jr., *Constitutional "Homeland Security", Volume One, The Nation in Arms* (Ashland, Ohio: BookMasters, Inc., 2007).

11. Even a "*quasi*-private militia" of the pattern which Pennsylvania attempted to set up in 1755—that is, "a voluntary militia of freemen" approved as such by a State statute[1414]—could claim no constitutional authority today, and indeed no statutory authority, either, because the statute creating such "a voluntary militia" would violate the constitutional principle of "[a] well regulated Militia" that mandates *near-universal* and *compulsory* service.[1415] Arguably, in a community composed solely of thoroughgoing patriots, "a voluntary militia" might in fact become near-universal in at least titular membership. But it would nonetheless not be compulsory *in law*—and, not being compulsory, it would be most unlikely ever to become near-universal even in that community, let alone anywhere else, when arose a crisis sufficiently severe to threaten to fracture popular solidarity along political, economic, social, or religious lines.

Admittedly, a compulsory Militia might not survive intact the onset of such a crisis, either.[1416] But people long schooled in their duty to coöperate to the maximum extent in governing their community—which is the primary lesson participation in the Militia teaches—would be less likely than any others to succumb to such fragmentation. Of course, it is also possible that a large majority of the community could become so corrupt as to refuse to settle a true Militia, in which case "a voluntary militia" might be the best such establishment that could be mounted. As Thomas Cushing, Samuel Adams, and William Heath of the Massachusetts Committee of Correspondence wrote to the Virginia Committee of Correspondence in 1773:

> *[I]t may be worth Consideration, that the Work is more likely to be well done, at a Time when the Ideas of Liberty, and its Importance are strong in Men's Minds. There is Danger that these Ideas will hereafter grow faint and languid. Our Posterity may be accustomed to bear the Yoke; and being inured to Servility they may even bow the Shoulder to the Burden. It can never be expected that a People however numerous, will form and execute a wise Plan to perpetuate their Liberty, when they have lost the Spirit and Feeling of it.*[1417]

Yet few individuals among a people largely devoid of "the Spirit and Feeling of [Liberty]" could be expected to form "a voluntary militia", or if they did so could be

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[1414] *See ante*, at 87-88 and 845-848.

[1415] *See post*, Chapter 35.

[1416] For the historically most pertinent example, many Americans who were considered staunchly patriotic during the early years of the Colonies' disputes with King George III and his ministerial governments—and who decried such measures as the Stamp Act, the so-called "Intolerable Acts", and the Quebec Act—emerged as ardent Loyalists when Americans' opposition to Parliamentary excesses finally ripened into a demand for independence. *See generally, e.g.,* Thomas B. Allen, *Tories: Fighting for the King in America's First Civil War* (New York, New York: HarperCollins Publishers, 2010).

[1417] Letter of 21 October 1773, in JOURNALS of the HOUSE *of* BURGESSES of VIRGINIA, *ante* note 318, at 57.

expected to convince many others to join with them in defending the abstraction of "a free State" at the cost of those others' treasure and ease, let alone their blood.

12. To be sure, if no constitutional Militia existed, and a catastrophic breakdown of public order suddenly occurred, individual citizens would have a duty under "the Laws of Nature and of Nature's God" to protect themselves collectively. As Blackstone taught,

> the right of punishing crimes against the law of nature, as murder and the like, is in a state of mere nature vested in every individual. For it must be vested in somebody; otherwise the laws of nature would be vain and fruitless, if none were empowered to put them in execution: and if that power is vested in any *one*, it must also be vested in *all* mankind; since all are by nature equal. * * * In a state of society this right is transferred from individuals to the sovereign power; whereby men are prevented from being judges in their own causes, which is one of the evils that civil government was intended to remedy. Whatever power therefore individuals had of punishing offences against the law of nature, that is now vested in the magistrate alone; who bears the sword of justice by the consent of the whole community.[1418]

So, if dire circumstances rendered "the magistrate[s']" normal authority utterly unavailable or ineffective, individuals would be justified *ex necessitate* in forming armed establishments in order to enforce law and order in their own Localities. In that event, however, such establishments would *not*, strictly speaking, be "private" at all, but instead would be at least provisional—and, depending upon the extent and duration of the breakdown, perhaps more or less permanent—"governmental" entities. Otherwise, as long as any functioning vestige of a preëxisting legitimate government remained, individuals would not be entitled to set up any "private militia" on their own authority, because a proper Militia could still be formed under the government's aegis.

Similarly, if "a long train of abuses and usurpations, pursuing invariably the same Object evince[d] a design to reduce the[People] under absolute Despotism, it [would be] * * * their right, it [would be] * * * their duty, to throw off such Government, and to provide new Guards for their future security"[1419]—presumably, by raising Militia on their own initiative in their own defense, because usurpers and tyrants would doubtlessly have enacted spurious "laws" purporting to prohibit WE THE PEOPLE from arming and organizing themselves. Again, these would not be "private militia", because they would be exercises of THE PEOPLE'S sovereign right

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[1418] *Commentaries on the Laws of England*, *ante* note 142, Volume 4, at 7-8.

[1419] Declaration of Independence.

"to alter or to abolish" a bad "Form of Government", and "to institute new Government", if necessary by force of arms.

E. The Militia the surest guarantors of WE THE PEOPLE'S liberties. Nevertheless, that the Militia are quintessentially governmental establishments should occasion no concern among patriots, because in America "government", properly understood and administered, is truly "of the people, by the people, for the people"[1420]—and, in the final analysis, the Militia themselves embody and guarantee that state of affairs, because they *are* "the people".

1. The Militia are the surest guarantors of WE THE PEOPLE'S liberties, not in spite of being governmental establishments, but precisely because they *are* governmental establishments of a very special kind. The Militia are the *very safest* of all governmental establishments, because they and they alone invest THE PEOPLE with supreme legal authority *in their own hands*, and provide them with a potent mechanism for enforcing the law *in their own hands*, and therefore with the means to secure their own liberty *in their own hands*. Certainly, when every thinking adult in America in 1791 knew that "[a] well regulated Militia" was one "settled" and "regulated" *by statute as a governmental institution*, no one could have believed that "[a] well regulated Militia" is "necessary to the security of a free State" (as the Second Amendment declares) yet might ever threaten such "security". So, today, that declaration informs, instructs, as admonishes Americans that *only by settling and regulating their Militia as* ***governmental*** *institutions according to the true pre-constitutional pattern can "the security of a free State" be guaranteed anywhere in this country*.

2. Revitalization of "the Militia of the several States" today (so long as it is accomplished along strictly constitutional lines) poses little danger to WE THE PEOPLE from the governmental character the Militia must assume, and derivatively from the possibly unsavory characters who might stealthily ascend the ladder of public office—whether such miscreants turn out to be rogue State Governors, or a rogue President, or a profusion of rogue Members of Congress or the States' legislatures.

a. In the extreme political circumstances predictably attendant upon attempts at usurpation and tyranny, political buccaneers posing as "the President" of the United States or "the Governor" of some State will likely issue directives, in their capacities as supposed "commanders in chief", aimed at coöpting the Militia into their schemes. But in each State in which a constitutional Militia exists, they will be unable to obtain the assent of more than a few individuals not already embraced within and among their cliques, factions, and clients. For if "*well regulated* Militia" exist at all, it will be because the overwhelming majority of WE THE PEOPLE

[1420] A. Lincoln, Gettysburg Address, *ante* note 30.

desire—and even in the face of adversity will demand—to live in "a free State". And institutions that are "necessary to the security of a free State", composed of such PEOPLE, will not bend before the dictates of usurpers and tyrants. To the contrary—

(1) Being "well regulated", Militiamen will understand the Constitution, "the Laws of the Union", and the laws of their States; their own rights, powers, privileges, immunities, and duties under those laws; and their own responsibility to maintain the rule of law against all enemies, domestic even more than foreign. In particular, Militiamen will know that, in the final analysis, *they* must judge whether the "Service" public officials might demand of them is "the *actual* Service of the United States" or of their own States; whether their States are being "*actually* invaded, or in such imminent Danger as will not admit of delay"; and whether they are "in *actual* service in time of War or public danger".[1421] Moreover, Militiamen will recognize that the most likely occasion for posing these and related questions to public officials will be when usurpation and tyranny are afoot—the immediate proof of which will be that officialdom's answers will amount only to mendacious bluff, bluster, and double-talk. For example, what happened to Virginia's last Royal Governor, Lord Dunmore, in 1775 presents a perfect picture of what would happen today, were *properly revitalized* "Militia of the several States" confronted by a like situation.[1422]

(2) Imbued with the authority "to execute the Laws of the Union, [and] suppress Insurrections", and to enforce the laws of their particular States, "well regulated" Militiamen will be entitled on their own recognizance to suppress the criminal enterprises of usurpers and tyrants *as those machinations arise*. For every scheme of usurpation and tyranny is a criminal act;[1423] and every such scheme in service of which the perpetrators use, or even contemplate the use of, force amounts to "Insurrection[ ]" and "domestic Violence" against the Constitution, the United States, the States, and WE THE PEOPLE—and, in the conspirators' actual employment of force, no less than "Treason"[1424]—which must be put down immediately in order to maintain "a Republican Form of Government" and ultimately "the security of a free State".[1425]

(3) "[W]ell regulated" Militiamen will *successfully* suppress every act of usurpation and tyranny, because they will have the combined moral, political, legal, and practical power to do so. *The* fundamental principle of American political

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[1421] *See* U.S. Const. art. II, § 2, cl. 1; art. I, § 10, cl. 3; *and* amend. V (emphases supplied). *See post*, at 871-880.

[1422] *See ante*, at 567-597.

[1423] *See, e.g.,* 18 U.S.C. §§ 241 and 242.

[1424] *See* U.S. Const. art. III, § 3, cl. 1. *See ante*, at 814-821.

[1425] *See* U.S. Const. art. I, § 8, cl. 15; art. IV, § 4; *and* amend. II.

science is that, "whenever any Form of Government becomes destructive of [men's unalienable Rights], it is the Right of the People to alter or to abolish it". *Indeed, it is not only their right, but under "the Laws of Nature and of Nature's God" "it is their* ***duty****, to throw off such Government".*[1426] And even if it should prove unnecessary "to throw off such Government" in its entirety, in extreme circumstances it would remain WE THE PEOPLE'S privilege and responsibility to correct the errant course of their government by punishing particular maleficent public officials as their misdeeds occurred. Yet, to be a *real* "right", there must be an *effective* remedy: "A right without a remedy is as if it were not. For every beneficial purpose it may be said not to exist."[1427] And to be a *real* "duty", it must be capable of fulfillment, not just in theory but in practice as well. At base, though, every "government" is an aggregation of physical force. For "'[p]olitical power grows out of the barrel of a gun'", and "the Sword and Soveraignty always march hand in hand".[1428] Thus, for WE THE PEOPLE to have a credible right and duty in law to "throw off such Government" of usurpers and tyrants, they must be able in fact to muster greater force than can their oppressors. Indeed, even to deter such miscreants, and thereby possibly avoid entirely the necessity to "throw off such Government", THE PEOPLE need to be able seriously to threaten the application of potentially overwhelming force. For "fear" is "the only restraining motive which may hold the hand of a tyrant".[1429]

b. When WE THE PEOPLE "ordained and established th[e] Constitution",[1430] they did not consign its or their future security to blind chance. Neither did they abandon it or themselves to the ministrations or mercies of such feckless or faithless men as Accident might vomit onto the political scene and Misfortune elevate to public office. Rather, THE PEOPLE reserved to themselves the right, the duty, and the power to safeguard their Constitution—and, subtending it, their Declaration of Independence—against all hazards at all times. The Constitution knows no "Militia *of the United States*", the power to create such an establishment having never been delegated to the United States. The Constitution recognizes "the Militia *of the several States*"; but the power to dispense with these institutions it has prohibited to the States by including those Militia as permanent structural components of the federal edifice—and, therefore, the ultimate power in, through, and over the Militia has been "reserved * * * to the people".[1431]

[1426] Declaration of Independence (emphasis supplied).

[1427] United States *ex rel.* Von Hoffman v. City of Quincy, 71 U.S. (4 Wallace) 535, 554 (1867). *Accord*, Poindexter v. Greenhow, 114 U.S. 270, 303 (1885); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

[1428] *Quotations From Chairman Mao, ante* note 28, at 61; AN ARGUMENT, Shewing that a Standing Army is inconsistent with A Free Government, *ante* note 27, at 7.

[1429] T. Jefferson, *A Summary View of the Rights of British America*, *ante* note 613.

[1430] U.S. Const. preamble.

[1431] *See* U.S. Const. amend. X.

This is emphatically proven by the Second Amendment's guarantee that "right *of the people* to keep and bear Arms, shall not be infringed". And this power is sufficient to its end—"the security of a free State"—because:

- It is *ubiquitous*, inasmuch as the Militia exist throughout the country in the persons of every single eligible citizen.

- It is *overwhelming*, inasmuch as WE THE PEOPLE organized in the Militia outnumber their potential oppressors by orders of magnitude; are armed; are in actual possession of almost all of the property, territory, and material resources in this country; and themselves embody the plenitude of human knowledge and skills that make America work. And,

- It is *inquisitorial*, inasmuch as it is capable of ferreting out the wrongdoing of rogue public officials at every level of government, if THE PEOPLE simply maintain their resolution and vigilance.

3. In addition, the Constitution contains numerous specific safeguards against misuse of the Militia:

a. Most obviously, although within her own territory a State may call forth her own Militia for any legitimate purpose in addition to the three allowable to Congress,[1432] oppression of the State's own citizens by rogue public officials in the service of factions and special-interest groups is anything but a legitimate purpose. After all, the purpose of "[a] well regulated Militia" is to provide "the security *of a free State*", not to empower the overseers of a *para*-military police state to shackle the people with the "badges and incidents" of slavery.[1433] Therefore, in the very nature of things, no rogue public officials in any State may attempt to employ her Militia to impose "martial law" (under any rubric or guise) in order to enforce her citizens' compliance with those officials' dictates.[1434] Indeed, any such attempt would constitute a *causus belli* as serious as Lord Dunmore's Proclamation in Virginia,[1435] which could justify WE THE PEOPLE then and there in invoking their right and duty "to throw off such Government, and to provide new Guards for their future security",[1436] just as Virginians responded to Dunmore's provocations. For anyone who attempts to deploy armed forces against THE PEOPLE who constitute the United States, or any of them, commits "Treason", by constitutional definition.[1437] *Mutatis mutandis*, the same condemnation would attach to any attempt by rogue

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[1432] *Compare* U.S. Const. amend. X *with* U.S. Const. art. I, § 8, cl. 16.

[1433] U.S. Const. amends. II and XIII.

[1434] The problem of defining "martial law", and the constitutional principles applicable to the most pertinent definitions, are discussed *post*, Chapter 48.

[1435] For the entire episode, *see ante*, at 567-597.

[1436] Declaration of Independence.

[1437] *See ante*, at 814-821.

officials in the General Government to employ the Militia to impose "martial law" or some other form of oppression upon either the States as political institutions or WE THE PEOPLE as individuals.

b. The Constitution empowers the President of the United States to assume the status of "Commander in Chief * * * of the Militia of the several States" *only* "when [the Militia are] called into *the actual Service of the United States*".[1438] And the Constitution delegates to Congress the powers: (i) "[t]o provide * * * for governing such Part of the[Militia] as may be employed in *the Service of the United States*",[1439] and such "Part" *only*; and (ii) "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions",[1440] and for those purposes *only*. Thus, *the Constitution defines "the Service of the United States" as those three specific and limited purposes alone, and makes such "Service" the condition* sine qua non *for deploying any "Part" of "the Militia of the several States" under the control of the United States*.

The President's authority as "Commander in Chief * * * of the Militia of the several States" differs from his authority as "Commander in Chief of the Army and Navy of the United States". The latter status pertains at all times that an "Army" or "Navy" actually exists. Of course, inasmuch as Congress need not "raise and support Armies"[1441] or "provide and maintain a Navy"[1442] unless it deems such establishments "necessary and proper" under the circumstances,[1443] the President in that regard could turn out to be the "Commander in Chief" of nothing, being possessed of a title without substance. On the other hand, although "the Militia of the several States" are permanent constitutional establishments, the President's authority as "Commander in Chief" over them is contingent both in law and fact—dependent upon both some statute through which Congress has "provide[d] for calling forth the Militia" "in the Service of the United States"[1444] and the existence of evidence satisfying the requirements of that statute.

Congress's power "[t]o provide * * * for governing such Part of the[Militia] as may be employed in the Service of the United States" is categorically distinct from its power "[t]o provide for organizing, arming, and disciplining, the Militia".[1445] The latter power enables Congress to impose a basic uniformity on "the Militia of

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[1438] U.S. Const. art. II, § 2, cl. 1 (emphasis supplied).

[1439] U.S. Const. art. I, § 8, cl. 16 (emphasis supplied).

[1440] U.S. Const. art. I, § 8, cl. 15.

[1441] U.S. Const. art. I, § 8, cl. 12.

[1442] U.S. Const. art. I, § 8, cl. 13.

[1443] *See* U.S. Const. art. I, § 8, cl. 18.

[1444] U.S. Const. art. I, § 8, cls. 15 and 16.

[1445] U.S. Const. art. I, § 8, cl. 16.

the several States" in their entirety throughout the country, with an eye towards maximizing their effectiveness "in the Service of the United States". The exercise of this power does not foreclose, however, the exertions of similar powers by the States, so long as those exertions are complementary or supplementary to, rather than contradictory of or otherwise incompatible with, Congress's mandates. The former power relates solely to some "Part" of the Militia which is actually "call[ed] forth" for "Service" on behalf of the United States upon the occurrence of circumstances that justify intervention by the Militia in order to fulfill one or more of the three purposes the Constitution stipulates. This, in contradistinction to Congress's power "[t]o make Rules for the Government and Regulation of the land and naval Forces", which "Rules" apply to those "Forces" in their entireties and at all times.[1446] So, "organizing, arming, and disciplining, the Militia" by Congress do not amount to "governing" them. And the mere existence of a Congressional statute for "organizing, arming, and disciplining, the Militia" does not in any way of its own force compel any "Part of the[Militia]" to comply with a Congressional code for "governing * * * them" or to take orders from the President of the United States as their "Commander in Chief".

Distinguishably, pursuant to a statute which "provid[ed] for organizing, arming, and disciplining, the Militia", Congress could delegate to the President whatever executive authority, *even separate from his status as "Commander in Chief"*, might be "necessary and proper" for him to see to the statute's enforcement.[1447] The President would be bound by the Constitution to undertake this delegation.[1448] And the States, their Militia, and every Militiamen would be required to comply with the statute and the President's directives thereunder.[1449] Such a delegation might even authorize the President to promulgate regulations in order to effectuate the statute.[1450] The only constitutional limitation on such a delegation would be that Congress should supply sufficient standards to guide the President's conduct.[1451] In such a situation, Congress's delegation to the President of the power to issue regulations would not constitute either an attempt "[t]o provide * * * for governing such Part of the[Militia] as may be employed in the Service of the United States", or orders from the "Commander in Chief", because those regulations would apply to *all* of the Militia, *whether or not any "Part of them" were so "employed"*. This points up the crucial distinction: Exercises of Congress's power "[t]o provide * * * for

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[1446] U.S. Const. art. I, § 8, cl. 14.

[1447] *See* U.S. Const. art. I, § 8, cl. 18.

[1448] *See* U.S. Const. art. II, § 3.

[1449] *See* U.S. Const. art. VI, cl. 2.

[1450] *See, e.g., An Act to amend the act calling forth the Militia to execute the Laws of the Union, suppress Insurrections, and repel Invasions, approved February twenty-eight, seventeen hundred and ninety-five, and the Acts amendatory thereof, and for other Purposes,* Act of 17 July 1862, CHAP. CCI, § 1, 12 Stat. 597, 597.

[1451] *See, e.g.,* Panama Refining Company v. Ryan, 293 U.S. 388 (1935).

governing such Part of the[Militia] as may be employed in the Service of the United States" and the President's authority as "Commander in Chief * * * of the Militia" depend upon prior exertions of Congress's power "to provide for calling forth the Militia". If the Militia, in any "Part", are not "call[ed] forth", neither occasion nor justification can arise for anyone's "governing such Part of them" pursuant specifically to a Congressional directive, or for the President to "command" any Militiaman. And when the United States are not in genuine danger of "Insurrections" or "Invasions", or no real need "to execute the Laws of the Union" has arisen, no justifications on those grounds—let alone on any other grounds—can exist for "calling forth the Militia" "in the Service of the United States", for any claim on behalf of Congress to impose rules to "govern[ ]" any "Part" of the Militia, or for the President's assertion of authority as "Commander in Chief * * * of the Militia of the several States".

c. If any State's Militia, in whole or in part, is to deploy at the request of the United States for any presumably legitimate purpose other than the three the Constitution enumerates as within the authority of Congress, permission of and affirmative action by that State herself must be had, because the power to employ their Militia for any other purpose is "reserved to the States respectively, or to the people".[1452] That is, the State herself, not Congress, must "call[ ] forth" her Militia—and therefore the State herself may refuse, rescind, or impose conditions upon that call at any time. Moreover, in such circumstances the State's Militia would be subordinate neither: (i) to the President as "Commander in Chief"—because the President's authority would not extend to the particular purpose for which the Militia were to come forth; nor (ii) to any other official of the General Government—because, other than the President, the Constitution "reserv[es] to the States respectively, the Appointment of the Officers" in their Militia.[1453]

d. Moreover, even with respect to the three constitutional purposes for which Congress itself may "provide for calling forth" the Militia, the parameters of legitimate "Service" *outside of the United States* are difficult to imagine. "Insurrections" will certainly be "suppress[ed]" *within* the United States. "Invasions" will surely be "repel[led]" *within or close to the borders* of the United States. And only in a very few peculiar situations—such as those involving "Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations", which Congress is empowered "[t]o define and punish"[1454]—might the Militia even arguably have occasion to "execute the Laws of the Union" beyond the Union's own boundaries.

[1452] U.S. Const. amend. X.

[1453] U.S. Const. art. I, § 8, cl. 16.

[1454] U.S. Const. art. I, § 8, cl. 10.

To be sure, within her own borders, a State may call forth her Militia for any legitimate purpose in addition to the three allowable to Congress, and without first seeking the permission of Congress.[1455] But for one State to deploy her Militia within the territory of *some other* State, either her Militia must be "call[ed] forth" by Congress—for one example, to fulfill the duty of the United States to "protect each of the[States] * * * against domestic Violence" that rises to the level of "Insurrection[ ]"[1456]—or the two States themselves must arrive at some agreement pursuant to which the Militia of the first may operate legally within the boundaries of the second. "No State", however, "shall * * * enter into any Agreement or Compact with another State" "without the Consent of Congress".[1457] And Congress cannot give its "Consent" to "any Agreement or Compact" between any two States that has the effect of expanding *Congress's own* powers beyond their constitutional limits. So, Congress could consent to an interstate "Agreement or Compact" under the authority of which one State could deploy her Militia into another State's territory in order "to execute the Laws of the Union, suppress Insurrections and repel Invasions",[1458] or to execute the laws of or deal with some other emergency in the latter State, *upon that State's request*.[1459] But Congress could not consent to an "Agreement or Compact" that allowed *Congress on its own initiative* "[t]o provide for calling forth the Militia" for some purpose beyond "execut[ing] the Laws of the Union, suppress[ing] Insurrections and repel[ling] Invasions". Otherwise, through such legalistic legerdemain, rogue Congressmen with the aid of compliant rogue public officials in the States could effectively employ "the Militia *of the several States*" as if they were "the Militia *of the United States*", thereby overriding both the very definition of the Militia and the Tenth Amendment.

e. In addition, as to all of the constitutional justifications for exercise of Congress's power "[t]o provide for calling forth the Militia", WE THE PEOPLE—doubtlessly with such as the example of Virginia's Governor Dunmore fresh in their minds—took care to draft the Constitution in especially strict terms. With respect to the Militia, the limiting adjective "actual" appears in two places in the Constitution, both times conjoined with the noun "service": (i) "[t]he President shall be Commander in Chief * * * of the Militia of the several States, when called

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[1455] *Compare* U.S. Const. amend. X *with* art. I, § 8, cl. 15. *And compare and contrast* U.S. Const. art. I, § 10, cl. 3.

[1456] *Compare* U.S. Const. art. IV, § 4 *with* art. I, § 8, cl. 15.

[1457] U.S. Const. art. I, § 10, cl. 3.

[1458] U.S. Const. art. I, § 8, cl. 15.

[1459] As Congress has done. *See* AN ACT Granting the consent and approval of Congress to an interstate compact relating to mutual military aid in an emergency, Act of 1 July 1952, Pub. L. 435, CHAPTER 538, 66 Stat. 315 (New York, New Jersey, and Pennsylvania). *See also* 4 U.S.C. § 112(a): "The consent of Congress is hereby given to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies".

into the *actual Service* of the United States";[1460] and (ii) "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in *actual service* in time of War or public danger".[1461] Such usage was no novelty in *pre*-constitutional American Militia law. Quite the contrary: Both Virginia's and Rhode Island's Militia statutes had employed the term "actual service" in precisely this way,{EN-1962} as well as employing the adjective "actual" to modify other nouns but for the same general purpose.{EN-1963} In all of those contexts, "actual" meant (and as far as the Constitution is concerned today continues to mean) "[r]eally in act; not merely potential" and "not purely in speculation"[1462]—"'real' as opposed to 'nominal'"[1463]—"[e]xisting in act or reality * * * ; in fact"[1464]—"[i]n action at the time being"[1465]—not just "*potential, possible, virtual, speculative, * * * theoretical,* or *nominal*"[1466]—and most assuredly not "seeming[ ], pretended[ ], or feigned[ ]".[1467] (In a different constitutional context, of course, "actual" could and does have a different connotation.[1468])

(1) As a matter of law, the adjective "actual" was not written into the Constitution in modification of "Service" in relation to the President's authority as "Commander in Chief * * * of the Militia" for no purpose other than the cosmetic one of filling up space on the line. Not at all. "'In expounding the Constitution * * * , every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly

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[1460] U.S. Const. art. II, § 2, cl. 1 (emphasis supplied).

[1461] U.S. Const. amend. V (emphasis supplied).

[1462] S. Johnson, *Dictionary, ante* note 50, definitions 2 and 3 in both the First (1755) and the Fourth (1773) Editions.

[1463] Astor v. Merritt, 111 U.S. 202, 213 (1884).

[1464] *Webster's Revised Unabridged Dictionary, ante* note 11, at 18, definition 2. *Accord, Webster's New International Dictionary, ante* note 330, at 27, definition 2.

[1465] *Webster's Revised Unabridged Dictionary, ante* note 11, at 18, definition 3. *Accord, Webster's New International Dictionary, ante* note 330, at 27, definition 3; *Webster's Third New International Dictionary, ante* note 330, at 22, definition 4.

[1466] *Webster's Revised Unabridged Dictionary, ante* note 11 at 18, definition 2. *See also Webster's New International Dictionary, ante* note 330, at 27, Ant. & Syn.; *Webster's Third New International Dictionary, ante* note 330, at 22, definition 3.

[1467] *Black's Law Dictionary, ante* note 368, at 53.

[1468] The only other place in which the adjective "actual" appears in the original Constitution is in Article I, Section 2, Clause 3 (emphasis supplied): "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The *actual* Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct." In this context, "actual" plays a prosaic part, importing simply the "Enumeration" that is really performed, as opposed to the "*potential*" or "*theoretical*" formula set out in the clause's first sentence. *See Webster's Revised Unabridged Dictionary, ante* note 11, at 18, definition 2. *Accord, Webster's Third New International Dictionary, ante* note 330, at 22, definition 2b.

added.'"[1469] And as a matter of fact as plain as the words themselves, "actual" was added specifically to *constrain* the noun it modifies. For, without "actual", the sentence would nonetheless parse perfectly well as to its general intent. The addition of "actual" supplies, not simply verbal emphasis for the sake of mere style, but *a legally necessary condition precedent that must be satisfied before the Militia can come, and if they are to remain, under the President's command*: namely, that their "Service" for the United States must be demonstrably other than speculative, let alone feigned, but instead existing in fact, and especially in the scientific sense *veritable* or *falsifiable*—because "[a]greeable to truth or to fact".[1470] Thus, the adjective "actual" supplies a constitutional safeguard against some rogue President who might attempt to commandeer "the Militia of the several States" in whole or in part, or to threaten individual Militiamen with prosecution under purported "martial law", in aid of his aspirations to usurpation or tyranny. Or against some rogue faction in Congress that might enact a statute which purported "[t]o provide for calling forth the Militia" for some purpose other than the three constitutionally permissible ones.[1471] Or against some combination of the two. But *how* is this "check and balance" to be enforced?

That it *must* be enforceable—in a timely manner, and very effectively—is self-evident. The Second Amendment declares that "[a] well regulated Militia" is "necessary to the security of a free State". No Militia would be "well regulated", however, if it could, without effective resistance, be misdirected to unlawful ends as a matter of course. For that would undermine and eventually destroy "a free State". In fact, such a Militia, far from being "necessary to the security of a free State", would be inimical to it. Therefore, in any particular instance in which the Militia, in whole or in "Part", are purportedly "call[ed] forth" "in the Service of the United States", *someone* must enjoy the authority to *deny* that such a summons *actually* relates to any one of the three constitutional purposes that might in principle justify it. And on the basis of that denial *someone* must enjoy the further authority, *and have the practical ability*, to *prevent* the illegal deployment of the Militia. But *who* is that to be?

Recourse to the adjective "actual" is not necessary in order to empower or enjoin any honest and conscientious President to refuse his participation as "Commander in Chief" in "calling forth the Militia" for some unconstitutional purpose. For the President always labors under the comprehensive duty to "take Care that the Laws be faithfully executed",[1472] and therefore must always refuse to

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[1469] Williams v. United States, 289 U.S. 553, 572-573 (1933).

[1470] *Webster's Revised Unabridged Dictionary, ante* note 11, at 1603 ("veritable"). *Accord, Webster's New International Dictionary, ante* note 330, at 2832, definition 1.

[1471] *See* U.S. Const. art. I, § 8, cl. 15.

[1472] U.S. Const. art. II, § 3.

be a party to *any* unconstitutional action. So, in any particular instance, on that ground alone he must determine in good faith whether any task to which, pursuant to Congressional statute, he "call[s] forth the Militia" constitutes, in law and fact, "the *actual* Service of the United States". Conversely, "actual" would hardly deter, let alone defeat, an aspiring usurper or tyrant who had somehow wormed his way into the office of President. For such a miscreant would simply pretend that the task he set for the Militia was in "the actual Service of the United States", even though it advanced only his own personal criminal agenda and those of his controllers, courtiers, and clients.

Similarly, the modifier "actual" is not necessary to convince and constrain honest and conscientious Members of Congress to enact only such statutes as constitutionally "call[ ] forth the Militia" and "govern[ ] such Part of them as may be employed in the Service of the United States".[1473] For those (and all of Congress's other) powers are already and always confined to the enactment of "all Laws *which shall be necessary and proper* for carrying [them] into Execution".[1474] And every Member of Congress is "bound by Oath or Affirmation, to support th[e] Constitution".[1475] With regard to the Militia (or anything else, for that matter), Congressmen lack any power to enact *false* "laws" that are *un*necessary and *im*proper, and the purported enactment of which would violate their "Oath[s] or Affirmation[s]". But if aspiring usurpers and tyrants should come to dominate Congress, would those miscreants pay any heed to the constitutional niceties of necessity and propriety or be swayed from their villainy by the mere paper and wind of "Oath[s] or Affirmation[s]"? Moreover, even were Congress composed overwhelmingly of patriots, how long would it require to impeach, convict, and remove from office a malefactor in the White House bent upon perverting the Militia into his personal *Schutzstaffel* or Red Guards?[1476] And with what adequate force could Congress rout out such a criminal, during or after such proceedings, if not only "the Militia of the several States", but "the Army and Navy of the United States" as well, continued in the manner of robots to obey his purported orders as "Commander in Chief"?[1477] Finally, no matter how effective its powers might be if it could exercise them, Congress might not even be in session—and might be prevented from coming back into session—when and after a rogue President struck.

The General Government's Judiciary, too, would be hard pressed to enforce the limitations expressed in the adjective "actual". The judges' avoidance of assuming the responsibility to confront the issue at all—through invocation of some

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[1473] U.S. Const. art. I, § 8, cls. 15 and 16.

[1474] U.S. Const. art. I, § 8, cl. 18 (emphasis supplied).

[1475] U.S. Const. art. VI, cl. 3.

[1476] *See* U.S. Const. art. I, § 2, cl. 5 *and* § 3, cls. 6 and 7; art. II, § 4.

[1477] *See* U.S. Const. art. II, § 2, cl. 1.

legalistic subterfuge such as the doctrine of "political questions"—would be the most likely result today.[1478] Absent that, what Hamlet rightly condemned as "the law's delay"—especially in the face of "[t]he insolence of office" flaunted by a rogue President and the barking and snapping hyenas and jackals of his criminal Administration—would doubtlessly render judicial intervention too late to produce any useful effect against "[t]he oppressor's wrong".[1479] And if not tardy, judicial relief would almost certainly prove to be impotent. For the judges would be utterly incompetent to enforce their decisions in the only decisive manner—by physically wresting command of the Militia from the rogue President—they not being among the "Officers" of the Militia the "Appointment" of which the Constitution has "reserv[ed] to the States respectively".[1480] On the other hand, if the rogue President's subversion of the Militia were part and parcel of a broad conspiracy infesting the upper echelons of the General Government as a whole, conniving judges would simply hold it "constitutional", unembarrassed by the naked speciousness of their contentions. After all, if judges can rule that Congress's power "[t]o regulate Commerce * * * among the several States" reaches matters that merely "affect" such "Commerce", even though the word "affect" is conspicuous by its absence in that clause of the Constitution (or anywhere else among Congress's powers);[1481] and can opine that "the right of the people to keep and bear Arms" should be construed without controlling reference to "[a] well regulated Militia", even though the Second Amendment inextricably conjoins the two[1482]—then they could with equal facility rule that "*actual* Service" does not actually mean "actual", or that "Service" need not be construed with reference to "actual", even though the word "actual" actually appears as its modifier.

The only parties left with the requisite constitutional authority and in a practical position to take the necessary action to enforce the safeguard of "*actual* Service" are the States and "the Militia of the several States" themselves. The States and their Militia are component parts of the Constitution's federal system that long preëxisted the creation of Congress, the President, and the Judiciary, and that enjoy legal statures not inferior to that of the General Government or any of its branches. But, distinguishably from both the States and the General Government, "the Militia of the several States" are the *only* institutions to which the Constitution explicitly assigns the responsibility "to execute the Laws of the

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[1478] *Compare and contrast, e.g.,* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 169-170 (1803) *with* Luther v. Borden, 48 U.S. (7 Howard) 1, 42-45 (1849).

[1479] William Shakespeare, *The Tragedy of Hamlet, Prince of Denmark*, Act III, Scene 1.

[1480] *Compare and contrast* U.S. Const. art. I, § 8, cl. 16 *with* art. II, § 2, cl. 2. Of course, the several States' judges might well be among those "Officers" who could assert their authority in that capacity.

[1481] U.S. Const. art. I, § 8, cl. 3, *as misconstrued in, for example*, United States v. Wrightwood Dairy, 315 U.S. 110, 118-119 (1942), *and especially* Wickard v. Filburn, 317 U.S. 111, 121-129 (1942).

[1482] District of Columbia v. Heller, 554 U.S. 570, 576-578, 598-605 (2008) (Scalia, J., for the Court).

Union" when they are "call[ed] forth".[1483] To be sure, the President, too, is under the specific institutional duty as "Commander in Chief * * * of the Militia" "to execute the Laws of the Union" when the Militia are "call[ed] forth" for that purpose, as well as being under the general duty as President at all times to "take Care that the Laws be faithfully executed".[1484] But in the circumstances posited here, whether in truth he were doing so would be squarely at issue. Due process of law would discountenance the President's acting as "a judge in his own case", particularly when he was the apparent defendant who stood to benefit, to the public's detriment, from a mistaken or jury-rigged ruling in his own favor.[1485] And the exigency of the circumstances would admit of no recourse other than for the Militia themselves to "execute the Laws of the Union" when they were purportedly "call[ed] forth", by determining whether that summons itself were constitutional.

For the Militia to assume this responsibility would be especially fitting as well. After all, the Militia consist of WE THE PEOPLE in essentially their entirety—the only part of the federal system that does.[1486] And as Blackstone observed, "whenever a question arises between the society at large and any magistrate vested with powers originally delegated by that society, it must be decided by the voice of the society itself: there is not upon earth any other tribunal to resort to".[1487] Moreover, "by Authority of the good People of the[ ] Colonies" the Declaration of Independence was "solemnly publishe[d]", and WE THE PEOPLE "ordain[ed] and establish[ed] th[e] Constitution"[1488]—and "[t]he power to enact carries with it final authority to declare the meaning of the legislation",[1489] which authority must be exercised whenever that meaning is seriously at issue.

In addition, "the Militia of the several States" have their own chain of command that enables them to function *with complete constitutional authority and autonomy even if the link to a rogue President is broken perforce of his own misdeeds*. For when the Militia are not "called into the actual Service of the United States", they are subject to the commands of only their own "Officers"—because the Constitution "reserv[es] to the States respectively, the Appointment of the Officers".[1490]

[1483] U.S. Const. art. I, § 8, cl. 15.

[1484] U.S. Const. art. II, § 2, cl. 1; art. I, § 8, cls. 15 and 16; *and* art. II, § 3.

[1485] *See, e.g.,* Tumey v. Ohio, 273 U.S. 510 (1927).

[1486] Having a claim on individuals as young as sixteen years of age, the Militia include many persons who are not eligible to vote. *See, e.g.,* U.S. Const. amend. XXVI. And, with respect even to those who may vote, voting is not compulsory, whereas service in the Militia is.

[1487] *Commentaries on the Laws of England*, *ante* note 142, Volume 1, at 212.

[1488] U.S. Const. preamble.

[1489] Propper v. Clark, 337 U.S. 472, 484 (1949).

[1490] U.S. Const. art. I, § 8, cl. 16.

Besides this constitutional authority and autonomy, "the Militia of the several States" wield the "'[p]olitical power [that] grows out of the barrel of a gun'".[1491] And presumably their members—WE THE PEOPLE themselves—possess the intestinal fortitude to use that power, the moral fibre not to misuse it, as well as the common sense and self-interest to realize that, if they fail to use it or succeed only in misusing it, they will cut their own throats, perhaps literally.

Therefore, the requirement of "*actual* Service" authorizes the Militia, on explicit constitutional grounds, to ascertain *by and for themselves* whether any purported commands from a possibly rogue President relate, in law and fact at that time, to genuine "Service" in the *real* National interest—that is, the National interest *as WE THE PEOPLE understand it*—or instead to some spurious, pretended, or feigned "Service" in furtherance of an unconstitutional agenda. This reflects and reinforces the Second Amendment's declaration of the Militia's purpose: "the security of a *free* State", *a "State" in which WE THE PEOPLE really and genuinely govern themselves, particularly with respect to the critical decision to employ their own martial force*. Inasmuch as the Militia, in and through the performance of their rightful functions, are "*necessary* to the security of a free State", they have *an absolute constitutional duty*, as well as an absolute constitutional right, to refuse to accede to commands from a rogue President that are unrelated to, let alone contradictory of, "the *actual* Service of the United States", because such commands must be subversive or even destructive of "a free State".

More than that, if Militiamen are "called into the [seeming, pretended, or feigned, rather than the] actual[,] Service of the United States", they become the subjects of an unconstitutional act committed in their very presences and against their very persons, as well as against the institutions they serve, because that false call attempts to inveigle them individually and instrumentally into an illegal enterprise, as both victims and accomplices.[1492] In those circumstances, to perform "the actual Service of the United States" they must wield the authority and take up the responsibility "to execute the Laws of the Union" on their own then and there—both in self-defense and in vindication of their respective States and of the United States—against the perpetrators of that improper call, along with all of the latters' co-conspirators, henchmen, and hangers-on, whoever they may be.

(2) The Constitution expects similar self-reliance from an individual Militiaman whom some rogue public officials might threaten with being "held to answer for a[n alleged] capital, or otherwise infamous crime" but without "a presentment or indictment of a Grand Jury", on the grounds that the Militiaman was supposedly subject to some species of "martial law" because of purportedly being

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[1491] *Quotations From Chairman Mao*, *ante* note 28, at 61.

[1492] *See, e.g.*, 18 U.S.C. §§ 241 and 242, *and* 1961 *et seq.*

"in actual service in time of War or public danger"—when in fact he was not.[1493] Presumably, such a kangaroo trial would be conducted before a trumped-up "military commission" or other *junta* composed of rogue officers from the regular Armed Forces. If the civilian courts were doing their duty, the Militiaman arguably could obtain an injunction against such an unconstitutional proceeding. But if the courts would not defend him (for fear of, or in complicity with, the tyrannous régime), his brethren in the Militia would step forward to quash the proceeding in one way or another. No one would be better situated than they to recognize its illegality.

(a) Even "actual service" would not always expose a Militiaman to some variety of "martial law". For example, in 1755 Virginia "rais[ed] and maintain[ed] three compa[n]ies of men * * * to be employed as rangers, for the protection of the subjects in the frontiers", who "shall not be sent out of this colony, nor incorporated with the soldiers * * * [in the Colony's regular armed forces], *or made subject to martial law*"{EN-1964}—proving that active service in the Militia does not necessarily subject Militiamen to "martial law". So, even if Congress could "provide * * * for governing [through martial law] such Part of the[Militia] as may be employed in the Service of the United States",[1494] the remainder of the States' Militia, not in such "Service", would be immune from such "govern[ance]".[1495]

(b) With respect to the General Government, a Militiaman's "actual service *in time of War or other public danger*" can entail no more than his "actual service" directed towards one or more of the three purposes constitutionally allowable for "calling forth the Militia": namely, "execut[ing] the Laws of the Union, suppress[ing] Insurrections and repel[ling] Invasions".[1496] Obviously, "War" would encompass a formal "Invasion".[1497] But "War" also could include certain violations of "the Laws of the Union" and "Insurrections" that descend to the Constitution's definition of "Treason": namely, "levying War against the[United States], or * * * adhering to their Enemies, giving them Aid and Comfort".[1498] "[P]ublic danger", then, would include only violations of "the Laws of the Union" and "Insurrections" of lesser magnitude than "Treason", because these are the only circumstances other than "Invasions" that allow the Militia to be "call[ed] forth". To be sure, with respect to the States, "War" is also "War", but "public danger" could extend beyond

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[1493] *See* U.S. Const. amend. V.

[1494] U.S. Const. art. I, § 8, cl. 16.

[1495] On the problems with various definitions of "martial law", *see post*, Chapter 48.

[1496] U.S. Const. art. I, § 8, cl. 15.

[1497] Unless it could be exposed as the aggressive foreign policy of some other nation, an *informal* "invasion", such as now assaults the United States through the influx of aliens not legally entitled to enter, would constitute only multiple violations of "the Laws of the Union".

[1498] U.S. Const. art. III, § 3, cl. 1.

violations of "the Laws of the Union" and "Insurrections", because the States may deploy their Militia within their own territories for *any* legitimate purpose of "homeland security".[1499] But Militiamen presumably have far less to fear from rogue public officials in their own States' governments, where the wrongdoers are initially deterred by their exposure to direct electoral control, than from a gang of villainous officeholders in the General Government, the composition of which a minority of the States cannot change by their own citizens' votes alone.

(3) The Constitution contains further confirmation of these conclusions. Besides the adjective "actual", the adverb "actually" also appears therein, and to the same effect: namely, "[n]o State shall, without the Consent of Congress, * * * engage in War, unless *actually* invaded, or in such imminent Danger as will not admit of delay".[1500] Once again, examples of just such usage can be found in Virginia's and Rhode Island's *pre-*constitutional statutes.{EN-1965} The Constitution's purpose here is plain enough. "War" should be waged only upon a formal "declar[ation]" from Congress, as the representative of all the States with respect to the rest of the world.[1501] Therefore, Congress must first extend its "Consent" by such a "declar[ation]", and perhaps further permission and direction, before any State may "engage in War". *Unless the State's own self-defense is necessary, in which case no Congressional "Consent" need be sought, because Congress could never rightfully exercise the privilege to deny "Consent".* For, as Blackstone observed, "[s]elf defence * * * , as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society".[1502]

Who, though, in such a situation is to judge whether self-defense is necessary, and how to provide it, if not the victim of aggression? Whether a State has been "*actually* invaded, or [is] in such *imminent* Danger *as will not admit of delay*" must be for the State herself to determine at that very moment, because otherwise inadmissible "delay" would ensue while the State sought the superfluous "Consent of Congress". And, of course, each State's premier self-defense force is (or should be) her Militia. In fact, the Constitution presumes that a State's Militia will be the force that first engages in "War" if and when the State is "actually invaded, or in such imminent Danger as will not admit of delay". For "[n]o State shall, without the Consent of Congress, * * * keep Troops, or Ships of War in time of Peace".[1503] And if, suddenly and unexpectedly, a State is "invaded", or put into "imminent Danger" of invasion, no opportunity will be available for her to obtain "the Consent of

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[1499] That the Fifth Amendment does apply *in full* to the States, *see, e.g.,* W. Crosskey, *Politics and the Constitution, ante* note 206, Volume 2, Chapters XXX through XXXII. *See post*, at 1519-1523.

[1500] U.S. Const. art. I, § 10, cl. 3 (emphasis supplied).

[1501] U.S. Const. art. I, § 8, cl. 11.

[1502] *Commentaries on the Laws of England*, *ante* note 142, Volume 3, at 4.

[1503] U.S. Const. art. I, § 10, cl. 3.

Congress" (if such "Consent" has not already been given) for the purpose of raising "Troops" or launching "Ships" to oppose the invasion in a timely manner. The *only* force available for her defense will be that State's own Militia.

Congress indeed has the power, the right, and the duty to "call[ ] forth the Militia" of some States to "repel Invasions" in other States; but no involvement of Congress is necessary to "call[ ] forth the Militia" of the State being violated in order to "repel [an] Invasion[ ]" of her own territory, because the Constitution itself reserves to each such State the power to "engage in War, [when] actually invaded, or in such imminent Danger as will not admit of delay".[1504] Being required by the Constitution itself, without reference to any "Consent of Congress", to exist and always to remain "well regulated" for the State's "security",[1505] each State's Militia is uniquely authorized by "the supreme Law of the Land"[1506] to defend that State on its own recognizance and by its own actions. Being in the right spot at the right time, each State's Militia is uniquely positioned to ascertain whether its State "has been *actually* invaded, or [is] in * * * *imminent* Danger". Being so situated, each State's Militia is uniquely responsible for deciding, then and there, how to respond to the facts on the ground before it is too late. And being "well regulated", and therefore prepared for all eventualities, each State's Militia is uniquely capable of dealing with the "Danger" until additional forces can be mustered.

[1504] *Compare* U.S. Const. art. I, § 8, cl. 15 *with* art. I, § 10, cl. 3.

[1505] U.S. Const. art. I, § 8, cls. 15 and 16; art. II, § 2, cl. 1; *and* amend. II.

[1506] U.S. Const. art. VI, cl. 2.

CHAPTER THIRTY-TWO

"[T]he Militia of the several States" perform the critically important political function of enforcing WE THE PEOPLE'S sovereignty both in ordinary and especially in extraordinary times.

The Constitution incorporated the Militia into its federal structure as governmental institutions, not because they had proven to be the most efficient and effective *military* organizations known to *pre-*constitutional Americans, but because they alone could serve the Constitution's overriding *political* purpose. "A well regulated Militia" is "necessary to the security of a free State"[1507] because, although in the final instrumental analysis raw "'[p]olitical *power* grows out of the barrel of a gun'" in every case,[1508] political power *coupled with right* grows only out of the barrel of guns *in the hands of virtuous people who subordinate their ambitions and appetites to "the Laws of Nature and of Nature's God".*

The Declaration of Independence asserts that it was promulgated "in the Name, and by the Authority of the good People of the[ ] Colonies"; and the Preamble to the Constitution attests that "WE THE PEOPLE * * * ordain[ed] and establish[ed] this Constitution for the United States of America". Therefore, as a matter of ink on parchment, the Militia, being "composed of the body of the people",[1509] consist of the armed executive establishments of the true sovereigns of this country. And as a matter of actual steel and lead in strong hands, the Militia enable the true sovereigns to defend their sovereignty against all enemies, translating THE PEOPLE'S claim of right into physical possession of the ground to which that right pertains. Thus, the Militia are the surest and most reliable enforcers of popular sovereignty, because they are composed and under the control of the sovereigns themselves, wielding the ultimate power of sovereignty for the ultimate ends of sovereignty.

A. "The right of restoration" defined. This is obvious enough in tranquil times, when the exercise of sovereignty will be directed towards the day-to-day maintenance of public order, responses to emergencies arising out of occasional natural or man-made disasters, and so on. But it is especially true in times of

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[1507] U.S. Const. amend. II.

[1508] *Quotations From Chairman Mao, ante* note 28, at 61 (emphasis supplied).

[1509] Virginia Declaration of Rights (1776) art. 13.

political turmoil. In such times, the Militia are the only instruments through which WE THE PEOPLE themselves can assert what is loosely denoted "the right of revolution". Americans are often reminded that "[b]elief in the principle of revolution is deep in our traditions" and that "the right of revolution has been and is a part of the fabric of our institutions".[1510] This phrase must be employed with circumspection, however, because the enemies of popular self-government have made no little headway in discrediting as an apparent self-contradiction the idea of WE THE PEOPLE'S right *within and through their government* to resist and when necessary forcibly replace rogue *governmental* officials. "The right of revolution" "is a part of the fabric of our institutions" *if* by the term "revolution" in the specifically American context one understands *a process of thoroughgoing political renaissance mediated directly by THE PEOPLE for the purpose of securing their unalienable rights*. This process involves: (i) recognition by THE PEOPLE of what their political rights, powers, privileges, immunities, and duties actually are; (ii) realization that rogue public officials have exceeded the legal limits on their authority; (iii) remonstrances and petitions for redress of grievances; (iv) if the wayward officials refuse to reform their conduct, then resistance to their continued rule; (v) removal of the miscreants from public office, and reversal of their policies, by whatever means prove necessary; and finally (vi) restoration of proper government, preferably in its original form but if necessary otherwise, as the circumstances may require. Thus, rather than reflecting some "*anti*-government" notion, the right—and, in order to render that right effective, the power and the duty—to retain, restore, and perhaps refashion a form of government that is supposed to derive its just powers (and *only* such powers) from the consent of the governed (and *only* from such consent) are actually the highest prerogatives of government of, by, and for THE PEOPLE. In America, then, a spurious "right of *revolution*" to *overthrow* an incumbent government, and install a new régime perhaps even worse than the one set aside, as has resulted from so many revolutions elsewhere in the world throughout history, does not exist. Here, THE PEOPLE enjoy "the right of *restoration*", which aims at correcting any corruptions in, and then permanently securing, a government of "*just* powers".

B. "The right of restoration" in political philosophy. At base, "the right of restoration" is nothing really remarkable, simply a people's obviously meritorious claim in justice to engage in collective acts of self-defense against rogue public officials who camouflage their misdeeds under the cloak of "law" in order to twist the real law into a shape suitable for their purposes of oppression. As Blackstone explained, the law of self-defense

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[1510] Scales v. United States, 367 U.S. 203, 268, 269 (1961) (Douglas, J., dissenting) The irony in these particular observations is that Scales was not an American patriot devoted in any degree to the ideals of the Declaration of Independence and the Constitution, but instead a communist revolutionary convicted of promoting the violent overthrow of the government of the United States in order to replace it with a Marxist totalitarian régime.

> considers that the future process of law is by no means an adequate remedy for injuries accompanied with force; since it is impossible to say, to what wanton lengths of rapine or cruelty outrages of this sort might be carried, unless it were permitted a man immediately to oppose one violence with another. Self-defence therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society.[1511]

When usurpers and tyrants misuse the law in order to violate the law under color of the law, obviously "the future process of [such perverted] law is by no means an adequate remedy for injuries accompanied with force" which the victims suffer. For "the future process of [such] law" will consist simply of further insults, injuries, injustices, and iniquities, because it will rationalize as "lawful" every past and future act of official oppression and as "unlawful" every act of popular resistance to that oppression.

Usurpers and tyrants can never deprive their victims of either the individual or the collective right of self-defense, however, both because no public officials (and rogue officials least of all) can ever claim to override "the primary law of nature", and because usurpers and tyrants in particular are themselves wrongdoers under "the law of society" as well as "the * * * law of nature" and therefore cannot invoke either of those bodies of law in defense of their actions. As Algernon Sidney rightly observed, why should rogue public officials

> not be deposed, if they become enemies to their people, and set up an interest in their own persons inconsistent with the publick good, for the promoting of which they were erected? If they were created by the publick consent, for the publick good, shall they not be removed when they prove to be of publick damage? If they set up themselves, may they not be thrown down? Shall it be lawful for them to usurp a power over the liberty of others, and shall it not be lawful for an injur'd people to resume their own? If injustice exalt itself, must it be forever established? Shall great persons be rendered sacred by rapine, perjury and murder? Shall the crimes for which private men do justly suffer the most grievous punishments, exempt them from all, who commit them in the highest excess, with most power, and most to the prejudice of mankind? Shall the laws that solely aim at the prevention of crimes be made to patronize them, and become snares to the innocent whom they ought to protect? Has every man given up into the common store his right of avenging the injuries he may receive, that the publick power which ought to protect or avenge him, should be turned to the destruction of himself, his posterity, and the society into which they enter, without any possibility of redress?

[1511] *Commentaries on the Laws of England*, *ante* note 142, Volume 3, at 4.

> Shall the ordinance of God be rendered of no effect; or the powers he hath appointed to be set up for the distribution of justice, be made subservient to the lusts of one or a few men, and by impunity encourage them to commit all manner of crimes? Is the corruption of man's nature so little known, that such as have common sense should expect justice from those, who fear no punishments if they do injustice[?] * * * There must therefore be a right of proceeding judicially or extrajudicially against all persons who transgress the laws; or else those laws, and the societies that should subsist by them, cannot stand; and the ends for which governments are constituted, together with the governments themselves, must be overthrown. Extrajudicial proceedings by sedition, tumult, or war, must take place, when the persons concern'd are of such power, that they cannot be brought under the judicial. They who deny this, deny all help against an usurping tyrant, or the perfidiousness of a lawfully created magistrate, who adds the crimes of ingratitude and treachery to usurpation. * * *
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> If it be said that the word sedition implies that which is evil; I answer, that it ought not then to be applied to whose who seek nothing but that which is just; and tho the ways of delivering an oppressed people from the violence of a wicked magistrate, who having armed a crew of lewd villains, and fatted them with the blood and confiscations of such as were most ready to oppose him, be extraordinary, the inward righteousness of the act doth fully justify the authors. ***He that has virtue and power to save a people, can never want a right of doing it.***[1512]

Nonetheless, although always in the wrong, usurpers and tyrants invariably will attempt to strip their victims of the remedy of self-defense through perversion or disregard of the law or through the application of main force notwithstanding and in open defiance of the law. Blackstone was certainly aware that such situations could occur, and actually had occurred in English history, which is why he explained that one of the five most important rights of Englishmen was

> that of having arms for their defence, suitable to their condition and degree, and such as are allowed by law. Which * * * is indeed a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.[1513]

The right "of having arms for the[people's] defence" against oppression is obviously the indispensable foundation for "the right of restoration", whenever popular

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[1512] *Discourses Concerning Government*, *ante* note 54, at 226-227 (emphasis supplied). On Sidney's influence among patriots in the *pre*-constitutional era, *see ante*, at 26 & note 55.

[1513] *Commentaries on the Laws of England, ante* note 142, Volume 1, at 143-144.

"resistance and self-preservation" require forcible resistance to rogue public officials, let alone the total overthrow of an entire form of government and the erection of another.

In addition, Blackstone went so far as to deny that the exercise of "the natural right of resistance" could ever amount to a crime. One "species of treason", he observed,

> is, "if a man do levy war against our lord the king in his realm." And this may be done by taking arms, not only to dethrone the king, but under pretence to reform religion, or the laws, or to remove evil counsellors, or other grievances whether real or pretended. For the law does not, neither can it, permit any private man, or set of men, to interfere forcibly in matters of such high importance; especially as it has established a sufficient power, for these purposes, in the high court of parliament: neither does the constitution justify any private or particular resistance for private or particular grievances; ***though in cases of national oppression the nation has very justifiably risen as one man, to vindicate the original contract subsisting between the king and his people***.[1514]

As long as those taking up arms were bent not simply on "private or particular resistance for private or particular grievances", but instead were intent upon rectifying political grievances stemming from "national oppression" under which their society as a whole groaned, and in so doing aimed at "vindicat[ing] the original [social] contract" (presumably by restoring its provisions in their purest form), their resistance, howsoever "forcibl[e]", would be "very justifiabl[e]".

C. "The right of restoration" in America's *pre-*constitutional experience. Although all politically and legally literate Americans in the *pre-*constitutional period were familiar with the substance of both Sidney's and Blackstone's exegeses, all observant Americans of that era would have come to the very same conclusions on their own, from personal experience. After all, all adult able-bodied free males were subject to service in the Militia of all but one of the Colonies and then all of the independent States—in which service the *duty* to possess arms was imposed by law. Thus, from the earliest days, Americans themselves controlled—indeed, were required by law to control—the ultimate instruments of resistance to usurpation and tyranny. Always keen to protect their liberties, they had the incentive to employ those instruments for political self-defense whenever a justifiable instance for doing so arose. And holding in their own hands the most effective remedies for usurpation and tyranny in fact, they would have extrapolated from that circumstance the right to resistance in law.

[1514] *Id.*, Volume 4, at 81-82 (footnote omitted) (emphasis supplied).

Granted, Americans initially formed their Militia for the primary purpose of enabling them to defend the Colonies against hostile Indians and foreign enemies on behalf of their Mother Country as well as themselves. Yet, had their first concern been the need to prepare to resist domestic rogue public officials, they would have organized, armed, and disciplined themselves in Militia in the very same way, because such institutions were eminently suitable, if not indispensable, for that purpose.

Furthermore, the limitations in English law on the right "of having arms for the[people's] defence" to which Blackstone referred were always inapplicable in *pre-*constitutional America. Average Americans did not possess only such arms as were "suitable to their condition and degree"—rather, every adult able-bodied free man was required to possess at least one firearm suitable for Militia service, without concern for his personal wealth or social status. (And if his lack of economic means had precluded his purchase of a firearm, one would have been provided to him at public expense.) Average Americans did not possess only such arms as were "allowed by law"—rather, they were required to possess certain arms specified by law, and perfectly free to acquire such other arms as they desired. And average Americans' possession of firearms was never imagined to be merely "a public allowance, under due restrictions"—rather, it was a personal duty imposed and enforced by statute as far as service in the Militia was concerned, and otherwise a personal liberty with essentially no "restrictions", statutory or otherwise. So, as a matter of American law and practice, no one in America would have considered either the right *and duty* to resist oppression by rogue officials, or the right *and duty* to possess the implements necessary to that end, as in any way even arguably *extra-*legal, let alone illegal.

Although the *pre-*constitutional American Militia statutes did not explicitly invoke the people's right and duty of resistance to usurpation and tyranny, they certainly prepared the people for such resistance to the maximum degree, not just materially but also mentally and morally. For free men with firearms in their hands under the aegis of law will naturally conclude, not simply that they have the ability, but also that they have the authority, to deploy with their arms in defense of their liberties. After all, why should the remedy be available without the right it effectuates? Free men possessed of and trained to arms will never conclude that in order to secure their liberties they should proceed only without arms even though arms might be necessary, let alone should first surrender their arms to the very rogue public officials and other domestic enemies who threaten those liberties. And when the occasion for decisions and actions on that score finally arrived at the end of the *pre-*constitutional era, Americans drew precisely the correct conclusions from their decades of personal experiences in the Militia.

D. "The right of restoration" in the Declaration of Independence. When that time came, the Declaration of Independence explicitly recognized and relied upon a "right of restoration" derived from the "self-evident" "truths":

> • "that all men * * * are endowed by their Creator with certain unalienable Rights";
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> • "[t]hat to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed";
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> • "[t]hat whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness"; and particularly,
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> • that "when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security".

This "right" and "duty" "to throw off [an abusive] Government, and to provide new Guards for the[People's] future security" was plainly not an unlimited "right of revolution", but instead a carefully defined and therefore constrained "right of restoration". For, although "the People", in "institu[ing] new Government", could "lay[ ] its foundations on such principles and organiz[e] its powers in such form, as to them sh[ould] seem most likely to effect their Safety and Happiness", nevertheless they could infuse that "new Government" only with "*just* powers" that comported with "the Laws of Nature and of Nature's God". Every act of "throw[ing] off [an abusive] Government" would require *a return to and restoration of the first principles of government*.

In such wise, the Declaration repudiated the false and vicious dogmas of legal positivism that a governmental apparatus is anterior and superior to "the People"; that particular individuals who fortuitously happen to occupy offices in that apparatus constitute the sources and supreme judges of "law"; and that abuses and usurpations—or worse yet, outright tyranny—cannot deprive an entire "Form of Government" of its legitimacy, or particular rogue public officials of their authority. Surely, too, if the Declaration sanctioned as "self-evident" "the Right of the People to alter or to abolish" "any [abusive] Form of Government" *in toto*, it also recognized their lesser included right to condemn and set aside the mere adventitious statutes, judicial opinions, and other purported public acts of usurpers or tyrants—and to condemn and set aside those miscreants themselves—*without* "alter[ing] or * * * abolish[ing]" the basic institutions of what otherwise, in proper hands, could be a reasonably good government. Furthermore, the Declaration

recognized that "the People's" need to exercise their "Right * * * to alter or to abolish" could likely arise not just from questionable statutes, judicial opinions, or other acts that amounted to mere serial acts of imprudence, oversights, or errors on the part of insouciant or incompetent public officials, but also from actual political conspiracies rogue officials and their allies hatched against "the People's" liberties in the form of "long train[s] of abuses and usurpations, pursuing invariably the same Object [that] evince[ ] *a design* to reduce the[People] under absolute Despotism".

Most importantly, "the right of restoration" is not merely a fancy of political theorists of the *pre-*constitutional era, or the hobby horse of the windy radicals who have cropped up throughout American history thereafter, but instead constitutes *the foundational precept of American law*, proven by actual experience, and without which neither the Constitution of the United States, nor the constitution of any State, nor any statute enacted under color of those organic laws could claim the least validity. After all, the Declaration of Independence was "[t]he first official action of this nation", which "declared the foundation of [a new] government" on the basis of the most fundamental of all legal principles derived from "the Laws of Nature and of Nature's God".[1515] As such, the Declaration must have had, and must perpetually have, the full force of organic law in America.[1516] For if "[t]he first official action of this nation" had proven nugatory—if the Colonies had failed to secure the *legal* status the Declaration asserted for them of "Free and Independent States" with "full Power * * * to do all * * * Acts and Things which Independent States may of right do"—no one then or thereafter could rationally have contended that the patriots' revolt against the Crown and its loyal subjects rested upon any legal foundation.[1517] Therefore, the original State constitutions, the original Constitution, and the Bill of Rights all qualify as proper "laws" only because of the Declaration's legal efficacy—and *only to the extent that they confirm and conform with what the Declaration itself identified as the "self-evident" "truths" of political life—including especially "the right of restoration" which forms the foundation of the entire federal edifice*.

E. "The right of restoration" in the Constitution. The Constitution confirms and conforms to "the right of restoration", both implicitly and even explicitly.

1. It is impossible to conceive, let alone to believe, that the American patriots who had won their independence by overthrowing British oppression through force of arms, *and whose ability to govern themselves derived from that overthrow*, would a mere twelve years later have disapproved, disclaimed, and even

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[1515] Gulf, Colorado and Santa Fé Railway Company v. Ellis, 165 U.S. 150, 159 (1897).

[1516] *See ante*, at 22-27.

[1517] *See* Williams v. Bruffy, 96 U.S. 176, 186 (1878).

legally denied to themselves and their progeny the "right of restoration" if and when the same circumstances described in the Declaration of Independence once again arose. After all, the Declaration recognized that "*whenever any* Form of Government"—not just monarchy in general or the rule of King George III in the late 1700s in particular—"becomes destructive of the[ ] ends [of Government], it is the Right of the People to alter or to abolish it".[1518] The Founders were too shrewd students of political science and human nature arbitrarily to exclude from the reach of this "Right of the People" an apparently representative republic, even one of their own creation. Quite the contrary: History had taught them that "Governments have their Infancy, their Meridian, and their Decay; and the Preludes to their Destruction are generally Luxury, Pride, Sloth, Prodigality, Cowardice, Irreligion, Self-interest, and an universal Neglect of the Publick".[1519] Patriots in the Founding Era were well aware, and therefore surely anticipated, that even democratically elected representatives could succumb to arrogance, avarice, ambition, and the appetite for abusive powers. So, had they desired in and through the Constitution to repudiate on behalf of themselves and their posterity "the right of restoration" which they had just broadcast to "a candid world" in order to sway "the opinions of mankind" through the Declaration of Independence, they would have done so in some explicit and unequivocal manner that unmistakably placed them at the mercy of the new governmental apparatus they created, so that any attempt at popular "revolution" (in any sense of that term) would thereafter be, if not utterly impossible, then undeniably illegal, even if rogue public officials were unquestionably guilty of the most heinous acts of usurpation and tyranny that marked them, no less than King George III, as "unfit to be the ruler[s] of a free people". For this reason, one must presume—until the contrary is proven beyond any reasonable doubt—that the Constitution does embody "the right of restoration" in some efficacious form.

2. Of course, no such proof exists. The original Constitution delegated to the General Government no license whatsoever to aggress against the States or their people, or for any of the governments of the States to aggress against their own people, or for either the General Government or the governments of the States to strip the victims of any such aggression of the legal authority or the material ability to defend themselves. To the contrary:

a. The original Constitution explicitly recognized that WE THE PEOPLE are superior to both the General Government and the States, because WE THE PEOPLE created the General Government from nothing when they "ordain[ed] and

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[1518] Emphasis supplied.

[1519] Anonymous [John Trenchard with Walter Moyle], THE SECOND PART OF AN ARGUMENT, Shewing, that a STANDING ARMY Is inconsistent with a Free Government, and absolutely destructive to the Constitution of the English Monarchy (London, England: [no publisher identified] 1697), at 17-18.

establish[ed] th[e] Constitution"[1520] and in the course of that creation diminished the preëxistent powers of the States as well.[1521] Because the General Government received its "just powers from the consent of the governed" and from no other source, it must be exposed to the legal correlative that, should it "become[ ] destructive of the[ ] ends [for which it was instituted], it is the Right of the People to alter or to abolish it".[1522] *For those who consent may withdraw their consent when the condition upon which it was originally granted is vitiated.* And so, too, for the States.

b. Moreover, the original Constitution explicitly distinguished the "Republican Form of Government" that must exist within each of the States from the State herself.[1523] And the Second Amendment then emphasized that each of the States must always remain "a free State", if necessary through the application of armed force by "the people" themselves. Because the original Constitution commanded the United States to "guarantee to every State in this Union a Republican Form of Government",[1524] and because, perforce of the Second Amendment, each "Republican Form of Government" must so conduct itself as to preserve its State as "a free State"—therefore the General Government must so conduct itself as to preserve "a free State" in every State, and by extension to preserve the United States as a collective "free State". *Thus, in principle, tyranny is constitutionally impossible.* In addition, the fundamental principle of the original Constitution and all of its Amendments is that any act by a public official which contradicts the Constitution is unlawful.[1525] *Thus, in principle, usurpation is constitutionally impossible.*

To ensure this outcome in practice—when "the great difficulty" is that "you must first enable the government to control the governed; and in the next place oblige it to control itself"[1526]—the Constitution explicitly incorporates numerous specific rights and remedies against rogue public officials' attempts at usurpation and tyranny. For instance:

> • *The supremacy of the Constitution:* "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties * * * shall be the supreme Law of the Land[.]"[1527]

[1520] U.S. Const. preamble.

[1521] *See* U.S. Const. art. I, § 10.

[1522] Declaration of Independence.

[1523] U.S. Const. art. IV, § 4.

[1524] U.S. Const. art. IV, § 4.

[1525] *E.g.,* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-178 (1803); Norton v. Shelby County, 118 U.S. 425, 442 (1886); Poindexter v. Greenhow, 114 U.S. 270, 288 (1885); Huntington v. Worthen, 120 U.S. 97, 101-102 (1887); Fay v. Noia, 372 U.S. 391, 408-409 (1963).

[1526] *The Federalist* No. 51 (James Madison).

[1527] U.S. Const. art. VI, cl. 2.

• *Public officials' fidelity to the Constitution:* "The Senators and Representatives [in Congress] * * * , and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution[.]"[1528]

• *Limitations on legal immunities for public officials:* "The Senators and Representatives * * * shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place."[1529] Because the Constitution recognizes no other immunities for any public officials of the General Government, no other immunities can exist. As for all of the States' officials (and for all officials of the General Government other than Members of Congress as well), they "shall be bound by Oath or Affirmation, to support th[e] Constitution".[1530] Self-evidently, no official could be "*bound*" in any meaningful sense if, when he transgressed the Constitution, he could nonetheless evade punishment by interposing some purported immunity supposedly derived from his office. An "Oath or Affirmation, to *support* th[e] Constitution", taken as a condition of holding office, cannot grant a license to violate it. Therefore, no such immunity can exist for *an*y official.

• *Removal from office of rogue public officials:* "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."[1531] "Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States[.]"[1532] "Each House [of Congress] may * * * punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member."[1533] And "[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour[.]"[1534]—the necessary implications being that such "Judges" may *lose* "their Offices" for "[*bad*] Behaviour", and that this "[bad] Behaviour" need not descend to the depth

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[1528] U.S. Const. art. VI, cl. 3.

[1529] U.S. Const. art. I, § 6, cl. 1.

[1530] U.S. Const. art. VI, cl. 3.

[1531] U.S. Const. art. II, § 4.

[1532] U.S. Const. art. I, § 3, cl. 7.

[1533] U.S. Const. art. I, § 5, cl. 2.

[1534] U.S. Const. art. III, § 1.

of an impeachable offence (for otherwise this clause would be unnecessary).[1535]

•*No permanent political superordination and subordination:* "No Title of Nobility shall be granted by the United States[.]"[1536] And "[n]o State shall * * * grant any Title of Nobility."[1537]

•*No corrupting foreign influences:* "[N]o Person holding any Office of Profit or Trust under the[United States], shall, without the Consent of Congress, accept any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."[1538]

•*No subversion or violent overthrow of the governments of the States:* "The United States shall guarantee to every State in this Union a Republican Form of Government * * * ; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."[1539] "[D]omestic Violence", of course, could be fomented and carried on by rogue public officials, as well as by private parties. Indeed, the former perpetrators would likely be far more dangerous than the latter if they coöpted police and other law-enforcement agencies into their conspiracies.

•*Treason:* "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort."[1540] Rogue public officials are certainly capable of committing "Treason" against WE THE PEOPLE.[1541] Indeed, they are probably more capable of committing "Treason" than any other group imaginable.

•*All of the provisions of the Bill of Rights.*

[1535] *See* E. Vieira, Jr., *Imperial Judiciary, ante* note 188, Part II, Chapter 14.

[1536] U.S. Const. art. I, § 9, cl. 8.

[1537] U.S. Const. art. I, § 10, cl. 1.

[1538] U.S. Const. art. I, § 9, cl. 8. The noun "present" means "[a] gift; a donative". S. Johnson, *Dictionary, ante* note 50, definition 1 in both the First (1755) and the Fourth (1773) Editions. And "Emolument" means "[p]rofit; advantage". *Id.*, the only definition given in both editions. A financial contribution to a politician's campaign for any public office "under the[United States]" surely fits these definitions. So does the promotion of a candidate in the big print or electronic media through "slanted" news coverage. The same conclusion follows even if the noun "Emolument" is narrowly defined as "[t]he profit arising from office * * * ; compensation; * * * perquisites, fees, or salary". *Webster's Revised Unabridged Dictionary, ante* note 11, at 485. For one reason a candidate for public office would accept foreigners' support would be to assure himself of such monetary benefits. Therefore, any such contribution or promotion made directly or indirectly by, through the influence of, or for the ultimate benefit of, any "foreign State" violates the Constitution. The present statutory curbs and controls on these practices, however, are woefully insufficient. *See* 22 U.S.C. § 611 *et seq.* and 11 C.F.R. § 110.20.

[1539] U.S. Const. art. IV, § 4.

[1540] U.S. Const. art. III, § 3, cl. 1.

[1541] *See ante*, at 814-821.

• *The President's duty to enforce the laws*: "[H]e shall take Care that the Laws by faithfully executed[.]"[1542]

• *The Militia's authority and responsibility:* Congress is "[t]o provide for calling forth the Militia to execute the Laws of the Union" and "suppress Insurrections".[1543] Beyond doubt, rogue public officials—whether civilian, military, or both—can violate "the Laws of the Union" and participate in widespread "Insurrections".[1544]

All of these rights and remedies deter wrongdoing by rogue public officials, protect against the effects of such wrongdoing as does occur, and ultimately by suppressing that wrongdoing restore the situation to the *status quo ante*. Therefore, they are rights and remedies of "restoration"—not rights and remedies to be applied only *in extremis* "to alter or to abolish" a "Form of Government [which has] become[ ] destructive of the[ ] ends" for which it was "instituted" by "the consent of the governed",[1545] but instead rights and remedies to put into proper order and preserve the *present* government in its *present* "Form" in accordance with "the [*original*] consent of the governed". For that reason, this could be called the enforcement of "the right of restoration" in its *ordinary* aspect.

In the normal course of events, these remedies would be enforced by officials or agencies of the General Government other than the President and the Militia "call[ed] forth" to "be employed in the Service of the United States" "to execute the Laws of the Union" and "suppress Insurrections".[1546] But most if not all of these remedies also could be enforced, even in the first instance, by "calling forth the Militia" under the President's command. For the *United States Code* now provides that "[w]henever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings, he may call into Federal service such of the Militia of any State * * * as he considers necessary to enforce those laws or suppress the rebellion".[1547] Thus, it would be for the President to decide, in the course of fulfilling his duty to "take Care that the Laws be faithfully executed",[1548] whether the situation warranted "calling forth the Militia". Even were the center of the "unlawful obstructions, combinations or assemblages, or rebellion against the

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[1542] U.S. Const. art. II, § 3.

[1543] U.S. Const. art. I, § 8, cl. 15.

[1544] *Compare* Texas v. White, 74 U.S. (7 Wallace) 700, 718-726 (1868), *with* 18 U.S.C. §§ 241 and 242.

[1545] Declaration of Independence.

[1546] *See* U.S. Const. art. I, § 8, cls. 15 and 16.

[1547] 15 U.S.C. § 332.

[1548] U.S. Const. art. II, § 3.

authority of the United States" located uniquely within the District of Columbia, among rogue public officials and within rogue agencies of the General Government, this statute would still apply, because the effect of the center's malign operations would undoubtedly be to "make it impracticable to enforce the laws of the United States in [one or more] State[s]".

3. What, however, if in instance after instance these rights of restoration had proven to be unenforceable because rogue public officials had refused to apply the remedies, so that at length the entire General Government were taken over by usurpers and aspiring tyrants—thoroughly permeated with "unlawful obstructions, combinations or assemblages, or rebellion against the authority of the United States"—and being run as a "racketeering enterprise" engaged in the systematic "terrorism" of "government * * * by intimidation" directed against WE THE PEOPLE,[1549] perhaps even to the extent that the General Government's *para*-military police-state apparatus could fairly be described as actually committing "Treason" by "levying War against the United States" in the persons of huge numbers of its victims among average Americans?[1550] And what if this were the product of a massive flow of campaign contributions by political-action committees, and an incessant drumbeat of political propaganda and agitation by the big media, all orchestrated by some "foreign State" and its helpers within America, which had turned most Members of Congress and the President into mere marionettes of and mouthpieces for that foreign power—such that WE THE PEOPLE had little to no chance to overcome the corruption either through "petition[ing] the Government for a redress of grievances"[1551] or through the ballot-box? Even if they were not sympathizers or otherwise stooges of that "foreign State", the judges would probably find themselves helpless to correct the problem, because the Pinocchio in the White House would not allow the Department of Justice to bring civil actions or criminal prosecutions to enforce any part of "the right of restoration" in its ordinary aspect. And as the chief malefactor in the "unlawful obstruction[ ], combination[ ], or assemblage[ ] into which the General Government had degenerated, the disloyal President would not command the Militia to support the Constitution, but instead would try to coöpt, cajole, or coerce them into serving the conspiracy. In such a situation, Americans would have to resort to "the right of restoration" in its *extraordinary* aspect.

a. True enough, the original Constitution did not explicitly address any "right of restoration"—that is, "the Right of the People to alter or to abolish" the "Form of Government [when it] becomes destructive of the[ ] ends" for which it

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[1549] *Compare* 18 U.S.C. §§ 1961(1)(G), (4), and (5); 1962(b) and (d); *and* 1963(a), *with Webster's Revised Unabridged Dictionary, ante* note 11, at 1489.

[1550] *See* U.S. Const. art. III, § 3, cl. 1. *See ante*, at 814-821.

[1551] U.S. Const. amend. I.

was instituted,[1552] or even the lesser-included "Right of the People" to prevent, correct, and punish widespread official criminality, and thereby avoid having "to alter or to abolish" the entire "Form of Government" itself. But the apparent silence of the original Constitution on this score did not obviate the problem that, if so many officials of the General Government turned rogue that the normal processes of investigation, prosecution, adjudication, and punishment of political malefactors—or their replacements through the electoral process—proved unavailing, then either: (i) The present "Form of Government" of the United States must be deemed to have failed, this country must revert into essentially the situation of political flux that immediately preceded the Declaration of Independence, and WE THE PEOPLE must endeavor to set up an entirely new government in the course of what will surely amount to a civil war. Or (ii) THE PEOPLE must find somewhere within the present "Form of Government" a right enforceable through the States or at their own hands to indict, try, and execute judgment upon rogue officials. The former alternative being unacceptable on its face, the latter must be adopted if any legal justification for doing so can be found. And certainly the original Constitution itself encouraged the belief that such a justification exists. For the Preamble asserted that one of its goals was "to form a more perfect Union"—not to suffer the Union to fly to pieces because faithless or feckless public officials fail, neglect, or refuse to administer it properly. The Preamble asserted that another of its goals was "to * * * establish Justice"—which is impossible of attainment so long as rogue officials can cover up their wrongdoing, and even when exposed can immunize and exonerate themselves from punishment. The Preamble asserted that yet another of its goals was "to * * * insure domestic Tranquility"—which must remain a hopeless fantasy while rogue officials construct and deploy a nationwide *para*-military police-state apparatus, effectively "levying War" upon common Americans. And the Preamble asserted that perhaps its most important goal was "to * * * secure the Blessings of Liberty to ourselves and our Posterity"—which the existence of rogue officialdom as an inoperable cancer in the body politic renders inconceivable.

b. Moreover, the apparent silence of the original Constitution with respect to "the right of restoration" is only apparent. If the original Constitution was less than pellucid on this score, the Bill of Rights clarified the situation. For "[t]he first ten amendments to the Constitution * * * were adopted in order to quiet the apprehension of many that without some such declaration of rights the government would assume, and might be held to possess, the power to trespass upon those rights of persons and property which by the Declaration of Independence were affirmed to be unalienable rights".[1553] The Declaration asserted that, "as Free and

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[1552] Declaration of Independence.

[1553] Monongahela Navigation Company v. United States, 148 U.S. 312, 324 (1893).

Independent States, the[Colonies] ha[d] full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do". Perforce of the original Constitution, WE THE PEOPLE required the States to surrender some of these "full Power[s]" conditionally or unconditionally;[1554] or to share authority concurrently with the General Government, subject to the latter's supremacy in appropriate situations.[1555]

Nonetheless, as the Tenth Amendment witnesses, THE PEOPLE did not indiscriminately strip the States—or especially their citizens—of *all* "Power[s] * * * to do *all* * * * Acts and Things which Independent States may of right do". To the contrary, that Amendment explicitly recognizes and guarantees that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." And through "the right * * * to keep and bear Arms", the Second Amendment secures to "the people" the means to make effective those prohibitions of power to the United States and those reservations of power "to the States respectively, or to the people".

One right central to the Declaration of Independence which WE THE PEOPLE never surrendered—and never could have surrendered—either to the United States or to the States is "the right of restoration": "the Right *of the People* to alter or to abolish" an abusive "Form of Government" "and to institute new Government"; "*their* right, * * * *their* duty, to throw off [an abusive] Government" by force of arms (threatened or actual), and "to provide new Guards for *their* future security". Because "the good People" of America were entitled under "the Laws of Nature and of Nature's God" "to throw off" the abusive "Form of Government" of the British Empire under which they lived in order to become citizens of "Free and Independent States" of their own with entirely new "Form[s] of Government", then as citizens of those "Free and Independent States", and of the Union those States comprise, they remain no less entitled, under similar circumstances, "to throw off" their new "Form[s] of Government", too. For "the good People" of America derived then, and still derive today, the authority "to throw off [an abusive] Government",

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[1554] *Compare* the Declaration's reference to the States' powers of "levy[ing] War, conclud[ing] Peace, [and] contract[ing] Alliances" *with* the Constitution's prohibitions on these matters—U.S. Const. art. I, § 10, cl. 3 ("[n]o State shall, without the Consent of Congress, * * * enter into any Agreement or Compact * * * with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay"), *and* art. I, § 10, cl. 1 ("[n]o State shall enter into any Treaty, Alliance, or Confederation"); *and with* the Constitution's corresponding grants of authority to the General Government—U.S. Const. art. I, § 8, cl. 11 (exclusive power of Congress "[t]o declare War"), *and* art. II, § 2, cl. 2 (joint power of the President and the Senate "to make Treaties").

[1555] *Compare* the Declaration's reference to the States' "establish[ing] Commerce" *with* Congress's power under the Constitution "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes". U.S. Const. art. I, § 8, cl. 3; *and* art. VI, cl. 2. *See*, *e.g.*, Cooley v. Board of Wardens, 53 U.S. (12 Howard) 299, 315-321 (1851); Simpson v. Shepard (Minnesota Rate Cases), 230 U.S. 352, 397-412 (1913).

not from the laws of any "Free and Independent State[ ]", but from "the Laws of Nature and of Nature's God", the rights and obligations of which *no* people may ever "throw off". And because "the good People" always retain the right *and the duty* "to throw off [an abusive] Government" entirely, they necessarily always retain the right *and the duty* to correct, dislodge, and punish rogue public officials and to amend, repeal, or simply set aside those officials' improper acts taken under color of law, thereby restoring "the good People['s]" "Form of Government" to its original pristine condition, so that it need not be "thrown off" after all.

True enough, in the original Constitution WE THE PEOPLE delegated a partial "*duty* of restoration" to the General Government, in the requirement that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and * * * against domestic Violence".[1556] And, of course, this duty necessarily implies a right in the General Government to defend and if necessary reinstate a "Republican Form of Government" in any State in which that "Form of Government" has been attacked or torn down, along with the ancillary powers sufficient to fulfill that duty and enforce that right.[1557] So, should rogue public officials attempt to subvert or overthrow by force the "Republican Form of Government" of a State, or to achieve the same end by surrendering their State to foreign invaders, the General Government would share in THE PEOPLE'S "right of restoration", as their designated agent. Nonetheless, in such a situation, the Constitution foresees THE PEOPLE'S direct participation in the process. For subversion of a State's "Republican Form of Government" would doubtlessly involve multiple violations of "the Laws of the Union" as well as of that State; "domestic Violence" sufficient to threaten the "Republican Form of Government" itself would doubtlessly amount to "Insurrection[ ]" of one form or another; and an "Invasion" would doubtlessly put the "Republican Form of Government" in jeopardy, whether it manifested itself in a direct attack by foreign armed forces, a *Volkerwanderung* by masses of illegal aliens, or the capture of the governmental apparatus by foreign agents of influence and their home-grown helpers—and for each of those troubles, let alone any combination of them, the Constitution authorizes the Militia to be "call[ed] forth".[1558] Yet, even in the case of an assault on a State's "Republican Form of Government", THE PEOPLE could not have delegated the entirety of the right, the duty, and the allied powers of restoration to the United States, because rogue public officials *within the General Government itself*, as well as within the State, might be among the villains against whom THE PEOPLE would have to contend—and so many of them, in so many important positions, that for all intents and purposes the

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[1556] U.S. Const. art. IV, § 4.

[1557] *See* U.S. Const. art. I, § 8, cl. 18.

[1558] U.S. Const. art. I, § 8, cl. 15.

General Government and the government of the State would be in abeyance in fact, whatever their formal existences in law.[1559]

Beyond doubt, too, THE PEOPLE must have delegated part of "the right of restoration" to their States, for assertion against rogue officials within the General Government, *that being the very pattern by which that right was first exercised against the British government directly under the Declaration of Independence*. Yet, once again, not the entirety of that right could have been delegated, because THE PEOPLE might find themselves confronted by a plethora of rogue officials in *both* the General Government *and* the States. So, the balance of "the right of restoration" applicable in such dire situations THE PEOPLE must have retained for themselves—out of self-evident necessity, there being no one else who would or could exercise that right on their behalf if both the General Government and the States became infested with rogue officials. That is, ***some sufficient part of "the Right of the People" under "the Laws of Nature and of Nature's God" to "throw off [an abusive] Government" must always remain in the People's hands, to be exercised by them directly***.

Thus, applying the constitutional taxonomy of the Tenth Amendment, if the General Government refuses to "call[ ] forth the Militia to execute the Laws of the Union", because its offices are under the control of rogues, then the power "delegated to the United States" for that purpose has been rendered temporarily dormant. (For no power can be delegated both for use and for the abuse of non-use precisely when it should be used.) Under those circumstances, though, the power of the States to call forth "the Militia *of the several States*" has not been "prohibited by [the Constitution] *to the States*", so it must be "reserved to the States respectively". And if the States' governments refuse to call forth the Militia, because their offices, too, have been captured by rogues, then the States' power as well has been rendered temporarily dormant. At that point, the only parties who still possess any legitimate reserved power with respect to the Militia are "the people" themselves. Indeed, in this eventuality, when every other form of legal control over rogue public officials has failed, it would be WE THE PEOPLE'S *constitutional duty* to call themselves forth in their Militia, under their own command, because that would be the only way in which the constitutional authority and responsibility "to execute the Laws of the Union" and "suppress Insurrections" could be exercised and fulfilled. Otherwise, by standing idly by, THE PEOPLE would render themselves accomplices to rogue officialdom's wrongdoing: *Nam qui non prohibet cum prohibere possit iubet*.[1560] In fact, any American who *did* stand idly by could rightly be deemed a traitor, because his inaction would amount to "adhering to the[PEOPLE'S] Enemies, giving them Aid and Comfort".[1561] Yet, in calling themselves forth in their

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[1559] *Compare* Texas v. White, 74 U.S. (7 Wallace) 700, 718-726 (1868).

[1560] "For he who does not prohibit [something] when he can prohibit [it thereby] commands [or ratifies] it."

[1561] U.S. Const. art. III, § 3, cl. 1.

own Militia, THE PEOPLE would obviously not be claiming any "right of *revolution*", because they would proceed *according to and in vindication of the Constitution*, not in disregard or violation of it. The power THE PEOPLE asserted—ultimately by appeal to "the Laws of Nature and of Nature's God" through the Declaration of Independence—they would employ to protect and preserve, not to "throw off", the Constitution.

4. In light of the foregoing, it would be bootless for rogue officials to complain of any alleged "irregularity" in THE PEOPLE'S self-deployment in their Militia. For, as Algernon Sidney taught America's patriots of the *pre-*constitutional era, a rogue official

> cannot be protected by the law which he has overthrown, nor obtain impunity for his crimes from the authority that was conferred upon him, only that he might do good with it.
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> * * * * *
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> * * * The law that gives the power, regulates it; and they who give no more than what they please, cannot be obliged to suffer him to whom they give it, to take more than they thought fit to give, or to go unpunished if he do. The agreements made are always confirmed by oath, and the treachery of violating them is consequently aggravated by perjury.[1562]

Neither could rogue officials rightfully complain that THE PEOPLE lacked authority to set themselves up as judges. For, to the question of "who shall judge, whether [public officials] perform[their] duty, or whether [they] govern[ ] tyrannically? Can the people be judge in their own cause?" Burlamaqui answered that "[i]t certainly belongs to those who have given any person a power, which he had not of himself, to judge whether he uses it agreeably to the end for which it was given him".[1563] In which answer Blackstone concurred—"whenever a question arises between the society at large and any magistrate vested with powers originally delegated by that society, it must be decided by the voice of the society itself: there is not upon earth any other tribunal to resort to".[1564]

F. "The right of restoration" effective because reliant upon WE THE PEOPLE in the Militia. Nonetheless, an important distinction does exist between "the right of restoration" as it had to be asserted at the time of the Declaration of Independence and as it can be asserted today under the Constitution. Not, of course, that the exercise of that right in some significant degree may never become

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[1562] *Discourses Concerning Government*, *ante* note 54, at 223, 225. *Compare* U.S. Const. art. VI, cl. 3.

[1563] THE PRINCIPLES OF POLITIC LAW, *ante* note 1025, Part II, Chapter VI, § XXXIV, at 132.

[1564] *Commentaries on the Laws of England*, *ante* note 142, Volume 1, at 212.

necessary in modern times. The Declaration takes it for granted that "*any* Form of Government [*can*] become[ ] destructive of the[ ] ends" for which *proper* "Governments are instituted among Men"—and not on the basis of a single historically peculiar incident alone, but rather on general grounds that have applied, and always will apply, throughout the sad chronicle of humanity's political failures and folly. America's Founding Fathers may not have had the advantage of the succinct statement in the now-familiar epigram that "all power tends to corrupt, and absolute power corrupts absolutely".[1565] But they certainly shared the insight that epigram encapsulates and that their own personal experiences validated: namely, that the more political power *can* be misused without swift, sure, and severe exposure of and repercussions to the malefactors, the more it *will* be; and the more public offices will be colonized by individuals who lust to pervert those positions to the vilest ends of usurpation and tyranny—until sociopaths and psychopaths infest, subvert, and at length come to dominate the governmental apparatus to society's sorrow.[1566]

The Founders' approach to a solution of this problem was to surround and infuse the governmental apparatus, at every level, with interlocking "checks and balances". As James Madison correctly observed,

> the great security against a gradual concentration of the several powers [of government] in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must * * * be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interests of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.[1567]

[1565] John E.E. Dalberg-Acton, *Essays in Religion, Politics, and Morality* [Volume III of *Selected Writings of Lord Acton*, J. Rufus Fears, Editor] (Indianapolis, Indiana: Liberty Fund, Inc., 1988), at 519.

[1566] *See, e.g.,* Andrew M. Łobaczewski, *Political Ponerology: A Science on the Nature of Evil Adjusted for Political Purposes* (Grande Prairie, Alberta, Canada: Red Pill Press, Second Edition, 2006).

[1567] *The Federalist* No. 51.

Of course, Madison focused narrowly on "checks and balances" between and within the General Government and the States:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.[1568]

To render his prescription more useful, though, he should have concentrated his attentions on "the power [***not***] surrendered by the people". For, in the final analysis, a "dependence on the people" is the *only* reliable "check and balance". Inasmuch as "Governments are instituted among Men, deriving their just powers from the consent of the governed",[1569] *and from nowhere else*, there is *nothing* in the material world beyond "the people" upon which anyone can rely to control governmental personnel when they go awry.

To be sure, in the first instance a "dependence on the people" can be achieved through reliance on "the republican principle", under which the people elect representatives to administer their governments.[1570] This reliance remains realistic, however, only while elections are conducted honestly. But when, as is the case today, "two" professional political parties enjoy oligopolistic control of the electoral process—when these "two" parties invariably cater to factions and other selfish special interests, disdainful of "the general Welfare"—when the big media, controlled by some of the same factions, spew out little more than rank propaganda, agitation, and disinformation in support of "the party line"—and especially when rampant, systematic, and officially condoned fraud corrupts the elections themselves—then something more than "the republican principle" is needed, because "the republican principle" has been thoroughly subverted and turned against itself to its own destruction.[1571] In addition, even if the contemporary political-party system were not corrupt, and elections often rigged, something more than "the republican principle" would always be needed *between* elections. For individuals who appear to be acceptable candidates can turn rogue once safely ensconced in public office—and then during their terms can inflict perhaps

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[1568] *Id.*

[1569] Declaration of Independence.

[1570] A republic is "a government in which the scheme of representation takes place". *The Federalist* No. 10 (James Madison).

[1571] With good reason, some observers would describe this situation as one of truly *monopolistic* control, because the "two" parties and their adherents and allies really form but a single party that exhibits two different faces, for the purpose of duping the electorate into imagining that voters enjoy a meaningful "choice" among candidates.

irreparable harm on the community, unless somehow restrained before the next election supervenes. And although a "check and balance" such as impeachment, conviction, and removal from and disqualification for any future office might suffice in the case of one or a few such miscreants,[1572] it can hardly be expected to provide relief when a majority of the legislature administering that remedy is itself composed of rogues.

One form—and only one form—of "dependence on the people" does not suffer from these disadvantages: namely, "dependence on the people" *in their capacity as the Militia*:

> • The Militia do not trace their existences and authority to the outcomes of elections of any kind.
>
> • The Militia are permanent "department[s]" of government, exercising full constitutional authority within both the General Government and the States, yet *in extremis* independent of all of them.
>
> • The members of the Militia all share "the necessary * * * personal motives to resist encroachments" by rogue public officials, factions, and special-interest groups: namely, to maintain "the security of a free State" in which they may exercise to the fullest degree their "unalienable Rights" to "Life, Liberty and the pursuit of Happiness".[1573] And those "personal motives" are inextricably "connected with the constitutional rights of the place", because such is the constitutional responsibility, authority, and ability of the Militia as institutions of government.
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> • The Militia enjoy "the necessary constitutional means * * * to resist encroachments" by rogue public officials, factions, and special-interest groups: namely, "the right of the people to keep and bear Arms".[1574]
>
> • The Militia's "provision for defense" is "commensurate to the danger of attack", because "'[p]olitical power grows out of the barrel of a gun'".[1575] And,
>
> • The Militia are the only institutions capable *in extremis* of making good on the principle that, "[i]f the representatives of the people betray their constituents, there is then no resource left but in the exertion of that original right of self-defense which is paramount to all positive forms of government".[1576] So,

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[1572] *See, e.g.,* U.S. Const. art. I, § 2, cl. 5 and § 3, cls. 6 and 7; *and* art. II, § 4.

[1573] U.S. Const. amend. II *and* Declaration of Independence.

[1574] U.S. Const. amend. II.

[1575] *Quotations From Chairman Mao, ante* note 28, at 61.

[1576] *The Federalist* No. 28 (Alexander Hamilton).

• Although in form one part of the government appears to serve as a "check and balance" on the rest—thus not avoiding Madison's paradox that "you must first enable the government to control the governed; *and in the next place oblige it to control itself*"—in substance the problem is completely solved, because the Militia are the only parts of the government that are at the same time outside of and always superior to the government, because they are composed of the source (in human terms) of all governmental authority, WE THE PEOPLE themselves.

Therefore, as long as THE PEOPLE keep a firm grasp on "th[is] power [***not***] surrendered by the people"—remaining organized, armed, and disciplined in the Militia, and always willing to employ the Militia for their intended purposes—they will live in "a free State", with a properly controlled government.

WE THE PEOPLE retained a firm hold over this power at the time of the Declaration of Independence. Today, in legal principle their grip is even more secure. Immediately preceding the Declaration, "the good People of the[ ] Colonies" defended themselves through their Militia in an arguably *extra-*legal manner. The Militia were establishments settled and regulated by statute, and as such integral parts of the British Colonial governments. But in standing up to rogue officials, "the good People" were soon driven to *overthrow* the authority of the British government in America, not to preserve, perfect, and protect it. (Although one could conclude that they nevertheless *did* preserve, perfect, and protect the best parts of the British "constitution" and the most valuable of the traditional "rights of Englishmen".) In the course of that struggle, the Militia had to accept the charge of illegality within the British political system in order to achieve legality within the new American political system. Now, distinguishably, "the Militia of the several States" are permanent constitutional establishments. *So any actions they might be compelled to take against rogue public officials would occur fully within the present political system, justified by the highest law, and empowered under the authority delegated to the Militia "to execute the Laws of the Union".*[1577] For that reason, contemporary Americans need never again face the situation that confronted the Founding Fathers, in which (as the Declaration of Independence attested) their "Form of Government" had failed, and could not be resuscitated and renovated, but needed to be replaced with something entirely new.

G. "The right of restoration" protective, not destructive, of the Constitution. Critics will carp that no "right of revolution"—even understood precisely as a "right of restoration"—*can* exist *within* the Constitution, because if WE THE PEOPLE could assert a true "right of revolution" then public officials would labor under a corresponding "duty" to allow the "revolution" to succeed, which

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[1577] U.S. Const. art. I, § 8, cl. 15.

would be to accede to anarchy and thereby destroy the Constitution. Setting themselves up as superior to public officials, THE PEOPLE could take the government into their own hands, and thus supersede the present "Form" of government, whenever they saw fit. This criticism mistakes the true political relationship between THE PEOPLE and their government. *WE THE PEOPLE always have been, are, and always will be superior to public officials*. THE PEOPLE are the permanent principals in the political system—the sovereigns—while public officials are merely THE PEOPLE'S temporary agents. Officials merely "represent", and therefore can never rule, THE PEOPLE in any way. THE PEOPLE never need to "take the government into their own hands", because in a self-governing society as a matter of final authority and responsibility the government is already in their hands at all times. Upon occasion, THE PEOPLE may need to wrest the day-to-day workings of the governmental apparatus from the grasps of rogue public officials. The question then becomes, however, not whether THE PEOPLE enjoy the absolute right to take such action (which they do), but in what manner they should exercise their authority. The issue is one, not of power, but of prudence. So, in resisting and repelling the aggression of rogue public officials and removing them from the offices they were abusing, THE PEOPLE would not destroy the present "Form of Government", but instead would vindicate it—for the right, power, and duty of THE PEOPLE to defend themselves against "a long train of abuses and usurpations" by rogue officials form the legal foundation upon which the Declaration of Independence declares that every legitimate "Form of Government" stands.

Criticism of "the right of restoration" is also anachronistic. It reads into the Constitution of the United States the essential but defective principle of the British "constitution", and thus reads out of the Constitution the essential and curative principle of the Declaration of Independence. Americans' fundamental complaint against the English "Form of Government" in *pre-*constitutional days was that Parliament, although composed of the people's mere "representatives", nevertheless claimed to be *supreme and uncontrollable*. As Blackstone approvingly explained the situation,

> [T]HE power and jurisdiction of parliament * * * is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. * * * It hath sovereign and uncontrollable authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical, or temporal, civil, military, maritime, or criminal: this being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms. * * * It can change and create afresh even the constitution of the kingdom and of parliaments themselves * * * . It can, in short, do every thing that is not naturally impossible * * * .

> True it is, that what the parliament doth, no authority upon earth can undo. So that it is a matter most essential to the liberties of this kingdom, that such members be delegated to this important trust, as are most eminent for their probity, their fortitude, and their knowledge; for it was a known apothegm * * * "that England could never be ruined but by a parliament:" and * * * this being the highest and greatest court, over which none other can have jurisdiction in the kingdom, if by any means a misgovernment should any way fall upon it, the subjects of this kingdom are left without all manner of remedy. * * *
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> IT must be owned that Mr. Locke, and other theoretical writers, have held, that "there remains still inherent in the people supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them: for when such trust is abused, it is therefore forfeited, and devolves to those who gave it."[1578] But however just this conclusion may be in theory, we cannot adopt it, nor argue from it, under any dispensation of government at present actually existing. For this devolution of power, to the people at large, includes in it a dissolution of the whole form of government established by that people; reduces all the members to their original state of equality; and, by annihilating the sovereign power, repeals all positive laws whatsoever before enacted. No human laws will therefore suppose a case, which at once must destroy all law, and compel men to build afresh upon a new foundation; nor will they make provision for so desperate an event, as must render all legal proceedings ineffectual. So long therefore as the English constitution lasts, we may venture to affirm, that the power of parliament is absolute and without control.[1579]

Americans of that era could not and would not accept, and therefore rose in defiance against, this assertion of absolute and uncontrollable *governmental* supremacy over the people.

Obviously, under the Declaration of Independence and the Constitution, the authority of the General Government, or of any State's government, or of all of the States' governments combined, or of the General Government and all of the States' governments put together, is *not* "so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds". Quite the opposite. The questions remain, though, "What institutions can keep the General Government and the governments of the States within their rightful bounds? What remedies are available to WE THE PEOPLE for 'misgovernment' when public officials turn out *not* to be 'the most eminent for their probity, their fortitude, and their

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[1578] This material appears in *Two Treatises of Government*, *ante* note 53, Book II, Chapter XIII, § 149 *and* Chapter XIX, §§ 221-227 and 243.

[1579] *Commentaries on the Laws of England, ante* note 142, Volume 1, at 160-162 (footnotes omitted).

knowledge'—but instead are exposed as ignorant, slothful, cowardly, arrogant, avaricious, ambitious, dishonest, and insolent asses?"

WE THE PEOPLE can exercise their supreme political power—their sovereignty—directly against rogue public officials in three different ways: (i) on a regular basis through elections of representatives;[1580] (ii) on an irregular basis through "petition[ing] the Government for a redress of grievances";[1581] and (iii) in extraordinary circumstances through the Militia's exercise of the "'[p]olitical power [that] grows out of the barrel of a gun'".[1582] (A fourth method—amendment of the Constitution—cannot be considered a *direct* exercise of popular sovereignty against rogue officials, because it depends entirely upon the coöperation of Congress and the States' legislatures, which may be controlled by rogues, and is a tortuous and tedious method of reform to boot .[1583]) When the voters succeed in "throwing the bums out", no one calls that turn of the electoral card a "revolution". But what happens when election after election fails to throw *enough* of the bums out, because the bums rig the polls—so that the ballot, although it lists entries for candidates from "two" major political parties, still amounts to a Stalinist ballot, where in effect a single slate and a single party always win? Does that not amount in fact to a surreptitious revolution by means of "electoral theater", through which the Constitution has been temporarily overthrown?[1584] Similarly, when petitions, demonstrations, and even extensive acts of civil disobedience at "the grass roots" convince or frighten public officials into behaving properly for a little while, no one calls that turn of events a "revolution". But what happens when rogue public officials set their sights squarely on usurpation and tyranny, and the inutility, inanity, and even political insanity of "freedom of petition" then becomes apparent to every thinking man and woman? It was said of old that Parliament was "the Grand Inquest of the Kingdom, where the People speak boldly their Grievances, and call to account over-grown Criminals, who are above the reach of ordinary Justice".[1585] So, too, should Congress and every State legislature be, ideally. In reality, though, Congress and all too many of the States' legislatures have, as of this writing, become the cozy dens of "over-grown Criminals" and their co-conspirators and accomplices in wrongdoing. When those in public office ooze with disdain for THE PEOPLE'S liberties, when they openly hold THE PEOPLE in contempt, when they brazenly oppress THE PEOPLE in order to fatten the purses of domestic special-

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[1580] *See, e.g.,* U.S. Const. art. I, § 2, cls. 1 and 2; art. I, § 3, cl. 1; art. II, § 1, cls. 1 and 2; *and* amends. XII; XIV, § 2; XV; XVII; XIX; XXIII; XXIV; and XXVI.

[1581] U.S. Const. amend. I.

[1582] *Quotations From Chairman Mao, ante* note 28, at 61.

[1583] *See* U.S. Const. art. V.

[1584] *See, e.g.,* J. Locke, *Two Treatises of Government, ante* note 53, Book II, Chapter XIX, §§ 216 and 222.

[1585] AN ARGUMENT, Shewing, that a Standing Army Is inconsistent with a Free Government, *ante* note 27, at 3.

interest groups or to advance the agenda of some foreign power, what good will it do for THE PEOPLE to petition them? None.[1586]

Such is the lesson American history teaches. As the Declaration of Independence recounted the Colonists' experiences to "a candid world", "[t]he history of the * * * King of Great Britain is a history of repeated injuries and usurpations". "In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury." These petitions proved impotent, not just because the King was recalcitrant, but also because Anglo-American society was riven by mutually antagonistic factions. As the Declaration reported,

> [n]or have We been wanting in attentions to our British brethren. We have warned them from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us. * * * We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations, which, would inevitably interrupt our connections and correspondence. They too have been deaf to the voice of justice and of consanguinity.

Who then were the "revolutionaries" of that time? The American patriots who petitioned again and again; or the King, his Ministers, Parliament, and many among the British public who refused to "promote the spirit of peace" within the Empire by paying attention to these petitions, in violation of the Mother Country's "constitution"?[1587] And is not the same surreptitious "revolution" taking place today in violation of the Constitution of the United States when rogue public officials at every level of the federal system turn deaf ears and blind eyes to citizens' fully documented complaints of "repeated injuries and usurpations"?[1588]

If rogue officials refuse to listen to the peaceful voices THE PEOPLE raise in the specific manner the Constitution provides, and if such officials cannot be replaced in person or in kind because they have corrupted the electoral process, then only one alternative remains for THE PEOPLE: the Militia. For the Militia to sally forth to put rogue officials in their proper places would not, however, constitute a "revolution". Rather, it would amount only to what could be called a "police action"—"suppress[ing] Insurrection[s]" by "execut[ing] the Laws of the Union" against political criminals.[1589] To adopt Blackstone's phrase, the Militia are the ultimate "dispensation of government at present actually existing"—for they

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[1586] *See, e.g.,* J. Locke, *Two Treatises of Government, ante* note 53, Book II, Chapter XIX, §§ 221 and 217.

[1587] *See* W. Blackstone, *Commentaries on the Laws of England, ante* note 142, Volume 1, at 143.

[1588] *See, e.g.,* J. Locke, *Two Treatises of Government, ante* note 53, Book II, Chapter XIX, §§ 224 through 229.

[1589] *Compare* U.S. Const. art. I, § 8, cl. 15 *with, e.g.,* 18 U.S.C. §§ 241 and 242.

and they alone place immediately and directly within THE PEOPLE'S own hands the "'[p]olitical power [that] grows out of the barrel of a gun'". Contrary to Blackstone, however, deployment of the Militia to police rogue public officials would not "annihilat[e] the sovereign power"—but instead would constitute the exercise of that power by the sovereigns themselves. It would not result in "a dissolution of the whole form of government established by th[e] people"—but instead would mobilize THE PEOPLE within the most puissant part of that "form", in order to save both the government and themselves. It would not "destroy all law", "repeal all positive laws before enacted", and "render all legal provisions ineffectual"—but instead would execute the laws against the very worst criminals from which any republic can suffer: namely, faithless public officials who violate their "Oath[s] or Affirmation[s], to support th[e] Constitution".[1590]

Yet, in eliminating the unconstitutional misrule of political élitists, factions, and special interests both domestic and foreign, deployment of the Militia *would* "reduce[ ] all members [of the society] to their original state of equality"—that is, the state of affairs mandated by the Declaration of Independence in which "all men are created equal" in political status, and forever treated that way. ***This is the right which every true American can and must claim, both for himself and for every other American, because upon it the entire political edifice of national sovereignty and limited government rests***. For this to be a true "right", though, it must have an effective "remedy" for its "infringement". "'[E]very right, when withheld, must have a remedy, and every injury its proper redress'".[1591] That remedy must be the Militia. For the Second Amendment declares the Militia to be "necessary to the security of a free State". And inasmuch as political equality is the hallmark of "a free State", the Militia must be necessary to that, too. Indeed, the very nature of the Militia compels this conclusion. The Declaration of Independence and the Constitution understand WE THE PEOPLE to be one indivisible body, because each and every member is the political equal of every other member. The Militia are "composed of the body of the people, trained to arms".[1592] Therefore, the Militia are in their members the embodiments, and in their members' self-interests the guarantors, of political equality.

H. The capability of the Militia to enforce "the right of restoration" today. Naysayers will carp and whine that mere "parchment guarantees" inscribed in the Declaration of Independence, the original Constitution, and the Bill of Rights

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[1590] *Compare* U.S. Const. art. VI, cl. 3 *with* J. Locke, *Two Treatises of Government, ante* note 53, Book II, Chapter XIX, § 230.

[1591] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803), *quoting* W. Blackstone, *Commentaries on the Laws of England*, *ante* note 142, Volume 3, at 109. *Accord*, United States *ex rel.* Von Hoffman v. City of Quincy, 71 U.S. (4 Wallace) 535, 554 (1867); Poindexter v. Greenhow, 114 U.S. 270, 303 (1885).

[1592] Virginia Declaration of Rights (1776) art. 13.

are of little worth in the long run. In respect of the Militia, however, America's organic laws are anything but mere "*parchment* guarantees". Rather, they are composed of blood and iron. So, the "Form of Government" under the Declaration and the Constitution cannot fail unless the Militia—which are the key elements in that "Form", being "necessary to the security of a free State"—should fail. And such a disaster could never occur unless WE THE PEOPLE themselves—who make up the Militia—should fail in the performance of their duty of self-government. Are patriotic Americans, however, ready to conceive and concede that THE PEOPLE *will* so fail? That they *will* sink into such ignorance, sloth, and irresponsibility as to become politically impotent? That they *will* delude themselves into imagining that they need not participate personally in bearing the burdens of self-government, yet nonetheless will continue to enjoy its benefits? Well, surely *some*—perhaps even not just a few—will do so. (On that score, the reader must look into his own heart and determine in which camp he wants to be found.) But not *all* will, and surely *not enough* to allow America's present "Form of Government [to] become[ ] destructive of the[ ] ends" for which it was originally "instituted".

For not everyone eligible for service in the Militia will need to be deployed to reassert popular sovereignty and purify, protect, and preserve this country's restored "Form of Government". Against even the myriad attacks being launched by rogue public officials and their allies in various factions and special-interest groups, the Militia need and ought not to be wielded as bludgeons, to beat to a bloody pulp the entirety of the existing governmental apparatus because part of it is rotten beyond redemption. Quite the contrary. *First*, one ought not to hurry the operation. As the Declaration of Independence counsels,

> Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed.

Second, one ought not to undertake too much of the operation if it threatens to bring about more harm than benefit. WE THE PEOPLE may not occupy an advantageous position from which to change the "Form of Government" from top to bottom now that serious corruption has infested the body politic. Political and economic structures erected upon foundations of usurpation and tyranny over long periods of time may have become so large, so complex, and so interlocked with legitimate and necessary social institutions and *mores* that trying to excise them all at once will only make matters worse than they are. *Third*, even the political surgery that is expedient needs to be carefully directed towards the gangrenous tissue alone. THE PEOPLE'S goal must be to reassert popular sovereignty directly, in a sharply

focused manner, in as many areas as possible, *but without an abrupt, destabilizing, and possibly catastrophic alteration in the entire "Form of Government"*.

Take, for example, the Power of the Purse and the Power of the Sword, which today have largely been usurped by the Federal Reserve System, on the one hand, and by the General Government's increasingly *para*-militarized Department of Homeland Security, on the other. Although every thinking American realizes that these institutions in tandem are looting the Nation's wealth for the benefit of a financial *Mafia* and grinding its population under the heel of a National police-state apparatus, one also recognizes that this complex cannot easily be disestablished as a whole, or even disassembled major part by major part in the near term. Yet, *through deployment of the Militia, both the Federal Reserve System and the Department of Homeland Security could be treated effectively as nonentities by the States and their people, who could thereby regain legal as well as practical control over the Powers of the Purse and the Sword at the Local level.* (i) The Federal Reserve System could be rendered irrelevant if the States were to adopt an alternative currency which they required both their governments and their citizens, in their capacities as members of the Militia, to use in all of their day-to-day transactions.[1593] And (ii) the Department of Homeland Security could be rendered impotent if the States were to establish their own programs of "homeland security", based upon their Militia, because the Constitution would not allow any "Officers" of the Militia to come under the command of anyone in that Department; and if no one in the Department of Homeland Security could give orders to any "Officers" in the Militia, then no rank-and-file Militiamen would be subject to anyone in that Department, either.[1594]

Importantly—

- A strategy of this kind would not involve "revolution", in the sense of a sudden, shattering *renversement* of the political, economic, and social order, because the Federal Reserve System and the Department of Homeland Security would not be disestablished, but merely increasingly disregarded.

- Even if "secession" of a State from the Union were constitutional,[1595] no need for it would ever arise, because any State could separate herself from the Federal Reserve System and the Department of Homeland Security in this manner while still remaining within the Union.

[1593] *See post*, at 1208-1233.

[1594] *See* U.S. Const. art. I, § 8, cl. 16.

[1595] *E.g.*, by an Amendment of the Constitution under Article V, rescinding the State's ratification or adhesion to the Constitution under Article VII or Article IV, Section 3, Clause 1. *See* Texas v. White, 74 U.S. (7 Wallace) 700, 724-726 (1868).

•No State would need to claim a right and power of "nullification" as to any of the largely unconstitutional statutes under color of which the Federal Reserve System and the Department of Homeland Security operated, because the constitutionality *vel non* of those statutes would be quite irrelevant to the legitimacy of any State's adoption of an alternative currency or development of a Local program of "homeland security" based upon her Militia.[1596] And,

•No State would need to assert the doctrine of "interposition" against any such statute, either, because no direct challenge to its constitutionality would be necessary.[1597] Rather,

•Each State would engage in *constitutional circumvention* of the usurpation and tyranny embodied in the Federal Reserve System and the Department of Homeland Security. Thus, "the right of restoration" would be exercised within and through the federal system "from the bottom up", as it always must be in a self-governing republic.

WE THE PEOPLE need to experiment in this way, because no "Form of Government" can fairly be said to have failed when one of its central components—and arguably the most important of them, the only one explicitly recognized to be "necessary"—has not been put to use. Of course, if THE PEOPLE do succeed in revitalizing the Militia but nonetheless this country's political and economic situations do not perceptibly improve—or if rogue public officials in the General Government and the governments of the States, in league with powerful private factions and other special-interest groups, can prevent THE PEOPLE from revitalizing and deploying the Militia in the first place—then Americans will have witnessed the *final* step in "a long train of abuses and usurpations", and will know that their present "Form of Government" *has* failed, that it is irremediably, hopelessly "destructive of [men's unalienable Rights]", and that they must "throw

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[1596] The question of "nullification" is raised here solely to deal with all argumentative possibilities. The term "nullification" is generally taken to mean the supposed power of a State to declare invalid a purported statute or other official act of the General Government. Yet, on the one hand, if that statute or other act is constitutional, then no such power of "nullification" can possibly exist. U.S. Const. art. VI, cls. 2 and 3. On the other hand, if that statute or other act is unconstitutional, then it is null and void *ab initio* as a matter of its character; and any declaration to that effect by a State is superfluous. *See* Norton v. Shelby County, 118 U.S. 425, 442 (1886); Poindexter v. Greenhow, 114 U.S. 270, 288 (1885); Huntington v. Worthen, 120 U.S. 97, 101-102 (1887); Fay v. Noia, 372 U.S. 391, 408-409 (1963). Nonetheless, for moral, political, and prudential reasons, a State might choose to publish a declaration and remonstrance exposing and denouncing the nullity of whatever purported statutes or other acts of the General Government she deemed most obnoxious. This would follow the example set by the Founding Fathers, who, out of "a decent respect to the opinions of mankind", and in order "[t]o prove" that "[t]he history of the * * * King of Great Britain [wa]s a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny", "let Facts be submitted to a candid world" in a lengthy catalogue of the Monarch's abuses in the Declaration of Independence.

[1597] "Interposition" refers to the right and power of a State to protect her citizens against the application to them of an unconstitutional statute by rogue agents of the General Government.

off such Government" as soon as possible by whatever means they can master and at whatever price they must pay.

CHAPTER THIRTY-THREE

"[T]he Militia of the several States" consist of separate and independent establishments which must always exist in each and every State throughout the United States.

In the nature of things, the Militia must be permanently in existence, throughly organized, and prepared at all times by dint of equipment and training to perform their functions, because: (i) A fundamental axiom of political philosophy is that "sovereignty is never in abeyance". (ii) In America, WE THE PEOPLE are the sovereigns.[1598] (iii) Sovereignty is the highest form of political power; and the sovereigns are the supreme executors of that power. (iv) "'Political power grows out of the barrel of a gun'".[1599] (v) Through their Militia, THE PEOPLE hold the guns, and therefore maintain control over the ultimate political power in their own hands. (vi) To the degree that THE PEOPLE do not hold the guns in their own hands, they forfeit political power. (vii) Once THE PEOPLE have forfeited enough political power, *popular* sovereignty *will be* in abeyance—in which case some *other* "sovereign" will inevitably assert its dominance over society. And (viii) inasmuch as "[a] well regulated Militia" is "necessary to the security of a free State",[1600] and the only politically reliable group in "a free State" consists of THE PEOPLE themselves, this new "sovereign"—for which "'[p]olitical power grows out of the barrel of * * * gun[s]'" *other than those held by the Militia*—will be the tool of factions and other special interests inimical to a free society.

With the temporary exception of Pennsylvania (and that because of the dominance of pacifistic Quakers in her legislature),[1601] throughout the *pre*-constitutional era the Militia existed as "settled" institutions in and of each of the individual Colonies and then the independent States. During that period, no single, unified Militia of the Colonies or the independent States as a whole was ever established—even under the Articles of Confederation, which provided, *not* for a

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[1598] *See* Chisholm v. Georgia, 2 U.S. (2 Dallas) 419, 454, 456 (opinion of Wilson, J.), 471-472 (opinion of Jay, C.J.) (1793). Chief Justice John Jay's recognition of popular sovereignty in this opinion evidences that no one of any consequence living at that time could have seriously doubted that doctrine as a fundamental premiss of the Constitution—or at least would have dared to contradict or disparage it in an official statement. For Jay himself was no friend of the people, but instead was personally contemptuous of democracy and the common man. *See* Claude G. Bowers, *Jefferson and Hamilton: The Struggle for Democracy in America* (Cambridge, Massachusetts: The Riverside Press, 1925), at 248-250.

[1599] *Quotations From Chairman Mao, ante* note 142, at 61.

[1600] U.S. Const. amend. II.

[1601] *See ante*, at 87-88 and 845-848.

"militia of the United States", but instead that "every state shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutred".[1602] The original Constitution incorporated "the Militia of the several States" into its federal system in conformity with the comprehensive definition of "Militia" that nearly one hundred fifty years of American *pre-*constitutional history provided. Therefore, under the Constitution, ***the Militia must be separate and independent institutions permanently established within and for each and every one of "the several States"*** (albeit with certain specific responsibilities to and authority within the General Government).

And so they are. For the original Constitution "settled" the Militia once and for all, in the sense of "establish[ing]" and "fix[ing them] unalienably by legal sanctions,"[1603] by recognizing and confirming their existences as permanent State institutions within the federal system—leaving them only to be "regulated", in the sense of being "adjusted by rule or method",[1604] in accordance with the principles of the *pre-*constitutional Militia as the specific needs of later times might dictate.[1605] When the original Constitution referred specifically to "the Militia *of the several States*",[1606] it presumed that individual Militia then were and thereafter always would be "settled" within, by, and under the jurisdiction and ultimate control of each of the States. And when the Second Amendment later declared in general that "[a] *well regulated* Militia" is "necessary to the security of a free State",[1607] it presumed that a Militia capable of such regulation would always be "settled" in each State needing such "security"—which, self-evidently, included *every* State then in the Union as well as every State which would join thereafter.

When the original Constitution empowered Congress "[t]o provide for organizing, arming, and disciplining, *the* Militia, and for governing such Part of *them* as may be employed in the Service of the United States",[1608] it delegated only an authority for regulating "*the* Militia". And because the original Constitution nowhere delegated to Congress any power whatsoever to "settle" any species of supposed "militia" different from "*the* Militia" to which it referred, it thereby absolutely precluded Congress from purporting to create any such institution anew. For, inasmuch as "[t]he government * * * of the United States, can claim no

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[1602] Arts. of Confed'n art. VI, ¶ 4.

[1603] S. Johnson, *Dictionary*, *ante* note 50, definitions 4 and 9 in both the First (1755) and the Fourth (1773) Editions.

[1604] *Id.*, definition 1 in both the First (1755) and the Fourth (1773) Editions.

[1605] The important distinction between "settling" and "regulating" the Militia is discussed in more detail *ante*, at 100-102.

[1606] U.S. Const. art. II, § 2, cl. 1 (emphasis supplied).

[1607] Emphasis supplied.

[1608] U.S. Const. art. I, § 8, cl. 16 (emphasis supplied).

powers which are not granted to it by the constitution",[1609] "powers not granted are prohibited".[1610]

This arrangement, of course, contrasts starkly with the powers the original Constitution delegated to Congress "[*t*]*o raise* and support Armies", [*t*]*o provide* and maintain a Navy", and "[t]o make Rules for the Government and Regulation of the land and naval Forces",[1611] while prohibiting the States from "keep[ing] Troops, or Ships of War in time of Peace" "without the Consent of Congress".[1612] For pursuant to these provisions, the authority both to "settle" and to "regulate" what the Constitution denotes "the Army and Navy of the United States",[1613] and to "regulate" through its "Consent" whatever "Troops, or Ships of War" Congress permits the States to "keep * * * in time of Peace", remains the prerogative of Congress, similar to what it was under the Articles of Confederation. The Articles mandated that

> [n]o vessels of war shall be kept up in time of peace by any state, except such number only, as shall be deemed necessary by the united states in congress assembled, for the defence of such state, or its trade; nor shall any body of forces be kept up by any state, in time of peace, except such number only, as in the judgment of the united states, in congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such state[;][1614]

> [t]he united states in congress assembled shall have authority * * * to build and equip a navy—to agree upon the number of land forces, and to make requisitions from each state for its quota, in proportion to the number of white inhabitants in such state; which requisition shall be binding, and thereupon the legislature of each state shall appoint the regimental officers, raise the men and cloath, arm and equip them in a soldier like manner, at the expence of the united states[.][1615]

Under the Constitution, too, the States may not maintain their own "bod[ies] of forces" ("Troops") or "vessels of war" ("Ships of War") "in time of Peace" "without the Consent of Congress". And when Congress does give that "Consent", it may

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[1609] Martin v. Hunter's Lessee, 14 U.S. (1 Wheaton) 304, 326 (1816). *Accord*, McCulloch v. Maryland, 17 U.S. (4 Wheaton) 316, 405 (1819).

[1610] United States v. Butler, 297 U.S. 1, 68 (1936).

[1611] U.S. Const. art. I, § 8, cls. 12, 13, and 14 (emphasis supplied). *See also* U.S. Const. amend. V, which explicitly reinforces what should be the obvious distinction between "the land or naval forces" and "the Militia".

[1612] U.S. Const. art. I, § 10, cl. 3.

[1613] U.S. Const. art. II, § 2, cl. 1.

[1614] Arts. of Confed'n art. VI, ¶ 4.

[1615] Arts. of Confed'n art. IX, ¶ 5.

annex thereto otherwise constitutional conditions—including the requirement that the States' "Troops" serve in "the land * * * Forces" of the United States, or that the "Ships of War" produced by the States become part of "the * * * naval Forces" of the United States, under some circumstances.[1616] Moreover, when Congress "raise[s] Armies" directly under its constitutional power to do so,[1617] it may (as did the Congress under the Articles) "make requisitions from each state for her quota" of "land forces".[1618] On the other hand, the Constitution does *not* require the States to obtain "the Consent of Congress" before they "keep Troops, or Ships of War in time of [War]". And, inasmuch as the latter power had *always* been the prerogative of the States, both before and even under the Articles of Confederation, the absence of any express limitation on it in the Constitution—and especially the express reservation to the States of the further power to "engage in War" when "actually invaded, or in such imminent Danger as will not admit of delay",[1619] which might prove useless without the ability to "keep Troops, or Ships of War" under those circumstances—proves that the power to "keep Troops, or Ships of War in time of [War]" *without "the Consent" or subjection to the interference of Congress* remains "reserved to the States respectively, or to the people".[1620]

The obvious reason for the different treatments of "the Militia" and "the land and naval Forces" in the original Constitution was that, in 1788, WE THE PEOPLE saw no need to empower Congress to "settle" "the Militia", because "the Militia" were already "settled" by and within each of "the several States", and had been for generations; and for political reasons THE PEOPLE desired "the Militia" to remain as permanent institutions within the federal system, yet always as the establishments of "the several States". It sufficed, then, solely to empower Congress to "regulate" "the Militia" for the purpose of inducing reasonable uniformity in their "organiz[ation], arm[s], and disciplin[e]" when they "m[ight] be employed in the Service of the United States".[1621] Whereas, inasmuch as THE PEOPLE desired to continue the prohibition against the States' raising their own "Troops, or Ships of War in time of Peace" without Congressional "Consent", they needed to delegate to Congress the exclusive authority to "settle" ("raise" and "provide") "Armies" and "a Navy" in the first instance—either by Congress's own actions or through its approval of actions taken by the States—or else "the land and naval Forces" *of the United States* would not have come into existence at all.

[1616] *See* U.S. Const. art. I, § 8, cl. 14. This is doubtlessly the shaky constitutional basis upon which the modern National Guard and the Naval Militia rest. *See ante*, at 786-793.

[1617] U.S. Const. art. I, § 8, cl. 12.

[1618] *See post*, Chapter 49.

[1619] U.S. Const. art. I, § 10, cl. 3.

[1620] U.S. Const. amend. X.

[1621] U.S. Const. art. I, § 8, cls. 15 and 16.

CHAPTER THIRTY-FOUR

Congress, the States, and in default thereof WE THE PEOPLE themselves must ensure that each and every one of "the Militia of the several States" is fully organized, armed, disciplined, and trained at all times.

By whatever permutation or combination of unpreparedness may obtain, an "unorganized", "unarmed", "undisciplined", or "untrained" Militia is little better than no Militia at all—and perhaps worse, because it deceives THE PEOPLE into accepting the shadow for the substance. But *no* Militia at all within any of the several States, whether the product of actual nonexistence or simply insufficient preparation, is a legally impossible state of affairs under both the Declaration of Independence and the Constitution.

A. The requirement of fully organized Militia perforce of the Declaration of Independence. The Declaration categorically asserts that, "when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce the[People] under absolute Despotism, it is their right, it is their duty, to throw off such Government". Plainly enough, confronted by usurpers and tyrants aiming at "absolute Despotism", "the good People" (as the Declaration identifies them) can secure their own liberation and protection only through the threat or at length the actual application of overwhelming force—by organizing, arming, disciplining, training, and deploying themselves in some variety of Militia sufficient to the purpose. Just as plainly, though, "the good People" need not wait until "absolute Despotism" has nearly fastened its strangulating grip upon and sunk its fangs into their throats before they mount a defense against it. If "it is their right, it is their duty, to throw off such [a bad] Government" when the malignancy fully appears—accepting all of the evil consequences that will inevitably arise out of the struggle—then it must be even more imperatively their right and their duty to support and sustain a good government in the first place and thereby avoid those evils altogether. "[T]he good People" need not, dare not, remain quiescent in the face of crescent usurpation and tyranny until, perhaps too late to be effective, desperation finally prompts action. Rather, at *all* times, even in those of apparent tranquillity, they must prepare themselves to detect, to deter, to resist when deterrence fails, and ultimately to defeat every "design to reduce them under absolute Despotism". Across such a wide range of circumstances—from calm, through crisis, even to calamity—what institution can invariably best serve "the good People['s]" needs?

Again, the answer is some variety of Militia. A "right of the people peaceably to assemble, and to petition the Government for a redress of grievances"[1622] will not necessarily prove efficacious, because self-assured usurpers and tyrants with no fear of "the people" will contemptuously disregard the petitioners—whose futile endeavors will produce only new "grievances", new petitions for the "redress" of which will remain unanswered in their turn. The next elections may prove equally futile as means of reform, if the usurpers and tyrants have corrupted the process by (say) coöpting the major political parties, subverting the big media, and arranging for the use of rigged voting machines. In any event, elections occur only periodically—and the times between elections may prove sufficient for the malefactors' purposes.[1623] Inasmuch as "the good People" cannot expect usurpers and tyrants to prosecute themselves even when their misdeeds are exposed and made the subjects of public denunciations, and inasmuch as "the good People" must be able to investigate and police such malefactors between elections, therefore "the good People" require instruments with the organization, equipment, training, and legal authority to serve that purpose under their own control at all times. *Only* the Militia, *fully prepared to do whatever is necessary, when it is necessary*, fill the bill.

Obviously, *prior, permanent, and complete* organization of the Militia is mandatory in the case of a natural disaster, because the consequences of any such catastrophe will not wait for the people to prepare themselves to deal with a situation that may prevent such preparation altogether or at least may render it more difficult than it otherwise would have been. Such organization is even more important, though, in the case of threats by such domestic and foreign human enemies as usurpers, insurrectionists, or invaders. For, on the one hand, natural disasters are usually of limited duration and geographic scope, whereas the subversion or conquest of an entire country by internal or external enemies may consign all of "the good People" to the darkness of despotism for generations. But, on the other hand, unlike natural disasters, threats from human enemies may possibly be *deterred* in the first place. Deterrence, however, is a chancy business. Deterrence depends upon aggressors' perceptions of the extent of the community's actual ability to deploy sufficient forces effectively at a particular time and place. Being public institutions, the Militia's level of readiness will be generally known; so potential aggressors cannot possibly mistake what they may be taking on. Conversely, if "the good People" are largely disorganized, usurpers or invaders will

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[1622] *E.g.,* U.S. Const. amend. I.

[1623] For example, a rogue President has four uninterrupted years of incumbency. Even if after two years in office his partisans lose control of Congress, he may nonetheless be able to accomplish his goals, without new legislation, through the use of purported "executive orders", "proclamations", "nationals security decision directives", "signing statements", and like dictatorial devices. And unless the new Congress overwhelmingly turns against him, he may continue his depredations without fear of impeachment, conviction, and removal from office for "high Crimes and Misdemeanors". *See* U.S. Const. art. I, § 2, cl. 5 and § 3, cls. 6 and 7; *and* art. II, § 4.

not be deterred by the expectation that individuals or small groups might oppose them. Rather, their anticipation that resistance will be limited and uncoördinated will encourage their aggression. To constitute an effective deterrent, then, the Militia must have the *maximum feasible* organization, arms, discipline, and training necessary to deal with every reasonably foreseeable threat. This requires foresight, planning, preparation, and testing well in advance of the appearance of danger. The hope to improvise or "muddle through" after a crisis strikes cannot make up for what should have been, but was not, done beforehand.

The question then becomes, "*Who* will organize such *fully prepared* Militia?" Under the Declaration of Independence, it must be either the government or "the good People" themselves, because the Declaration recognizes only those two categories of political actors. A good government—"deriving [its] just powers from the consent of the governed" and intent upon exercising those powers to forefend "a long train of abuses and usurpations"—will properly organize the Militia. But if incompetent or rogue public officials fail, neglect, or refuse to do so, then "the good People" themselves must take the initiative. In neither case can the Militia simply be held in abeyance or desuetude.

B. The requirement of fully organized Militia under the Constitution. *No* "well regulated Militia"—whether from the absence of such an establishment altogether or from its debilitating deficiencies—is even more plainly impossible under the Constitution than under the Declaration of Independence. *First,* the Constitution explicitly incorporates "the Militia of the several States" into its federal system. *Second*, any other than "[a] *well regulated* Militia" in each of the several States is a constitutional impossibility, because the Second Amendment declares that such a Militia is "necessary to the security of a free State" everywhere without exception. *Third*, by historical definition, "[a] *well regulated* Militia" is a Militia *fully* "regulated" at all times according to *pre-*constitutional principles. For just as never during that period did a single one of the Colonies (other than Pennsylvania) and then the independent States not maintain her own Militia at all, neither did a single one of the Colonies or States (including, at last, Pennsylvania) not "regulate[ ]" her Militia "well"—in terms of *fully* organizing, arming, disciplining, and training it for the "homeland-security" tasks then at hand—let alone even admit the possibility of jury rigging only an oxymoronic "well [but un]regulated Militia". *Fourth*, the Constitution licenses neither the States nor Congress to set up truncated "select militia", leaving "the body of the people"[1624] "unorganized". The States lack any such discretion, because the Militia are "the Militia *of the several States*" *as those Militia existed before and at the time the Constitution was ratified*. And during that period of almost one hundred fifty years, *no* Militia of any Colony or independent

[1624] Virginia Declaration of Rights (1776) art. 13.

State had been other than *fully* organized. Congress, too, lacks any such discretion, because its relevant power is solely "[t]o provide for organizing * * * *the* Militia", not "[*Part of*] *the* Militia" only.[1625] And "***the** Militia*" means *the Militia just as they existed in* pre*-constitutional times—in which **every** eligible individual was subject to **some** form of organization.* If Congress were at liberty "[t]o provide for organizing" only "[Part of] the Militia"—that is, effectively to redefine "*the* Militia" *ad libitum* without reference to American legal history—rogue Members of Congress: (i) could reduce the Militia to impotence by enlisting only a tiny fraction of eligible individuals, which would not serve "the security of a free State", or (ii) could create a Praetorian Guard or *Schutzstaffel* out of those legislators' political cronies, partisans, and hangers-on, which would subvert that "security". Yet the question remains, "If the Militia are to be 'well regulated', *who* has the authority and the responsibility to 'regulate' them?" That is, *who* is to *ensure* that the Militia are *fully* organized, armed, disciplined, and trained *at all times*, according to *pre-*constitutional principles?

1. The responsibility of Congress. The initial answer is "Congress", because the original Constitution explicitly delegated to Congress the powers "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections, and repel Invasions" and "[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States", whenever it might be "necessary and proper" to do so.[1626] Even under the original Constitution, these were not simply powers, but also and especially *duties*, too. For, self-evidently, the very terminology "[*t*]*o provide for* organizing, arming, and disciplining, the Militia" excludes not providing at all for those states of readiness, or providing for their very opposites—because "[a]ffirmative words are * * * , in their operation, negative of other objects than those affirmed".[1627] And unimaginable are the circumstances in which: (i) it would even arguably not be "necessary and proper" "to execute the Laws of the Union, suppress Insurrections, and repel Invasions"—and therefore (ii) it would not be "necessary and proper" to "call[ ] forth" the *only* establishments that the Constitution explicitly authorizes to take such actions—yet (iii) it would be allowable for those establishments to be less than sufficiently "organiz[ed], arm[ed], and disciplin[ed]" when they were "call[ed] forth" for such purposes.

To be sure, the necessity and propriety of some "Laws" the original Constitution left to Congress to determine. For, then as now, with respect to some subjects in some situations WE THE PEOPLE'S representatives must be allowed a reasonable political latitude to determine for themselves the expediency of

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[1625] U.S. Const. art. I, § 8, cl. 16 (emphasis supplied).

[1626] U.S. Const. art. I, § 8, cls. 15, 16, and 18.

[1627] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803).

legislation—remaining liable, of course, at least to censure by the electorate if they misuse or abuse their discretion. Not so with respect to "the Militia of the several States", however. From the very beginning, the Militia were *constitutionally required* establishments which, absent amendment, the "supreme Law of the Land"[1628] conclusively presumed: (i) would exist *as components of its federal structure no less permanent than the States themselves*; and (ii) would always operate *according to the* pre*-constitutional principles and practices that define* "[*a*] *well regulated Militia*", just as (for the most relevant parallel) "[t]he definition of 'a state' is found in the powers possessed by the original states which adopted the Constitution".[1629] After all, it could not have been lost on the Founders that, more than any other establishments, the Militia as they had come to exist in the 1770s served the foundational purposes of the Declaration of Independence. In asserting that, "when a long train of abuses and usurpations * * * evinces a design to reduce the[People] under absolute Despotism, it is their right, it is their duty *to throw off* such Government",[1630] the Declaration presumed that WE THE PEOPLE would always retain the ability, by force of arms if necessary, to succeed in that endeavor, and that therefore they would always have available to them armed establishments sufficient for that purpose. These would not likely be "standing armies", because no régime pursuing "a design to reduce the[People] under absolute Despotism" would allow its victims to command or to call upon the protection of such forces. Instead they would have to be "well regulated militia, composed of the body of the people, trained to arms",[1631] and as fully organized, armed, and disciplined as circumstances allowed. So, deriving its authority from the Declaration, the original Constitution naturally embodied this principle.

Moreover, the original Constitution emphatically required that "the United States *shall* guarantee to every State in this Union a Republican Form of Government".[1632] No exception to this duty existed then or exists now. *Every* State government in America between 1776 and 1788, though, was already "Republican" in form or would have had to be modified upon the noncompliant State's accession to the Constitution. And every Colony but one in America prior to 1776, and every independent State thereafter, established by statute and always maintained a Militia *of a certain type* as an integral part of her governmental structure. Therefore, a Militia *of that type* constituted an essential and integral component of "a Republican Form of Government", because such an unbroken legislative cavalcade provides "unmistakable evidence of what was republican in form, within the meaning of that

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[1628] U.S. Const. art. VI, cl. 2.

[1629] Coyle v. Smith, 221 U.S. 559, 566 (1911).

[1630] Emphasis supplied.

[1631] Virginia Declaration of Rights (1776) art. 13.

[1632] U.S. Const. art. IV, § 4 (emphasis supplied).

term as employed in the Constitution".[1633] That being so, as part of the duty imposed upon the United States, Congress was required *always* to "guarantee to every State" a Militia sufficiently "organiz[ed], arm[ed], and disciplin[ed]" to meet these historical standards. Thus, from this perspective as well, the powers of Congress with respect to the Militia under even the original Constitution translated into ***absolute duties***.

Not surprisingly, then, the Second Amendment as well treated those powers as duties, those duties as *absolute*, and their full execution as *always* "necessary and proper", when it declared, categorically and without any exception, that "[a] well regulated Militia" is "*necessary* to the security of a free State".[1634] Thus, even if under the original Constitution Congress might have enjoyed some leeway to decide for itself that "provid[ing] for organizing, arming, and disciplining, the Militia" was not "necessary and proper" at some time or to some degree, ratification of the Second Amendment denied it that latitude by declaring with finality for every circumstance to which the original Constitution might have applied and would thereafter apply that "[a] well regulated Militia"—that is, one properly "organiz[ed], arm[ed], and disciplin[ed]"—*is always* "*necessary*", and for the highest purpose of all, "the security of a free State". Indeed, the phraseology of the Amendment's nominative absolute clause in the *present* tense—"[a] well regulated Militia, *being* necessary", *right now, at every moment*—precludes any other interpretation.

2. The responsibility of the States. Nonetheless, although absolute, Congress's power and duty "[t]o provide for organizing, arming, and disciplining, the Militia" are neither limitless nor exclusive. True, they must be construed to enable Congress fully to prepare the Militia to perform the three vital constitutional tasks for which the latter may be "call[ed] forth" to "be employed in the Service of the United States". But, in the nature of things, they are not suited to address the myriad other tasks of "homeland security" that would surely need to be performed in different States at various times. Rather, the most expansive power and duty for statutory regulation of the Militia must rest with the individual States, because: (i) The Militia are "the Militia *of the several States*", not "the Militia *of the United States*". (ii) *True* "homeland security"—"the security of a free State"—must be provided within the "homeland", which is within the States themselves and amongst their own people at the Local level. And (iii) as a practical matter, neither Congress nor some "national-security" bureaucracy can possibly provide uniformly and in a timely fashion for—or even be apprised of, let alone itself foresee—all of the purposes of "homeland security" that the Militia might serve within individual States (beyond the responsibilities "to execute the Laws of the Union, suppress Insurrections and repel Invasions"), each of which other purposes would require the

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[1633] *See* Minor v. Happersett, 88 U.S. (21 Wallace) 162, 176 (1875) (*dictum*).

[1634] Emphasis supplied.

rapid mobilization of diverse resources in the service of various and variable needs.[1635] Therefore, each of the several States must exercise authority for statutorily organizing her own Militia, not simply concurrent with that of Congress with respect to the three explicit constitutional purposes for which the Militia may be "call[ed] forth", but in all other respects exclusive, with broad discretion to proceed in her own way, so long as what she prescribes for "homeland security" within her own territory does not frustrate, operate at cross-purposes towards, or otherwise impermissibly interfere with what Congress has mandated for "the Service of the United States".

3. The responsibility of WE THE PEOPLE. The Second and Tenth Amendments' focus on "the people" emphasizes that not just Congress and the States labor under an affirmative obligation in this regard. Indeed, the fundamental responsibility for seeing to the proper "regulation" of the Militia in each State rests squarely upon WE THE PEOPLE: (i) Because "[a] well regulated Militia" is "necessary to the security of a free State", the responsibility for proper "regulation" of the Militia cannot be delegated to possibly incompetent or rogue public officials in a government the survival and even the legitimacy of which depends upon constitutionally sufficient "regulation" of the Militia in the first place. (ii) THE PEOPLE themselves comprise the Militia, and therefore have the greatest insight into, interest in, and incentive to insure the Militia's proper functioning. (iii) THE PEOPLE, not the General Government or the States, are America's true sovereigns; and in practical politics "the buck stops" on the desk of the highest authority.[1636]

That the ultimate driving and controlling force behind "[a] well regulated Militia" in each State consists of WE THE PEOPLE themselves is particularly fitting in a federal system that is designed to operate from "the bottom up" not from "the top down". In the normal course of human events, THE PEOPLE may be content merely to vote for representatives in State legislatures and in Congress who then are expected to enact appropriate legislation. But when the electoral and legislative processes become clogged with factionalism and the manipulations, corruptions, and frauds fostered by calcified political parties and conniving special-interest groups, must THE PEOPLE meekly suffer "the security of a free State" to be jeopardized? Hardly. If Members of Congress will not act when they should with respect to "regulating" the Militia, the States' legislators must; and if both Congressmen and the States' lawmakers will not act when they should, THE PEOPLE must. No one else can. And they will be justified in taking whatever action may be necessary to

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[1635] "The slave patrols"—which existed in Virginia but not in Rhode Island—exemplify the widely different purposes the Militia served in different Colonies and States during *pre*-constitutional times. *See ante*, at 339-343, 392-395, and 718-723.

[1636] *See A Dictionary of Americanisms on Historical Principles*, Mitford M. Mathews, Editor (Chicago, Illinois: University of Chicago Press, 1951), at 198-199.

achieve that end. Because *salus populi suprema lex*,[1637] "***[h]e that has virtue and power to save a people, can never want a right of doing it".***[1638]

4. No "unorganized", "unarmed", or "undisciplined" "Militia of the several States" constitutionally possible. If minor details of "regulation" may be altered in order to obtain "[a] *well regulated* Militia" in each State under varying conditions,[1639] nonetheless Congress or the legislatures of the several States must exercise such discretion as they enjoy in this regard with scrupulous concern for fixed constitutional principles. Presumably, being "bound by [their] Oath[s] or Affirmation[s], to support th[e] Constitution",[1640] Members of Congress and State legislators will both know the law and discharge their duties to it faithfully under changing circumstances.[1641] Nothing could be more important, because the least departure from the fundamental principles of "regulation" can never be allowed without transmogrifying the "regulated" entity into something other than a true constitutional "Militia", *with whatever deleterious consequences will surely follow from upsetting the "checks and balances" that true Militia provide within the Constitution's federal system*.

a. For example, because the population eligible for enlistment in "[a] well regulated Militia" must be fully "organized", such a Militia can never be divided into one relatively small "organized", "armed", and "disciplined" component with every other eligible individual shunted off into some other, "unorganized", "unarmed", and "undisciplined" component. Such a dichotomy between subsets within the Militia was neither known nor even imagined during *pre-*constitutional times. True enough, *pre-*constitutional statutes allowed various exemptions from some Militia duties.[1642] But that did not place the individuals thereby excused from such service into an "unorganized militia". Exemptions actually constituted one method of organizing and disciplining the Militia,[1643] and in any event never authorized a general exclusion of otherwise eligible individuals, but instead were severely limited in scope and always justified by some special purposes consistent with the common defense and the general welfare. And in most cases, the individuals exempted (other than conscientious objectors) were required to arm themselves or to provide arms for others.[1644]

[1637] "The health [or welfare] of the people is the supreme law."

[1638] A. Sidney, *Discourses Concerning Government*, *ante* note 54, at 227 (emphasis supplied).

[1639] *See post*, at 926-928.

[1640] U.S. Const. art. VI, cl. 3.

[1641] *Compare* Cannon v. University of Chicago, 441 U.S. 677, 696-697 (1979), *with* Myers v. United States, 272 U.S. 52, 183 (1926) (McReynolds, J., dissenting).

[1642] *See ante,* Chapters 11 and 22.

[1643] *See ante*, at 274 (Rhode Island) and 643-646 (Virginia).

[1644] *See ante,* at 259-261 (Rhode Island) and 419-423 (Virginia).

Americans in *pre-*constitutional times would have recoiled from the suggestion that their Militia could, to any degree, be "unorganized", "unarmed", or "undisciplined". And with good reason: In effect, any form of "militia" in that parlous state can be no more than a ruse rigged for the purpose of enabling those who do not want to serve to avoid their constitutional duties, or of denying the right to serve to those who wish to do so but whom the contrivers of the "unorganized militia" desire to exclude from the authentic Militia. Existence of an "unorganized militia" also rationalizes "gun control"—for if individuals can be statutorily declared to be "unorganized" in the full sense of that term, as a consequence they can also be declared to be "unarmed", and then perhaps even deprived of the firearms they have acquired on their own unconnected with Militia service. Weak minds may fixate upon the illusion that individuals consigned to an "unorganized militia" are still somehow "in" the Militia in an imaginary "reserve" capacity, because they could perhaps be transferred by some later statute to an "organized militia". This illusion is particularly stupid, though, inasmuch as even individuals whom some statute deemed to be part of *no* "militia" at all could nonetheless always be summoned for service in the Militia under some subsequent statute, if they met the standards for eligibility at that time. On the other hand, if rogue Congressmen or State legislators may purport to "organize" the Militia by consigning to an "unorganized militia" individuals in unlimited numbers whom they are not required and never deign to transfer to an "organized militia", they can effectively disestablish the Militia entirely. That being its potential consequence, the notion of an "unorganized", and therefore "unarmed" and "undisciplined", "militia" must be one of the most perverse and dangerous subterfuges and subversions of the Constitution ever to be insinuated into America's legal system.

b. All this notwithstanding, today a Congressional statute describes "the National Guard and the Naval Militia" as constituting "the organized militia", and everyone else who might be eligible for service being relegated to "the unorganized militia"—with no opportunity, let alone requirement, to be "armed" or "disciplined".[1645] Of course, inasmuch as this statute also treats the so-called "organized militia" and "unorganized militia" as the two components of something it calls "[t]he militia of the United States",[1646] it can be dismissed as being "not a law" at all with respect to a true Militia.[1647] Nonetheless, it is barely possible to construe this statute in an arguably constitutional manner. Namely, that: (i) "The militia of the United States" is the peculiar name Congress has assigned to the set of individuals eligible for the National Guard and the Naval Militia. (ii) "[T]he organized militia" is Congress's misnomer for the set of individuals actually enrolled

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[1645] 10 U.S.C. § 311(b).

[1646] 10 U.S.C. § 311(a).

[1647] *See, e.g.*, Norton v. Shelby County, 118 U.S. 425, 442 (1886).

in the National Guard and the Naval Militia. And (iii) "the unorganized militia" is Congress's term for the set of individuals not so enrolled.[1648] Thus, in fact, "the unorganized militia" also consists of individuals eligible for "the Militia of the several States" who (were the Militia revitalized) presumably would be required to be enrolled therein. As members of "the Militia of the several States" perforce of the Constitution itself, though, these individuals ought to be *organized as a matter of law right now*, not left "unorganized". Because piercing this kind of statutory conundrum depends upon a detailed understanding of what *constitutional* Militia actually are, it is probably beyond the unaided ability of most Americans today, however. So the fanciful trilogy of "organized militia", "unorganized militia", and "militia of the United States" will continue to confuse readers of the *United States Code*—as one among many examples of purported statutes that embody the propensity of incompetent or rogue public officials to attempt to evade the Constitution's requirements by semantic legerdemain, so as to avoid having to conduct the intense National debate necessary to amend the Constitution.

c. Although this propensity is pernicious with respect to any part of the Constitution, it is especially perilous with respect to the Militia, because the primary purpose of the Militia is not simply military, but ultimately *political* in nature. After all, it is "'[*p*]*olitical* power [that] grows out of the barrel of a gun'".[1649] The Militia are "necessary to the security of a free State"—and therefore without the Militia either "a free State" will lack "security", or the "security" that does arise from some other source will support a "State" that is other than "free". Indeed, precisely because the Militia are not only "necessary to the security of [every] free State" but also integral parts of the Constitution's federal system, the likelihood is that, ***without the Militia, the entire Constitution will fail, and America's present form of government will become destructive of the ends for which it was instituted***.

5. The allowance for some flexibility in "regulation". Although the constitutional duty to provide "[a] well regulated Militia" is absolute, and although the constitutional principles that define "[a] well regulated Militia" have been historically determined once and for all, and although "[a] well regulated Militia" must be fully "organized", "armed", and "disciplined according to these principles at all times, nonetheless what satisfies that standard at any particular point in time will inevitably depend to some degree upon changing circumstances—including the threats the community faces, the population that makes up the community, the economic resources the community can command, the availability of new technology useful for "homeland security", and so on. To be "*well* regulated", a Militia must be *fully* "regulated" at all times, but not necessarily *fixedly* "regulated" for all time. For, although the "*meaning* [of all constitutional provisions] is

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[1648] *See ante,* at 786-793.

[1649] *Quotations From Chairman Mao, ante* note 28, at 61 (emphasis supplied).

changeless", "their *application* is extensible" throughout the ages.[1650] For an obvious example, although in principle "[a] well regulated Militia" must always be "composed of the body of the people, trained to arms",[1651] in practice the arms and training that passed muster in the late 1700s will not suffice today. Of course, not all adjustments necessary to produce "[a] well regulated Militia" under changing conditions will be as straightforward. Nevertheless, no matter how challenging the problem, the proper response to changes in the needs of and means to promote "homeland security" should always be carefully to adjust the Militia's "regulations", *not* (as Congress has done since the early 1900s) simply to reduce the Militia to an "unorganized", "unarmed", and "undisciplined" nonexistence. Eliminating the Militia may obviate the essentially technical difficulties of "regulating" and "re-regulating" them in an ever-changing environment—but only at the cost of creating the far more severe *political* danger that "free State[s]" deprived of the establishments the Constitution declares to be "necessary to the[ir] security" will not remain "free" for long.

Making prudent adjustments in the "regulation" of the Militia from time to time is constitutionally required, because it is the lesson History teaches. During the *pre-*constitutional period, complaints arose again and again that the Militia were not functioning as they should. For example, as early as 1664, Rhode Island's General Assembly deplored "the great neglect and defficiency in the vse of the military exercise in most townes in this Collony".{EN-1966} In 1665, it took "into consideration the great defect in training, occasioned by the remissnes of some vnder the pretence of the burden in training soe often as eight dayes in the yeare".{EN-1967} In 1666, it gave "searious consideration [to] the great neglect of the due exicution of the enacted lawes of this Collony concerninge the militia".{EN-1968} In 1726, it worried that "through the dissatisfaction and discontent * * * in the choice and election of commissioned officers, to lead and conduct them, and the smallness of the fine on delinquents, the militia is of late visibly declining".{EN-1969} And in 1755, its conclusion was that "*the several Fines for Neglect of Military Duty are found by Experience to be too low*".{EN-1970} Virginia's General Assembly, too, found cause for concern in 1738 and 1755 that "the laws heretofore made, *for the settling and better regulation of the Militia*, have proved very ineffectual, whereby the colony is like to be deprived of its proper defence, in time of danger".{EN-1971} Yet, even with these and other problems, neither Rhode Island, nor Virginia, nor any other Colony (other than Pennsylvania) or any independent State ever dispensed with her Militia, or divided it into active and "organized" *versus* inactive and "unorganized" parts. Instead, as did "*the good people of* Virginia" in their Declaration of Rights in 1776, Americans throughout the *pre-*constitutional era learned from personal experience

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[1650] Home Building & Loan Association v. Blaisdell, 290 U.S. 398, 451 (1934) (Sutherland, J., dissenting).

[1651] Virginia Declaration of Rights (1776) art. 13.

that "a well regulated militia", *alway*s "composed of the body of the people", with *all of them* "trained to arms, is the proper, natural, and safe defence of a free state".{EN-1972}

Thus, when difficulties arose during the *pre-*constitutional period, Americans took remedial action to improve their Militia as entireties, rather than attempting to fracture them into "organized" and "unorganized" components, or to eliminate them completely. Plainly, they adhered to the basic principles of the Militia in statute after statute over several generations because the utility of those establishments so outweighed their inconveniences as to render them, not merely expedient, but indispensable in the *fully* "organized" form in which they had always operated. At length, this was proven beyond peradventure by WE THE PEOPLE'S elevation of the Militia from the statutory to the constitutional plane: first, by incorporation of "the Militia of the several States" into the original Constitution's federal system, which implicitly acknowledged the necessity of those establishments for the purposes set out in the Preamble; then, by the Second Amendment's explicit declaration that "[a] well regulated Militia" is "necessary to the security of a free State" in all circumstances and for all purposes whatsoever.

CHAPTER THIRTY-FIVE

Near-universal membership, compulsory participation, and reasonable equality in individuals' burdens of service are necessary characteristics of "the Militia of the several States".

Ubiquity and continuity are fundamental principles of "the Militia of the several States", not just in terms of place and time—in that "[a] well regulated Militia", capable of dealing with every reasonably foreseeable danger, must exist within every State at all times; but also in relation to personnel—in that everyone who is eligible for duty must always participate to some appropriate degree.

A. Near-universal membership. "A well regulated Militia" is neither a private organization—and therefore exclusive in character; nor a governmental entity in which only a few select members of the community may participate—and therefore élitist in character. Instead, it is the one and only governmental institution in which everyone who is physically able to perform a useful function is expected to serve in one way or another—and therefore near-universal in character. In this, the Militia differs from every other public establishment and institution. To be sure, "[a] well regulated Militia" is always smaller than the community as a whole. But the community as a whole performs no particular governmental function. The electorate, too, may outnumber the Militia, depending on demographic circumstances. But, as explained below, service in the Militia is compulsory, whereas voting almost never is. And in any jurisdiction the Militia is always much larger than the aggregate of all other governmental entities.

1. Membership in "[a] well regulated Militia" must be near-universal, because the provision of "security [for] a free State"—in terms (say) of "execut[ing] the Laws * * * , suppress[ing] Insurrections and repel[ling] Invasions"[1652]—must be everyone's responsibility, everywhere, at all times. After all, in "a free State" the people govern themselves. A self-governing people exercise political power by and for themselves. "'Political power grows out of the barrel of a gun.'"[1653] Therefore, a self-governing people in "a free State" must control all of the "gun[s]" necessary to maintain political power in their own hands against all conceivable enemies, both foreign and especially domestic—and, when necessary, must be willing and able to

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[1652] U.S. Const. art. I, § 8, cl. 15.

[1653] *Quotations From Chairman Mao, ante* note 28, at 61.

use those "gun[s]" at a moment's notice, with neither hesitation nor compunction. In the normal course of events, public officials who have proven incompetent or otherwise unworthy of their positions can be voted out peacefully at the next election. But if an insurrection or an invasion succeeds, no new election may thereafter be possible. And if the laws are not enforced against aspiring usurpers and tyrants, upon their seizure of power such miscreants will substitute their own arbitrary dictates for the laws, to everyone else's detriment.

For society to depend upon professional "police" and other "law-enforcement" and "internal-security" forces separate from, independent of, and perhaps antagonistic to the people would be irresponsible in the extreme. Although such forces might provide adequate support for a police state concerned only with maintaining an élitist leadership-class in power, the Constitution itself declares that they cannot possibly guarantee "the security of a *free* State", to which instead "[a] well regulated *Militia*" is "necessary".[1654] For even if such forces did not prove to be too few in numbers, too deficient in training, or too bereft of equipment to put down insurrectionists or invaders, they could—and, as History repetitively teaches, probably would—treacherously cast their lots with, or themselves spawn, usurpers and tyrants. After all, "[t]he seizure of power by armed force * * * is the central task and the highest form of revolution".[1655] And armed force will likely be applied successfully by those who are best armed. In a self-governing "free State", no matter how heavily armed they may be, the people will not conduct revolutions against themselves. But when the balance of armed force shifts decisively into in the hands of others, some "form of revolution" is at least empowered, if not invited, encouraged, and facilitated.

For these reasons, every "free State" throughout America—in order to remain free—must enlist in her Militia essentially *every* free adult citizen of *any* age who is physically, mentally, and emotionally capable of performing *any* useful public service in that respect. *"A well regulated Militia" consists of every eligible man and woman within the community, completely organized, equipped, trained, and assigned to particular duties according to statutes that define the types of service for individuals may volunteer or to which they may be assigned.*

2. Generally, "[a] well regulated Militia" will have at least seven major components:

> (i) Those individuals from (say) sixteen to fifty or so years of age who are assigned to Local Militia Companies; are fully equipped at all times—usually with their own firearms, ammunition, and accoutrements; who undergo intensive regular training; and who

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[1654] U.S. Const. amend. II (emphasis supplied).

[1655] *Quotations From Chairman Mao, ante* note 28, at 61.

assume the primary responsibility for whatever service in the field may be necessary.

(ii) Those able-bodied individuals from (say) fifty to sixty or so years of age, and partially disabled individuals from sixteen to sixty years of age, who are assigned to their own Local Militia Companies; who are fully equipped at all times; but who are subject to only an intermediate degree of training; and who may be called forth for active service in the field only during "alarms" or in other exigent circumstances.

(iii) Those able-bodied individuals from (say) sixteen to sixty or so years of age who are exempt from other than minimal training and from all regular service in the field because of their important public offices or specialized private professions or trades which the community considers crucial to its functioning; but who are fully equipped at all times; and who may be called forth during "alarms" or in other exigent circumstances.

(iv) Those individuals who fulfill all of their Militia responsibilities by serving as full-time State or Local policemen, firemen, emergency-services personnel, or other specifically "homeland-security" operatives, according to the particular qualifications established for those specialized units within the Militia.

(v) Those individuals, otherwise eligible for Militia service, who voluntarily recruit, organize, equip, and train themselves in their own "Independent Companies", separate from other Local Militia units; who are subject to control by the regular Militia chain of command only for periodic inspections of their personnel and reviews of their activities, and when called forth for actual service in the field; and one of whose primary purposes is to devise and experiment with new methods of organizing, equipping, training, and deploying Militia in their particular States and Localities.

(vi) Those individuals, otherwise eligible for Militia service, who raise religious or other conscientious objections to their own possession or use of firearms, and who for that reason are assigned special Militia duties of an entirely "noncombatant" nature.

(vii) Those individuals who are to some degree not able-bodied, or who are beyond sixty years of age, but who can perform some useful service in the Militia, and who volunteer for such duty.

Cumulatively, these categories will embrace every adult free citizen from sixteen years of age—in or of whatever public office, private occupation, or religious conviction—other than those with absolutely incapacitating physical or mental disabilities. So membership in the Militia will be as near to universal as is practicable. *Everyone who reasonably can serve will serve in some capacity. No inactive "unorganized militia" or "reserve militia" will exist.* Neither will any "private militia" (assuming *arguendo* its legitimacy on other grounds) be likely to develop—because no one will be left to form it, except individuals less than sixteen years of age, who would be physically or mentally immature; or the physically or mentally disabled of every age, who could do little or nothing useful; or the few people with relatively sound minds and bodies over sixty years of age who would not want to volunteer for the real Militia, even in some "Independent Company".

B. Compulsory participation. "A well regulated Militia" is near-universal in composition because individuals eligible for enrollment in it are not just expected to serve, in the sense of a having merely a moral obligation to do so, but are *required* to serve, in the sense of being subject to a *legally enforceable personal duty* in that regard.

1. This duty is not indefinite, nor inchoate, nor contingent, but very specific and always operative. It attaches as soon as an individual becomes an adult and is capable of serving in some useful capacity, and continues for as long as he remains capable of participating productively, unless the legislature decides that special circumstances warrant some exemption for him in the public interest.

2. Although all of the "well regulated Militia" in every "free State" are establishments founded upon *compulsory* enrollment of their members—and therefore the very embodiments of the political power to impress, conscript, or draft most of the citizenry—such Militia do not derive from that power. Rather, the political power to impress arises out of the necessity for the Militia under "the Laws of Nature and of Nature's God", and must be exercised so as and only to preserve the Militia as "the proper, natural, and safe defence of a free state".[1656] Impressment is no independent power of government, to be employed for any purpose whatsoever, but solely the means to ensure adequate enrollment in "[a] well regulated Militia" which makes all of the just powers of government in "a free State" possible. Impressment is a power of government solely because the Militia are constitutional establishments of government that consist of *nearly all* of "the people"; and therefore government may never exercise the power of impressment for any purpose that might disable the Militia from functioning at a high level of efficiency according to constitutional principles.[1657]

[1656] Virginia Declaration of Rights (1776) art. 13.

[1657] *See ante*, Chapters 3, 5, 14, and 16, *and post*, Chapter 49.

3. The justification for impressment should be self-evident. Almost all free men live, not in isolation, but in society. And in society, as Benjamin Franklin observed, "we must all hang together, or assuredly we shall all hang separately"[1658]—not just figuratively, but possibly literally as well if society succumbs to foreign invaders or to domestic usurpers and tyrants. For the preservation of his freedom within society, each man depends upon everyone else. To defend himself he must also defend them, and they him. To be sure, free men should always volunteer to do their duty. But if they refuse, they can and should be compelled to defend—if needs be, with their very own lives—the society in, through, and by the aid of which they enjoy their freedoms. No man may, in justice, partake of society's benefits while shirking the share of its burdens that he is capable of assuming.

America's Founders knew that the most prevalent as well as the most insidious internal threat to "a free State" is factionalism. As James Madison observed, "[t]he friend of popular governments never finds himself so much alarmed for their character and fate as when he contemplates their propensity to this dangerous vice". By his definition, a "faction" consists of "a number of citizens * * * who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community".[1659] Typically, both in Madison's era and thereafter, the goal and method of every faction have been and are to pervert the government into an engine for redistributing real wealth from society as a whole to the faction's members as a privileged class—today, for example, in violation of the unmistakable constitutional limitation that "Congress shall have Power To lay and collect Taxes * * * to pay the Debts and provide for the *common* Defence and *general* Welfare of the United States",[1660] not to provide *particular and exclusive* benefits to narrow special-interest groups at everyone else's expense. Yet, although blatantly *anti*-social in character and operation, factions enjoy a tremendous practical advantage as against the rest of the community, because of the perverse structure of economic incentives inherent in factionalism.[1661] A given amount of wealth to be redistributed to some faction through some proposed governmental program may amount to a significant sum for each individual member of that group. Therefore, the adherents of the faction will have a powerful incentive to organize themselves for aggressive electioneering, lobbying, and other political action in order to secure the program's enactment—with the ultimate measure of their commitment of time, effort, and money being roughly equal (at the margin) to the total amount of wealth they

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[1658] *Quoted in, e.g.,* John Bartlett, *Familiar Quotations* (Boston, Massachusetts: Little, Brown and Company, Thirteenth Edition, 1955), at 331b.

[1659] *The Federalist* No. 10.

[1660] U.S. Const. art. I, § 8, cl. 1 (emphasis supplied).

[1661] *See generally, e.g.,* Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Cambridge, Massachusetts: Harvard University Press, Revised Edition, 1971).

expect to siphon off from that program. Conversely, even if the program results in the redistribution of huge amounts of real wealth, each solitary individual in the great mass of average citizens who are exposed to the increased taxes or monetary depreciation necessary to pay for the program will perceive his own potential losses as relatively minor—if he even becomes aware that the program may be enacted, what it may cost, or that it really costs anything when politicians and propagandists for special-interest groups ceaselessly advertise all governmental "services" and "social programs" as being "free". Therefore, the incentives for individual taxpayers or victims of monetary depreciation to oppose enactment of the program will be minimal, and their disincentives against forming protest organizations or engaging in defensive lobbying or political campaigns will be correspondingly large. Similarly, a proposed reduction in some ongoing governmental program that especially enriches some faction will threaten that faction's members with personal losses wholly disproportionate to the minuscule gains that might accrue to average individuals if cancellation of that program actually resulted in lower taxes for citizens in general. So, in this case, too, the economic incentives will always be essentially one-sided in operation. Thus, most of the members of a faction will not need to be coerced into participating in its *anti*-social activities, because they will understand that their involvement can be hugely profitable to each of them. Whereas, even if he comprehends what is going on, the average citizen will usually not voluntarily undertake activities designed (in Madison's evocative phrase) "to break and control the violence of faction", precisely because the cost of the necessary political activism will far exceed the economic benefits he may ultimately derive from it.

Obviously, though, the long-term stability of society cannot be secured when short-term economic incentives grounded in selfishness are constantly enhancing the wealth and political power of the very groups that are intent upon looting, and thereby *de*stabilizing, the community. Yet WE THE PEOPLE cannot simply sit back and expect public officials to correct this situation. As Madison pointed out, "[i]t is in vain to say that enlightened statesmen will be able to adjust these clashing interests [of factionalism] and render them all subservient to the public good. Enlightened statesmen will not always be at the helm."[1662] Besides, as he added, "[i]n framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself".[1663] And, of course, the government may not be able to "control itself" precisely because powerful factions exert undue influence over simple-minded, corrupt, or rogue public officials, gaining ever-increasing power as each iteration of their parasitism succeeds.

[1662] *The Federalist* No. 10.

[1663] *The Federalist* No. 51.

This is a fundamental reason why *compulsory* participation by all eligible individuals in the Militia is, as a purely practical matter, "*necessary* to the security of a free State"—*because only* ***compulsory*** *participation can overcome the sizeable economic disincentives that discourage average citizens from otherwise organizing themselves effectively against factionalism*. Indeed, in the long run, compulsory participation in the Militia is more likely "to break and control the violence of faction" than any other possible remedy. *First*, all legitimate social groups will be represented in the Militia—and ought to be, because cumulatively they all constitute "a free State". *Second*, being required to work together in and through the Militia for common goals will demand and bring about conciliation and compromise among the various groups, or at least compel by dint of circumstances each group to act as a "check and balance" on the possibly *anti-*social proclivities and pretensions of every other group. *Third*, properly disciplined, all of the component groups within the Militia will become mutually interdependent. *Fourth*, recognizing their mutual responsibility to provide for "the security of a free State" *in every way*, the groups so unified in the Militia will provide the most extensive and intensive "checks and balances" possible against anyone outside of the Militia who attempts to pervert the government for the purposes of factionalism—whereas, without the Militia, the factions will be highly organized but not subject to any significant "checks and balances" by the unorganized remainder of society.

4. By its very nature, the power of impressment for service in the Militia supports the principle of *subsidiarity*, that an ostensibly "higher" level of government (in the sense of its position on an organizational chart) should be delegated only those powers that "lower" levels of government cannot adequately perform, reserving all other powers for division among each of the "lower" levels on the basis of their particular competences.[1664] So, by empowering those "lower" levels, impressment into Militia service is profoundly *federal* in structure and operation.

a. The Constitution delegates to Congress the power and the duty "[t]o make all Laws which shall be necessary and proper for carrying into Execution" all of its powers, including the power "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions".[1665] Thus, Congress may draft the Militia for those purposes, and "provide * * * for governing such Part of the[Militia] as may [thus] be [compulsorily] employed in

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[1664] *See* U.S. Const. amend. X. This is the recognition, in the political realm, of something akin to what economists call "the problem of rational economic calculation"—essentially, that the information necessary to operate a complex social organization is usually *created* at the lower levels of the organization, and only slowly and imperfectly (if at all) filters up to the higher levels well after the fact; so that, whenever possible, the lower levels are positioned, and therefore should be allowed, to act on the information immediately available to them, without interference from the relatively ignorant higher levels. For a good introduction to the economic analysis involved, *see, e.g.,* Trygve J.B. Hoff, *Economic Calculation in the Socialist Society*, M.A. Michael, Translator (London, England: William Hodge and Company Limited, 1949).

[1665] U.S. Const. art. I, § 8, cls. 18 and 15.

the Service of the United States".[1666] But Congress need "make [no] Law[ ]" to authorize "the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions" in the first place—for the Constitution so declares the Militia's authority. And that declaration being "complete in itself, it executes itself".[1667] Congress's sole task is simply to provide the standards and procedures necessary and sufficient under normal circumstances "for calling forth the Militia" in order to perform one or more of those specific functions.

b. In the exercise of her concurrent powers over "the Militia *of the several States*",[1668] each State may draft her own Militia for two reasons: (i) the narrow purpose of "execut[ing] the Laws of the Union, suppress[ing] Insurrections, and repel[ling] Invasions" when Congress has failed, neglected, or refused "[t]o provide for calling forth the Militia" to fulfill one or more of those assignments; and (ii) the broad purpose of performing any and all other tasks of "homeland security" that may possibly arise within the State.

c. If both Congress and the States should fail, neglect, or refuse to draft the Militia for *any* service the performance of is "necessary to the security of a free State", then WE THE PEOPLE not only could and should, but also would be required by "the Laws of Nature and of Nature's God" to, impress themselves into duty. For, if the Militia are composed and may enforce the participation of every eligible adult in the community, and are truly "*necessary* to the security of a free State", then, if public officials default on their duties to draft the Militia into service when "homeland security" at any level requires it, WE THE PEOPLE *must* order themselves into the field—if necessary, even "to throw off" "a[ ] Form of Government [that has] become[ ] destructive" of men's "unalienable Rights"[1669]—because, at that point in time, the command *must* be given, and no one else can or will give it.

5. Yet, although thoroughly compulsory in nature, "well regulated Militia" do not threaten Americans' "unalienable Rights". Quite the contrary:

a. The original Constitution and the Bill of Rights formed the charter of what the Declaration of Independence described as a "Government[ ] * * * instituted among Men, deriving [its] just powers from the consent of the governed" and intended "to secure [men's unalienable] rights". Both the original Constitution and the Bill of Rights provide for Militia based upon compulsory membership. Therefore, such Militia must be consistent, in both principle and practice, with their members' "unalienable Rights". And the power "[t]o provide for calling forth the Militia" by draft must be a "just power".

[1666] U.S. Const. art. I, § 8, cl. 16.

[1667] *See* Davis v. Burke, 179 U.S. 399, 403 (1900).

[1668] *See* U.S. Const. art. II, § 2, cl. 1 (emphasis supplied), *and* amends. II and X.

[1669] Declaration of Independence.

b. The Second Amendment assures Americans in so many words that "[a] well regulated Militia" is "necessary to the security of a free State"—that is, only by obliging all free men to defend their State can her freedom, and theirs, be secured. Moreover, the Constitution's Preamble identifies as two of its goals "to * * * provide for the common defence * * * and secure the Blessings of Liberty to ourselves and our Posterity"—and through the conjunction "and" the Preamble attests that WE THE PEOPLE expect *both* of these goals to be achieved *simultaneously*. The Second Amendment and the Preamble cannot contradict one another—for the Constitution must be construed "in such a manner, as, consistently with the words, shall fully and completely effectuate the whole objects of it".[1670] Therefore, inasmuch as "[a] well regulated Militia" is "necessary to the security of a free State", and inasmuch as the Constitution identifies no other establishment as "necessary" (or even useful) for this purpose, "[a] well regulated Militia", even though compulsory in nature, must be uniquely capable of providing for *both* "the common defence" *and* "the Blessings of Liberty".

c. The original Constitution authorized Congress "[t]o provide for calling forth the Militia to execute the Laws of the Union". The preëminent of these "Laws" (after "the Laws of Nature and of Nature's God" and the Declaration of Independence) is the Constitution itself. Its Preamble identifies the Constitution's overarching purposes, to which in their interpretation and application all of the powers of the General Government must be referred, and with which any and every such interpretation and application must be harmonized.[1671] So, whenever "the Militia of the several States" "execute the Laws of the Union", they must do so consistently with the Preamble's mandate to "provide for the common defence * * * and secure the Blessings of Liberty to ourselves and our Posterity". Inasmuch as the Constitution explicitly delegates to no other institution the authority and responsibility "to execute th[os]e Laws", it implicitly identifies the Militia as "necessary" for that purpose. But "execut[ing] the Laws of the Union" in favor of "the common defence * * * and the Blessings of Liberty" is precisely providing for "the security" ("the common defence") "of a free State" (one in which the citizenry enjoys "the Blessings of Liberty"). So, on this score, the Second Amendment and the original Constitution are in perfect accord.

6. Compulsory service is an apparent exception to the "Liberty" which the Declaration of Independence considers so important that it explicitly lists it among men's "certain unalienable Rights". If justifiable at all, then, compulsory service must be closely confined to those purposes *absolutely necessary* to secure such "Rights". The Second Amendment identifies the Militia as "necessary to the security of a free State". The Militia are compulsory establishments. The Militia are

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[1670] Prigg v. Pennsylvania, 41 U.S. (16 Peters) 539, 612 (1842).

[1671] *See* W. Crosskey, *Politics and the Constitution, ante* note 206, Volume 1, at 374-379.

the *only* establishments that enjoy such an explicit and sufficient constitutional justification for the power of impressment. (The only other explicit constitutional justification for compulsory service of any sort appears in Section 1 of the Thirteenth Amendment, which tolerates "slavery [ ]or involuntary servitude * * * as a punishment for crime whereof the party shall have been duly convicted". In this case, though, compulsory service derives from an individual's own *forfeiture* of his "Liberty" as the consequence of his own serious *anti*-social misbehavior.) Therefore, the justification for compulsion in the case of the Militia arises, not from any purpose of depriving Americans of their "Liberty", but from the intent to secure "Liberty" for all through their own efforts. Rather than being an exception to "Liberty", in reality compulsory service in the Militia is an indispensable condition precedent to, the instrument for achieving, and perhaps even the most important component of "Liberty".

For example, in "a free State" individuals must enjoy the "Liberty"—in the forms of the freedoms of speech, assembly, and petition[1672]—to debate, within constitutional bounds, the particular policies that such a State should adopt. But first there must *be* "a free State" in which such discussions can take place openly and without undue restraint. The Militia guarantee "the security", and thereby the existence as well as all of the political operations, of "a free State". So the Militia—and the requirement, inherent in their nature and consistently applied throughout American *pre*-constitutional history, that they be formed through near-universal impressment—are necessary to secure everyone's freedoms of speech, assembly, and petition. Which is hardly surprising, in light of the juxtaposition of the First and the Second Amendments in the Bill of Rights.[1673]

In their regular operations, the Militia also provide fora for investigations specifically by Militiamen of the extent to which public officials in particular and even Americans in general in every community are living up to the ideals of freedom, and what the people need to do in order to rectify any perceived shortcomings in these particulars.[1674] The purpose of these investigations is two-fold. Members of the Militia: (i) peaceably assemble in regular meetings of their Companies or other units in order to collect evidence in support of any "grievances" which they should "petition the Government" to "redress";[1675] and (ii) with such evidence in hand, then petition either the Militia itself or some other governmental body to take appropriate action. That attendance at these meetings is compulsory cannot detract from, but instead maximizes, their utility, by assuring that everyone who should participate does so.

[1672] U.S. Const. amend. I.

[1673] *See ante*, at 851-857.

[1674] *See post*, at 956-963 and 1134-1135.

[1675] U.S. Const. amend. I.

7. *Compulsory* enrollment of citizens in the Militia should terminate after (say) sixty years of age, in light of the unlikelihood that many individuals that old would be physically capable of continuing to perform some useful service. Nonetheless, no modern Militia statute should preclude anyone beyond such an age from *volunteering* for whatever Militia duties he could still fulfill. That is, any age-limit should be treated as an exemption, not an exclusion.[1676]

C. Equality in the burdens of service. Near-universal membership in the Militia implies that every able-bodied free adult has an equal duty of public service in principle. In practice, however, the actual substance of that duty, in terms of each individual's day-to-day activities, must vary according to the principles of the division of labor—the advantages of which accrue to society in the political as well as the economic field. So, the exact terms of a particular person's service will depend upon numerous contingencies, such as the numbers of eligible individuals of various ages and abilities available; the immediacy and severity of the threats that confront the community; the types of service deemed necessary in one Locality or another from time to time; and any important responsibilities to their community, other than Militia service, that particular individuals may have to fulfill.

The ultimate *desideratum*, though, should be to temper equality with discernment and discrimination, so that the burdens of service within reason weigh no more heavily on some than on others, unless disproportionate duties will promote the common defense and the general welfare better than something approaching strict equality of service. For this purpose (as explained immediately below), a general burden of service applicable initially to all must be tempered by various exemptions suitable to individuals differentiated on the basis of gender, age, critical public office or private occupation, specialized training or experience, and so on.

[1676] *See post*, at 948-950.

CHAPTER THIRTY-SIX

Service in each of "the Militia of the several States" is subject only to limited exemptions, all of which in principle must be consistent with the fundamental standards of "[a] well regulated Militia" and in application must advance "the common defence" and "the general Welfare".

Although the Militia are to be "well regulated" under the principles of near-universal enrollment and compulsory service, in practice some individuals may be exempted from some duties on the basis of other fundamental principles.

A. Exemptions a means to organize the Militia. In general, "to exempt" means "[t]o privilege; to grant immunity from".[1677] More specifically here, "to exempt" means "[t]o release or deliver from some liability which others are subject to; to except or excuse from the operation of a law * * * to free from obligation * * * as, to exempt from military duty"[1678]—or "[t]o relieve, excuse, or set free from a duty or service imposed upon the general class to which the individual exempted belongs; as to exempt from militia service".[1679] An exemption from some Militia service presumes that the individual to which it applies *is* a member of the Militia, and grants him an immunity from some duty for the performance of which he otherwise would be liable, but as a result of the exemption is then privileged not to perform. Thus, exemptions constitute a means, not for excluding people from the Militia *ab initio*, but for organizing and disciplining people within the Militia by assigning varying burdens of service to them. As such, *exemptions must be consistent with the existence of Militia in which every eligible individual is "organized" in* ***some*** *way*. Even those who may be granted some exemption are nonetheless required to serve, or at least are always made subject to service, in some specifically defined capacity. So, typically, exemptions are to be coupled with the performance of particular duties—such as the requirement to possess firearms and ammunition, or to serve in some noncombatant capacity; or with conditions—such as the exempted individuals' provision of substitutes, payment of some monetary compensation, or

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[1677] S. Johnson, *Dictionary, ante* note 50, in both the First (1755) and the Fourth (1773) Editions.

[1678] *Webster's Revised Unabridged Dictionary, ante* note 11, at 523, definition 2. *Accord*, N. Webster, *An American Dictionary, ante* note 15; *The Compact Edition of the Oxford English Dictionary, ante* note 11, Volume 1, at 922, definitions 4. and 4.d.; *Webster's Third New International Dictionary, ante* note 330, at 795, definition 2.

[1679] *Black's Law Dictionary, ante* note 368, at 681.

provision of firearms to others; or with limitations—such as an exemption's not being applicable during such "alarms" as insurrections or invasions.

Purported exemptions may *never* be employed to create an oxymoronic "*un*organized militia" composed of large numbers of individuals with no duties whatsoever, other than to do nothing almost all of the time, as is the all-too-typical statutory pattern for neglect (or, perhaps, intentional suppression) of the Militia today.[1680] During the *pre*-constitutional era, the Colonies and then independent States enjoyed the power to grant statutory exemptions from duties in their Militia that were themselves the products of statutes. Even so, as Rhode Island's experience illustrated, "th[e] Principle of general Utility" which legislators consulted in fashioning exemptions was always applied so as to serve the common defense, and always reserved and preserved for "the Public, in Cases of Necessity," its "Right to claim [every man's] personal Services" in the Militia.{EN-1973} Perhaps legislators in that era could legitimately have disregarded these purposes in fashioning exemptions for the benefit of factions and other selfish special interests. Even if so, after the Constitution was ratified in 1788 and the statutory duty of service in the Militia become *constitutional* in nature, the authority of both Congress and the States' legislatures to grant exemptions became explicitly limited by the Preamble's purpose to "provide for the common defence" and "promote the general Welfare".[1681] And that limitation was emphasized, if not extended, when the Bill of Rights was ratified in 1791, by the Second Amendment's declaration that "[a] well regulated Militia" is "necessary to the security of a free State".

B. No "right" to any exemption. Because of the principles of near-universal and compulsory membership, no eligible individual may claim an *inherent* (or *unalienable*) "right" to any exemption from duty in the Militia. Within constitutional boundaries, exemptions are matters solely of legislative discretion to define, grant, expand, contract, withdraw, limit, condition, or withhold entirely on such terms as policymakers may deem expedient. Therefore, exemptions must always appear in some statute, either explicitly or by necessary implication. Of course, once granted, an exemption may be claimed as a *statutory* right, privilege, or immunity. But, arising out of statutes alone, exemptions are always subject to change as circumstances demand. No one can claim a permanently "vested" right, privilege, or immunity in any statutory exemption (other than while the statute remains in force). Furthermore, because "the Militia of the several States" are not private organizations or in any way the products of "contracts" among their members or between a State's government and those members, a State's legislature is not

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[1680] *See, e.g.,* 10 U.S.C. § 311(b)(2); General Laws of Rhode Island §§ 30-1-4(4) and 30-1-5; Code of Virginia §§ 44-1, 44-4, 44-75.1(A), and 44-88.

[1681] *See generally* W. Crosskey, *Politics and the Constitution, ante* note 206, Volume 1, at 363-379. *See post*, at 943-945.

prohibited by the constitutional constraint that "[n]o State shall * * * pass any * * * Law impairing the Obligation of Contracts"[1682] from rearranging individuals' terms and conditions of Militia service, as embodied in exemptions.

C. Exemptions limited by "the common defence" and "the general Welfare". Yet, although no "inherent", "unalienable", or permanently "vested" right to any exemption from Militia service can exist, exemptions can never be simply arbitrary and capricious in nature. Rather, every exemption must be consistent with both the structure of the Militia as "composed of the body of the people, trained to arms", and the purpose of the Militia as "the proper, natural, and safe defence of a free state",[1683] and otherwise must arise out of, depend upon, and serve some principle of general social utility that advances "the common defence" and "the general Welfare".[1684]

1. First and foremost, exemptions must not be suffered to undermine "the Militia of the several States" either in their fundamental legal principle, by denying the duty of *every* eligible individual to provide *some* service, or in their practical deployment, by removing too many individuals from the pool of those *immediately* available for service in the field. Inasmuch as exemptions must advance important *public* purposes, not cater to the parochial and ephemeral special interests of politically or economically influential factions, those who importune the legislature for relief from Militia duties generally applicable to others must establish either: (i) Their participation in the Militia is in fact not necessary and proper at all—because, for example, they are physically unable to perform those duties. Or, (ii) their fulfillment of duties in the Militia that many others could carry out just as well should give way to particular services to the community that only they can adequately deliver, and without their performance of which "homeland security" in the State or some Locality would suffer—because, for example, they occupy critical public offices or are engaged in essential private occupations. Or, (iii) in rare situations, their fulfillment of duties in the Militia is actually excluded by the nature of their civilian offices or occupations.

For an example of the last of these situations, the only official of the General Government whom the Constitution makes a member of "the Militia of the several States" is the President, whom it designates as their "Commander in Chief * * * when [they are] called into the *actual* Service of the United States" (but not otherwise).[1685] All other officials of that government Congress could completely exempt from the Militia, on the grounds of federalism: namely, that all of "the

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[1682] U.S. Const. art. I, § 10, cl. 1.

[1683] Virginia Declaration of Rights (1776) art. 13. *Accord,* U.S. Const. amend. II.

[1684] U.S. Const. preamble.

[1685] U.S. Const. art. II, § 2, cl. 1 (emphasis supplied). *See ante*, at 871-880

Officers" of the Militia (other than the President) are appointed by the States, and thus are the States' "Officers";[1686] and officials of the General Government cannot be subjected to control by any of the States' "Officers" perhaps at all, and certainly where such control might interfere with their performance of their duties for that government.[1687] Yet, on the other hand, Congress could also conclude that no total exemption from Militia duty for officials, employees, and agents of the General Government would ever be necessary, because when the Militia were "call[ed] forth" for one or more of the three constitutionally permissible purposes,[1688] all of their members so activated—including the "Officers" appointed by the States—would be "employed in the Service of the United States"; and therefore commands from State "Officers" would constitute directives from "Officers" "excut[ing] the Laws of the Union" on behalf of the General Government itself.

Of course, because "[a] well regulated Militia" is "necessary to the security of a free State",[1689] any purely civilian function, whether in public office or private occupation, can justify an exemption from Militia service only if it, too, is reasonably "necessary to the security of a free State". That being so, individuals exempted on this score are not excluded or removed entirely from the Militia. Rather, the functions they perform are recognized as part and parcel of the overarching Militia duty that all citizens owe to their community. Certain public offices and private occupations are "necessary to the security of a free State" because "a free State" absolutely requires such offices to be filled and such occupations to be carried on if the community's normal political and economic life is to continue. Therefore, the exemptions individuals receive from particular Militia duties, in order to enable them to perform these critical public duties and private tasks, in effect operate as their assignments to forms of Militia service peculiar to them.

2. Of equal importance, though, a dearth of exemptions must not be suffered overly to weaken society by calling forth too many individuals too often for too much service in the Militia. "[W]ell regulated Militia" are to provide the "security" that is "necessary" for "a free State", not transform America into a gaggle of little "garrison states". So, the degree to which the plenitude of the near-universal duty to serve in the Militia needs to be enforced will depend upon the actual dangers confronting the community balanced against its ability to muster forces

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[1686] U.S. Const. art. I, § 8, cl. 16.

[1687] U.S. Const. art. VI, cl. 2. *See* Wise v. Withers, 7 U.S. (3 Cranch) 331, 337 (1806), *applying An Act more effectually to provide for the National Defence by establishing an Uniform Militia throughout the United States*, Act of 8 May 1792, CHAP. XXXIII, § 2, 1 Stat. 271, 272: An officer of the United States, exempted from Militia service by Congress, "could never be legally enrolled" in a State's Militia, and therefore a court-martial could never have jurisdiction over him for his purported violation of any Militia duty. Actually, such a officer *could and should* be constitutionally "enrolled", but could interpose the exemption against performance of any duty.

[1688] *See* U.S. Const. art. I, § 8, cl. 15.

[1689] U.S. Const. amend. II.

sufficient to deal with those threats while simultaneously maintaining "the home front" in a condition not too far removed from normalcy.

D. *Pre*-constitutional exemptions the norm. Because exemptions must have a largely empirical, experimental, and pragmatic cast—looking to what is workable in specific circumstances—the list adopted under the *pre*-constitutional Militia statutes is particularly useful as a guide.

As a matter of law fixed at the time of the ratifications of the original Constitution in 1788 and the Bill of Rights in 1791, the *pre*-constitutional list established the set of *constitutionally permissible* general categories of exemptions. For these categories—and only these categories—were part and parcel of the working definition of "[a] well regulated Militia" during that era. So no other categories of exemptions are consistent with such a Militia. Which means that no new categories can be added, and none of the original categories can be removed, from the set, except by a constitutional Amendment that redefines "[a] well regulated Militia" to that extent. Therefore, any specific exemption proposed for recognition today must fit with exactitude into one of the *pre*-constitutional categories, and then be shown as well to be consistent with "the common defence" and "the general Welfare" in these times.

Happily, contemporary social arrangements being not wildly dissimilar from those in the *pre*-constitutional era, as a matter of fact the *pre*-constitutional list provides a set of practical, well-tested categories of exemptions that should work as well today as they did then. The focus must be on *categories of*, rather than particular, exemptions drawn from the *pre*-constitutional lists, because some flexibility must be allowed for variances in social, economic, and political conditions over time. For example, not all of the public offices or private occupations included in those two categories during the *pre*-constitutional era would be considered critical (or, in the case of "overseers" of slaves on plantations, even allowable) today; whereas some offices or occupations which might be deemed essential today did not even exist then.

Neither Congress nor a State legislature is constitutionally bound, however, to grant a modern statutory exemption within every *pre*-constitutional category. For legislators could find that, under peculiar contemporary conditions, no need exists for any exemption within a certain category, or that the recognition of any such exemption would overly weaken the Militia and therefore must be refused. Thus, in keeping with the principles of near-universal enrollment and compulsory service, exemptions cannot be expanded in principle (by category), but can be greatly reduced in practice (by particular examples within a category, until perhaps the entire category lies dormant).

On the other hand, although exemptions from Militia duties must be consistent with "the common defence" and "the general Welfare" and in some

significant manner conducive to "the security of a free State", they need not be restricted simply for the sake of restriction. Although America now faces perhaps more widespread and potentially catastrophic emergencies than at any time in the past—including nuclear, biological, and chemical attacks or accidents; epidemics or even pandemics; other environmental disasters; and, perhaps most likely of all, serial crises in her monetary and banking systems, with concomitant economic and social upheavals—and therefore needs more, and more thoroughly trained, Militiamen than ever before to provide adequate "homeland security", she also enjoys such a large population that a smaller percentage of her people than in *pre-*constitutional times needs to be mobilized in order to provide forces sufficient for immediate deployment. Therefore, a significant number of eligible individuals could be exempted from most or even all duty, other than the acquisition of primary equipment and basic training, upon the payment of some reasonable composition in the form of notional "fines". And the moneys thereby collected could largely finance the Militia—thus making the exemption of such superfluous manpower, upon adequate payments by those exempted, an actual and very useful form of service.[1690]

E. The categories of constitutionally permissible exemptions. Based on the foregoing, the following categories of exemptions stand out—

1. Disability. A significant disability must always exempt an individual, on the ground that his performance of the required duty is simply not possible, either at that time alone (as the consequence of some temporary infirmity) or at all (as the consequence of some irremediable condition).

a. In *pre-*constitutional times, exempting individuals with serious disabilities from "listing" in the Militia was the course common sense dictated, and no rational legislator would have refused to follow. Today, in revitalized "Militia of the several States", it would be a matter both of common sense and of *constitutional* requirement, because no one can be compelled to attempt to perform any duty that is simply beyond his physical, mental, or emotional abilities. In cases involving total disabilities as the result of which the individual can do nothing whatsoever that could contribute to the community's "homeland security", an exemption amounts to a true "unalienable right" (or, perhaps more pointedly put, an "unalienable immunty"), because—inasmuch as "Governments are instituted among Men, deriving their *just* powers from the consent of the governed"[1691]—the community cannot in reason and therefore in justice demand from any of its members any service, no matter how slight, that he simply cannot perform. Such an individual is perhaps not so much "exempted from" as simply *ineligible for* the Militia.

[1690] *See post*, Chapter 43.

[1691] Declaration of Independence (emphasis supplied).

After all, impressment into Militia service can result in particular denials of an individual's "liberty", and perhaps the specific denial of his "life", too, if he is compelled to obey the orders of his superiors to a personally fatal conclusion. "No person", however, shall * * * be deprived of life, [or] liberty * * * , without due process of law"; "nor shall any State deprive any person of life, [or] liberty * * * without due process of law".[1692] If an individual can in fact perform some useful service in "[a] well regulated Militia", then statutorily compelling him to do so is, in a sense, the perfection of "due process of law", because "[a] well regulated Militia" cannot function without impressment, and a Militia so constituted is "necessary to the security of a free State",[1693] without which "due process of law" would not long continue. If, however, perforce of some disability, an individual simply cannot perform any useful service for the Militia, or the value of his provision of any such service is vastly outweighed by its cost, then the deprivation of his "liberty" by "listing" him in the Militia can achieve no rational purpose, and thus violates the first principle of due process, which outlaws "all substantial arbitrary impositions and purposeless restraints".[1694] So, certainly the impossibility—and arguably the substantial impracticability—of an individual's performance of any useful duty provides him with a constitutional immunity from compulsory service.

b. In cases involving severe disabilities as the result of which individuals cannot perform Militia services themselves but can still direct their own personal affairs, such individuals may be exempted from fulfilling any duties through their own individual efforts, but nonetheless may be required to finance the provision of suitable substitutes for themselves, or to pay the expenses their minor sons or wards may incur in the course of the latters' own Militia duties. Being limited to monetary obligations, these disabled individuals' duties would be only indirect—but withal they would be services in and for the Militia.

c. In keeping with the principle of near-universal enrollment, standards for physical and mental eligibility for the Militia must be prone neither to lax nor to arbitrary and capricious enforcement. Only after individuals have been called for enrollment in the Militia should suitably qualified officers exempt such as they may adjudge incapable of service—their decisions to be made on the basis of personal observations of the individuals' abilities or other dispositive evidence, coupled with

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[1692] U.S. Const. amends. V and XIV, § 1.

[1693] U.S. Const. amend. II.

[1694] Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting). Although the absence of a disability provides a so-called "rational basis" for denying an exemption, an individual aggrieved by such a denial would always be entitled to prove that he did in fact qualify for the exemption. *See, e.g.,* United States v. Carolene Products Company, 304 U.S. 144, 152 (1938). On the other hand, where an individual denied that he was in fact disabled, the parties seeking to impose such an exemption on him would be required to make out at least a *prima facie* case. *Compare* Railroad Retirement Board v. Alton Railroad, 295 U.S. 330, 347-348 & note 5 (1935), *and* Nebbia v. New York, 291 U.S. 502, 525 (1934), *with* Mayflower Farms, Inc. v. Ten Eyck, 297 U.S. 266, 274 (1936).

the officers' own knowledge of what would probably be required of those Militiamen in the field. Moreover, any exemptions on the grounds of disability should be periodically reviewed to determine whether the individuals' underlying conditions have changed.

2. Age. The principles of near-universal enrollment and compulsory service demand that *every* able-bodied individual, of *any* age, who *can* perform *some* Militia services be subject in principle to *some* sort of Militia duty. For *in extremis* the security of the community may require *la levée en masse*, down to the last man and boy. In normal practice, however, as a matter of deference to the physical or mental immaturity of individuals of tender years and to the foreseeable degenerative consequences of superannuation in others, a legislature should enjoy some discretion to set reasonable statutory upper and lower limits of age, with individuals above or below those limits declared (or at least understood) to be exempt from enrollment in the Militia.

a. These boundaries cannot be merely arbitrary or capricious, but instead must rest upon empirical observations and scientific judgments concerning the typical physical and mental maturities, physical abilities, and continuing mental acuities among different groups—from which sound estimates can be made as to the likely capabilities of representative individuals within those groups to perform the duties to be required of them. Human experience since early *pre-*constitutional times suggests that under sixteen and over sixty years of age are reasonable outer boundaries within which, at the various stages of his life, the average individual can be presumed able to perform most Militia duties. Minor contractions at either end of that range—for example, up to eighteen and down to fifty-five years of age—might be justifiable in some special circumstances, provided that they did not adversely affect the total pool of individuals immediately available for Militia service. But otherwise they are inadvisable. Better to create specific and narrow exemptions for particular categories of individuals when and where necessary within the broadest possible range of ages, so as to secure for the Militia the largest possible pool of enrollees, than to exempt large numbers initially on the basis simply of age only to discover in times of "alarm" that the remaining pool proves too small to enable the Militia to provide the necessary level of security. And surely no major contractions in the range of eligibility are constitutionally allowable—for example, exempting from Militia service every eligible individual less than twenty one and more than thirty years of age—because, if this were permissible in principle, the range of ages could be so reduced as to render the Militia nothing but skeletal forces, if they survived at all.[1695]

[1695] The ages given in the example were not selected randomly, but because one State court actually held that a State could exempt from enrollment in her Militia all individuals outside of that range. Opinion of the Justices, 39 Mass. 571 (1838). Revealingly, this ill-considered decision was handed down but a few years after

b. If below or above the statutory limits on ages, individuals should not be *compulsorily* enrolled in the Militia. Presumably, the lower boundary of sixteen years of age would be sufficiently justifiable to the community that individuals known to be below it would never be allowed to volunteer for Militia duty—such exemption to be relaxed only in the event of an actual insurrection or invasion, massive natural disaster or industrial accident, or other catastrophe. Of course, such a fixed minimum age for enrollment in the Militia proper would not preclude *mandatory education and training* of young people in Militia principles and practices in all secondary schools.[1696] Indeed, it ought to *compel* such instruction, in order to ensure that individuals less than sixteen years of age were at least minimally prepared for compulsory enrollment in the event of such a calamity (as well as being ready to enter the Militia when they came of minimum statutory age). At the other extreme, though, an exemption from compulsory enrollment for individuals above sixty years of age should never prevent or discourage their *voluntary* service in whatever capacities they might prove useful, subject when appropriate to a Militia board of inquiry's assessment of their actual suitability for duty. After all, once the Militia had been revitalized for several years, the majority (if not all) of the individuals over sixty who were still physically and mentally fit would already have served at one time or another, and therefore would remain trained, equipped, and ready for *some* further service. History and common sense also suggest that many Militia officers in the higher ranks would likely be more than fifty or even sixty years old, so that mandatory retirement would foolishly deprive the Militia of the services of precisely those individuals with arguably the most extensive and useful experience.

c. Furthermore, just as in the case of physical disabilities, no limitation based solely on age should excuse the superannuated father or guardian of a minor from being required to pay the expenses the minor incurs in the course of his own Militia service. So even some individuals who themselves could perform no Militia services

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Justice Joseph Story had observed that, although "the importance of a well-regulated militia would seem so undeniable, it cannot be disguised that, among the American people, there is a growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burdens, to be rid of all regulations". *Commentaries on the Constitution*, *ante* note 576, Volume 2, § 1897, at 646. And only two years after the decision had appeared, Massachusetts abolished compulsory service in her Militia altogether. *See, e.g.,* John K. Mahon, *The History of the Militia and the National Guard* (New York, New York: Macmillan Publishing Company, 1983), at 83, *referring to Chap.* 92, An ACT in addition to the several Acts concerning the Militia [*Approved by the* Governor, *March* 24, 1840.], §§ 1, 5, and 11, ACTS AND RESOLVES PASSED BY THE Legislature of Massachusetts IN THE YEAR 1840 (Boston, Massachusetts: Dutton and Wentworth, 1840), at 233, 234, 235. Thus, only one long lifetime had been required for the political leaders in Massachusetts, and apparently her common people as well, to forget the lesson of the 19th of April, 1775. Although the significance of this statute is just as lost on most Americans today, some college students can appreciate it. *See* Dominic Vieira, "The World Turned Upside Down: The Militia of the Several States, the National Guard and the Constitution", A Thesis Submitted to Dr. Adam Schwartz in Candidacy for the Degree of Bachelor or Arts, Department of History, Christendom College (Front Royal, Virginia: 30 April 2012).

[1696] *See, e.g.,* B. Stentiford, *The American Home Guard, ante* note 1058, at 182-183, describing the so-called "Junior State Guard" program in Mississippi, immediately following World War II.

at all would nonetheless remain vicariously liable for the performance of some Militia duties.

3. Gender. As with age, the principles of near-universal enrollment and compulsory service require that *every* able-bodied individual, of *either* gender, who *can* perform *some* Militia services be subject in principle to *some* kind of Militia duty. For *in extremis* the security of the community may require *la levée en masse totale*, down to even the very last woman and girl. Yet the application of that principle as to women cannot, in the nature of things, be exactly the same as its application to men.

a. Because no Colony or independent State formally enrolled women in her Militia during the *pre-*constitutional era, some superficial students of this subject might advance the syllogism: anyone excluded from the Militia during *pre-*constitutional times should (or at least may) be excluded from the Militia today; women were excluded from the Militia in that era; therefore, women should (or at least may) be excluded from the Militia today. That conclusion is false, however. For although women typically were almost entirely *exempted* from *pre-*constitutional Militia service, they were never absolutely *excluded*. Here again, definitions are important. As has already been explained, "to exempt" means to grant someone an immunity or freedom from a liability that otherwise would attach to that individual.[1697] Whereas, "to exclude" means "[t]o shut out; to hinder from entrance or admission";[1698] "to debar from participation;[1699] and "to prohibit".[1700] Thus, "to exclude" means to shut out an individual from the relevant group in the first place, so that no liability related to membership in that group can ever attach to her; and therefore she requires no "exemption" from any particular liability. If the individual is subject to even a single liability related to membership, then she is not "excluded" from the group, even though she may be "exempted" from all other such liabilities.

In fact, that was the case for free adult women during *pre-*constitutional times. That *pre-*constitutional Militia statutes did not mandate the enrollment of women was not the product of legislators' legal disability to enroll them. No legislature of any Colony or independent State ever explicitly abjured a power to call forth adult able-bodied free women for some kind of service in, with, or for the Militia, at least in situations of direst necessity. Indeed, any such renunciation of authority would have been ridiculous on its face. For, in circumstances of *direst*

[1697] *See ante*, at 941.

[1698] S. Johnson, *Dictionary, ante* note 50, definition 1 in both the First (1755) and the Fourth (1773) Editions. *Accord, Webster's New International Dictionary, ante* note 330, at 890, definition 1.

[1699] *Webster's Revised Unabridged Dictionary, ante* note 11, at 521, definition 1. *Accord, The Compact Edition of the Oxford English Dictionary, ante* note 11, Volume 1, at 918, definition 1; *Webster's Third New International Dictionary, ante* note 330, at 793, definitions 1a and 1b.

[1700] S. Johnson, *Dictionary, ante* note 50, definition 2 in both the First (1755) and the Fourth (1773) Editions.

necessity, every individual other than a pacifist or a coward will fight for his or her freedom even without an order to do so from public officials, because the alternative of sheepish submission to murder, rapine, and subjugation is suicidal and dishonorable.

Confusion on this score arises because *pre-*constitutional Militia statutes never *explicitly* exempted women from most duties. Rather, women's exemption was *implicit* in the statutes' directives to enroll "men" or "male persons", with no mention of women, and then assignments of various duties to the individuals so enrolled. But that *some* statutory duties *did* attach to women proves that the statutes' silence as to them in all other particulars constituted only a very broad exemption *sotto voce*, not an iron-bound exclusion *a priori*. For example, widows and other independent women were obliged to provide firearms, ammunition, and accoutrements for those of their minor sons and male apprentices and servants who served in the Militia, and to ensure that the latter performed their other Militia duties, by being made personally liable in monetary fines for any defaults in those particulars;[1701] and female "house keepers" such as widows were required to procure suitable male substitutes to serve on behalf of their houses in the Watch and the Ward.[1702] Had women been excluded from the Militia in the first place, these (or any other) Militia duties would never—indeed, in principle could never—have been imposed upon them. Whereas, because women were included in the Militia in principle albeit not to any great degree in practice, they could be exempted from almost all duties, yet nonetheless required to perform the few duties that legislators considered appropriate for them.

After all, women's broad exemption from most Militia service in *pre-*constitutional times derived from neither a physical impossibility for most women to perform at least some of those functions nor a lack of legislative power to require them to do so if the need arose. Instead, it embodied a judgment of social policy—based primarily on considerations of feminine physiology, together with then-prevailing religious, legal, and cultural *mores*—that women could not effectively serve in most of the capacities required of men, and in deference to societal values should not be impressed to serve in any but a very few of them.

b. Today, no purely legal rationale precludes either the inclusion of women in the Militia in some capacities, or their complete exemption from various duties not deemed suitable for them—in particular, service in the field as combatants.[1703] Each one of "the Militia of the several States" must be constitutionally "well

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[1701] *See ante*, at 244-245 (Rhode Island) and 606-607 (Virginia).

[1702] *See ante*, at 242-244 (Rhode Island).

[1703] *See* Rostker v. Goldberg, 453 U.S. 57 (1981) (Congress may limit registration for the Selective Service System to men, because Congressional policy excludes women from combat assignments in the Armed Forces).

regulated"—and "[a] well regulated Militia" consists of "the people", because the basis of such a Militia is "the right of the people to keep and bear Arms".[1704] During the *pre*-constitutional period, the term "the people" could have been construed in at least two ways: *first*, physically, to include every adult human being in the community; *second*, politically, to include only those adult human beings who could have participated in the political process through their eligibility for exercise of the franchise. On the one hand, if the first interpretation is assigned to "the people" in "[a] well regulated Militia", then in *pre*-constitutional times women were always subject to duty in the Militia in principle, but were generally exempted from almost all duties in practice. And today their eligibility for service, and for exemptions from service, would continue, just as before. This is the more likely of the two interpretations, because during the *pre*-constitutional era women *were* subject to *some* Militia duties, if only of a financial nature. And if a legislature could have assigned to them *some* of those duties, it could have assigned *all* such duties. Moreover, during that era many men who could not vote—such as minors—were nonetheless subject to Militia service. So an individual's *actual* ability to participate in the political process was not the criterion for her, or his, mandatory participation in the Militia. On the other hand, if the second interpretation is assigned to "the people", then in *pre*-constitutional times "[a] well regulated Militia" included only adult able-bodied men, because only men were *eligible* to vote in principle (even if not all of them actually were allowed to vote for one reason or another). Presumably, that definition of "[a] well regulated Militia" continued in every State *until women were included among "the people" by being granted the right to vote*—a process that ratification of the Nineteenth Amendment completed in 1920.[1705] So, even if the provisions relating to the Militia in the original Constitution and the Second Amendment needed revision in order to bring women within "the people" and therefore within "[a] well regulated Militia", the Nineteenth Amendment arguably performed that task. Therefore, today, as part of either the physical or the political definition of "the people", women may serve, *and because of the Militia's compulsory nature may be required to serve in suitable capacities*, in "well regulated Militia".

c. Nonetheless, contemporary arbiters of public policy in this regard must not allow modern ideological blinders to close their eyes to the differences between the sexes, to the unique and indispensable separate contributions to a stable and well-ordered community that each sex makes, and otherwise to the profitable application of the economic principle of the division of labor based upon the distinctions between the sexes that biology and culture render inescapable.

[1704] *Compare* U.S. Const. art. II, § 2, cl. 1 *with* amend. II.

[1705] U.S. Const. amend. XIX provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex".

Whether and to what extent women may desire to serve in the Militia, or not to do so, and in what numbers they may vote for legislators who will effectuate such desires, however, remain political questions that can be answered only in the course of the electoral campaigns that will occur as part of the process of revitalizing "the Militia of the several States". Women are participants in self-government who contribute many votes. The ability to vote, though, is not enough. True self-government implies and demands self-knowledge, self-restraint, and self-defense, too. It is not unlikely that the vast majority of modern women, applying foresight and discernment from their special perspective, will conclude that compelling large numbers of women to undergo "combat training" in the Militia, let alone acually to engage in real combat, will be highly detrimental to women as individuals as well as destabilizing of the society in which most women want to live. And therefore they will agree that women's involvement in the Militia should be limited to providing financial support—for example, by being exempted from most duties upon payment of various fees—or to serving in staff, administrative, service, or like capacities well insulated from any assignment directly related to combat.

d. In any event, in keeping with the *pre-*constitutional practice that defines "[a] well regulated Militia" in this regard, the overarching principle remains that women enjoy no constitutional "right" to serve in the Militia on the basis of strict equality with men across the board, and therefore may constitutionally be exempted from essentially all Militia service, and certainly all Militia service that might result in their direct deployment into the field in the capacity of combatants. So, in dealing with women in the Militia, contemporary legislators should consider selectively crafting and applying *absences of* exemption—by setting out in the statutes explicit, specific, and limited assignments of duty, with all other service at least implicitly exempted—rather than adopting overly broad statutory language that requires women to serve on an unattainably "equal" basis with men unless subject to some explicit exemption.

4. Public offices. During the *pre-*constitutional era, public officials *as a class* were never excluded from the Militia perforce of their positions in civil government. Rather, *some* officials were granted statutory exemptions from *some* Militia duties. The existence of these exemptions proves that, in their absence, even while holding public offices those individuals would have been required to serve in the Militia to the fullest extent mandated by law as a consequence simply of their being otherwise eligible for service. Inasmuch as these exemptions substituted one public service (in the civil government) for another public service (in the Militia), they should be deemed in effect not really "exemptions" *from* the Militia but only reassignments of duties *within* the Militia—that is, by serving in certain public offices the incumbents were performing part of their Militia duty. All that being the case in *pre-*constitutional times, it remains the case today as part of the constitutional

definitions of "organizing, arming, and disciplining, the Militia" and "[a] well regulated Militia".[1706]

a. That performance of the tasks connected with certain public offices may substitute for ordinary types of Militia service is an application of the fundamental operative principle of the Militia that everyone owes a duty of personal service to the community, but not necessarily in or through the selfsame institution or establishment that serves the community. For most individuals, this duty must be fulfilled through actual Militia service, because "a well regulated militia * * * is the proper, natural, and safe defence of a free state",[1707] and the only one that the Constitution declares to be "*necessary* to the security of a free State" (or, for that matter, "necessary" for any purpose at all).[1708] But the legislature may grant exemptions from some, even most, forms of Militia service to those individuals who perform certain other, purely civilian functions in the government. The criterion for any such exemption is those functions' practical necessity in relation to the overarching purpose of the Militia—that is, the degree to which they contribute to "homeland security". For inasmuch as "[a] well regulated Militia" is "*necessary* to the *security* of a free State", service in a particular public office can justify an exemption from Militia service only if it, too, is reasonably "*necessary* to the *security* of a free State".

Some exemptions from Militia duties for incumbents in certain public offices are "necessary to the security of a *free* State", at least in tranquil times, because "a *free* State" absolutely requires such offices to be filled if its normal political and legal life is to continue. As a *quasi*-military establishment, "[a] *well regulated* Militia" can be neither the full embodiment of "a free State", nor the purpose of "a free State", nor a sufficient means for governance of "a free State" during the peaceful course of human events. Civil government is necessary, too. Any Militia would actually prove detrimental to the "safe defence of a free state" if its demands for manpower, training, and deployment seriously undermined the efficacy of civil government. And "a free state" does not exist if the entire community is subject at all times to even the attenuated form of "martial law" applicable to the Militia.[1709]

b. The mere existence of a public office, however, does not necessarily entail the automatic exemption of its occupant from all, or even any, of the Militia duties to which that individual would otherwise be subject. This should be self-evident, inasmuch as *all* members of the Militia are to some degree "public officials", because they are part of a governmental institution with the authority and responsibility "to

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[1706] U.S. Const. art. I, § 8, cl. 15 *and* amend. II. *See ante,* at 63-81.

[1707] Virginia Declaration of Rights (1776) art. 13.

[1708] U.S. Const. amend. II (emphasis supplied).

[1709] *See post*, Chapter 48.

execute the Laws of the Union" on behalf of the General Government,[1710] and the laws of the several States and their myriad Localities on the States' behalf.[1711] Surely, though, incumbents in all public offices in charge of absolutely "critical" governmental functions should qualify for exemptions that will enable them to perform those functions to their full extent. Most reasoning minds would agree that a "critical" function is one of such supreme importance to the community that, as a practical matter, it would have to be taken in hand *by the Militia itself under some form of "martial law"* if it were not being performed to a minimally satisfactory degree by civilian officeholders. That is, a "critical" governmental function is one the performance of which obviates even the arguable necessity for such "martial law". Public officials who perform those functions should be granted exemptions from the Militia so that they can single-mindedly concentrate on those tasks, and thereby can relieve the Militia from being deployed to fulfill them in the course of a crisis that threatens "the security of [their] free State".

The primary "critical" functions of contemporary government (and the officers performing them) fall under two heads: The Power of the Law (namely, legislators, judges, and such executive officers as the Governor and Attorney General)—for if the government cannot make and enforce the laws that may be indispensable in a crisis, how is public order to be maintained? And the Power of the Purse (namely, the Treasurer or equivalent official)—for if the government cannot tax and spend, who is to collect and disburse the public resources necessary to secure the common defense and promote the general welfare under catastrophic conditions? Although undeniably the font of perhaps the most "critical" governmental functions of all—because "'[p]olitical power grows out of the barrel of a gun'"[1712]—a third great power of government, the Power of the Sword, would not support "exemptions" in the strict sense from Militia duty for civil law-enforcement officers. For, in properly revitalized "Militia of the several States", State and Local police forces, Sheriffs' departments, and like agencies would be subdivisions of the Militia that enforced civilian law throughout the federal system, but the members of which were themselves always subject to regulation by their Local Militia for the sake of their own training and especially discipline.[1713]

c. Of course, not just public officials who perform absolutely "critical" functions could be granted some exemptions from Militia duty. Contemporary American society being more complex than was society in the *pre-*constitutional era, and therefore the rôle of government being more extensive and intricate now than then, many public offices exist today which were unknown in *pre-*constitutional

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[1710] U.S. Const. art. I, § 8, cl. 15.

[1711] *See* U.S. Const. amends. II and X.

[1712] *Quotations From Chairman Mao, ante* note 28, at 61.

[1713] *See ante*, at 327-328, *and post*, at 1135-1138, 1194-1202, 1276-1277, 1291-1293, and 1482-1488.

times, but for which a reasonable argument in favor of some exemption for their incumbents can now be advanced on the grounds simply of public convenience. Inasmuch as contemporary society also has far more than enough people to provide effective Militia in most Localities, the expansion of exemptions to officeholders in "important" albeit not "critical" positions, and perhaps in "highly useful" albeit not even "important" positions, would maintain the efficiency of civil government while not undermining the Militia. The controlling criterion for any such exemption, though, must always be the existence of evidence of an overall positive return between what is taken from the Militia, on the one hand, and what is transferred to the civil government, on the other—namely, that society receives more in public service by granting the exemption than by denying it. Therefore, *pre-*constitutional lists of particular public offices for which exemptions of their incumbents were allowed in no way limit legislators' discretion today, because those lists, while illustrative of application of the principle that must always control such exemptions, were not independent of the peculiar circumstances of those times, but were themselves drawn up on the basis of legislators' pragmatic judgments that, under those circumstances, those offices were in some sense "critical", "important", or "highly useful".

d. Obviously, the nature and extent of any public officeholder's exemption from Militia service should be proportioned to the nature and extent of the duties the officeholder performs in the civilian government. Yet, no matter how "critical" those duties may be, no such exemption should ever excuse any such individual *entirely* from all aspects of Militia service. Typically, this was the case in *pre-*constitutional times, usually with different limitations or conditions attaching to different exemptions. And, during that era, what sometimes appeared on the face of a statute to be an exemption from certain types of service as a matter of law was not always so as a matter of fact. For example, many of the individuals whom the statutes explicitly exempted from compulsory attendance at Militia "musters" on account of their public offices might have served as high-ranking officers in the Militia and therefore would have attended "musters" as a matter of course, albeit voluntarily. Today, statutes for revitalizing "the Militia of the several States" should not depend upon such voluntary participation, but instead should specify with exactitude that no individual, no matter what public office he may hold, is to be exempted from certain minimum terms of service. To wit—

(1) No public officials should ever be exempted from the basic duty to attend a designated number of the regularly scheduled meetings of the Local Militia Companies in which as individual private citizens they were enrolled. The "meetings" proposed here should be distinguished from "musters". "Musters" would involve some kind of formal instruction, training, or actual deployment in the field, the form and substance of which would vary, depending upon precisely what type

of Company happened to be involved.[1714] "Meetings", on the other hand, would entail essentially the same activities for all types of Companies: namely, (i) performing the ordinary business of maintaining and operating the Company (such as electing officers, planning activities distinct from "musters", and authorizing the disbursement of discretionary funds), and then (ii) disseminating and discussing democratically in committee of the whole whatever political, economic, and other information the Militiamen deemed relevant to the Militia's functions—*including what public officials were doing, why they were doing it, what were the present and likely future consequences of their actions for good or for ill, and what WE THE PEOPLE should do about the matter*.[1715]

The requirement that, as a condition of their exemptions from Militia duties in other respects, all public officials must attend such meetings and participate in disclosure of and critical inquiry into their behavior in office will be vital to the proper functioning of all "well regulated Militia" in these days in which public administration is so complex (and often so corrupt). Notwithstanding that the Militia are always "necessary to the security of a free State" in principle, they will inevitably prove to be ineffective for that purpose in practice unless they can avail themselves of all the information that may be necessary for them to carry their functions to fruition in a timely and efficient manner. Self-evidently, the performance of its duties by civil government—whether good, bad, or indifferent, and particularly in the latter two cases—is one critical component of "the security of a free State". For "the two greatest securities the[people] can have for the faithful exercise of any delegated power [are], *first*, the restraints of public opinion * * * and, *second*, ***the opportunity of discovering with facility and clearness the misconduct of the persons they trust, in order either to their removal from office or to their actual punishment in cases which admit of it***".[1716] Therefore, to discharge their own responsibilities, the Militia will need to be continuously and completely apprised of officials' performances in office. And to guarantee that they are so informed, the Militia themselves will need to exercise the authority to compel public officials—who comprise the source of arguably the best evidence on that score—to describe, explain, *and justify* their actions *to the Militia* on a regular basis. To be sure, even today public officials *should* have a responsibility to prove (say) that they are

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[1714] For example, "musters" for an Engineering Company would differ from "musters" for a Communications Company, a Transportation Company, or some other specialized Company—all of which would differ from "musters" for unspecialized "line" Companies.

[1715] Inasmuch as revitalized "Militia of the several States" would be organized on a Local basis, a particular public official would be enrolled in the Militia Company in his own neighborhood. But the territory his office served might include many neighborhoods, a Town, a City, a County, or even the entire State. So his appearance before his own Militia Company would likely interest many other Companies. Modern technology, however, would allow for virtual participation in the Local Militia Company's meeting by as many Companies as had access to telephones or the Internet.

[1716] *The Federalist* No. 70 (Alexander Hamilton) (***bold-face emphasis*** supplied).

complying with their "Oath[s] or Affirmation[s], to support th[e] Constitution" whenever "the people * * * petition the Government for a redress of grievances" that arguably arise from violations of those "Oath[s] or Affirmation[s]".[1717] In fact, however, petitions from "the people" typically fall upon deaf ears and mute lips, because no mechanism exists to *compel* wayward officials' to respond to common citizens' complaints or related inquiries, no matter how serious the "grievances" at issue may be. Conditioning public officials' exemptions from other Militia duties upon their fulfillment of a duty to respond to "the people" in their own Local Militia Companies will put teeth into the right to petition.

In particular, the requirement that public officials must participate in regular Militia meetings and submit to inquiries concerning their behavior in office will enable the Militia to fulfill their constitutional responsibility to execute the laws against incompetents, adventitious lawbreakers, and aspiring usurpers and tyrants who somehow insinuate themselves into public office. That the Constitution explicitly delegates to the Militia the specific authority and responsibility "to execute the Laws of the Union", and implicitly reserves to the Militia that same authority and responsibility with respect to the laws of the several States,[1718] proves that the Militia are not just military or *para-*military establishments, but above and beyond that are *legal and political* institutions. For the Constitution assigns to the Militia the duty "to execute the Laws" *ahead of* the duties to "suppress Insurrections and repel Invasions". So, in furtherance of this vital purpose, under its authority "[t]o provide for organizing * * * the Militia" and "[t]o provide for calling forth the Militia to execute the Laws of the Union" Congress should mandate that, as part of their regular organizational routine, the Militia conduct investigations into the consistency of public officials' behavior with those laws.[1719] And the States should do the same with respect to their own laws, under their concurrent authority to organize their Militia.

This would hardly constitute a startling legal innovation. After all, each and every legislature in America—composed, not of WE THE PEOPLE themselves, but merely of their supposed, yet all too often disloyal, "representatives"—is empowered to conduct investigations:

> [T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. * * *
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> * * * A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself

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[1717] *Compare* U.S. Const. art. VI, cl. 3 *with* amend. I.

[1718] *Compare* U.S. Const. art. I, § 8, cl. 15 *with* amends. II and X.

[1719] *See* U.S. Const. art. I, § 8, cls. 15 and 16.

> possess the requisite information * * * recourse must be had to others * * * . Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed.[1720]

The Constitution assigns three specific responsibilities to the Militia when "employed in the Service of the United States",[1721] and implicitly recognizes an indefinite list of responsibilities for the Militia's provision of "the security of a free State" to each of their States. With respect to the fulfillment of all of these responsibilities—

> • Because no "well regulated Militia" could possibly function "wisely or effectively in the absence of information respecting the conditions" under which they were to operate, the Militia must enjoy the inherent authority to perform whatever investigations may assist them in the performance of their duties. And,
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> • Because Congress or a State's legislature would always be authorized to investigate matters relating to the Militia's activities, Congress or a State's legislature could delegate authority for the Militia to conduct such investigations.[1722]

In either event, "[t]he scope of the power of inquiry" would be "as penetrating and far-reaching as the potential power" the Militia might exercise,[1723] enabling the Militia to examine into and expose political subversion, malfeasance, fraud, corruption, misfeasance, nonfeasance, and incompetence; to survey how effectively the laws relating to "homeland security" were being executed; and to consider what actions were needed to improve "homeland security" in the political, economic, and social realms.[1724] Moreover, because public officials are also members of the Militia *whose exemptions from Militia service are conditioned upon their full, faithful, honest, and competent performance of official duties*, the Militia may investigate their official conduct as a matter of internal Militia discipline.[1725] And even if such

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[1720] McGrain v. Daugherty, 273 U.S. 135, 174-175 (1927) (Congress). *See also id.* at 165-166 (the States' legislatures).

[1721] U.S. Const. art. I, § 8, cls. 15 and 16.

[1722] *See, e.g.,* Hanna v. Larche, 363 U.S. 420, 440-451 (1960); Interstate Commerce Commission v. Brimson, 154 U.S. 447, 472-474 (1894).

[1723] *See, e.g.,* Barenblatt v. United States, 360 U.S. 109, 111 (1959).

[1724] *See, e.g.,* Wilkinson v. United States, 365 U.S. 399, 407-415 (1961); Watkins v. United States, 354 U.S. 178, 187-188 (1957); Barenblatt v. United States, 360 U.S. 109, 117-132 (1959); Sinclair v. United States, 279 U.S. 263, 294-295 (1929); McGrain v. Daugherty, 273 U.S. 135, 177-178 (1927).

[1725] *See, e.g., In re* Chapman, 166 U.S. 661, 668-670 (1897); Barry v. United States *ex rel.* Cunningham, 279 U.S. 597, 612-617 (1929).

investigations could pour the foundations for eventual criminal prosecutions, they would be constitutionally valid[1726]—although, depending upon the scope of the Militia's statutory mandate, they might require investigators to afford witnesses the full panoply of procedural protections the Constitution guarantees in other contexts.[1727]

At the least, the requirement that public officials submit to such inquiries will exert both a salutary educative and a sanitizing deterrent effect. Officials who must regularly appear before their own Local Militia Companies—on which occasions their behavior in office will become the subject of investigation, evaluation, and (if appropriate) face-to-face criticism or even condemnation by their true peers among common Americans—will not be able to imagine themselves separate from, independent of, and superior to WE THE PEOPLE. And knowing that they will be inescapably subject and answerable directly to THE PEOPLE—with no opaque layers of governmental bureaucracies, political parties, or special-interest groups to shroud them from searching scrutiny—they will be deterred from any but the most recondite misbehavior. Deterrence is the more important the more powerful the public office and the more-expansive the extent of other exemptions from Militia duty its incumbent has been granted, because: (i) The more powerful the office the greater the temptation to the officeholder to abuse his authority, inasmuch as (according to Lord Acton's familiar *dictum*) "all power tends to corrupt, and absolute power corrupts absolutely".[1728] (ii) The more powerful the office the greater the peril to society from its perversion. And (iii) the more extensive his other exemptions, the less the incumbent will otherwise find himself under close observation by WE THE PEOPLE in the Militia. Furthermore, nothing will deter rogue public officials' negligence, recklessness, willful blindness, or intentional misbehavior more effectively than the requirement, *directly enforceable though Militia discipline*, that they periodically provide, and *personally* at that, an exposition, explanation, and if necessary exculpation of their conduct to fellow-citizens for whom their mere incumbency in public office may very well constitute probable cause for suspicion. (This situation will be beneficial for competent and scrupulous officeholders, too, because they will have an incentive continuously to inquire into and improve their performances.)

To be sure, deterrence is never perfect, and may fail. But then the requirement that public officials participate in regular Militia meetings wherein they must respond to complaints and submit to inquiries concerning the performance of their duties during their tenures in office will allow for timely exposure of their

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[1726] *See, e.g., In re* Groban, 352 U.S. 330, 332-335 (1957); Anonymous Nos. 6 and 7 v. Baker, 360 U.S. 287, 290-298 (1959).

[1727] *Contrast* Hannah v. Larche, 363 U.S. 420 (1960), *with* Jenkins v. McKeithen, 395 U.S. 411 (1969).

[1728] *Essays, ante* note 1563, at 519.

wrongdoing, with appropriate censure and correction not far behind. At the least, serious misbehavior in public office should be treated as an offense *within and against the Militia itself*, and therefore subject to Militia regulations, so that such wrongdoing could be punished just as soon as it were ferreted out. The rationale would be that misconduct in public office violates the condition implicit in any exemption from other Militia duty that the individual should carry out the responsibilities of his public office *properly*. After all, it would be irrational to grant an exemption that in principle weakened the Militia which is "necessary to the security of a free State", and at the same time license the beneficiary of that exemption to undermine through his own misconduct the civil government which is a vital component of "a free State". This principle could easily be extended to *any and all* misbehavior in public office, of whatever degree, by anyone whose exemption from any Militia duties derived from his incumbency. And, as a further safeguard, all varieties of egregious misconduct in office which were first exposed and punished as offenses specifically against the Militia would be then subject to further investigation, trial, and punishment outside of the Militia as normal civil or criminal offenses.

This approach would offer unique advantages: It would be effective at all times—for critical review of public officeholders' conduct by the Militia would take place not just every few years during normal election-cycles, but on many days in every year in every Local Militia Company. It would be quicker, easier, and surer to apply than other means of detection and punishment—such as the process of impeachment, which has proven too cumbersome to be useful in the general case, no matter how desperately it may be needed;[1729] or private civil-rights lawsuits, which are at best adventitious and always time-consuming and expensive, even if they succeed in the face of judges no less rogue than the officials being sued;[1730] or public prosecution for crimes committed under color of law,[1731] which may be thwarted by some "good old boy" network of malefactors within the governmental apparatus. It would tend to nip potentially serious problems in the bud, by exposing incipient misbehavior before the negligence, recklessness, or outright criminality of politically entrenched rogue officials rose to a level that could cause egregious, perhaps irreparable, damage to individuals, the Local community, the State, or even the country as a whole. It would constantly, pointedly, and very personally remind public officials that they are WE THE PEOPLE'S servants, not THE PEOPLE'S masters; that they are answerable to THE PEOPLE for *every* aspect of their conduct, not immune from inquiry to any degree; that their behavior will *always* be under the closest scrutiny; and that their wrongdoing will be swiftly and surely exposed, and

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[1729] *See, e.g.,* U.S. Const. art. I, § 2, cl. 5, and § 3, cls. 6 and 7; *and* art. II, § 4.

[1730] *See, e.g.,* 42 U.S.C. § 1983 (officials and employees of State and Local governments); Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) (officials and employees of the General Government).

[1731] *E.g.,* 18 U.S.C. §§ 241 and 242.

severely punished.[1732] Above all, it would build and enforce the only constitutionally correct form of political consensus within the community. Through inquiry as to officials' behavior, exposure of their wrongdoing, admonitions, and (where necessary) punishments, "well regulated Militia" would "well regulate" THE PEOPLE'S ostensible "public servants" *according to* ***THE PEOPLE'S*** *conceptions of propriety, responsibility, and efficacy*.

That some public officials might take offense at being taken down a peg in this way from the exaggerated heights they imagine themselves to occupy would prove only how little they understand their *constitutional* positions as against the Militia. To be sure, during the *pre-*constitutional era, the Militia were the creatures of Colonial or State statutes—and for that reason could be seen as somehow inferior in status to the officials who enacted those laws. The people constituted the Militia; but, outside of the tumultuous times that began in the 1770s, their rôle in governance was limited to their involvement in elections as voters, in the judicial process as jurors, and in the legislative arena as petitioners. The Constitution, however, elevated the Militia from primarily onlookers to full and permanent participants in its federal system. They—and WE THE PEOPLE who comprise them—are no longer simply creatures of Congress's and the States' laws, presumably subordinate to legislators, but are now component parts of "the supreme Law of the Land", by which "the Judges in every State shall be bound * * * , any Thing in the Constitution or Laws of any State to the Contrary notwithstanding", and to which "[t]he Senators and Representatives [in Congress] * * * and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation".[1733] This being so, public officials should no longer be suffered to contrive to channel THE PEOPLE'S political voices through the artificially narrow and insulated confines of elections, too often rigged by career politicians, professional activists from the "two" major political parties, string-pullers of special-interest groups, propagandists in the big media—and, if the truth be faced courageously, systematic and pervasive fraud in the counting of votes. Perforce of their constitutional position, the Militia have become permanent and powerful political fora, too—perhaps, if intelligently employed, the most influential and efficacious political fora of all.

Thus, the requirement that public officials must participate in Militia meetings as a condition of any exemption from other Militia duties is yet another

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[1732] The rule that public officials should be subject to stringent policing, no less (and perhaps even more) strictly than other citizens, is nothing particularly novel, but has been adopted and enforced to good effect in relatively simple societies. For example, among the Lakota people, when even the most respected chief misbehaved, he could be severely disciplined by the camp police, the *akicita*—and when in the wrong would quietly submit. *See, e.g.,* Thomas Powers, *The Killing of Crazy Horse* (New York, New York: Alfred A. Knopf, 2010), at 224.

[1733] U.S. Const. art. VI, cls. 2 and 3.

very important way in which organization in revitalized "Militia of the several States" will enable WE THE PEOPLE to exercise self-government effectively. For ultimately the success of self-government depends upon THE PEOPLE'S timely access (i) to all material information as to how their representatives in government are performing—or are failing, neglecting, or refusing to perform—the responsibilities of office, and (ii) to an efficient process by which those representatives can be compelled to conform their behavior to their "Oath[s] or Affirmation[s], to support th[e] Constitution", or be exposed and punished for not doing so.

(2) In addition to attending regular meetings of their Local Militia Companies, public officials, if not already expected to serve as Militia officers, should be required to appear in the field during the type of grave emergencies *pre*-constitutional Militia statutes designated as "alarms". Perverse would be an exemption that, for example, licensed legislators to sit blathering in their chamber in the capitol while an enemy's forces goose-stepped into the capital. What purpose would their exemptions then serve—other than making them available to cobble together some cowardly instrument of surrender at the point of the invaders' bayonets? If, however, the performances of those officials' functions in the civil government at that time were actually *indispensable* to the community's response to the threat underlying the "alarm", the officials should be suffered to send suitable substitutes in their stead[1734]—especially in the case of judges and the staff necessary to keep the courts open, so that no possible excuse for any form of "martial law" could be drummed up.[1735]

(3) In order to be able to serve the Militia in the field during "alarms", all public officials otherwise exempted from the full panoply of Militia training should be required to satisfy some minimal standards of personal preparedness. *None of them* (nor anyone else, for that matter) should be exempted from the requirements that: (i) every member of the Militia (other than conscientious objectors) must possess, in his own home and in readiness for use at all times, one or more firearms suitable for Militia service, together with sufficient ammunition and appropriate accoutrements; (ii) every member of the Militia (including conscientious objectors) must be trained in basic firearms' operations and safety; and (iii) every member of the Militia must pass a test of proficiency in at least one discipline related to emergency services, such as fire-and-rescue work, first aid, survival under primitive conditions, community hygiene, and so on.

The emphasis on requiring public officials to arm themselves obviously derives in part from the very nature of "the Militia of the several States" as *armed* establishments: *Anyone* who participates in the Militia *in any way* must become

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[1734] *See post*, at 977-981.

[1735] *See post,* Chapter 48.

thoroughly familiar with firearms, because the quintessence of the Militia is "the right of the people to keep and bear Arms".[1736] But this emphasis also takes into account that well-financed subversive groups operating both domestically and internationally are attempting through mass propaganda and agitation, lobbying, and judicial activism to eliminate that "right of the people", and with it the possibility of any "well regulated Militia", and then "the security of a free State"—until no "free State" exists or can exist anywhere in America. Although this campaign for "gun control" must be countered everywhere, and the mentality it has sown among all too many Americans must be pulled up by the roots and the contrary, constitutional point of view planted and cultivated in its place in everyone's mind, *nowhere is this work more necessary or urgent than among public officials who—precisely because they have direct access to the powers of civil government and through ignorance or malice might misuse those powers to promote "gun control"—are the main targets of "gun controllers'" efforts*. These efforts will be thoroughly thwarted, however, if public officials are compelled to learn the truth about "the right of the people to keep and bear Arms" through personal, "hands-on" involvement with firearms in the Militia. Knowledge born of actual experience, after all, is usually the best prophylactic against goofy ideologies.

5. Private occupations. Carefully crafted limitations exempting individuals in *some, but not all,* private occupations from *some, but not all,* Militia duties were always part of the statutory definition of "[a] *well regulated* Militia" during the *pre-*constitutional era, and therefore became and today remain part of that constitutional definition. *Some, but not all*—because Americans of that era knew not to put the cart before the horse: that, as important as the free market may be to society, private enterprise is not separate from, independent of, and superior to the community, but is only one component of the totality of human activities that make up, *and first and foremost must always serve*, the *res publica*.

a. By itself alone, an individual's mere gainful employment in some private occupation obviously cannot justify an exemption from Militia service, or else no Militia of significant size would ever be possible in America. For most people are employed, by themselves or others, in some manner for a large part of their time. Yet exemptions for some individuals in deference to the special natures of their particular private occupations make eminently good sense. For, although "[a] well regulated Militia" is "necessary to the security of a free State",[1737] such a Militia is neither the entirety nor the purpose of such a "State". Rather, most of the activity in "a *free* State" consists of *private enterprise*, the purpose of which is to assist the people, as producers and consumers, in their personal "pursuit of Happiness"—for

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[1736] U.S. Const. amend. II.

[1737] U.S. Const. amend. II.

the security of which "unalienable Right[ ]", the Declaration of Independence attests, "Governments are instituted among Men" in the first place. And although "a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state",[1738] being "trained *to arms*" in the Militia cannot by itself provide "a free state" with the economic support necessary even to guarantee the people a rudimentary day-to-day existence, let alone to secure for them anything approaching prosperity. Moreover, "train[ing the people] to arms" to an exorbitant degree could actually prove detrimental to the economic life of the community, and therefore to the "safe defence of a free state", by seriously restricting the provision of essential private services, including those upon which the Militia depended. Therefore, because "[a] well regulated Militia" is a *governmental* establishment, one of its main purposes must be to protect the people in their personal "pursuit of Happiness" through private enterprise. And because flourishing private enterprises are vital organs in "a free state", and in particular are necessary to provide logistical support to "a well regulated militia" as the "safe defence of a free state", one of the Militia's main purposes must be to protect the functioning of those enterprises. This purpose "a *well regulated* militia" can best serve in its normal operations by not impinging upon private enterprises through demands that every eligible individual should "train[ ] to arms" and perform other Militia duties to the same degree.

b. To that end, appropriate limitations on the Militia's ability to impress men out of essential private pursuits must be established, in the form of *specific, explicit statutory exemptions* from Militia service. This, because—

(1) Individuals engaged in merely private enterprise can claim no special "rights" whatsoever as against the Militia. Absent some exemption, all otherwise eligible individuals are required to serve in the Militia to the fullest extent mandated by law, notwithstanding their occupations. The reason for this is plain enough: Inasmuch as no mere part of "a free State" can be allowed to jeopardize the security of the whole; and inasmuch as "[a] well regulated Militia" is "*necessary* to the security of a free State"; and inasmuch as the Constitution designates no private enterprise of any sort as being "necessary" to that "security"—therefore the interests of no private enterprise can in principle be superior to the needs of the Militia. (Indeed, that even individuals holding *public offices* require exemptions in order to avoid normal Militia service should be conclusive on this point.)

(2) In and through the Militia, an essential unity exists between private enterprise and public service for the interlocked purposes of "the common defence" and "the general Welfare".[1739] The fundamental principle of the Militia is that

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[1738] Virginia Declaration of Rights (1776) art. 13.

[1739] *See* U.S. Const. preamble.

everyone owes a duty of personal service to the community in its defense. The private occupations with respect to which individuals may be granted exemptions from normal Militia service take the place of such part of that service as the exemptions allow. Thus, their exemptions are actually directives by virtue of which these individuals perform some of their Militia duties in the specialized form of their private occupations. Inasmuch as exemptions of this type substitute a private activity (in some enterprise) for a public service (in the Militia), they could be deemed not so much "exemptions" of those individuals *from* the Militia as implicit inclusions of those individuals' occupational activities *within* the Militia and designations of those activities *pro tanto* as "public services".

c. The source and character of these exemptions establishes that, in the Militia, private enterprise must be subordinated to the community's security. In principle, the interests of no private enterprise can be superior to the needs of the Militia, because no private enterprise is superior to "the security of a free State". In practice, though, the purposes of the Militia may best be served, depending upon circumstances, by granting exemptions to individuals occupied in this or that enterprise. Yet it is not society's premier *economic* institution—the free market—that determines, simply by a calculation based upon monetary profit and loss, whether some private occupation is sufficiently important to the community to warrant an exemption from normal Militia duties for those engaged in it. The free market is ill-suited for this purpose, because private occupations for which there may be little economic demand in tranquil times may become absolutely critical in times of "alarm", and therefore in the exercise of *political* foresight need to be promoted at all times so as to be always in readiness even if apparently never actually employed for the community's defense.[1740] Because "'[p]olitical power grows out of the barrel of a gun'",[1741] not out of the stock market, the institution composed of the representatives chosen by the community according to political procedures and charged with the exercise of political authority fo the community's benefit should determine in the first instance what exemptions should apply to the individuals who are "to keep and bear Arms" are to be "well regulated", in the sense of being "organiz[ed], arm[ed], and disciplin[ed]" for "the general Welfare". [1742]

d. The criterion on the basis of which the legislature must decide whether and on what conditions it should grant an exemption from Militia service to individuals in a particular private occupation is the degree to which, in light of all the relevant circumstances and reasonable expectations at the time, the individuals'

[1740] "Apparently", because (for example) although in many cases the mere preparation of some defensive measures may serve to deter aggression, their eventual efficacy in that regard usually can only be assumed, not strictly proven before the fact.

[1741] *Quotations From Chairman Mao, ante* note 28, at 61.

[1742] *See* U.S. Const. amend. II; art. I, § 8, cl. 15; *and* preamble.

employment in that occupation can fairly be predicted to contribute sufficiently to "the security of a free State". That is, inasmuch as "[a] well regulated Militia" is "*necessary* to the *security* of a free State", an individual's employment in some private occupation can justify an exemption from Militia service only if that employment is deemed to be at least as "*necessary* to the *security* of a free State" as the service from which it exempts that individual. In the nature of things, then, because every such exemption must be the product of such a complex political-*cum*-economic judgment, any exemption can and should be withheld, amended, or withdrawn entirely whenever in the legislators' opinion justifiable conditions for it do not or no longer obtain. So any exemption on the basis of private occupation must always be a matter of legislative discretion alone, never the product of any "inherent right" *ab initio,* or the source of any "vested right" after having once been granted (except, of course, perforce of the statute which grants it).

More exemptions on the basis of private occupations should be expected today than were allowed (or even imaginable) during the *pre*-constitutional era, though, simply because society is more complex—and in many ways more fragile—now than then. Many more things can go wrong in the modern economy; and the effects can be far more widespread, severe, and long-lasting than ever before. Fortunately, because contemporary Militia can draw upon pools of eligible individuals far broader in numbers and deeper in skills than existed in *pre*-constitutional times, more exemptions can be granted without unduly weakening the basic structure.

Nonetheless, legislators will need to convince themselves that proposed exemptions in favor of private occupations actually support the common defense to the requisite degree. In contrast to public offices today, the existences and operations of which are the plainest matters of public record, and to private occupations in earlier days, which were relatively few in number and the inner workings and contributions to society of which almost everyone could comprehend, private occupations in modern America are many in number and varied in type, often complex in operation, and in myriad instances even unknown and often unintelligible to the average person. So what they do, how they contribute to the community, and whether they are as or more vital than particular types of Militia service will have to be painstakingly investigated.

In this regard, the legislature may (and probably should) determine that broad classes of exemptions are warranted, not just for individuals, but also for particular private organizations or establishments as a whole. For example, private universities, colleges, and other institutions of higher education often occupy singular positions in their communities, in many instances operating as virtual towns or small cities themselves. Many of the needs of "homeland security" and the resources that can be devoted to them within an extensive campus will likely differ to some significant degree from those of the surrounding community. So these

institutions should be allowed to design, test, and put into practice techniques of "homeland security" tailored to their particular circumstances, largely unfettered by requirements to conform to normal Militia regulations. In this way, they would serve not only their own interests, but also the interests of their Localities and States by experimenting under closely controlled conditions with new techniques of "homeland security" that could prove applicable elsewhere. Thus, such institutions would function as huge "Independent Companies".[1743]

e. Except in the most extraordinary cases, though, an exemption in favor of some private occupation should never result in an individual's *total* release from *all* Militia duties, but from only those duties the performance of which would be absolutely incompatible with his employment. Moreover, any exemption must always be conditional. Even if exempted from all regular Militia duties, the individual remains a member of the Militia, subject to being called forth at any time and for any purpose as the legislature may deem necessary and proper. And, in any event, just as with public officials, no one exempted from any Militia service on account of his private occupation should ever be released from three basic duties:

(1) Individuals so exempted should be required personally to attend regular meetings of their Local Militia Companies unless these meetings occurred at times and places that unavoidably conflicted to a significant degree with their private employments. Even in that eventuality, though, these individuals should be obliged to watch video recordings of (or otherwise to apprise themselves of what transpired at) those meetings shortly after the events have taken place, and then in a timely fashion to provide their Companies with such personal comments, answers to questions, and so on as may be appropriate. If an individual's occupation is sufficiently important to warrant his exemption from some aspects of Militia service, then the operations of the enterprise in which he is employed and the opinions on matters relating to that enterprise of persons (such as himself) who are engaged in it will be of significant interest to every member of the Militia Company in which he is enrolled—which justifies compelling that individual, and all others similarly situated, to participate in some manner in the Company's meetings.

(2) In addition to attending regular meetings of their Local Militia Companies, individuals who have been granted exemptions from other Militia service on the basis of their private occupations should be required to appear in the field during "alarms". Unless, of course, their employment at that time were actually *indispensable* to the community's response to the specific threat underlying the "alarm", in which case they should be licensed to provide suitable substitutes in their stead.[1744]

[1743] *See post*, Chapter 44.

[1744] *See post*, at 977-981.

(3) In order to be able to serve the Militia in the field during "alarms", all individuals otherwise exempted from Militia training on the basis of their private occupations should be required to satisfy the same minimum standards of personal preparedness as apply to public officials who are granted exemptions from Militia service.[1745]

6. Conscientious objection. This denotes a personal refusal, not to serve in the Militia at all, but only to engage in activities that might require the objector to use such weapons as firearms in a manner that could result in death or bodily injury to others, even though those others might be domestic or foreign enemies of the community against whose aggressions any citizen's resistance would qualify as self-defense. Thus, conscientious objection covers at least all of the Militia's military, *para*-military, and police functions of a combatant or otherwise armed nature. An exemption on such grounds allows the objector permanently to disarm himself, but does not immunize him from the duty applicable to everyone else to perform *some* services in the Militia, so long as those services do not involve him personally in the use of arms against someone else.

a. Today, for the same reasons adduced in *pre*-constitutional times, any grant of an exemption from Militia service based exclusively on conscientious objection of any sort should remain discretionary with Congress or the States' legislatures:

> Government, federal and state, each in its own sphere owes a duty to the people within its jurisdiction to preserve itself in adequate strength to maintain peace and order and to assure the just enforcement of law. And every citizen owes the reciprocal duty, according to his capacity, to support and defend government against all enemies.[1746]
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> All [citizens] alike owe allegiance to the government, and the government owes to them the duty of protection. These are reciprocal obligations, and each is a consideration for the other.
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> That it is the duty of citizens by force of arms to defend our government against all enemies whenever necessity arises is a fundamental principle of the Constitution.
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> The common defense was one of the purposes for which the people ordained and established the Constitution.[1747]

[1745] *See ante*, at 963-964.

[1746] Hamilton v. Board of Regents of the University of California, 293 U.S. 245, 262-263 (1934).

[1747] United States v. Schwimmer, 279 U.S. 644, 649-650 (1929). *See* U.S. Const. preamble; art. I, § 8, cls. 15 and 16; art. II, § 2, cl. 1; *and* amend. II. Arguable, though, is that if perforce of the First Amendment "Congress shall make no law * * * prohibiting the free exercise" of religion, and "no law" means "*no* law", then "the common defence" *as a whole* must yield in an individual case to the religious scruples of a complete pacifist.

> [W]hether any citizen shall be exempt from serving in the armed forces of the nation in time of war is dependent upon the will of Congress and not upon the scruples of the individual, except as Congress provides. That body * * * has seen fit * * * to relieve from the obligation of armed service those persons who belong to the class known as conscientious objectors; and this policy is of such long standing that it is thought by some to be beyond the possibility of alteration.
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> * * * Of course, there is no such principle of the Constitution * * * . The conscientious objector is relieved from the obligation to bear arms in obedience to no constitutional provision, express or implied; but because, and only because, it has accorded with the policy of Congress thus to relieve him. * * * The privilege of the * * * conscientious objector to avoid bearing arms comes not from the Constitution, but from the acts of Congress. That body may grant or withhold the exemption as in its wisdom it sees fit; and if it be withheld, the * * * conscientious objector cannot successfully assert the privilege.[1748]

Therefore,

> [i]t is impossible * * * to conclude that the insistence of [a State] that an officer who is charged with the administration of justice must take an oath to support the Constitution of [the State] and [the State's] interpretation of that oath to require a willingness to perform military service [in the State's Militia] violates the principles of religious freedom which the Fourteenth Amendment secures against state action * * * .[1749]

And "th[e] proposition must at once be put aside as untenable" that "the due process clause of the Fourteenth Amendment as a safeguard of 'liberty' confers the right to be students in [a] State University free from obligation to take military training as one of the conditions of attendance".[1750] Rather, in such a case there exists no

> obstruction by the state to "the free exercise" of religion as the phrase was understood by the founders of this nation, and by the generations that have followed.
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[1748] United States v. Macintosh, 283 U.S. 605, 623-624 (1931), *quoted with approval in part in* Hamilton v. Board of Regents of the University of California, 293 U.S. 245, 263-264 (1934).

[1749] *In re* Summers, 325 U.S. 561, 573 (1945) (conscientious objector applying to the State Bar denied admission because he could not take an oath to support the State's constitution insofar as it required service in the State's Militia, even though that constitution allowed for exemption from actual Militia service for conscientious objectors).

[1750] Hamilton v. Board of Regents of the University of California, 293 U.S. 245, 262 (1934).

> * * * Instruction in military science is not instruction in the practice or tenets of a religion. Neither directly nor indirectly is government establishing a state religion when it insists upon such training. Instruction in military science * * * is not an interference by the state with the free exercise of religion when the liberties of the constitution are read in the light of a century and a half of history during days of peace and war.
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> *The meaning of those liberties has striking illustration in statutes that were enacted in colonial times and later. * * * From the beginnings of our history, Quakers and other conscientious objectors have been exempted as an act of grace from military service, but the exemption, when granted, has been coupled with a condition, at least in many instances, that they supply * * * a substitute or * * * the money necessary to hire one.*[1751]

This, of course, is never to denigrate the services that conscientious objectors can and do provide to their country:

> The bearing of arms, important as it is, is not the only way in which our institutions may be supported and defended, even in times of great peril. Total war in its modern form dramatizes as never before the great cooperative effort necessary for victory. The nuclear physicists who developed the atomic bomb, the worker at his lathe, the seamen on cargo vessels, construction battalions, nurses, engineers, litter bearers, doctors, chaplains—these, too, made essential contributions. And many of them made the supreme sacrifice. * * * And the annals of the recent war [*i.e.*, World War II] show that many whose religious scruples prevented them from bearing arms, nevertheless were unselfish participants in the war effort. Refusal to bear arms is not necessarily a sign of disloyalty or a lack of attachment to our institutions. One may serve his country faithfully and devotedly, though his religious scruples make it impossible for him to shoulder a rifle. Devotion to one's country can be as real and enduring among non-combatants as among combatants. One may adhere to what he deems to be his obligation to God and yet assume all military risks to secure victory. The effort of war is indivisible; and those whose religious scriples prevent them from killing are no less patriots than those whose special traits or handicaps result in their assignment to duties far behind the fighting front. Each is making the utmost contribution according to his capacity. The fact that his role may be limited by religious convictions rather than by physical characteristics has no necessary bearing on his attachment to his country or on his willingness to support and defend it to his utmost.[1752]

[1751] *Id.* at 265-267 (Cardozo, J., concurring in the opinion of the Court) (emphasis supplied).

[1752] Girouard v. United States, 328 U.S. 61, 64-65 (1946).

b. In particular, an exemption based on conscientious objection should consist of three elements:

(1) The claimant must prove that his objection is in fact a matter, not merely of convenience, but instead of *bona fide* personal convictions that conform to the statutory standards for an exemption on that ground. During *pre-*constitutional times, Colonial and State legislatures granted exemptions only to sectarians such as Quakers and Mennonites. Although this amounted to exemption on exclusively religious grounds, it posed no legal problem in those days, because first the Colonies and then the independent States often established official religions and discriminated by law among different faiths. Today, however, an explicitly religious basis for conscientious objections would raise thorny constitutional problems due to the injunction that public officials "shall make no law respecting an establishment of religion".[1753] Therefore, where an exemption for conscientious objection is offered, the inspiration for an individual's convictions may now arise, not just from religious precepts, but also from purely secular moral, ethical, or philosophical beliefs.[1754] Inevitably, though, the more diffuse the sources from which an individual may draw in defense of an alleged conscientious objection, the more searching the inquiry to which he must submit in order to validate his claim. One person may prove easily enough that he is (say) a practicing Quaker, while another, no less sincere, may find it exceedingly difficult to produce testimony or documents to establish his own idiosyncratic philosophical beliefs against the personal use of arms. On the other hand, that a State refuses to allow an exemption for conscientious objection, even to those with the strongest religious scruples, does not amount to a denial of any "right" whatsoever, including the constitutional right to "the free exercise" of religion.[1755] For inasmuch as "the free exercise" of religion in *pre-*constitutional days entitled no one to an automatic immunity from Militia service, it can entitle no one to any more in that regard now. Nonetheless, in the final analysis granting exemptions to every possible conscientious objector would be far more practical than denying such exemptions altogether. For committed conscientious objectors cannot be compelled to fight effectively if at all, but can only be punished for refusing to fight. Which incurs a large expense with no gain, because being penalized for their own consciences' sake will neither change their behavior nor deter others of like fixity of mind. But conscientious objectors usually will perform Militia services of a noncombatant nature. And if some simply refuse

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[1753] U.S. Const. amend. I, *applied to the States through* amend. XIV *in, e.g.,* Abingdon School District of Abingdon Township v. Schempp, 374 U.S. 203, 215 (1963).

[1754] On the many complexities and conundrums this expansion of the grounds for the exemption has caused, *see generally, e.g.,* Gillette v. United States, 401 U.S. 437 (1971); Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965).

[1755] *See* U.S. Const. amend. I, *applied to the States through* amend. XIV, *in, e.g.,* Cantwell v. Connecticut, 310 U.S. 296, 300, 303 (1940).

to do so, their punishment will deter others whose consciences cannot justify such obstinacy.

(2) Being that a conscientious objector's primary concern is usually to avoid any personal involvement with firearms or other weapons, the legislature should specify exactly what an objector's exemption entails in that regard. Although an exemption should excuse an objector from having to maintain personal possession of a firearm in his place of abode at all times (as is normally required of all other members of the Militia[1756]), it need not and probably never should excuse him from all training with firearms. For no less than everyone else, conscientious objectors will need instruction in basic firearms operations and safety because, within the Militia (if not elsewhere throughout a society in which firearms are widely distributed among the people at large), unavoidable exigent circumstances may compel conscientious objectors to take charge of other individuals' firearms, unload and perhaps deactivate those firearms, and secure them against access by unauthorized persons—and they must learn how to perform these functions in a manner that does not endanger either themselves or others, before some unexpected situation suddenly calls upon them to do so. Then, too, an exemption allowing a conscientious objector to abstain from the personal possession of arms might usefully be conditioned upon the requirement that he purchase a firearm for some other member of the Militia who cannot afford it, or that he pay for the provision of an armed substitute to perform some duty that requires the bearing of arms and that absent his exemption the objector would be obliged to perform.

(3) Inasmuch as an exemption on the ground of conscientious objection licenses no one to avoid Militia service altogether, but simply substitutes various noncombatant for combatant tasks, the legislature must take care to assign to objectors specific noncombatant duties the satisfactory performance of which is the condition *sine qua non* of their exemptions. Of course, although these duties may themselves be noncombatant in nature when considered in isolation, each of them when performed within the Militia will further the Militia's purposes in every way, combatant as well as noncombatant, because the performance by conscientious objectors of noncombatant duties that individuals other than conscientious objectors would have had to perform will make those individuals available to perform combatant services.

7. Time to comply with statutory requirements. The legislature may grant exemptions from the performance of particular Militia duties for limited lengths of time in order to enable individuals, as conveniently as possible in relation to their other pursuits and economic conditions, to use their best efforts: (i) to enroll in the appropriate Local Militia Companies when they become eligible for service in

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[1756] *See post*, Chapter 38.

particular communities—which may involve some degree of choice among regular Companies or even Independent Companies; (ii) to obtain the standard equipment necessary to perform the Militia duties to which they are assigned—which may allow for their temporary use as "substitute standards" of firearms and other personal property they already happen to possess or can readily obtain; (iii) to fulfill the initial requirements for basic Militia training; and (iv) to deal with various special circumstances, such as establishing their entitlements to other exemptions.

Exemptions of this type would be especially useful during the initial phases of revitalization of "the Militia of the several States", in order to advance the process with the least practicable disruptions in the normal course of the community's economic and social activity. After all, in contrast to the *pre-*constitutional era in which the Militia were both ubiquitous in the territory and near-universal in their membership, today most Americans have next to no familiarity with even the concept of "[a] well regulated Militia", let alone actual experience with such an institution. Many will need time to learn how the system operates; to accept and acclimate themselves to its requirements; to reorient and reorganize their personal lives (albeit probably only to a minimal degree) so that they can perform their Militia duties along with their other responsibilities in the most effective and efficient manner; to acquire and become familiar with the use of their equipment; to complete their basic training; and overall to integrate themselves into a new political environment in which for the first time in their lives they are called upon to participate to the fullest possible degree in self-government by themselves providing "the security of [the] free State" in which they live.

Also, after revitalization of the Militia had been successfully completed in States with populations large in comparison to their communities' requirements for "homeland security", probably only a relatively few individuals would be needed for active service most of the time in the condition of greatest immediate readiness. The remainder, therefore, could be assigned to various categories of lesser readiness to be defined, in part, by different lengths of time allowed before they were required to perform their first tours of certain types of regular duty in the field—the lesser the group's level of readiness, the longer its exemption from its initial service of that kind, so as to allow its members more time to prepare themselves for each level of readiness. This would not create a permanent, but only poorly prepared "reserve militia", let alone an "unorganized militia", because the *entirety* of the Militia would be constantly in the process of being organized, armed, disciplined, trained, and deployed according to fixed schedules, such that *everyone* in the Militia who were capable of serving in each category of readiness would at some time find himself in each such category, and at all times in some such category, with respect at least to training if not to actual duty in the field.

8. Payment of fines. In keeping with the practice which all but one of the Colonies and then every one of the independent States applied throughout *pre-*

constitutional times, the imposition of fines should be the preferred means of discipline for routine infractions of regulations within revitalized "Militia of the several States" today.[1757] As they were then, fines (or the absence of fines) also could be employed to create certain special exemptions.

a. A statute could license a member of the Militia to pay a stipulated fine as the cost of absenting himself from some required service *by his own personal choice for some entirely personal reason*. (Were he *involuntarily* absent, the circumstances would likely provide good cause for his not being fined at all.) In effect, fines of this type would enable individuals to grant themselves *ad hoc* exemptions from certain Militia duties. Obviously, though, for purpose of maintaining morale, discipline, and the overall effectiveness of the Militia, this practice would need to be treated as an "honor system" which individuals would use their best efforts not to abuse for light and transient causes. And, in any event, it should apply only to statutory duties of other than a critical nature, and fix an absolute limit on the number of times any individual would be permitted to claim a particular *ad hoc* exemption by payment of a fine.

Today, during the initial stages of revitalizing "the Militia of the several States", allowing individuals to exempt themselves from various duties upon their payments of fines would be particularly advisable, because:

- Generous exemptions purchasable with modest fines would garner support for the program from many individuals who, although unwilling to participate in the Militia personally, would not be loathe to contribute small sums to defray the costs of others' participation if those payments excused their own reluctance to become directly involved

- With far more individuals eligible for Militia service than were necessary to mobilize outside of the most serious "alarms", even widespread exemptions from certain routine duties at reasonable costs to the individuals excused would not seriously impair the readiness or effectiveness of the Militia, but would provide significant, if not wholly sufficient, revenues to finance them directly. "Directly" is the key adverb. For, if their operations were largely self-financed through fines generated internally (as well, perhaps, as through voluntary subscriptions and subsidies secured from their members), the Militia to that extent would be independent of the rest of the government, and thereby protected against rogue public officials who might attempt to disable them by cutting off appropriations from the public treasury. Indeed, *nothing would conduce more to "well regulated Militia" than financial independence guaranteed by the people themselves*, without the intermediation of possibly incompetent or untrustworthy public officials.

[1757] *See post*, Chapter 43.

b. Especially during the early stages of revitalizing "the Militia of the several States", Militia Companies and other units should be encouraged to go beyond the statutorily required minima for arming, training, and other discipline. Yet, except in true "Independent Companies",[1758] no fines should be allowed to be imposed on individuals who failed to appear for duty of a particular type in excess of the number of times the applicable statute required. Militia officers keen on maximizing their units' performances might ask individuals under their commands to perform extra, or even non-statutory, duties; but those individuals would have to volunteer for such activities, and could not be fined if they refused. This absence of coercive enforcement through fines would frustrate aspiring martinets among Militia officers, while still allowing *esprit de corps* and peer pressure to encourage shirkers among the rank and file to perform extra duty whenever a large majority of the unit desired it—and in the course of the process to identify unreliable individuals, so that they might eventually be corrected or if they proved incorrigible even weeded out of the unit in some manner.

Nonetheless, for the sake of overall preparedness, the mere payment of a fine should never exempt anyone from certain critical requirements, such as:

- studying the Militia's history, law, organization, discipline, and duties;
- learning how safely and effectively to operate and maintain in good order the major types of firearms, ammunition, and accoutrements suitable for Militia service;
- training to provide basic emergency medical and related assistance to themselves and others;
- preparing to furnish shelter, food, water, sanitation, and like necessities to themselves and others in the course or aftermath of a natural disaster, massive industrial accident, or similar calamity; and
- learning how to cope with a major breakdown of the monetary and banking systems; the electric grid; transportation networks; the supply of food, water, and medicines; and other critical elements of the State and Local economic and social infrastructure.

Moreover, no Militiaman who has simply refused, failed, or neglected to perform duty in his proper rotation in the modern equivalent of the Watch or the Ward should ever be suffered to incur no penalty other than a fine. To be sure, a fine should be imposed, its amount graduated according to the seriousness of the

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[1758] *See post*, Chapter 44.

default and degree of the defaulter's wilfulness—but, in addition, the delinquent should be required to perform at least two further consecutive tours of equivalent (or even more exacting) duty for which no excuse other than impossibility would be accepted. After all, the Watch and the Ward are the most important in principle of all Militia functions—because advanced intelligence of danger is always critical, and its absence not infrequently fatal; yet also the simplest functions to perform in practice—because every Militiamen can be trained to fulfill *some* useful task in the chain of surveillance and communications through which intelligence is obtained, evaluated, and transmitted. Therefore, if any Militia service should be *compulsory*, in the fullest sense of that term, it should be participation in modern forms of the Watch and the Ward.

9. Provision of substitutes. In keeping with the common practice in *pre-*constitutional times, members of revitalized "Militia of the several States" today should be allowed, under carefully defined circumstances, to proffer substitutes, both for themselves as individuals when called to active duty in the field, and for particular equipment and training they were required to maintain in their personal possession at any time.

a. Inasmuch as revitalized Militia will be able to draw upon populations of sizes unimaginable in *pre-*constitutional times, many fully capable individuals (including those who might be the recipients of various exemptions from service for less-than-critical public offices or private occupations) could be allowed to volunteer as substitutes for others. Indeed, at the margin, in a well-populated State the allowance of substitutes would provide a means for constituting a Militia largely of volunteers. To obviate possible problems, however—

(1) Except on the grounds of personal physical disability, no substitutes at all should be allowed in such circumstances of "alarm" as "Insurrections", "Invasions", and "domestic Violence".[1759]

(2) No Militiaman should be allowed to proffer a substitute—even one no less skillful than himself—for any duty in modernized forms of the Watch or the Ward, except on the grounds of personal physical disability or extreme familial crisis, or for some other truly extraordinary excuse.

(3) Inasmuch as no conceivable justification exists for imposing a heavier burden of service in revitalized Militia on relatively poor individuals in favor of relatively rich ones simply on the basis of wealth, a person unable to afford to hire a substitute when called forth for particular duty should not be required to serve as long as substitutes were allowed with respect to that duty for those who could afford them. Then, if rich individuals wanted to avail themselves of substitutes in those

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[1759] *See* U.S. Const. art. I, § 8, cl. 15 *and* art. IV, § 4.

circumstances, they would, one way or another, have to arrange to help in providing substitutes for the poor, too.[1760]

Admittedly, disallowing discrimination in the provision of substitutes based on Militiamen's personal wealth would complicate the Militia's administration. For instance, the Militia itself or Local governmental bodies would need to verify the straitened economic status of men claiming an inability to hire substitutes. But the selfsame type of inquiry would be necessary in the case of men claiming an inability to purchase the firearms, ammunition, and other accoutrements required for their Militia service. So, inasmuch as the two groups would very largely (if not entirely) overlap, the added administrative burden in relation to substitutes would likely be minuscule.

To be sure, disallowing discrimination in the provision of substitutes based on Militiamen's personal wealth was not the practice in *pre-*constitutional times. But the Constitution imposes various constraints on governments, at every level of the federal system, that did not exist in that era. Among these is the restriction in Section 1 of the Fourteenth Amendment that "[n]o State shall * * * deny to any person within its jurisdiction the equal protection of the laws". According to the Supreme Court, the substance of this limitation reaches the General Government as well, through the Due Process Clause of the Fifth Amendment.[1761] Actually, as relevant here, it applies to the General Government through the principles of "the *common* defence" and "the *general* Welfare" set out in the Preamble to the Constitution,[1762] which controls the construction and application of the entirety of the document, and did so before the Fifth and Fourteenth Amendments were enacted.[1763]

Plainly enough, a statutory scheme which enables some individuals to purchase exemptions from their statutory (indeed, constitutional) duties while other individuals, because of their lack of financial wherewithal, cannot do so, denies equal treatment on the basis of wealth alone. Whether it denies "equal protection of the laws", though, is another matter. To be constitutional under even the most

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[1760] For example, consider such a rule applied to a Militia unit in which two rich men, R1 and R2, and one poor man, P, are enlisted among many others, and two men are to be impressed for some special duty. R1 is the first man impressed. Rather than serve, he hires a substitute. P is the second man in line for impressment; but under the prevailing rule he cannot be drafted and therefore must be passed over. So, in P's place, R2 is impressed. He also hires a substitute. The overall effect is that R2 has provided a substitute for P. Similarly, all those Militiamen whose wealth exceeded some minimum amount could be required to pay into a fund to hire substitutes for poor Militiamen, substitutes for the rich being allowed only to the extent that the fund were sufficient to subsidize substitutes for the poor. Once the fund were exhausted, substitutes for the rich would no longer be allowed.

[1761] *See, e.g.,* Truax v. Corrigan, 257 U.S. 312, 331-332 (1921); Hirabayashi v. United States, 320 U.S. 81, 100-101 (1943); Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954).

[1762] Emphasis supplied.

[1763] *See* W. Crosskey, *Politics and the Constitution, ante* note 206, Volume 1, at 374-379.

constrained construction of that principle, a statutory "classification must be reasonable, not arbitrary, *and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation*".[1764] Where the allowance of a substitute for Militia service is concerned, "the object of the legislation" is to guarantee that *some* qualified individual will actually perform that service when needed. The statute is perfectly indifferent as to whether a rich or a poor Militiaman, or either one's substitute, does so. In principle, both the rich and the poor Militiaman labor under the selfsame duty. In practice, though, the effective burden on the wealthy individual is merely the monetary cost of hiring a substitute. He suffers no disruptions of his personal life other than may arise from the unavailability of that amount of money; and even those inconveniences he can minimize by rearranging his normal pattern of expenditures. Moreover, the cost to a rich individual of hiring a substitute will be inconsequential in comparison to the value of his avoidance of the danger and other personal discomfort arising out of service in the field. Conversely, the effective burden on the poor individual is his actual personal deployment—with disruption of his ordinary domestic existence, curtailment of his already limited income, and possibly the loss of life or limb as well. Self-evidently, the special privilege the statute affords the rich man, on account of his wealth alone, bears no "fair and substantial relation to the object of the legislation". That the rich man supplies a substitute does not, in some unique manner, advance the goal of providing sufficient suitable men for the service—because, if he were not allowed to shift the burden of his duty onto a surrogate, he would have to perform that duty himself, just as the poor man always must.

(4) Every substitute should have essentially the same equipment, basic training, and physical conditioning—and, where necessary, the very same education, specialized skills, and experience—required for performance of the particular duty as has the Militiaman who proffers him as a replacement. Although hiring in the free market should generally be the means for obtaining substitutes, the process of substitution should never be suffered to become a loose *laissez-faire* procedure. The purpose of the process, after all, is to provide substitutes actually qualified to perform the duty of the individuals seeking exemption. Therefore, strict standards and close supervision will be necessary to ensure that the substitutes are at least as competent in that regard as the Militiamen originally posted to duty. Final judgement as to whether a proffered substitute is in fact an effective man for the service at issue, then, can be left neither to the individual proffering the substitute nor to the substitute himself (both of whom are self-interested in having the substitute accepted), but instead must be the prerogative of the presumably objective Militia officers in the unit to which the substitute is to be assigned.

[1764] F.S. Royster Guano Company v. Virginia, 253 U.S. 412, 415 (1920) (emphasis supplied).

(5) At his own cost, the Militiaman proffering a substitute should provide him with the firearm, ammunition, and all other accoutrements necessary for his performance of the specified duty, should the substitute lack any of that equipment, whether in kind or quality.

(6) In addition to whatever stipend a Militiaman paid a substitute for the latter's services and the use of his equipment (the minimum rates of compensation to be set by the Militia itself), the Militiaman should also reimburse the substitute for all of the ordinary and necessary expenses the latter might incur in his performance of the Militiaman's duty. Full and timely payment and reimbursement in one instance of substitution should be a condition precedent for allowance of any further instance.

(7) A Militiaman employing a substitute on one occasion should be listed first for the next call-up of or from his unit. And, absent some extraordinary excuse sounding in personal disability or extreme familial crisis, only (say) two substitutions in sequence should ever be allowed.

b. With respect to the basic mandate that members of the Militia should furnish themselves from the free market with firearms, ammunition, and necessary accoutrements suitable for Militia service if they are capable of doing so,[1765] at least during the initial period of revitalization of the Militia any Militiaman should be allowed to substitute for the particular equipment specified by statute whatever similar equipment he possessed that would be at least minimally suitable for the purpose.[1766] Similarly, at least during the initial period of revitalization, individuals might be allowed to substitute various forms of civilian training for specific Militia training until the latter became available. Indeed, some types of civilian training could prove so efficacious that the Militia might simply adopt them in lieu of "reinventing the wheel" in those particulars. In both cases, for the Militia to rely to the greatest possible degree on what their members could obtain through the free market in terms of equipment and training would accrue to everyone's advantage, because that approach would integrate the market and the Militia, thereby not only closely allying economic freedom with the "'[p]olitical power [that] grows out of the barrel of gun'",[1767] but even rendering the latter *power* dependent upon the former *freedom*, as it always should be in "a free State". Doubtlessly, this would confound both *ultra*-"libertarians" who disapproved of the Militia's compulsory nature and bureaucrats who favored rigid "top-down" organization over the flexible "bottom-up" organization of the market. The Constitution, however, was not designed to please ideologues of either an anarchistic or a collectivistic cast of mind, or political

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[1765] *See post*, at Chapters 38 through 40.

[1766] *See post*, at 1103-1111.

[1767] *Quotations From Chairman Mao, ante* note 28, at 61.

careerists whose only concern is their individual advancement in the governmental apparatus, but instead to provide WE THE PEOPLE with an effective means for using their freedoms to obtain the power that would guarantee those freedoms.

10. "Criminal" behavior. As to whether individuals who have been convicted of certain "crimes", and having served their sentences have then returned to society as free men, should be prohibited from possessing firearms—and then be barred from participation in the Militia on the strength of that disability—two mutually opposed policies exist: (i) the *exclusory* policy of modern "gun controllers", which infects contemporary statutes on the subject of firearms, and (ii) the *inclusory* policy of the *pre-*constitutional Militia statutes, which the Constitution incorporated into its federal system.

a. Under the tenets of present-day "gun control", an individual's serious "criminal" behavior in a single instance would entail his almost complete *exclusion* (not just exemption) from revitalized "Militia of the several States", because conviction for (or often simply a charge of) such a "crime" generally results throughout America in permanent forfeiture of the alleged "criminal's" right to possess a firearm after he has been released from custody and returned to society, thereby making it impossible for him personally to fulfill the fundamental requirement that every member of the Militia (not a conscientious objector) should be possessed at all times of a firearm suitable for his Militia service. Moreover, such an individual could not satisfy his Militia duty through the provision of a substitute who did not suffer from such a disability, because substitution can be allowed only on relatively few particular occasions, not in every single instance in which that individual is required to serve. Of course, modern "gun control" is not concerned specifically with the Militia in general, or with the duties of any individual Militiamen, because "gun controllers" hardly ever think about the Militia any more than do most other Americans. The goal of "gun control" is simply to disarm as many ordinary Americans as quickly and completely as possible, leaving firearms in the hands of only the regular Armed Forces and élitist professional *para-*militarized "law-enforcement agencies" at the National, State, and Local levels—for what dark ulterior purpose only "gun controllers" can say, although it is obviously *not* to provide for "the security of a *free* State". So, "gun control" is served by constantly expanding the numbers of "crimes" and "criminals", and indictments for and other charges and allegations of "crimes", thereby swelling the set of individuals disqualified either temporarily or permanently from the possession of firearms. That this also results in making the revitalization and maintenance of "[a] well regulated Militia" increasing difficult provides an added dividend.

(1) Although formulations may vary somewhat in different jurisdictions, generally an individual will lose his right to receive, ship or transport, or even merely possess a firearm and ammunition upon conviction of "a crime punishable by imprisonment for a term exceeding one year".

(a) This is the standard the Government Government now applies.[1768] Whoever knowingly violates this restriction may "be fined * * * , imprisoned not more than ten years, or both".[1769] As a consequence of the length of imprisonment which may be imposed, this prohibition on possession of a firearm can be said to arise out of an individual's conviction for what nowadays is loosely termed a "felony".

At present, the General Government treats as some class of "felony" any "offense" for which "the maximum term of imprisonment authorized" is "more than one year".[1770] Only one class of "felony" is punishable by death, however.[1771] And *no* "felony" in any class is punishable by the perpetrator's forfeiture of all of his goods (except insofar as the penalty of death works that result indirectly). Congress is, however, not very consistent in its employment of the terms "felony" (for major crimes) and "misdemeanor" (for lesser crimes). For example, one important statute dealing with emergency restrictions on banking provides that "[a]ny individual, partnership, corporation, or association, or any director, officer or employee thereof,

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[1768] *Originally* AN ACT To assist State and local governments in reducing the incidence of crime, to increase the effectiveness, fairness, and coordination of law enforcement and criminal justice systems at all levels of government, and for other purposes ("Omnibus Crime Control and Safe Streets Act of 1968"), Act of 19 June 1968, Pub. L. 90-351, TITLE IV—STATE FIREARMS CONTROL ASSISTANCE, § 902 [§ 922(e) and (f)], 82 Stat. 197, 230-231; *followed by* AN ACT To amend title 18, United States Code, to provide for better control of the interstate traffic in firearms ("Gun Control Act of 1968"), Act of 22 October 1968, Pub. L. 90-618, TITLE I—STATE FIREARMS CONTROL ASSISTANCE, § 102 [§ 922(g)(1) and (h)(1)], 82 Stat. 1213, 1220; *amended by* An Act To amend chapter 44 (relating to firearms) of title 18, United States Code, and for other purposes ("Firearms Owners' Protection Act"), Act of 19 May 1986, Pub. L. 99-308, § 102(6) [§ 922 (g)(1)], 100 Stat. 449, 452; *now codified at* 18 U.S.C. § 922(g)(1).

Although the most important pieces of legislation of this kind to date, the two Acts of 1968 were not the first to impose a permanent prohibition of possession of any and all firearms upon an alleged "criminal" solely on the basis of the type of "crime" he had supposedly committed, or the length of sentence he could have been ordered to serve. In 1926, the American Bar Association approved a "model act" that prohibited any individual "convicted * * * of a crime of violence" from possessing handguns, but not long guns. A Uniform Act to Regulate the Sale and Possession of Firearms, § 4, *Uniform Firearms Act Drafted by the National Conference of Commissioners on Uniform State Laws* (1926), at 3. *See generally*, "The Uniform Firearms Act", 18 *Virginia Law Review* 904 (1932). In 1938, the General Government made it "unlawful for any person who has been convicted of a crime of violence * * * to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received * * * by such person in violation of this Act". AN ACT To regulate commerce in firearms ("Federal Firearms Act"), Act of 30 June 1938, CHAPTER 850, § 2(f), 52 Stat. 1250, 1251. And in 1961, this prohibition was extended to "any person who has been convicted of a crime punishable by imprisonment for a term exceeding one year". AN ACT To strengthen the Federal Firearms Act, Act of 3 October 1961, Pub. L. 87-342, § 2, 75 Stat. 757, 757.

[1769] *Originally* Act of 19 June 1968, § 902 [§ 924(a) ("imprisoned not more than five years")], 82 Stat. at 233; *followed by* Act of 22 October 1968, § 102 [§ 924(a)], 82 Stat. at 1223-1224; *continued by* Act of 19 May 1986, § 104(a)(1) [§ 924(a)(1)], 100 Stat. at 456; *penalty increased by* An Act To prevent the manufacturing, distribution, and use of illegal drugs, and for other purposes ("Anti-Drug Abuse Act of 1988"), Act of 18 November 1988, Pub. L. 100-690, TITLE VI—ANTI-DRUG ABUSE AMENDMENTS OF 1988, Subtitle N—Sundry Criminal Provisions, § 6462(4) [§ 924(a)(2)], 102 Stat. 4181, 4374 ("be fined * * * , imprisoned not more than 10 years or both"); *now codified at* 18 U.S.C. § 924(a)(2).

[1770] 18 U.S.C. §§ 3156(a)(2) and (3), *and* 3559(a)(1) through (5).

[1771] 18 U.S.C. § 3559(a)(1).

violating any of the provisions of this section shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000 or, if a natural person, may, in addition to such fine, be imprisoned for a term not exceeding ten years. Each day that any such violation continues shall be deemed a separate offense."[1772] Inasmuch as a violation that continued for (say) a mere ten business days could incur for the perpetrator a penalty of *one hundred thousand dollars and one hundred years in prison*, Congress's use of the term "misdemeanor" for such an infraction seems ill-conceived at best. No less peculiar, in its major "gun-control" statute, Congress declares that "[t]he term 'crime punishable by imprisonment for a term exceeding one year' does not include * * * any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices".[1773] Which leads one to speculate as to whether Members of Congress believe that offenses capable of prostrating broad sectors of America's economy are inconsequential, or whether politically influential factions among crooked businessmen have suborned legislators in order to carve out for themselves a special immunity from the draconian penalties that apply to everyone else who allegedly commits some "crime punishable by imprisonment for a term exceeding one year".

Moreover, the connection that can be drawn in various statutes between the phrase "a crime punishable by imprisonment for a term exceeding one year" and the word "felony" is more emotive in purpose than grounded in Anglo-American legal history. After all, during *pre-*constitutional times, the definition of the noun "Felony" was "[a] crime denounced capital by the law"[1774]—that is, punishable by the perpetrator's *death*, and consequently his loss of *all conceivable* rights. As Blackstone explained, "[F]ELONY, in the general acceptation of our English law, comprizes every species of crime, which occasioned at common law the forfeiture of lands or goods. This most frequently happens in those crimes, for which a capital punishment either is or was liable to be inflicted[.]"[1775] "THE idea of felony is indeed so generally connected with that of capital punishment, that we find it hard to

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[1772] AN ACT To provide relief in the existing national emergency in banking, and for other purposes, Act of 9 March 1933, CHAPTER 1, § 4, 48 Stat. 1, 2; *now codified at* 12 U.S.C. § 95(a).

[1773] *Originally* AN ACT To assist State and local governments in reducing the incidence of crime, to increase the effectiveness, fairness, and coordination of law enforcement and criminal justice systems at all levels of government, and for other purposes ("Omnibus Crime Control and Safe Streets Acts of 1968"), Act of 19 June 1968, Pub. L. 90-351, TITLE IV—STATE FIREARMS CONTROL ASSISTANCE, § 902 [§ 921(b)(3)], 82 Stat. 197, 228; *followed by* AN ACT To amend title 18, United States Code, to provide for better control of the interstate traffic in firearms ("Gun Control Act of 1968"), Act of 22 October 1968, Pub. L. 90-618, TITLE I—STATE FIREARMS CONTROL ASSISTANCE, § 102 [§ 921(20)(A)], 82 Stat. 1213, 1216; *amended by* An Act To amend chapter 44 (relating to firearms) of title 18, United States Code, and for other purposes (Firearms Owners' Protection Act"), Act of 19 May 1986, Pub. L. 99-308, § 101 [§ 921(20)(A)], 100 Stat. 449, 449; *now codified at* 18 U.S.C. § 921(a)(20)(A).

[1774] S. Johnson, *Dictionary*, *ante* note 50, in both the First (1755) and the Fourth (1773) Editions.

[1775] *Commentaries on the Laws of England*, *ante* note 142, Volume 4, at 94.

separate them; and to this usage the interpretations of the law do now conform."[1776] Hawkins, too, opined that among "Capital" offenses in *pre*-constitutional English law "[t]hose by the Common Law come generally under the Title of Felony"; and "[t]he Judgment against a Man or Woman for Felony of Death, hath always been the same * * * That he or she be hanged by the Neck 'till dead".[1777]

Of course, not every conviction of "[F]ELONY" inevitably resulted in the death of the perpetrator. For under English law it was "a settled Rule, That the King may pardon any Offence whatever, whether against the Common or Statute Law, so far as the Publick is concerned in it".[1778] And "the *effect* of * * * pardon by the king, is to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to that offence for which he obtains his pardon".[1779] Pardons might "also be *conditional*", such as "transportation to some foreign country (usually to some of his majesty's colonies and plantations in America) for life, or for a term of years".[1780] (Americans might have been transported to the British West Indies.)

To be sure, because "the offender also forfeit[ed] all his chattel interests absolutely" in "felonies of all sorts" "by *conviction*",[1781] an American adjudicated guilty of a "[F]ELONY" who had avoided execution or transportation, and not received a pardon, would nonetheless likely have been deprived of the Militia (or any other) firearm, ammunition, and accoutrements he had possessed *at the time of his conviction*. By itself, however, that result would not have precluded him from lawfully acquiring *new* "chattel interests"—in some other firearm, ammunition, and accoutrements suitable for Militia service—*after his return to society*. Certainly it would not have excused him from the *duty* the *pre*-constitutional Militia statutes imposed upon all adult, able-bodied free men (other than conscientious objectors) to acquire and thereafter permanently possess such equipment. The Militia Acts of Rhode Island and Virginia, for example, never mandated any exception from that duty for any otherwise eligible man on the ground of his previous conviction of a "[F]ELONY" (or any other infraction, for that matter).

The Framers, the Founding Fathers, and WE THE PEOPLE in general were certainly familiar with the term "Felony", and its meaning, because the Constitution employs that noun in the singular or the plural in three places—*first*, providing that "[t]he Senators and Representatives [in Congress] * * * shall in all Cases, except Treason, *Felony* and Breach of the Peace, be privileged from Arrest during their

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[1776] *Id.*, Volume 4, at 98.

[1777] A *Treatise of The Pleas of the Crown, ante* note 434, Book I, Chapter XXV, § 1, at 65, *and* Book II, Chapter XLVIII, § 7, at 444 (footnotes omitted).

[1778] *Id.*, Book II, Chapter XXXVII, § 33, at 391 (footnote omitted).

[1779] W. Blackstone, *Commentaries on the Laws of England*, *ante* note 142, Volume 4, at 395.

[1780] *Id.*, Volume 4, at 394.

[1781] *Id.*, Volume 4, at 378-380.

Attendance at the Session of their respective Houses, and in going to and returning from the same";[1782] *second*, delegating to Congress the power "[t]o define and punish Piracies and *Felonies* committed on the high Seas";[1783] and *third*, requiring that "[a] Person charged in any State with Treason, *Felony*, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up".[1784] Now, as a general rule of constitutional construction and application, "[w]hat [the Constitution] meant when adopted it still means for the purpose of interpretation"[1785]—and no branch of the General Government, or any of the States, or even the electorate as a whole is authorized to change the meaning of any constitutional term outside of the formal process of amendment.[1786] More specifically, the Fifth Amendment provides that "[n]o person shall be held to answer for *a capital, or otherwise infamous crime*, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger[.]"[1787] Because the term "infamous crime" is not explicitly defined anywhere in the original Constitution or the Bill of Rights—as, in sharp contrast, the term "Treason" is[1788]—its meaning must be determined by reference to *pre*-constitutional law.[1789] And, so determined, it is not open to modification by any Congressional statute.[1790] Being the most familiar of all "capital * * * crime[s]" at the time, a "Felony" was also necessarily an "infamous crime" within the meaning of the Fifth Amendment's phrase "*capital, or otherwise* infamous crime". Therefore, the meaning of the term "Felony" is no more subject to transmogrification by some Congressional enactment than is the meaning of the term "infamous crime".

So, today, neither Congress nor any State's legislature may constitutionally treat a "crime" as a "Felony" simply by labeling it as such. For constitutional issues turn on substance, not sounds.[1791] Rather, for a modern statutory "felony" to qualify as a true "Felony", the punishment for the "crime" must meet the constitutional

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[1782] U.S. Const. art. I, § 6, cl. 1 (emphasis supplied).

[1783] U.S. Const. art. I, § 8, cl. 10 (emphasis supplied).

[1784] U.S. Const. art. IV, § 2, cl. 2 (emphasis supplied).

[1785] Hawke v. Smith, 253 U.S. 221, 227 (1920), *quoted in* Smiley v. Holm, 285 U.S. 355, 365 (1932). *Accord*, South Carolina v. United States, 199 U.S. 437, 448-449 (1905).

[1786] *See, e.g.,* Eisner v. Macomber, 252 U.S. 189, 206 (1920).

[1787] Emphasis supplied.

[1788] *See* U.S. Const. art. III, § 3, cl. 1.

[1789] *See, e.g.,* W. Blackstone, *Commentaries on the Laws of England, ante* note 142, Volume 3, at 363-364; W. Hawkins, *A Treatise of The Pleas of the Crown, ante* note 434, Book II, Chapter XLVI, § 19, at 432.

[1790] *Ex parte* Wilson, 114 U.S. 417, 426 (1885).

[1791] *See, e.g.,* Craig v. Missouri, 29 U.S. (4 Peters) 410, 433 (1830); NAACP v. Button, 371 U.S. 415, 429 (1963); New York Times Company v. Sullivan, 376 U.S. 254, 268-269 & notes 7 to 12 (1964); Bigelow v. Virginia, 421 U.S. 809, 826 (1975); City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Commission, 429 U.S. 167, 173-174 & note 5 (1976).

standard for a "Felony". During the *pre-*constitutional era, however, that standard was never simply "a crime punishable by imprisonment for a term exceeding one year". As a result, even if the permanent prohibition of an individual's possession of a firearm after his release from incarceration and return to society could constitutionally to tied to his conviction for a true "Felony", convictions today for *ersatz* statutory "felonies" cannot support that result. Furthermore, as just pointed out, a conviction for some "[F]ELONY" in *pre-*constitutional times did *not* necessarily result in the perpetrator's permanent excusal from his statutory duty to possess a firearm for purposes of service in the Militia once he had returned to society as a free man. And if that individual was subject to a statutory *duty* to be armed, then he had at least an implied statutory *right* to be armed as well.

Partisans of "gun control" might contend that modern statutes loosely fit the *pre-*constitutional pattern, because the disabilities they impose apply only until an individual convicted of an *ersatz* "felony" receives a sufficient pardon, after which he may once more lawfully possess a firearm. For example, the General Government's leading "gun-control" statute provides that "[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of [denying that person a right to possess a firearm] * * * , unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms".[1792] This contention would have to overlook, though, that no Militia statute in the *pre-*constitutional period conditioned anyone's duty to possess a firearm on his having received a pardon for some "Felony" he may theretofore have committed.

The only relevant example this study has uncovered in the records for Rhode Island and Virginia appears in Virginia's Militia Act of 1738 which, after commanding "[t]hat * * * the * * * chief officer of the militia, in every county, shall list *all free male persons*, above the age of one and twenty years, * * * under the command of such captains as he shall think fit", provided

> [t]hat nothing * * * shall * * * compel any persons herein aftermentioned, to a personal attendance at musters: that is to say, Such as are, or shall have been, members of his majesty's council, speaker of the house of burgesses, secretary, receiver-general, auditor, judge of the court of vice-admiralty, attorney-general, clerk of the council, clerk of the house

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[1792] An Act To amend chapter 44 (relating to firearms) of title 18, United States Code, and for other purposes ("Firearms Owners' Protection Act"), Act of 19 May 1986, Pub. L. 99-308, § 101(5) [§ 921(a)(20)], 100 Stat. 449, 450; *now codified at* 18 U.S.C. § 921(a)(20). *To similar effect,* An Act Making omnibus consolidated appropriations for the fiscal year ending September 30, 1997, and for other purposes, Act of 30 September 1996, Pub. L. 104-208, TITLE VI—GENERAL PROVISIONS, § 658 [§ 921(a)(33)(B)(ii)], 110 Stat. 3009, 3009-372; *now codified at* 18 U.S.C. § 921(a)(33)(B)(ii).

> of burgesses, clerk of the secretary's office, a justice of the peace, clerk of any county court, or any person that shall have borne any military commission as high as that of a captain, or any of the people commonly called Quakers: Yet all the persons aforesaid, shall * * * send one able-bodied man, *not being a convict*, or man and horse, armed and accoutred, * * * constantly to appear, and exercise at musters.{EN-1974}

As this evidences, Virginia's pool of able-bodied "free male persons, above the age of one and twenty years" during the period from 1738 to at least 1755 (when the next Militia Act was passed), and probably well before 1738 (if a statute had to be enacted in that year to deal with the matter), must have included more than a few "convict[s]" who, notwithstanding their past "criminal" behavior, were not deemed automatically incapable of serving as substitutes in the Militia—otherwise, an explicit prohibition to that end would not have been necessary. Doubtlessly, too, exclusion of "convict[s]" as substitutes under the Act of 1738 was a matter more of social and political propriety than anything else. Plainly, it would have been unseemly for public officials and conscientious objectors of good repute to have sent "convict[s]" to musters in their stead. (Although, apparently, some of these good citizens would have done so, had not the statute precluded that choice.) Yet, in this very same Act, Virginia's legislators did not treat it as unseemly, or in any manner undesirable, to compel "convict[s]" to serve alongside "all [other] free male persons" in the Militia:

> *First*, "convict[s]" were not included (except in the capacity of substitutes) within the narrow sets of persons who were not "compel[led] * * * to a personal attendance at musters" or who were "exempted from being any ways concerned in the militia".{EN-1975}
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> *Second*, Caucasian "convict[s]" were not excused from the duty of "every person * * * (except free mulattos, negros and Indians)" to "be armed and accoutred" with a "carbine or fuzee" and "a case of pistols" (if a "horse-man"), or with "a firelock, musket, or fuzee, well fixed, with a bayonet fitted to the same" (if a "footman").{EN-1976}
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> *Third*, in contradistinction to "all such free mulattos, negros, or Indians, as are or shall be listed" in the Militia, Caucasian "convict[s]" were not commanded to "appear [at Militia musters] without arms", to "be emploied [only] as drummers, trumpeters, or pioneers, or in such other servile labour, as they shall be directed to perform".{EN-1977} To the contrary, as was everyone else, they were expected to appear *with* arms, and were fined if they filed to do so.{EN-1978}

Thus, the most extensive disability imposed upon any "convict" in all of Virginia's *pre-*constitutional Militia Acts merely prohibited such an individual from serving as *someone else's* substitute, not from serving *in propria persona* to fulfill *his own* Militia

duty—and, of course, not from personally possessing one or more firearms for that (or any other legitimate) purpose. The true burden of this disability was borne more by the person seeking a substitute than by the "convict" who could not perform that function. Self-evidently, then, this statute provides no precedent whatsoever in favor of the sweeping disabilities that modern "gun control" emanating from the General Government imposes on today's "convict[s]". Instead, it conclusively proves that, from the historical and constitutional perspectives, those disabilities are utter bunkum.

(b) Similarly, Virginia's own contemporary law broadly disarms every adult who has ever been convicted of a so-called "felony", and juveniles who have been convicted of "a delinquent act which would be a felony if committed by an adult", unless they fall into certain specially favored categories:

> A. It shall be unlawful for
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> (i) any person who has been convicted of a felony;
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> (ii) any person adjudicated delinquent as a juvenile 14 years of age or older at the time of the offense of murder * * * , kidnapping * * * , robbery by the threat or presentation of firearms * * * , or rape * * * ; or
>
> (iii) any person under the age of 29 who was adjudicated delinquent as a juvenile 14 years of age or older at the time of the offense of a delinquent act which would be a felony if committed by an adult, other than those felonies set forth in clause (ii),
>
> *whether such conviction or adjudication occurred under the laws of the Commonwealth, or any other state, the District of Columbia, the United States or any territory thereof*, to knowingly and intentionally possess or transport any firearm or ammunition for a firearm, * * * or to knowingly and intentionally carry about his person, hidden from common observation, any [firearm] * * * . Any person who violates this section shall be guilty of a Class 6 felony. However, any person who violates this section by knowingly and intentionally possessing or transporting any firearm and who was previously convicted of a violent felony * * * shall be sentenced to a mandatory minimum term of imprisonment of five years. Any person who violates this section by knowingly and intentionally possessing or transporting any firearm and who was previously convicted of any other felony within the prior 10 years shall be sentenced to a mandatory minimum term of imprisonment of two years. * * *
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> B. The prohibitions of subsection A shall not apply to
>
> (i) any person who possesses a firearm, ammunition for a firearm * * * while carrying out his duties as a member of the Armed Forces of the United

> States or of the National Guard of Virginia or of any other state,
>
> (ii) any law-enforcement officer in the performance of his duties, or
>
> (iii) any person who has been pardoned or whose political disabilities have been removed pursuant to Article V, Section 12 of the Constitution of Virginia provided the Governor, in the document granting the pardon or removing the person's political disabilities, may expressly place conditions upon the reinstatement of the person's right to ship, transport, possess or receive firearms.
>
> C. Any person prohibited from possessing, transporting or carrying a firearm * * * under subsection A, may petition the circuit court of the jurisdiction in which he resides for a permit to possess or carry a firearm * * * ; however, no person who has been convicted of a felony shall be qualified to petition for such a permit unless his civil rights have been restored by the Governor or other appropriate authority. * * * The court may, in its discretion and for good cause shown, grant such petition and issue a permit.[1793]

In rather stark contradistinction to *pre-*constitutional law, in Virginia's contemporary law the term "felony" embraces six classes of crimes for which the punishment may be: (i) imprisonment for more than one year and possibly some monetary fine; or (ii) imprisonment for not more than twelve months, or a monetary fine, or both.[1794] The term "misdemeanor" includes four classes of crimes for which the punishment is a fine and possibly imprisonment for not more than twelve months.[1795] But *only one* class of "felony" in this body of statutory law is punishable by death.[1796] And *none* is punishable by forfeiture of all of the perpetrator's real and personal property. So, at best, only that one class of so-called "felony" in Virginia which provides for the penalty of death today would arguably have constituted a "[F]ELONY" anywhere in America during the *pre-*constitutional era. For, as Blackstone observed, "[F]ELONY, in the general acceptation of our English law, comprizes every species of crime, which occasioned at common law the forfeiture of lands or goods. This most frequently happens in those crimes, for which a capital punishment either is or was liable to be inflicted[.]"[1797] "THE idea of felony is indeed so generally connected with that of capital punishment, that we find it

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[1793] Code of Virginia § 18.2-308.2 (emphasis supplied).

[1794] Code of Virginia § 18.2-10(a) through (f).

[1795] Code of Virginia § 18.2-11(a) through (d).

[1796] Code of Virginia § 18.2-10(a).

[1797] *Commentaries on the Laws of England, ante* note 142, Volume 4, at 94.

hard to separate them; and to this usage the interpretations of the law do now conform."[1798]

In those instances in which an individual adjudged guilty of a "[F]ELONY" in *pre-*constitutional Virginia would have been executed, any claim he might have had to possession of a firearm would have been terminated along with him. Similarly, while an individual in that era remained in custody on suspicion of criminal behavior, or awaited execution of his sentence, naturally he would not have been allowed to retain personal possession of a firearm. In those circumstances, the consequences of applying Virginia's modern law, on the one hand, and her *pre-*constitutional law, on the other hand, would be the same. But, in fact, *not all individuals convicted of a true "*[F]*ELONY" in* pre*-constitutional Virginia were executed, or suffered permanent forfeiture of all their property*. For example, in 1731, two men convicted of "Felony" were "pardoned & transported out of th[e] Colony into some other of his Majesties Plantations for the Term of Seven Years".{EN-1979} Presumably, after that period of exile ended, they could lawfully have returned to Virginia and resumed the common activities of normal civilian lives, including the acquisition of real and personal property. And in 1742, a man who had been "convicted of Felony" and "thereby forfeited all his Effects" was restored to the possession of a boat by which he earned his living.{EN-1980}

Even a conviction in *pre-*constitutional Virginia for a true "[F]ELONY" that resulted, not in execution, but in the forfeiture of all of the property the perpetrator possessed at the time would not have prohibited him, after his release from incarceration and return to society, from acquiring new goods—including a firearm, ammunition, and accoutrements suitable for Militia service. For, just as "the forfeiture of goods and chattels ha[d] no relation backwards" to the time of the crime committed, "so that those only which a man ha[d] at the time of conviction shall be forfeited",[1799] so too did "the forfeiture of goods and chattels" not relate forward in time to all the property into the possession of which a man might come after his conviction and return to society. Indeed, Virginia's Militia statutes would have *required* such an individual to acquire a firearm as his personal property, inasmuch as those laws extended no exemption from possession of arms to any individual simply because he had happened to have lost all of his possessions in the past, for whatever reason. Rather, the laws directed Militia officers or other public officials to provide the necessary equipment to any man too poor to obtain it on his own.[1800] And if a prior conviction for a true "[F]ELONY" did not necessarily preclude an individual from later possessing a firearm for service in the Militia, conviction for some less serious crime surely did not, either.

[1798] *Id.*, Volume 4, at 98.

[1799] *Id.*, Volume 4, at 380.

[1800] *See ante*, at 424-428.

Thus, in most instances, the effect of Virginia's present-day statute is to deprive of the possession of firearms those persons who have been convicted of crimes now designated as "felonies", but which are *not* "felonies" as that term was understood in *pre-*constitutional times—and this, when a conviction for even a true "[F]ELONY" in *pre-*constitutional times would not necessarily have resulted in a convict's permanent exclusion from such possession after his release from custody. Furthermore, in most cases, the modern statute precludes individuals once convicted of "felonies", but who have returned to society, from performing their constitutional duties under *both* the Second Amendment to the Constitution—by denying those individuals "the right * * * to keep and bear Arms", *and* Article 13 of Virginia's own Declaration of Rights—by excluding them from "the body of the people, trained to arms".

To be sure, the modern statute is not absolute in its prohibitions. But the limitations on its reach do nothing for most of the individuals it penalizes. *Constitutionally*, every able-bodied adult Virginian from sixteen to sixty is in principle a member of the Militia today. As such, and absent some exemption *of a type recognized during* pre-*constitutional times*, he is *constitutionally* required to possess a firearm, ammunition, and accoutrements suitable for Militia service. No general exemption (or exclusion or disability) predicated solely upon an individual's prior conviction for even a true "[F]ELONY" existed during the *pre-*constitutional era, however. The only individuals never "listed" in the Militia were slaves.[1801] This, perhaps, is more realistically explained as an actual "exclusion", rather than an "exemption", because it plainly was intended, not to benefit the slaves by limiting their burdens of service, but instead to prevent them from providing themselves with the wherewithal forcibly to challenge their bondage. Free persons of color were not called upon to bear arms during their Militia service, either; but neither were they—nor, for that matter, even some slaves—entirely denied access to firearms in other contexts.[1802] Virginia's contemporary statute, however, decrees that an individual who has been convicted of a modern *ersatz* "felony" may not possess a firearm for some or all of the remainder of his life, and therefore cannot possibly function as a full-fledged member of Virginia's Militia during the term of such disability. Rather, such an *ersatz* "felon" could appear at a Militia muster only in the degraded position to which "free mulattoes, negroes, or Indians" were often relegated in *pre-*constitutional times —that is "without arms".{EN-1981} Or in the disgraceful position of an individual branded by his own conduct as disloyal—who, although "disarmed", was "nevertheless * * * obliged to attend musters".{EN-1982} Worse yet, he could not possess a firearm at any other time—thereby finding himself *more* degraded than free people of color, or even some slaves.

[1801] *See ante*, at 607-609.

[1802] *See ante*, at 363-369, 468, 609-611, and 733-742.

The modern statute does allow for an individual whose disability derives from some juvenile delinquency to possess a firearm after he becomes twenty-nine years old. But from sixteen to twenty-nine years of age such possession is illegal—although his membership in the Militia, and possession of a firearm suitable for Militia service, is constitutionally required. The statute further excludes from its prohibitions an individual who is performing duties as a member of the regular Armed Forces of the United States or of the National Guard. But, those being military establishments of the General Government, or "Troops" the States may "keep * * * in time of Peace" only "with[ ] the Consent of Congress" (and therefore subject to whatever conditions Congress may impose),[1803] no State can exercise any authority to dictate how their members will perform such duties in any event—so this explicit exclusion is supererogatory.[1804] The statute also allows an individual convicted of a modern *ersatz* "felony" to possess a firearm as a "law-enforcement officer in the performance of his duties". Such an allowance would be mandatory were the "law-enforcement agency" recognized (as it should be) as a unit of the Militia[1805]—so this, too, merely precludes the statute's reach to a situation in which its application would be unconstitutional anyway. Finally, the statute licenses individuals convicted of *ersatz* "felonies" to possess firearms if they have been pardoned by the Governor, or issued a permit by a judge "for good cause shown" after their "civil rights have been restored by the Governor or other apporpriate authority". But, in general, no one in *pre*-constitutional times needed some permission from the Governor or some judge to be armed within the Militia—rather, *the statutes themselves*, without any further action from any public officials, required every Militiaman personally to possess arms at all times. Neither did anyone—except slaves and free persons of color, who had "no rights which the white man was bound to respect"[1806]—need permission from some judge to be armed for other legitimate purposes.[1807]

Although conviction for a true "[F]ELONY" during the *pre*-constitutional era could have resulted in the perpetrator's forfeiture of all of his property, and even his death, it would not have reduced him to full-blown slavery, or imposed upon him all of slavery's odious "badges and incidents",[1808] or even burdened him with the particular "badge and incident" of slavery necessary to preservation of a condition of bondage: namely, the bondsmen's permanent personal disarmament.[1809] So how

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[1803] U.S. Const. art. I, § 10, cl. 3. *See ante*, at 786-793.

[1804] *See* U.S. Const. art. VI, cl. 2. A State could, however, refuse to "keep Troops" under such a condition.

[1805] *See ante*, at 327-328, *and post*, at 1135-1138, 1194-1202, 1276-1277, 1291-1293, and 1482-1488.

[1806] Scott v. Sandford, 60 U.S. (19 Howard) 393, 407 (1857) (opinion of Taney, C.J.).

[1807] *See ante*, at 733-742.

[1808] *See* Civil Rights Cases, 109 U.S. 3, 20-21 (1883).

[1809] *See* W. Blackstone, *Commentaries on the Laws of England*, *ante* note 142, Volume 1, at 416.

is it that, today, simply by labeling some crime as a "felony"—when constitutionally it is not such—Virginia's (or any State's) legislature can superadd to the punishment of a monetary fine and imprisonment for some term of years the further disability of permanent personal disarmament following the perpetrator's release from incarceration—which was never inherent in the punishment for a true "[F]ELONY" during *pre*-constitutional times? Simply as a matter of legislative discretion, can *all* contemporary crimes simply be *called* "felonies", and *all* such nominal but fictional "felonies" be punished with one or more of the classical "badges and incidents" of slavery without admitting that some degree of slavery has been imposed on the alleged perpetrator? Yet this is the effect of all modern "gun control" that depends upon an individual's violation of some law as the basis for his disarmament—including those "gun-control" statutes that rest upon convictions for mere misdemeanors, or even upon no actual convictions for any crime at all.[1810]

(c) If an individual convicted of a crime is condemned to death and executed, the question of his right to possess a firearm expires with him. Similarly, if an individual convicted of a crime is sentenced to imprisonment, he cannot reasonably claim a right to possess a firearm while incarcerated. But on what basis can a sentence of imprisonment for a limited term, let alone of a mere monetary fine, justify permanent personal disarmament after that sentence has been served or satisfied?

Section 1 of the Thirteenth Amendment provides that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction". It has been suggested that the limitation set out in the Amendment—"[n]either slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*"—might be read as modifying "involuntary servitude" only, so as to allow for (say) imprisonment at hard labor, but not the imposition of actual "slavery" "as a punishment for crime".[1811] Such a misinterpretation forgets, however, that the language in the Thirteenth Amendment "was not new"—rather it tracked the words of the Ordinance of 1787 for the government of the Northwest Territory, "and gave them unrestricted application within the United States".[1812] For its part, the Northwest Ordinance provided that "[t]here shall be neither slavery nor involuntary servitude in the * * * territory, otherwise than in the punishment of crimes, whereof the party shall

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[1810] *See*, e.g., Code of Virginia §§ 18.2-308.1:5 ("[a]ny person who, within a thirty-six consecutive month period, has been convicted of two misdemeanor offenses under [certain statutes relating to illicit drugs] shall be ineligible to purchase or transport a handgun" for "a period of five years from the date of the second conviction") and 18.2-308.1:4 ("unlawful for any person who is subject to" certain civil "protective order[s]" or "preliminary protective order[s]" "to purchase or transport any firearm while the order is in effect").

[1811] *See Ex parte* Wilson, 114 U.S. 417, 429 (1885) (*semble*).

[1812] Bailey v. Alabama, 219 U.S. 219, 240 (1911).

have been duly convicted".[1813] Plainly enough, by its placement in the Ordinance, the limiting clause modified *both* "slavery" *and* "involuntary servitude". So that construction must be carried over into the Thirteenth Amendment, too. In which case, an individual convicted of a "crime" could be sentenced to slavery—one of the conditions of which could be (and probably would be) personal disarmament during his term of servitude.

If, however, *every* "crime"—whether a true or only an *ersatz* "felony", or even merely a "misdemeanor"—may be punished with imposition of the indispensable "badge and incident" of slavery, then *every* such "crime" may be punished with imposition of *every other* "badge and incident of slavery", too. If not, why not? And if *every* violation of *every* law can be made such a "crime" simply by rogue public officials' saying so, then *every* violation of *every* law can be punished with *some or every* "badge and incident" of slavery—thus rationalizing the entirety of the Stalinist Gulag system, in addition to universal disarmament of everyone save the regular Armed Forces and various professional "law-enforcement agencies" that would be necessary to enforce that system against the people. So, either the Thirteenth Amendment is a snare and a delusion (which conclusion cannot be accepted), or some constitutional limits must exist to the "crimes" that may be punished by imposition of the "badges and incidents" of slavery, particularly the chief one of permanent personal disarmament.

Now, with respect to some "crimes", the Constitution empowers Congress to decree whatever punishment it deems fit, provided that such punishment is not "cruel and unusual":[1814] namely, "[t]o provide for the Punishment of counterfeiting the Securities and current Coin of the United States";[1815] "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations";[1816] "to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted";[1817] and "[t]o make all Laws which shall be necessary and proper for carrying into Execution th[os]e * * * Powers".[1818] Although imposing the penalties of death or imprisonment for life without parole for these crimes would entail in

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[1813] Art. VI, AN ORDINANCE FOR THE GOVERNMENT OF THE TERRITORY OF THE UNITED STATES NORTHWEST OF THE RIVER OHIO (13 July 1787), *in Documents Illustrative of the Formation of the Union of the American States*, *ante* note 1, at 54.

[1814] *See* U.S. Const. amend. VIII.

[1815] U.S. Const. art. I, § 8, cl. 6.

[1816] U.S. Const. art. I, § 8, cl. 10.

[1817] U.S. Const. art. III, § 3, cl. 2.

[1818] U.S. Const. art. I, § 8, cl. 18. Supposedly, this clause implicitly empowers Congress to establish criminal penalties for violations of statutes Congress enacts under powers other than those cited immediately above. Even if so, that the penalties for the crimes Congress by happenstance defines could be more severe than the penalties for the crimes the Constitution explicitly enumerates is highly implausible.

practice a complete infringement of the convicted party's "right * * * to keep and bear Arms", to contend that the Second Amendment prohibits Congress from imposing them is unreasonable. For, throughout the *pre-*constitutional era, at least some crimes in all of these categories were considered true "[F]ELON[IES]", and therefore routinely punished by death. "Offences against the Law of Nations" is perhaps the one category among the constitutionally enumerated crimes for which some instances might be imagined as to which death and life imprisonment would constitute totally disproportionate penalties, and therefore would be excluded as "cruel and unusual".[1819] Yet, as Blackstone pointed out, "offences against the law of nations can rarely be the object of the criminal law of any particular state. For offences against this law are principally incident to whole states or nations: in which case recourse can only be had to war * * * . But where the individuals of any state violate this general law, it is then the interest as well as duty of the government under which they live, to animadvert upon them with a becoming severity, that the peace of the world may be maintained."[1820] Were "the peace of the world" truly at stake, though, an individual's execution or imprisonment for life would hardly be denounced in every case as an "[*un*]becoming severity".

If Congress may impose death as the penalty for commission of these crimes, it may also impose slavery in lieu of execution. To determine why requires a review of one of the traditional apologies for slavery. As Blackstone explained,

> slavery is held to arise * * * from a state of captivity in war * * * . The conqueror * * * had a right to the life of his captive; and having spared that, has a right to deal with him as he pleases. But it is an untrue position, when taken generally, that, by the law of nature or nations, a man may kill his enemy: he has only a right to kill him, in particular cases; in cases of absolute necessity, for self-defence; and it is plain this absolute necessity did not subsist, since the victor did not actually kill him, but made him prisoner. * * * Since therefore the right of *making* slaves by captivity, depends on a supposed right of slaughter, that foundation failing, the consequence drawn from it must fail likewise.[1821]

What Blackstone called "absolute slavery", in which a slave's very "life * * * [was] held to be in the master's disposal", never existed under color of law in America, however. No chattel slave could lawfully have been "wilfully, maliciously, or designedly" killed by his master.{EN-1983} And it is undeniable in principle that the General Government could from its very inception, and today still may, for some

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[1819] U.S. Const. amend. VIII. *See* O'Neil v. Vermont, 144 U.S. 323, 339-340 (1892) (Field, J., dissenting), *position of dissent adopted in* Weems v. United States, 217 U.S. 349, 367, 380-381 (1910).

[1820] *Commentaries on the Laws of England, ante* note 142, Volume 4, at 68.

[1821] *Id.*, Volume 1, at 423.

heinous crimes justly execute an individual after a fair trial.[1822] Inasmuch as, throughout the *pre-*constitutional era, death was deemed a just punishment for the commission of a true "[F]ELONY", and inasmuch as the crimes for which the Constitution explicitly empowers Congress to define the punishments were mostly "[F]ELON[IES]" in that era (and therefore should be classified as "felonies" today), the substitution of slavery for the penalty of death in any such case would presumably constitute a mitigation of sentence. Arguably, the same logic would apply to the punishment of imprisonment for life without parole. An individual serving such a sentence may be alive; but for all intents and purposes he languishes in a state no better if not worse than slavery, because the authorities in charge of his prison can subject his every action to controls even more extensive and intrusive that those under which the average chattel slave chafed in *pre-*constitutional America. And if Congress may impose slavery as the punishment for these crimes, in lieu of death or life imprisonment, and on the basis of such mitigation may allow a convict to return to society albeit in a servile state, it may also impose perpetual personal disarmament upon him, as one necessary "badge and incident" (as well as practical guarantee) of that status. Moreover, if enforced within the bounds of human decency, neither "slavery" nor "involuntary servitude" can constitutionally be denounced as "cruel and unusual punishments", because: (i) prior to the Thirteenth Amendment, no one ever imagined that they were outlawed by the Eighth Amendment; (ii) the Thirteenth Amendment presumes that they may be imposed today; and (iii) the Thirteenth Amendment postdates, and therefore where necessary and proper overrides, the Eighth Amendment.

As far as crimes punishable by the States are concerned: If the just penalty for some crime were death (as for a true "[F]ELONY"), or possibly imprisonment for life without parole, then slavery would in effect constitute mitigation of punishment. If the just penalty were incarceration for a term, then disarmament during incarceration would of course be valid, but not disarmament after release from prison. And if part of the punishment were for the perpetrator to make restitution to the victim, then the perpetrator could be condemned to slavery or involuntary servitude, and temporarily disarmed, until restitution were complete.

To determine for exactly what other crimes slavery (and therefore personal disarmament) might constitute just punishment, though, requires review of another of the traditional apologies for slavery. As Blackstone explained,

> it is said that slavery may begin * * * when one man sells himself to another. This, if only meant of contracts to serve or work for another, is

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[1822] Especially in contemporary America's incompetent, politicized, and corrupt "justice system", whether a trial or subsequent appeals can ever be *assuredly* "fair" enough in practice where the penalty of death is involved is another matter, though.

> very just: but when applied to strict slavery * * * is * * * impossible. Every sale implies a price, a *quid pro quo*, an equivalent given to the seller in lieu of what he transfers to the buyer: but what equivalent can be given for life, and liberty, both of which (in absolute slavery) are held to be in the master's disposal? His property also, the very price he seems to receive, devolves *ipso facto* to his master, the instant he becomes his slave. In this case therefore the buyer gives nothing, and the seller receives nothing: of what validity then can a sale be, which destroys the very principles upon which all sales are founded?[1823]

By voluntarily remaining within the social order, however, each man impliedly agrees to make whole anyone whom he is justly convicted of having harmed. So slavery as a means of compelling restitution can indeed be imposed as a matter of *quasi*-contract.

Otherwise, however, no disarmament of individuals convicted of crimes who have served the sentences of imprisonment imposed upon them presumably should be allowable. Those who consider this to be a policy "soft on criminals" overlook the overarching consideration: namely, *to leave as many of WE THE PEOPLE as possible sufficiently armed, by preventing rogue public officials from employing legalistic labels and mumbo jumbo to disarm ever increasing numbers of them*. To be sure, some individuals released after serving sentences for their crimes might turn out to be sociopaths or even psychopaths who would misuse any firearms they came to possess. But such individuals would doubtlessly be able be obtain firearms from the underworld even were they formally prohibited from doing so in the free market. In any event, these miscreants would possess only small arms; could claim no legal authority for their future misuse of those arms; would be confronted by an entire society organized, armed, and trained in the Militia to deter, and where deterrence failed to apprehend, common criminals; and most likely could victimize only a relatively few citizens before they themselves were brought to justice. Conversely, if rogue public officials could disarm enough of WE THE PEOPLE on the grounds of their having been convicted (or worse yet, merely suspected) of some "violation of law", the result would be an *anti*-social order in which THE PEOPLE would find themselves at the mercy of a small but highly armed and thoroughly organized clique of sociopaths and psychopaths, *who would claim under color of their public offices the legal right and power to dictate to everyone else, such that any individual's resistance to their oppression would be condemned and punished as "illegal"*. In such circumstances, not only would those individuals who might have been harmed by *private* sociopaths and psychopaths find their lives, liberty, and property at risk, but also countless others would be in jeopardy of being repressed, even unto slavery and death, by the

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[1823] *Commentaries on the Laws of England, ante* note 142, Volume 1, at 423-424.

totalitarian police state of *public* sociopaths and psychopaths that general disarmament of the population would render possible.[1824]

(2) More problematic than disabilities predicated solely on convictions for "crime[s] punishable by imprisonment for a term exceeding one year", that at least legislators feel compelled imaginatively to label as "felonies", are similar disabilities that arise from an individual's "convict[ion] in any court of a misdemeanor crime of domestic violence".[1825] Although the predicate for this provision is only "a *misdemeanor* crime of violence", whoever violates it is subject to "be fined * * * , imprisoned not more than ten years, or both".[1826] To be sure, the statute defines "a misdemeanor crime of domestic violence" in some detail to mean an offense that

> (i) is a misdemeanor under Federal or State law; and
> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.[1827]

Nonetheless, a "misdemeanor" remains an extremely broad and protean category of "crime". For example, under the criminal code of the General Government it includes any offense for which the punishment of imprisonment can range from "one year or less" to "more than five days".[1828] And, under State law, even an offense punishable by no more than a fine could be deemed a "misdemeanor".[1829] So, in principle, nothing precludes extension of these definitions by some future Congress or State legislatures to embrace "misdemeanors" for which the penalty might be imprisonment for *any* length of time, *no matter how short*, or the imposition of *any* fine, *no matter how small*. Moreover, "violence" is itself a dangerously elastic standard, too, potentially ranging in meaning from "unjust force" and "assault" to "vehemence" and "impetuosity".[1830] If every verbal altercation that might rise to the decibel level of "vehemence", coupled with some physical interaction no more

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[1824] *See generally* Andrew M. Łobaczewski, *Political Ponerology: A Science on the Nature of Evil Adjusted for Political Purposes* (Grande Prairie, Alberta, Canada: Red Pill Press, Second Edition, 2008).

[1825] An Act Making omnibus consolidated appropriations for the fiscal year ending September 30, 1997, and for other purposes, Act of 30 September 1996, Pub. L. 104-208, TITLE VI—GENERAL PROVISIONS, § 658(b)(2)(C), 110 Stat. 3009, 3009-372; *now codified at* 18 U.S.C. § 922(g)(9). *See also* 18 U.S.C. § 922(d)(9).

[1826] 18 U.S.C. § 924(a)(2).

[1827] Act of 30 September 1996, § 658(a), 110 Stat. at 3009-371; *now codified at* 18 U.S.C. § 921(a)(33)(A).

[1828] 18 U.S.C. § 3559(a)(6) through (8).

[1829] *See* 27 C.F.R. § 478.11, *Misdemeanor crime of domestic violence*, ¶ (a)(1).

[1830] *Webster's Revised Unabridged Dictionary, ante* note 11, at 1611, definitions 2 and 1. *Accord, Webster's Third New International Dictionary, ante* note 330, at 2554, definitions 1a and 3b.

forceful than shoving or raising a fist in anger, could constitute "the use or attempted use of physical force" as the basis for a charge of "misdemeanor crime of domestic violence", many Americans could be permanently disarmed for doing little beyond disturbing the peace in their own homes. And who is to say, other than legislators and judges intent on imposing pervasive "gun control" throughout this country, what few and ambiguous facts would need to be proven in order to establish the type and level of "unjust force" or "assault" sufficient for conviction?[1831] On its face, then, this statute amounts to an assertion by Congress of an open-ended power to impose the salient disabilities of "gun control" itself, and to assist the States in imposing them, on anyone whose domestic behavior might be categorized as "violen[t]" in even the most attenuated sense—notwithstanding that "the threatened use of a deadly weapon", or even the presence of any "weapon", in any such instance was *absent*.

(3) More problematic yet are disabilities that require *no* conviction whatsoever, for either a "felony" or a "misdemeanor". The leading example is the General Government's statute that deprives an individual of all rights "to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce", while that individual "is subject to a court order that * * * restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child".[1832] Although the predicate for this provision is a mere *civil* "court order", whoever violates it may nonetheless "be fined * * * , imprisoned not more than ten years, or both".[1833] Particularly troublesome is that a restraining order under this statute may *either* "include[ ] a finding that the person represents a credible threat to [another person's] physical safety", *or* simply "by its terms explicitly prohibit[ ] the actual, threatened, or attempted use of physical force that would reasonably be expected to cause bodily injury", apparently with no specific "finding" of any "credible threat" at all.[1834] Presumably, though, before the statute's draconian penalty could constitutionally be imposed upon an individual who possessed a firearm while under such a restraining order, not only would *some* safeguards of procedural due process in the

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[1831] *See, e.g.,* "Walter Reddy: Patriot's Guns Seized", *New American*, Volume 27, Number 10 (23 May 2011), at 20.

[1832] An Act To control and prevent crime ("Violent Crime Control and Law Enforcement Act of 1994"), Act of 13 September 1994, Pub. L. 103-322, Title XI—FIREARMS, Subtitle D—Domestic Violence, § 110401(c) [§ 922(g)(8)(B)], 108 Stat. 1796, 2015; *now codified at* 18 U.S.C. § 922(g)(8)(B). *See also* 18 U.S.C. § 922(d)(8).

[1833] 18 U.S.C. § 924(a)(2).

[1834] 18 U.S.C. § 922(g)(8)(C).

States' civil judicial systems have had to attach,[1835] but also—one would hope—the factual foundation purportedly underlying any such order would have had to have been subjected to even stricter review in the courts of the General Government under the doctrine of "constitutional fact": namely, that "[i]n cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function".[1836] And in the absence of sufficient evidence supporting "a credible threat", no conviction could be had in the first instance, or could be sustained on appeal. Unfortunately, nothing suggests that such will always be the case.[1837]

(4) Even more problematic is the General Government's statute that declares it "unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce any firearm or ammunition or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce".[1838] An individual who violates this statute may be fined, or "imprisoned for not more than five years", or both.[1839] As questionable as they are in other respects, the statutes that impose disabilities upon individuals who have actually been convicted of a "crime punishable by imprisonment for a term exceeding one year" or "a misdemeanor crime of domestic violence", or who have actually been made subject to a civil restraining order, at least provide those individuals with a modicum of procedural due process, in the form of notice and an adversarial judicial hearing on the underlying issue. Also, convictions for so-called "felony" and "misdemeanor" offenses require actual proof beyond a reasonable doubt; and a civil court order must at a minimum be grounded upon no less than a preponderance of legally admissible evidence. An indictment, distinguishably, is nothing more than a bare charge issued on only the thin veneer of probable cause—perhaps by a grand jury from which unscrupulous prosecutors have withheld all the evidence that might

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[1835] *See* 18 U.S.C. § 922(g)(8)(A).

[1836] Crowell v. Benson, 285 U.S. 22, 60 (1932). *Accord,* Saint Joseph Stock Yards Company v. United States, 298 U.S. 38, 50-52 (1936).

[1837] *See* United States v. Emerson, 270 F.3d 203 (5th Cir. 2001).

[1838] *Originally* AN ACT To assist State and local governments in reducing the incidence of crime, to increase the effectiveness, fairness, and coordination of law enforcement and criminal justice systems at all levels of government, and for other purposes ("Omnibus Crime Control and Safe Streets Act of 1968"), Act of 19 June 1968, Pub. L. 90-351, TITLE IV—STATE FIREARMS CONTROL ASSISTANCE, § 902 [§ 922(e) and (f)], 82 Stat. 197, 230-231; *followed by* AN ACT To amend title 18, United States Code, to provide for better control of the interstate traffic in firearms ("Gun Control Act of 1968"), Act of 22 October 1968, Pub. L. 90-618, TITLE I—STATE FIREARMS CONTROL ASSISTANCE, § 102 [§ 922(g)(1) and (h)(1)], 82 Stat. 1213, 1220; *amended by* An Act To amend chapter 44 (relating to firearms) of title 18, United States Code, and for other purposes ("Firearms' Owners' Protection Act"), Act of 19 May 1986, Pub. L. 99-308, § 102(8) [§ 922(n)], 100 Stat. 449, 452; *now codified as amended at* 18 U.S.C. § 922(n).

[1839] 18 U.S.C. § 924(a)(1)(D).

have tended to exculpate the target of their investigation, and before which the target probably was never allowed to testify.

(5) Most problematic of all are statutes that carve out so-called "gun-free zones" where the possession of firearms was never theretofore unlawful, and impose "criminal" sanctions on otherwise innocent individuals who transgress these forbidden geographical lines with firearms in their possession.

(a) The most familiar of these is the General Government's creation of "gun-free school zones".[1840] This statute defines a "school zone" as "in, or on the grounds of, a public, parochial or private school" or "within a distance of 1,000 feet from the grounds of a public, parochial or private school",[1841] and declares it "unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone".[1842] The penalty for each violation may be a fine, or imprisonment for "not more than five years", or both.[1843] Although, in its present form, this statute does contain some limitations and safeguards—such as being inapplicable "on private property not part of school grounds", if the firearm is in the possession of an individual licensed by the State to carry firearms, or if the firearm is unloaded and in a "locked container, or a locked firearms rack * * * on a motor vehicle"[1844]—the premiss of the legislation nevertheless remains that *Congress may carve out extensive geographical enclaves in which possession of firearms by most Americans is flatly prohibited, except in accordance with whatever regulations Congress may dictate, and that even an otherwise innocent individual's failure to comply with those restrictions may be punished as a serious "crime"*. Needless to emphasize, *no* precedent exists in *pre-*constitutional Colonial or State law for such legislation.

(b) Quite interesting as an object lesson in the reversal of American legal history is one of Virginia's contemporary "gun-free zones". Although in many places Virginians may bear firearms openly or concealed, they cannot lawfully "carry any gun, [or] pistol * * * , without good and sufficient reason, to a place of worship

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[1840] *Originally* An Act To control crime ("Crime Control Act of 1990"), Act of 29 November 1990, Pub. L. 101-647, TITLE XVII—GENERAL PROVISIONS, § 1702 ("Gun-Free School Zones Act of 1990"), 104 Stat. 4789, 4844; *declared unconstitutional in part by* United States v. Lopez, 514 U.S. 549 (1995); *reënacted with amendments by* An Act Making omnibus consolidated appropriations for the fiscal year ending September 30, 1997, and for other purposes, Act of 30 September 1996, Pub. L. 104-208, TITLE VI—GENERAL PROVISIONS, § 657 [§ 922(q)], 110 Stat. 3009, 3009-369; *now codified at* 18 U.S.C. §§ 921(a)(25) and (26) *and* 922(q).

Similar laws now exist, for example, in Rhode Island and Virginia. General Laws of Rhode Island § 11-47-60; Code of Virginia § 18.2-308.1.

[1841] 18 U.S.C. § 921(a)(25).

[1842] 18 U.S.C. § 922(q)(2)(A).

[1843] *See* 18 U.S.C. § 924(a)(1)(D).

[1844] *See* 18 U.S.C. § 922(q)(2)(B)(i) through (iii).

while a meeting for religious purposes is being held".[1845] Violation of this provision is a "misdemeanor". In stark contrast, during *pre*-constitutional times Virginia's statutes required Militiamen to be armed on such occasions:

> • [1619] "All persons whatsoever upon the Sabaoth daye shall frequent divine service and sermons both forenoon and afternoon, and all suche as beare arms shall bring their pieces swordes, poulder and shotte."{EN-1984}
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> • [1632] "ALL men that are fittinge to beare armes, shall bringe their peices to the church uppon payne for every effence[.]"{EN-1985}
>
> • [1643] "[M]asters of every family shall bring with them to church on Sondays one fixed and serviceable gun with sufficient powder and shott[.]"{EN-1986}
>
> • [1738, 1755, 1757, 1759, 1762, 1766, and 1771] "[I]t shall and may be lawful, for the chief officer of the militia, in every county, to order all persons listed therein, to go armed to their respective parish churches[.]"{EN-1987}
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> • [1775] "[T]he * * * chief officer[ ] of the militia, shall and may order the other officers and soldiers under him to go armed to their parish churches on Sundays, and to any licensed meeting-houses, whenever he judges it necessary."{EN-1988}

And nothing in Virginia's *pre*-constitutional laws prohibited any other law-abiding residents from voluntarily arming themselves on Sundays, or on any other days of the week.

Presumably, were the Militia revitalized in contemporary Virginia, an order from a "chief officer" to appear armed at religious services would constitute a "good and sufficient reason" for any Militiaman. But, even in the absence of a revitalized Militia, that having at hand the ability to defend one's self and others against the possibility of violent assault—which could occur at any place and any time—*always* constitutes a "good and sufficient reason" for *any* honest individual to be armed seems not yet to have occurred to Virginia's legislators. The present Attorney General of Virginia has held in an official advisory opinion that personal protection *does* constitute a "good and sufficient reason".[1846] But whether the Commonwealth's judges will accept personal protection as a defense to prosecution under this statute remains to be seen.

(6) One need not be paranoiac to identify the target of all of this legislation from its obvious trajectory, according to the exterior ballistics of usurpation and tyranny.

[1845] Code of Virginia § 18.2-283.

[1846] *See* Letter of 8 April 2011 from Attorney General Kenneth T. Cuccinelli II to Delegate Mark L. Cole.

(a) The principle of raw power at stake is plain enough: If Congress and the States' legislatures may disqualify individuals for the permanent or temporary possession of firearms on the basis of those individuals' having once committed some "crime punishable by imprisonment for a term exceeding one year" or some "misdemeanor crime of domestic violence", or being under a mere "indictment" or other charge relating to such a "crime", or even being subject to some civil court order—with legislators and judges enjoying complete discretion to determine to which "crimes" and court orders such a prohibition should attach, and under what conditions—then rogue public officials may impose such a disqualification as the consequence of a conviction for *any* "crime" or even in connection with *any* civil proceeding whatsoever. For if permanent disarmament is a constitutionally appropriate penalty for an individual's having committed a "crime punishable by imprisonment for a term exceeding one year", then nothing precludes imposing that penalty for an individual's having committed a "crime punishable by imprisonment" for *any lesser* term. And if permanent disarmament is a constitutionally appropriate penalty for an individual's having committed one particular "felony", or one particular "misdemeanor", then nothing precludes imposing that penalty for an individual's commission of *any* "felony" or *any* "misdemeanor". And if at least temporary disarmament perforce of a civil court order is a constitutionally appropriate prophylactic device to prevent the subject from engaging in allegedly "violent" behavior in the future, then nothing precludes the use of that device in *any* civil proceeding in which a judge believes that one or more of the parties might pose an imagined danger to some other party at some later time.

(b) The ulterior goal of the proponents of such statutes is also pellucid: namely, step by step to remove firearms and ammunition from WE THE PEOPLE'S hands—without risking the political repercussions attendant upon attempting to outlaw possession directly—by: (i) lowering the severity of the underlying offense to which the penalty of permanent personal disarmament attaches from an *ersatz* "felony" to a "misdemeanor"; (ii) attaching that penalty to more and more existing offenses; (iii) inventing new offenses to which that penalty is appended; (iv) empowering civil courts to employ personal disarmament as a means of disciplining and controlling litigants; (v) employing pending indictments as the grounds for disarming the individuals charged; and (vi) defining the underlying offense as simply the otherwise lawful possession of a firearm in relation to some geographical "zone", so that mere possession itself becomes the excuse for dispossession.

(c) The last of these tactics is the most disturbing, because it offers the amplest ambit for abuse, for at least two reasons:

First, in practice, unlike the other rationales for personal disarmament, the establishment of a "gun-free zone" does not require that anyone actually commit, or even be suspected of having committed, any "felony", "misdemeanor", civil infraction, or arguably *anti*-social act of any sort in order for legislators to disarm

whomever they wish within the "zone". Not only is proof of anyone's actual wrongdoing or even supposed malicious intent unnecessary, but also—due to the non-rational, largely emotive character of the entire enterprise, especially where children may be concerned—evidence that the creation of such "zones" does not in fact reduce the misuse of firearms in those venues (or anywhere else), but instead encourages, facilitates, and ultimately exacerbates that problem, will be disregarded.[1847]

Second, in perverse principle, a "gun-free zone" can be staked out around *any* type of facility (or presumably *any* type of real property at all) in *any* location to essentially *any* degree, because Congress's supposed regulatory power attaches, not to the facility *per se*, but to the "gun" to be excluded therefrom. Under the General Government's present statute, for example, a "gun-free zone" not only includes "the grounds" of every "public, parochial or private school" in America, but also extends to "a distance of 1,000 feet from th[os]e grounds".[1848] Now, presuming for ease of calculation that each school subject to this statute is no larger than a mere Euclidean point at the center of a circle, the minimum "gun-free school zone" encompasses 0.112689 square miles.[1849] Inasmuch as (for example) in 2009 some 178,949 schools were subject to this legislation,[1850] the total expanse of "gun-free school zones" within the United States at that time was no less than 20,165.58 square miles.[1851] Were the concept extrapolated from schools to circumscribe a boundary with a radius of 1,000 feet around *every* supposedly "sensitive" facility in the country—such as every court house, every police station, every hospital and medical clinic, every large indoor mall, every house of worship, and so on—the overlapping "zones" could prohibit possession of firearms essentially everywhere except "on private property not part of [some covered facility's] grounds", in the possession of a licensed individual, and under certain conditions in motor vehicles[1852]—and then only if legislators deigned to continue such exceptions in the statute. Rather ominously, the first exception—and politically the most likely to be retained the longest—dovetails quite conveniently and neatly with the opinions of a bare majority of the Justices of Supreme Court, that "the individual right" "to keep and bear Arms" supposedly guaranteed by the Second and Fourteenth

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[1847] *See, e.g.,* David B. Kopel, "Pretend 'Gun-Free' School Zones: A Deadly Legal Fiction", 42 *Connecticut Law Review* 515 (2009).

[1848] 18 U.S.C. §§ 921(a)(25) and 922(q)(2)(A). The laws in Rhode Island and Virginia are less expansive, applying only to actual school grounds and school buses. General Laws of Rhode Island § 11-47-60(a)(2); Code of Virginia § 18.2-308.1(A) and (B).

[1849] Each "zone" contains 3.1416 ***times*** 1,000 ***times*** 1,000 ***equals*** 3,141,600 square feet. One square mile contains 5,280 ***times*** 5,280 ***equals*** 27,878,400 square feet. Therefore, each "zone" covers 3,141,600 square feet ***divided by*** 27,878,400 square feet *per* square mile ***equals*** 0.112689 square miles.

[1850] "K-12 Facts" at <http://www.data360.org/dsg.aspx?Data_Set_Group_Id=1389>.

[1851] 178,949 schools ***times*** 0.112689 square miles *per* school ***equals*** 20,165.58 square miles.

[1852] *See* 18 U.S.C. § 922(q)(2)(B)(i) through (iii).

Amendments applies in full force *only* within the confines of one's own home,[1853] and especially would find support in the *dicta* in which every Justice of the Supreme Court explicitly or implicitly concurred, that "nothing in our opinion should be taken to cast doubt on * * * laws forbidding the carrying of firearms in sensitive places such as schools and government buildings".[1854] In accordance with these notions, then, the "individual right" to possess a firearm could be reduced to the corresponding "individual right" to possess pornography in one's own home.[1855] And, in principle, if "gun-free school zones" are valid, then nothing would preclude Congress or some State legislature from dictating that private homes, too, shall be "gun free" whenever they are occupied, or may be visited, by children.

(7) Obviously, the Militia Clauses of the original Constitution as well as the Second Amendment cannot countenance these kinds of restrictions on individuals' ability to possess the firearms they may need to perform their Militia service. No doubt, rogue public officials will claim that they intend to increase "public safety" by taking firearms out of the hands of putatively "dangerous" individuals. But the larger the number of individuals who are disarmed on the basis of their commission of "crimes" *to which officials attach the penalty of disarmament for the very purpose of disarming as many individuals as possible*, the greater the peril to true public safety. At some point that number will become so large that "the people" will no longer be capable of exercising "the right * * * to keep and bear Arms" to a sufficient collective degree, the organization of "well regulated Militia" will become impractical, and "the security of a free State" will be left to the mercies of the very rogue officials whose policy of disarming "the people" proves them inimical to such a "State". Because "[a] well regulated Militia" is "necessary to the security of a free State", and because "the right of the people to keep and bear Arms" is necessary to "[a] well regulated Militia", and because that "right * * * shall not be infringed" for *any* reason (for the Second Amendment admits of no exception)—therefore,"a free State" cannot be maintained when some critical mass among "the people" is disarmed for *any* reason. A *fortiori*, "a free State" cannot long survive when rogue public officials set out to disarm that mass of individuals simply by labeling them "criminals" for every minor misbehavior. "[A] free State" cannot coëxist with what amounts to a "prison state". Therefore, Congress and the States' legislatures must be severely constrained with respect to the "crimes" and other infractions to which they can affix the penalty of personal disarmament upon the perpetrators after the latter have served their sentences of incarceration (if any) and returned to society.

[1853] *See* District of Columbia v. Heller, 554 U.S. 570, 628, 635 (2008) (Scalia, J., for the Court); McDonald v. City of Chicago, 561 U.S. ___, ___ (2010) (Alito, J., announcing the judgment of the Court), Slip Opinion at 1-2. The dissenting Justices in these cases contended that even such a narrow "right" is subject to extensive governmental regulation which, in some situations at least, could amount to outright prohibition.

[1854] Heller, 554 U.S. at 626 (Scalia, J., for the Court).

[1855] *See* Stanley v. Georgia, 394 U.S. 557, 565, 568 (1969).

These observations are not intended to encourage the mollycoddling of individuals who have actually committed real and serious "criminal" offenses.[1856] If they have broken the law, then whether private citizens or public officials (and especially in the latter case) they should be punished with severity proportionate to their transgressions. As explained below, personal disarmament would always be appropriate were a term of "slavery", after the perpetrator's release from any incarceration, imposed as the "punishment for [some] crime whereof the party shall have been duly convicted"[1857]—for personal disarmament has always been and must always be the principal "badge and incident" of slavery. But then the "crime" would need to be one so egregious that slavery would unquestionably constitute a *just* "punishment" in the view of the vast majority of Americans. If authentic slavery were the punishment stipulated for certain "crimes", though, disarmament of the perpetrators would comport with the fundamental principles of the Militia—for armed slaves were never enlisted on an equal basis with free men in any *pre*-constitutional Militia. In addition, the extent of disarmament in society as the result of the imposition of slavery on convicted "criminals" would undoubtedly be extremely limited—for no sane citizenry would allow so many "crimes" to be punished with slavery as would seriously interfere with the Militia.

If hedged with sufficient safeguards, temporary personal disarmament in connection with certain civil court orders restraining individuals from harming or threatening others where the existence of such a danger had been properly proven might be constitutionally appropriate, too, because the rationale for such orders harkens back to the doctrine of "surety of the peace" well-established in *pre*-constitutional times.[1858] In many cases, however, disarmament on those terms could be *only* temporary, or would have to be narrowly confined in terms of geography, because the subjects of such restraining orders would still be required to fulfill their Militia duties, and therefore would have to be allowed access to arms at least when called forth for training or actual service in the field. In such situations, then, the administration of restraining orders should be assigned directly to the Militia.

[1856] The nagging problems in this area that cannot be addressed here include: (i) whether, as a matter of principle, the behavior for which many individuals are routinely convicted of various "crimes" in this country should be deemed "criminal" at all in "a free State"; and (ii) whether, as a matter of practice, those individuals have been *justly* convicted, or instead have been framed or otherwise railroaded by unscrupulous prosecutors and judges in kangaroo proceedings. On the former issue, *see, e.g.,* Symposium—"Overcriminalization: The Politics of Crime", 54 *American University Law Review* (2005), at 539-820; Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (New York, New York: Oxford University Press, Inc. 2008). On the latter issue, *see, e.g.,* Paul Craig Roberts & Lawrence M. Stratton, *The Tyranny of Good Intentions: How Prosecutors and Law Enforcement Are Trampling the Constitution in the Name of Justice* (New York, New York: Three Rivers Press, 2008). These problems are becoming increasingly acute, because in large part they arise, not at all from "good intentions", but from thoroughly bad ones. A proper police state, after all, operates on the perverse principle that "everything is prohibited, except what is expressly permitted". So, as that principle is increasingly adopted, the ulterior intention becomes manifest.

[1857] U.S. Const. amend. XIII, § 1.

[1858] *See ante*, at 303-307 (Rhode Island) and 732-733 (Virginia).

Similarly, in cases that had resulted in some, and might result in more, domestic violence, investigation, intervention, and monitoring by the Militia could obviate future tragedies. Inasmuch as a Local Militia Company would include as members *all* of the adults in every family in its area, its officers would either personally know about, or would receive reports concerning, domestic disputes that had resulted in or could escalate into violence. As the adults in such a situation would be subject to Militia discipline, they could be required to receive counseling, support, and where necessary continuing observation and control that would forefend future trouble. Supervision of and support for such people by members of their own families, friends, and neighbors organized through their own Militia Companies would surely be more close, sympathetic, and effective than monitoring by lawyers, judges and other judicial personnel, and bureaucrats from "social-services" agencies who all too often focus on keeping up case loads so as to justify ever-increasing fees and appropriations, not on helping to solve individuals' personal problems.

Finally, upon revitalization of the Militia, most (if not all) "gun-free zones" should definitely be eliminated, because next to no places would exist in any community where members of the Militia would not be active in one capacity or another—and, being active, would not be armed. Actually, in principle this would not be a great departure from the present situation. *First*, even the statutes now in force make exceptions for individuals licensed to carry firearms, including both civilians and various law-enforcement officers.[1859] And upon revitalization of the Militia, every member will be deemed to be a "law-enforcement officer" to some degree. *Second*, the statutes now in force also make exceptions for programs involving firearms that are approved by and conducted in the schools.[1860] And upon revitalization of the Militia, schools will be centers for training not only students but also other members of the community in such matters as firearms safety and marksmanship, in addition to advanced courses in Militia science and related disciplines—in all of which activities firearms will have a prominent place.

b. The *pre-*constitutional Militia laws fully support these conclusions. Those laws never disqualified from Militia service in general or excluded from the personal possession of firearms in particular: (i) those individuals who had committed crimes or other offenses—including "[F]ELON[IES]"—for which they had served their sentences, paid their fines, or undergone other punishments, and thereafter had returned to society; or (ii) those individuals who had merely been charged with but not convicted of crimes, and during the pendency of any inquiry or trial had been allowed to remain at large in the community; or (iii) those individuals subject to

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[1859] 18 U.S.C. § 922(q)(2)(B)(ii) and (vi); General Laws of Rhode Island § 11-47-60(b); Code of Virginia § 18.2-308.1, exceptions (iv), (vi), and (vii).

[1860] 18 U.S.C. § 922(q)(2)(B)(iv); General Laws of Rhode Island § 11-47-60(b)(1) through (4); Code of Virginia § 18.2-308.1, exception (iii).

judicial orders in civil cases (except possibly in situations involving a "surety of the peace"[1861]). And if convictions for *real* "[F]ELON[IES]" did not always result in exclusion from the Militia in that era, then convictions for *faux* "felonies" or mere "misdemeanors" today certainly cannot invariably have that effect.

Only two classes of persons were routinely disarmed pursuant to law during the *pre*-constitutional period—namely, slaves at all times (and along with them sometimes free people of color, too) and politically disloyal individuals during tumultuous times:

(1) Slaves were always almost totally precluded from service in or for the Militia, for the self-evident reason that personal possession of firearms and ammunition, and training in how to use that equipment, by large numbers of bondsmen were utterly incompatible with perpetuation of what American slaveholders came to call their "Peculiar Institution". Because "a well regulated militia" in *pre*-constitutional times was "composed of the body *of the people*, trained to arms" as "the proper, natural, and safe defence of a *free* state",[1862] slaves obviously could take no part in the Militia on the basis of anything approaching equality with the rest of the community. For being *un*free themselves, they were not among "the people" who formed "a *free* state": "[N]either the class of persons who had been imported as slaves nor their descendants, whether they had become free or not, were * * * acknowledged as a part of the people".[1863] Furthermore, because "a well regulated militia" was always "composed of the body of the people, *trained to arms*", slaves could take no part in the Militia specifically as soldiers. For the bondsmen's thoroughgoing personal disarmament was the preëminent and absolutely necessary "badge and incident" of slavery. As Blackstone pointed out,

> [t]wo precautions are * * * advised to be observed in all prudent and free governments: 1. To prevent the introduction of slavery at all: or, 2. If it be already introduced, not to intrust those slaves with arms; who will then find themselves an overmatch for the freemen.[1864]

This, together with "[t]he long existence of African slavery in this country[,] g[i]ve[s] us very distinct notions of what [slavery] was, and what were its necessary incidents" in relation to slaves' possession of firearms.[1865]

If slaves were always granted a near-absolute exemption (or, perhaps more realistically in light of their degraded social status, *exclusion*) from the Militia out of

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[1861] *See ante*, at 303-307 (Rhode Island) and 732-733 (Virginia).

[1862] Virginia Declaration of Rights (1776) art. 13 (emphasis supplied).

[1863] Scott v. Sandford, 60 U.S. (19 Howard) 393, 407 (1857) (opinion of Taney, C.J.).

[1864] *Commentaries on the Laws of England*, *ante* note 142, Volume 1, at 416.

[1865] Civil Rights Cases, 109 U.S. 3, 22 (1883).

necessity, free people of color were conditionally exempted out of social prejudice: perhaps formally enlisted in the Militia, but (as in Virginia) usually required to perform only servile labor rather than to muster as armed soldiers on equal terms with White Americans.{EN-1989} This is hardly surprising, inasmuch as "'[p]olitical power grows out of the barrel of a gun'",[1866] and during the *pre*-constitutional era even free Negroes and other people of color were "considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them".[1867]

(2) Similarly, in that era politically disloyal individuals were considered, not simply to be no part of "the people" because of their disaffection toward the government, but even to be actual enemies of the community (and perhaps actual alien enemies, at that). For example, in 1779 Rhode Island's General Assembly declared that,

> WHEREAS all Countries have a Right to the personal service of its Inhabitants, the greatest Exertions of whom, in their different Capacities, are especially requisite for the Defence and Protection of their Lives, Liberties and Properties, during the actual Invasion of Enemies; and a Refusal or withdrawing the same being against the Rights of human Society, and the being voluntarily adherent to public Enemies, by giving them Aid or Comfort, or the seeking of their Protection, amount to a total Renunciation of all former Rights, Privileges and Inheritances whatever: And whereas, since the King and Parliament of *Great-Britain*, have tyrannically framed, and attempted with Fleets and Armies to introduce into these United States, a most cruel System of Despotism, at the same Time declaring the Inhabitants thereof out of their Protection, sundry of said Inhabitants, regardless of their Ties and Obligations aforesaid, have left their Habitations, joined and been adherent to the Enemies aforesaid, thereby giving them Aid and Comfort, or continued to reside in Places invaded by or in the Power of said Enemies, and have voluntarily aided and abetted them: Therefore,
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> * * * every Inhabitant * * * who * * * hath levied War, or conspired to levy War, against * * * [the] United States, or who hath adhered to the said King of *Great-Britain* * * * , or who * * * hath withdrawn * * * into Parts and Places under the acknowledged Authority and Dominion of the said King * * * shall be held, taken, deemed and judged to have voluntarily renounced all civil and political relation to

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[1866] *Quotations From Chairman Mao, ante* note 28, at 61.

[1867] Scott v. Sandford, 60 U.S. (19 Howard) 393, 404-405 (1857) (opinion of Taney, C.J.).

> each and every of the said United States, and be considered as an Alien.{EN-1990}

So disarming disloyal albeit free individuals in that era was at least as imperative as disarming slaves.

(3) Based on this history, exemptions from revitalized "Militia of the several States" grounded solely on an individual's *prior* "criminal" misbehavior, for which he had served his sentence, would be nonexistent today, whether his "crime" had been an *ersatz* "felony" as now loosely defined or even a true "[F]ELONY" as understood in *pre*-constitutional times (if the perpetrator had not been executed but had eventually returned to the community as a free individual), let alone some less-serious "crime" or a mere civil infraction that resulted in a court order. After all, individuals may be justly convicted of *having been* "criminals". And while in custody, serving their sentences, they may be disarmed *as* "criminals" as part of their punishment. But when they return to society and begin leading upright lives, they are "criminals" no longer, only *former* "criminals". So why should a status derived from their past misbehavior, for which they have already suffered a penalty, continue indefinitely into their present lives, particularly when that continuation prevents them from serving their community in the Militia on an equal basis with everyone else?

Even a prior conviction for a so-called "crime of violence" should not suffice for an individual's permanent exemption from the Militia.[1868] To be sure, "gun controllers" often contend that an individual who has committed a "crime of violence" has thereby demonstrated a personal "propensity for violence" which justifies preëmptively disarming him thereafter. Any such conclusion, though, either rests on some species of biological or psychological determinism, which is inadmissible within the legal system of "a free State", or is hopelessly speculative, because no "due process of law" with respect to purely imagined *future* acts can justify depriving an individual of his *present* life, liberty, or property. Absent the invocation of determinism, although a conviction in the past may prove that the perpetrator posed a danger to others at that time, it cannot establish to any degree of certitude that he will pose a danger to anyone in the future. If isolated past acts could prove inherent tendencies which could then justify prior restraints, any proof of evil tendencies should suffice for that result, because the tendencies, not the acts, will supposedly find new expression in the future. In that case, though, *everyone* should be permanently subject to preëmptive governmental controls of some

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[1868] *See, e.g.,* AN ACT To regulate commerce in firearms, Act of 30 June 1938, CHAPTER 850, §§ 1(6), 2(f), and 5, 52 Stat. 1250, 1250, 1251, 1252, *amended to change* "crime of violence" *to* "crime punishable by imprisonment for a term exceeding one year" *in* AN ACT To strengthen the Federal Firearms Act, Act of 3 October 1961, Pub. L. 87-342, 75 Stat. 757. Today, the term "crime of violence" is broadly defined. *See, e.g.,* 18 U.S.C. §§ 16 and 3156(a)(4).

variety, because everyone suffers from an inborn tendency to commit antisocial acts, known as Original Sin. Precisely how such a system could work in practice, when the public officials administering it were themselves as prone to the weaknesses stemming from Original Sin as the people they purported to supervise, remains the perennial mystery: *Quis custodes custodiet?* "Who shall guard the guardians?" Or perhaps better put, *Quis custodes custodire potest?* "Who is *able* to guard the guardians?"

In any event, with every individual who was required to serve in the revitalized Militia being thoroughly instructed on a regular basis in regard to his responsibilities as a citizen of "a free State", far less crime of all sorts would occur than society suffers now. Moreover, because revitalized Militia would maintain far closer scrutiny of their members than can present-day police forces and the judicial system over anyone not in custody, early indications of an individual's possibly aberrant behavior would likely be observed and the problem addressed before it suppurated into overt illegal activity. The Militia, after all, could constitutionally supervise, and even impose requirements on, an individual member's possession and employment of firearms—not in derogation, but in enforcement, of that individual's "right * * * to keep and bear Arms"—as they did in *pre*-constitutional times, when they enforced inspections, at home as well as in the field, in order to insure that Militiamen were properly supplied with arms.[1869] "[T]he right * * * to keep and bear Arms", after all, aims at guaranteeing "the security of a free State", not undermining that "security" through individuals' misuse of their "Arms" for criminal or other *anti*-social purposes. So "[a] well regulated Militia" could be invested with supervisory authority to ensure *before the fact* that all of the "Arms" in its members' hands were not capable of being put to improper uses (for example, because they were fully accounted for and safely stored), and with investigatory authority to verify *after the fact* that none of those "Arms" had been involved in crimes involving firearms (for example, by conducting ballistics and other examinations of the types of "Arms" in Militiamen's possession that were suspected of having been misused).

(4) Conversely, that an individual, although out and about in the community, were being held in actual "slavery * * * as a punishment for crime whereof the party shall have been duly convicted" would provide a valid basis for exempting him from the Militia's normal requirement that he be armed. For, absent some special legislative dispensation, the status of "slavery" *always* disqualified an individual to some significant degree for the personal possession of arms during *pre*-constitutional times; and therefore that disqualification forms part of the constitutional definition of "[a] well regulated Militia". Today, though, an individual's "crime" would have to be quite serious for the community to have

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[1869] *E.g., see ante,* Chapter 8 (Rhode Island), *and* at 472-480, 648-649, and 652-657 (Virginia).

decreed as the proper punishment for committing it the stigma as well as the general loss of liberty and property, and especially the specific burdens of uncompensated labor, that "slavery" would impose, perhaps for life, on the perpetrator.

As Blackstone instructed Americans of the *pre*-constitutional era,

> * * * [T]he *end*, or final cause of human punishments * * * [is] as a precaution against future offences of the same kind. This is effected three ways: either by the amendment of the offender himself; for which purpose all corporal punishments, fines, and temporary exile or imprisonment are inflicted: or, by deterring others by the dread of his example from offending in the like way, "*ut poena * * * ad paucos, metus ad omnes pervieniat*;" [1870] which gives rise to all ignominious punishments, and to such executions of justice as are open and public; or lastly, by depriving the party injuring of the power to do future mischief; which is effected by either putting him to death, or condemning him to perpetual confinement, slavery, or exile. * * * The method however of inflicting punishment ought always to be proportioned to the particular purpose it is meant to serve, and by no means to exceed it: therefore the pains of death, and perpetual disability by exile, slavery, or imprisonment, ought never to be inflicted, but when the offender appears *incorrigible*: which may be collected either from a repetition of minuter offences; or from the perpetration of some one crime of deep malignity, which of itself demonstrates a disposition without hope or probability of amendment: and in such cases it would be cruelty to the public, to defer the punishment of such a criminal, till he had an opportunity of repeating perhaps the worst of villainies.
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> * * * As to the *measure* of human punishments * * * the quantity of punishment can never be absolutely determined by any standing invariable rule; but it must be left to the arbitration of the legislature to inflict such penalties as are warranted by the laws of nature and society, and such as appear to be the best calculated to answer the end of precaution against future offences.[1871]

Similarly, Thomas Rutherforth, another English legal commentator influential in the *pre*-constitutional period, observed that

> slavery may be produced by guilt, consistently with the law of nature. Amongst the other methods of restraining a criminal from offending again, this is one: he will have few opportunities of offending, where all his actions are under the absolute authority and control of another. And this

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[1870] "That by punishment to a few fear shall reach all."

[1871] *Commentaries on the Laws of England, ante* note 142, Volume 4, at 11-12.

> loss of liberty may be either temporary or perpetual, according as the guilt of the criminal deserves a less or a greater penalty. The punishment of a criminal may likewise end in slavery, where the guilt is such as to deserve death. They, who are to punish him, may, if they find it proper, remit the rigour of the penalty, and give him his life, upon condition of his becoming their slave.[1872]

The admonition that "perpetual disability by * * * slavery * * * ought never to be inflicted, *but when the offender appears incorrigible*"—and, in particular, the justification that slavery may be imposed on a criminal "where the guilt is such as to deserve *death*"—rather starkly frame the antinomy in contemporary mass political psychology (or perhaps psychopathology) that, on the one hand, most Americans would think long and hard before making actual slavery the punishment for some "crime", even though that would be an historically supportable and therefore strictly constitutional way to disarm an isolated perpetrator while he was allowed to be at large in the community; but, on the other hand, very few people even notice, let alone deprecate, that modern "gun controllers" aim at nothing less than reintroducing slavery *pro tanto* among almost the entire population, by imposing the primary "badge and incident" of the Peculiar Institution—coerced personal disarmament—on common Americans, next to none of whom has ever been charged, let alone convicted, of any "crime" worthy of punishment by slavery. This ignorance or insouciance is all the more astounding, because—even if the average citizen were not aware of the somewhat arcane points of law that the Thirteenth Amendment "denounces a status or condition, irrespective of the manner or authority by which it is created",[1873] aims at "the obliteration and prevention of slavery with all its badges and incidents", and therefore "abolish[es] all badges and incidents of slavery in the United States"[1874]—he should know that under the Declaration of Independence "all men are created equal"; that "in view of the Constitution * * * there is in this country no superior, dominant, ruling class of citizens";[1875] and that the Constitution itself explicitly warns everyone that without "well regulated Militia" based upon "the right *of the people* to keep and bear Arms" the "security of a *free* State" is in jeopardy.[1876]

[1872] INSTITUTES OF NATURAL LAW; BEING THE SUBSTANCE OF A COURSE OF LECTURES ON GROTIUS DE JURE BELLI ET PACIS [1754-1756] (Baltimore, Maryland: William and Joseph Neal, Second American Edition, 1832), Book I, Chapter XX, § IV, at 242. On Rutherforth's importance, *see, e.g,* W. Crosskey, *Politics and the Constitution, ante* note 206, Volume 1, at 364-369.

[1873] Clyatt v. United States, 197 U.S. 207, 216 (1905).

[1874] Civil Rights Cases, 109 U.S. 3, 21, 20 (1883). *See* Jones v. Alfred H. Mayer Company, 392 U.S. 409, 440-441 (1968); Griffin v. Breckenridge, 403 U.S. 88, 105 (1971).

[1875] Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

[1876] U.S. Const. amend. II (emphasis supplied).

(5) Disloyalty as the basis for exempting an individual from the Militia's normal requirement that he be armed raises a slightly different problem. Not that disloyalty would not justifiably constitute such a basis today in principle. For having been so in *pre-*constitutional times, for good and sufficient reasons which the Constitution does not gainsay, it must remain so now. And not that disloyalty with very serious consequences is not possible today in practice. For although disloyal Americans could not threaten to stir up revolts among slaves, they could—and from the recent history of (say) the Communist Party of the United States probably would—engage in subversion, sedition, espionage, sabotage, and perhaps even acts of mass terrorism on behalf of a foreign power.[1877] But, unlike most "criminal" activity, disloyalty stems from and reflects a state of mind, usually grounded in some ideology, which may appear merely in words as well as in overt illegal acts.

On the face of it, any American disloyal to the Constitution as a whole would necessarily be an enemy of "a free State", and of such a State's "security", to which at a minimum he would refuse to contribute his best efforts, and which at a maximum he would affirmatively seek to subvert or destroy entirely. So, were he suffered to remain at large in society, allowing him "to keep and bear Arms" on the same extensive basis as loyal citizens would be absurd (although he might be licensed to possess a firearm in his own home, exclusively for the defense of himself and his family). Once adjudicated as disloyal, an individual would have to purge himself of that taint, at least by taking an oath or affirmation of loyalty of a legally binding nature, before he would be allowed to possess a firearm and to serve in the Militia on the same terms as loyal citizens.[1878] Plainly enough, if America can require her presumably loyal public officials to "be bound by Oath or Affirmation, to support th[e] Constitution",[1879] she can require individuals of proven disloyalty to do as much in order to rehabilitate themselves.

F. Exemptions not compulsory Other than with respect to "slavery [ ]or involuntary servitude" and disloyalty, certain critical public offices and private occupations, and participation by women and very young men in *para-*military activities of a combatant nature, exemptions from Militia service should not be compulsory. Rather, those individuals who might qualify for an exemption might always waive it.

[1877] *See, e.g.,* Dennis v. United States, 341 U.S. 494 (1951); American Communications Association v. Douds, 339 U.S. 382 (1950); and Communist Party USA v. Subversive Activities Control Board, 367 U.S. 1 (1961), *confirmed by, e.g.,* Harvey Klehr, John Earl Haynes, & Fridrikh Igorevich Firsov, *The Secret World of American Communism* (New Haven, Connecticut: Yale University Press, 1995); John Earl Haynes & Harvey Klehr, *Venona: Decoding Soviet Espionage in America* (New Haven, Connecticut: Yale University Press, 2000); and Ted Morgan, *Reds: McCarthyism in Twentieth-century America* (New York, New York: Random House Trade Paperbacks 2004).

[1878] *See ante*, at 297-299 (Rhode Island) and 742-746 (Virginia).

[1879] U.S. Const. art. VI, cl. 3.

Also, an individual who became exempt from all compulsory Militia service upon reaching the upper limit of age would not thereby somehow lose his right to remain fully armed. Besides the possibility that he might still be able to volunteer to perform *some* Militia duties within his abilities, thereby waiving the exemption, the exemption itself could have no such effect. When during the *pre-*constitutional era an individual acquired a firearm, ammunition, and necessary accoutrements in fulfillment of his Militia duty, he became vested with a statutory right to maintain possession of that equipment throughout his period of service. His later automatic exemption from duty perforce of old age did not deprive him of that equipment. When thereafter each individual's statutory duty and right to possess a firearm became a constitutional duty and right, the power of any legislature to fashion exemptions from that duty and right was confined to the contours that had been previously established. Exemption on the basis of age under the *pre-*constitutional Militia statutes had always extinguished the individual's *duty*, but had never affected his *right*, to possess a firearm. Therefore, under the Constitution, any such exemption could not affect that right, either. The upshot being that an individual who today takes possession of a firearm in fulfillment of his Militia duty, and then is exempted from Militia service on account of age, cannot lawfully be deprived of possession of that firearm solely on the grounds of his exemption.

G. Required payments for exemptions. Being a release from some aspect of Militia duty to which no one is entitled as a "right", an exemption may be conditioned upon the performance of some service or the payment of some compensation to the Militia, the government, or a substitute. For example, Congress's first Militia statute under the Constitution provided "[t]hat each and every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years (except as is herein after excepted) shall severally and respectively be enrolled in the militia by the * * * commanding officer of the company, within whose bounds such citizen shall reside", but also stipulated that "all persons who now are or may hereafter be exempted by the laws of the respective states, shall be, and are hereby exempted from militia duty, notwithstanding their being above the age of eighteen, and under the age of forty-five years".[1880] When Rhode Island reorganized her Militia in compliance with this Act, her General Assembly mandated that,

> in addition to the Persons exempted from military Duty by the Act of the United States [of 1792] * * * , there shall be * * * exempted by this Act * * * , either in the Regiments of Senior Class or Infantry, the following Persons, *to wit:* The Members of both Houses of the Legislature, the Justices of the Superior Court of Judicature, the Justices of the Court of

[1880] *An Act more effectually to provide for the National Defence by establishing an Uniform Militia throughout the United States*, Act of 8 May 1792, CHAP. XXXIII, §§ 1 and 2, 1 Stat. 271, 271, 272

> Common Pleas, the Secretary, the Attorney-General, the General-Treasurer, One Ferryman to each stated Ferry, the Ministers and Teachers of each Church or Congregation, the President, Professors, Tutors, Students and Steward of *Rhode-Island* College, and all Persons who are conscientiously scrupulous against bearing Arms * * * .
>
> * * * *Provided nevertheless* * * * That all Persons who are or shall hereafter be exempted from military service as in the preceding Section, and shall not perform the same as directed by this Act, * * * shall pay for such Exemption, and as an Equivalent for the said Services, the Sum of *Twelve Shillings* annually * * * . *Provided further,* That every settled Minister of each Church and Congregation, the President, Professors, Tutors, Students, and Steward of *Rhode-Island* College, shall be exempted from paying the said Equivalent.{EN-1991}

This statute was revealing in two respects: *First*, even the highest public officials—"[t]he Members of both Houses of the Legislature, the Justices of the Court of Common Pleas, the Secretary, the Attorney-General, [and] the General-Treasurer"—were exempted only upon their payment of a monetary "Equivalent" for the Militia service they did not perform. *Second*, these individuals *could* waive their exemptions and perform regular Militia duty if they so chose, because the statute required payments only if they "shall not perform th[eir military Service] as directed by this Act".

This exemplifies how exemptions could be profitably employed to facilitate revitalization of the Militia today. With such large populations in most States in comparison to *pre-*constitutional times, revitalization could initially proceed with only relatively small percentages of the eligible citizenry actively participating—for instance, primarily through the formation of Independent Companies.[1881] Large numbers of individuals, then, could be exempted from almost all regular duty simply on their payment of modest "Equivalent[s]", which would be dedicated exclusively to funding the Militia's activities. Presumably, in the early days of revitalization, when formal enrollment were compulsory but active participation still largely voluntary, and perhaps as much as fifty, sixty, or seventy percent of the population chose not to participate, even an "Equivalent" of only (say) twenty-five or fifty dollars *per* person *per* year would net sizeable revenues. In this way, political pressure against revitalization of the Militia from those reluctant to serve would be attenuated; such unwilling individuals would in both law and fact be serving by paying for their exemptions; and the moneys collected would allow for rapid revitalization by enabling the foresighted patriots who did serve to obtain the necessary equipment, training, and so on with little to no financial burden on themselves.

[1881] *See post*, Chapter 44.

CHAPTER THIRTY-SEVEN

Because the ultimate goal of "homeland security" must be WE THE PEOPLE'S own political freedom and economic well-being, and because that goal can be attained only by THE PEOPLE'S own participation where they actually reside in Local communities, "the Militia of the several States" must be organized and controlled "from the bottom up", not "from the top down".

Although revitalized "Militia of the several States" will be forces potentially as extensive as the populations of able-bodied adults living throughout America, they will be decidedly different from mere agglomerations of armed robots, ruled "from the top down" out of the District of Columbia, or even out of their State capitals, according to some latter-day variant of *das Führerprinzip* ("the Leader Principle"). Quite the contrary: In keeping with the pattern consistently followed throughout America during *pre-*constitutional times, "[*w*]*ell regulated* Militia" must be organized on the basis of, have their members recruited from, be equipped and trained for the purpose of protecting, and have their authority centered in, Local communities.

A. Localities the focal points for revitalization of the Militia. Self-evidently, true and lasting "homeland security" for "a free State"[1882]—"ordain[ed]" and "establish[ed]" by WE THE PEOPLE themselves to "provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity"[1883]—demands the maintenance of both political freedom and economic stability. Not for some disembodied "polity" or "economy" in the abstract, but for the real Americans who *are* the "polity" and the "economy" in action. Not for some self-selected élite, either—for "in view of the Constitution * * * there is in this country no superior, dominant, ruling class of citizens"[1884]—but instead for all common Americans. And not simply for the sake of some mere symbol of the "homeland", but in the actual home towns and even family homes where average Americans actually work and live, and expect their governmental institutions to protect their "unalienable Rights", including "Life, Liberty and the

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[1882] U.S. Const. amend. II.

[1883] U.S. Const. preamble.

[1884] Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

pursuit of Happiness".[1885] The purpose of the "defence of a free state"[1886] and "the security of a free State"[1887] is to enable the people to live peaceful, prosperous lives, according to their own purposes—when, where, and how *they themselves* choose. That being so, the primary locus of that "defence" and "security" must be *in Local communities*, because there the people, the places, the things, and the ways of life to be defended are to be found. Thus, *true* American "homeland security" is not about the District of Columbia—although that is this country's political capital; or about New York City—although that purports to be this country's economic (or at least financial) capital. It finds neither its genesis, nor its terminus, nor its being or purpose or justification in either or both of those places. For America can survive perfectly well without either of them, and especially the two of them when they are conspiring together. Rather, just as charity begins at home, so too does self-defense, not only for each individual but also for the particular community in which that individual lives, as well as the Nation which is the "homeland" to them all.

1. Each of the revitalized "Militia of the several States" must be "well regulated" pursuant to some Congressional or State statute. Initially, Congress could "provide for organizing, arming, and disciplining, the Militia" by itself stipulating a fully detailed set of regulations.[1888] Or it could "provide for" those purposes by doing nothing more than allowing individual States to establish their own regulations, consistent with constitutional principles, but specifically tailored to their particular circumstances. Or it could promulgate some basic regulations to which the States would be free to and should add such complementary and supplementary regulations as their peculiar needs might require. And in default of Congressional action, the States could provide for all those matters themselves pursuant to their concurrent powers over their Militia.

Except in extreme circumstances, however, "well regulated Militia" by that name may not be revitalized directly by Local communities. During *pre-*constitutional times, Militia were always "well regulated" pursuant to some Colonial or State statute which emanated from the General Assembly or other supreme legislative authority. This requirement was carried over into the Constitution, when it incorporated "the Militia *of the several States*"—not the Militia of innumerable Local jurisdictions—into its federal system. And for good reason. Throughout the United States, Localities are mere creatures of their States, exercising only such limited governmental powers as the States' constitutions and laws delegate to them. Inasmuch as "'[p]olitical power grows out of the barrel of a gun'", and her "well regulated Militia" is the highest because the most puissant embodiment of popular

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[1885] *See* Declaration of Independence.

[1886] Virginia Declaration of Rights (1776) art. 13.

[1887] U.S. Const. amend. II.

[1888] U.S. Const. art. I, § 8, cl. 16.

sovereignty in a State, independent control over the Militia—such as the power to revitalize it at will—can never be vested in a Locality without setting up a miniature *imperium in imperio*.[1889] To be sure, in principle a State's constitution or laws could delegate some carefully limited authority of that nature to her Localities—always, of course, subject to supervision and control by the State herself. But in practice that delegation would have to be rather explicit and specific, in order to avoid a charge of usurpation against Local officials. Nonetheless, in the absence of sufficient action by either Congress or a State's legislature to revitalize the Militia, presumably most Localities within a State would enjoy sufficient authority to establish community-self-defense organizations under the control of "Committees of Safety" set up by and operating subject to the Localities' normal governing bodies. Having no authorization from either Congress or a State's legislature, though, these organizations could not qualify as true Militia (although they might be able to perform many of the Local "homeland-security" functions of Militia), and therefore would enjoy none of the specifically *constitutional* rights, powers, privileges, and immunities that true Militia do.

2. Although Localities may not themselves provide the legal impetus for revitalization of the Militia, they should nevertheless be made the focal points of the process. In addition to preparing Local communities to act in unison, either on behalf of their State as a whole and under her direction for purposes of the State's "homeland security", or when and as "call[ed] forth" by Congress "to execute the Laws of the Union, suppress Insurrections and repel Invasions",[1890] every State and Congressional statute aimed at revitalizing the Militia should devolve upon those communities both: (i) as much autonomy, authority, and ability to function independently in the operations of the Militia units within their own jurisdictions as they could prudently be entrusted to assume and exercise; and (ii) the responsibility and capability to coöperate amongst themselves in aid of the "homeland-security" needs of neighboring communities within their State—so that, to the greatest degree practicable, the people within each State would be prepared, in the face of any plausibly foreseeable emergency, to provide themselves with at least minimally adequate "homeland security" for some reasonable period of time without assistance from the General Government, the central government of their own State, or the government of any other State.[1891] Because no substitute for self-reliance exists when reliance on others proves unavailing, a prudent people must always be ready, willing, and able to rely upon themselves.

[1889] Figuratively, "a state within a state".

[1890] U.S. Const. art. I, § 8, cl. 15.

[1891] Of course, if Congress required the States to supply some "Part[s] of the[ir Militia]" to "be employed in the Service of the United States", selection of the units to be "call[ed] forth" would not be subject to either State or Local control unless Congress so authorized. *See* U.S. Const. art. I, § 8, cls. 15 and 16, *and* art. VI, cl. 2.

3. In the initial stages of revitalization of the Militia—when imagination, flexibility, experimentation, and maximal use of minimal resources will be most necessary—Local governmental bodies, in conformity with general Congressional and specific State standards, should be authorized, encouraged, enabled, and equipped *inter alia* to:

- Place the Militia in each Locality under the immediate overall command of a Local "Committee of Safety" composed of designated members of the Local governing body and selected Captains of the regular Militia Companies and "Independent Companies" organized within that body's jurisdiction—with the understanding that: (i) Local "homeland security" is the Militia's primary responsibility. (ii) The State's Governor (or other official appointed as her Militia's "commander in chief") may call out the Militia of any Locality for service in another Locality within the State, or possibly within another State, only pursuant to specific authorization in the State's Militia laws. And (iii) the Militia may come under the command of the President only "when called into the actual Service of the United States" for the sole purposes of "execut[ing] the Laws of the Union, suppress[ing] Insurrections and repel[ling] Invasions".[1892]

- Inform residents of the community of their duty to serve in the Militia, and the options available to them for fulfilling that duty.

- Establish special categories of exemptions responsive to peculiar Local conditions.

- Determine the numbers, types, structures, and sizes of Militia units appropriate for each region in the Locality.

- Encourage the formation of Independent Companies in order to supply highly specialized units and to provide working models for organizing the remainder of the Militia.[1893]

- Ascertain where various Militia units composed of specialists, or requiring the use of specialized equipment, should be based.

- Promulgate the initial procedures by which Militiamen within each unit may select their officers.

- See to it that: (i) All individuals eligible for Militia service (other than conscientious objectors) who are financially capable of providing themselves with suitable firearms, ammunition, and related accoutrements obtain that equipment within some reasonable period of time, and

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[1892] On the last of these points, *see* U.S. Const. art. I, § 8, cls. 15 and 16, *and* art. II, § 2, cl. 1, *discussed ante*, at 871-880

[1893] *See post*, Chapter 44.

thereafter at all times maintain personal possession of it, in good order, in their places of abode. And (ii) the Militia itself or for some agency of Local government will provide or otherwise assist in the provision of firearms, ammunition, and necessary accoutrements, on fair conditions, to those individuals who are financially unable to purchase that equipment.

• Devise and put into practice a method for regularly assessing Militiamen's compliance with the requirement that at all times they maintain personal possession of firearms, ammunition, and related accoutrements suitable for Militia service and in good order.

• Secure adequate reserves of firearms, ammunition, accoutrements, and other matériel in conveniently situated arsenals, magazines, and depots under the Militia's direct and exclusive supervision.

• Allow through normal judicial process for fines to be assessed against or other sanctions to be imposed upon Militiamen who default in their duties (with all fines so collected to be turned over to the Militia to defray its necessary and proper expenses), until Militia courts-martial have been established (and even thereafter for dealing with misbehavior during Militia service that cannot constitutionally be subject to courts-martial).[1894] And,

• Arrange for regular courses of training and instruction, and field exercises, to be conducted according to schedules and in manners that do not overly interfere with Militiamen's normal employment and other necessary social activities, with special emphasis to be placed on the particular threats to "homeland security" that confront the Locality.

One absolutely necessary exception to the limitation on "field exercises" would be a mandate that the Militia in each community, in concert with the Militia in all other communities throughout the Locality and the State, should conduct a continuous and intensive exercise aimed at: (i) the introduction into the State's public financial transactions and her private economy as a whole of an alternative currency consisting of silver and gold fully capable of competing with Federal Reserve Notes; and (ii) the creation of an alternative structure of prices denominated in that alternative currency; so that (iii) in the event of a catastrophic failure of the Federal Reserve System the State's government and private economy could abandon the use of Federal Reserve Notes and continue to function with the least possible disruption. This operation might be seen as a "field *deployment*" of

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[1894] *See* U.S. Const. amend. V: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger[.]"

the Militia, rather than a "field exercise", inasmuch as its purpose would be to *replace* one set of "normal activities" (based on the use of Federal Reserve Notes) with another set (based on the use of an alternative currency) as soon as economic conditions warranted the change. In the context of a National economy permeated with ham-handed political interference and sophisticated financial fraud organized and perpetrated at the highest levels in the District of Columbia and New York City, other instances of such "field deployments" can easily be imagined.

After revitalization of the Militia has been accomplished, the highest commanders of the Militia in each Locality will take on most of these responsibilities, where appropriate in consultation and coöperation with the Local governing bodies.

B. Local control of the Militia the facilitator and guarantor of popular sovereignty. Although such painstaking Local organization and command can be mandated easily enough in a State statute, they cannot be made to work in the field unless their source, sustenance, and structure derive from WE THE PEOPLE themselves, as a result of THE PEOPLE'S recognition that "homeland security" imposed "from the top down" is unsupportable as a matter of constitutional law, unworkable as a matter of fact, and unacceptable as a matter of political principle.

1. Local control a fundamental constitutional principle. Local organization and command are inherent in the historical understanding of the term "[a] well regulated Militia"—which understanding, of course, controls the constitutional definition of that term.[1895] Not surprisingly, therefore, in numerous ways the Constitution recognizes the primacy of Local control over the Militia.

a. Rather than creating an unitary "Militia *of the United States*", the Constitution incorporates within its federal system the multiple "Militia *of the several States*"[1896]—which is why the Constitution refers to the Militia in the *plural*, in the power of Congress "[t]o provide * * * for governing such Part *of them* as may be employed in the Service of the United States".[1897] Thus, the Constitution recognizes that there are as many "Militia" as there are "States", and that each of these "Militia" has, perforce of the Constitution, as permanent an existence as the State to which it appertains. In contrast to the "Troops, or Ships of War" that "[n]o State shall, without the Consent of Congress, * * * keep * * * in time of Peace",[1898] ***no State needs "the Consent of Congress" to maintain her own Militia.*** To the contrary: For public officials in any State to neglect or refuse to maintain "[a] well

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[1895] *See ante*, at 63-81.

[1896] U.S. Const. art. II, § 2, cl. 1 (emphasis supplied).

[1897] U.S. Const. art. I, § 8, cl. 16 (emphasis supplied).

[1898] U.S. Const. art. I, § 10, cl. 3.

regulated Militia"—particularly if Congress fails, neglects, or refuses "[t]o provide for organizing, arming, and disciplining, the Militia"[1899]—constitutes the most serious possible violation of their "Oath[s] or Affirmation[s], to support th[e] Constitution",[1900] because it endangers "the security of a free State",[1901] upon which *all* constitutional rights, powers, privileges, and immunities depend.

b. The Constitution allows the Militia to be "call[ed] forth" into "the Service of the United States" for only three specific reasons: namely, "to execute the Laws of the Union, suppress Insurrections and repel Invasions".[1902] Otherwise, the Militia serve State and Local purposes alone, because they are the several States' own establishments.

c. The Constitution authorizes Congress "[t]o provide for organizing, arming, and disciplining, the Militia"—but with the explicit restriction on that power: "reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress".[1903] In the final analysis, "organizing, arming, and disciplining" may often prove to be largely matters of form. More consequential to the actual performance of the Militia may be the identities of their "Officers", and particularly the "Officers[']" attachments to the Militiamen and the Militiamen's attachments to them, which arise out of everyone's close association in such activities as "training", and which make for loyalty to and cohesion of those institutions in the midst of adversity. So, with "the Appointment of the Officers" (other than the President of the United States himself[1904]) left to the States, the real power of command and control will reside there, in the hands of THE PEOPLE themselves.

Of crucial importance, the language—"reserving to the States respectively, the Appointment of the Officers" in the Militia—establishes *an absolute Congressional disability*. Congress can claim *no power whatsoever* with respect to "the Appointment of th[os]e Officers". As the Tenth Amendment makes clear in relation to this type of situation, "[t]he powers not delegated to the United States * * * are reserved to the States respectively"—so, inasmuch as "the Appointment of the Officers" is explicitly "reserv[ed] to the States respectively", the power to appoint such "Officers" is just as explicitly "not delegated to the United States". The absolute constitutional disability for Congress to exercise this power also entails an absolute constitutional disability for the States to cede this power to Congress:

[1899] U.S. Const. art. I, § 8, cl. 16.

[1900] U.S. Const. art. VI, cl. 3.

[1901] U.S. Const. amend. II.

[1902] U.S. Const. art. I, § 8, cls. 15 and 16.

[1903] U.S. Const. art. I, § 8, cl. 16.

[1904] *See* U.S. Const. art. II, § 2, cl. 1.

Having been explicitly "reserv[ed] to the States" by the Constitution, absent an Amendment of the Constitution it *cannot under any circumstances* be transferred, directly or indirectly, by any one or even all of them to Congress.

For that reason, Congress cannot condition grants of public moneys to the States—for the ostensible purpose of "organizing, arming, and disciplining, the Militia"—upon the States' agreement to allow Congress to dictate terms for "the Appointment of the Officers" in the Militia. True enough, Congress has the "Power to lay and collect Taxes * * * to * * * provide for the common Defence",[1905] and may expend "Money" collected for that purpose and then "drawn from the Treasury [of the United States], * * * in Consequence of Appropriations made by Law".[1906] The term "common Defence", however, must be construed consistently with the rest of the Constitution. For all constitutional "principles are of equal dignity, and n[one] must be so enforced as to nullify or substantially impair [any] other".[1907] Constitutional reservations of various powers to the States—and corresponding disabilities in both Congress and the States as to the subjects of those powers—define in part what the Constitution intends "the common Defence" to protect. So rogue Congressmen cannot "provide for the common Defence" by usurping powers directly, or by bribing rogue public officials in the States into assisting them in doing so. Any requirement purportedly enacted by Congress that, as the condition of the States' receipt of "Money * * * drawn from the Treasury [of the United States]" for the purpose of "organizing, arming, and disciplining, the[ir] Militia" (or for any other purpose, for that matter), the States must acquiesce in "the Appointment of the Officers [in their Militia]" other than by themselves alone would be null and void *ab initio* as in direct conflict with Congress's and the States' constitutional disabilities with respect to such "Appointment[s]". And any purported "Appropriations" to that end, being intended to facilitate rogue Congressmen's usurpation of power and rogue State officials' complicity therein, would not be "made *by Law*", because they would be in direct violation of "the supreme Law of the Land",[1908] and therefore would be null and void *ab initio*, too.[1909]

For generations, however, the pellucidity of the Constitution on this score has escaped both Congressmen and public officials in the several States. As explained above,[1910] as part of a scheme for surreptitiously disestablishing the

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[1905] U.S. Const. art. I, § 8, cl. 1.

[1906] U.S. Const. art. I, § 9, cl. 7.

[1907] Dick v. United States, 208 U.S. 340, 353 (1908).

[1908] U.S. Const. art. VI, cl. 2.

[1909] *See, e.g.*, Norton v. Shelby County, 118 U.S. 425, 442 (1886); Huntington v. Worthen, 120 U.S. 97, 101-102 (1887); *Ex parte* Siebold, 100 U.S. 371, 376-377 (1880), *quoted with approval in* Fay v. Noia, 372 U.S. 391, 408 (1963).

[1910] *See ante*, at 786-793.

Militia, in 1916 Congress purported to define "[t]he militia of the United States" as "be[ing] divided into three classes, the National Guard, the Naval Militia, and the Unorganized Militia".[1911] For the first time, too, although Congress treated the National Guard as some sort of "militia", this same statute established distinct Congressional standards for this supposed "militia's" officers—in effect, stripping the States of the power the Constitution reserves to them for "the Appointment of the Officers [in the Militia]".[1912] Congress brought about the States' compliance by threatening to withhold from defiant States *all* financial and other assistance in relation to the National Guard: "Whenever any State shall, within a limit of time to be fixed by the President, have failed or refused to comply with or enforce any requirement of this Act, or any regulation promulgated thereunder and in aid thereof by the President or the Secretary of War, the National Guard of such State shall be debarred, wholly or in part, as the President may direct, from receiving from the United States any pecuniary or other aid, benefit, or privilege authorized or provided by this Act or any other law."[1913] Thus, in as plain an exhibition of legislative psychosis as one could imagine, Members of Congress purported to exercise one of that body's constitutional powers—namely, "[t]o provide for organizing, arming, and disciplining, the Militia"—by refusing to abide by one of its constitutional disabilities as to the selfsame subject matter, *explicitly set out in the very same clause of the Constitution*—namely, to "reserv[e] to the States respectively, the Appointment of the Officers".[1914]

Worse yet, in that same statute Congress required each "enlisted man" in the National Guard to "sign[ ] an enlistment contract" and take an "oath of enlistment" that he would "'obey the orders of the President of the United States and of the governor of the State of —— , and of the officers appointed over me according to law and the rules and articles of war'".[1915] The President, however, is "Commander in Chief * * * of the Militia of the several States", not at all times, but *only* "when [they are] called into the *actual* Service of the United States", for one or more of the three purposes the Constitution enumerates.[1916] So a purported "militiaman's" "oath of enlistment" as to the President, not qualified by the requirement that it can apply *only* during such "*actual* Service", is deceptively

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[1911] An Act For making further and more effectual provision for the national defense, and for other purposes, Act of 3 June 1916, CHAP. 134, § 57, 39 Stat. 166, 197; *now codified as amended at* 10 U.S.C. § 311.

[1912] Act of 3 June 1916, §§ 74 and 75, 39 Stat. at 201-202; *now codified as amended at* 32 U.S.C. §§ 305(a), 307 through 310, and 313(b).

[1913] Act of 3 June 1916, § 116, 39 Stat. at 212; *now codified as amended at* 32 U.S.C. § 108.

[1914] *See* U.S. Const. art. I, § 8, cl. 16.

[1915] Act of 3 June 1916, § 70, 39 Stat. at 201; *now codified as amended at* 32 U.S.C. § 304 (which extends the enlistment contract and oath to "[e]ach person enlisting in the National Guard"). This Act included a similar "oath of office" for "[c]ommissioned officers of the National Guard". § 73, 39 Stat. at 201; *now codified at* 32 U.S.C. § 312.

[1916] U.S. Const. art. II, § 2, cl. 1 (emphasis supplied) *and* art. I, § 8, cl. 15. *See ante,* at 871-880.

overbroad. Similarly, a "governor of [some] State" is no *constitutional* "Officer[ ]" in the Militia simply because he happens to be the "governor", but only if some constitutional provision or statute of that State invests him with such an "Appointment". So a purported "militiaman's" "oath of enlistment" as to the "governor", not qualified by the requirement that it can apply only to a "governor" actually under "Appointment" by the State as an "Officer[ ]" in her Militia, is deceptively overbroad. And the statutory requirement that each enlisted man agrees to "obey the orders * * * of the officers appointed over me according to law and the rules and articles of war"—when the same statute requires those "officers" to be "appointed" according to National standards—is patently overbroad, too.

Nonetheless, one cannot condemn the Act of 1916 as necessarily unconstitutional—for were the various States' components of the National Guard and the Naval Militia taken to be constitutional Militia, the statute might be narrowly construed by THE PEOPLE and the courts to permit the "oath of enlistment" to apply only under the specific conditions just considered.[1917] On the other hand, the statute might be construed to treat those components of the National Guard and the Naval Militia, not as any parts of "the Militia of the several States" at all, but instead as some of the "Troops, or Ships of War" the States may "keep * * * in time of Peace" "with[ ] the Consent of Congress".[1918] Were that the true character of the National Guard and the Naval Militia (which is far more plausible than their being any kind of constitutional Militia), Congress arguably could condition its "Consent" on the States' compliance with various regulations, and could revoke its "Consent" by withholding funds or other assistance from those States which refused to comply. In the absence of such constructions, however, and especially in the presence of the misperception public officials assiduously foster among common Americans that the National Guard especially (and the Naval Militia, too) constitute some species of "militia", the whole matter is a veritable unconstitutional shambles which makes a hash of the principle of Local organization and command.

d. The Second Amendment declares that "the right of the people to keep and bear Arms, shall not be infringed". No matter to what else it may pertain, first and foremost "the right * * * to keep and bear Arms" aims at enabling "the people" to serve in "well regulated Militia". Inasmuch as this "right", having that purpose, "shall not be infringed" by public officials, "the people" must enjoy the component rights: (i) to demand that Congress "provide for organizing, arming, and disciplining, the Militia" in such wise as to enlist full participation by "the people"

[1917] *See, e.g.,* Crowell v. Benson, 285 U.S. 22, 62 (1932); National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U.S. 1, 30 (1937); Lynch v. Overholser, 369 U.S. 705, 710-711 (1962); United States v. Thirty-seven (37) Photographs, 402 U.S. 363, 369 (1971).

[1918] U.S. Const. art. I, § 10, cl. 3. *See ante*, at 786-793.

therein;[1919] (ii) in the event of default by Congress in this regard, and even in the face of opposition from rogue public officials in the General Government, to demand that the States organize, arm, and discipline their Militia independently of that government; and (iii) in the event of default by both Congress and the States, and even in the face of opposition from rogue public officials in both the General Government and the States' governments, to organize, arm, and discipline themselves in "well regulated Militia". None of these component rights may be "infringed" by public officials, either—because, if any of them were, then that "infringe[ment]" would effectively nullify the composite right that embraces them all (that is, "the right of the people to keep and bear Arms") as to its primary purpose.

These component rights, and the composite right which melds them all, must be exercised by individuals within the "militia, composed of the body of the people, trained to arms".[1920] Therefore, "the Militia of the several States" must be organized in each State where "the body of the people" is actually to be found; where "the people * * * keep * * * [their] Arms"; where "the people" can conveniently and efficiently "train[ ] to arms"; where "the people" can be expected to "bear Arms" in their own hands in quick and decisive deployments in the event of sudden emergencies; and where, in the final analysis, the actual "bear[ing] of Arms", pursuant to "the right of the people" to do so, "shall not be infringed" by rogue public officials—which in all of these respects is where "the people" themselves live, and under their own Local organization and command.

e. The Tenth Amendment resoundingly confirms all of this. It provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people". And, in any particular case, "[t]he burden of establishing a delegation of power to the United States or the prohibition of power to the states is upon those making the claim".[1921]

(1) The Constitution explicitly delegates to Congress the power "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions" *only*.[1922] This enumeration of just three specific purposes would be senseless were Congress licensed to "provide for calling forth the Militia" for every imaginable purpose. In that case the power would read "[t]o provide for calling forth the Militia" *simpliciter*. Therefore, the power "[t]o provide for calling forth the Militia" for any other than one or more of those three purposes

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[1919] *See* U.S. Const. art. I, § 8, cl. 16.

[1920] Virginia Declaration of Rights (1776) art. 13.

[1921] Bute v. Illinois, 333 U.S. 640, 653 (1948).

[1922] U.S. Const. art. I, § 8, cl. 15.

is "not delegated to the United States". *Inclusio unius exclusio alterius*.[1923] And "it is * * * imperative that where * * * limitation is placed upon the power of Congress that * * * limitation should be enforced in its spirit and to its entirety".[1924]

Moreover, Congress's power to "provide for calling forth the Militia" cannot be doubly exclusive, in the sense that only Congress may so "provide", and then only for those three purposes. For, were that the case, the Militia would be "the Militia *of the United States*", rather than (as the Constitution actually denotes them) "the Militia *of the several States*".[1925] But the Constitution explicitly empowers Congress "[t]o provide * * * for governing such *Part* of them [that is, the Militia] *as may be employed in the Service of the United States*", *not* all of the Militia at all times.[1926] This is at once both the delegation of a power *and the imposition of a disability*. And the Constitution designates the President as "Commander in Chief * * * of the Militia of the several States, *when called into the* ***actual*** *Service of the United States*", *not* (as with "the Army and Navy of the United States") at all times.[1927] Again, this is at once both the grant of an authority *and the conditioning of that grant upon contingent facts*. Thus, the Constitution explicitly recognizes that only "Part" of the Militia might be "call[ed] forth"; that only the "Part" "call[ed] forth" will be "employed in the Service of the United States"; and that "the actual Service of the United States" includes only one or more of the three constitutional purposes (because no other possible purposes for that "Service" are allowable). Therefore, the Constitution does not delegate to—but explicitly withholds from—Congress any power "[t]o provide for calling forth" *any* "Part" of the Militia at *all* times and for *all* possible purposes; and it does not delegate to—but explicitly withholds from—the President the authority of "Commander in Chief * * * of the Militia" at *all* times and for *all* possible purposes. Which means that, whenever they are not "call[ed] forth" in whole or in "Part" for one or more of the three constitutional purposes, the Militia will *not* be "in the Service of the United States", or under the command of the President, *in any way*. As, of course, should be obvious from their very designation as "the Militia *of the several States*".

The Constitution does not contemplate that, when not in "the actual Service of the United States", the Militia will simply be idle as a matter of fact, let alone incapable of employment as a matter of law. Self-evidently, the three purposes for which Congress may "provide for calling [them] forth" are not the only purposes that the Militia in principle can serve, or in fact did serve during *pre-*constitutional times. Indeed, the set of other possible purposes includes every imaginable activity

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[1923] "Inclusion of the one is exclusion of the other."

[1924] Fairbank v. United States, 181 U.S. 283, 289 (1901).

[1925] U.S. Const. art. II, § 2, cl. 1 (emphasis supplied).

[1926] U.S. Const. art. I, § 8, cl. 16 (emphasis supplied).

[1927] U.S. Const. art. II, § 2, cl. 1 (emphasis supplied).

within the modern concept "homeland security". Nowhere in the Constitution is the power to call forth their Militia for such purposes "prohibited * * * to the States". Rather, that the Constitution denotes the Militia as "the Militia *of the several States*" excludes the possibility of such a prohibition.

Furthermore, it would be ridiculous to suggest that the States could not employ *their own* Militia to execute *their own* laws—when Congress's power "to provide for calling forth the Militia" is limited in that general respect "to execut[ing] the Laws *of the Union*". Or to suggest that the States could not employ *their own* Militia to "suppress Insurrections" within *their own* territories. For although the Constitution imposes upon the United States the duty to "protect each of the[States] * * * on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence",[1928] and although the United States might fulfill this duty as to one State by "calling forth the Militia" of other States, the Constitution obviously foresees that no State need make any such "Application" when she can suppress "domestic Violence" by herself. Which implies that the States must always retain the ability to do so, at least in principle. But, because the States *are* prohibited from "keep[ing] Troops * * * in time of Peace" "without the Consent of Congress",[1929] that ability must depend upon their Militia, and the power "reserved to the States respectively" to employ their Militia for that purpose.

It would as well be the very apogee of absurdity to suggest that the States could not employ *their own* Militia to "repel Invasions" of *their own* territories. For although the Constitution imposes on the United States the duty to "protect each of the[States] against Invasion",[1930] and although the United States might fulfill this duty as to one State by "calling forth the Militia" of other States (as well as the regular Armed Forces), the Constitution cannot guarantee that succor from these sources will arrive in good time. Which again implies that the States must always retain the ability to protect themselves, at least in principle. In this situation, although only Congress is constitutionally authorized "[t]o declare War",[1931] the States are *not* prohibited from "engag[ing] in War" when "actually invaded, or in such imminent Danger as will not admit of delay".[1932] Nonetheless, inasmuch as the States *are* prohibited from "keep[ing] Troops, or Ships of War in time of Peace" "without the Consent of Congress", and inasmuch as a sudden invasion would leave them scant time to raise "Troops" or launch "Ships of War", the States' ability to repel invasions must in the final analysis depend upon their own Militia, and the

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[1928] U.S. Const. art. IV, § 4.

[1929] U.S. Const. art. I, § 10, cl. 3.

[1930] U.S. Const. art. IV, § 4.

[1931] U.S. Const. art. I, § 8, cl. 11.

[1932] U.S. Const. art. I, § 10, cl. 3.

"power reserved to the States respectively" to employ their Militia for that purpose.[1933]

In addition, the power to employ the Militia for purposes other than the three vouchsafed to Congress—and even with respect to those, if Congress fails, neglects, or refuses "[t]o provide for calling forth the Militia"—is "reserved" not only "to the States respectively" but also to "the people". Self-evidently, the power to call themselves forth in the Militia for all of these purposes must always inhere in "the people", because they *are* the Militia. Congress enjoys no power to declare who comprises the Militia. Neither do the States. For the definition of "Militia" is *constitutional* in nature, and therefore not subject to statutory modification.[1934] And the basic constitutional definition of "a well regulated militia" is "the body *of the people*, trained to arms", and exercising "the right *of the people* to keep and bear Arms" without "infringe[ment]" by public officials.[1935] Thus, the ultimate authority of "the people" over themselves in the Militia *cannot* have been "delegated to the United States" or even "reserved" to the States, and *cannot* have been "prohibited" to "the people". Instead, because "the people" *are* the Militia, "the people" must always retain—and therefore have permanently "reserved" to themselves—every authority and competence necessary for the full functioning of their Militia.

In particular, then, if usurpers and tyrants take over the apparatus of the General Government—such that *all* of "the Laws of the Union", especially "the supreme Law of the Land",[1936] are being mocked and violated—the States together with "the people" can call forth the Militia, and through the Militia can "execute the Laws of the Union" against such miscreants, no matter what those usurpers and tyrants might say or do. Perhaps of even greater consequence, if usurpers and tyrants seize control over the apparatus of both the General Government and the States' governments, "the people" by themselves and on their own initiative can call themselves forth in the Militia "to execute the Laws of the Union" and of their own

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[1933] This is hardly as far-fetched a concern as it might seem at first blush. For, as of this writing, the States which share the international border with Mexico have long been suffering from a massive influx of illegal aliens. Whether this *Volkerwanderung* is being orchestrated by what passes for a "government" in Mexico, and therefore constitutes an "invasion" in international law, may be debatable. But that it constitutes an "invasion" in fact cannot be doubted. Yet rogue officials in control of the General Government seem intent upon doing as little as possible to stem the tide—even preventing the States from engaging on their own in such obviously justifiable self-defensive measures as enforcing the laws of the Union that Congress has enacted, and presumably therefore desires to be enforced, but which the Executive Branch refuses to execute. *See* Arizona v. United States, No. 11-182, ___ U.S. ___ (2012). In principle, these States might be able to deploy their contingents of the National Guard to stem this tide. But in practice many of those contingents have already been or could be called up for duty with the regular Army in foreign military adventures, and therefore are or would be unavailable for duty along the border; and those remaining at home might be "federalized" and then required to obey orders from the President to stand down from any such operations.

[1934] *See, e.g.,* Eisner v. Macomber, 252 U.S. 189, 206 (1920). *See ante*, at 63-81.

[1935] Virginia Declaration of Rights (1776) art. 13 (emphasis supplied) *and* U.S. Const. amend. II (emphasis supplied).

[1936] U.S. Const. art. VI, cl. 2.

States against *all* rogue public officials, in vindication of constitutional government. Otherwise, "the good People" of America (as the Declaration of Independence styles them) would have no alternative but "to throw off such Government" entirely.

(2) The Constitution also delegates to Congress the power "[t]o provide for organizing, arming, and disciplining, the Militia", so that "such Part of them as may be employed in the Service of the United States" will be prepared to achieve the three purposes for which Congress may "provide for calling [them] forth".[1937] Congress cannot possibly determine, however, what may be necessary—in terms of "organizing, arming, and disciplining"—for all of the other purposes of "homeland security" for which the States may need to employ their Militia under ever-varying circumstances in the indefinite future. So, given the impossibility of Congress's accurately foreseeing, let alone adequately providing for, every eventuality, the States must enjoy the "reserved" power to "organiz[e], arm[ ], and disciplin[e]" their Militia for every purpose other than the three purposes the Constitution enumerates—and even for those purposes, in the event that Congress somehow defaults on its duty in that particular. And, if both Congress and the States default, then "the people" themselves must be able to exercise such a power.

The legal evolution from the Articles of Confederation to the Constitution supports no other conclusion. The Articles provided that "every state shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutred".[1938] The Articles delegated *no* power to Congress with respect to the Militia. Thus, the States' jurisdiction was exclusive, Congress's jurisdiction nonexistent. The Constitution transferred *part* of the States' jurisdiction to Congress—namely, "[t]o provide for organizing, arming, and disciplining, the Militia", so that the Militia would be prepared to be "call[ed] forth to execute the Laws of the Union, suppress Insurrections and repel Invasions" (for, once again, the Constitution identifies no other purpose for which the Militia "may be employed in the Service of the United States"). The remaining part of the States' original jurisdiction, *embracing every other possible employment of the Militia, and every form of "organiz[ation], arm[ament], and disciplin[e]" necessary and proper for such employment*, the Constitution must have "reserved to the States respectively, or to the people", because none of it is "prohibited * * * to the States", and none of it is or could be prohibited to "the people", inasmuch as "the people" *are* the Militia.

To be sure, if Congress enacts legislation relating to the Militia that is "in Pursuance" of its constitutional authority, all public officials in the States "shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary

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[1937] U.S. Const. art. I, § 8, cls. 16 and 15.

[1938] Arts. of Confed'n art. VI, ¶ 4.

notwithstanding".[1939] But if incompetent or rogue Members of Congress fail, neglect, or refuse "[t]o provide for calling forth the Militia" in a manner adequate for the three purposes the Constitution lists, or "[t]o provide for organizing, arming, and disciplining, the Militia" in a manner sufficient for those purposes, their default is not "in Pursuance" of the Constitution, but in dereliction or defiance of it. And if any such delinquency exposes the States to danger—which presumably it always will—then they are not bound supinely to acquiesce in it unto their own hurt. After all, America cannot long endure with "the Laws of the Union" unenforced and her populace exposed to "Insurrections" and "Invasions". Indeed, if such a situation were within the authority of Congress to allow, and actually came to pass, it would prove the utter failure of the Constitution to "establish Justice, insure domestic Tranquility, [and] provide for the common defence",[1940] and thereby would justify WE THE PEOPLE in exercising their ultimate reserved "Right * * * to alter or to abolish [the Government], and to institute new Government".[1941] So, as to "organizing, arming, and disciplining, the Militia" with respect to the three constitutional purposes for which they can be "call[ed] forth, the States enjoy a *contingent* concurrent jurisdiction—that is, one they can (and should) exercise if Congress is somehow derelict in the exercise of its jurisdiction.

Similarly, if incompetent or rogue Congressmen simply do nothing with regard to "organizing, arming, and disciplining, the Militia" in a manner suitable for achieving purposes of "homeland security" *other than the three the Constitution enumerates*, the States are not thereby constrained to do nothing themselves. After all, Congress's inaction could evidence simply its Members' belief (erroneous in law but harmless in fact) that Congress and the States enjoy concurrent jurisdiction in this regard, and that it is politic for Congress to encourage them to take the lead in legislation because of the complexity of the matter. Under the supposition of concurrent jurisdiction, Congressional silence can mean no more than acquiesce in the *status quo ante*. But the *status quo ante* for concurrent jurisdiction entails the right and power of the States to enact legislation concerning their Militia unless that legislation is inconsistent with legislation that Congress has the right to enact and *has actually enacted* (not merely *might possibly enact*). For only "the Laws of the United States *which shall be made* in Pursuance [of the Constitution] * * * shall be the supreme Law of the Land".[1942] "Laws" which are not "made" at all are, of course, not "Laws" at all, but simply nullities. On the other hand, Congress's inaction could evidence its Members' correct recognition that the subject lies entirely within the "reserved" powers of the States, and that therefore Congress is bereft of power to

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[1939] U.S. Const. art. VI, cls. 2 and 3. In lawyers' jargon, this is often called the principle of "preëmption".

[1940] U.S. Const. preamble.

[1941] Declaration of Independence.

[1942] U.S. Const. art. VI, cl. 2 (emphasis supplied).

enact any "Laws" on that subject "which shall be made in Pursuance [of the Constitution]". In either event, absent an express Congressional command for the States to abstain from such legislation, they are entitled to go ahead as they choose, on the basis of the legal maxim *qui tacet consentire videtur*.[1943] If, however, inaction by Congress is taken as a tacit directive that the States cease and desist from all legislation in that area, or if Congress issues an explicit directive to that effect, then either order must fail as being not "in Pursuance" of the Constitution, because Congress is disabled from compelling the States to refrain from "organizing, arming, and disciplining, the[ir own] Militia" with respect to any and all of the purposes as to which Congress lacks any authority "[t]o provide for calling [the Militia] forth". So, in either case, public officials in the States may act as they alone see fit. And if, for whatever reason, officials in the States do not act appropriately or especially at all in these situations, then "the people" themselves must take up the slack.

All of which proves that the powers to organize and command "the Militia of the several States" must be exercised to the greatest degree practicable at the Local level. For if these powers flowed from "the top down"—either from the General Government or from the States' governments, as public officials might find expedient—then *no* power at all would truly be "*reserved* * * * to the people", which contradicts the very definition of a constitutional "Militia". Whereas, because these powers flow "from the bottom up", they are capable *both*: (i) of being delegated by "the people" to Congress for the purposes of "provid[ing] for organizing, arming, and disciplining, the Militia" and "provid[ing] for calling [them] forth" to "be employed in the Service of the United States" for the purposes the Constitution species, and to the several States for the purpose of enacting statutes to organize and call forth "well regulated Militia" in every other way; *and* (ii) of being "reserved", in the sense of being subject to being recalled and reasserted by "the people" themselves at a moment's notice for their own use, if Congress or the States prove derelict in their duties.

2. Local control the only workable arrangement in practice. American constitutional law, of course, did not arise in a vacuum. The original Constitution and then the Second Amendment did not adopt and guarantee a system of Local organization and command for "the Militia of the several States" for no good reason. Throughout the *pre-*constitutional era, Americans distilled from their own practical experiences principles which they later infused into the declarations that "a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state",[1944] and that "[a] well regulated Militia", based squarely upon "the right of the people to keep and bear Arms", is "necessary

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[1943] "He who is silent"—in this case, Congress—"is seen to consent." Or, figuratively, "one's silence betokens his consent".

[1944] Virginia Declaration of Rights (1776) art. 13.

to the security of a free State".[1945] These statements were no mere ideological fancies, but instead were eminently realistic conclusions drawn from careful observations of real life. They became axioms of American constitutional law because they had been verified through the hardest of human experiences over many generations.

a. As pointed out above, "homeland security" must secure the *true* "homeland". Being the very places in which population, property, natural resources, industry, general economic activity, education, and accumulated wealth are concentrated, Localities need and deserve the most protection. America's Localities *are* America. They can survive perfectly well without hubristic political or economic "leadership" from the District of Columbia or the financial centers in New York City. Conversely, these cities are largely irrelevant without America's Localities.

b. All dangers initially arise Locally—everything that happens, after all, has to begin somewhere in particular. Therefore, the responses to threats against "homeland security" must initially be directed Locally, too. In the first instance, that must be accomplished with the people actually available at the times and in the places the threats arise. All other things being equal, the highest state of readiness in any community demands the greatest degree of self-reliance, self-sufficiency, and self-confidence on the part of ordinary people themselves, where they live and work. Only Militia organized and commanded from "the bottom up" will always be on the scene even before dangers strike, and then quickly and easily mobilized and deployed to where the dangers prove to be most acute.

c. Because threats against "homeland security" will affect the lives, liberties, and property of the people on the scene before and to a more serious degree than they affect anyone else, those people should be afforded as much control over the responses to those threats as practicable, consistent with the common defense and the general welfare of the larger community.

d. Because almost every American lives in one Locality or another, the Militia will be most easily organized, armed, disciplined, trained, and commanded at the Local level. "'Political power grows out the barrel of a gun'"[1946] in an *effective* manner, not simply to the extent that individuals adventitiously possess firearms, or to the extent that they fortuitously know how to use the arms they possess in isolation, but instead to the degree that each of them can employ his own arms together with others' arms *in a collective and organized fashion*. As Virginia learned from her *pre*-constitutional experience, "a well regulated militia, composed of the body of the people, *trained to arms*, is the proper, natural, and safe defence of a free

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[1945] U.S. Const. amend. II.

[1946] *Quotations From Chairman Mao, ante* note 28, at 61.

State".[1947] The goal is always near-universal, comprehensive, and thoroughgoing preparedness. But to approach such a high degree of readiness in any State will require that "the body of the people" be "trained to arms" in geographical proximity to where they live and work, so as to maximize their practical ability to muster and exercise on a regular basis while simultaneously minimizing the disruption of their normal lives. Organizing and instructing a State's Militia on a Local basis will enable its various units to be integrated into the basic economic and social fabrics of the communities in which they are based—perhaps not effortlessly, but more effectively and efficiently than could otherwise be accomplished.

e. Just as in *pre*-constitutional times, every "well regulated Militia" must be a *governmental* establishment today.[1948] And inasmuch as counties, cities, and towns are still America's foundational governmental subdivisions, basing the Militia on these already existing units of Local government will maintain political continuity, serve administrative regularity and convenience, and allow for the closest possible coördination of activity among the commanders of the Militia and other public officials.

f. The very opposite of decentralized Local organization and command based upon the principles of federalism, subsidiarity, and the division of labor is organization and command centralized in the District of Columbia, in some agency such as the Department of Homeland Security. Central control necessarily entails "bureaucratic central planning". And "bureaucratic central planning" raises the intractable problem of "rational economic calculation", even in this era of ever-more-powerful computers.[1949] "Rational economic calculation" involves the intelligent assessment and application of means to ends. Most broadly defined, economics is the science of human action. The essence of *human* action is behavior informed by some *rational* purpose.[1950] And behavior in that sense depends upon timely and accurate information from which can be made sound judgments by the individuals who have the greatest personal incentives to be correct and therefore to work together harmoniously and effectively in their mutual self-interests—*and who have the authority and the ability to act upon their judgments as soon as they may deem it necessary*. Thus, in *pre*-constitutional Virginia and today as well, "a well regulated militia" is the "*proper* * * * defence of a free state",[1951] because such a Militia is particularly "[f]it; accommodated; adapted; suitable; [and] qualified" for

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[1947] Virginia Declaration of Rights (1776) art. 13 (emphasis supplied).

[1948] *See ante*, Chapter 31.

[1949] *See, e.g.,* Trygve J.B. Hoff, *Economic Calculation in the Socialist Society,* M.A. Michael, Translator (London, England: William Hodge and Company Limited, 1949); Ludwig von Mises, *Economic Calculation in the Socialist Commonwealth* (Auburn, Alabama: The Praxeology Press of the Ludwig von Mises Institute, 1990).

[1950] *See* Ludwig von Mises, *Human Action: A Treatise on Economics* (Chicago, Illinois: Henry Regnery Company, Third Revised Edition, 1966), at 11.

[1951] Virginia Declaration of Rights (1776) art. 13 (emphasis supplied).

that purpose,[1952] inasmuch as a Militia "[b]elongs to the natural or essential constitution" of "a free State".[1953] To wit—

> • Even before a crisis strikes, Militia organized and commanded "from the bottom up" will already be well versed as to Local conditions, as well as being uniquely knowledgeable as to the personnel at hand, the resources available to them, the equipment actually in their possession, and their levels of preparedness. Moreover, organization "from the bottom up" will allow for the discovery, recruitment, training, and seasoning of many potential leaders whom organization "from the top down" would inevitably overlook. After all, individual imagination, innovation, and initiative cannot be derived from perusal of compendia of bureaucratic "position papers" and "guidelines" about "security", but must be developed, practiced, and perfected in the field.[1954]
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> • When a crisis does break out, Local Militiamen will necessarily be the first to obtain detailed intelligence identifying and assessing the character, extent, and seriousness of the danger. And they will have immediate access to other critical information as it becomes available. Indeed, because any distant center of command can receive the most accurate and timely information only from Local sources in proximity to the danger—and probably will not receive all of the information those sources collect, or at least will not receive it as quickly as it is collected—no distant gaggle of "central planners" can possibly devise responses to the threat as expeditiously or as comprehensively as the Militia units on the scene.
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> • Being fully apprised of the situation, Local Militia units will be able to intervene as soon as dangers became imminent, without having to await the tardy approval—let alone to abide the misinformed intervention, then correct the misjudgments—of distant and less knowledgeable "higher authorities". Indeed, Local Militia will be the only ones capable of taking effective remedial action immediately. Because they will know more about the situation sooner and in more detail than anyone else, they will be able to act more quickly and decisively than emergency personnel dispatched from the outside according to ill-formed notions concocted too late from too little information at some remote "command headquarters". And the ability

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[1952] S. Johnson, *Dictionary*, *ante* note 50, definition 5 in both the First (1755) and the Fourth (1773) Editions. *Accord*, *Webster's Third New International Dictionary, ante* note 330, at 1817, definitions 1, 1.d, and 1.e.

[1953] *Webster's Revised Unabridged Dictionary, ante* note 11, at 1148, definition 2.

[1954] "We are not fit to lead an army on the march unless we are familiar with the face of country * * * . We shall be unable to turn natural advantages to account unless we make use of local guides." *Sun Tzu on the Art of War*, Lionel Giles, Translator (London, England: Luzac & Company, 1910. *Reprinted in* Taipei, Taiwan, China: Literature House, Ltd., 1964), at 60, ¶¶ 13 and 14.

to deploy effectively on the spot in a timely fashion will justify the Local units' assumption of initial command.

•The responses of Local Militia units will likely produce the maximum effects, because the people actually on the scene will be intimately familiar with the lay of the land, thoroughly versed in their own plans for Local "homeland security", and as a result of regular training throughout the area prepared to implement those plans immediately. The sooner the danger is comprehended, confronted, and contained, the more quickly it can be eradicated.

•Local organization and command will work, because it will promote, as well as rely upon, *social solidarity and sympathy*. Militia Companies will be composed of individuals who know not only the lay of the land in terms of geography, patterns of residence, and economic activities, but also each other, as well as particular social and even *inter*-familial arrangements and understandings. And inasmuch as Militia officers, too, will be residents of the Localities, they will be especially familiar with the Militiamen under their command; and the Militiamen will have greater confidence in Local residents who have attained sufficient social standing to be selected as Militia officers than in strangers suddenly assigned to take charge from "the top down".

•Perhaps most importantly, in crisis situations Militiamen who are subject to Local organization and command will be highly motivated—not simply by concerns of personal self-interest, because they are defending their own homes and families, but also by an assurance of community self-reliance: that they know and can depend upon the individuals whom they have selected to lead them and with whom they have trained for just such eventualities.

3. Local control WE THE PEOPLE'S ultimate political protection. Yet, that Local organization and command of the Militia have been incorporated into "the supreme Law of the Land" in multiple ways, precisely because they work well in practice, is not sufficient to explain their preëminent importance. Also necessary is close examination of the overarching *political* purpose they serve—which is that *Local organization and command of the Militia embody and guarantee WE THE PEOPLE'S sovereignty and the freedoms that flow from it.*

a. Not surprisingly, both the Second Amendment in 1791—"[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed", and Article 13 of Virginia's Declaration of Rights in 1776—"a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state", made exactly the same point. For *all* relevant American *pre*-constitutional history

demonstrates that, by both definition and uniform practice, "a well regulated militia" was *always* "composed of the people"; "the people" in such a "militia" *always* exercised "the right * * * to keep and bear Arms", without "infringe[ment]" from public officials; and "the right * * * to keep and bear Arms" was *always* perfected by "the people's" being "trained to arms" with the very arms they personally possessed.[1955]

Going further, during the *pre*-constitutional era "security" (as that word was used in the Second Amendment) meant "freedom from fear", "[p]rotection; defense", and "[s]afety".[1956] "[S]afe" (as that word was used in Virginia's Declaration of Rights) meant "[f]ree from danger" and "[c]onferring security".[1957] And "free State" and "free state" in those two places self-evidently shared the identical meaning. So those two pronouncements—that "[a] well regulated Militia" is "necessary to the security of a free State" and that "a well regulated militia * * * is the * * * safe defence of a free state"—were precisely equivalent, too. In addition, "the security of a *free* State" and the "safe defence of a *free* state" entailed more than simply security and safety in a purely physical sense, to the effect that the Militia would protect merely the structure of the "State". Rather, those words promised security and safety in a *political* sense, to the effect that the Militia would guarantee the substance of "a *free* State"—"the Blessings of Liberty"[1958]—to WE THE PEOPLE from generation to generation .

Thus, these two textual statements can justifiably be conflated to set out in fullest detail the precept of American political science that they both express: namely, ***"A well regulated Militia", "composed of the body of the people, trained to arms," and exercising "the right of the people to keep and bear Arms" without "infringe[ment]" by public officials, is "the proper, natural, and safe defence of a free state", and therefore is "necessary to the security of a free State".***

b. But *why* should Americans during *pre*-constitutional times have concluded that "[a] well regulated Militia" is the "*natural* * * * defense of a free state"? Simply because, as they knew, the relationship between "[a] well regulated Militia" and "a free state" is "[p]roduced or effected by nature"[1959] and

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[1955] In addition to the close scrutiny given to the Militia Acts of Rhode Island and Virginia in the present study, *see generally* The Selective Service System, *Backgrounds of Selective Service, Military Obligation: The American Tradition, A Compilation of the Enactments of Compulsion From the Earliest Settlements of the Original Thirteen Colonies in 1607 Through the Articles of Confederation 1789*, Special Monograph No. 1, Volume II (14 Parts) (Washington, D.C.: Government Printing Office, 1947).

[1956] S. Johnson, *Dictionary*, *ante* note 50, definitions 1, 3, and 5 in both the First (1755) and the Fourth (1773) Editions.

[1957] *Id.*, definitions 1 and 3 in both the First (1755) and the Fourth (1773) Editions.

[1958] U.S. Const. preamble.

[1959] S. Johnson, *Dictionary*, *ante* note 50, definition 1 in both the First (1755) and the Fourth (1773) Editions.

"[d]iscoverable by reason" because "according to truth and reality".[1960] "A well regulated Militia" and "a free State" are the products of human laws. As the Declaration of Independence affirmed, all valid human laws derive from and must conform and be construed according to "the Laws of Nature and of Nature's God". And, as Blackstone explained, "the law of nature" contains "certain immutable laws of human nature, whereby * * * [men's] freewill is in some degree regulated and restrained"—and "in order to apply this [law] to the particular exigencies of each individual, it is * * * necessary to have recourse to reason: whose office it is to discover * * * what the law of nature directs in every circumstance of life; by considering, what method will tend most effectually to our substantial happiness".[1961] The American definition of "a free State" is one in which WE THE PEOPLE are not subject to command by others. Under the aegis of "the Laws of Nature and of Nature's God", WE THE PEOPLE "institute new Government, laying its foundations on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness".[1962] And WE THE PEOPLE "do ordain and establish" their own "supreme Law of the Land".[1963] Yet the "defence of a free state" requires more than that THE PEOPLE "institute new Government", "ordain and establish" laws, arrange for someone else to protect them through the use of arms, or even possess arms on their own as individuals. Rather, THE PEOPLE must organize *themselves* in order to control the use of *their own* arms, in *their own* hands, wherever *they* are, for *their own* purposes. The "'[p]olitical power [that] grows out of the barrel of a gun'"[1964] must *always* flow in a coördinated fashion "from the bottom up", not "from the top down".

Then, too, in America "a free State" and "a Republican Form of Government" are inextricably interconnected.[1965] By constitutional definition, "a Republican Form of Government" is "one constructed on th[e] principle * * * that the Supreme Power resides in the body of the people".[1966] True enough, "a Republican Form of Government" is based upon "the republican principle"—being "a government in which the scheme of representation takes place".[1967] But, being *only* "representative", THE PEOPLE'S representatives do not and can not exercise the highest authority in "a free State". Not at all. Immediately, they are bound by the

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[1960] *Id.*, definition 1 in the First (1755) Edition and 7 in the Fourth (1773) Edition.

[1961] *Commentaries on the Laws of England, ante* note 142, Volume 1, at 39-40, 41.

[1962] Declaration of Independence.

[1963] U.S. Const. preamble *and* art. VI, cl. 2.

[1964] *Quotations From Chairman Mao, ante* note 28, at 61.

[1965] *Compare* U.S. Const. art. IV, § 4 *with* amend. II. *See ante*, at 890-893 and 921-922, *and post*, at 1301-1307, 1451-1453, and 1497-1499.

[1966] Chisholm v. Georgia, 2 U.S. (2 Dallas) 419, 457 (1793) (opinion of Wilson, J.).

[1967] *The Federalist* No. 10 (James Madison).

principle of constitutionalism, which precludes them from even attempting to exercise governmental powers which THE PEOPLE have not delegated. And ultimately, they are subject to the power THE PEOPLE have reserved to themselves alone, in the Militia, through the principle that "'[p]olitical power grows out the barrel of a gun'". Under that principle, THE PEOPLE act directly as governors, seeking and needing approval from no "representatives" or anyone else. They are both the source and the executors of the supreme political authority in "a free State"; and from their decisions no possible appeals (in strictly human terms) lie. So, on that ground, too, power always flows "from the bottom up", never "from the top down".

c. In addition, *why* should Americans during *pre-*constitutional times have believed that "[a] well regulated Militia" is "*necessary* to the security of a free State", in the sense of being "indispensably requisite" to that end?[1968] Simply because they knew that "sovereignty"—in human terms, the supreme political power in every polity—is never in abeyance, but must always reside somewhere, to be executed by someone. As Blackstone explained, the creation of some sovereignty

> in nature and reason must always be understood and implied, in the very act of [men's] associating together: namely, that the whole should protect all it's parts, and that every part should pay obedience to the will of the whole; or, in other words, that the community should guard the rights of each individual member, and that (in return for this protection) each individual should submit to the laws of the community; without which submission of all it was impossible that protection could be certainly extended to any[.][1969]

So, inasmuch as "'[p]olitical power grows out of the barrel of a gun'", whoever determines the direction in which "the barrel[s] of [the community's] gun[s]" point thereby wields unchallengeable political power; and whoever wields such power, so that his directives are effectively "law", is the "sovereign". If WE THE PEOPLE fail to exercise that power by and for themselves—collectively to "guard the rights of each individual member [of the community]"—inevitably others will take advantage of their default, inexorably to THE PEOPLE'S harm. On this ground, then, THE PEOPLE themselves must control the use of their arms "from the bottom up". Here again, reason supports only this result.

d. And *why* should Americans during *pre-*constitutional times have believed that "the right of the people to keep and bear Arms, shall not be infringed"? Simply

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[1968] *See* S. Johnson, *Dictionary*, *ante* note 50, definition 1 in both the First (1755) and the Fourth (1773) Editions.

[1969] *Commentaries on the Laws of England, ante* note 142, Volume 1, at 47-48.

because they knew that if—as a consequence of their living in "a free State" with "a Republican Form of Government" and under popular sovereignty—WE THE PEOPLE themselves are entitled as of right to wield the highest measure of "'[p]olitical power [that] grows out of the barrel of a gun'", then public officials must labor under an absolute duty to refrain from any attempt to hinder THE PEOPLE in mobilizing, organizing, and deploying themselves in the "well regulated Militia" to which the exercise of "the right of the people to keep and bear Arms" primarily pertains. Such a duty is utterly inconsistent with control over THE PEOPLE'S possession and use of their arms by rogue officials "from the top down". Instead, such control must flow "from the bottom up", precisely in order to deter, resist, and put down such officials' machinations. Once again, reason excludes any alternative.

e. What Americans knew during the *pre-*constitutional era still applies today. Popular sovereignty in "a free State" with "a Republican Form of Government" remains impossible without "[a] well regulated Militia". Popular sovereignty starts with each able-bodied adult personally possessed of his own firearm, ammunition, and necessary accoutrements in his own home at all times—and trained to employ those arms (together with whatever specialized skills he may have) in a coördinated fashion with everyone else in the community for all of the purposes of "homeland security". This is Local control in physical fact, at the very grass roots. With Local control comes Local independence in fact—because organization of a fully articulated, armed, and trained citizenry "from the bottom up" provides an effective "check and balance" against any form of officious interference with the people's lives "from the top down". With Local independence comes Local political authority—for, as a consequence of holding the means of their own defense securely in their own hands, the people also possess the "'[p]olitical power [that] grows out of the barrel of a gun", and will realize that in law, morality, and reason they and no one else should exercise that power. With Local political authority *that can be enforced* comes sovereignty. The people themselves are sovereigns because they have the numbers, the armaments, the organization, the training, the physical possession of most of the property, and the political authority sufficient to protect their community as a whole from all enemies. To be sure, not every Locality that can muster "[a] well regulated Militia" will be capable of exercising *effective* sovereignty, because not every Locality will actually be able to defend itself by itself against all enemies. But a sufficiently extensive group of contiguous Localities, working together, will achieve that capability. Thus, Local organization and command of the Militia will create the conditions necessary for popular sovereignty in the same manner as separate dots or strokes of various colors, properly coördinated on a canvas through the technique of *pointillisme*, produce a picture when viewed as a whole.

f. Even popular sovereignty that finds its source and strength at the Local level does not do away with the need for higher levels of government, but indeed requires them—properly constrained by a constitution embodying the principles of federalism and subsidiarity. The bane of all constitutional government, however, is usurpation, usually followed in short order by tyranny. So the question must always be asked: *Quis custodes custodire poterit?*[1970] The answer is: With Local organization and command of "well regulated Militia" committed to constitutional principles, usurpation and tyranny can be detected, deterred, and defeated in short order.

The Members of Congress, "and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support th[e] Constitution".[1971] In addition, the President is required, "[b]efore he enter on the Execution of his Office", to "'solemnly swear (or affirm) that [he] will faithfully execute the Office of President of the United States, and will to the best of [his] Ability, preserve, protect and defend the Constitution'".[1972] For public officials to be "*bound* by Oath[s] or Affirmation[s], to support th[e] Constitution" implies a *legally enforceable* duty—for which the statutes of the United States now provide.[1973] In the final analysis, compliance with this duty in individual cases must be had through the imposition of *physical force* against the miscreants. But in extreme circumstances of usurpation and tyranny, no public officials may be available or willing to apply this force, either because they are usurpers and tyrants themselves, or because they do not dare to challenge the rogue elements of the Armed Forces or various *para*-military "police" agencies which the usurpers and tyrants have recruited or suborned. That leaves enforcement to WE THE PEOPLE. Which is highly appropriate, inasmuch as public officials are "bound by Oath or Affirmation", not to themselves alone, because then they would be "bound" only to the extent that they chose to treat themselves so; and not to other public officials alone, because then no "check and balance" would exist if the rot of usurpation and tyranny had spread sufficiently far throughout the governmental apparatus, when such a "check and balance" would be needed most; and not to the Constitution *in abstracto*, because it cannot enforce itself—but instead to THE PEOPLE, because an "Oath or Affirmation, to support th[e] Constitution" is necessarily an "Oath or Affirmation" of fidelity to WE THE PEOPLE who "ordain[ed] and establish[ed] th[e]

[1970] "Who will be able to watch the guardians?" Figuratively, "Who will govern the governors?"

[1971] U.S. Const. art. VI, cl. 3.

[1972] U.S. Const. art. II, § 1, cl. 7.

[1973] *E.g.,* 18 U.S.C. §§ 241 and 242. And this, with respect not only to individuals actually holding public offices, but also to private individuals who conspire with them. *See, e.g.*, *In re* Quarles, 158 U.S. 532 (1895); Logan v. United States, 144 U.S. 263, 293-295 (1892); United States v. Waddell, 112 U.S. 76, 77-81 (1884); *Ex parte* Yarborough, 110 U.S. 651 (1884).

Constitution".[1974] Thus, "[a] well regulated Militia"—organized and commanded "from the bottom up" at the Local level—is "necessary to the security of a free State", because "the security of a free State" demands that public officials *always be* "bound by Oath or Affirmation, to support th[e] Constitution", and because ultimately only THE PEOPLE can guarantee that officials *always are* so "bound". For if the Militia were organized and commanded "from the top down", control would necessarily concentrate in the hands of the very public officials *against whom* such control might need to be directed.

So today, just as in *pre-*constitutional times, decentralization remains the *desideratum* for revitalized "Militia of the several States". For Local enlistment, organization, training, command, and deployment will bring about maximum participation, preparedness, and effectiveness. Most importantly, *only* in Militia thoroughly organized at the Local level can WE THE PEOPLE protect themselves effectively against the most dangerous—as well as the most likely—form of breakdown in this country's political structure: what could be generalized as "the Dunmore scenario".[1975] If History is any guide, rogue public officials at the apex of America's political pyramid *will* attempt to transmogrify WE THE PEOPLE'S constitutional Republic into a puppet régime—misusing the law to break the law under color of the law for the benefit of avaricious factions and other selfish special-interest groups, domestic and foreign, while stridently defaming as "extremists" and even "terrorists" the patriots who expose and oppose them in the name and with the true support of the law. Predicting exactly how they will proceed is, of course, problematic. But knowing what American patriots' response must be is not. For the Constitution—properly construed to apply old but timeless principles to new problems—provides it, in no uncertain terms:

> Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is particularly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are * * * "designed to approach immortality, as nearly as human institutions can approach it." The future is their care, and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be. Under any other rule a constitution would indeed be as easy of application

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[1974] U.S. Const. preamble.

[1975] *See ante*, at 567-597.

> as it would be deficient in efficacy and power. Its general principles would have little value, and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.[1976]

"Rights declared in words" *will inevitably* "be lost in reality", if THE PEOPLE do not take care to ensure that the "words" are translated into whatever *actions* are necessary to overcome the dangers confronting them. Properly organized in Militia in their Local communities, though, common people need not, *and will not*, sit still while their country is subverted, looted, debauched, and destroyed before their very eyes. Instead, they can and will apply the self-reliance, self-sufficiency, and self-confidence they have developed through their Militia training to the vital task of reëstablishing true constitutional federalism, by building upon its irreplaceable foundation in self-government. For Local participation in the Militia will convince ordinary Americans, month after month and year after year in the most direct manner possible, that they should be and are in charge of their communities, and ultimately of their country as a whole, not just practically, but legally and politically as well—and that in the final analysis their "'[p]olitical power grows out of the barrel of a gun'" that each of them holds in his own hands as a consequence of his membership in the Militia.

[1976] Weems v. United States, 217 U.S. 349, 373 (1910).

CHAPTER THIRTY-EIGHT

Unless specifically exempted, all members of "the Militia of the several States" must acquire and thereafter at all times must maintain—and must be supported by public officials in their maintenance of—personal possession (and usually their own private ownership) of firearms, ammunition, and accoutrements suitable in any manner for Militia service.

Precisely because "'[p]olitical power grows out of *the barrel of a gun*'", Local organization of the Militia, although necessary to assert WE THE PEOPLE'S ultimate political authority in the most effective manner, is not sufficient to that end. *Equipment suitable for performing the Militia's tasks must also be at hand—**and always in the right hands***. Local control of the Militia, and of America's entire political system for which the Militia provide security, begins and ends with who actually holds the guns. Indeed, the possession of such equipment may arguably be more important than, or at least have priority over, organization—because no variety of mere organization can guarantee to provide suitable equipment; whereas proper equipment in THE PEOPLE'S own hands will inevitably serve whatever form of organization its possessors may choose to adopt. Thus, the conditions *sine qua non* to put into effect the organizational principle that "a well regulated militia" is "composed of the body of the people, *trained to arms*",[1977] are: *(i) THE PEOPLE themselves are required as a matter of law personally to, and as a matter of fact do, possess sufficient quantities of firearms, ammunition, and accoutrements suitable specifically for their Militia service. And (ii) THE PEOPLE'S permanent possession of that equipment is guaranteed by their absolute "right * * * to keep * * * Arms".*[1978]

A. The duty of permanent personal possession of firearms by all individuals eligible for service in the Militia. Other than as to conscientious objectors generally, and a few other exempted individuals rarely, *pre-*constitutional Militia statutes throughout America invariably required members of the Militia, within some fixed periods of time after their enrollments, to acquire and thereafter permanently to possess in their own places of abode at least one firearm, a supply of ammunition, and necessary accoutrements suitable for Militia service—to bring that equipment along with themselves to Militia musters, training, and the

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[1977] Virginia Declaration of Rights (1776) art. 13 (emphasis supplied).

[1978] U.S. Const. amend. II.

performance of other duty in the field—and then to return it to their homes, where it was to remain subject to their own control at all times.[1979]

Usually, the arms each Militiaman was required to obtain and possess were to be his own private property, which he purchased for himself in the free market out of his own resources, and thereafter kept in his own home under his own dominion, not arms owned, supplied, or controlled by any government or public official. Individuals exempted from normal Militia musters and training by dint of their critical public offices or private occupations were often required to arm themselves personally in the same manner as other Militiamen, or (as were some conscientious objectors) to provide arms to the Militia for other Militiamen's use. At their own expense, parents, guardians, masters, and mistresses with the ability to pay were expected to supply arms to the minor sons, wards, apprentices, and servants under their supervision who served in the Militia, and who (no differently from adults) kept their arms in their own homes. Even Militiamen who were too poor to purchase their own arms, and therefore to whom public arms were distributed, were usually required to maintain personal possession of that equipment. *Thus, most Militiamen's actual personal possession (and usually private ownership) of arms in their own homes at all times, mandated by law, constitutes one of the indispensable elements of the definition of "[a] well regulated Militia" among "the Militia of the several States".*[1980]

1. That requirement renders pellucid the meaning of the power WE THE PEOPLE delegated to Congress "[t]o provide for * * * arming * * * the Militia", so that they can be "call[ed] forth * * * to execute the Laws of the Union, suppress Insurrections and repel Invasions";[1981] as well as the nature of "the powers reserved to the States respectively, or to the people" with regard to arming the Militia.[1982] To wit—

a. The Constitution imposes a *permanently enforceable legal duty to be armed* upon every individual who is *eligible* to be a member of "the Militia of the several States" and who has not been granted an exemption.[1983] During the *pre-*

[1979] In addition to the comprehensive survey of the Militia Acts of Rhode Island and Virginia presented in the present study, *see generally* The Selective Service System, *Backgrounds of Selective Service, Military Obligation: The American Tradition, A Compilation of the Enactments of Compulsion From the Earliest Settlements of the Original Thirteen Colonies in 1607 Through the Articles of Confederation 1789,* Special Monograph No. 1, Volume II (14 Parts) (Washington, D.C.: Government Printing Office, 1947).

[1980] U.S. Const. amend. II *and* art. II, § 2, cl. 1.

[1981] U.S. Const. art. I, § 8, cls. 16 and 15.

[1982] U.S. Const. amend. X.

[1983] Conceivably, the members of a private *para*-military organization could agree by contract to arm themselves, with some penalty stipulated for those who failed to do so whilst they maintained their memberships in the group. But, even were such an organization legitimate under the laws of the jurisdiction in which it operated, and could obtain against dissident members an enforceable judicial decree for specific performance of such a contract, it could not require individuals to join in the first place. Lacking this power of impressment,

constitutional era, the duty of each individual, not otherwise exempted (such as conscientious objectors), to obtain and maintain personal possession of at least one firearm, ammunition, and necessary accoutrements was merely *statutory* in nature, and therefore presumably always subject to amendment, alteration, or even repeal by legislators. And that duty arose only with the actual enactment of some statute. As soon as through the original Constitution and the Bill of Rights "the Militia of the several States" became *constitutional* establishments that were required to be "well regulated" in accordance with *pre-*constitutional principles, the duty of each individual merely *eligible* for service in the Militia to possess arms became *constitutional*, too. Thereupon, an individual was required to fulfill the duty to possess firearms as soon as he became eligible for Militia service in principle, whether or not an actual statute provided for organizing and arming the Militia in practice where he lived. So, today, the right to possess arms—which most Americans consider to be embodied in "the right of the people to keep * * * Arms" in the Second Amendment, although it actually inheres in every mention of the "Militia" in the original Constitution, too—is the one constitutional right that everyone eligible for the Militia *must* exercise on his own, and can be *compelled* to exercise by statute, unless justifiably exempted. For, as the Second Amendment makes clear, "the security of a free State" depends upon the existence of "[a] well regulated Militia", and "[a] well regulated Militia" can exist only when "the people" *actually and fully* exercise "the[ir] right * * * to keep and bear Arms". Therefore, that "right" is necessarily a *permanent personal duty* as well. And, being a *constitutional* duty, it must be fulfilled by each and every individual subject to it *whether or not a specific statute to that effect has been enacted*. After all, "a free State" without "security" cannot effectively legislate anything. Thus, no statute, nor even the Constitution itself, can be the source of the duty to possess arms. Rather, the Constitution recognizes the duty to possess arms as the legal embodiment of the raw political power that is the foundation for all laws.

Of course, individuals not possibly eligible for Militia service at all have no constitutional duty to possess firearms. And the constitutional duty of those eligible for such service but statutorily exempted on proper grounds from that requirement is somewhat attenuated, in that they need to possess only such arms as they might be required to bring into the field in the event their statutory exemptions were repealed altogether or temporarily rescinded during an "alarm".[1984] Nonetheless, all of these individuals may still insist on a constitutional "right * * * to keep * * * Arms", to the extent that they are physically capable of doing so, for the purpose of personal self-defense. For self-defense constitutes execution of the law against an aggressor. And inasmuch as execution of the law is one of the primary functions of

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it would not qualify as a "militia". *See ante*, at 932-939.

[1984] *See ante*, at 222-224 and 257-258 (Rhode Island).

the Militia, an individual even preparing himself for, let alone actually engaged in, personal self-defense thereby performs a Militia service, and therefore should be entitled to all of the constitutional protections that appertain to members of the Militia in that regard, even if he is not himself a member of the Militia or although a member is exempted from the duty to possess a firearm.[1985] Indeed, on this ground, it would be proper to construe the Constitution as imposing a duty upon *every* adult who is physically and mentally capable of using a firearm responsibly (other than conscientious objectors) *always* to possess a firearm for purposes of personal self-defense. For example, an individual over (say) sixty years of age would normally be exempt from regular Militia service, and on that account not required to possess a firearm. But if he could use a firearm for self-defense he could be required to possess one for that purpose.

b. On its face, the power the Constitution delegates to Congress "[t]o provide for * * * arming * * * the Militia" authorizes Congress to arrange in some efficacious manner to have arms put into the hands of as many eligible individuals among WE THE PEOPLE as possible, so that they will be prepared at any and all times to be "call[ed] forth * * * to execute the Laws of the Union, suppress Insurrections and repel Invasions".[1986] This, for two reasons: *First*, the term "Militia" imports "the standing force of a nation" as a whole.[1987] And the Constitution intends "the Militia of the several States" to be *the only constitutionally permanent* "standing force of [the] nation", inasmuch as "no Appropriation of Money to [raise and support regular Armies] shall be for a longer Term than two Years".[1988] *Second*, "the Militia" to which the powers of Congress refer are "the Militia *of the several States*",[1989] which in their composition must always conform to the *pre-*constitutional principle recognized and applied in all of the States, that "a well regulated militia" is "composed of the body of the people".[1990]

If these verbal considerations are not enough, both a positive and a negative purpose compel construing Congress's power so as to allow its Members scant discretion with respect to how extensive "arming * * * the Militia" must be. Positively, the Constitution ensures that Congress will "provide for * * * arming" nearly the entirety of "the Militia of the several States", because nearly the entirety of the Militia, adequately equipped, may need to be "call[ed] forth" for one or more

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[1985] To this extent is justified the result—albeit certainly not all of the reasoning set out—in *District of Columbia* v. *Heller*, 554 U.S. 570 (2008) (Scalia, J., for the Court).

[1986] U.S. Const. art. I, § 8, cls. 16 and 15.

[1987] S. Johnson, *Dictionary, ante* note 50, in both the First (1755) and the Fourth (1773) Editions (emphasis supplied) .

[1988] U.S. Const. art. I, § 8, cl. 12.

[1989] U.S. Const. art. II, § 2, cl. 1 (emphasis supplied).

[1990] Virginia Declaration of Rights (1776) art. 13.

of the three constitutionally mandated tasks. Negatively, the Constitution commands that Congress will "provide for * * * arming" nearly the entirety of the Militia in order to prevent rogue Congressmen from attempting to disarm and thereby destroy the Militia by limiting WE THE PEOPLE'S access to arms. So, unless the Constitution can be read to license Congress to arrange for the impotence of the Militia under the very circumstances in which the Constitution declares them to be most needed, or to enable aspiring usurpers and tyrants to deny THE PEOPLE the tools necessary to deter and defeat usurpation and tyranny, Congress's power "[t]o provide for * * * arming * * * the Militia" must amount to a *duty* "[t]o provide for * * * arming * * * [nearly the entirety of] the Militia".[1991]

The qualification "*nearly* the entirety" is necessary because Congress must enjoy *some* discretion to allow for *some* exemptions consonant with *pre-*constitutional principles, under its power "[t]o provide for organizing * * * the Militia".[1992] So, although Congress must "organiz[e]" the entirety of the Militia,[1993] it may "arm[ ]" slightly less than the entirety of the Militia, with the difference being made up of those members of the Militia whom Congress may justifiably exempt from the requirement personally to possess arms. (Yet arguably these individuals would still be subject to a personal constitutional duty to possess arms, in the event their exemptions were repealed or otherwise rescinded, and for purposes of personal self-defense.) This legislative latitude, however, must be *exceedingly* narrow, because vanishingly few individuals other than conscientious objectors could conceivably put forward any rational basis consistent with "the common defence" and "the general Welfare"[1994] for requesting an exemption from the simple requirement to acquire and possess firearms and ammunition (particularly if the Militia itself or some other governmental agency were to supply them with that equipment, using moneys collected from Militia fines or general taxes).

The Second Amendment renders impossible any other interpretation of Congress's power.[1995]

c. If incompetent or rogue Members of Congress fail, neglect, or refuse to perform their duty "[t]o provide for * * * arming * * * the Militia", then the several States must provide for arming their own people, because the Militia are "the Militia *of the several States*". Here, Congress's power must be construed with reference not only to the Second Amendment, but also to the Tenth: "The powers not delegated

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[1991] *See ante*, at 50-54.

[1992] U.S. Const. art. I, § 8, cl. 16. *See ante*, Chapter 36.

[1993] *See ante*, Chapters 34 and 35.

[1994] *See* U.S. Const. preamble.

[1995] *See post*, Chapters 45 and 46.

to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

True enough, the Constitution does delegate to Congress the power "[t]o provide for * * * arming * * * the Militia", without any mention of the States. But the mere delegation of that authority does not render it *exclusive*, in the sense that under no circumstances may any one of the States, on her own initiative, provide for arming her own Militia—let alone that WE THE PEOPLE may not arm themselves. In general, the Constitution itself recognizes that not every power it "delegate[s] to the United States" is exclusive perforce of its delegation alone, because it explicitly prohibits the States from exercising some of them—and never explicitly prohibits THE PEOPLE from exercising any power that they are capable of exercising on their own. For example, the Constitution delegates to Congress the powers "[t]o coin Money" and "[t]o * * * grant Letters of Marque and Reprisal"[1996]—*and* explicitly prohibits the States from exercising those selfsame powers[1997]—but does not expressly prohibit THE PEOPLE from "coin[ing] Money", which they certainly have the ability to do without any governmental support. And the Constitution delegates to the President the "Power, by and with the Advice and Consent of the Senate, to make Treaties"[1998]—*and* explicitly prohibits the States from "enter[ing] into any Treaty"[1999]—a power, of course, which in the normal course of events THE PEOPLE cannot exercise on their own. If their delegations to the General Government alone made the powers in these examples exclusive, the corresponding prohibitions as to the States would be unnecessary. But it is inadmissible to "interpret the clause[s] in question as if th[e words] were not to be found in th[e Constitution]",[2000] or to "presume[ ] that any clause in the constitution is intended to be without effect".[2001] Rather, "effect [must] be given to each word of the Constitution".[2002] So, inasmuch as the power of Congress "[t]o provide for * * * arming * * * the Militia" is accompanied by *no* prohibition against any State's exercising an equivalent power as to her own Militia, and inasmuch as the power to arm "the Militia *of the several States*" was always the exclusive power of the Colonies and then the independent States prior to ratification of the Constitution, even under the Articles of Confederation,[2003] then in principle the

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[1996] U.S. Const. art. I, § 8, cls. 5 and 11.

[1997] U.S. Const. art. I, § 10, cl. 1.

[1998] U.S. Const. art. II, § 2, cl. 2.

[1999] U.S. Const. art. I, § 10, cl. 1.

[2000] Blake v. McClung, 172 U.S. 239, 261 (1898).

[2001] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803).

[2002] Knowlton v. Moore, 178 U.S. 41, 87 (1900).

[2003] *See* Arts. of Confed'n art. VI, ¶ 4 ("every state shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutred").

power of Congress and the power of the States in that regard must be *concurrent*, not exclusive on the one side and nonexistent on the other.

In general, too, the Constitution itself recognizes that, where no explicit prohibition exists, the States may legislate on many subjects that fall within the powers of Congress so long as "the Laws of any State" are not "to the Contrary" of "the Laws of the United States which shall be made in Pursuance [of the Constitution]".[2004] After all, only once among its list of Congressional powers does the Constitution explicitly declare that Congress's authority is always to be exclusive: namely, in the power "[t]o exercise *exclusive* Legislation *in all Cases whatsoever*, over such District * * * as may * * * become the Seat of the Government of the United States, and to exercise *like Authority* over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings".[2005] The unique use of "exclusive" in this clause establishes that, with respect to all of those other powers that the States might exercise in principle,[2006] Congress's legislative authority is presumptively concurrent with the legislative authority of the States—unless and until Congress *actually* enacts a "Law[ ] * * * in Pursuance [of the Constitution]", at which point that "Law[ ]" takes precedence over the contrary legislation of any State. For "[i]t is not the existence of the power [of Congress], but its exercise, which is incompatible with the exercise of the same power by the States".[2007] Otherwise, the States are ousted of legislative authority only where (as noted before) the Constitution contains an express prohibition to that effect,[2008] or where the very nature of Congress's power precludes its exercise by the States.[2009]

So, if Congress has simply not exercised its power "[t]o provide for * * * arming * * * the Militia", a State's law for arming her own Militia cannot be "to the Contrary" of "the Laws of the United States", there being nothing in the form of any actual "Law[ ] of the United States" to contradict. After all, to come into existence, "Laws of the United States" demand certain specifically prescribed

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[2004] U.S. Const. art. VI, cl. 2.

[2005] U.S. Const. art. I, § 8, cl. 17 (emphasis supplied).

[2006] *See, e.g.,* U.S. Const. art. I, § 8, cls. 3, 6, 7, 8, 10, 15, and 16; *and compare* art. I, § 8, cls. 12 through 14 *with* art. I, § 10, cl. 3 (when a State is "actually invaded, or in such imminent Danger as will not admit of delay").

[2007] Sturges v. Crowninshield, 17 U.S. (4 Wheaton) 122, 196 (1819).

[2008] *See* U.S. Const. amend. X. *Compare, e.g.,* U.S. Const. art. I § 8, cls. 1, 5, 11, 12, 13, and 14 *with* art. I, § 10, cls. 1 through 3.

[2009] *See, e.g.,* U.S. Const. art. I, § 8, cls. 1 ("[t]o lay and collect Taxes * * * to pay the Debts and provide for the common Defence and general Welfare *of the United States*"), 2 ("[t]o borrow Money on the credit *of the United States*"), 4 ("[t]o establish an *uniform* Rule of Naturalization, and *uniform* Laws on the subject of Bankruptcies *throughout the United States*"), and 9 ("[t]o constitute tribunals inferior to the Supreme Court").

constitutional *actions*, and therefore cannot arise out of *in*action.[2010] Indeed, if Congress took no action at all "[t]o provide for * * * arming * * * the Militia", the logical conclusion would be that it had decided "[t]o provide for" that purpose by leaving the matter of devising appropriate legislation entirely to the individual States, not that it had determined to leave the Militia utterly *un*armed (and therefore no "Militia" at all) and to coerce the States into acceding to that policy.

On the other hand, if rogue Members of Congress violate the Constitution by enacting a purported statute that "provide[s] for * * * [*dis*]arming * * * the Militia", a State's law for arming her own Militia cannot be "to the Contrary" of "the Laws of the United States", there being no such "Law[ ]" to contradict. True "Laws of the United States", after all, must be "made in Pursuance [of the Constitution]", not in defiance of it. And "[a]n unconstitutional act is not a law", in any sense of that term.[2011] So nothing a State does with respect to enacting and enforcing otherwise valid laws of her own within her own jurisdiction can be "to the Contrary" of a purported "Law[ ] of the United States" that "is not a law" at all.

In particular, the Constitution recognizes circumstances that would compel the States to arm their Militia on their own if for whatever reason Congress had not done so. In the power of Congress "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions",[2012] the Constitution identifies three crucial functions "the Militia of the several States" are authorized and responsible to perform. These, however, are not functions that appertain solely to the United States. For example, in the course of a nationwide crisis which overwhelmed the law-enforcement capabilities of the General Government and prevented its courts from functioning, or in which rogue public officials in that government ran amok in an orgy of usurpation and tyranny, the States would be forced "to execute the Laws of the Union" within their jurisdictions if those "Laws" were to be enforced at all.[2013] Inasmuch as the Constitution foresees that the United States as a whole might need to "call[ ] forth" the Militia for that purpose, it must also foresee that one or more States might need to do so as well, if

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[2010] *See* U.S. Const. art. I, § 7.

[2011] Norton v. Shelby County, 118 U.S. 425, 442 (1886). *Accord*, Huntington v. Worthen, 120 U.S. 101-102 (1887); *Ex parte* Siebold, 100 U.S. 371, 376-377 (1880), *quoted with approval in* Fay v. Noia, 372 U.S. 391, 408 (1963).

[2012] U.S. Const. art. I, § 8, cl. 15.

[2013] On the authority of the States to do so, *compare* U.S. Const. art. VI, cls. 2 and 3, *with, e.g.,* Tafflin v. Levitt, 493 U.S. 455, 458-460 (1990), *and* Testa v. Katt, 330 U.S. 386, 389-394 (1947). In such circumstances, the States' executive and judicial officials would simply have to disregard as impertinent to the situation a statute such as 18 U.S.C. § 3231, which purports to give to "[t]he district courts of the United States * * * original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States", and 28 U.S.C. § 1442(a)(1), which permits "any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office" to remove a lawsuit against him from a State court to a court of the General Government. For no mere statute can be suffered to frustrate enforcement of the Constitution.

for whatever reason the General Government proved impotent. Moreover, the Constitution neither delegates to Congress any power "[t]o provide for calling forth * * * the Militia to execute the Laws *of the individual States*" nor prohibits that power to the States themselves—thereby, as the Tenth Amendment declares, "reserv[ing that power] to the States respectively, or to the people". Yet, are the States to be denied the ability to "execute the Laws", *particularly their own laws and in their own territories*, because *their own* Militia are bereft of arms through some default by Congress?

Similarly, the Constitution does not prohibit the States from "suppress[ing] Insurrections" within their own territories. The Constitution does require that "[t]he United States * * * shall protect each of the[States] * * * on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence",[2014] in performance of which duty the Militia might be "call[ed] forth * * * to suppress Insurrections". But, in its very requirement of an "Application", the Constitution presumes that, under some circumstances, the States will be desirous and capable of marshaling the force necessary to put down "domestic Violence" by themselves. Yet, are the States to be denied the ability to quell "domestic Violence" *on their own ground in their own way*, because *their own* Militia are bereft of arms through some default by Congress?

Finally, an "Invasion" of any State—to "repel" which the Militia might be "call[ed] forth"—would in most cases constitute an act of "War". The Constitution expressly reserves to each State the power to "engage in War" when "actually invaded, or in such imminent Danger as will not admit of delay"—yet it also prohibits all of the States from "keep[ing] Troops, or Ships of War in time of Peace" "without the Consent of Congress".[2015] Self-evidently, the authority to "engage in War" under those pressing circumstances would be useless if the States had at their immediate disposal no effective military forces to deploy, because Congress had withheld "Consent" for them to "keep Troops, or Ships of War in [the preceding] time of Peace" and had not "provide[d] for * * * arming * * * the Militia". And even had Congress licensed the States to "keep [some] Troops, or Ships of War", one or more States might justifiably fear such an allowance be to insufficient. No constitutional purpose consistent with "the common defence"[2016] could possibly be served by denying the States the ability to prepare their Militia to meet the anticipated level of danger. Indeed, such a denial would be illogical: If Congress allowed the States to "keep Troops, or Ships of War"—as an exception from the Constitution's prohibition of such forces—each State would have to arm her own "Troops" and outfit her own "Ships" if Congress did not. So why should the

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[2014] U.S. Const. art. IV, § 4.

[2015] U.S. Const. art. I, § 10, cl. 3.

[2016] U.S. Const. preamble.

Constitution deny each State the power to arm her own Militia—all of which the Constitution permanently incorporates into its federal system—if Congress does not? Could the power to arm "Troops" and fit out "Ships" that might not be allowed to exist at all be more important than the power to arm the Militia the existence of which the Constitution requires as "necessary to the security of a free State"?[2017]

d. WE THE PEOPLE ordained and established the Constitution for certain purposes as critical as they are concrete—with the expectation that everything which was necessary to be done to achieve those purposes would be done. The "security of a free State" is the Constitution's overriding goal. For that, "[a] well regulated Militia" is "necessary" in every State. "A well regulated Militia" requires that everyone eligible for service and not specifically exempted on proper grounds be personally possessed of arms at all times. If incompetent or rogue Members of Congress and of the States' legislatures fail, neglect, or refuse to perform their duties "[t]o provide for * * * arming * * * the Militia", then the Constitution requires THE PEOPLE to arm themselves.

In the beginning, WE THE PEOPLE did not stake everything on the perpetual competence or loyalty of public officials. Quite the contrary: THE PEOPLE knew that public officials can default on or even betray their responsibilities. Indeed, not just the possibility but the actuality of that betrayal led to the Declaration of Independence. The British imperial "Form of Government bec[a]m[e] destructive" of Americans' "unalienable Rights" through serial misuses and abuses of power. "The history of the present King of Great Britain", the Declaration charged, "is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States." The Colonists tried to employ the means for peaceful redress of these grievances available under the British "Form of Government"—but their "repeated Petitions * * * [were] answered only by repeated injury". At that point, it became both "their right" and "their duty, to throw off such Government". That being so, as a practical matter it became imperatively their duty to take into their own hands the equipment necessary to accomplish that task. But this duty they had already fulfilled for generations prior to 1776, in obedience to the requirement of the *pre*-constitutional Militia Acts that every able-bodied free man be armed. And that experience supplied the principles that became the premisses of all government in America thereafter.

In these particulars, the world has changed not one iota for the better since 1776, 1788, or 1791. Public officials arrogant in their ignorance and infused with avarice, ambition, an appetite for abusive powers, and an aggressive antagonism towards THE PEOPLE are just as prevalent now as they were then, perhaps even more so. Contemporary Americans, however, find themselves in a better position than

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[2017] U.S. Const. amend. II.

did their *pre-*constitutional predecessors, because the present constitutional "Form of Government" contains within itself what America's Founders believed, on good and sufficient grounds in their day, to be the best possible means to deter, and (when deterrence fails) to resist and overcome, usurpation and tyranny: namely, WE THE PEOPLE "well regulated" in "the Militia of the several States". Yet the protection the Militia can provide to "a free State" must remain purely theoretical until "the people" actually exercise their "right * * * to keep * * * Arms"—not just as a right, but especially as a duty.

2. In the final analysis, neither the Militia Clauses of the Constitution, nor the Second and Tenth Amendments, nor any statutes of Congress or the States' legislatures are necessary to impose upon WE THE PEOPLE a duty, and to guarantee their right, to possess firearms, ammunition, and accoutrements suitable for Militia service. After all, the original Constitution and the Bill of Rights did not arise out of nothing in a political and legal vacuum. They were not self-validating. Neither were they intellectually self-sufficient—in particular, they did not invent, but only adopted, the concepts of "[a] well regulated Militia" and "the right of the people to keep and bear Arms", and the federal principles that the Militia are "the Militia *of the several States*" and "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people". Rather, the legitimacy of these concepts and principles derived from the Declaration of Independence, and their substance from its precepts as earlier applied throughout America's *pre-*constitutional history.[2018]

In and through the Declaration, WE THE PEOPLE did not exercise an unfettered discretion to delegate to the States (and later, through THE PEOPLE in their States, to the General Government under the Constitution) whatever powers they wished. For THE PEOPLE drew their authority, not from themselves as the ultimate lawgivers, but from "the Laws of Nature and of Nature's God" to which they themselves were (and remain) always subject. Under that eternal *corpus juris*, the "Governments" THE PEOPLE "instituted" could "deriv[e]" only "*just* powers from the consent of the governed". The "*just* powers" of government, though, cannot include a power to disarm THE PEOPLE. To the contrary: The only "*just* power[ ]" in that regard is to see to it that THE PEOPLE are fully armed at all times—because "whenever any Form of Government becomes destructive of [men's unalienable Rights], it is the Right of the People to alter or to abolish it", which task often cannot be accomplished except through THE PEOPLE'S participation in armed struggle. Certainly no "Form of Government" not already "destructive" of men's rights would ever attempt to prevent THE PEOPLE from possessing the very implements they would need to oppose a "Form of Government" which was or

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[2018] *See ante*, at 22-27.

might become so "destructive". Rather, a "Form of Government" protective of men's rights would *require* THE PEOPLE to be armed, and facilitate their being armed, precisely in order to enable them "to alter or to abolish" their "Form of Government" should that course of action become necessary.

Furthermore, the Declaration did not stop at the "*just* powers" of government as a basis for the duty of THE PEOPLE to be armed. Instead, it identified this as a duty which attached to THE PEOPLE as a political community even when—*especially when*—their "Form of Government" affirmatively and aggressively denied that duty (and any concomitant right which flowed from it): namely, "when a long train of abuses and usurpations * * * evinces a design to reduce the[People] under absolute Despotism, it is their right, *it is their* ***duty***, to throw off such Government, and to provide new Guards for their future security". "[T]o *throw off* such [an abusive] Government", however, must entail *main force*, because aspirants to "absolute Despotism" rarely surrender without a fight. And inasmuch as "the Sword and Soveraignty always march hand in hand",[2019] THE PEOPLE cannot fulfill their "*duty,* to throw off such Government" and retain sovereignty in their own hands without the armed might to do so, also in their own hands. Therefore, THE PEOPLE must labor under a duty to be armed at whatever time and in whatever manner may be necessary to accomplish that end. In practice, this entails their maintaining personal possession of *sufficient* arms at *all* times—because, even though "a long train of abuses and usurpations" is the necessary predicate for invocation of their duty, the straw that finally breaks the camel's back may be piled on suddenly and without warning.

Now, WE THE PEOPLE'S duty to be fully armed cannot derive from the abusive "Government" they intend "to throw off"—which naturally wants them to be disarmed. It cannot derive from the "new Guards" THE PEOPLE hope "to provide * * * for their future security"—which do not yet exist. And it cannot derive autonomously from THE PEOPLE—who are powerless to impose a true *duty* on themselves. Therefore, it must derive from the only source of law the Declaration acknowledges, "the Laws of Nature and of Nature's God". Thus, even if rogue public officials so thoroughly corrupted the Constitution as to transmogrify it into a "Form of Government * * * destructive of [men's unalienable Rights]", the higher law would nonetheless require THE PEOPLE personally to possess arms suitable for Militia service. *Nothing* either THE PEOPLE or their disloyal "representatives" could do could absolve THE PEOPLE of that duty.

B. The absolute right of permanent personal possession of firearms by all individuals eligible for service in the Militia. If, as the adage has it, "possession

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[2019] AN ARGUMENT, Shewing, that a Standing Army Is inconsistent with A Free Government, *ante* note 27, at 7.

is nine points of the law", the tenth and decisive point with regard to WE THE PEOPLE'S personal possession of firearms suitable for Militia service must be *to guarantee that possession by law* against all adverse claimants, public or private.

1. During *pre-*constitutional times, the firearms, ammunition, and necessary accoutrements Militiamen purchased in the first instance for purposes of their Militia service, or dedicated to that service from equipment they already owned, did not thereby become some species of "public property". Nonetheless, as a consequence of their employment in that service such arms were impressed with a public interest that transformed them into a special form of private property of which their owners could not easily be dispossessed.

a. In the nature of things, the *pre-*constitutional Militia statutes precluded public officials from dispossessing members of the Militia of their arms. Self-evidently, no individual could have been be required by statute to acquire and possess firearms yet also have been subject to dispossession under color of law at the very same time. Although those statutes often granted or were applied so as to allow members of the Militia periods of grace in which to acquire firearms before fines or other penalties were enforced,[2020] they nowhere even suggested that anyone eligible for the Militia might be excused altogether from satisfying the requirement of personally possessing firearms because some form of "gun control" prohibited him from doing so.

b. Either by explicit prohibitions or implicitly under applicable rules of the common law, *pre-*constitutional Militia statutes protected Militiamen's possession of the firearms, ammunition, and accoutrements they owned, by providing them with immunities from seizures of that equipment in satisfaction or security for the payment of civil debts or other judgments against them.[2021] Poor Militiamen, too, were equally protected, because, although held in their personal possession, the firearms distributed to them by the Militia or some other governmental agency nonetheless remained public property, and therefore could not have been taken from them by private parties in order to satisfy private claims in any event.

Thus, a legal guarantee of the personal possession of firearms while an individual is eligible for any service in the Militia constitutes one of the indispensable elements of the definition of "[a] well regulated Militia" among "the Militia of the several States".

2. In addition, although the *pre-*constitutional Militia statutes were silent on the subject, nothing in the law of that era precluded anyone eligible for the Militia from possessing either more or better arms than were necessary for his own Militia service, or arms not suitable for Militia service but that might have been put

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[2020] *See ante*, at 289 (Rhode Island) and 705-712 (Virginia).

[2021] *See ante*, at 295-296 (Rhode Island); 460-463 and 715-717 (Virginia).

to other lawful purposes. Other than persons of color, who formed a peculiar class because of the existence of Negro chattel slavery,[2022] loyal Americans who happened to have been exempted from possessing arms suitable for Militia service were never prohibited from possessing those or any other arms for any legitimate purpose. Neither did the requirement that Militiamen personally possess arms entail disarmament of any members of the Militia who reached the upper limit of age at which their compulsory participation was no longer statutorily mandated, or who became too disabled to serve at any age. Nor were such individuals ever prohibited from acquiring new firearms after their compulsory participation in the Militia ceased. Nor, for that matter, as a general rule were adult women, whose gender exempted them from almost all Militia duties,[2023] ever prohibited from possessing firearms for any legitimate purpose. Indeed, it is well-nigh impossible to imagine how the goal of modern "gun control"—dispossessing as many common Americans of as many firearms as possible—could have operated in communities in which every free adult able-bodied male was required by statute to possess in his own home at least one firearm and a large supply of ammunition—and in which the law held that the natural right of self-defense, effectuated with whatever lawful implements were at hand, "is not, neither can it be in fact, taken away by the law of society".[2024] So, in those days, possession of firearms was generally considered a personal "right", whether its exact provenance were traceable to statute, common law, custom, or "the Laws of Nature and of Nature's God".

3. During the *pre*-constitutional era, the explicit duty and ancillary implicit right of each member of the Militia to obtain and maintain personal possession of suitable firearms, ammunition, and necessary accoutrements found their sources only in statutes, and therefore were always subject to amendment, alteration, or perhaps even repeal by legislators (although "the Laws of Nature and of Nature's God" would have imposed limits on how far any such repeal could have gone in justice). As soon as through the Declaration of Independence, the original Constitution, and the Bill of Rights "the Militia of the several States" became *constitutional* establishments that were to be "well regulated" in accordance with *pre*-constitutional principles, the duty of each individual eligible for service in the Militia to possess arms—and his concomitant right not to be dispossessed of them—became *constitutional*, too.

Indeed, "the right of the people to keep and bear Arms" recognized in the Second Amendment—which right had always enjoyed far less emphasis than the corresponding statutory duty embodied in the Militia Acts during the *pre*-constitutional period, when unbridled legislative supremacy was the hallmark of the

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[2022] *See ante,* at 363-369, 468, and 733-742 (Virginia).

[2023] *See ante*, at 242-245 (Rhode Island) and 601-607 (Virginia).

[2024] W. Blackstone, *Commentaries on the Laws of England, ante* note 142, Volume 3, at 4.

British idea of a "constitution"—became the explicit legal relation, because the Founders' concern was to put an end to arbitrary legislative (or any other type of governmental) supremacy. To be sure, by 1788 and 1791 every legally and historically literate American was already well aware that "the right of the people to keep and bear Arms" was the reciprocal of the duty of each eligible individual to serve in "[a] well regulated Militia". The original Constitution made crystal clear to everyone—and especially to public officials—that the duty could be statutorily "regulated" by legislators only within narrow limits, because it was imposed and defined in the first place through the incorporation of "the Militia of the several States" into the federal system. And in order to insure that the duty would be fulfilled to the letter, the Second Amendment declared that the reciprocal right "shall not be infringed".

This right is plainly *absolute* in character. Not simply because the injunction that it "shall not be infringed" is without exception or qualification, but also because "the right * * * to keep and bear Arms" *alone* enables the corresponding duty to be fulfilled; fulfillment of that duty *alone* makes "well regulated Militia" possible; and "well regulated Militia" *alone* are "necessary to the security of a free State". Thus, because *no* "infringe[ment]" of "the right * * * to keep and bear Arms", *of any kind and to any degree*, can coexist with "a free State", *no* "infringe[ment]" can ever be justified—and therefore no power to "infringe[ ]" that "right" can exist.

C. The political significance of permanent personal possession of firearms by all individuals eligible for service in the Militia. Not surprisingly, as with other principles of the constitutional Militia, the right and duty (or the duty and right, depending upon which legal perspective one adopts) of each Militiaman personally to possess in his home at all times one or more firearms, ammunition, and accoutrements suitable for Militia service are of profound *political* significance.

1. In any society, for good or ill, "'[p]olitical power grows out of the barrel of a gun'".[2025] Thus, the firearm in any individual's hands represents his own personal portion of political power. To be effective, however, that basic *quantum* of power must be aggregated with the similar tiny particles of power possessed by many others. For only those people who hold guns *in sufficient numbers*, and employ them *in an organized manner*, are able to wield decisive power within any society. At that point, though, each individual's personal possession of a firearm represents, not simply some mere "*individual* right", but his participation in, responsibility for the exercise of, and benefit from *the community's* political authority.

In a society formed in accordance with "the Laws of Nature and of Nature's God", "[a] well regulated Militia" is rightly considered "necessary to the security of a free State". For when firearms are dispersed throughout the community to the

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[2025] *Quotations From Chairman Mao*, *ante* note 28, at 61.

selfsame degree that Militiamen are—and thereby are always ready for immediate use in each Militiaman's own hands, rather than in public arsenals or magazines controlled by public officials—the "'[p]olitical power that grows out of the barrel of a gun'" is dispersed among the people and remains under their control. In "a free State" the people themselves maintain in their own hands as individuals the instruments of physical force for the purpose of protecting their freedom—not just as isolated individuals, because "a free State" is not anarchic, but through collective effort. Each individual must possess his very own gun so that *the whole community* will be armed and therefore capable of remaining free.

2. In addition, the right to and duty of personal possession (and usually the possessor's private ownership) of firearms by the largest possible number of eligible adults throughout the community creates a special kind of personal property that serves a public, governmental, and ultimately sovereign function as the means by which the community as a whole exercises the most fundamental and important of all political and legal powers: the Power of the Sword. Firearms privately possessed guarantee that the sovereign power truly and permanently resides with WE THE PEOPLE, who hold in their own hands the implements necessary to exercise that power in the gravest extreme. So, *firearms privately possessed are the most important of all property, private or public, because in the final analysis the security of all other property depends upon them*.

D. Ensuring the permanent personal possession of firearms by all individuals eligible for service in the Militia today. America's *pre-*constitutional Militia laws aimed at a near-universality of armament among her able-bodied free adult male inhabitants, preferably through their own efforts, but otherwise with the assistance of public institutions. Had the term been current in those days, "gun control" would not have denoted (as it does today) keeping firearms and ammunition away from as many common Americans as legislators, judges, bureaucrats, and officious private special-interest groups might contrive to disarm or to prohibit from the acquisition of arms in the first place, but instead would have meant seeing to it that as many citizens as possible acquired through the free market and thereafter at all times possessed in their own abodes their very own arms.[2026] So, revitalization of "the Militia of the several States" in the immediate future will require: (i) devising a suitable strategy for ensuring that all Americans eligible for the Militia personally possess firearms, ammunition, and necessary accoutrements suitable for their Militia service; and (ii) eliminating all forms of modern "gun control" that could possibly interfere with that goal. That strategy will be considered here.

1. At least five alternatives are available: namely,

[2026] *See ante*, Chapters 6, 7, 9, 17, 18, 19, and 20.

{1} Militiamen financially able to purchase their own firearms, ammunition, and accoutrements are required to do so, and those who are too poor are loaned public arms for as long as they remain in the Militia—*but all Militiamen retain personal possession, in their own homes and at all times, of the arms they own or borrow*.

{2} Militiamen financially able to purchase their own firearms, ammunition, and accoutrements are required to do so; and those who are too poor instead receive from the Militia or some other governmental agency, as a donation to "the common defence" and "the general Welfare",[2027] actual title to sufficient arms to perform their service in the Militia—*and all Militiamen retain personal possession, in their own homes and at all times, of the arms they own*.

{3} Some governmental agency other than the Militia themselves supplies public arms to *all* Militiamen—*and all Militiamen retain personal possession of those arms in their own homes at all times*, although the government retains formal title to the arms.[2028]

{4} The Militia or some other governmental agencies supply public arms *only to Militiamen who cannot arm themselves satisfactorily through their own efforts—and only when public officials determine that those arms are needed for those individuals' actual service—and otherwise store those arms in public armories and magazines*.

{5} The Militia or some other governmental agencies supply public arms to *all* Militiamen—*but only when public officials determine that those arms are needed for the men's actual service—and otherwise store those arms in public armories and magazines*.[2029]

a. Choice among these alternatives requires prudent reflection, in terms not only of *pre*-constitutional practices but also of the Second Amendment's strictures. The Amendment demands that a constitutional "Militia" be "well regulated"—and a fair measure of "[a] well regulated Militia" in *pre*-constitutional times (and therefore today) is what was actually done, pursuant to statute, not just what might

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[2027] U.S. Const. preamble *and* art. I, § 8, cl. 1.

[2028] Although this alternative was never adopted in any Colony or independent State during *pre*-constitutional times, it arguably does comport with the constitutional power of Congress "[t]o provide for * * * arming * * * the Militia" (provided that certain safeguards are established), and could have been the manner in which State officials applied An Act To promote the efficiency of the militia, and for other purposes, Act of 21 January 1903, CHAP. 196, § 13, 32 Stat. 775, 777.

[2029] This alternative, too, was never adopted in any Colony or independent State during *pre*-constitutional times, and does not comport with the constitutional power of Congress "[t]o provide for * * * arming * * * the Militia", but apparently was the manner in which State officials actually applied the Act of 21 January 1903, § 13, 32 Stat. at 777.

possibly have been done by a Colonial or State legislature but was never put to the test. So, in some cases, the correct conclusion would be to excise from the definition of "[a] well regulated Militia" what the *pre-*constitutional statutes never ordered to be done. For example, although Rhode Island and Virginia (and the other Colonies and independent States as well) *might* have created solely "select militia" composed exclusively of some politically influential or reliable factions and their hangers-on, instead they always included in their Militia just about every able-bodied adult free man resident within their jurisdictions. Happily, this result is in perfect accord with the Second Amendment, which protects "the right *of the people*", *without exception*, "to keep and bear Arms" in relation to "well regulated Militia".

Yet to conclude that the definition of "[a] well regulated Militia" cannot embrace what the *pre-*constitutional statutes never happened to command in so many words—or cannot exclude some of what they did explicitly mandate or implicitly allowed—would not necessarily be correct in every situation, either. Certainly that is the case with respect to racial discrimination in the Militia, which persisted throughout the *pre-*constitutional era and even during a good portion of the immediate *post-*constitutional period, too, but subsequently became unconstitutional.

b. So, for examples pertinent to the matter at hand, options **{4}** and **{5}** both limit the possession of firearms by some Militiamen or all Militiamen, and assign control and usually physical custody over those particular arms to public officials. The latter option finds no foundation in *pre-*constitutional practice. And that the former might have met legal muster to some degree at some times and in some places during that era does not necessarily immunize it against condemnation in the face of the Second Amendment today.

In order to support "well regulated Militia", the Second Amendment guarantees "the right of the people to keep and bear Arms". Not to public officials as distinct from "the people"; not just to some of "the people"; not just as to only some "Arms"; and not just some of the time. Beyond question, the actually dominant practice in *pre-*constitutional America was for Militiamen, of whatever financial status, to maintain personal possession, in their own homes and at all times, of the firearms, ammunition, and accoutrements they owned outright or borrowed from the community for their Militia service. Beyond doubt, too, this practice is perfectly congruent with "the right of the people to keep and bear Arms". Indeed, it perfectly defines that "right": For an individual alone—let alone all individuals taken collectively as "the people"—can hardly "*keep* * * * Arms" unless he does, in fact, *personally possess those "Arms" himself at all times*. Moreover, the conjunction "keep *and* bear Arms" in the Second Amendment signifies in practical application *personal possession in readiness for immediate action*. Actually, "keep[ing]" arms in one's personal possession in readiness for immediate action *is* a form of "bear[ing]" them. Conversely, although an individual could "bear Arms" after they

had been handed out to him by public officials from some governmental arsenal or magazine, before that moment he could not "keep * * * Arms", because they would be under someone else's control. Plainly enough, too, "the government" or "public officials" are not "the people". To the contrary, the Constitution invariably distinguishes among them—as in the First Amendment, which contrasts "the people" who enjoy "the right * * * peaceably to assemble", from "the Government" which "the people * * * petition * * * for a redress of grievances"; or in the Tenth Amendment, which contrasts the governmental entities "the United States" and "the States" with "the people", with respect to powers "delegated", "prohibited", or "reserved". So if in practice "the government" or "public officials" "keep * * * [the] Arms", "the people" do not. In addition, rogue "public officials" constitute the primary set of miscreants who, the Amendment expects, would attempt to "infringe[ ]" "the right of the people to keep and bear Arms". In their capacities as *disloyal* officials, they are not among the individuals whose possession of "Arms" the Amendment protects from "infringe[ment]". Indeed, *rogue public officials should always be disarmed*. And, outside of the Militia, even loyal public officials should be armed in their official capacities only to the extent that WE THE PEOPLE allow. Overall, then, options **{4}** and especially **{5}** are not permissible today. ***If a contemporary Congress or State legislature desires to supply Militiamen with public arms, it must entrust each and every Militiaman who receives such arms with personal possession thereof throughout his entire period of eligibility for service***. Public arms may always remain public property in terms of ownership. But while they are being used for Militia service, they must be treated as Militiamen's personal property in terms, not only of actual possession, but also of ***absolute possessory right***.

This result makes perfect practical and political sense. The Founders recognized that a true Militia requires the full participation of *all* eligible individuals within the community, which demands that *each and every* individual be guaranteed a "right * * * *to keep*" as well as "to * * * bear Arms". For any individual's ability to "bear Arms" could easily be frustrated if rogue public officials simply denied him possession of "Arms" by sequestering them in public armories or magazines, from which they would be handed out only to the officials' cronies and partisans, thereby destroying the Militia and replacing it with a species of Praetorian Guard or *Shutzstaffel*. ***The only way to insure that everyone in the community is able to "bear Arms" in the Militia whenever his service is "necessary to the security of a free State"—which may be at any time and specifically in opposition to rogue public officials—is to insure that everyone in the community is able to "keep * * * Arms" by him at all times.*** And so the Second Amendment provides.

c. As for the remaining three options, **{1}** provides for ownership and possession of arms by some Militiamen, and simply possession of arms by others; **{2}** for ownership and possession of arms by all Militiamen; and **{3}** for ownership of arms by no Militiamen, but possession by them all. All of these options are

compatible with the Militia Clauses of the original Constitution and with the Second Amendment, because permanent possession of, not mere title to, "Arms" by individual Militiamen is the crucial matter. Militiamen personally possessed of public arms could effectively refuse an illegal command by rogue public officials to "lay down their arms". But if their own arms were sequestered in public armories and magazines under the control of such officials' heavily armed myrmidons, Militiamen with the best of legal titles could vociferously "petition the Government for a redress or grievances"[2030] and assert their paper rights in the kangaroo courts until the cows came home without much hope of ever gaining access to the property they desperately needed to resist oppression.

All other things being equal, though, option **{2}** is so much more desirable than the others that it ought always to be adopted. Each Militiaman's permanent personal possession of suitable firearms, ammunition, and accoutrements is, of course, of the utmost importance. For, self-evidently, only actual possession will enable a Militiaman to provide "the security of a free State" whenever, wherever, and howsoever it may become "necessary". Less obviously but no less truly, only actual possession will enable a Militiaman to care for his "Arms", and to train with them, on a basis sufficiently regular that he becomes competent to perform the tasks that may be required of him at a decisive moment. (To be sure, the Constitution delegates to Congress the power and the duty "[t]o provide for * * * disciplining, the Militia, * * * reserving to the States respectively * * * the Authority of training the Militia according to the discipline prescribed by Congress".[2031] Nonetheless, WE THE PEOPLE must be fully prepared and equipped to train themselves in the event of defaults by both Congress and the States.)

2. The requirement that Militiamen financially able to do so should supply their own firearms, ammunition, and accoutrements made good sense during the *pre-*constitutional period, and should be continued today as part of the discipline of revitalized Militia, for at least four reasons:

a. Historically, as this was the general practice throughout *pre-*constitutional America, and therefore part and parcel of the very definition of "Militia", it should not be superseded unless to continue it were utterly impractical.

b. Economically, to tax the people in general, and then expend the receipts to purchase firearms for distribution mostly to the very same people, would make little sense—for, on average, those who were not too poor to buy their own arms in the first place would simply pay for those arms in a different manner (and not unlikely pay *more*, given the excessive costs the public treasury and armories would inevitably run up as the profligate "middle men" in the process).

[2030] U.S. Const. amend. I.

[2031] U.S. Const. art. I, § 8, cl. 16.

c. Politically, if the General Government or the States' governments retained ownership of the firearms, such a procedure would be potentially dangerous—for although public officials would not possess the arms after their distribution, and ought never to be suffered to assert a legal claim to repossess any of them except when a Militiaman expired or expatriated, aspiring usurpers and tyrants might misassert the government's paper title in order to rationalize every Militiaman's physical surrender of his arms, for the purpose of effectively destroying the Militia entirely. True enough, if the General Government or the States owned the arms, WE THE PEOPLE would own them, too, because the General Government and the States are merely WE THE PEOPLE'S creatures, agents, and in the ultimate analysis dependencies. But THE PEOPLE'S ownership would be "one step removed" in law, which could give coloration to rogue public officials' claim to expand governmental ownership into a right to possess, or at least a right comprehensively to regulate THE PEOPLE'S possession and use of, the arms.

d. Psychologically, WE THE PEOPLE'S *personal ownership* as well as possession of arms is critically important. Imposing directly on each Militiaman the financial burden of supplying himself with *his own* firearm creates a strong personal incentive to obtain the very best firearm he can afford, and to maintain it in serviceable condition at all times—for men are always more interested in preserving what is *theirs*, than in preserving what is someone else's. Moreover, ownership reminds every single Militiaman that *his* "Arms" are both symbols and guarantors of *his* political status as a free man—that rogue public officials cannot command *him* to "lay down his arms", because those arms and what they represent are truly *his*, not in any way theirs.

3. Were "the Militia of the several States" properly revitalized today, the *pre-*constitutional practice of using public funds to supply firearms, ammunition, and necessary accoutrements to Militiamen too poor to purchase such equipment themselves would have an especially firm constitutional basis, too.

a. This was one way in which many poor Militiamen were armed, in both Rhode Island and Virginia (as well as in other Colonies and independent States).[2032] Therefore, the constitutional definition of "[a] well regulated Militia",[2033] drawn (as it must be) from these *pre-*constitutional Militia statutes,[2034] necessarily includes this practice.

b. The cost to the community of adding ownership to possession in the case of impecunious Militiamen will likely be minimal. In practical terms, possession and ownership will amount to the same thing while impecunious individuals remain in

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[2032] *See ante*, at 157-162 (Rhode Island) and 424-428 (Virginia).

[2033] U.S. Const. amend. II.

[2034] *See ante*, at 63-81.

the Militia, under the requirement that they must always have those firearms ready at hand. And if they continue to possess them as their owners even after their years of Militia service end, the firearms' residual value to the Militia will be too small to be a serious consideration. But, throughout the process, the Militia will have demonstrated how to build social solidarity across the lines of economic classes.

c. The relevant powers the Constitution delegates to Congress support the practice of supplying arms to poor Militiamen. Congress is affirmatively authorized "[t]o provide for * * * arming * * * the Militia".[2035] And "[a]ffirmative words are often, in their operation, negative of other objects than those affirmed".[2036] Thus, these words not only delegate a power, and also impose a *duty*,[2037] but even establish an ***absolute disability*** *as to their opposites*. That is, Congress not only *may* "arm[ ]" the members of the Militia, and also *must* "arm[ ]" them whenever that course is "necessary and proper",[2038] but may *never* take any action intentionally to compel them to remain "[*un*]arm[ed]", let alone to "[*dis*]arm[ ]" them. Thus properly construed, *Congress's own power in the premises and the Second Amendment's command that "the right of the people to keep and bear Arms, shall not be infringed" embody precisely the same mandate*. In this particular, "the [original] Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS".[2039] Now, obviously, by definition poor individuals cannot easily, effectively, or perhaps even ever provide themselves with arms suitable for Militia service. So, for someone else to supply them with arms is plainly "necessary and proper". To be sure, revitalized "Militia of the several States" themselves could arm their poor members (through the use of fines assessed against delinquents or fees collected from persons exempted from various duties); or the States' governments could do so (through the use of treasury funds)—and Congress could legitimately "provide for * * * arming [poor Americans serving in] the Militia" by entrusting that task directly to the States and WE THE PEOPLE. Although this course would comport well with federalism (because the Militia are "the Militia *of the several States*" and are composed of WE THE PEOPLE themselves); and although it would provide the best way to determine by experimentation how most expeditiously to go about arming newly revitalized Militia—nevertheless, it would not be incumbent upon Congress to proceed in only that way. Congress could also draw on the General Government's tax receipts for this purpose. That would be a particularly apt use of such moneys. For another of Congress's powers is "[t]o lay and collect taxes * * * *to* * * * *provide for the common*

[2035] U.S. Const. art. I, § 8, cl. 16.

[2036] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803).

[2037] *See ante*, at 50-54.

[2038] *See* U.S. Const. art. I, § 8, cl. 18.

[2039] *The Federalist* No. 84 (Alexander Hamilton).

Defence and general Welfare of the United States"[2040]—a purpose so important that the Founders took care to repeat it in the latter clause even though it already appeared in the Preamble to the Constitution, which they knew controlled the construction of everything that followed.[2041] "To provide for * * * arming * * * [any part of] the Militia" is unquestionably to "provide for the common Defence and general Welfare of the United States" *pro tanto*. Therefore, expending the General Government's funds to "arm[ ] * * * [poor Americans serving in] the Militia" would be eminently constitutional. For the reasons given in favor of retaining the requirement that Militiamen financially able to do so should supply their own firearms, ammunition, and accoutrements, though, the recipients of such subsidies should be limited to those individuals certifiably too poor to purchase their very own arms.[2042]

[2040] U.S. Const. art. I, § 8, cl. 1 (emphasis supplied).

[2041] *See* Gibbons v. Ogden, 22 U.S. (9 Wheaton) 1, 188-189 (1824). *See generally*, W. Crosskey, *Politics and the Constitution*, *ante* note 206, Volume 1, at 374-379.

[2042] *See ante*, at 205-207 (Rhode Island) and 424-428 (Virginia).

CHAPTER THIRTY-NINE

Every individual possibly eligible to be a member of "the Militia of the several States" may acquire, possess, and own as of right *any* firearms, ammunition, and accoutrements possibly suitable for *any* type of Militia service.

Self-evidently, if every individual possibly eligible to be a member of one of "the Militia of the several States" is subject to a constitutional duty, and enjoys a constitutional right, to possess firearms as a consequence of such eligibility, then those firearms must be of the types that subserve the constitutional purposes for which they are possessed—namely, "[t]o provide for * * * arming * * * *the Militia*",[2043] and to effectuate "the right of the people to keep and bear Arms" so as to enable them to operate in "well regulated *Militia*" that can provide "the security of a free State".[2044] But *who* is to define what firearms are suitable—let alone required or permissible—for those purposes? Inasmuch as the "Arms" that "the people [are] to keep and bear" are necessary for the Militia, and the Militia are "necessary to the security of a free State", WE THE PEOPLE would never have left the term "Arms" without a clear definition in 1788 and 1791, and cannot afford to leave that matter unsettled today. For, in practice, that term must be *correctly* defined by someone.

A. No exclusions from or exceptions to the term "Arms" in the Constitution. Actually, the Constitution itself goes a long way towards supplying a definition. Pursuant to its power "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its power "[t]o provide for * * * arming * * * the Militia",[2045] Congress may "provide for * * * arming * * * the Militia" with *anything and everything* that could in principle, and in light of the particular circumstances could reasonably be expected to, "arm[ ] * * * the Militia" in a proper fashion. And in the absence of or to complement or supplement Congressional action, the States may do so as well, under their reserved powers to maintain and regulate their own "Militia of the several States". Similarly, because "the right * * * to keep and bear Arms" enables "the people" to serve within "well regulated Militia", public officials in either the General Government or the States cannot deprive anyone among "the people" of *any* "Arms" with which a member of

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[2043] U.S. Const. art. I, § 8, cl. 16 (emphasis supplied).

[2044] U.S. Const. amend. II (emphasis supplied).

[2045] U.S. Const. art. I, § 8, cls. 18 and 16.

such a Militia could reasonably be expected to perform his duties under whatever plausibly anticipated circumstances might confront him. For, in each of these cases, "where no exception is made in terms, none will be made by mere implication or construction".[2046]

B. WE THE PEOPLE the source of the definition of "Arms". Although the Constitution does not explicitly define "arming" and "Arms" more specifically than that, it does not leave those words undefinable in more detail, or fail to identify the parties who are authorized to define them, or in any manner license those definitions to be committed to the discretion of other parties whose pernicious self-interests would disqualify them from exercising any such authority within "a free State".

1. If Members of Congress could define in whatever idiosyncratic manner they chose what "arming * * * the Militia" means, they could thereby define in any way—or even define away—the Militia. "[T]he Militia of the several States", however, preëxisted the Constitution, and were incorporated into its federal system as they existed in 1788, just as they were incorporated into the Articles of Confederation as they existed in 1781,[2047] and just as they had existed pursuant to statutory regulation within the Colonies and independent States for more than a century theretofore. In all relevant particulars, their history fixes their definition. The Constitution delegated to Congress no authority to change that definition, directly or indirectly, any more than it delegated to Congress any license to change the definition of the noun "State" (or of any other constitutional term).[2048] Therefore, when Congress "provide[s] for * * * arming * * * the Militia", it must see to equipping the Militia with what Militiamen are supposed to possess in conformity with the constitutional definition of "Militia". That is, the constitutional definition of "Militia" fixes the constitutional definition of "arming". And the several States' legislators, too, are no less constrained in the exercise of their concurrent powers in this particular.

2. The definition of "Militia", of course, points, not to legislators, but to WE THE PEOPLE. "If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, * * * the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction."[2049] As far as "the Militia of the several States" are concerned, everything which "WE THE PEOPLE * * * ordain[ed] and

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[2046] Rhode Island v. Massachusetts, 37 U.S. (12 Peters) 657, 722 (1838). *Accord,* Martin v. Hunter's Lessee, 14 U.S. (1 Wheaton) 304, 338-339 (1816).

[2047] *See* Arts. of Confed'n art. VI, ¶ 4.

[2048] *Compare, e.g.,* Coyle v. Smith, 221 U.S. 559, 566-568 (1911), *with* Eisner v. Macomber, 252 U.S. 189, 206 (1920).

[2049] Gibbons v. Ogden, 22 U.S. (9 Wheaton) 1, 188-189 (1824).

establish[ed in] th[e] Constitution"[2050] identifies one overriding "object": namely, to field a self-actuating, self-reliant, and self-sufficient armed force, for the purpose of community self-defense, composed of and ultimately answerable only to WE THE PEOPLE themselves. So, in the final analysis, only THE PEOPLE themselves can define what "arming * * * the Militia" means, not only because THE PEOPLE "ordain[ed] and establish[ed] th[e] Constitution" in the beginning, and have sustained it every day thereafter, but also because they *were* "the Militia of the several States" then and *are* "the Militia of the several States" now. More than anything else, "arming" makes THE PEOPLE into "Militia". So how and with what they are to be "arm[ed]" implicates their very own identity in that particular, which THE PEOPLE themselves must, in the nature of things, know better than anyone else. Who else could possibly be competent to tell THE PEOPLE whether they are so suitably "arm[ed]" as to qualify as "Militia"—particularly when the very "security of a free State" is concerned?

3. In addition, because the Second Amendment is a "declaratory and restrictive clause[ ]" that "prevent[s] misconstruction or abuse of [the original Constitution's] powers",[2051] "arming * * * the Militia" must always be interpreted and applied so as to ensure and effectuate the "right of the people to keep and bear Arms". That "right" is "the right *of the people*", not of public officials. In their capacity as such, public officials enjoy no right at all under the Second Amendment, but instead labor under a *duty* not to "infringe[ ]" "the right of the people". "[T]he right of the people to keep and bear Arms" would not be a "right" in any meaningful sense if public officials enjoyed discretion to define the types of "Arms" that "the people" would be licensed to "keep and bear". For, in that case, no "infringe[ment]" of the supposed "right" could ever occur, because the "right" would be measured by what public officials allowed—their own willingness to limit themselves would be the extent of their duty—and thus the Second Amendment would be reduced to nothing but a snare and a delusion. Worse yet, if rogue public officials enjoyed the unalloyed discretion to define both the power "[t]o provide for * * * arming * * * the Militia" and "the right of the people to keep and bear Arms" with respect to the very "Arms" that "the people" might need to oppose those disloyal officials' own acts of usurpation and tyranny, then that power would provide the means for, and that right would prove impotent to prevent, subversion and then destruction of "the security of a free State". Therefore, if "the people" are to enjoy a *true* "right" and public officials are to labor under a *true* duty in this regard, only "the people" themselves, whose "right" it is "to keep and bear Arms", can decide what "Arms" they should "keep and bear".

[2050] U.S. Const. preamble.

[2051] RESOLUTION OF THE FIRST CONGRESS SUBMITTING TWELVE AMENDMENTS TO THE CONSTITUTION (4 March 1789), *in Documents Illustrative of the Formation of the Union of the American States*, *ante* note 1, at 1063.

Thus, the power of Congress in the original Constitution "[t]o provide for * * * arming * * * the Militia" is precisely equivalent in effect to "the right of the people to keep and bear Arms" in the Second Amendment—proving through this particular that the original "Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS".[2052]

C. The broadest possible standards for "Arms". Even WE THE PEOPLE, however, must be guided by standards beyond their ability to change. Where "Arms" are concerned, the standards are both objective and relative. For example, the technical competence of a firearm for an intended use is what counts, not someone's personal opinion, let alone political attitude, about it. Thus, armchair critics may deny that a handgun so cheaply and crudely made as to be more or less disposable is of any value for a Militia—but, in the hands of a *résistant*, something as apparently primitive as the "Liberator" .45 ACP pistol of World War II may prove to be the perfect implement for the job.[2053] This demonstrates how the usefulness of any type of workable firearm will strongly depend upon circumstances. To be sure, no one can predict what any particular member of the Militia may be called upon to do in the future. Some general considerations can provide guidance, though.

1. No type of "Arms" necessarily unsuitable for Militia service. Self-evidently, whatever the circumstances, *some* firearm at hand is always better than *no* firearm at all. The Constitution understands this to be the case; or it would neither require "arming * * * the Militia" nor guarantee "the right of the people to keep and bear Arms". For this reason, prohibition of "the people['s]" possession of every class of firearms suitable for Militia service is obviously unconstitutional, because it renders the very existence of "[a] well regulated Militia" impossible. Prohibition of "the people['s]" possession of a particular class of firearms suitable for Militia service is equally unlawful, because whether the Militia is "well regulated" in particular circumstances may depend upon the availability of just such firearms. And prohibition of an individual Militiaman's possession of some specific firearm within a particular class of firearms suitable for Militia service is no less unconstitutional, because such a firearm may be the only one available with which to arm that Militiaman in an emergency; and without familiarity with it, the Militiaman may be unable to use it effectively, if at all, leaving him essentially disarmed.

In addition, no firearm is useful as a firearm without a plentiful supply of ammunition. So, except in some peculiar circumstances, no limitations are

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[2052] *The Federalist* No. 84 (Alexander Hamilton).

[2053] *See, e.g., Encyclopedia of Firearms, ante* note 428, at 114, 190; Francis Russell, *World War II, The Secret War* (Chicago, Illinois: Time-Life Books, Inc., 1981), at 129; Bruce N. Canfield, "Desperate Times: The 'Liberator' Pistol", *American Rifleman,* Volume 160, No. 8 (August 2012), at 48.

allowable on "the people['s]" possession of ammunition, with respect not just to type and quality but also to quantity.[2054]

2. "Arms" suitable for the three explicit constitutional purposes. "Arms" suitable for "the Militia of the several States" must be those that are necessary and sufficient for performance of at least the three responsibilities the Constitution explicitly assigns to the Militia: namely, "to execute the Laws of the Union, suppress Insurrections and repel Invasions" when "call[ed] forth" for those purposes.[2055] By implicit constitutional definition, "[a] well regulated Militia" is one that is suitably armed for at least those purposes. (The qualification "at least" is necessary, because the States are not bound to employ their Militia for only those three tasks, and therefore may assign to their Militia further responsibilities in the performance of which other types of "Arms" may be necessary and proper.) Certainly, no Militia can be "well regulated" if due to a lack of suitable armament it is incapable of performing one or more of the tasks the Constitution expressly assigns to the Militia and the Militia only.

Of those three duties, the first is primarily a "police" function; the third is almost exclusively a "military" function; and the second is a "police" function, a "military" function, or both, depending upon circumstances. Perforce of the constitutional requirement that the Militia be armed, and of the constitutional delegation to the Militia of the authority and responsibility to perform those three tasks when "call[ed] forth" "in the Service of the United States", the Militia everywhere throughout America must possess whatever "Arms" may be necessary and sufficient to perform any and all of them at any time. There does exist, however, an obvious practical hierarchy within the types of "Arms" suitable for those purposes. To wit—

a. "Arms" suitable to "repel Invasions". It is, of course, possible to denote massive illegal immigration, even when unaccompanied by the organized use of arms on the part of the aliens, as an "invasion", in the sense of an "[h]ostile entrance upon the rights or possessions of another" by foreigners against the

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[2054] *E.g.,* limitations on the amounts of black powder that individual Militiamen might store in private businesses and dwellings in densely populated urban areas, or special requirements with respect to the mode of storage, might be as permissible today as they were in *pre*-constitutional times, on the grounds of public safety, because black powder is an explosive. *See ante*, at 310-311 (Rhode Island). But modern "well regulated Militia" would have scant occasion to stockpile large quantities of black powder, because far safer alternatives are available for use in muzzle-loadings firearms. Some limitations on the amounts and facilities for safe keeping of smokeless powder and primers might be justifiable on the grounds of public safety, too. It is difficult, however, to imagine any stockpile of modern fixed ammunition, or components for handloading such ammunition, that a typical, properly trained Militiaman might possess that would pose significant safety problems. *See* Sporting Arms and Ammunition Manufacturers Institute, Publications No. 200, "Smokeless Powder—Properties & Storage"; No. 201, "Sporting Ammunition Primers—Properties, Handling & Storage for Handloading"; No. 202, "Small Arms Ammunition—Properties & Recommendations for Storage & Handling"; and No. 212, "Sporting Ammunition Fires".

[2055] U.S. Const. art. I, § 8, cl. 15.

country's legal residents.[2056] And, doubtlessly, "the Militia of the several States" could be "call[ed] forth" to suppress such immigration, by "execut[ing] the Laws of the Union" against the interlopers. It is also possible to denote widespread incursions by *guerrilleros* or other irregular fighters dispatched from some foreign country as an "Invasion[ ]", which doubtlessly the Militia could be "call[ed] forth" to "repel" as well. But the Constitution seems to contemplate that in almost all cases "Invasions" will involve large numbers of fully armed and highly trained troops from some foreign nation's regular armed forces. Confronted with such an attack, Militiamen would be compelled to function as "soldiers"; their service would be *military* service, no different in principle or practice from the service of regular troops; and therefore they would need to be equipped with firearms specifically suitable for soldiers in such military service—indeed, *"Arms" at least as good for military purposes as the "Arms" carried by the invaders, and therefore at least equivalent to the "Arms" carried by America's own regular Armed Forces which presumably Congress would supply with all the "Arms" sufficient to repel likely invaders*. Certainly the Constitution does not foolishly assume that foreign troops actually mounting an "Invasion[ ]" would themselves be so poorly armed that just any old armaments the Militia brought to the field would suffice to defeat them. Neither does it presume that America's regular Armed Forces would always be able to drive out the invaders without assistance—for, if it did, it would not explicitly assign that responsibility to the Militia. Nor does it contemplate "calling forth the Militia to * * * repel Invasions" when the Militia were too poorly armed to have a reasonable chance to survive those encounters.

In addition, "repel[ling] Invasions" can occur through deterrence as well as actual combat. "[A] well regulated militia, composed of the body of the people, trained to arms" is, first and foremost, to provide military protection to "a free state", so that, as much as possible, "standing armies, in time of peace, * * * [can] be avoided, as dangerous to liberty".[2057] But if standing armies are to be avoided, while foreign aggressors—no less "dangerous to liberty"—are to be deterred from attacking, then the Militia must be armed to the point that their ability to "repel Invasions" is credible in those aggressors' estimations. This requires that the Militia be armed and trained with military-grade firearms of the highest order at all times and in an highly visible manner.

So, inasmuch as "Invasions" constitute the direst threat—because, if successful, they would destroy not only "a free State" in America but even America herself—***the first priority in "arming * * * the Militia" and the main focus of "the right of the people to keep and bear Arms" must be to arm "the people" in the***

[2056] S. Johnson, *Dictionary*, *ante* note 50, definition 1 in both the First (1755) and the Fourth (1773) Editions.

[2057] Virginia Declaration of Rights (1776) art. 13.

Militia with, and to protect "the people" in their ability to acquire and thereafter their permanent possession of, first-class military-grade firearms.

Nonetheless, even for the purpose of "repel[ling] Invasions", the Militia's arsenal should not be limited to military-grade firearms. A firearm suitable for Militia service is one with which a Militiaman can perform his duties in any conceivable situation. The Constitution cannot and therefore does not exclude the possibility that an "Invasion[ ]" of America will temporarily succeed in some significant part, or even the entirety, of the country. At that point, "the people" in the Militia (as well as what remains of the regular Armed Forces) will be reduced to operating as *guerrilleros*, irregulars, partisans, and *résistants*—perhaps in small groups, perhaps even as lone individuals. In such circumstances, *every* workable firearm and *all* of the ammunition that the enemy has not confiscated will be useful and will be used—from what remains of the stock of modern military-grade arms in patriots' hands, to "sporting" rifles and shotguns, to the cheap handguns subject to derision by "gun controllers" as "Saturday-night specials", and even to muzzle-loading firearms for which black powder can be compounded and lead balls fabricated in secret basement arsenals. In such times, the constitutional term "Arms" will be as broadly defined as necessity requires. Which means that *now*, too, it must be just as broadly defined—because "the people" must be prepared now for what may happen then. "[T]he people" cannot suffer some arbitrarily narrow definition of "Arms" applied today to result in effectively disarming the Militia in the face of necessity tomorrow. The power and duty "[t]o provide for * * * arming * * * the Militia" cannot be limited to what may be done to meet the obvious needs of the moment, but must encompass as well what should be done today to forefend the dangers that may possibly arise in some dim and distant future time.

That "the right of the people to keep and bear Arms" includes *military-grade* "Arms" in the very first position may surprise and unsettle some who conceive of the Militia as essentially *civilian* establishments. This basic understanding is not wrong—for, throughout American history, "well regulated militia" have always been contrasted with "standing armies". The Militia are the ultimate embodiment of civil power; whereas "the military should be under strict subordination to, and governed by, the civil power".[2058] But the *civilian character* of the Militia does not preclude their performance of *military functions*. And the types of "Arms" suitable for the Militia in any particular circumstances must depend upon those functions. Thus, the contention of contemporary "gun controllers" that "civilians" should not have "military"-grade firearms is simply nonsensical. Every "civilian" who is eligible for Militia service (and not properly exempted) may at any time be required, and

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[2058] Virginia Declaration of Rights (1776) art. 13. *Accord, e.g., Ratification of the Constitution, by the Convention of the State of Rhode-Island and Providence Plantations* (1790), ¶ 17th, *in Documents Illustrative of the Formation of the Union of the American States*, *ante* note 1, at 1055.

should at all times be prepared, to perform services in which the possession of a "military"-grade firearm is essential. Therefore, every such "civilian"—which includes most of the population of able-bodied adults throughout America—has a constitutional right and duty to possess such "Arms", and a right to look in the first instance to Members of Congress and the States' legislators to provide some means by which he can acquire them.

Confusion on this score would abate if it were recalled that during the *pre*-constitutional era as a practical matter the distinction between "civilian" and "military" firearms was vanishingly small. Firearms that might have been characterized as "civilian" in nature, because they were initially designed or marketed as such, or because "civilians" happened to carry them, were not simply, let alone exclusively, "civilian" as to function. Many firearms in the hands of "civilians" were actual "military"-grade firearms, used both to satisfy the individuals' public Militia duties and for private "civilian" purposes. Most "civilian" firearms were capable of "military" uses—and (more to the point) were legally accepted as such, because no *pre*-constitutional statute ever excluded such firearms as a class from being used to fulfill a Militiaman's duty to possess a firearm. In fact, apart from the capability to mount a bayonet, no functional difference between typical "civilian" and "military" muskets existed; and many "civilian" muskets were modified to take bayonets. Moreover, rifles, which in America were generally produced for "civilian" uses at first, were superior in range and accuracy to any "military" muskets. So, man for man, in many circumstances "civilians" armed with rifles were arguably better equipped than regular "soldiers" armed with muskets.

b. "Arms" suitable to "suppress Insurrections". By "Insurrections", the Constitution usually envisions violations of the laws that residents perpetrate within the country on a relatively large scale—what it denotes in another place as "domestic Violence", and assumes may become so serious within a State as to require "protect[ion]" by the United States.[2059] In the late 1700s, "insurrection" meant "[a] seditious rising; a rebellious commotion".[2060] "Seditious" meant "[f]actious with tumult; turbulent".[2061] "Rebellious" meant "[o]pponent to lawful authority".[2062] And "factious" meant "[p]roceeding from publick dissensions; tending to publick discord".[2063] So, in its most typical manifestation, an "Insurrection[ ]" in the constitutional sense would entail widespread social disorder set in motion by private citizens, perhaps in opposition to the government's policies or even to the government itself, but in any event proceeding in a lawless and

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[2059] U.S. Const. art. IV, § 4.

[2060] S. Johnson, *Dictionary*, *ante* note 50, in both the First (1755) and the Fourth (1773) Editions.

[2061] *Id.*, in both the First (1755) and the Fourth (1773) Editions.

[2062] *Id.*, in both the First (1755) and the Fourth (1773) Editions.

[2063] *Id.*, definition 2 in both the First (1755) and the Fourth (1773) Editions.

probably violent manner. Depending upon the size and degree of organization of the "Insurrection[ ]", in "suppress[ing]" it and "executing the Laws of the Union" against its perpetrators the Militia would perform a "police" or a "*para*-military" function, and therefore would need to be equipped with firearms suitable for those purposes. Presumably, military-grade firearms would always suffice, although they might not always be necessary. In many instances the less-extensive modern police armamentarium of handguns, shotguns, various types of stun-guns, tear-gas launchers, and so on would prove adequate. (Because these would typically be included in the table of equipment of any military-police unit, however, they could fairly be considered "military" as well as "police" "Arms", too.)

"Insurrections" can also consist of organized violations of the laws by rogue public officials who are "rebellious" in the sense of "[o]pponent to lawful authority"—specifically, to the Constitution and their own "Oath[s] or Affirmation[s], to support [it]".[2064] When usurpations and tyrannical acts by rogue officials set off "publick discord"—in particular, justifiable defensive resistance on the part of their victims—they become, not simply crimes in their own right,[2065] but also nothing less than "Insurrection[ ]" under color of but in opposition to law. And if the rogue officials perpetrating those crimes then deploy armed contingents, whether rogue members of civilian police agencies or the regular Armed Forces, in the field against WE THE PEOPLE, thereby "levying War against them", those officials and their myrmidons commit "Treason" in the full constitutional sense of that term.[2066]

The great danger that "Insurrections" of the latter type pose lies in the likelihood that the Militia will be required to "suppress", not only the rogue public officials themselves, but also their henchmen and deluded supporters among the police and the regular Armed Forces. Yet that type of confrontation is precisely what the Constitution foresees may occur when it declares that "[a] well regulated Militia" is "necessary to the security of a free State".[2067] For, as Joseph Story pointed out in that very regard, "large military establishments and standing armies in time of peace" afford

> facile means * * * to ambitious and unprincipled rulers to subvert the government or trample upon the rights of the people. The right of the citizens to keep and bear arms has justly been considered as the palladium of the liberties of a republic, since it offers a strong moral check against the usurpation and arbitrary power of rulers, and will generally, even if

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[2064] U.S. Const. art. VI, cl. 3.

[2065] *See, e.g.,* 18 U.S.C. §§ 241 and 242.

[2066] *See ante*, at 814-821.

[2067] U.S. Const. amend. II.

> these are successful in the first instance, enable the people to resist and triumph over them.[2068]

So, in this case, too, the "Arms" WE THE PEOPLE must possess, and the possession of which "shall not be infringed" by public officials, must be of such a nature as to be sufficient at least to deter, to resist when deterrence fails, and if at all possible then to put down, usurpation and tyranny supported even by rogue elements of the civilian *para*-militarized police agencies and the Armed Forces. Which means "Arms" as least as good technologically as, and far more plentiful than, those THE PEOPLE'S domestic enemies wield.

To those modern-day "gun controllers" who contend that American "civilians" should never be as well armed as "the authorities"—that is, the regular Armed Forces and *para*-militarized professional police departments or other armed governmental agencies—the short answer is that "the Militia of the several States" are as much legal "authorities" as any such establishment. Indeed, far more so, because the Militia are the *only* establishments to which the Constitution explicitly delegates the authority and responsibility "to execute the Laws of the Union". Moreover, the Militia's ultimate constitutional responsibility is to provide for "the security of a free State" *domestically*, by deterring rogue public officials from, and if necessary seeing them swifty, surely, and severely punished for, misusing the law to break the law under color of the law. That is, ***the Militia are "the authorities" the Constitution explicitly assigns to keep watch at all times over all other "authorities"—thus solving the perennial conundrum of political philosophy, "Quis custodes custodire poterit?"***[2069]

Conversely, it can never be the responsibility, right, privilege, power, or even arguable claim of the Armed Forces or any professional police agency to supervise the Militia, let alone to prevent WE THE PEOPLE from asserting their sovereignty in and through their Militia. Americans in the *pre*-constitutional era were agreed that "standing armies, in time of peace, should be avoided, as dangerous to liberty".[2070]

[2068] *Commentaries on the Constitution, ante* note 576, Volume 2, § 1897, at 646 (footnote omitted).

[2069] "Who will be able to watch the guardians?" Figuratively, "Who will be able to govern the governors?"

[2070] Virginia Declaration of Rights (1776) art. 13. *Accord*, *e.g.*, Declaration of Independence (King George III "has kept among us, in times of peace, Standing Armies without the Consent of our legislatures" and "has affected to render the Military independent of and superior to the Civil power"); Ratification of the Constitution by the State of New Hampshire (1788), *in Documents Illustrative of the Formation of the Union of the American States*, *ante* note 1, at 1026 ("no standing Army shall be Kept up in time of Peace unless with the consent of three fourths of the Members of each branch of Congress"); Ratification of the Constitution by the State of Virginia (1788), *in id.*, at 1030 ("standing armies in time of peace are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the Community will admit"); Ratification of the Constitution by the State of New York (1788), *in id.* at 1035 ("standing armies in time of Peace are dangerous to Liberty, and ought not to be kept up, except in Cases of necessity"); Ratification of the Constitution by the State of North Carolina (1789), *in id.* at 1047 ("standing armies in time of peace are dangerous to Liberty, and therefore ought to be avoided, as far as the circumstances and protection of the

And had they been familiar with the type of professional police agencies commonplace today, they doubtlessly would have included them as well in the category of "dangerous" establishments, perhaps even in the very front rank. Certainly the recent history of such totalitarian states as Hitler's Germany and Stalin's Russia teaches that such ostensibly civilian secret police as the Gestapo and the NKVD were more to be feared as the enforcers of official political terrorism than the regular armed forces; and that, indeed, even officers at the very highest levels of those country's armed forces often fell victim to them. Nothing suggests that any change has occurred in the relative danger that establishments of this kind pose at the present time.

To the contrary: Everything attests that the situation has become far worse. Today, professional careers in "law enforcement" too often appeal to the aberrant type of individual who yearns to wield the brute power, but not fulfill the constitutional responsibility, that accompanies his receipt of an official badge and gun. And, as human psychology teaches, all power tends to be abused, especially by the very individuals who actively seek it. Moreover, those who spend much time among the rank and file within contemporary American "law enforcement" soon realize that their co-workers, superiors, prosecutors, judges, and other public officials will often, if not usually, "look the other way" when police powers are abused in favor of the governmental apparatus. So they come to believe that they can always get away with more than the apparatus would ever tolerate in the average citizen—which doubtlessly tempts all too many of them to engage in reckless, abusive, wanton, and even criminal behavior.[2071] In addition, the stresses on questionable personalities inherent in modern "law enforcement" inevitably bring to the surface various psychic weaknesses and even disabilities that would lay repressed for longer periods (or even permanently) in average citizens. That these would typically manifest themselves in irresponsible, abusive, sadistic, and even violent behavior should hardly be surprising. To be sure, most individuals seeking employment in "law enforcement" are subjected to some psychological screening, and are put through various programs of instruction and on-the-job training. But, in light of the increasingly repressive and even feral misbehavior of American police towards private citizens, many of the latter entirely innocent of any infraction of the law, one is entitled to question what such screening, instruction, and training actually seek to, or in fact do, discover and promote. Are those who recruit and supervise the police looking for individuals who believe that the purpose of the police is not to control WE THE PEOPLE in aid of the political, economic, or social agenda of some hidden faction, but instead to protect THE PEOPLE in the enjoyment

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community will admit"); *Ratification of the Constitution, by Convention of the State of Rhode-Island and Providence Plantations* (1790), *in id.* at 1055 ("standing armies in time of peace, are dangerous to liberty, and ought not to be kept up, except in cases of necessity").

[2071] *All* intentional violations of Americans' civil rights are criminal acts. *See, e.g.,* 18 U.S.C. §§ 241 and 242.

of their liberty *as they choose to enjoy it*—who are willing to "take a bullet" from some criminal rather than to oppress (let alone kill) an innocent citizen (that is, who will think first, and shoot only second, if at all)—who will disobey *all* overtly criminal orders, and firmly question "authority" in borderline cases—who will refuse to perjure themselves, suppress evidence, and otherwise obstruct justice in order to protect "the Department", to cover for "their brothers and sisters" on "the Force", or to keep within the good graces of prosecutors and judges—and who will expose and oppose police oppression of the citizenry, internal corruption in their own agency, and other wrongdoing by rogue public officials? Or, are the recruiters and supervisors seeking to enlist individuals who subscribe to the amoral principle that "the ends justify the means"—who imagine that a badge and a gun license them to oppress others—who harbor an "us versus them" mentality that contemptuously puts police, prosecutors, and other officials at odds with common "civilians"—who will obey orders from their superiors in the mechanical manner of thoughtless robots—who are willing to deprive of constitutional rights, inflict pain upon, or even kill, anyone who physically challenges their supposed authority—and who will affirmatively cover up misbehavior by rogue officials?

On the basis of these considerations, every prudent American should conclude that *the very last* individuals who should be entrusted with what amounts to a monopoly of firearms are to be found in any form of "standing army", whether openly designated as such or cloaked in the mantle of a civilian, but *para-*military, "law-enforcement agency". Of course, that is exactly what the Second Amendment to the Constitution teaches: "A well regulated *Militia*, being necessary to the security of a free State, the right of *the people* to keep and bear Arms, shall not be infringed."[2072] Nowhere does the Constitution suggest that any "standing army" or professional "police force" is "necessary to the security of a free State", or even "necessary" for any purpose whatsoever. Rather, by not just implicit but even studied exclusion, the Amendment teaches the very opposite. Furthermore, when the Amendment categorically declares that "the right of the people * * * shall not be infringed", it leaves no room in its prohibition for any exception—whether of legislative, executive, or judicial concoction—to its prohibition in favor of a "standing army" or any professional "police force". No less than anyone else are such establishments prohibited from "infring[ing]" "the people['s]" "right". Therefore, with respect to the "keep[ing] and bear[ing of] Arms", any "standing army" and all "police forces" must always remain inferior and thereby subordinate to the Militia.

For such subordination to be enforced, though, two conditions must be met: *First*, the Militia must always be able to "outgun" every one of the General Government's professional police agencies, and all such agencies in the States until

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[2072] Emphasis supplied.

upon revitalization of the Militia the latter are incorporated within the Militia as specialized units akin to the Minutemen or Rangers of *pre-*constitutional times. *Second*, if the Militia cannot be expected to "outgun" the Armed Forces in some important respects, because the latter will inevitably possess various types of heavy equipment perhaps not suitable for the Militia, nonetheless the Militia must always be sufficiently organized that they will vastly outnumber any rogue elements within the Armed Forces, so that quantity will have a reasonable chance to overwhelm quality at least with respect to deterring those relatively few renegades from combining with aspiring usurpers and tyrants to oppress THE PEOPLE.[2073] Moreover, upon revitalization of the Militia, a Militia liaison officer should be attached to every major unit in the Armed Forces, in order to promote the closest coördination, coöperation, mutual understanding, and sympathy between the two establishments.

As in the case of "Invasions", the Constitution cannot presume that an "Insurrection[ ]" will not in fact temporarily succeed, ensconcing usurpers and tyrants in control of a puppet "government" propped up by armed agents of repression. Should such a calamity occur, patriotic Americans would be reduced to outlaws in their own land, their only alternative to surrender and slavery being to take the field as *guerrilleros*, partisans, *résistants*, and other types of clandestine fighters. At that point, *any and all* firearms—and whatever ammunition was available—would be usable, and used, for "suppress[ing] Insurrections" in whatever ways patriots could devise. Again, because necessity would define the scope of the constitutional term "Arms" in that future day, that term must be just as broadly construed in the present, so that WE THE PEOPLE can prepare now for what may happen then.

Moreover, if, under such adverse circumstances, THE PEOPLE are to be capable of any effective resistance, they must have access to some "Arms" about which, before the outbreak of open defiance of the régime, the oppressors have no knowledge. Therefore, long before aspiring usurpers and tyrants come anywhere near their goal, THE PEOPLE will need to secrete in long-term storage firearms and ammunition for which no official "registration" exists, along with the tools and the raw and *semi-*finished materials necessary to manufacture new (even if only crude) firearms and especially ammunition. Therefore, "[t]o provide for * * * arming * * * the Militia" requires loyal public officials not to interfere with THE PEOPLE'S acquisition and retention of firearms, ammunition, gunsmithing tools, and related resources *about which those officials know, and except through constitutional judicial processes can ascertain, nothing*.

If no governmental records of who possesses this equipment exist, and no private records are easily accessible, rogue public officials eager to confiscate THE

[2073] *See The Federalist* No. 46 (James Madison), *quoted ante,* at 41.

PEOPLE'S "Arms" cannot know where to look. Except everywhere. But no régime can deploy the manpower to look *everywhere*. To be sure, after revitalization of the Militia, rogue officials would know that every member of the Militia not specifically exempted by statute possessed at least one firearm, ammunition, and accoutrements suitable for Militia service. Even if those officials were able to confiscate every one of these first-line "Arms", however, they could never be sure of who among Militiamen—if not all of them—possessed *other* "Arms" in well-hidden caches. For that reason, all public officials should always be kept in the dark on that score, so that their ignorance, uncertainty, and insecurity will deter them from disloyal acts.

Self-evidently, WE THE PEOPLE cannot secrete stockpiles of "Arms" adequate for effective resistance only at the last minute, when tyranny has ascended to its zenith and can clamp down on them in full force. For the very first thing successful usurpers and tyrants will do, if they have not already done so on their road to power, will be to confiscate from THE PEOPLE whatever firearms and ammunition have not yet been hidden. Thus, the contingency "if they have not already done so" becomes quite important, because the steps usurpers and tyrants take on that road are not always obvious. Their full-blown puppet "government" will probably not be set up overnight in one fell swoop. The political system will not undergo a sudden devolutionary saltation from apparent freedom to undeniable oppression. More likely, the corruption will insinuate itself through a gradual degenerative process that imposes incremental deprivations of liberty on an unsuspecting public (as the saying goes, "slowly boiling the frog"). Under one guise or another, "gun control" will be introduced in a step-by-step fashion so as not to arouse too much opposition from too many individuals too soon.

For WE THE PEOPLE successfully to combat this stratagem, they must cultivate instincts intensely inimical to "gun control". They must recognize "gun control" as no less contrary to "the security of a free State" than "well regulated Militia", based upon "the right of the people to keep and bear Arms", are "necessary". Of course, THE PEOPLE must know that "an unconstitutional act is not a law",[2074] and that "[a]n offense created by it is not a crime".[2075] More than that, they must also recognize that any supposed "law" the effect of which is to hinder their ability to resist oppression by force of arms is itself a component part of "a design to reduce them under absolute Despotism", and therefore not simply unconstitutional and void, but even beyond the "just powers" that any "Government" can "deriv[e] * * * from the consent of the governed".[2076] And if a rotten Judiciary crawling with the maggots of usurpation will not strike down such a "law", then THE PEOPLE themselves must do so by systematic and thoroughgoing

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[2074] Norton v. Shelby County, 118 U.S. 425, 442 (1886).

[2075] *Ex parte* Siebold, 100 U.S. 371, 376 (1880), *quoted with approval in* Fay v. Noia, 372 U.S. 391, 408 (1963).

[2076] Declaration of Independence.

noncompliance, employing whatever means are available—secreting the firearms and ammunition they already possess; setting up clandestine factories; smuggling; and finally, at the onset of open resistance, liberating arms from the usurpers' and tyrants' puppet troops and police. Indeed, fraudulent judicial decisions unashamedly whitewashing such a "law" would supply the final indicia that "due process of law" aimed at "the security of a free State" no longer existed—and thereby would constitute an occasion and reason in fact, and a sufficient justification in law, for resistance, and call into being a duty of resistance aimed at "throw[ing] off such [an abusive] Government, and * * * provid[ing] new Guards for the[People's] future security".[2077]

True enough, even a duty under "the Laws of Nature and of Nature's God" "to throw off" tyranny must be fulfilled with prudence, circumspection, and (if possible) moderation. Depending upon circumstances, WE THE PEOPLE perhaps may not need to resort to "Arms", but instead may successfully employ tactics of nonviolent resistance.[2078] Yet the Constitution nowhere identifies unarmed, nonviolent resistance as the primary means, or even an alternative means, by which THE PEOPLE can and should effectively oppose tyranny. "A well regulated Militia", which the Second Amendment declares to "be[ ] necessary to the security of a free State", is not an agglomeration of pacifists. And if the Constitution implicitly allows for unarmed resistance—because the Militia, although always trained to arms, need not invariably turn to arms in every situation in which their intervention might be required—it renders nonviolent action credible by requiring and securing the possibility of mass, concerted, fully armed resistance if all other recourse fails. But only if THE PEOPLE actually possess whatever firearms may be necessary under the circumstances can they exercise an option to use them.

c. "Arms" suitable to "execute the Laws of the Union". As far as the Militia are concerned, the modern-day dichotomy between "military" and "police" functions is an artifact of lawmakers' failure over many generations past properly "[t]o provide for organizing, arming, and disciplining, the Militia".[2079] During the *pre*-constitutional era, no professional "police departments" or equivalent governmental "law-enforcement agencies" existed. Large-scale "police" operations, such as "slave patrols", were the job of the Militia.[2080] Following this pattern, in the future all "police" in the several States should be specialized units *within* the

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[2077] Declaration of Independence.

[2078] *See, e.g.,* Gene Sharp, *Civilian-Based Defense: A Post-Military Weapons System* (Princeton, New Jersey: Princeton University Press, 1990); *idem*, *The Politics of Nonviolent Action, Part One, Power and Struggle* (Boston, Massachusetts: Porter Sargent Publishers, 1973); *idem, The Politics of Nonviolent Action, Part Two, The Methods of Nonviolent Action* (Boston, Massachusetts: Porter Sargent Publishers, 1973); *idem, The Politics of Nonviolent Action, Part Three, The Dynamics of Nonviolent Action* (Boston, Massachusetts: Porter Sargent Publishers, 1973).

[2079] U.S. Const. art. I, § 8, cl. 16.

[2080] *See ante*, at 339-343, 392-395, and 718-723 (Virginia).

revitalized Militia, akin in principle to the Minutemen and Rangers of *pre*-constitutional times.[2081]

Because (as just explained) the Constitution requires that "the Militia of the several States" be equipped with firearms at least equivalent to those the regular Armed Forces carry, revitalized Militia will be more than suitably armed to perform their duties as "police" who "execute the Laws of the Union". For even today's most highly *para*-militarized police and other civilian law-enforcement agencies are not anywhere near as well equipped as the regular Armed Forces. And, of course, nothing would prevent the Militia from being armed, not only with firearms of the highest "military" grade, but also with firearms of some lesser (or at least different) "police" grade, so that they could select the very best tools for the particular purposes at hand.

3. "Arms" suitable for individual self-defense. Individual self-defense amounts to personal execution of the laws on the spot, being justifiable as such because no alternative exists other than ceding to criminals free reign over their victims. Thus, individual self-defense is quintessentially a Militia function, albeit one performed at the level of each solitary individual. In principle, then, any and all "Arms" at all suitable for individual self-defense come within the set of "Arms" suitable for the Militia, and therefore are constitutionally protected as such for "the people to keep and bear".

Many instances could be cited in which personal "execut[ion of] the Laws of the Union" would constitute an integral part of a case of individual self-defense. For example, Title 18, United States Code, Section 241declares it a crime "[i]f two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right of privilege * * * secured [to him by the Constitution or laws of the United States]", and embraces situations in which "death results from the acts committed * * * or * * * such acts include kidnapping or an attempt to kidnap, * * * or an attempt to kill"—any of which heinous "acts" would justify a victim's resort to deadly force with a firearm to repel such aggression. Similarly, Title 18, United States Code, Section 242 declares it a crime for anyone, "under color of any law, statute, ordinance, regulation, or custom, willfully [to] subject[ ] any person in any State * * * to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States", and includes situations that involve "bodily injury"; "the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire"; "death result[ing] from the acts committed"; "kidnapping or an attempt to kidnap"; or "an attempt to kill"—again, any of which

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[2081] *See ante and post*, at 202, 214-215, 217, 472, 511-512, 514-515, and 559-563 (Minutemen); 563-564 (Rangers); *and* 327-328, 1135-1138, 1194-1202, 1276-1277, 1291-1293, and 1482-1488 (incorporation of law-enforcement agencies into, and performance of law-enforcement functions by, the Militia).

threats would justify a victim's resort to deadly force in self-defense.[2082] And numerous laws of the several States fit this general pattern, too.

Now, *any* small arms suitable for typical "military" or "police" purposes *can* be employed for personal self-defense in a pinch. In most cases, though, where a criminal assault on an individual occurred at close quarters, the use of a high-powered rifle for self-defense would be unlikely, because the average American would not keep such a firearm immediately at hand on a routine basis; and where any choice among different firearms were possible such use would probably be contraindicated, because in any populated area the bullet fired from such a rifle, even having struck an assailant, might nonetheless travel a long distance farther on and perhaps injure some innocent bystander.[2083] Of course, a semiautomatic or even a fully automatic rifle might be the preferable firearm where the victim faced a pack of heavily armed jack-booted thugs from some rogue governmental agency, acting "under color" but in violation of law, whose illegal acts "include[d] the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire", or "kidnapping or an attempt to kidnap", or "an attempt to kill".[2084] On the other hand, many firearms that would be considered substandard for modern "military" or "police" use—even a single-shot handgun chambered in .22 LR caliber—could suffice for self-defense in the absence of something better. And "the right of the people to keep" such "Arms" would already be guaranteed because of their potential usefulness to patriotic *guerrilleros*, partisans, or *résistants* engaged in last-ditch efforts to "repel Invasions" or "suppress Insurrections".

This matter is especially worthy of comment because of the currency of the utterly wrong-headed notion that "the right of the people to keep and bear Arms" in the Second Amendment should be construed and applied without controlling reference to the clause preceding it (that is, "[a] well regulated Militia, being necessary to the security of a free State"), and therefore that average Americans are constitutionally entitled "to keep" only such "Arms" as happen to be "in common use" at the time for personal self-defense against private criminals.[2085] Individual

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[2082] For the purpose of this analysis, presumably the "bodily injury" being threatened would be of so severe a nature as to permit the use of lethal force in order to prevent it.

[2083] One of the basic rules for the safe use of firearms, which applies even in situations involving self-defense, is to "know your target *and what is beyond it*."

[2084] 18 U.S.C. § 242. The thugs' possession of badges would afford them no defense. For example, a rogue officer who attempts an unlawful arrest, even under color of a claim of "good faith", is an aggressor whom his victim may resist in self-defense with whatever force is reasonable in relation to the harm threatened under the circumstances. *See* John Bad Elk v. United States, 177 U.S. 529 (1900); Brown v. Commonwealth, 27 Va. App. 111, 116-117, 497 S.E.2d 527, 530 (1998), *citing* Foote v. Commonwealth, 11 Va. App. 61, 69, 396 S.E.2d 851, 856 (1990), *and* Diffendal v. Commonwealth, 8 Va. App. 417, 421, 382 S.E.2d 24, 26 (1989). If by some overt act indicative of imminent danger the rogue officer threatens his victim with death or severe bodily injury, the victim may respond with lethal force. *See* Commonwealth v. Sands, 262 Va. 724, 729, 553 S.E.2d 733, 736 (2001); McGhee v. Commonwealth, 219 Va. 560, 562, 248 S.E.2d 808, 810 (1978).

[2085] *E.g.,* District of Columbia v. Heller, 554 U.S. 570, 595-600, 626-628 (2008) (Scalia, J., for the Court).

self-defense is the fundamental purpose neither of the Second Amendment itself nor of the Militia Clauses of the original Constitution, "in order to prevent misconstruction or abuse" of which the Amendment was adopted.[2086] For individual self-defense can enforce but a few laws, and then only in adventitious situations. And individual self-defense cannot "suppress Insurrections and repel Invasions"—or deter, let alone effectively resist, a rogue "standing army" or professional *para*-military police forces which afford "facile means * * * to ambitious and unprincipled rulers to subvert the government or trample upon the rights of the people".[2087] In fact, if individual self-defense is the sole, or even the primary, purpose for which "the people" can claim a "right * * * to keep and bear Arms", then that ostensible "right" is in actuality an open invitation to aspiring usurpers and tyrants, to insurrectionists, and to invaders—because these jackals, who invariably hunt in packs, will expect from experience that "the people's" sporadic and uncoördinated resistance to aggression as mere individuals will assuredly prove feckless and futile.

4. "Arms" suitable for target shooting, hunting, and other "shooting sports". Self-evidently, inasmuch as Militia service is not a "sport", "Arms" that were suitable *only* for "sporting purposes" would not be suitable for Militia service, by definition. In fact, however, throughout American history, essentially all firearms designed primarily for "sporting purposes" have always been capable of being and in many instances have been employed for Militia service if nothing better were available. And during the initial stages of revitalization of "the Militia of the several States" in the near future, reliance will have to be placed upon then-current stocks of primarily "sporting" firearms in average Americans' hands, because nothing better will be available in sufficiently large quantities.

Of course, the designation of many of these "Arms" as being of "sporting" character will be nothing but an artifact of the efforts of "gun controllers" to strip Americans of the right to possess "military-" and "police-grade" firearms, and the counter-efforts of those Americans to evade that restriction by the use of semantics. For example, common Americans now possess very large numbers of well-made, highly accurate, and dependable modern rifles that are grudgingly classified by the General Government's Bureau of Alcohol, Tobacco, Firearms, and Explosives as "sporting arms", but which, only a few decades ago, would have been considered of first-class "military" character in any country in the world—in particular, various semiautomatic, magazine-fed rifles of the domestic "AR" and "M1A" types, in .223 (5.56 x 45) and .308 (7.62 x 51) caliber, as well as no less effective rifles of the foreign "AK" type, in 7.62 x 39 and 7.62 x 54R caliber, more of which are being

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[2086] RESOLUTION OF THE FIRST CONGRESS SUBMITTING TWELVE AMENDMENTS TO THE CONSTITUTION (4 March 1789), *in Documents Illustrative of the Formation of the Union of the American States*, *ante* note 1, at 1063.

[2087] J. Story, *Commentaries on the Constitution, ante* note 576, Volume 2, § 1897, at 646.

produced and purchased every year. And if the list is enlarged to encompass the M1 Garand, M1 Carbine, FN-FAL, and other semiautomatic rifles of "military" pedigree that are no longer being produced for military use, but in large numbers have come into "civilian" hands and are most unlikely to wear out in the foreseeable future, the "sporting" rifles that are fully capable of "military" uses must constitute a significant percentage of all the "sporting" arms extant. All of these rifles differ from the corresponding "military" versions only in their rate of fire: the "sporting" arms being semiautomatic only, many of the "military" arms being fully automatic or capable of burst fire. And inasmuch as a well-trained rifleman with a semiautomatic firearm can be just as effective as one with a fully automatic arm—and far less wasteful of ammunition, too—the practical difference between "sporting" and "military" arms is probably too small to measure.

Moreover, even after revitalization of the Militia is complete, firearms designed for target shooting, hunting, and other of "the shooting sports" will always prove useful for training individuals in the safe and effective use of arms. Such has been recognized since the very earliest days, when (for example) Virginia's General Assembly declared that "any man be permitted to kill deare or other wild beasts or fowle in the common woods, forrests, or rivers in regard that thereby the inhabitants may be trained in the use of theire armes".{EN-1992} So, because "a well regulated militia" is "composed of the body of the people, *trained to arms*",[2088] *all* firearms capable of being employed for training are properly categorized as "Militia arms" and therefore come within the protection of "the right of the people to keep and bear Arms". To be sure, universal training with standard military rifles should be the goal, as it long has been in principle if not always in practice.[2089] But until such a comprehensive program can be instituted, WE THE PEOPLE can at least learn the fundamentals of the safe and effective usage of firearms with the "Arms" they happen to have at hand.

5. "Arms" to be as technologically advanced as possible. Because the Militia have been in the past and may be in the future called upon to fulfill any or all of the three responsibilities the Constitution explicitly assigns to them—namely, "to execute the Laws of the Union, suppress Insurrections and repel Invasions"[2090]—under widely divergent conditions, the specific types and examples of "Arms" within the various categories of "Arms" suitable for Militia service are not and cannot be historically fixed. Rather, they must include *whatever "Arms" may be necessary and sufficient for performance of those tasks under the particular conditions that exist at the time*.

[2088] Virginia Declaration of Rights (1776) art. 13 (emphasis supplied).

[2089] *See, e.g.,* An Act For making further and more effectual provision for the national defense, and for other purposes, Act of 3 June 1916, CHAP. 134, § 113, 39 Stat. 166, 211; *now codified as amended at* 10 U.S.C. § 4309.

[2090] U.S. Const. art. I, § 8, cl. 15.

a. Construing the Constitution according to the principle of "original intent" does not require that the phrase "provide for * * * arming * * * the Militia" in the original Constitution[2091] and the noun "Arms" in the Second Amendment must embrace only single-shot muskets, rifles, and pistols with flintlock actions that employ black powder as a propellant and lead balls as missiles. Many constitutional terms address sets of activities or things the contents of which can, and must be expected to, change with the times—for example, "Commerce";[2092] "the Securities and current Coin of the United States";[2093] "any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State";[2094] and "any Title of Nobility".[2095] "Arms" suitable for the Militia constitutes one of these compendious categories.

To credit the contention that the meanings of "arming" and "Arms" were unalterably fixed as of 1788 and 1791 to include only such "Arms" as "the people" of that day brought to their Militia service, one would be obliged to accept two propositions bordering on the absurd:

(1) One would have to assume that, if Americans immediately after 1791 (or at any time during the entire *pre*-constitutional period, for that matter) had enjoyed access to modern firearms, they would not spontaneously have adopted them for their Militia service, and beyond that would even have denied the power of Congress or the States' legislatures to require them to keep and bear such "Arms" for that purpose. Yet, no doubt can exist that, as eminently practical people, Americans of that era would have adopted *any* "Arms" that could have improved the performance of their Militia. Indeed, although technology advanced slowly during the 1700s, the category "Arms" was not closed to significant improvements—as proven by the adoption of rifles in place of smoothbored muskets.[2096]

(2) One would have to assume that WE THE PEOPLE in the late 1700s intended through the Constitution to deny any right to possess new types of "Arms" to the very "Posterity" for whom they claimed to "provide for the common defence", to "secure the Blessings of Liberty", and to guarantee what is "necessary to the security of a free State".[2097] Yet WE THE PEOPLE surely knew that no self-denying ordinance in their own Constitution could withhold improvements in "Arms" from

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[2091] U.S. Const. art. I, § 8, cl. 16.

[2092] U.S. Const. art. I, § 8, cl. 3.

[2093] U.S. Const. art. I, § 8, cl. 6.

[2094] U.S. Const. art. I, § 9, cl. 8.

[2095] U.S. Const. art. I, § 10, cl. 1. *Accord*, U.S. Const. art. I, § 9, cl. 8.

[2096] *See ante*, Chapter 7 (Rhode Island) and Chapter 19 (Virginia).

[2097] U.S. Const. preamble *and* amend. II.

whatever enemies might aggress against their "Posterity" in an uncertain future. Rather, they had to (and surely did) expect that such enemies, both foreign and domestic, would rush to adopt the most modern "Arms" possible, so as to make their aggressions effective. Which meant that, for "the common defence" and "the security of a free State", THE PEOPLE'S "Posterity" also needed access to such "Arms"—and well before any aggression occurred, so as to be able to deter it, if at all possible. Nothing suggests that the practical requirement for WE THE PEOPLE'S "Posterity" to be at least as well armed as any potential aggressors is any less imperative today than it was in America's Founding Era. Indeed, it has become of far greater concern in the present era than at any time in the past, because the technology of armaments, and the ability of industry to produce and distribute them are making more rapid strides now than ever before.

b. In more than one way, the Constitution recognizes that the "Arms" which "the people" enjoy "the right * * * to keep and bear" for Militia service must be up to date, and their effectiveness improved whenever and however possible in lockstep with technological developments:

(1) Congress's power "[t]o provide for * * * arming * * * the Militia" and the Second Amendment's declaration, "[a] well regulated Militia, being necessary to the security of a free State", are both phrased in the *present* tense. What Congress is to "provide" *at the present time* must be available if it is to be "provide[d]"; and what is "necessary" *at the present time* must be capable of performing the assigned task *at the present time*, in the face of opposition that presumably will employ the best armaments available to it *at the present time*. Therefore, the most suitable, and thus the preferable, "Arms" for the Militia will be the very best armaments available *at the present time*. (Of course, if the best armaments are unavailable, then whatever happens to be at hand has to suffice.)

(2) The Constitution expects and encourages technological advances in all fields, including armaments, which it why it empowers Congress to "secur[e] for limited Times to * * * Inventors the exclusive Right to their respective * * * Discoveries".[2098] So, when Congress "make[s] all Laws which shall be necessary and proper for carrying into Execution" its power "[t]o provide for * * * arming the Militia",[2099] it can—indeed, it must—see to it that the Militia are "arm[ed]" with the best armaments available at that time, which should be at least equivalent to the "Arms" the regular Armed Forces carry. And, for a while, this is what Congress did.

Originally, following the *pre*-constitutional pattern precisely, in 1792 Congress simply ordered

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[2098] U.S. Const. art. I, § 8, cl. 8.

[2099] U.S. Const. art. I, § 8, cls. 18 and 16.

> [t]hat every citizen * * * enrolled [in the Militia] * * * shall, within six months thereafter, provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, * * * a pouch with a box therein to contain not less than twenty-four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball: or with a good rifle, * * * shot-pouch and powder-horn, twenty balls suited to the bore of his rifle, and a quarter of a pound of powder[.][2100]

As the technology of small arms advanced very little during the first half of the Nineteenth Century, these requirements were modified only slightly by 1874, when Congress ordained that

> [e]very citizen shall, after notice of his enrollment [in the Militia], be constantly provided with a good musket or firelock of a bore sufficient for balls of the eighteenth part of a pound, a sufficient bayonet and belt, two spare flints, * * * a pouch with a box therein to contain not less than twenty-four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball; or with a good rifle, * * * shot-pouch and powder-horn, twenty balls suited to the bore of his rifle, and a quarter of a pound of powder[.][2101]

Arguably, these specifications were partly obsolete at the time, because locks using percussion caps had replaced flintlocks in standard military arms even before the Civil War; and during that conflict firearms using so-called "fixed" ammunition composed of a copper or brass case, primer, powder, and bullet all combined in one cartridge became commonplace—sometimes as the result of the intervention of gifted amateurs in high office, such as President Abraham Lincoln's promotion of the Spencer repeating rifles and carbines.[2102] Yet this statute was at least capable of constitutional application; for it did not preclude any member of the Militia from arming himself with "a *good* musket" or "a *good* rifle" of some type more up-to-date than the flintlock.

In any event, between 1874 and 1903 major improvements in small arms came about—primarily, the adoption of repeating in place of single-shot rifles, the substitution of smokeless powder for black powder, and the introduction of jacketed bullets in *spitzer* configuration which enabled high-velocity ammunition to be produced. So, from 1874 to 1887, Congress appropriated money "for the purpose

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[2100] *An Act more effectually to provide for the National Defence by establishing an Uniform Militia throughout the United States*, Act of 8 May 1792, CHAP. XXXIII, § 1, 1 Stat. 271, 271.

[2101] Revised Statutes of the United States (1873-1874), TITLE XVI, THE MILITIA, § 1628, 18 Stat. 285, 285.

[2102] *See* James M. McPherson, *Tried by War: Abraham Lincoln as Commander in Chief* (New York, New York: Penguin Books, 2009), at 191.

of providing arms and equipments for the whole body of the militia, either by purchase or manufacture, by and on account of the United States"[2103]—"arms and equipments" which presumably were superior to any "good musket or firelock" allowable under the Militia Act of 1792. Then, from 1887 to 1903, Congress authorized appropriations "for the purpose of providing arms, ordnance stores, quartermaster's stores, and camp equipage for issue to the militia", with the requirement that "the purchase or manufacture" of this equipment "shall be made under the direction of the Secretary of War, as such arms, ordnance and quartermaster's stores and camp equipage are now manufactured or otherwise provided for the use of the Regular Army"[2104]—thus securing for the Militia a parity in basic personal armament with "the Regular Army". At last, in 1903 Congress authorized the Secretary of War

> to issue, on the requisitions of the governors of the several States and Territories, or of the commanding general of the militia of the District of Columbia, such number of the United States standard service magazine arms, with bayonets * * * and such * * * necessary accouterments and equipments as are required for the Army of the United States, for arming all of the organized militia * * * and to exchange * * * ammunition * * * suitable to the new arms, round for round, for corresponding ammunition suitable to the old arms theretofore issued[.][2105]

In keeping with this historical pattern, today members of "the Militia of the several States" who are not exempted as conscientious objectors from being armed should have access to every type of rifle, handgun, and shotgun, including both *semi-*automatic and fully automatic rifles and machine pistols at least equivalent to the "standard service magazine arms" with which the regular Armed Forces are equipped.

[2103] Revised Statutes of the United States (1873-1874), TITLE XVI, THE MILITIA, § 1661, 18 Stat. 285, 290.

[2104] An act to amend section sixteen hundred and sixty-one of the Revised Statutes, making an annual appropriation to provide arms and equipments for the militia, Act of 12 February 1887, CHAP. 129, §§ 1 and 3, 24 Stat. 401, 401, 402. *Continued with an increase in appropriations*, An Act To amend section one of the Act of Congress approved February twelfth, eighteen hundred and eighty-seven, entitled "An Act To amend section one of the Act of Congress approved February twelfth, eighteen hundred and eighty-seven, entitled "An act to amend section sixteen hundred and sixty-one of the Revised Statutes, making an annual appropriation to provide arms and equipments for the militia", Act of 6 June 1900, CHAP. 805, 31 Stat. 662.

[2105] An Act To promote the efficiency of the militia, and for other purposes, Act of 21 January 1903, CHAP. 196, § 13, 32 Stat. 775, 777. Congress also purported, however, to bifurcate the Militia into components unknown to American history and therefore to the Constitution—"the organized militia, to be known as the National Guard * * * , and the remainder to be known as the Reserve Militia"—and to provide for arming only "the organized militia". *Compare* Act of 21 January 1903, § 1, 32 Stat. at 775, *with* § 13, 32 Stat. at 777. This was the first time that a significant part of the Militia—indeed, the major part in terms of numbers—was not required to be armed. In effect, by affirmatively arming "the organized militia" while completely neglecting "the Reserve Militia" (or, as it was later styled, "the unorganized militia"), Congress created a "select militia" more narrowly exclusive than even Alexander Hamilton had recommended. *See ante*, at 786-793, *and post,* at 1435-1441.

c. In addition, that "the Militia of the several States" should always be equipped with the best "Arms" available at the time should not preclude them from developing and adopting even better "Arms". Rather, WE THE PEOPLE must have direct access, not only to "Arms" that are particularly suitable for the military and law-enforcement aspects of Militia service according to the standards of the day, and not only to various substitutes that THE PEOPLE can stockpile against any conceivable emergency arising in the future, but also to new types of firearms that *exceed* current military and police requirements. This, for two reasons, one political the other practical:

(1) In America "a Republican Form of Government"[2106] is "constructed on th[e] principle, that the Supreme Power resides in the body of the people",[2107] who are the true sovereigns[2108]—WE THE PEOPLE *are* "the Militia of the several States"—the salient characteristic of the Militia is that their members are armed—and "'[p]olitical power grows out of the barrel of a gun'".[2109] Therefore, in order to maintain their political power as sovereigns in the face of every foreseeable vicissitude in the course of human events, THE PEOPLE by their own efforts in and through their Militia must be able continuously to increase the quantity and especially to improve the quality of the guns they possess. As a consequence of their sovereignty THE PEOPLE cannot be required to, and under the counsel of prudence never should, depend exclusively upon public officials to supply them with the "Arms" they need. For public officials may simply neglect or fail properly to perform their duty "[t]o provide for organizing, arming, and disciplining, the Militia"[2110]—as they have since 1916, when Congress purported to divide the Militia into a "regularly enlisted" component consisting of the National Guard and the Naval Militia, on the one hand, and "the Unorganized Militia", on the other hand; and declared that, "while in the service of the United States" the National Guard would "stand discharged from the militia" and become part of "the Army of the United States".[2111] And public officials may even turn rogue, with the assistance of disloyal elements in a "standing army" or *para*-military police forces, and affirmatively seek to disarm THE PEOPLE.

(2) The Constitution allows Congress to promote the invention, perfection, and production of new types of "Arms" through the exercise of its powers "[t]o lay and collect Taxes * * * to * * * provide for the common Defence", to "secur[e] for

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[2106] U.S. Const. art. IV, § 4.

[2107] Chisholm v. Georgia, 2 U.S. (2 Dallas) 419, 457 (1793) (opinion of Wilson, J.).

[2108] *See id.* at 454, 456 (opinion of Wilson, J.), 471-472 (opinion of Jay, C.J.).

[2109] *Quotations From Chairman Mao, ante* note 28, at 61.

[2110] U.S. Const. art. I, § 8, cl. 16.

[2111] An Act For making further and more effectual provision for the national defense, and for other purposes, Act of 3 June 1916, CHAP. 134, §§ 1, 57, 58, 111, and 117, 39 Stat. 166, 166, 197, 211, 212.

limited Times to * * * Inventors the exclusive Right to their respective * * * Discoveries", "[t]o provide for * * * arming * * * the Militia", and "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers".[2112] This approach, however, can be successful only to a limited degree, because Congress simply cannot foresee, let alone "plan", what amount to evolutionary (let alone revolutionary) developments in firearms, ammunition, and related accoutrements that will depend largely upon a process of "natural selection" through experimental trial and error by the people in the field who will actually discover the need and work out designs for new equipment. In the long run, "central planning" for establishments as large, geographically dispersed, and diversified in activities as "the Militia of the several States" must prove no more workable than "central planning" in any other field of complex human endeavor.

Congress and the States' legislatures as well can best "provide for * * * arming * * * the Militia" with the most technologically advanced and useful firearms by encouraging the freest and closest possible interaction between WE THE PEOPLE in the Militia and private manufacturers of arms. Far more than any legislators or bureaucrats, revitalized "Militia of the several States"—with membership in the tens of millions throughout the country, including large numbers of individuals with imagination, intelligence, and practical skills—with widely differing "homeland-security" missions and challenges in each State—with large discretionary budgets drawn from internal fines—with the ability and incentive to experiment—and capable of drawing upon the resources, expertise, and experience of the armaments industry—should be concerned with and capable of developing an extremely wide variety of new firearms, ammunition, accoutrements, and other equipment, as well as tactics for employing them in the most effective manner. But such a coöperative endeavor requires that THE PEOPLE be free to demand, and the manufacturers free to develop and distribute, whatever THE PEOPLE consider necessary for Militia service; and that the manufacturers be free to offer, and THE PEOPLE free to adopt, whatever the manufacturers devise that may prove useful for that purpose. Only with such freedom can emerge the on-going and even accelerating application of imagination, innovation, invention, and improvement with respect to the "Arms" that THE PEOPLE not only can possess but, more importantly, want to possess because they themselves have determined the need to possess such "Arms".

D. Errors as to "Arms" in the Supreme Court's majority opinion in *District of Columbia* v. *Heller*. The foregoing should put paid to the absurd suggestions explicitly or implicitly endorsed by every Justice of the Supreme Court that "the Second Amendment does not protect those weapons not typically

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[2112] U.S. Const. art. I, § 8, cls. 1, 8, 16, and 18.

possessed by law-abiding citizens for lawful purposes"; that "the right of the people to keep and bear Arms" is somehow limited to "the sorts of weapons * * * 'in common use at the time'"; that "weapons that are most useful in military service—[fully automatic] M-16 rifles and the like—may be banned", even though "[i]t may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large"; and that these "limitation[s are] fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons'".[2113] Yet something more should be added, because panegyrists for "gun control" doubtlessly will seize upon these loose assertions in order to continue to deny to most of "the people" the very firearms necessary for Militia service.

1. The Justices failed to ask *why* certain types of firearms, *and not others*, happen to be "'in common use at th[is] time'" "by law-abiding citizens". For example, *why* are firearms "most useful in military service—M-16 rifles and the like" not "'in common use'" by average Americans today? The answer surely is *not* that such firearms are unsuitable for Militia service. Indeed, the Justices correctly presumed that such firearms would be eminently suitable for that purpose.

Rather, the answer is that: (i) Because of public officials' serial neglects, failures, and refusals to fulfill their "Oath[s] or Affirmation[s], to support th[e] Constitution",[2114] "the Militia of the several States" are effectively nonexistent throughout America. (ii) As a result, common Americans are not required by statute (as they should be) to acquire and permanently to possess the "Arms" best suited for Militia service. Therefore, (iii) such "Arms" are not "typically possessed by law-abiding citizens for lawful purposes" and are not "'in common use at th[is] time'". In addition, (iv) various "gun-control" statutes drastically limit the supply of such "Arms" in the free market,[2115] and impose taxes and requirements for registration on average "law-abiding" Americans who desire to manufacture, distribute, and possess "Arms" of that type[2116]—restrictions that would *not* apply were the "Arms" in question being used "by law-abiding citizens" for the "lawful purposes" of "the Militia of the several States", because then those "Arms" would

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[2113] District of Columbia v. Heller, 554 U.S. 570, 625, 627 (2008) (Scalia, J., for the Court). These remarks, however, were mere *obiter dicta*, because "the right of the people to keep and bear" "weapons * * * most useful in military service" was not *sub judice*.

[2114] U.S. Const. art. VI, cl. 3.

[2115] *See* An Act To amend chapter 44 (relating to firearms) of title 18, United States Code, and for other purposes ("Firearms Owners' Protection Act"), Act of 19 May 1986, Pub. L. 99-308, § 102(9) [§ 922(o)(1)], 100 Stat. 449, 453; *now codified at* 18 U.S.C. § 922(o)(1).

[2116] *See* AN ACT to amend title 18, United States Code, to provide for better control of the interstate traffic in firearms ("Gun Control Act of 1968"), Act of 22 October 1968, Pub. L. 90-618, TITLE II—MACHINE GUNS, DESTRUCTIVE DEVICES, AND CERTAIN OTHER FIREARMS, § 201 [§§ 5801, 5802, 5811, 5812, 5821, 5822, 5841, 5844, *and* 5845(a)(6) and (b)], 82 Stat. 1213, 1228-1231; *now codified at* 26 U.S.C. §§ 5801, 5802, 5811, 5812, 5821, 5822, 5841, 5844, *and* 5845(a)(6) and (b).

be involved in "a transfer to or by, or possession by or under the authority of * * * a State, or a department, agency, or political subdivision thereof",[2117] or would be "being imported or brought in for the use of * * * any State or possession or any political subdivision thereof".[2118] Thus, precisely that such "Arms" are *not* "'in common use'" constitutes a blatant "infringe[ment]" upon "the right of the people to keep and bear Arms"—which renders the Supreme Court's misinterpretation of the Second Amendment based upon the absence of such "'common use'", not just a further, but even an *aggravated,* "infringe[ment]" of that "right".

Underlying this situation, no doubt, is that for many generations past (just as Joseph Story pointed out as early as the 1830s), "it cannot be disguised that, among the American people, there [has been and] is a growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burdens, to be rid of all regulations".[2119] Whether they have willingly embraced or been unwittingly deceived by propaganda in favor of "gun control", all too many Americans have neglected, failed, or refused to recognize their constitutional duty to serve in the Militia, to possess "Arms" especially suitable for Militia service, and even to possess *any* "Arms" capable of being employed in that service. This apathy among the citizenry helps to explain how incompetent and rogue public officials have been able to get away with effectively suppressing the Militia for so long. Nonetheless, as long as the Militia Clauses of the original Constitution and the Second Amendment exist, private convenience and political prejudices cannot override "the right of the people to keep and bear Arms" *and particularly their constitutional duty to do so.* Short of an actual constitutional Amendment, no amount of public acquiescence and even approbation—whether spontaneous and genuine or contrived by the subtle brainwashing of corrupt mass media—can license rogue officials of either the General Government or the States to claim a power to disarm the people in general on the grounds that many individuals already have been fooled into disarming themselves.

2. The majority of the Justices in *Heller* explicitly, and the minority implicitly, rather grotesquely twisted the "historical tradition" upon which all of them purported to rely. True enough, as Blackstone observed, under *pre-*constitutional English law "[T]HE offence of *riding* or *going armed*, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land; and is particularly prohibited by * * * statute * * * upon pain of forfeiture of the arms, and imprisonment during the king's pleasure".[2120] And as Hawkins elaborated on the subject, "any Justice of Peace may * * * bind all those

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[2117] 18 U.S.C. § 922(o)(2)(A).

[2118] 26 U.S.C. § 5844(1).

[2119] *Commentaries on the Constitution*, *ante* note 576, Volume 2, § 1897, at 646.

[2120] *Commentaries on the Laws of England, ante* note 142, Volume 4, at 148-149.

to the Peace, who in his Presence * * * shall go about with unusual Weapons or Attendants, to the Terror of the People", and may grant "the Surety of the Peace" to any "Person [who] has just Cause to fear that another will * * * do him a corporal Hurt, as by killing or beating him, or that he will procure others to do him such Mischief".[2121] These descriptions, however, evidence that the concern at that time was not with "dangerous or unusual weapons" in and of themselves, or with such implements in the hands of responsible persons who employed them for legitimate purposes, but with individuals who went about with such weapons so "terrifying the good people of the land" that some of "the good people" could reasonably anticipate bodily harm if the armed interlopers were not restrained. The problem was not the character of the thing, but the lack of character of the person misusing it.

Hawkins also touched on this matter in his discussion of "affrays". "[T]he Word Affray", he explained, "in a legal Sense * * * is * * * a publick Offence, to the Terror of the People".[2122] And "in some Cases there may be an Affray where there is no actual Violence; as where a Man arms himself with dangerous and unusual Weapons, in such Manner as will naturally cause a Terror to the People".[2123] Yet, no one would incur any "Penalty * * * for assembling his Neighbours and Friends in his own House, against those who threaten to do him any Violence therein, because a Man's House is as his Castle".[2124] Neither was the mere "Wearing of Arms" an offense, "unless it be accompanied with such Circumstances as are apt to terrify the People"—so "Persons of Quality are in no Danger of offending * * * by wearing common Weapons * * * for their Ornament or Defence, in such Places, and upon such Occasions, in which it is the common Fashion to make use of them, without causing the least Suspicion of an Intention to commit any Act of Violence or Disturbance of the Peace"; and "Persons armed with privy [that is, concealed] coats of mail to the Intent to defend themselves against their Adversaries" did not violate the law, "because they do nothing *in terrorem populi*".[2125] Moreover, "no Person" would be liable "who arms himself to suppress dangerous Rioters, Rebels, or Enemies, and endeavours to suppress or resist such Disturbers of the Peace or Quiet of the Realm".[2126] And, of course, if a man might legitimately arm himself (and his "Neighbours and Friends", too) with "dangerous or unusual Weapons" for individual self-defense "against [his] Adversaries", and for collective self-defense against Rioters, Rebels, or Enemies", then he and others similarly situated must

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[2121] A *Treatise of The Pleas of the Crown, ante* note 434, Book I, Chapter LX, §§ 1 and 6, at 126, 127.

[2122] *Id.*, Book I, Chapter LXIII, § 1, at 134.

[2123] *Id.*, Book I, Chapter LXIII, § 4, at 135.

[2124] *Id.*, Book I, Chapter LXIII, § 8, at 136.

[2125] *Id.*, Book I, Chapter LXIII, § 9, at 136.

[2126] *Id.,* Book I, Chapter LXIII, § 10, at 136.

already have had, or must have been able to acquire, lawful access to such weapons in the first place.

In his discussion "*Of Riots, Routs, and unlawful Assemblies*", Hawkins further observed "[t]hat Persons riding together on the Road with unusual Weapons, or otherwise assembling together in such a Manner as is apt to raise a Terror in the People, without any Offer of Violence to any one in Respect either of his Person or Possessions, are not properly guilty of a Riot, but only of an unlawful Assembly".[2127] For, he explained, "any Meeting whatsoever of great Numbers of People with such Circumstances of Terror, as cannot but endanger the Publick Peace, and raise Fears and Jealousies among the King's Subjects, seems properly to be called an unlawful Assembly; as where great Numbers, complaining of a common Grievance, meet together, armed in warlike Manner in order to consult together concerning the most proper Means for the Recovery of their Interests; for no one can foresee what may be the Event of such an Assembly".[2128] Once again, though, the gravamen of the problem was, not all assemblies of men who happened to be armed, but only those groups that, for whatever reasons, "assembl[ed] together in a Manner as is apt to raise a Terror in the People".

Now, no matter how in other situations the English prohibition against the employment of "dangerous or unusual Weapons" in perpetration of a "crime against the public peace" might have carried over into *pre*-constitutional American law, it plainly did not apply and could not have applied either: (i) in general, to rationalize broad prohibitions against the possession by common Americans of whole categories of "Arms"; or (ii) in particular, to render "well regulated Militia" effectively impossible by prohibitions directed towards those "Arms" specifically suitable for Militia service.

In general, the rule applied only to "dangerous or unusual Weapons" displayed or otherwise used by particular individuals in particular circumstances so as to "terrify[ ] the good people of the land"—typically, by creating some "just Cause to fear * * * a corporal Hurt" to a particular person or persons. By itself, an individual's mere possession of a purportedly "dangerous or unusual Weapon[ ]" was not enough to impose liability on him. Rather, some overt act "*in terrorem populi*" was necessary, too. In addition, the punishment for such an offence was forfeiture of the weapon the particular perpetrator improperly employed, not disarmament of "the good people" *en masse*. That some individual might misuse certain types of firearms or other weapons for criminal purposes never served as a pretext for disallowing possession of those implements to any class of law-abiding citizens—let alone as a rationalization for "gun control" of the modern variety that seeks to limit

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[2127] *Id.*, Book I, Chapter LXV, § 4, at 157.

[2128] *Id.,* Book I, Chapter LXV, § 9, at 158.

possession of all firearms to the regular Armed Forces and various civilian "law-enforcement agencies".

Moreover, carrying "dangerous or unusual Weapons" did not amount to a "crime against the public peace" when the weapons were employed for personal self-defense, either by an individual himself or even by assemblies of "Neighbors and Friends" gathered together in his home. Neither was the carrying of concealed arms (such as "privy coats of mail") for that purpose a "crime against the public peace", because being *concealed* they "do nothing *in terrorem populi*". And, besides personal self-defense, participation in collective self-defense "to suppress dangerous Rioters, Rebels, or Enemies" also constituted a legitimate reason for any citizen's carrying—and, indeed, *actually using*—"dangerous or unusual Weapons".

In particular, the rule could not possibly have applied, even in principle, to "dangerous or unusual Weapons" individuals possessed for purposes of their Militia service. This should be obvious just from comparison of the last-noted exception in favor of individuals' "suppress[ing] dangerous Rioters, Rebels, or Enemies" to the Constitution's recognition of the basic responsibilities of the Militia, drawn from *pre*-constitutional practices throughout America, "to execute the Laws of the Union, suppress Insurrections and repel Invasions".[2129] Because it was no "crime against the public peace" for individuals adventitiously to take up "dangerous or unusual Weapons" for those purposes, it could hardly have been a crime for them to do so in an organized fashion in the Militia—presumably, too, even if no statute had explicitly sanctioned such action.

Just as obviously, all Militiamen not exempted on the basis of conscientious objection were required to possess "dangerous * * * Weapons", although many of these, because of their ubiquity, were not "unusual". At least initially, however, rifles were both particularly "dangerous" and "unusual" in comparison to typical smoothbored muskets. Nonetheless, no one ever claimed that therefore common people should have been prohibited from possessing rifles. Indeed, it was precisely the common people's possession of rifles, and through that possession the perfection of the design by experimentation in day-to-day usage, that eventually made rifles sufficiently "[ ]usual" for Militia service. In addition, if during that era someone had invented a reliable rifle capable of firing modern metallic cartridges, initially such a firearm would have been both *exceedingly* "dangerous" and *extremely* "unusual". Indeed, had it been perfected, perhaps even the Ferguson breachloading rifle might at first have been considered such.[2130] Yet as quickly as any such firearm of improved design could have been produced in quantity, it would have been adopted by the Militia (and no doubt everyone else), thus making it anything but "unusual".

[2129] U.S. Const. art. I, § 8, cl. 16.

[2130] *See ante*, note 799.

Which compels the conclusion that no firearm that is superior to the firearms individuals carry for Militia service can be considered "unusual" in any permanent sense unless its cost of production remains so high as to render it simply unavailable in practice. That is, whether a particular firearm is truly "unusual" depends not only on how many happen to be extant at the present moment (the immediate supply), but also on how many are capable of being produced and distributed (the rate of production), or perhaps how many *should be* produced if any level of production were possible (the actual, albeit unsatisfied demand). Also questionable is whether such a superior firearm could be considered "unusual" as a matter of law if a statute required members of the Militia to possess it, even though, because of economic constraints, few had yet been able to do so.

Obviously, too, no Militia statute ever subjected members of the Militia, for any reason, to forfeiture of whatever firearms—no matter how "dangerous" or "unusual"—they brought to Militia service. To the contrary, the statutes generally immunized Militiamen's possession of their firearms from legal claims.[2131] If in principle under the legal theories of the day legislators could have outlawed private possession of "dangerous or unusual Weapons" across the board, in practice they never did so where such possession served the interests of the Militia. (The few prohibitions in effect in that era applied solely to hostile Indians, slaves, other persons of color, and disloyal individuals.[2132]) Rather, the Militia statutes required Militiamen to possess "dangerous * * * Weapons" and often further encouraged them to possess "unusual Weapons" suitable for Militia service. Thus, today, inasmuch as "the people" *are* the Militia, and inasmuch as "the right of the people to keep and bear Arms" embodies the principles on which the *pre-*constitutional Militia operated, that "right" must embrace possession by "the people" of whatever "dangerous or unusual Weapons" "the people" find suitable for Militia service.

No less obviously, whatever firearms members of the Militia possessed in *pre-*constitutional times were never borne "against the public peace", but to secure it. No one could have imagined that the Militia were even capable of "terrifying the good people of the land", because they themselves made up most of "the good people". Thus, any American of that era would have rejected as absurd the modern-day notion that the people should be disarmed of "dangerous or unusual Weapons" in order to protect the public from the public.

Obviously as well, no "well regulated Militia" can ever constitute "an unlawful Assembly" (as Hawkins defined that term), because each and every such Militia assembles pursuant to—indeed, according to the direct commands of—law. Now, "the Militia of the several States" are constitutionally authorized "to execute

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[2131] *See ante*, at 715-717 (Virginia).

[2132] *See ante*, at 297-302 (Rhode Island); 363-369, 468, and 733-742 (Virginia).

the Laws of the Union", and to execute the laws of their respective States, too. So surely, when "complaining of a common Grievance", Militiamen are entitled to "meet together, armed in warlike Manner in order to consult together concerning the most proper Means for the Recovery of their interests" through exercise of their authority to execute the laws. In fact, every muster and other regular meeting of a Militia Company in revitalized "Militia of the several States" would be dedicated in part to this very purpose.[2133]

In one sense, any such Militia muster or meeting would amount to no more or no less than an exercise, albeit a formal one under specific statutory authority, of the constitutional right of all Americans "peaceably to assemble, and to petition the Government for a redress of grievances".[2134] The peculiarity of this situation, however, is that, because the Militia are constituent parts of "the Government" at every level of the federal system, they need not necessarily wait for some *other* part of "the Government" to redress their "grievances", but in appropriate circumstances may themselves take direct remedial action on their own initiative. That is, their "petitions" can function as self-authorizations. In the most common cases, when public officials' misbehavior results from their mere incompetence or insouciance, it may suffice as a corrective for the Militia simply to admonish those officials or their superiors, who will then straighten out the situation on their own. When confronted with aggressive and adamantine *rogue* public officials, though, "a redress of grievances" will usually not be obtained simply by remonstrating with the malefactors to cease and make restitution for their very own wrongdoing, but only by removing them from their offices entirely. If WE THE PEOPLE as voters cannot accomplish this through the normal electoral process because the next elections are too far off and the danger to the public welfare is too serious and close at hand, then WE THE PEOPLE as the Militia must forcibly separate the rogue officials from their positions of power. Such action will not "endanger the Publick Peace"—for by breaking the law under color of the law the rogues will already have done that. Rather, it will restore "the Publick Peace" through the exercise of THE PEOPLE'S sovereign authority. For, as Hawkins himself explained,

> in the Grant of every Office whatsoever, there is this Condition implied by common Reason, that the Grantee ought to execute it diligently and faithfully: For since every Office is instituted, not for the sake of the Officer, but for the good of some other, nothing can be more just, than that he, who either neglects or refuses to answer the End for which his Office was ordained, should give way to others who are both able and willing to take Care of it. And therefore it is certain, That an Officer is

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[2133] *See ante*, at 956-963 and 968.

[2134] U.S. Const. amend. I.

> liable to a Forfeiture of his Office, not only for doing a Thing directly contrary to the Design of it, but also for neglecting to attend his Duty at all usual, proper, and convenient Times and Places, whereby any Damage shall accrue to those, by or for whom he was made an Officer. * * * [I]t cannot but be very reasonable, That he who so far neglects a publick Office, as plainly to appear to take no manner of Care of it, should rather be immediately displaced, than the publick be in danger of suffering that Damage, which cannot but be expected some Time or other from his Negligence.[2135]

3. Notwithstanding all of this, it cannot be gainsaid that *some* contemporary Americans *are* frightened by *some* types of firearms—such as fully automatic rifles—in all instances, or by *some* types of firearms specifically in the hands of mere "civilians" as opposed to the regular Armed Forces and professional law-enforcement agencies. Irrational as fears of inanimate objects may be, and unreasonable as confidence in public officials and their myrmidons for protection has proven to be in society after society,[2136] these delusions lead the individuals suffering from them to accept at face value the strident propaganda and agitation touting "gun-free schools" and other "gun-free zones", "zero tolerance" for firearms, and kindred slogans designed for mass brainwashing in aid of mass disarmament through pervasive "gun control". These individuals apparently are unable to recognize the absurdity of seeking safety by dispossessing themselves as well as everyone else around them, *except the very groups most likely to oppress them all*, of the very implements essential for the operations of the *only* establishments that the Constitution declares are "necessary to the security of a free State". This combination of paranoia with myopia is particularly grotesque when the rationalization for "gun control" is "to save the children" (or some equivalently emotional fatuity), because the Preamble to the Constitution declares its concern for America's children down through the ages—namely, to "secure the Blessings of Liberty for ourselves and our Posterity"; and the Second Amendment attests that this goal can be achieved from generation to generation in "a free State" only through the agency of "well regulated Militia" in which all of "the people" exercise "the right * * * to keep and bear Arms".

In the short run, though, nothing can be done with such individuals except to remind them as often as possible that the principles commonplace in defense of the freedoms protected by the First Amendment—which they themselves invoke when proselytizing in favor of "gun control"—fully apply to the Second Amendment, too. For example,

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[2135] A *Treatise of The Pleas of the Crown, ante* note 434, Book I, Chapter LXVI, § 1, at 167-168.

[2136] *See* Rudolph J. Rummel, *Death by Government: Genocide and Mass Murder in the Twentieth Century* (New Brunswick, New Jersey: Transaction Publishers, 1994).

• That "the right of the people to keep and bear Arms" of one sort or another may be offensive to some—even to many—individuals cannot license public officials to "infringe[ ]" it.[2137]

• That some individuals are afraid of certain types of firearms is not sufficient to override "the right of the people to keep and bear [such] Arms".[2138]

• The desire to prevent the commission of crimes cannot license public officials to "infinge[ ]" upon "the right of the people to keep and bear [particular types of] Arms".[2139]

• That the availability of certain types of firearms in society might inspire some unidentified individuals to commit crimes with such firearms at some time in the indefinite future cannot rationalize "infring[ing]" upon "the right of [all] the people to keep and bear [those types of] Arms" now.[2140]

• "[T]he right of [all of] the people to keep and bear [particular types of] Arms" cannot be "infringed" simply because some individuals may keep and bear arms of those types for the purpose of doing wrong.[2141] And,

• Public officials can deny an individual "the right * * * to keep and bear Arms" of any variety only if he is actually misusing those "Arms" in some lawless fashion.[2142]

On the other hand, in particular contexts some types of firearms may justifiably inspire concern. For instance, center-fire rifles loaded with high-velocity ammunition are arguably overpowered for personal self-defense, and thereby pose

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[2137] *Compare* Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726, 745 (1978) ("that society may find speech offensive is not a sufficient reason for suppressing it"). *Accord*, Carey v. Population Services International, 431 U.S. 678, 701 (1977). *See, e.g.,* Gooding v. Wilson, 405 U.S. 518, 527 (1972); Cohen v. California, 403 U.S. 15, 22-25 (1971); Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971).

[2138] *Compare* Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 508 (1969) ("undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression").

[2139] *Compare* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 245 (2002) ("[t]he prospect of crime * * * by itself does not justify laws suppressing protected speech").

[2140] *Compare id.* at 253 ("[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it"), *citing inter alia* Hess v. Indiana, 414 U.S. 105, 108 (1973).

[2141] *Compare* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 255 (2002) ("[p]rotected speech does not become unprotected merely because it resembles the latter").

[2142] *Compare* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (advocacy of the use of force can be suppressed only when it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

a distinct danger when so employed in highly populated urban and suburban environments. Yet, in those same areas, such rifles would be necessary for collective self-defense against usurpation, insurrection, or invasion. So, to deny "the right of the people" in cities and dense suburbs "to keep and bear [such] Arms" would entail destroying the effectiveness of the Militia for their primary purposes, simply because those "Arms" were not entirely suitable for a secondary purpose. Moreover, the straightforward solution to the problem would be thoroughly to train Militiamen in those areas in the properly restricted use of such "Arms", while providing them with other "Arms" more suitable for individual self-defense in densely populated areas, such as handguns with ammunition of law penetrative power.

E. All "Arms" potentially suitable for *some* service in revitalized Militia. That *essentially **all** working firearms are in some ways suitable for **some** types of Militia service* is a conclusion which will have significant consequences when "the Militia of the several States" are revitalized.

1. Use by "the people" of the "Arms" they already possess. Ideally, Militia "Arms" should satisfy some rigorous standards. Obviously preferable would be for Militiamen's firearms, ammunition, and accoutrements to be designed specifically for "military" usage, to be up to date in every way, to be of first-class quality, and to be produced in quantities sufficient to supply everyone. In practice, however, these standards are unlikely to be met in the initial stages of revitalization of the Militia. For most Americans today do not possess such firearms; and it will take time for manufacturers to design, produce, and distribute enough of that equipment to meet the Militia's needs. Nonetheless, the Militia must be revitalized as soon as practicable, which will require providing at least minimally suitable "Arms" for "the people to keep and bear" *now*.

The only way this can be accomplished is for "the people" to use the firearms they actually have at hand. Common Americans today possess hundreds of millions of firearms, and a huge supply of ammunition. Admittedly, many of these firearms are not of purely "military" type; and of the ones that are, many are of old designs. Yet, "in a pinch", all of them could find some useful employment in the Militia. After all, the suitability of a particular firearm for some intended service depends upon circumstances, the most important of which is its *availability*. If a firearm is not at hand, it cannot be used for any purpose. And if it is the only one available, it will have to be put to use for whatever purpose needs to be accomplished.

Reliance upon the firearms "the people" already possess during the initial period of revitalization of the Militia would fit the *pre-*constitutional pattern. In that era, explicitly or implicitly the Militia statutes called upon Militiamen to bring to their service the best firearms they could obtain—whether these were "military"-grade arms in their original design, or "dual-purpose" or "civilian" arms that could be put to or modified for "military" use. In the final analysis, because almost all

working firearms in those days could have served some Militia purpose, availability became the test of suitability.

For example, Rhode Island looked to her Militiamen to arm themselves properly, relying in the first instance on their own sound judgment. Sometimes the statutes afforded them a specific choice of arms—that they were to appear "complete in arms * * * with a good or sufficient muskett or fuse" (1701);{EN-1993} or "with a sufficient Gun, or Fuzee" (1774);{EN-1994} or "with a good Fire-Arm * * * or * * * a Rifle-Gun" (1778).{EN-1995} At other times, the statutes mandated more generally that each and every Militiaman should appear "with a good fire-arm" (1776);{EN-1996} or "with one good Musquet" (1779 and 1781);{EN-1997} or with "a good Gun, being his own Property" (1781).{EN-1998} And at still other times, the statutes were even less specific, requiring Militiamen to appear "with arms and ammunition" or simply "Arms" (1701, 1705, and 1755);{EN-1999} or "completely with arms and ammunition" (1775){EN-2000}—thereby presuming that the men themselves would know perfectly well what was wanted without being told once again. In some instances, the statutes did explicitly call upon Militiamen to appear "with one good Musket, or Fuzee * * * to the satisfaction of the * * * Officers of the Company" (1718, 1730, 1744, and 1766).{EN-2001} This safeguard was doubtlessly implicit in all of the legislation, however. For a Militiaman was hardly "armed" if his firearm was not sufficiently "good" to satisfy an officer who knew the difference between "good" and "bad". But, in any event, reviewing officers would have had to be satisfied with even a merely marginally "good" firearm if that was all the man had, or could afford, and the Town or the Militia itself could not supply him with something better.

Similarly, in Virginia the statutes presumed that each of her Militiamen would bring to his service a suitable firearm, by requiring simply that each one of them be provided or furnished with "a firelock, muskett or fusee well fixed" (1705, 1723, and 1738);{EN-2002} "a firelock well fixed" (1755, 1757, 1759, 1762, 1766, and 1771);{EN-2003} "a good rifle, if to be had, or otherwise * * * a * * * common firelock" (1775);{EN-2004} "a rifle * * * or good fire-lock" (1777);{EN-2005} or "a good clean musket * * * provided, that the militia of the counties westward of the Blue Ridge, and the counties below adjoining thereto, shall not be obliged to be armed with muskets, but may have good rifles" (1784 and 1785).{EN-2006}

Virginia's statutes went even further than Rhode Island's in their specificity as to this matter, though, providing "[t]hat eighteen months time be given and allowed to each soldier, to furnish and provide himself with arms and ammunition [required by the statute] * * * So as every soldier, during the said eighteen months, do appear at all musters with such arms as he is already furnished with" (1723 and 1738);{EN-2007} "[t]hat twelve months time be given and allowed to each soldier, to furnish and provide himself with arms and ammunition [required by the statute] * * * , so as such soldier do appear at all musters, during the said twelve months, with such arms as he hath, and is already furnished with" (1755, 1757, 1759, 1762, 1766,

and 1771);{EN-2008} "[t]hat the soldiers shall be allowed six months after enlisting to provide themselves with arms [as required by the statute], and in the mean time shall bring with them such arms as they have" (1775);{EN-2009} and "[t]hat twelve months" or "two years" "after the commencement of th[e statutes] shall be allowed for providing the arms and accoutrements * * * directed; but in the mean time, the militia shall appear at musters with, and keep by them the best arms and accoutrements they can get" (1784 and 1785).{EN-2010}

Thus, throughout the *pre*-constitutional period, the statutes set standards for firearms that Militiamen initially could meet with the firearms they already possessed or were able easily to acquire on their own. These might not have been the absolutely best firearms for the purpose; but as long as they were suitable to a reasonable degree they were satisfactory, until Militiamen were in a position to replace them with something better.

2. The "Arms" that "the people" already possess to be immunized against "gun control". The same practice should be applied today. Indeed, adopting this practice, properly adapted to modern conditions, would materially assist in revitalizing "the Militia of the several States", because it would provide a very strong incentive for the tens of millions of Americans who own firearms to press for revitalization.

a. Patriotic Americans detest and fear "gun control", some insightfully and the rest implicitly recognizing that its proponents aim at nothing less than the thoroughly unconstitutional goal of confiscating all firearms and ammunition in private hands, and prohibiting the future possession of firearms, except under the most stringent controls, by anyone not in the Armed Forces or various ostensibly "civilian" *para*-militarized "law-enforcement agencies". Yet, as utterly at odds with the true construction of the Second Amendment as well as the Militia Clauses of the original Constitution as typical "gun-control" schemes are, common Americans can do little as isolated individuals to protect themselves, if the General Government's courts in duplicitous opinions uphold those purported statutes and regulations as supposedly valid exercises of Congress's powers "[t]o lay and collect Taxes"[2143] and "[t]o regulate Commerce * * * among the several States".[2144]

It is useless to protest that the Supreme Court has recently upheld the right of private citizens, under both the Second and the Fourteenth Amendments, to possess certain types of firearms for purposes of individual self-defense in their own homes.[2145] For these were bare five-to-four decisions, which can easily be reversed

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[2143] U.S. Const. art. I, § 8, cl. 1.

[2144] U.S. Const. art. I, § 8, cl. 3.

[2145] *See* District of Columbia v. Heller, 554 U.S. 570 (2008) (Scalia, J., for the Court); McDonald v. City of Chicago, 561 U.S. ___ (2010) (Alito, J., announcing the judgment of the Court).

upon the replacement on the Bench of a single Justice, or even the mere change of mind of a single Justice now sitting, whenever a new case comes up for review. Moreover, no change in the composition of the Court or revision in the thinking of any Justice is necessary to continue the enforcement of all sorts of draconian "gun controls" already on the books, which the Justices who heard those cases went out of their way unanimously to approve in principle.[2146] And advocates of "gun control" will tirelessly endeavor to extrapolate from these judicial encomia the rationales for enactment of ever more, and ever more comprehensive and draconian, statutes and regulations that will advance their goal of depriving as many common Americans as possible of as many firearms as possible as soon as possible.

Once the Militia have been revitalized, though, their members will no longer be mere "private individuals" as against the General Government, but instead will be officials of the governments of their respective States—exercising constitutional authority reserved to the States both in the original Constitution, with its incorporation of "the Militia of the several States" into its federal structure, and in the Second and Tenth Amendments—and against whom in that capacity Congress cannot direct its powers "[t]o lay and collect Taxes" or "[t]o regulate Commerce". Rather, once the Militia are revitalized, the only "gun control" that Congress may put into practice will be to exercise its power "[t]o provide for * * * arming * * * the Militia"[2147] so as to guarantee that, somehow or other, all eligible Americans are in permanent personal possession of firearms and ammunition suitable for Militia service. In addition (for what it may be worth), once the Militia have been revitalized, *District of Columbia* v. *Heller* and those judicial decisions following it will become irrelevant as well as erroneous, because *Heller* derived the so-called "individual right" it upheld—*along with the limitations on that right it purported to approve*—from a misreading of the Second Amendment which expressly eschewed any reliance upon the clause "[a] well regulated Militia, being necessary to the security of a free State".[2148]

b. Over the years, Congress has repeatedly recognized the immunity from typical forms of "gun control" enjoyed by the States and their Militia, or law-enforcement personnel or agencies who or which would become integral parts of "the Militia of the several States" were the latter properly revitalized today. For example—

> • [1927] "[P]istols, revolvers, and other firearms capable of being concealed on the person are hereby declared to be nonmailable, and shall

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[2146] *See* District of Columbia v. Heller, 554 U.S. at 624-628 (2008) (Scalia, J., for the Court) (*dicta*); McDonald v. City of Chicago, 561 U.S. at ___ (2010) (Alito, J., announcing the judgment of the Court), Slip Opinion at 39-40 (*dicta*). The dissenting Justices in these cases, of course, wandered even farther off course.

[2147] U.S. Const. art. I, § 8, cl. 16.

[2148] *See* 554 U.S. at 576-600 (Scalia, J., for the Court).

not be deposited in or carried by the mails * * * : *Provided*, That such articles may be conveyed in the mails, * * * for use in connection with their official duty, to officers of the * * * Militia of the several States[.]"[2149]

• [1934] "This Act shall not apply to the transfer of firearms (1) to * * * any State * * * or to any political subdivision thereof * * * ; (2) to any peace officer[.]"[2150]

• [1938] "The provisions of this Act shall not apply with respect to the transportation, shipment, receipt, or importation of any firearm, or ammunition, sold or shipped to, or issued for the use of, * * * any State * * * or any department, independent establishment, or agency thereof; * * * any duly commissioned officer or agent of * * * a State * * * or any political subdivision thereof[.]"[2151]

• [1968] "The provisions of this chapter shall not apply with respect to the transportation, shipment, receipt, or importation of any firearm or ammunition imported for, or sold or shipped to, or issued for the use of * * * any State * * * or any department, agency, or political subdivision thereof."[2152]

• [1968] "The provisions of this chapter shall not apply with respect to the transportation, shipment, receipt, or importation of any firearm or ammunition imported for, or sold or shipped to, or issued for the use of * * * any State * * * or any department, agency, or political subdivision thereof."[2153]

• [1968] "A firearm may be transferred without the payment of the transfer tax * * * to any State * * * , any political subdivision thereof, or any official police organization of such a government entity engaged in criminal investigations." And "[a] firearm may be made without payment of the making tax * * * by, or on behalf of, any State, * * * any political

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[2149] An Act Declaring pistols, revolvers, and other firearms capable of being concealed on the person nonmailable and providing penalty, Act of 8 February 1927, CHAP. 75, 44 Stat. 1059, 1059.

[2150] AN ACT To provide for the taxation of manufacturers, importers, and dealers in certain firearms and machine guns, to tax the sale or other disposal of such weapons, and to restrict importation and regulate interstate transportation thereof ("National Firearms Act"), Act of 26 June 1934, CHAPTER 757, § 13, 48 Stat. 1236, 1240.

[2151] AN ACT To regulate commerce in firearms ("Federal Firearms Act"), Act of 30 June 1938, CHAPTER 850, § 4, 52 Stat. 1250, 1252.

[2152] AN ACT To assist State and local governments in reducing the incidence of crime, to increase the effectiveness, fairness, and coordination of law enforcement and criminal justice systems at all levels of government, and for other purposes ("Omnibus Crime Control and Safe Streets Acts of 1968"), Act of 19 June 1968, Pub. L. 90-351, TITLE IV—STATE FIREARMS CONTROL ASSISTANCE, § 902 [§ 925(a)], 82 Stat. 197, 233.

[2153] AN ACT To amend title 18, United States Code, to provide for better control of the interstate traffic in firearms ("Gun Control Act of 1968"), Act of 22 October 1968, Pub. L. 90-618, TITLE I—STATE FIREARMS CONTROL ASSISTANCE, § 101 [§ 925(a)(1)], 82 Stat. 1213, 1224.

subdivision thereof, or any official police organization of such a government entity engaged in criminal investigations."[2154]

• [1986] "[I]t shall be unlawful for any person to transfer or possess a machinegun", except that "[t]his subsection does not apply with respect to * * * a transfer to or by, or possession by or under the authority of * * * a State, or a department, agency, or political subdivision thereof[.]"[2155]

• [1990] "It shall be unlawful for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone", except that this prohibition "shall not apply to the possession of a firearm * * * if the individual possessing the firearm is licensed to do so by the State in which the school zone is located or a political subdivision of the State", or "by a law enforcement officer acting in his or her official capacity".[2156]

• [1994] "It shall be unlawful for a person to manufacture, transfer, or possess a semiautomatic assault weapon", except that this prohibition "shall not apply to * * * the manufacture for, transfer to, or possession by * * * a State or a department, agency, or political subdivision of a State, or a transfer to or possession by a law-enforcement officer employed by such an entity for purposes of law enforcement (whether on or off duty)". And "[i]t shall be unlawful for a person to transfer or possess a large capacity ammunition feeding device", except that this prohibition "shall not apply to * * * the manufacture for, transfer to, or possession by * * * a State or a department, agency, or political subdivision of a State, or a transfer to or possession by a law-enforcement officer employed by such an entity for purposes of law enforcement (whether on or off duty)".[2157]

• [1996] "It shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone", except that this prohibition "does not apply to the possession of a firearm * * * if the individual possessing the firearm is licensed to do so by the State in which the school zone is

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[2154] Act of 22 October 1968, TITLE II—MACHINE GUNS, DESTRUCTIVE DEVICES, AND CERTAIN OTHER FIREARMS, § 201 [§ 5853(a) and (b)], 82 Stat. at 1233-1234.

[2155] An Act To amend chapter 44 (relating to firearms) of title 18, United States Code, and for other purposes ("Firearms Owners' Protection Act"), Act of 19 May 1986, Pub. L. 99-308, § 102 [§ 922(o)(1) and (2)], 100 Stat. 449, 453.

[2156] An Act To control crime ("Crime Control Act of 1990"), Act of 29 November 1990, Pub. L. 101-647, TITLE XVII—GENERAL PROVISIONS, § 1702 ("Gun-Free School Zones Act of 1990") [§ 922(q)(1)(A) *and* (B)(ii) and (vi)], 104 Stat. 4789, 4844.

[2157] An Act To control and prevent crime ("Violent Crime Control and Law Enforcement Act of 1994"), Act of 13 September 1994, Pub. L. 103-322, TITLE XI—FIREARMS, Subtitle A—Assault Weapons, §§ 110102 and 110103 [§ 922(v)(1) and (4)(A) *and* (w)(1) and (3)(A)], 108 Stat. 1796, 1996-1997, 1999.

located or a political subdivision of the State", or "by a law enforcement officer acting in his or her official capacity".[2158]

This immunity derives primarily from three principles: (i) Almost all "gun control" issuing from the General Government is predicated upon purported exercises of Congress's powers "[t]o lay and collect Taxes" and "[t]o regulate Commerce with foreign Nations, and among the several States".[2159] But (ii) the General Government cannot tax the States or their instrumentalities, because "the power to tax involves the power to destroy",[2160] and the General Government has no authority to destroy the States, by taxation or otherwise.[2161] And (iii) the States and their instrumentalities do not constitute "Commerce", and therefore cannot be regulated as such.[2162] So this immunity is constitutionally absolute.

c. The procedure for immunizing from control by the General Government (other than the power of Congress "[t]o provide for * * * arming * * * the Militia") the firearms already in common Americans' possession, as well as firearms they might acquire in the future, would be straightforward:

• Once the Militia were revitalized, every able-bodied American from (say) sixteen to fifty or fifty-five years of age would be required perforce of a State statute to enroll. Those from fifty or fifty-five years of age upwards would not be compelled to enroll, but could voluntarily do so. Every individual so enrolled could then immunize all of the firearms he possessed (and, presumably, owned) simply by dedicating *pro tempore* those firearms to Militia service.

• The Local Committee of Safety[2163] would supply a standard form on which every individual Militiaman would list his firearms, describing each one by reference to its manufacturer, model, caliber, and serial number. In addition, the Militiaman could list various special accessories in service with his particular firearms, such as magazines, optical sights, night-vision devices, slings, bipods, spare parts, and specialized tools for take-down and repair.

• Once completed, this form would be executed by the Militiamen and notarized (or otherwise legally witnessed), and a tab imprinted with an

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[2158] An Act Making omnibus consolidated appropriations for the fiscal year ending September 30, 1997, and for other purposes, Act of 30 September 1996, TITLE VI—GENERAL PROVISIONS, § 657 [§ 922(q)(1)(A) *and* (B)(ii) and (vi)], 110 Stat. 3009, 3009-370 to 3009-371.

[2159] U.S. Const. art. I, § 8, cls. 2 and 3.

[2160] McCulloch v. Maryland, 17 U.S. (4 Wheaton) 316, 431 (1819).

[2161] *See post*, at 1456-1462.

[2162] *See post*, at 1462-1470.

[2163] *See post*, at 1271-1273.

unique serial number (also appropriately witnessed) would be detached and filed with the Local Committee of Safety. This tab would neither contain any information about any particular firearm, nor identify the particular individual submitting it, but: (i) would serve as conclusive evidence in any future proceeding of the completion of the form on a particular date, and the correctness of its contents with respect to all of the firearms listed thereupon; and (ii) would officially dedicate those firearms to that individual's Militia service as of that date. The individual who completed the form would retain it in his own safekeeping, to be brought forth if ever it were necessary to establish which firearms and related equipment he had dedicated to that service and when.

• As of the date the form was notarized, the firearms so listed would no longer be subject to "gun control" by the General Government (or, of course, by the State, which would hardly pursue a course of "gun control" after revitalizing her Militia), because they would then have been transformed from individual into *Militia* firearms, and thus into *instrumentalities of the State herself, the possession of which by her citizens within "[a] well regulated Militia" the Constitution itself declares "necessary to the security of a free State"*.

• Any firearm and equipment an individual acquired later on could also be dedicated to his Militia service by filing an additional form at that time. Conversely, any firearm that had once been so dedicated could be returned to the individual's mere private possession. And if a firearm once dedicated to Militia use were sold, given away, permanently removed from the State, lost, or stolen, it would have to be officially deleted from that individual's list (unless and until returned or recovered).

• No limit would be imposed on the types or numbers of firearms an individual could dedicate to his Militia service, because: (i) under circumstances as they might arise *any* firearm might prove useful to him for that purpose; and (ii) even if someone possessed more firearms than he might need for his own Militia service at any particular moment, at a later date he might help to provide for the common defense by transferring possession of some of those firearms to others, in the meantime serving as a kind of "home arsenal" in his neighborhood.

• The same form would allow the preparer to record that he was maintaining personal possession of ammunition of calibers suitable for use in the firearms identified on the form. No requirement would exist for him to state *what quantities or types* of ammunition were involved, because the Militia would desire to encourage its members to operate, with the minimum amount of "red tape", according to the precept that "one can

never have too much ammunition". Thus, *all* supplies of ammunition in citizens' hands, large or small, would be immunized from "gun control".

Obviously, once publicized as a key provision of the initial statute to revitalize the Militia, this plan should be expected to generate immense support from owners of firearms.

CHAPTER FORTY

Every individual possibly eligible for service in "the Militia of the several States" must enjoy untrammeled access to a free market in which to obtain whatever firearms, ammunition, and accoutrements may to any degree prove useful for such service.

It is not enough to assert that every individual possibly eligible to be a member of "the Militia of the several States" may acquire, possess, and own as of right whatever firearms, ammunition, and accoutrements are suitable for any type of Militia service. Adequate and permanent sources of that equipment must be identified and secured as well. The primary source must be the free market.

A. A primary reliance on the free market for arming the Militia the *pre*-constitutional pattern. This, of course, is not simply idle "conjecture, supposition, or mere reasoning on the meaning or intention of the writing" in the Constitution,[2164] but instead the proper interpretation of that document based upon undeniable *pre*-constitutional legal history.

1. During the entire *pre*-constitutional era, most Americans obtained the firearms and ammunition necessary for their Militia service through private purchases in the free market. Nowhere throughout America did any of the relevant statutes order most (or even many) Militiamen to be supplied with public arms that they then kept in their private homes, let alone to repair to some public arsenal, magazine, or other facility in order to retrieve public arms, and then to return those arms to such a place after they had performed their Militia service. Rather, in the overwhelming majority of cases, the firearm, ammunition, and accoutrements each able-bodied adult free male (not otherwise exempted) was required to obtain and thereafter permanently to possess in his own home in order to fulfill his Militia duties were to be his own personal property, which he was to purchase for himself in the free market if he were financially capable of doing so—not equipment manufactured, supplied, owned, or controlled by any level of government or by any public official.

Of course, some exceptional situations did exist. When individuals were too poor to acquire firearms through their own efforts, the Militia (through fines imposed on defaulters) or Local governments (through general taxes) might supply,

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[2164] *See* Rhode Island v. Massachusetts, 37 U.S. (12 Peters) 657, 723 (1838).

and then possibly control access to, the necessary equipment. For example, in 1776 Rhode Island provided that

> • "each town" should supply all of its "inhabitants * * * who are not able to purchase" arms "with a good fire-arm, bayonet and cartouch box, at such town's expense, to be lodged with the captains of such district wherein such poor persons belong, for their use upon any proper occasion";{EN-2011} and
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> • "the Colony" would purchase "Two Thousand Stand of good Fire-Arms", to be "distributed to each Town, in Proportion to the Number of Polls upon the Alarm List therein", with the Town Councils "to determine what Persons * * * shall have the Benefit and Use of the Arms provided * * * , and be exempted from providing themselves as the Law requires".{EN-2012}

Similarly, throughout the 1700s, small portions of Virginia's Militiamen who had not armed themselves were issued public arms for active service during certain emergencies:

> • [1727, 1732, 1734, 1738, 1740, 1744, 1748, 1753, 1757, 1758, 1759, 1761, 1762, 1764, 1766, 1769, and 1772] "[I]t may be needful, in time of danger, to arm part of the militia, not otherwise sufficiently provided, out of his majesty's magazine, and other stores, within this colony[.]" {EN-2013}
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> • [1775] "[T]he militia or volunteers * * * , if not well armed, shall be furnished with arms out of such as belong to the county or corporation, to be returned as soon as they shall be discharged from the service."{EN-2014}
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> • [1777] "The several divisions of the militia of any county shall be called into duty by regular rotation * * * . The soldiers of such militia, if not well armed and provided with ammunition, shall be furnished with the arms and ammunition of the county, and any deficiency in these may be supplied from the publick magazines, or if the case admit not that delay, by impressing arms and ammunition of private property, which ammunition, so far as not used, and arms, shall be duly returned, as soon as they may be spared."{EN-2015}

Even in these extraordinary situations, legislators expected the remainder of the Militiamen to be "otherwise sufficiently provided" and "well armed" *by their own efforts and through their own resources*, as the Militia laws applicable to normal times required. Importantly, too, in all of these cases, public arms were merely supplements or complements to private arms. Furthermore, there being next to no public arsenals or other manufacturing facilities in America during the *pre-*constitutional period, the various Colonial and State governments were only very infrequently the original sources of public arms, but instead generally purchased

them in the first place in the Colonial free market, or obtained them from Britain, where the free market was the underlying source of arms, too.[2165]

2. Self-evidently, the veritable legion of legislators who enacted, reënacted, and reënacted yet again these statutes during the late 1600s and throughout the 1700s could never have expected most Militiamen

> • to arm themselves—for instance, to "*find themselves* armes" (Rhode Island, 1665);{EN-2016} "*to accoutre themselves with* * * * carbine and pistol" (Rhode Island, 1701);{EN-2017} "*to provide himself with* Arms, and other Accoutrements" (Rhode Island, 1755);{EN-2018} "*to equip himself completely with* arms and ammunition" (Rhode Island, 1755);{EN-2019} "*to equip themselves with* a good fire-arm" (Rhode Island, 1776);{EN-2020} and to "*provide, and at all times be furnished, at his own Expence* * * * *with* one good Musquet" (Rhode Island, 1779);{EN-2021} or
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> • to bring to their service the arms the laws specified—for instance, "such arms *as he is already furnished with*" (Virginia, 1723 and 1738);{EN-2022} "such arms *as he hath, and is already furnished with*" (Virginia, 1755, 1757, 1759, 1762, 1766, and 1771);{EN-2023} "a good rifle, *if to be had*" (Virginia, 1775);{EN-2024} "such arms *as they have*" (Virginia, 1775);{EN-2025} "a good Gun, *being his own Property*" (Rhode Island, 1781);{EN-2026} and "the best arms and accoutrements *they can get*" (Virginia, 1784 and 1785),{EN-2027}

if no permanent, reliable, efficient, and convenient source had existed from which one generation of Militiamen after another could readily have obtained such arms. Similarly, those selfsame legislators could never have expected either the Militia as institutions or Local governments to have been able to acquire and distribute whatever additional firearms and ammunition might have become necessary in exceptional situations (for example, to supply Militiamen too poor to purchase their own arms), had no such source been available from which Militia officers and public functionaries could have acquired that equipment. Thus, all of the Militia laws and related statutes of that period presupposed, depended upon, encouraged, and implicitly protected against interference common Americans' and even their governments' access to a widespread, vibrant, and thoroughly free market in firearms, ammunition, and accoutrements suitable for Militia service. No statute of that era ever questioned the usefulness of, let alone attempted to constrain or suppress, the free market in arms. Instead, every statute implicitly took for granted, not only that the free market was adequate for the purpose of arming the Militia, but also that it was preferable to any other source of the equipment necessary to make the Militia workable establishments in all but one of the Colonies and then in every independent State.

[2165] *E.g.*, *see ante*, at 451-456 (Virginia).

More than that, the *pre-*constitutional Militia laws must also have strengthened a free market in, and private ownership and possession of, both types and amounts of firearms and ammunition other those that were or could have been used for actual service in the Militia. For once the network linking suppliers of raw materials to manufacturers, to merchants, and to customers was established, it could have provided and in fact did provide whatever arms free men as consumers desired, for both public and private uses.

3. So, had the term been in then-current usage, "gun control" in the *pre-*constitutional era would have meant that: (i) the Colonial and State governments required just about every able-bodied adult free male within their jurisdictions to obtain from the free market a firearm and ammunition suitable for Militia service; and (ii) in order to effectuate and facilitate the latter policy, the governments encouraged—and certainly took no actions to impede—a free market in arms for all of their citizens. Confounding those modern *ultra-*"libertarians" who suppose governmental "regulation" to be necessarily antithetical to "economic freedom", the market for arms during the *pre-*constitutional period was far freer than that market is today, *not* because legislators in those times refrained from "regulating" common Americans' acquisition, possession, ownership, and use of firearms, ammunition, and related accoutrements, but precisely because the success of their comprehensive "regulation" of the Militia necessitated a market as widespread and efficient, and therefore as free, as it could be. That is, *a free market in arms was part and parcel of "regulation" of the Militia; and "regulation" of the Militia reciprocally guaranteed a free market in arms. What Americans came to know as "**well regulated** Militia" were establishments in the operations of which a free market in arms was not just coincidental or optional, but instead unavoidably necessary, integral, and therefore mandatory in both a practical and a legal sense.*

B. A primary reliance on the free market for arming the Militia now constitutionally required. Thus, today, because "the Militia of the several States" and "the right of the people to keep and bear Arms" have advanced from a statutory to a constitutional foundation, reliance on the free market for "arming * * * the Militia" and for securing "the right of the people to keep and bear Arms" is constitutionally mandatory, too, and therefore cannot be overridden by any mere statute.

1. During the *pre-*constitutional era, public officials' disinclination, if not disability, to interfere with the free market in arms was a consequence of the duty of almost all of the members of the Militia to provide and thereafter permanently to possess their own firearms and ammunition. On its face, that was a statutory duty—although its origin, justification, and even compulsory nature can be traced to "the Laws of Nature and of Nature's God", and particularly to the responsibility of every government exercising "just powers" to provide adequate safeguards to "secure" to its citizens the "unalienable Rights" of "Life, Liberty and the pursuit of

Happiness"[2166]—which duty, in a *self*-governing community, *the people themselves* must fulfill through some form of Militia. Yet, even if noninterference by public officials with the operations of the free market for arms had not been deemed perforce of "the Laws of Nature and of Nature's God" a truly "constitutional" principle during *pre*-constitutional times, it certainly was a statutory practice of very long standing and the utmost consistency, which became a constitutional principle when the original Constitution incorporated "the Militia of the several States" as integral and permanent parts of its federal structure,[2167] and then the Second Amendment declared "[a] well regulated Militia * * * necessary to the security of a free State". For inasmuch as the practical definition and operation of "Militia" during the *pre*-constitutional period included every able-bodied adult free man's access to a free market in firearms and ammunition suitable for his Militia service—and, reciprocally, public officials' disability to interfere with that access or that market—both became part and parcel of the definition of "Militia" in the Constitution.

On this basis, "[a] well regulated Militia" the Second Amendment contemplates is one the members of which can both first obtain and then maintain in readiness for immediate service *all* of their basic equipment *through the free market*. Therefore, "the right of the people to keep and bear Arms" includes not only the right of all of "the people" to acquire, possess, and employ "Arms", but also the right of some of "the people" to design, manufacture, distribute, sell, and repair "Arms" for everyone else's use. For how could "the people" have a "right * * * to keep and bear Arms" if they could not acquire them in the first instance by their own actions? How could "the people" acquire "Arms" that were not readily available to them? How could "Arms" be available to "the people" that were not produced for and distributed to them? And what purpose would it serve for "the people to keep and bear" unserviceable or outdated "Arms"?

2. The inclusion of access to a free market for "Arms" in the definition of "[a] well regulated Militia" and "the right of the people to keep and bear Arms" neither the General Government nor any State can now deny or modify, absent some constitutional Amendment. As the mass of *pre*-constitutional Militia statutes renders undeniable, the term "well regulated Militia" "was not one 'of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of interpretation.'"[2168] Moreover, if one correctly concludes that WE THE PEOPLE'S right and duty to engage in collective self-defense against usurpation and tyranny are *absolute*, and therefore cannot be denied or even

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[2166] Declaration of Independence.

[2167] U.S. Const. art. I, § 8, cls. 15 and 16, *and* art. II, § 2, cl. 1.

[2168] *See* Smiley v. Holm, 285 U.S. 355, 365 (1932), *quoting* Hawke v. Smith, 253 U.S. 221, 227 (1920). *Accord, e.g.,* South Carolina v. United States, 199 U.S. 437, 448 (1905).

questioned by any "just government",[2169] then not even a constitutional Amendment can change that definition.

3. In particular, because the definition of "[a] well regulated Militia" cannot now be changed,

- whenever Congress enacts "necessary and proper" legislation in order "[t]o provide for * * * arming * * * the Militia",[2170] it must rely as much as practicable on America's free market in armaments—for the controlling standard of "necess[ity] and prop[riety]" in that regard is the historical one;

- whenever possible in other legislation—as, for example, under its authority "[t]o lay and collect Taxes", "[t]o regulate Commerce with foreign Nations, and among the several States", and "[t]o promote the Progress of Science and useful Arts"[2171]—Congress must take appropriate action to facilitate and improve the workings of that market;

- Congress may not itself interfere, or suffer any agency of the General Government or the several States to interfere for any reason with the free market's provision of the firearms, ammunition, and accoutrements necessary for the Militia's and operations;[2172]

- as "Commander in Chief * * * of the Militia of the several States", the President must especially ensure that the Constitution and laws in this regard are scrupulous enforced, under his duty to "take Care that the Laws be faithfully executed";[2173] and

- so, too, for the several States' legislatures and governors within their own respective jurisdictions.

C. A primary reliance on the free market for arming the Militia the politically prudent course. Even if a primary reliance on the free market for "arming * * * the Militia" and for securing "the right of the people to keep and bear Arms" were not, strictly speaking, mandatory in constitutional law, it would be compellingly advisable in political principle.

1. After all, the ultimate purpose of "[a] well regulated Militia" is, not just "the security of a free State", but the "free State" itself. Every institution and every participant in every institution, both public and private, that constitutes part of, can

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[2169] *See* Declaration of Independence.

[2170] *See* U.S. Const. art. I, § 8, cls. 16 and 18.

[2171] U.S. Const. art. I, § 8, cls. 1, 3, and 8.

[2172] As to limitations on the States arising out of Congressional legislation, *see* U.S. Const. art. VI, cl. 2.

[2173] U.S. Const. art. II, § 2, cl. 1 and § 3.

contribute to, and can support "a free State" has an interest and should be enlisted in the provision of that State's "security". Free markets of all kinds are critical components of "a free State", because economic freedom and political freedom go hand in hand. The free market consists of WE THE PEOPLE in their economic capacity. "[A] free State" consists of THE PEOPLE in their political capacity. "A well regulated Militia" integrates the market with the State through the duty and right of THE PEOPLE "to keep and bear" the guns the market produces and out of the barrels of which all political power grows. WE THE PEOPLE'S exercise of their economic freedom, channeled through the Militia, secures their political freedom, which then reciprocally ensures their economic freedom. Therefore, all other things being equal, a free market in armaments should be employed to supply the Militia with necessary equipment in preference to—and if possible to the exclusion of—any other source.

2. Conversely, public arms provide at best a shaky foundation for "a free State". If the General Government or the governments in each State were the sole or even the major suppliers of firearms and ammunition to the Militia, then incompetent, negligent, or malevolent public officials might fail to secure, or might even intentionally restrict or cut off altogether, WE THE PEOPLE'S access to that equipment. Although this would have little effect initially as far as the hundreds of millions of firearms already in private possession throughout American were concerned (because well manufactured and properly maintained modern firearms will function almost indefinitely), it would surely become critical at an early date when the supplies of ammunition in private hands became depleted. For once a steady supply of ammunition ceases, the usefulness of even the best firearms is drastically reduced. Inasmuch as "'[p]olitical power [cannot] grow[ ] out of the barrel of a gun'" for which no ammunition is available,[2174] to suffer possibly rogue public officials to control THE PEOPLE'S supply of ammunition is effectively to surrender political power to them. And, inasmuch as *rogue* public officials, by definition, always aspire to aggrandize their positions in the governmental apparatus through usurpation and tyranny, to surrender political power to them is to forfeit "a free State".

3. If, in contrast, the free market supplied THE PEOPLE with firearms and ammunition, the bumbling, negligence, or even intentional flouting of their duties on the part of a few members of the Militia in one or more States might gradually disarm those particular individuals, but could not debilitate the institutions as a whole. And the possible incompetence, or even the calculated wrongdoing, of public officials—National, State, or Local—would be without effect on a matter over which they could exercise no control in any event.

[2174] *See Quotations From Chairman Mao*, *ante* note 28, at 61.

The lesson of political prudence is clear: ***"[T]he right of the people to keep and bear Arms" can never be secure unless and until—and will remain secure only while—WE THE PEOPLE have a sufficient source of "Arms" separate from, independent of, and secure against the actions of possibly rogue public officials.***

D. Reliance on the free market for arming the Militia the best of the possible alternatives available. The Constitution authorizes Congress "[t]o provide for * * * arming * * * the Militia" and "[t]o make all Laws which shall be necessary and proper for carrying into Execution th[at] * * * Power[ ]",[2175] but does not explicitly define exactly *how* Congress should so "provide". At least five alternatives are available for that purpose. Congress could:

> **{1}** order appropriate public officials of the General Government to supply the Militia on a nationwide basis with arms that meet certain standards;
>
> **{2}** direct each of the several States individually to supply such arms to her own Militia;
>
> **{3}** authorize the Militia in each State to supply such arms to their respective members;
>
> **{4}** require WE THE PEOPLE, as individuals, to obtain such arms themselves;
>
> **{5}** allow THE PEOPLE to use whatever arms they already possessed or could acquire for themselves, provided that those arms were at least minimally suitable for Militia service; or
>
> **{6}** employ some combination of two or more of the foregoing means.

In cases **{1}**, **{2}**, **{3}**, and **{6}**, the General Government, the States, and the Militia would either procure the necessary arms in the free market, produce them in public arsenals, or both; and then would donate, loan, or sell the arms to THE PEOPLE. Whatever procedure public officials chose to adopt, however, would have to ensure THE PEOPLE'S permanent personal possession of those arms in their own homes at all times.[2176] In cases **{4}**, **{5}**, and **{6}**, of course, THE PEOPLE themselves would manufacture, distribute, purchase, and immediately take personal possession of the necessary arms through the free market, and thereafter retain such possession (and usually ownership, too).

Should Congress fail, neglect, or refuse to fulfill its duty "[t]o provide for * * * arming * * * the Militia", each of the several States would herself put into

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[2175] U.S. Const. art. I, § 8, cls. 16 and 18.

[2176] *See ante*, Chapter 38.

operation one or more of alternatives **{2}** through **{6}**—and, exercising her reserved power, would do so in any event with regard to "arming" her Militia for tasks to be undertaken on behalf of and within the State in addition to the three the Constitution explicitly identifies as constituting "the Service of the United States".[2177]

Should both Congress and the States' legislatures default on their obligations, then THE PEOPLE themselves would collectively and individually take the initiative under alternatives **{3}** through **{6}**. "A well regulated Militia, being necessary to the security of a free State", and being "composed of the body of the people, trained to arms",[2178] THE PEOPLE (as Virginia mandated in 1775) "should be armed, accoutred, trained, and disciplined, in the best manner the circumstances of the country will admit of".{EN-2028} Absent adequate supplies of suitable arms forthcoming from the General Government or the governments of the several States, *ex necessitate* THE PEOPLE (as Virginia mandated throughout the 1700s) would have to rely upon their own devices, and put into use such arms as they are "already furnished with",{EN-2029} "such arms as they have",{EN-2030} and "the best arms and accoutrements they can get".{EN-2031} But for THE PEOPLE to succeed in arming themselves, there must *always* be some "circumstances" *throughout the country* that "will admit of [arming them]"—which means that ***sufficient sources of suitable "Arms" must always be directly and immediately available to THE PEOPLE everywhere, and outside of the control of possibly rogue public officials***. Therefore, "the right of the people to keep and bear Arms" must include—indeed, must depend upon—their "right" *to acquire* those "Arms" in the first place, and thus must guarantee their "right" to *a truly free and comprehensive market* in and through which "Arms" can be manufactured and distributed.

For this reason, alternatives **{1}** and **{2}** for "arming * * * the Militia" can neiher be exclusive nor strongly preferred—because, if they were, rogue public officials could deprive THE PEOPLE of new firearms, and particularly of ammunition for use in any firearms, thus rendering next to useless whatever firearms THE PEOPLE were "already furnished with" or could somehow obtain. Alternative **{3}** could in principle be exclusive, because THE PEOPLE and the Militia are fundamentally identical in composition, interest, and intent. Were THE PEOPLE to rely exclusively for their arms upon arsenals operated by the Militia as a species of "socialized" industry in each State, though, they would forfeit the benefits the free market offers—for without vigorous competition in the development, production, and distribution of arms, bureaucratization would likely take hold, innovation would stagnate, and institutionalized inefficiency would insinuate itself into the process. So if alternative **{3}** were to be employed, the Militia should depend in the largest

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[2177] *See* U.S. Const. art. I, § 8, cls. 15 and 16.

[2178] U.S. Const. amend. II *and* Virginia Declaration of Rights (1776) art. 13.

measure possible upon alternative **{4}**—that is, the Militia would supervise the process, but would depend upon its members' use of the free market to see to it that all but impecunious Militiamen armed themselves out of their own resources. Alternative **{5}** could take immediate advantage of the huge supply of firearms, ammunition, and accoutrements already in THE PEOPLE'S hands—and therefore should be the first step in any plan for revitalization of the Militia.[2179] It could not, however, provide most of THE PEOPLE with the arms *best* suited for many types of Militia service required even now, let alone the *new* arms they would assuredly need to employ in order to meet the grave challenges of a future day. Overall, then, alternative **{4}** stands out as the surest and safest of all.

America already boasts an armaments-industry which the entire world envies and even fears. This industry runs largely on free-market principles, especially private ownership of the actual means of production. Thus, because most everyone connected with the private firms producing firearms and ammunition—from their owners and stockholders, to their directors and officers, to their employees—would be members of the revitalized Militia or closely related thereto, the armaments-industry would in effect be owned, and certainly would be subject to day-to-day oversight and control, by the Militia.[2180] Moreover, if the industry were properly harnessed in aid of arming the Militia under alternative **{4}**, it would render unnecessary and inadvisable any use of public arsenals under alternatives **{1}**, **{2}**, and **{3}**, and thereby would obviate even the possibility that rogue public officials might seize control of such establishments and cut off WE THE PEOPLE'S access to the "Arms" the Constitution requires them "to keep and bear". Indeed, with the General Government and the States dependent upon the free market for arms with which to equip the regular Armed Forces (and such of their adjuncts as the National Guard), with the market free to produce and distribute the latest and best equipment available, with THE PEOPLE free to procure such equipment from the market in whatever quantities they desired, *and with the vast majority of the owners, managers, and workers in the arms industry enrolled in the Militia*, rogue public officials could not even imagine themselves capable of such action.

E. Possible allowances for governmental provision of "Arms" to the Militia. Nonetheless, *some* governmental assistance to or supplementation of the free market in "Arms" would be plainly constitutional, politically acceptable, and advisable if not unavoidable in practice. In most contexts, of course, the General Government has no obligation to fund activities simply because they involve

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[2179] *See ante*, at 1103-1111.

[2180] To ensure this, however, it would be necessary to exclude foreign interests from simultaneous ownership and control of manufacturers of armaments located within the United States. Foreign stockholders could own such an operation; but only American citizens who were members and subject to the discipline of the Militia in the State in which the operation were located would be allowed to direct its day-to-day operations.

individuals' exercise of so-called "fundamental" constitutional rights.[2181] Not only is membership in "the Militia of the several States" the most "fundamental" of all "fundamental" rights, though, but also Congress labors under the affirmative duty "[*t*]*o provide for* * * * arming" them,[2182] "arming" being *always* "*necessary* and proper"[2183] because "[a] well regulated Militia" is "*necessary* to the security of a free State".[2184] Fulfillment of this duty could take several forms:

1. Congress might expend public moneys where private moneys did not suffice, both: (i) by requiring those individuals with sufficient personal financial resources to buy their own firearms in the free market; and (ii) by subsidizing other individuals who lacked those resources through tax credits, public grants, or even outright provision of the necessary equipment at public expense.[2185] The latter course would be a legitimate exercise of Congress's power "[t]o lay and collect Taxes * * * to pay the Debts and provide for the common Defence and general Welfare of the United States"[2186]—for the Militia, being "necessary to the security of a free State", are unquestionably central to "the common Defence and general Welfare", and therefore "all Laws which shall be necessary and proper for carrying into Execution the * * * Power[ ]" "[t]o provide for * * * arming the Militia" through the power "[t]o lay and collect Taxes" would be constitutional.[2187]

2. Congress might direct private firms to produce arms specifically suitable for the Militia. In light of the pressing need to revitalize the Militia as soon as possible, orders of this type could be quite draconian. For example, in 1916, Congress empowered

> [t]he President, in time of war or when war is imminent, * * * through the head of any department of the Government, * * * to place an order with any individual, firm, association, company, corporation, or organized manufacturing industry for such product or material as may be required, and which is of the nature and kind usually produced or capable of being

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[2181] *See, e.g.*, Regan v. Taxation With Representation of Washington, 461 U.S. 540, 549 (1983); Lyng v. Automobile Workers, 485 U.S. 360, 368 (1988).

[2182] U.S. Const. art. I, § 8, cl. 16 (emphasis supplied). *See ante*, at 50-54.

[2183] U.S. Const. art. I, § 8, cl. 18 (emphasis supplied).

[2184] U.S. Const. amend. II (emphasis supplied).

[2185] On the latter option, *see, e.g.*, Revised Statutes of the United States (1873-1874), TITLE XVI, THE MILITIA, § 1661, 18 Stat. 285, 290; An act to amend section sixteen hundred and sixty-one of the Revised Statutes, making an annual appropriation to provide arms and equipments for the militia, Act of 12 February 1887, CHAP. 129, §§ 1 and 3, 24 Stat. 401, 401, 402; An Act To amend section one of the Act of Congress approved February twelfth, eighteen hundred and eighty-seven, entitled "An Act to amend section sixteen hundred and sixty-one of the Revised Statutes, making an annual appropriation to provide arms and equipments for the militia", Act of 6 June 1900, CHAP. 805, 31 Stat. 662.

[2186] U.S. Const. art. I, § 8, cl. 1.

[2187] *See* U.S. Const. art. I, § 8, cl. 18.

> produced by such individual, firm, company, association, corporation, or organized manufacturing industry.
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> Compliance with all such orders for products or material shall be obligatory on any individual, firm, association, company, corporation, or organized manufacturing industry * * * and shall take precedence over all other orders and contracts theretofore placed with such individual, firm, company, association, corporation, or organized manufacturing industry, and any individual, firm, association, company, corporation, or organized manufacturing industry * * * owning or operating any plant equipped for the manufacture of arms or ammunition, or parts of ammunition, or any necessary supplies or equipment for the Army, and any individual, firm, association, company, corporation, or organized manufacturing industry * * * owning or operating any manufacturing plant, which * * * shall be capable of being readily transformed into a plant for the manufacture of arms or ammunition, or parts thereof, or other necessary supplies or equipment, who shall refuse to give to the United States such preference in the matter of the execution of orders, or who shall refuse to manufacture the kind, quantity, or quality of arms or ammunition, or the parts thereof, or any necessary supplies or equipment, * * * or who shall refuse to furnish such arms, ammunitions, or parts of ammunition, or other supplies or equipment, at a reasonable price * * * , then * * * the President * * * is hereby authorized to take immediate possession of any such plant or plants, and through the Ordnance Department of the United States Army, to manufacture therein in time of war, or when war shall be imminent, such product or material as may be required[.][2188]

Although the Constitution delegates to Congress only the general power "[t]o * * * *support* Armies" (from which a power to provide arms in particular must be implied[2189]), it extends to Congress the explicit power "[t]o *provide for* * * * *arming* * * * the Militia", which is complete in and of itself.[2190] So, if a statute of the latter type in favor of the Army is constitutional, an equivalent statute directed to arms produced specifically for the Militia would be equally constitutional. To be sure, one may question the constitutionality of the mandate in the statute of 1916 for "the President * * * to take immediate possession of any plant" that refused to comply with the General Government's "order[s]" for martial supplies—unless, of course, "just compensation" were to be paid for the temporary seizure.[2191] A similar statute drafted in favor of arming the Militia, however, would hardly need to rely on such

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[2188] An Act For making further and more effectual provision for the national defense, and for other purposes, Act of 3 June 1916, CHAP. 134, § 120, 39 Stat. 166, 213.

[2189] *See* U.S. Const. art. I, § 8, cl. 18.

[2190] *Compare and contrast* U.S. Const. art. I, § 8, cl. 12 *with* art. I, § 8, cl. 16 (emphases supplied).

[2191] *Compare* Youngstown Sheet & Tube Company v. Sawyer, 343 U.S. 579 (1952) *with* U.S. Const. amend. V.

a severe means of enforcing compliance. For with most of the owners, managers, and employees in such a plant already being members of the Militia—whose continued work there would depend upon their exemptions from regular Militia duty in the field, whose exemptions would have been granted upon the condition of their continued work at the plant (or at least in that industry), and who would be under Militia discipline even though they were so exempted and employed—the people in actual control of the plant would have no inclination, and little latitude, to decline to perform the tasks assigned to them. Rather, they would recognize their plant not simply as a private enterprise, but instead as a private enterprise seconded to or even integrated within the Militia, and the interests of which were coincident with the interests of the Militia. Even the customers of such a plant would recognize as much, most of them being members of the Militia, too.

3. Congress might order that the Militia be supplied with the same new types of arms being provided to the regular Armed Forces when and as sufficient supplies of those arms became available—as, for example, it did in 1903, when it authorized the Secretary of War "to issue, on the requisitions of the governors of the several States * * * , such number of the United States standard service magazine arms, with bayonets, bayonet scabbards, gun slings, belts, and such other necessary accouterments and equipments as are required for the Army of the United States, for arming all of the organized militia in said States";[2192] and in 1907, when it imposed on the Secretary of War "the duty * * * , whenever a new type of small arm shall have been adopted for the use of the Regular Army, and when a sufficient quantity of such arms shall have been manufactured to constitute * * * an adequate reserve for the armament of any regular and volunteer forces that it may be found necessary to raise in time of war, to cause the organized militia of the United States to be furnished with small arms of the type so adopted, with bayonets and the necessary accouterments and equipments, including ammunition therefor".[2193]

4. Congress might mandate the distribution to the Militia of old but still serviceable firearms, ammunition, and accoutrements no longer needed by the regular Armed Forces, pursuant to its authority "to dispose of and make all needful Rules and Regulations respecting the * * * Property belonging to the United States".[2194]

5. Under its power "[t]o exercise exclusive Legislation in all Cases whatsoever * * * over all Places purchased by the Consent of the Legislature of the

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[2192] An Act To promote the efficiency of the militia, and for other purposes, Act of 21 January 1903, CHAP. 196, § 13, 32 Stat. 775, 777.

[2193] An Act Making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and eight, Act of 2 March 1907, CHAP. 2511, ORDNANCE DEPARTMENT, 34 Stat. 1158, 1174-1175.

[2194] U.S. Const. art. IV, § 3, cl. 2.

State in which the Same shall be, for the Erection of * * * Magazines, Arsenals, * * * and other needful Buildings",[2195] Congress might investigate the feasibility of establishing a few public armories or other facilities for the production, maintenance, and repair of Militia "Arms" where private services simply could not be provided.[2196] And,

6. Within their own jurisdictions, the States might themselves take in hand the first and the fourth of these activities, and could coöperate with Congress with respect to the second, third, and fifth.

F. The States the preferred actors for arming revitalized Militia through the free market. The points just set out are phrased in terms of what Congress and the States "might" do, because "the Militia of the several States" are almost entirely in abeyance throughout America today, and need to be revitalized before anything can be done.[2197] Inasmuch as the Militia are "the Militia *of the several States*", though, revitalization should—and perhaps as a practical matter in the contemporary political context can only—come through the States.

In the process of revitalization, not just historical continuity, constitutional requirements, and political prudence recommend the States' reliance on the free market to supply WE THE PEOPLE with the firearms and ammunition they will need. The overwhelming advantage of the *pre-*constitutional system is that, properly modernized in operation, and in the context of the widespread private possession of firearms—along with the panoply of private inventors, manufacturers, distributors, and retailers—already extant throughout contemporary America, it would be much more flexible and efficient, and far more capable of producing immediately beneficial results, than any other system for arming the Militia.

Thus, a State intent on revitalizing her Militia from the very ground up (as most of the States would be compelled to do) could follow a sequence of steps that employed the free market to the maximum extent:

1. To encourage large numbers of individuals to enroll in her Militia quickly and at the least cost to them, a State could allow Militiamen to bring to their service whatever firearms they already possessed or wanted to acquire in the free market for that purpose—with the added incentive that, by dedicating these firearms to their Militia service, individuals could immunize their equipment from most of the General Government's contemporary "gun control".[2198]

[2195] U.S. Const. art. I, § 8, cl. 17.

[2196] Again, this is not a novel idea. *See, e.g.,* An Act For making further and more effectual provision for the national defense, and for other purposes, Act of 3 June 1916, CHAP. 134, § 121, 39 Stat. 166, 214.

[2197] *See* Edwin Vieira, Jr., *Constitutional "Homeland Security", Volume One, The Nation in Arms* (Ashland, Ohio: BookMasters, Inc., 2007), *especially* Chapter 3.

[2198] *See ante,* 1105-1111.

2. To promote interoperability of ammunition once her own Militia were revitalized, a State could require Militiamen to arm themselves with firearms of particular calibers, if they were not already so supplied. And,

3. To provide for uniformity, serviceability, and high quality in all Militia equipment, to guarantee a permanent supply of that equipment, and to link service in the Militia symbiotically to the State's economy, at least some of the States could encourage private firms within their territories to produce and market specially designed firearms, ammunition, and accoutrements with which Militiamen would gradually replace or supplement whatever other arms they already possessed. In this effort, each such State would: (i) conduct an inventory of plants within her territory that were manufacturing or were capable of manufacturing firearms, ammunition, and related accoutrements; (ii) place orders with existing plants for the manufacture of such arms, these orders to take preference over any other business of those companies; and (iii) grant benefits to entrepreneurs who would agree to set up new plants within the State. Importantly, this process would encourage extensive innovation and experimentation wherever inquiring minds set themselves to work. With potentially all of the States involved, and with each of them facing different—and some of them confronted by unique—problems of "homeland security", a multitude of new designs of arms and related equipment would surely be devised in short order to fit disparate requirements. With numerous sources of manufacture, many competing or complementary prototypes could be turned out, tested, and adopted for service. And new techniques of production could be introduced, tried, and perfected. Such decentralized innovation, experimentation, and competition would minimize the likelihood that Militia throughout "the several States" would all be plagued by such blunders as the regular Army's adoption of the trouble-plagued M16 rifle and its often inadequate 5.56 x 45 mm cartridge.[2199] Conceivably, of course, this process might take place in only a few States, because once suitable new designs had proven themselves there, other States would simply adopt them. Yet, in light of the immensity of the task of properly equipping revitalized Militia throughout America—and generally of "reindustrializing" this country to repair the economic destruction "globalization" has wrought over the last few decades—it is not unlikely that new facilities for research and development, manufacturing, and allied activities could profitably be set up in almost every State.

[2199] For a recent example involving the M16-derived M4 carbine, *see* Kirk Ross, "What Really Happened at WANAT", U.S. Naval Institute, *Proceedings* (July 2010), at 38.

CHAPTER FORTY-ONE

Every member of "the Militia of the several States" must be trained to participate in the provision of *some* aspect of "homeland security" for his particular State and Locality as well as for the United States as a whole.

Just as men organized in a group but without arms, or men possessed of arms but without organization, do not constitute a proper Militia at all, a group of men organized and equipped with arms but without appropriate training is at best the merest shadow of a Militia. Essential to success in any martial endeavor is "training, TRAINING and M-O-R-E T-R-A-I-N-I-N-G".[2200] Not surprisingly, then, the Constitution explicitly empowers Congress "[t]o provide for organizing, arming, *and disciplining*, the Militia".[2201] To the Constitution, "disciplining" includes "training", as explicitly appears in that very same clause, which "reserv[es] to the States respectively * * * the Authority of ***training*** *the Militia according to the* ***discipline*** prescribed by Congress".[2202] This reflects the common usage of those terms during the *pre*-constitutional period. At that time, the noun "discipline" meant "[e]ducation; instruction" and "[m]ilitary regulation".[2203] And the verb "to discipline" meant "[t]o educate; to instruct" and "[t]o regulate; to keep in order".[2204] So, with regard to Militia in particular, "discipline" included every form of "[e]ducation" and "instruction" that appertained to "[m]ilitary regulation".[2205] These words retain essentially the same meanings today. For instance, the noun "discipline" means "[s]evere training, corrective of faults" which "aims at the removal of bad habits and the substitution of good ones";[2206] or "[i]nstruction and government, comprehending the communication of knowledge and the regulation of practice; as, military discipline, which includes instruction in manual exercise,

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[2200] Admiral Chester W. Nimitz to Admiral Ernest J. King (February 1943), *quoted in* James D. Hornfischer, *Neptune's Inferno: The U.S. Navy at Guadalcanal* (New York, New York: Bantam Books, 2001) at 427.

[2201] U.S. Const. art. I, § 8, cl. 16 (emphasis supplied).

[2202] Emphasis supplied.

[2203] S. Johnson, *Dictionary*, *ante* note 50, definitions 1 and 3 in both the First (1755) and the Fourth (1773) Editions.

[2204] *Id.*, definitions 1 and 2 in both the First (1755) and the Fourth (1773) Editions.

[2205] *See, e.g.*, Timothy Pickering, Jr., *An Easy Plan of Discipline for a Militia* (Salem, Massachusetts: Samuel and Ebenezer Hall, 1775), which contains a set of instructions for drilling Militiamen.

[2206] *Webster's Revised Unabridged Dictionary, ante* note 11, at 420, definitions 4 and 1. *See also Webster's Third New International Dictionary, ante* note 330, at 644, definition 3.

evolutions and subordination".[2207] And the verb "discipline" means "[t]o accustom to regular and systematic action; * * * to train to act together under orders; to teach subordination * * * to form a habit of obedience * * * ; to drill".[2208] Therefore, "[a] *well regulated* Militia"[2209]—which each of "the Militia of the several States" was understood to be in the late 1700s, and must remain today—is a Militia all of the members of which are thoroughly "[e]ducate[d]" and "instruct[ed]" in whatever subjects may be relevant to their functions.

A. The constitutional divisions of authority and labor with respect to training the Militia. Congress is "[t]o provide for * * * disciplining, the Militia" with respect to performance of the three constitutional purposes for which "the Militia of the several States" may be "call[ed] forth" to be "employed in the Service of the United States"—namely, "to execute the Laws of the Union, suppress Insurrections and repel Invasions"—but at all times "reserving to the States respectively * * * the Authority of training the Militia according to the discipline prescribed by Congress" for those three purposes.[2210] As with "organizing" and "arming", the constitutional *desideratum* is to guarantee uniformity among all and within each of the Militia—so that, when "call[ed] forth" for any of the three constitutional purposes, any "Part of the[Militia] as may be employed in the Service of the United States",[2211] no matter from which State or States it may be drawn, can be expected to perform up to some basic standard of competence.

1. WE THE PEOPLE needed explicitly to delegate to Congress the power "[t]o provide for * * * disciplining, the Militia" for the three constitutional purposes, because otherwise that power would have remained the exclusive prerogative of each of the several States, just as it had been the jealously guarded authority of all but one Colony and then of each independent State throughout the *pre-*constitutional period. For not only did the Colonies and States enact their own statutes that provided for discipline of their Militia, but even the Articles of Confederation mandated that "every state shall always keep up a well regulated *and disciplined* militia, sufficiently armed and accoutred".[2212] And although the Articles made the maintenance of "a well regulated and disciplined militia" incumbent upon the States as a legal duty, they also recognized that the power to determine how to maintain such a "militia" remained exclusively with the States, because "[e]ach

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[2207] N. Webster, *An American Dictionary, ante* note 15, definition 2. *Accord, The Compact Edition of the Oxford English Dictionary, ante* note 11, Volume 1, at 741, definitions 1.b. and 3.b.

[2208] *Webster's Revised Unabridged Dictionary, ante* note 11, at 420, definition 2. *Accord, Webster's New International Dictionary, ante* note 330, at 743, definition 3.

[2209] U.S. Const. amend. II (emphasis supplied).

[2210] U.S. Const. art. I, § 8, cls. 15 and 16.

[2211] U.S. Const. art. I, § 8, cl. 16.

[2212] Arts. of Confed'n art. VI, ¶ 4 (emphasis supplied).

state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled".[2213]

To be sure, the Constitution's general language "[*t*]*o provide for* * * * disciplining" would allow Congress simply to authorize each of the individual States to discipline her own Militia, according to the *pre-*constitutional pattern. Unless Congress set out some mandatory basic principles, however, this approach would not be likely to result in the necessary degree of nationwide uniformity of "discipline". So, as a practical matter, Congress's power "[t]o provide for * * * disciplining, the Militia" *for the three constitutional purposes* must be preëminent, in the sense that the States cannot detract from or otherwise interfere with its exercise—provided that exercise is timely and effective.

2. Although preëminent, Congress's power is not exclusive. If Congress defaults on its responsibility, the States must themselves devise "discipline" for those purposes. For, plainly enough, although only "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people",[2214] yet if Congress fails, neglects, or refuses to exercise its powers when it ought to do so, then the States must take that exercise into their own hands, so long as the powers at issue are "no[t] prohibited by [the Constitution] to the States". And, although "the Laws of the United States which shall be made in Pursuance [of the Constitution] * * * shall be the supreme Law of the Land", binding on "the Members of the several State Legislatures, and all executive and judicial Officers * * * of the several States",[2215] yet if Congress fails, neglects, or refuses to enact a "Law[ ]" for "disciplining[ ] the Militia", then no possible prohibition against the exercise of such a power by the States exists. In the case of the Militia, particularly, this concurrent, reserved authority of the States in the face of Congressional default is of crucial importance, because America cannot afford to have "the Militia of the several States" *im*properly "disciplin[ed]", let alone not "disciplin[ed]" at all, with respect to the three constitutional purposes upon the fulfillment of which this country's very survival could well depend.

As explained heretofore, that the Constitution explicitly "reserv[es] to the States respectively, the * * * Authority of training the Militia according to the discipline prescribed by Congress" implies a right in the States to require that Congress does, in fact, "prescribe[ ]" such "discipline", so that the States can exercise their exclusive "Authority" in that regard.[2216] If, however, Congress

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[2213] Arts. of Confed'n art. II.

[2214] U.S. Const. amend. X.

[2215] U.S. Const. art. VI, cls. 2 and 3.

[2216] *See ante*, at 52-53.

defaults, then the States must assume the substance of that duty on their own, in order to fulfill their own constitutional responsibility for "training the Militia". Congress cannot command the States to refrain from fulfilling their duty—and certainly cannot absolve the States of their duty through some dereliction of its own.

3. For all purposes other than the three the Constitution enumerates for "calling forth the Militia", the States enjoy exclusive authority to devise suitable "discipline" for, and according to that "discipline" to train, their own Militia. Obviously, as to these other purposes, no alternative exists. For the Constitution delegates to Congress no constitutional authority "[t]o provide for * * * disciplining, the Militia" for any purpose in addition to the three the Constitution explicitly lists. Inasmuch as Congress can "provide for calling forth the Militia" *only* for those three purposes, training the Militia for any other purpose would be pointless as far as the United States are concerned. And as to "the several States" (in contradistinction to "the United States"), Congress simply lacks the competence to devise appropriate training for each State's Militia with respect to the myriad distinct problems of "homeland security" that may arise in different Localities. (Which doubtlessly is why the Constitution does not authorize Congress even to try its hand at such a hopeless task.) So, because as a matter of both legality and practicality Congress *cannot* act, then the States *must*, unless—which can never be conceded—the Local problems in preparation for which the Militia should be "disciplin[ed]" are not to be addressed at all, and "the security of a free State" in each State is to be jeopardized.

Finally, if both Congress and the States fail, neglect, or refuse "to train the Militia" according to any "discipline", then the right, power, privilege, and duty fall to WE THE PEOPLE, for two reasons: *First*, "the right of the people to keep and bear Arms" for the purpose of participating in "well regulated Militia" in order to provide "the security of a free State" "shall not be infringed".[2217] For "the people to keep and bear Arms" effectively for that purpose necessitates their being "trained to arms".[2218] In turn, being "trained to arms" necessitates the prescription of some "discipline". Inasmuch as "the right of the people to keep and bear Arms, shall not be infringed", neither may their implied right to be "trained to arms" according to adequate "discipline" be infringed. Of course, no "infringe[ment]" would occur if Congress, the States, or both should provide sufficient training and discipline (as it is their constitutional duties to do). And in the first instance it is for the Members of Congress and the States' legislators, presumably proceeding with their constitutional responsibilities firmly in mind, to determine what training is sufficient. But neither

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[2217] U.S. Const. amend. II.

[2218] *See* Virginia Declaration of Rights (1776) art. 13.

Congress nor the States may *both* fail, neglect, or refuse to train the Militia *and* purport to prohibit THE PEOPLE from training themselves. That state of affairs would plainly constitute an "infringe[ment]" of "the right of the people to keep and bear Arms". *Second*, even without consideration of the Second Amendment, the intended beneficiaries of the duty of Congress "[t]o provide for * * * disciplining, the Militia" and of the States' "reserv[ed] * * * Authority of training the Militia according to the discipline prescribed by Congress" are WE THE PEOPLE in their Militia. The Constitution does not allow training to be withheld—because, if it were, "the Militia of the several States" would effectively be incapable of functioning . But the *only* way in which training will not be withheld in fact, in the event of defaults by Congress and the States, is if THE PEOPLE train themselves. Therefore, under such circumstances THE PEOPLE must be constitutionally authorized to train themselves according to a discipline which they themselves prescribe.

Thus, in this regard the Constitution establishes clear divisions of authority and labor along federal lines: (i) Congress "prescribe[s]" "discipline" for the three constitutional purposes. (ii) The several States supplement "the discipline prescribed by Congress" with "discipline" of their own for all other purposes (or, in the case of a default by Congress, for the three constitutional purposes as well). (iii) The States actually train their Militia for all purposes. And (iv) if rogue public officials in the General Government and the States fail, neglect, or refuse to take all of the steps necessary and proper for training the Militia, then WE THE PEOPLE take the initiative and train themselves, so that "the security of a free State" everywhere in the country will always be preserved.

B. Adequate training for *all* of the Militia constitutionally required. The Constitution did not set up this comprehensive and complex arrangement for ensuring that "the Militia of the several States" would be adequately trained with any expectation that the Militia would degenerate into ineffective (or, as is the case today, mostly invisible) establishments; or, worse yet, that rogue public officials, politicians, the big media, and various subversive private special-interest groups would successfully discredit, deride, and even demonize the Militia among all too many credulous Americans. No rational constitution would assign responsibility to both Congress and the States to see to the training of the Militia unless it expected—yea, *commanded*—that such responsibility would be fulfilled. Neither would any rational constitution expect that such responsibility would be fulfilled unless it expected—yea, *commanded*—as well that, as the result of such training, the Militia would be made fully capable of performing the tasks assigned to them. Least of all would any rational constitution declare that "[a] well regulated Militia" is "necessary to the security of a free State" unless it expected—yea, *commanded*—that such a Militia would be entirely sufficient to that end. So, as "[a] well regulated Militia", each and every one of "the Militia of the several States" must be *sufficiently*

trained to accomplish all of the reasonably anticipated tasks to which it may be assigned.

This is yet another reason (if any more were needed[2219]) why each and every so-called "*un*organized militia" in existence anywhere in America today is thoroughly *un*constitutional.[2220] After all, by practical definition an "*un*organized militia" is an *un*trained "militia", inasmuch as a gaggle of individuals without some mutual organization can hardly be educated and instructed so as to function as a coherent collective; and any group without some sufficient training directed towards its purposes can hardly be described as "organized".

C. The basic constitutional principles of training. "Discipline" and "training", of course, are general terms the precise applications of which are inevitably relative to the needs and possibilities of particular times and places. Because "homeland security" addresses the specific threats confronting the community *today*, and seeks to deter or defeat them with the resources available to the community *today*, the selfsame training that proved necessary and sufficient for the Militia during the 1600s and 1700s will not be adequate in the early decades of the Twenty-first Century. Certain overarching principles, though, are not historically bound.

1. Political training for self-government. Training in the Militia's *political* rôle as institutions of popular self-government must be first and foremost. So, whether or not the subject of some occupational exemption, *every* individual without exception should be obliged to attend regular meetings of his Local Militia Company. After all, inasmuch as "[a] well regulated Militia" is "necessary to the security of *a free State*" and "a free State" in America is one characterized by popular self-government, "[a] well regulated Militia" is an instrument of popular self-government. And inasmuch as "'[*p*]*olitical* power grows out of the barrel of a gun'" and every "well regulated Militia" must be an *armed* establishment, "[a] well regulated Militia" is ultimately a *political* institution in its own right, too. Therefore, each and every meeting of a Local Militia Company can and should perform a *political* function for a *political* purpose on the basis of popular self-government—at a minimum, by providing the community with a formal forum for the people's inquiry, discussion, education, and proposals for action with respect to such matters as the behavior of public officials and the workings of critical private enterprises. The jurisdiction of this forum, moreover, is potentially without bounds. For "[a] well regulated Militia" is not just a *quasi*-military establishment that prepares itself to deal solely with rare "emergency" situations. Rather, "being necessary to the

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[2219] *See ante*, Chapter 34.

[2220] *See, e.g.*, 10 U.S.C. § 311(b)(2); General Laws of Rhode Island §§ 30-1-4(4) and 30-1-5; *and* Code of Virginia §§ 44-1 and 44-4.

security of a free State" in *every* way (because the Constitution identifies *no* way in which the Militia is not "necessary"), "[a] well regulated Militia" must delve into *every* aspect of the day-to-day functioning of the Republic—at the Local, State, and National levels—that could possibly affect "the security of a free State", and thereby impact upon the Militia's constitutional mission, in *any* way. The proof of this appears most plainly in the Militia's authority and responsibility "to execute the Laws of the Union" at the level of the General Government,[2221] and to execute the laws of the several States and their Localities at those levels of the federal system,[2222] without any limitation as to time, place, or circumstances. For vanishingly few areas of social existence, from the very ordinary to the most extraordinary, are not affected on a daily basis by the execution of the community's laws.

Popular self-government, however, cannot succeed as merely "a spectator sport", but depends instead upon WE THE PEOPLE'S personal participation to some large and persistent degree. "A well regulated Militia"—which can *compel* its members' attendance at regular meetings where they will air the vital political issues of the day, and through that ventilation train themselves for self-government—can maximize that participation. Indeed, "[a] well regulated Militia" is potentially the *most effective* of all political institutions in a self-governing republic. It is the *most inclusive* of all political institutions, because it enrolls as members almost every adult living within its jurisdiction. It is the *most intensive* of all political institutions, because it is in operation every day of the year. It is the *most extensive* of all political institutions, because no subject arguably related to "the security of a free State" is beyond its ken and concern. It is the *most influential* of all political institutions, because through its members its deliberations and decisions can reach out to everyone in the community. And it is the *most open and honest* of all political institutions, because it is beholden to no political parties, special-interest groups, or narrow factions.[2223]

2. Training for "military" and "police" service. Training of the Militia for "military" and "police" functions must always be emphasized in any era, not only

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[2221] U.S. Const. art. I, § 8, cl. 15.

[2222] *See* U.S. Const. amends. II and X.

[2223] Although all of this can be proven only by a "thought experiment", it is certainly far more plausible than the alternative—namely, that America would be better off without fully functional Militia in every State, and thereby with WE THE PEOPLE hopelessly disorganized and defenseless against their opponents' political tactic of "divide and rule" which has brought THE PEOPLE to the mess in which they find themselves mired today. For instance, who can doubt that, had "Militia of the several States" been properly revitalized even as late as the last quarter of the Twentieth Century in order to investigate and criticize America's inherently unworkable monetary and banking systems, and to propose substitutes that would serve THE PEOPLE'S best interests, the disastrous breakdown of those rotten schemes in the early Twenty-first Century would probably never have occurred at all, or at least not to the extent that it did. In the absence of close scrutiny by the nonexistent Militia, however, public officials and politicians in the District of Columbia, speculators in New York City, and the big financial and other media that shilled for them were able to cover up the catastrophe they themselves had caused, until it was too late to correct at less than an exorbitant cost.

perforce of the common sense of how every polity preserves itself against foreign and domestic enemies, but also because the explicit authority and responsibility the Constitution assigns to the Militia are plainly of a character appropriate for—indeed, require—true "military" forces ("suppress Insurrections and repel Invasions") and "police" units ("execute the Laws of the Union" and "suppress Insurrections"). Exactly what "military" and "police" training will entail in practice, however, will depend upon various and variable circumstances. Nonetheless, some rough guidelines can be sketched:

a. Those units of revitalized Militia assigned to service of a military or *para*-military nature should train in close conjunction with, and receive extensive assistance from, the regular Armed Forces. Ideally, too, some member of some State's Militia with appropriate rank should be seconded as a liaison officer to each and every unit of consequence within the Armed Forces. Through these connections, the Militia—and thereby WE THE PEOPLE—will gain invaluable experience with and insights into how and why the Armed Forces operate as they do, in terms of their structures of command, strategies and tactics, armaments, logistics, intelligence, and so on, as well as becoming familiar with the intentions, plans, and capabilities of the anticipated enemies of America that the Armed Forces are preparing themselves to fight. Overall, such coöperation—and the constructive criticisms and suggestions that the Militia and the Armed Forces will exchange with one another as a result—will promote mutual understanding, sympathy, and respect.

On the other side, intimate involvement with the leading personalities and operations of the Armed Forces at every level will enable the Militia to deter, detect, expose, root out, and if necessary defeat rogue individuals and cliques attempting to transmogrify parts of the Armed Forces into instruments of subversion, usurpation, and tyranny. More than any other expedient, then, this will advance the fundamental principle of constitutional government that, "in all cases, the military should be under strict subordination to, and governed by, the civil power".[2224] For "the civil power"—that is, ultimately WE THE PEOPLE—cannot hope to "govern[ ]" "the military" unless it knows at all times precisely what "the military" is doing and why. And no more detailed knowledge on the subject can be gained than by means of WE THE PEOPLE'S direct personal involvement in the Armed Forces' day-to-day activities in the form of liaison through the Militia. Furthermore, every patriotic member of the Armed Forces should welcome, appreciate, and even encourage this arrangement, because it will mitigate the historically validated concerns that "large military establishments" afford "facile means * * * to ambitious and unprincipled rulers to subvert the government or

[2224] Virginia Declaration of Rights (1776) art. 13.

trample upon the rights of the people",[2225] and therefore that "standing armies, in time of peace, should be avoided, as dangerous to liberty"[2226]—concerns which have ripened into fully justified fears that America's "military-industrial complex" has overstepped its constitutional bounds.[2227]

Of course, any arrangement of this kind would necessitate explicit approval from Congress as well as the States, because Congress alone can "make Rules for the Government and Regulation of the land and naval Forces" that would require or even allow for those "Forces" to receive liaison "Officers" from the Militia;[2228] and inasmuch as the individuals performing the liaison would be Militia "Officers", they would have to be selected by the States, to which the Constitution "reserv[es] * * * the Appointment of [all of] the Officers" in the Militia, except for the ultimate "Commander in Chief".[2229] Also, no matter what Congress wanted, arguably the States could effectively veto any such arrangement in large measure, because, although Congress could always require the Armed Forces to accept liaison "Officers" from the Militia, it could not require the Militia to second such "Officers" at all times, but only at such times during which it was justified in exercising its power "[t]o provide * * * for governing such Part of the[Militia] as may be employed in the Service of the United States",[2230] and even then arguably only with respect to the "Part" so "employed". At all other times Congress would have to depend upon the States' voluntary accession to the plan. Possibly, even without agreement from the States, Congress could require Militia "Officers" to serve as liaison with the regular Armed Forces on the ground that it was "calling [them] forth * * * to execute the Laws of the Union"—by assigning them to supervise compliance of the Armed Forces with Congress's "Rules for the Government and Regulation of the land and naval Forces". This rationale would be somewhat porous, however, unless Congress authorized the Militia's liaison "Officers" actually "to *execute*" those "Rules" against wayward members of the Armed Forces. And the performance of such oversight might generate friction and perhaps arouse animosity between the Militia and "the land and naval Forces". Perhaps, too, in the absence of action by Congress or the States' legislatures, the President—as "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States"[2231]—could establish such liaison while the Militia (or some "Part" thereof) were in "the actual

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[2225] J. Story, *Commentaries on the Constitution*, *ante* note 576, Volume 2, § 1897, at 646.

[2226] Virginia Declaration of Rights (1776) art. 13.

[2227] *See post,* Chapter 47.

[2228] *See* U.S. Const. art. I, § 8, cl. 14.

[2229] *See* U.S. Const. art. I, § 8, cl. 16 *and* art. II, § 2, cl. 1.

[2230] U.S. Const. art. I, § 8, cl. 16.

[2231] U.S. Const. art. II, § 2, cl. 1.

Service of the United States", and otherwise could prevail upon the various commanders in chief of the Militia in the several States voluntarily to despatch liaison "Officers" to the "Army and Navy of the United States" if the laws of their States so permitted. Howsoever it could be brought about, though, such an arrangement would be uniquely valuable, because, although the Militia are constitutionally separate from and superior to the Armed Forces, being permanent parts of the federal system,[2232] both the Armed Forces and the Militia are constitutional establishments the purposes of which to a large degree can overlap in practice, and which therefore should cultivate and maintain a symbiotic relationship.

b. When State and Local police forces, Sheriffs' departments, and kindred law-enforcement agencies are wholly absorbed (as they should be) into the revitalized Militia,[2233] their present training-programs will form something of a foundation for future Militia instruction and practice. But only "something", not everything. Experience teaches that many if not most of those programs must be radically improved, and some of them eliminated. In all too many police agencies in all too many Localities, absences of standards, loose practices, and a general lack of transparency and especially accountability to WE THE PEOPLE—the dearth of true "discipline"—have metastasized into systematic corruption, arbitrary conduct, violations of citizens' constitutional rights, and especially rogue officers' brutality.[2234] These aberrant conditions must be vigorously stamped out wherever they exist, and strict regimens of specialized training imposed to prevent their recrudescence. *New forms of training will be necessary, not so that members of the Militia can become future police officers, but so that contemporary police officers can become proper members of the Militia or be discharged from the police*. Upon incorporation of the police into the Militia, the Militia will have far less to learn from the police than the police will need to learn from the Militia. Police are undoubtedly "necessary to the security" of a police state, a national-security state, or a totalitarian state. But the Militia are "necessary to the security of a *free* State". And once incorporated into the Militia, existing police departments will have to satisfy that exacting standard. And,

c. Because the "military" and "police" functions of revitalized Militia will rank among their most important tasks, and be ubiquitous throughout the several States; and because training for, as well as the actual performance of, those functions will unavoidably involve the use of firearms, ammunition, and related accoutrements by tens of millions of average Americans; therefore, training for the Militia will necessarily entail thoroughgoing education and instruction against the

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[2232] *See ante*, at 773-793.

[2233] *See ante*, at 327-328, *and post*, at 1194-1202, 1276-1277, 1291-1293, and 1482-1488.

[2234] *See, e.g.*, Radley Balko, *Overkill: The Rise of Paramilitary Police Raids in America* (Washington, D.C.: Cato Institute, 2006).

theory, the practice, and the individual and institutional proponents of "gun control". In short order, "gun control" of the modern variety—which slavers after the complete disarmament of as many "civilians" as possible—will become generally recognized as unnecessary, counterproductive, stupid, perverse, and obviously unconstitutional. For example—

> • The contention that "gun control", by making firearms increasingly unavailable to average citizens, somehow reduces the level of violent crimes—which counterintuitive notion scientific investigation has already thoroughly debunked[2235]—will be roundly dismissed as utterly nonsensical by every thinking person when the Militia become the primary law-enforcement establishments throughout the States, and are composed of almost the entire adult population in each community.
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> • The contention that "gun control", by reducing the number of firearms in private hands, minimizes accidents with firearms and thereby promotes public safety has always begged the question of the actual *causes* of such accidents—which almost universally can be traced to various individuals' lack of the proper attitude, knowledge, and skills necessary for safe usage of such implements. For that reason, that claim has always been subject to the commonsensical refutation that sufficient training of the citizenry in the safe use, rather than draconian prohibitions of private possession, of firearms is the sensible course to follow. When the Militia are revitalized throughout the several States, any purported link between "gun control" and public safety will be exposed as childishly ludicrous, because everyone eligible for the Militia (other than conscientious objectors) will be thoroughly trained in the safe and effective use of firearms.
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> • Because "the body of the people" eligible for service in the Militia will include minors from at least sixteen years of age, and because minors of even more tender years will receive instruction in schools as to the fundamental principles of the Militia in anticipation of their later enrollment, revitalization of the Militia will put paid to the deceptive plea that "gun control" is necessary "for the children". As with most arguments for "gun control", this claim is more heavily freighted with raw emotionalism than with historical scholarship. For, in *pre-*constitutional times, the notion of contemporary "gun controllers" that children capable (or soon to be capable) of using firearms in their community's defense should not have access to or training with such equipment would have been pilloried as the dangerous nonsense it is. Certainly the Militia statutes of that era aimed,

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[2235] *See, e.g.,* John R. Lott, Jr., *More Guns, Less Crime: Understanding Crime and Gun Control Laws* (Chicago, Illinois: University of Chicago Press, 3d Edition, 2010).

not at the modern "gun controllers'" goal of "zero tolerance" for minors' possession of firearms, but at putting firearms and ammunition directly into the hands of minors at least as soon as they reached the minimum age for enrollment in the Militia. A modern policy of *maximum practical exposure* of children to firearms would also minimize accidents with arms throughout those individuals' lifetimes—for "as the twig is bent, so grows the tree". This undeniable advantage of systematically training children with firearms as part of or in preparation for their Militia service exposes the incoherence and irresponsibility of "gun control"—that on the one hand demands enforced ignorance of firearms among America's youth, while on the other hand decries the number of accidents with firearms arising out of that very ignorance and the irresponsibility it fosters. And,

•Most importantly, "gun control" will be exposed, not simply as ridiculous in fact, but also as politically illogical, subversive of constitutional government, and potentially fatal to a free society. After all, other than a very few true pacifists among their number, the proponents of "gun control" do not advocate the banishment from society of *all* firearms. No, indeed. They seek to disarm the great mass of average Americans, but to retain a surfeit of arms of the most lethal varieties in the hands of "standing armies", *para*-militarized "law-enforcement agencies", and other assorted organized myrmidons in the pay of "ambitious and unprincipled rulers" who might come to desire "to subvert the government or trample upon the rights of the people".[2236] Thus, the propaganda and practices of "gun control" are (objectively at least) the inevitable leitmotifs in the prelude to the establishment of a totalitarian state. So even if, by suppressing the private possession of arms among Americans, "gun control" could eliminate the purported dangers that firearms in private hands conjecturally posed to public safety, it would thereby simply enable a different and exceedingly more serious danger to appear. Instead of accidents with firearms that arose from the adventitious negligence of individuals here and there, America would be confronted with, and stripped of any deterrence or defense against, the intentional and systematic employment of firearms by organized bands of political criminals terrorizing common Americans "from sea to shining sea". That is, disarming WE THE PEOPLE ostensibly for reasons of *general* public safety will inevitably and inexorably undermine their specifically *political* public safety. No one of good will can be safe, nor can "a free state" exist in "security" in the political sense, unless "the body of the people" be "trained to arms".[2237]

[2236] J. Story, *Commentaries on the Constitution*, *ante* note 576, Volume 2, § 1897, at 646.

[2237] Virginia Declaration of Rights (1776) art. 13.

D. Specific types of training for specific classes of individuals. Overall, the specifics of training within revitalized "Militia of the several States" will depend in every particular situation upon the peculiar "homeland-security" needs of each separate State and Locality, viewed in the context *inter alia* of: (i) the seriousness and immediacy of the threats against which the Militia must be deployed—that is, what must be done as soon as practicable; (ii) the size and composition of the population—that is, how many eligible individuals are available and may need to be trained; (iii) the ability of the Militia to draw upon individuals, groups, and organizations with specialized education, knowledge, skills, and experience—that is, the persons who may already be trained in some useful discipline, or be qualified to provide training to others; and (iv) the extent of funding or in-kind contributions to be expected from Congress, the Armed Forces, the States, Localities, the Militia themselves, and possibly other sources—that is, how extensive and intensive a program of training can the Militia afford to carry on.

In modern revitalized Militia, probably not everyone in the community will need to be extensively trained, and certainly not everyone will receive exactly the same training. What training may be required of or offered to any particular individual will usually depend upon his age and physical condition; his specialized education, knowledge, skills, and experience; and whether he is actually needed to perform a particular Militia function at a particular time and place.

1. Most obviously, an individual's physical and mental abilities to be trained will determine what training he may be required, or may volunteer, to undergo. In general, because basic physical ability and age are fairly well correlated, age-limits for various types of service in revitalized Militia, and therefore for training in that regard, would be reasonable as rough guidelines. But only as guidelines, because in any era differentiations in types of Militia service, and therefore training, made on the basis simply of a Militiaman's age must inevitably fall back upon statistics and generalized commonsensical appreciations that, although perhaps useful for preliminary judgments, cannot form the basis of any conclusive presumption where an individual's constitutional right, let alone duty, to serve in the Militia is concerned.[2238]

For instance, during the *pre*-constitutional period, the limits for active Militia service in Rhode Island and Virginia, and therefore for required training, were from sixteen to fifty or even sixty years of age, because the urgent goal was to be able in times of "alarm" to mobilize the largest possible number of men in at least minimally sufficient physical condition to serve in the field. Today, with significantly greater populations of able-bodied adults in many individual States than ever lived

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[2238] *See, e.g.*, Vlandis v. Kline, 412 U.S. 441, 452 (1973); United States Department of Agriculture v. Murry, 413 U.S. 508, 514 (1973).

in the Colonies and independent States taken as a whole during the 1700s, revitalized Militia could easily muster very extensive forces suitable for the most rigorous deployment in the field by drawing upon adults within a range of ages significantly narrower than from sixteen to fifty—which would argue for limiting full field training in the first instance to those in some suitably restricted range, such as eighteen to forty or forty-five years of age. On the other hand, though, because most individuals in modern times live longer and enjoy better physical and mental health than did their predecessors in the *pre*-constitutional era, large numbers of adults over forty, forty-five, or even fifty years of age today could profitably serve revitalized Militia in the field—and therefore should at least be allowed to volunteer for such duty, and if not proven to be disqualified then to be trained for it.

So, three conclusions as to limitations on training with respect to age can be drawn immediately:

a. Because—in keeping with the Militia's explicit constitutional responsibilities—training for and performance of "military" and "police" functions must be their first and foremost priority; and because such training and service in the field demand a great deal of physical exertion and therefore strength, stamina, and conditioning on the part of the individuals being trained and then so serving; therefore, the most physically rigorous training should presumptively be required only of Militiamen who could be anticipated to be in or be capable of developing the best physical condition: say, from eighteen to forty or forty-five years of age. This would not constitute "selection *for* the Militia", in the sense of the creation of an élitist "select Militia", but rather the exercise of an initial "selection *from* the Militia", in the sense of singling out particular individuals for certain duty and therefore training, allowable because of biologically determined circumstances and probably a superabundance of potentially qualified enrollees. For, in the gravest and most pressing emergencies, whoever *could* in fact possibly serve in the field *would* in law be required to do so, notwithstanding his youth, advanced age, or partial disability, and his relative lack of training on those grounds.

b. Members of the Militia from forty or forty-five to sixty or sixty-five years of age would be presumptively excused from the training required of members from eighteen to forty or forty-five, but required to undergo other training that matched their particular abilities. Modern Militia, after all, would offer many positions in intelligence, planning, logistics, education, training, maintenance of equipment and facilities, management of records, and general administration that would require individuals with specialized education, knowledge, skills, and experience, but who would not necessarily have to appear for duty in anything akin to field-grade physical condition. Moreover, whatever the statutory termini in age might be for various forms of or even all *compulsory* service, anyone of advanced years ought to be allowed to *volunteer* for training in whatever Militia duties he would be capable

of performing. Thus, training in any particular subject would be open to all who could perform the service to which the training was directed.

c. If some flexibility exists at the upper ends of the ranges of age in which individuals may be subject to mandatory training, the lowest boundary should be fixed at the very commencement of adulthood, so as to maximize the amount of training that the youngest Militiamen would receive during their physically, intellectually, and morally most formative years. As *pre*-constitutional history demonstrates, sixteen is not an unrealistic age at which to begin. Today, though, fifteen or even fourteen might prove satisfactory, too, if the required training and related duties were carefully tailored to what might be appropriate for individuals of those ages. In any event, basic Militia education and training should begin as soon as practicable. And it should focus primarily on inculcating, not simply rudimentary knowledge and skills, but especially the proper *attitude* towards the subject. These youngest adults will need to develop the correct four-sided frame of reference in which to situate and judge everything that comes thereafter: namely, that (i) ***self-government is not a "spectator sport"***; (ii) ***participation in the Militia is the quintessential activity of self-government***; (iii) ***the Militia constitute a great school, teaching the theory and operations of "a free State"***; and (iv) ***only by every Militiaman's learning and applying these lessons throughout his life can the security of "a free State" be preserved***. Of course, some (perhaps many) precocious young Militiamen might have special skills that could best be exploited right away in other, higher-level duties, and therefore would qualify those individuals for certain types of advanced training. In such cases, if a lack of emotional maturity did not stand in the way, mere chronological age should not.

2. Training and organization are intimately interrelated. In a large sense, training is actually the foundation for the Militia's organization, because individuals will be assigned various operational duties according to their training or capacity for it. It certainly would be useless to create parts of an organization that required the performance of duties of which no one was or could be made capable. Of course, any proposals in this regard can be, at best, suggestions and recommendations rather than requirements. For revitalizing the Militia under contemporary conditions will necessarily be an experimental endeavor. Different structures and regimens for organization and training will undoubtedly have to be tried in different States, and the ones that prove themselves best adapted or adaptable to Local conditions will be adopted, even though they differ from State to State and perhaps from Locality to Locality within a particular State. Nonetheless, a basic structure should probably consist of at least four groups:

{i} The first group might consist of Militia "cadets"—individuals of sixteen and seventeen years of age who would receive foundational instruction and preliminary training in all of the basic subjects germane to the Militia, and would be continuously evaluated with respect to their suitability for later assignments

within groups **{ii}** and **{iii}**. If the facilities were available, some parts of this program could be offered to precocious individuals of fourteen and fifteen years of age as well ("cadets-aspirant"), in preparation for their enrollment into the Militia in group **{i}**.

{ii} The second group might consist of individuals from eighteen to forty or forty-five years of age who were adjudged particularly fit to perform military, *para*-military, police, emergency-response, fire-fighting, and search-and-rescue duties; to participate in engineering and heavy construction; to provide food security by working on farms, ranches, and like facilities; to protect natural resources; or to engage in other "homeland-security" services in the field that required physical strength, conditioning, and endurance. The qualification "*particularly* fit" is necessary here, because in a dire emergency—what Americans of the *pre*-constitutional era would have designated an "alarm"—individuals in groups **{i}** and **{iii}**, and perhaps **{iv}** as well, who were even minimally fit might be drafted to perform duties normally assigned only to individuals in group **{ii}**. Also, the qualification "*in the field*" is necessary, because at all times some duties with respect to these activities could adequately be performed in an armory, a depot, an office, or some other administrative facility by individuals who were incapable of arduous service. For example, armorers—gunsmiths, in their private lives—would certainly be necessary to maintain Militiamen's firearms, ammunition, and accoutrements in good working order, and therefore would normally be assigned to the Militia's military, *para*-military, and police units; but the particular individuals fulfilling that function would not be expected, and therefore would not normally be required to be trained, actually to perform regular military, *para*-military, or police duty outside of their workshops.

{iii} The third group might consist of all individuals from forty or forty-five to sixty or sixty-five years of age, as well as those individuals between eighteen and forty or forty-five years old who did not qualify or were not needed for duty in group **{ii}**, or who were especially qualified for some other duty. Thus, group **{iii}** would include all otherwise eligible individuals already forty-six years of age or older when the Militia in their State was revitalized, who did not volunteer or were not accepted for service in group **{ii}**; all the members of group **{i}** who upon reaching eighteen years of age did not qualify for group **{ii}**; and all the members of group **{ii}** who reached forty-six years of age, excepting those who volunteered and were accepted for continued service in that group. Presumably, all women of eighteen years of age and older would be assigned to group **{iii}**, unless some special reason required their reassignment to group **{ii}**—such as that they possessed some unique and indispensable skills necessary for a Militia unit in group **{ii}**, or that a unit in group **{ii}** simply lacked enough men to perform certain routine duties for which some women in group **{iii}** were arguably qualified.

{iv} The fourth group might consist of those individuals of any age who had been granted some exemption from Militia service—such as conscientious objectors, or individuals who filled various important public offices or engaged in certain critical private occupations. Or, at least at the onset of revitalization of the Militia, when people were being gradually acclimatized to the new system, those individuals who purchased exemptions from Militia service.[2239] Membership in group **{iv}** would be something of a nominal status at best, though, because conscientious objection alone would not exempt anyone from performing the duties possible in groups **{ii}** or **{iii}** that did not require the use of firearms; and not only those individuals who purchased exemptions for reasons of personal convenience, but also those in offices or occupations that precluded most or all active service, would nonetheless be required to take a minimal course of training. An exemption from some aspects of Militia service presumes membership in the Militia, and limits only the duties thereof; it neither removes one from the Militia altogether nor provides a blanket immunity from all forms of service.

3. One of the main constitutional duties of membership in the Militia is for each individual to receive *some* training. Presumably, immediately upon revitalization of the Militia, although some individuals would have had the benefit of experience in the regular Armed Forces, in various law-enforcement agencies, or in other occupations relevant to Militia service, many other (perhaps most) individuals eligible for the Militia would lack any training with respect to any aspect of that service. The particular substance of the training these individuals would need to undergo would depend upon the duties they might be expected to perform.

a. The individuals who comprised group **{iv}** would be required to study: (i) in general, the history of "the Militia of the several States" and of their own State, and the Militia's contemporary constitutional and statutory status, purposes, structure, and operations; and (ii) in particular, how the Militia can secure "a free State" and guarantee "a Republican Form of Government" in each State and thus throughout the Union as a whole, can maintain the continuity of representative, constitutional government throughout the federal system in the face of whatever may threaten it, can promote a sound and vibrant economy in each State, and overall can bring about social solidarity. Specifically, because revitalized "Militia of the several States" would be vested—perforce of the Constitution of the United States, the various constitutions of individual States, and whatever implementing statutes might be forthcoming—with legal rights, powers, privileges, and immunities that authorized them to enforce the laws, deter and quell domestic violence, suppress insurrections, and repel invasions in whatever form,[2240] and otherwise to take whatever actions might be necessary for maintaining "the security of a free

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[2239] *See ante,* at 974-977, *and post*, at 1242-1243.

[2240] *See* U.S. Const. art. I, § 8, cls. 15 and 16; *and* art. IV, § 4.

State" in each of the several States,[2241] every member of the Militia who might be called forth to active duty would be required *fully to understand* the constitutional provisions, statutes, and regulations that applied to the Militia. Laws consistent with "the Laws of Nature and of Nature's God" that are enacted by "Governments * * * deriving their just powers from the consent of the governed" form the foundation for "the security of a free State".[2242] So, if "[a] well regulated Militia" is "necessary to the security of a free State",[2243] it must be composed of people who *know* their country's laws. WE THE PEOPLE cannot rely upon public officials to instruct them in this regard—not simply because some of those officials may turn out to be incompetents or even rogues, but more importantly because it is WE THE PEOPLE'S *own* right, power, and duty, through the Militia, to enforce the laws, and therefore WE THE PEOPLE'S *personal responsibility* to know what the laws are and how they are to be applied.

This course of study—encompassing when and where the Militia originated, why and how the Militia should function today according to *pre-*constitutional principles, and what critical rôle the Militia must always continue to play in America—would at first primarily involve each Militiaman's learning at home from books, CDs, DVDs, the Internet, and other resources.[2244] But, as revitalized Militia became increasingly well organized and funded, it could be supplemented with and probably even superseded by formal classes held at or by local schools, colleges, libraries, or various community, veterans', and other organizations, including those religious bodies which subscribe to the doctrine of Romans 13.

Education as to the history, constitutional status and authority, and political, economic, and social responsibilities of the Militia will be of signal importance, because initially upon revitalization of the Militia many of the individuals in group **{iv}** will likely have sought exemptions as a result of their misconceptions about the Militia. Whether these faulty ideas will originally arise out of black propaganda put out by rogue public officials, politicians, and subversive factions and special-interest groups eager to suppress WE THE PEOPLE'S assertion of their sovereignty, or will simply rationalize individuals' own insouciance towards their patriotic duty—or perhaps reflect just their narrow self-interest, self-indulgence, and sloth—they will need to be dispelled as quickly, as widely, and as thoroughly as possible. For, as Joseph Story recounted already in the 1830s, such attitudes must always be the primary cause of the degradation the Militia in any era,

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[2241] *See* U.S. Const. amends. II and X.

[2242] Declaration of Independence *and* U.S. Const. amend. II.

[2243] U.S. Const. amend. II.

[2244] *See, e.g., as an example of this genre*, Edwin Vieira, Jr., "The Purse and the Sword: Imminent Dangers of U.S. Economic and Homeland Security Policies" (Metamora, Michigan: DVDs produced by the Heritage Research Institute, 2010).

and therefore must be guarded against in every era.[2245] Nothing should be suffered to encourage Americans to infer from the open-handedness with which exemptions will be granted during the first stages of revitalizing the Militia—when that liberality will be intended specifically to smooth the transition from today's oxymoronic "unorganized militia" to tomorrow's constitutionally required "well regulated Militia"—that the Militia should be taken to be somehow optional establishments the burdens of which the average man would be well advised and justified in trying to avoid.

In addition to a study of American history and political-economic theory, individuals in group **{iv}** would be required to undergo a very basic course of practical training at appropriate facilities. *First,* they would familiarize themselves with the types (and where possible the specific models) of firearms most likely to be found in Militia service in their Locality—including how effectively and safely to load and unload, shoot, clean, maintain, and store each kind of arm—together with associated ammunition and accoutrements. They would become thoroughly conversant with all relevant laws relating to the employment of firearms in Militia service (particularly the justifications for the threat to use, and the actual use of, deadly force). And they would develop, demonstrate, and maintain at least a minimum level of personal proficiency with the particular firearms they were to keep always at hand in their own homes, in the anticipation that they might be called forth to bear those arms in Militia service during an "alarm".[2246] *Second*, they would undertake a course of "continuing Militia education" in which during each year they became certified in one or another different speciality useful for community protection under adverse conditions—including, for example, first aid and other basic *para*-medical skills; fire-fighting and emergency-rescue techniques; nuclear, chemical, and biological containment and decontamination; protocols for imposing quarantines; mass evacuations and support of displaced persons; traffic and crowd control; and related disciplines and methods—so that, after some reasonable period of time, they all would be well rounded in the fundamental skills necessary for them to assist one another in providing their own Locality with basic, but effective "homeland security" during any reasonably foreseeable crisis. Of course, *third,* none of these individuals would be rigidly confined solely to these entry-level forms of instruction, but instead could take such further and more extensive training as they might choose—and would be encouraged to do so.

b. The individuals who comprised group **{i}** would be required to absorb all of the training mandated for group **{iv}** with: *first*, the added assistance that would

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[2245] *See Commentaries on the Constitution, ante* note 576, Volume 2, § 1897, at 646.

[2246] Initially, this training could be provided at private firearms ranges, at State facilities (such as those now used for training State and Local police), and at ranges maintained by the Armed Forces. As to the availability at the present time of the last of these for use "by persons capable of bearing arms", *see* 10 U.S.C. § 4309.

come from their instruction's being part of a high school's or secondary school's regular curriculum to which the students could afford to devote more time and the faculty could provide more direction than would be available to (say) the average public official (or other exempted individual) trying to digest the material in his spare time at home; and, *second*, the added incentive that the students' mastery of the subject-matter would be reflected in formal grades that would stand them in good stead in their later applications for acceptances at colleges and universities at which "Militia science" would also be part of the mandatory courses of study. Importantly, too, the schools themselves could function as laboratories in which students and faculty not only could learn, practice, and perfect basic skills, but also could devise and experiment with entirely new types of Militia structures, equipment, and operations particularly pertinent to the territories in which the schools happened to be situated—so that the fundamental principles of truly *Local* "homeland security" would be, not only learned, but even actually invented and implemented, "from the bottom up" by each generation of Militiamen themselves in their very own backyards.

c. The individuals who comprised group **{iii}** would master all of the material mandated for group **{i}**, and in addition would be required: *First*, in general, to become well versed in the strategies and tactics the Militia were then employing in their various military, *para*-military, police, and emergency operations. *Second*, in particular, to understand at least the rudiments of the Militia's intelligence and counterintelligence work, including the nature, ideologies, structures, strategies, tactics, and operations of international and domestic "terrorists", subversives, and other criminal elements; methods for identification and surveillance of "terrorists'" cells, subversive networks, criminal enterprises, and other illicit conspiratorial groups within each State and Locality; plans for deterrence, detection, and defense against infiltration of and influence over the Militia, other State and Local governmental agencies, and key private businesses by "terrorists", subversives, and other criminal elements. *Third*, to go beyond what the Militia had already learned and put into practice, and to develop wherever possible entirely new means at the State and Local levels to predict, to prepare for, and to respond to all manner of reasonably foreseeable political, economic, and social crises, including various types of "terrorists'" attacks and subversion; industrial accidents or sabotage; epidemics and pandemics; natural disasters; catastrophic failures in the monetary, banking, and financial systems; and like events or conditions that involved sudden, widespread, and serious dangers to large numbers of people.

d. Finally, the individuals in group **{ii}** would receive instruction in all of the subjects mandated for group **{iii}**, in addition to which they would train in various disciplines related to actual service in the field: *First*, of a military and *para*-military nature, in conjunction with the regular Armed Forces, the Coast Guard,

and the Border Patrol—including repelling invasions by regular or irregular forces of foreign nations; suppressing insurrections or other extensive domestic violence; and suppressing illegal immigration, apprehending aliens not lawfully albeit physically within this country, and interdicting traffic in illicit commodities at America's international borders. *Second,* of a police nature, aimed at enforcement of the laws as part of or in coöperation with regular State and Local law-enforcement agencies that had already been absorbed into the Militia as specially uniformed units—including surveillance; ascertainment of probable cause; stop, search, arrest, and seizure of persons and things; identification, custody, and preliminary interrogation of suspects; forensic and other investigatory techniques; and general criminology (especially as it relates to "terrorism", subversion, large-scale criminal enterprises, gangs, and so on). *Third*, in the areas of intelligence and counterintelligence—including identification, surveillance, infiltration, exposure, and destruction by all legal means of "terrorists'" cells, subversive networks, criminal enterprises, and other illicit conspiratorial groups within each State and Locality. *Fourth,* in the field of emergency response to any situation that might involve sudden, widespread, and serious dangers to large numbers of people—including enforcing quarantines; sealing off areas made dangerous by hazardous conditions or substances; transporting individuals to safety by evacuating them from those places; supplying endangered individuals in the affected areas with radiological, chemical, and biological decontamination equipment, water, food, temporary shelter, medical services, sanitation, basic communications and informational services, and engineering personnel and heavy equipment to remove debris and restore transportation networks; and patrolling against and suppressing rioters, looters, and other disorderly persons.

4. Although in keeping with *pre-*constitutional practices *some* substantial training of *all* Militiamen will be mandatory when "the Militia of the several States" are revitalized, the particular subjects, frequency, extent, and intensity of training will in the nature of things depend upon circumstances, including: (i) the level and immediacy of the perceived threats to the community; (ii) the knowledge, skills, and discipline to be imparted to a particular State's Militia as a whole, and to whatever specialized subgroups were established within it, in light of the peculiar problems of "homeland security" that the State and her Localities might face; (iii) the time, effort, and expense that might be required to train mere "civilians" whose education or experience had not prepared them for any type of Militia service; and (iv) the resources available for various programs of instruction. Also, although some redundancy would no doubt be unavoidable, if only in order to maintain adequate numbers of properly instructed reserves and replacements, "[a] well regulated Militia" should not train individuals simply for the sake of training. Moreover, during the initial stages of revitalizing the Militia, some individuals in groups **{ii}** and **{iii}** would already be at least partially trained for the special services to which

they probably would be assigned, such as police, Sheriffs' deputies, fire-fighters, emergency-medical personnel, emergency-services workers, and employees of various other community-defense and community-service organizations who would be absorbed into the Militia directly in those capacities. These people would need only to undergo further general training in the basic principles of the Militia, along the lines of the instruction required for group **{iv}**, in order to become fully functional as Militiamen.

5. Training for members of "the Militia of the several States" would vary with the subject, the student, the situation, and the surroundings—being designed not only for specific tasks in a particular Locality but also in relationship to each individual's age, physical abilities, level of education, knowledge, skills, experience, aptitudes, and personal interests. But overall, in every jurisdiction, *the goal would be to maximize Local preparedness and self-sufficiency by developing and deploying within each Local area a cluster of Militia Companies (or other small units) that contained a well-balanced mix of personnel—all sufficiently trained in every necessary discipline, and some exceptionally trained in certain selected disciplines—who were collectively capable of dealing in a timely and effective manner with whatever types of problems might most likely confront them, until more help arrived*. Were a particular Locality too sparsely populated or otherwise unable to accomplish such a deployment, it would have to associate with one or more other Localities to that end. After all, ultimately self-government demands that WE THE PEOPLE *themselves* assume full responsibility for the public health, safety, and welfare within their own territory. The Militia are the primary instruments of self-government in America—the *only* establishments the Constitution identifies as "*necessary* to the security of a free State".[2247] Therefore, members of the Militia in each Locality (or group of cöoperating Localities) must be sufficiently trained so that they not only can assume that responsibility in principle but also can carry it out to a successful conclusion in practice.

[2247] U.S. Const. amend. II (emphasis supplied).

CHAPTER FORTY-TWO

"[T]he Militia of the several States" are vested with the authority and responsibility to, and therefore must, provide every type of protection—whether political, economic, or social in character—that may be "necessary to the security of a free State" in every State, for the United States as a whole, and ultimately for WE THE PEOPLE under whatever form of government they may establish.

Organizing, arming, disciplining, and deploying "the Militia of the several States" can and should provide *all* of the protective services—in the contemporry jargon, "homeland security"—that may be "necessary to the security of a free State"[2248] at *all* times *everywhere* throughout America.

A. The Militia's *supra*-constitutional and constitutional protective authority and responsibilities. In American political philosophy and practice, "a free State" is not uniquely the product of a temporary constitution and laws enacted pursuant thereto, but embraces as well WE THE PEOPLE'S permanent status as sovereigns under "the Laws of Nature and of Nature's God", *even in the absence of a formal constitution and other positive laws, and in some circumstances in opposition to the constitution and laws that do exist*. Thus, the Militia's protective authority and responsibilities—that is, WE THE PEOPLE'S authority and responsibility to provide "homeland security" in and through the Militia—arise and must be exercised in three political domains: (i) the *supra*-constitutional domain, under the aegis of the Declaration of Independence; (ii) the explicit constitutional domain of the General Government's delegated powers; and (iii) the explicit and implicit constitutional domains of the States' reserved powers.

1. Under the Declaration of Independence. The Militia are entitled to—indeed, *must*—supply political protection of a *supra*-constitutional character in at least two situations:

a. When WE THE PEOPLE'S existing "Form of Government becomes [*actually and immediately*] destructive of [men's unalienable rights]"—specifically, "when a long train of abuses and usurpations * * * evinces a design to reduce the[People] under absolute Despotism"—then "it is the[People's] right, it is their duty, to throw

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[2248] U.S. Const. amend. II.

off such Government, and to provide new Guards for their future security". At that point, whatever purported constitution and laws "such Government" may affect will no longer merit, let alone command, THE PEOPLE'S obedience. Rather, politics will temporarily revert to an *extra*-constitutional state, ruled directly by the *supra*-constitutional principles of "the Laws of Nature and of Nature's God". Because, in that state of affairs, it is THE PEOPLE'S "right" and "their duty, to throw off such Government", it must as well be "their right" and "their duty" to organize, equip, and deploy themselves collectively to do so with whatever protective forces they can muster on their own behalf. Self-evidently, THE PEOPLE will not be able "to provide new Guards for their future security" through the abusive "Form of Government['s]" own armed forces and professional law-enforcement agencies, which undoubtedly will attempt to aid and abet rogue public officials' march towards "absolute Despotism". No new "Form of Government" will exist. So THE PEOPLE will have no alternative except to brigade themselves in Militia imbued with the authority and responsibility, under the aegis of "the Laws of Nature and of Nature's God", to protect their "unalienable Rights" by "throw[ing] off such Government" through the application of whatever force may be necessary in opposition to whatever parts of the rogue armed forces and police side with the aspiring despots.

b. The Militia may also intervene directly under "the Laws of Nature and of Nature's God" to provide themselves with political "homeland security" when THE PEOPLE'S "Form of Government" exhibits unmistakable tendencies in the direction of serious "abuses and usurpations", or perhaps simply serial blunders of a critical nature, which if not corrected will likely lead to infringements of men's "unalienable Rights", but which public officials fail, neglect, or refuse to correct—not perhaps to such a degree that their actions prove an actual "*design* to reduce the[People] under absolute Despotism", but to a degree sufficient to evidence willful blindness to or reckless disregard of the dangers those actions pose. Officials may simply be too ignorant to recognize that a serious problem exists. They may be unwilling to face up to the existence of the problem, because they do not know what to do about it. They may be loathe to admit that they have no idea as to how to proceed, because they fear to lose political face and suffer defeat at the next election. Or they may be less eager to consider what "the general Welfare" requires than to follow the directions of those special-interest groups that actually benefit from continuation and even exacerbation of the problem and will finance their campaigns for re-election on that basis. Whatever the underlying cause, if THE PEOPLE, through their Militia, may of right "throw off [an incorrigibly abusive] Government" entirely, with all the travail and even destruction and death that course may entail, then surely they may take *extra*-constitutional action to return a dangerously wayward "Form of Government" to its proper constitutional boundaries before that "Form" becomes so hopelessly corrupt that it must be

"throw[n] off". For example, (i) when no statutes "provide for calling forth the Militia to execute the Laws of the Union" or to "suppress Insurrections" under the particular circumstances at hand;[2249] or (ii) when the courts of both the General Government and the States have erroneously ruled that public officials have not violated the Constitution or laws, so that under the statutes in existence the Militia cannot be "call[ed] forth", and no officials dare to deploy the Militia in defiance of these aberrant judicial opinions—but in either case when THE PEOPLE know that the Militia *must* be "call[ed] forth" *immediately*, because irreparable harm is on the wing, and too much time remains for disaster to strike before the next elections.

Even in such a dire situation, THE PEOPLE through their Militia need not always resort immediately to physical force. Legal and moral force exercised through "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances"[2250] may, and in many cases will, suffice to correct the difficulties through nonviolent means.[2251] No "long train of abuses and usurpations" will ever occur if the first of them become the subjects of successful petitions for "redress". But for such petitions to be assured of success under the conditions in which their success is most critical, they must assert more than mere prayers for relief from abject *subjects of* "the Government". Mere remonstrances will not suffice. Rather, THE PEOPLE'S petitions must affirm their willingness and ability, as *sovereigns over* "the Government", to back up their demands for "redress", not simply by the threat, but by the certainty, of actual resistance on the part of masses of organized, armed, and disciplined individuals who know the nature and extent of their authority, and are willing to employ whatever physical force may be necessary to compel their "representatives" in public office to bow before that authority.

To be sure, for the Militia to return a wayward "Form of Government" to its proper constitutional boundaries through effective exercise of the freedom "to petition th[at] Government for a redress of grievances" may constitute *intra-* rather than *extra-*constitutional protective action, because the freedom "to petition", being guaranteed by the Constitution, is one of "the Laws of the Union" which the Constitution empowers the Militia "to execute".[2252] Yet, because the stupidity of public officials may shade imperceptibly into actual subversion which approaches the point where the "Form of Government" is irretrievably undermined, the Declaration of Independence should always be invoked along with the Constitution

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[2249] *See* U.S. Const. art. I, § 8, cl. 15.

[2250] U.S. Const. amend. I.

[2251] *See, e.g.,* Gene Sharp, *Civilian-Based Defense: A Post-Military Weapons System* (Princeton, New Jersey: Princeton University Press, 1990); *idem*, *The Politics of Nonviolent Action, Part One, Power and Struggle* (Boston, Massachusetts: Porter Sargent Publishers, 1973); *idem, The Politics of Nonviolent Action, Part Two, The Methods of Nonviolent Action* (Boston, Massachusetts: Porter Sargent Publishers, 1973); *idem, The Politics of Nonviolent Action, Part Three, The Dynamics of Nonviolent Action* (Boston, Massachusetts: Porter Sargent Publishers, 1973).

[2252] U.S. Const. art. I, § 8, cl. 15.

as the basis for the Militia's action. For, if "'[p]olitical power grows out of the barrel of a gun'",[2253] one should "always use enough gun"—and the Declaration is Americans' political armament of the largest caliber available.

2. In service of the General Government. For the United States, the Constitution explicitly sets out the Militia's authority and responsibilities: namely, "to execute the Laws of the Union, suppress Insurrections and repel Invasions"; and to "guarantee to every State in this Union a Republican Form of Government, and * * * protect each of them against Invasion * * * or * * * against domestic Violence"—when "call[ed] forth" to be "employed" for one or more of those purposes "in the Service of the United States".[2254] To "guarantee * * * a Republican Form of Government" is part and parcel of "execut[ing] the Laws of the Union" (the Constitution itself being one such "Law[ ]"), and therefore comes squarely within the Militia's competence. To protect the States against "Invasion" and "domestic Violence" comes within the Militia's authority to "repel Invasions" and "suppress Insurrections".

3. On behalf of the several States. Finally, the Constitution addresses implicitly a very broad area of protective services that the Militia—and, for all practical purposes, *only* the Militia—can provide in aid of fulfillment of their States' duties to THE PEOPLE. The Militia are "necessary to the security of a free State".[2255] But no "free State" among the several States may simply sit back and enjoy her institutional "security" in insipid isolation, insouciance, indolence, and inactivity. To the contrary: "[I]t is not only the right, *but the bounden and solemn duty of a state*, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends".[2256] Each State, moreover, enjoys the full measure of legal authority necessary and sufficient to fulfill her duties to THE PEOPLE.

a. At the most basic and general level, that authority inheres in her "Police Power": "The police power of a State * * * springs from the obligation of the State to protect its citizens and provide for the safety and good order of society."[2257] The Police Power "is a power originally and always belonging to the States, not surrendered by them to the general government nor directly restrained by the Constitution of the United States, and essentially exclusive".[2258] The Police Power "is not granted by or derived from the Federal Constitution but exists independently

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[2253] *Quotations From Chairman Mao, ante* note 28, at 61.

[2254] U.S. Const. art. I, § 8, cls. 15 and 16; *and* art. IV, § 4.

[2255] U.S. Const. amend. II.

[2256] The Mayor, Aldermen, and Commonalty of the City of New York v. Miln, 36 U.S. (11 Peters) 102, 139 (1837) (emphasis supplied).

[2257] Panhandle Eastern Pipe Line Company v. State Highway Commission, 294 U.S. 613, 622 (1935).

[2258] *In re* Rahrer, 140 U.S. 545, 554 (1891).

of it, by reason of its never having been surrendered by the State to the General Government".[2259] The States possess the Police Power "in their sovereign capacity touching all subjects jurisdiction of which is not surrendered to the federal government".[2260] Thus, the Police Power is the primary subject of the Tenth Amendment with respect to the States, because it embraces *all* of "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, [which] are reserved to the States respectively". That being so, the Police Power is "one of the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government".[2261]

As with every other governmental power, though, the Police Power must be *enforced* in order to amount to something of practical consequence. Precisely because it is "one of the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government", the Police Power is most capably and reliably enforced by the Power of the Sword. Within the States, for all practical purposes the Power of the Sword lies ultimately in the hands of their Militia—because, of course, the States cannot constitutionally "keep Troops, or Ships of War in time of Peace" "without the Consent of Congress"; and if "actually invaded, or in such imminent Danger as will not admit of delay", the States would hardly have the time to raise sufficient "Troops".[2262] In contrast, the Militia are "the Militia *of the several States*", *permanent* components of the Constitution's federal system, which the States *must* maintain at all times, whether Congress grants its "Consent" or not. For Congress's "Consent", or its disapproval for that matter, is as irrelevant to the existence of the Militia as it is to the existence of the States themselves.

The Militia and the Police Power, moreover, are perfectly matched as means and end. For just as with their Police Power, the States' duty to maintain and right to deploy "well regulated Militia" are "not granted by or derived from the * * * Constitution, but exist[ ] independently of it, by reason of [their] never having been surrendered by the State[s] to the General Government". The Constitution does delegate to Congress the powers "[t]o provide for organizing, arming, and disciplining, the Militia" and "[t]o provide for * * * governing such Part of them as may be employed in the Service of the United States", when they are "call[ed] forth to execute the Laws of the Union, suppress Insurrections and repel Invasions".[2263]

[2259] House v. Mayes, 219 U.S. 270, 282 (1911). *Accord*, California Reduction Company v. Sanitary Reduction Works of San Francisco, 199 U.S. 306, 318 (1905).

[2260] Nebbia v. New York, 291 U.S. 502, 524 (1934).

[2261] District of Columbia v. Brooke, 214 U.S. 138, 149 (1909), *quoted in* Eubank v. City of Richmond, 226 U.S. 137, 142-143 (1912).

[2262] *See* U.S. Const. art. I, § 10, cl. 3.

[2263] U.S. Const. art. I, § 8, cls. 16 and 15.

But otherwise—and that entails the vast majority of imaginable instances—the power to organize, arm, discipline, and govern their Militia is, as with the Police Power, "a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the Constitution * * * and essentially exclusive". Thus, the States retain the plenary authority "in their sovereign capacit[ies]" to deploy their Militia "touching all subjects jurisdiction of which is not surrendered to the [General G]overnment". Which means *all conceivable* subjects other than "execut[ing] the Laws of the Union, suppress[ing] Insurrections and repel[ling] Invasions"—and even in those three cases *whenever the Militia are in fact and law* **not** *"called into the* ***actual*** *Service of the United States".*[2264]

b. All this being so, the practical reach of the States' Police Power—and therefore of the Militia's authority, responsibility, and usefulness for effectuating the various objects of that power within each of the several States respectively—is broad indeed. The power and the Militia's potential rôle in executing it "extend to the protection of the lives, health, and property of the[ir] citizens, and to the preservation of good order",[2265] and "embrace[ ] regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety".[2266]

> An attempt to define [the Police Power's] reach or trace its outer limits is fruitless * * * .
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> Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it.[2267]

Nonetheless, although, in keeping with the admonition of the Tenth Amendment, the States traditionally have been afforded "great latitude" to legislate with respect to the protection of the lives, limbs, health, comfort, and quiet enjoyment of property of and by of all persons within their territories,[2268] no more than any other governmental power can the Police Power be wielded in a manner inconsistent with due process of law. Yet, in most of the typical situations of this type, "the guaranty of due process * * * demands only that [a State's] law shall not be unreasonable,

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[2264] U.S. Const. art. I, § 8, cl. 15 *and* art. II, § 2, cl. 1 (emphasis supplied). *See ante*, at 871-880.

[2265] Beer Company v. Massachusetts, 97 U.S. 25, 33 (1877).

[2266] Chicago, Burlington and Quincy Railway Company v. Illinois *ex rel.* Grimwood, 200 U.S. 561, 592 (1906). *Accord*, Bacon v. Walker, 204 U.S. 311, 317 (1907); Eubank v. City of Richmond, 226 U.S. 137, 142 (1912); Sligh v. Kirkwood, 237 U.S. 52, 59 (1915).

[2267] Berman v. Parker, 348 U.S. 26, 32 (1954).

[2268] Metropolitan Life Insurance Company v. Massachusetts, 471 U.S. 724, 756 (1985). *Accord*, Medtronic, Inc. v. Lohr et vir, 518 U.S. 470, 475 (1996).

arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained".[2269]

c. Historically, the Police Power has focused on "[t]he dominant interest of the State in preventing violence and property damage".[2270] "The promotion of safety of persons and property is unquestionably at the core of the State's police power, and virtually all state and local governments employ a uniformed police force to aid in the accomplishment of that purpose."[2271] Self-evidently, when "the Militia of the several States" are revitalized, and "uniformed police force[s]" are absorbed into them as specialized units,[2272] this aspect of the States' Police Power will merge into and coalesce with their power to maintain "well regulated Militia".

But "[t]he promotion of safety of persons and property" under the Police Power does not stop with a State's simply "preventing violence and property damage" within her jurisdiction through deployment of her Militia. Every State's Police Power extends also to matters of "economic policy".

> So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it.[2273]

And a State's "economic policy" may be as extensive and comprehensive as her legislature deems the prevailing conditions warrant.[2274] Moreover, the Constitution's federal system empowers and encourages the States' legislatures, within broad limits, to experiment with innovative policies in their efforts to achieve socially desirable results.[2275] In such endeavors, too, the Militia can and should play a key rôle.

Of particularly urgent concern today is the matter of how to maintain "the general prosperity" throughout America—when the National economy, and therefore the economies of every State, are increasingly threatened by the institutionalized fraud, corruption, and incompetence permeating this country's monetary and banking arrangements and the allied financial, business, and political

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[2269] Nebbia v. New York, 291 U.S. 502, 525 (1934).

[2270] Auto Workers v. Wisconsin Employment Relations Board, 351 U.S. 266, 274 (1956).

[2271] Kelley v. Johnson, 425 U.S. 238, 247 (1976).

[2272] *See ante*, at 327-328 and 1135-1138, *and post*, at 1194-1202, 1276-1277, 1291-1293, and 1482-1488.

[2273] Nebbia v. New York, 291 U.S. 502, 537 (1934).

[2274] *See* Greene v. Frazier, 253 U.S. 233 (1920).

[2275] *See, e.g.*, Whalen v. Roe, 429 U.S. 589, 597-598 (1977); Ferguson v. Skrupa, 372 U.S. 726, 729-732 (1963); Fay v. New York, 332 U.S. 261, 294-296 (1947).

networks and enterprises centered around the Federal Reserve System. Most ominously, the best-informed experts in the theory and practice of money, banking, and both public and private finance predict the inevitable and unavoidable collapse of the Federal Reserve System's currency (Federal Reserve Notes) through hyperinflation in the foreseeable future, most likely accompanied or followed by a depression far more serious than took hold of the National economy during the 1930s.[2276] Some may dismiss predictions of this kind as too darkly pessimistic to be credited. But, as the folk wisdom has it, "a pessimist is actually an optimist who knows the facts". Undoubtable, though, is that, in the event of hyperinflation, depression, hyperinflation followed by depression, depression coupled with hyperinflation, or some other economic calamity arising out of the breakdown of the Federal Reserve System, *every* State's governmental finances and private economy will be thrown into chaos, with gravely detrimental effects upon the lives, health, safety, and prosperity of her citizens, and with consequences fatal to the preservation of good order throughout her territory. As of the present writing, however, *no* State is adequately prepared (if at all) to deal with this problem—because vanishingly few, if any, State officials can provide an immediate, unequivocal, and realistic answer to the questions: ***"If the Federal Reserve System collapses in hyperinflation in the near future, exactly what will the State and her citizens then use as their currency? And if no alternative sound currency is available, how will the State's government and her private economy continue to function with any semblance of normalcy?"***

Fortunately, this question can be answered through application of the Police Power. For

> the police power extends to all the great public needs. * * * It may be put forth in aid of what is sanctioned by usage, or held by * * * strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce.[2277]

In particular, because "the prevention of deception is within the competency of government" through exercises of the Police Power,[2278] that power can be invoked

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[2276] A good practical definition of "hyperinflation" is depreciation in the purchasing-power of a currency at the rate of 50% or more *per* month. On the likelihood of such a calamity occurring in the United States in the near future, *see, e.g.,* the prescient analysis by Laurence J. Kotlikoff, "Is the United States Bankrupt?", Federal Reserve Bank of St. Louis *Review* (July/August 2006), at 235, and especially at 241-242. Since the latter article was published, the scholarly and popular literature warning of such an eventuality has grown by leaps and bounds.

[2277] Noble State Bank v. Haskell, 219 U.S. 104, 111 (1911).

[2278] Hall v. Geiger-Jones Company, 242 U.S. 539, 551 (1917).

and applied so as "to require honest weights and measures in the transaction of business" and "in the sale of articles of general consumption",[2279] "with a view to preventing fraud and facilitating commercial transactions".[2280] Moreover,

> the power of the State to prevent frauds and impositions * * * applies as well to securities as to material products * * * . As to material products the purpose may be accomplished by a requirement of inherent purity. The intangibility of securities, they being representatives or purporting to be representatives of something else, * * * requires a difference of provision and the integrity of the securities can only be assured by the probity of the dealers in them and the information which may be given of them.[2281]

Importantly in this regard, modern paper currency is not, as many naive Americans imagine, really "money", but only a "security" (that is, a purported promise to pay "money") issued in lieu of "money".[2282] As the Supreme Court explained with respect to the legal-tender United States Treasury Notes of the Civil War (the first governmental paper currency issued in America since the War of Independence),

> these notes are obligations of the United States. Their name [that is, "notes"] imports obligation. Every one of them expresses upon its face an engagement of the nation to pay to the bearer a certain sum. The dollar note is an engagement to pay a dollar, and the dollar intended is the coined dollar of the United States; a certain quantity in weight and fineness of gold or silver, authenticated as such by the stamp of the government. No other dollars ha[ve] before been recognized by the legislation of the national government as lawful money.
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> * * * * *
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> * * * [T]hese notes are obligations. They bind the national faith. They are, therefore, strictly securities.[2283]

No less important is that the Police Power can be employed for "the protection of a large class of laborers in the receipt of their just dues and in the promotion of the harmonious relations of capital and labor engaged in * * * industry in the State".[2284] For no segment of modern society is as dependent upon "honest

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[2279] McLean v. Arkansas, 211 U.S. 539, 550 (1909); Schmidinger v. City of Chicago, 226 U.S. 578, 588 (1913).

[2280] Merchants Exchange of St. Louis v. Missouri *ex rel.* Barker, 248 U.S. 365, 368 (1919).

[2281] Hall v. Geiger-Jones Company, 242 U.S. 539, 552 (1917).

[2282] "Purported", because the promisor may renege on the promise.

[2283] New York *ex rel.* Bank of New York v. Board of Supervisors, 74 U.S. (7 Wallace) 26, 30-31 (1869).

[2284] McLean v. Arkansas, 211 U.S. 539, 550 (1909).

weights and measures in the [specifically financial] transaction[s] of business" as wage-earners, whose disposable wealth tends largely to consist of the money they acquire from one pay-period to another, either held as such in their personal possession or deposited in bank accounts.

Certainly no one can doubt that all of these principles and purposes of the Police Power apply with particular force to contemporary Federal Reserve Notes. For, although statutorily designated as "obligations of the United States" and "legal tender",[2285] Federal Reserve Notes do not constitute "honest weights and measures in the transaction of business", not only because they are not redeemable in any legally fixed amounts of either gold or silver,[2286] but also because both those Notes and the Federal Reserve System that emits them are unconstitutional.[2287] *So the Police Power can and should be employed, as soon as practicable, to establish and put into common use in every State a new, constitutional, and economically sound medium of exchange that can serve as an alternative to, and compete with, Federal Reserve Notes before, and in any event without delay in the event of, the self-destruction of that currency*. And an eminently practical—in the final analysis perhaps the *only* practical—way to accomplish this end would be to mobilize the Militia in each State to execute appropriate laws enacted under the Police Power.[2288]

d. Execution by the Militia of laws the States enact pursuant to their Police Power—whether in aid of fundamental monetary reform or otherwise—is constitutionally authorized, because the Militia are "the Militia *of the several States*"[2289]—that is, *State* establishments—and therefore, unless somehow precluded by the Constitution, can be called upon by the States and their people to serve all appropriate State and Local purposes.

(1) Plainly, the Constitution does not expressly prohibit the States' employment of their own Militia for purposes of executing their own Police Power. Neither does the Constitution do so impliedly of its own force. True enough, the Constitution specifies that the Militia may be "call[ed] forth" "to be employed in the Service of the United States"—but only for three particular purposes.[2290] Obviously, this express delegation of specific, limited authority impliedly prohibits *the United States* from "calling forth" the Militia for any other purpose. And it impliedly prohibits *the States* from "calling forth" their Militia "in the Service *of the United States*" for any other purpose, or even for those three purposes—unless

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[2285] 12 U.S.C. § 411 *and* 31 U.S.C. § 5103.

[2286] *Compare* 12 U.S.C. § 411 *with* 31 U.S.C. § 5118(b) and (c).

[2287] *See* E. Vieira, Jr., *Pieces of Eight, ante* note 39, Volume 2, at 1403-1524.

[2288] *See post*, at 1208-1233.

[2289] U.S. Const. art. II, § 2, cl. 1 (emphasis supplied).

[2290] U.S. Const. art. I, § 8, cls. 15 and 16.

Congress has failed, neglected, or refused "[t]o provide for calling forth the Militia" and a crisis (such as an "Invasion[ ]") demands that someone with at least residual authority "call[them] forth" immediately. But it could hardly mean that *the States* may call upon *their own* Militia for *no other purposes whatsoever*. For, were that the case, then the States could not employ their own Militia to enforce their own laws—for which purpose, of course, Congress could not "provide for calling forth the Militia", being limited to so providing only "to enforce the Laws *of the Union*". In addition, the States could not deploy their own Militia to suppress "domestic Violence" within their own borders—even though the Constitution foresees that the States might choose to do so on their own initiatives, inasmuch as it requires the United States to "protect each of them against * * * domestic Violence" only "on Application of the Legislature, or of the Executive (when the Legislature cannot be convened)".[2291] And the States could not muster their own Militia to "engage in War, * * * [when] actually invaded, or in such imminent Danger as will not admit of delay", even though the Constitution would permit them to raise or outfit regular "Troops, or Ships of War" at such junctures "without the Consent of Congress"[2292]—and notwithstanding that under such exigent circumstances regular "Troops, or Ships of War" could not possibly be made ready in time, whereas the Militia would always be organized, armed, and trained, and therefore could be activated at a moment's notice. So, unless one imagines that the Constitution requires the States to permit their own laws to remain unenforced—when their own Militia could enforce them; to allow their societies to be riven by "domestic Violence" unless they submit to occupation by the United States—when their own Militia could put down the disturbances directly; and to suffer their territories to be "actually invaded"—when their own Militia were the sole forces capable of opposing the invaders in time, the conclusion is inescapable that the States may call forth their Militia for *any* legitimate purpose of their own.

Furthermore, although Congress may "make all Laws which shall be necessary and proper for carrying into Execution" its "Power[ ]" "[t]o provide for calling forth the Militia",[2293] it cannot preclude the States, under the guise of "necessary and proper" legislation, from employing their own Militia for their own protection. *First*, so precluding the States would not "call[ ] forth * * * the Militia" for any of the three constitutionally mandated purposes, and therefore would not "carry[ ] into Execution" that "Power[ ]" of Congress at all. *Second*, even if in such legislation Congress assigned priority to "employ[ing] the Militia in the Service of the United States" over the Militia's employment for any other purpose, as it would

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[2291] U.S. Const. art. IV, § 4.

[2292] U.S. Const. art. I, § 10, cl. 3.

[2293] U.S. Const. art. I, § 8, cls. 18 and 15.

be constitutionally entitled to do,[2294] it would not have to exclude the States' employment of their Militia for other purposes when the Militia were *not* needed "in the Service of the United States"—so any such general exclusion would not qualify as "necessary and proper" to establish or enforce such a priority. *Third*, were Congress to prohibit the States' employment of their own Militia for their own purposes under all circumstances, the Militia would hardly deserve designation as "the Militia *of the several States*", because, except for "the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress" so that the Militia could engage in "the Service of the United States",[2295] the Militia would retain no significant State character. They would, in effect, become "the Militia *of the United States*", because they could serve no specifically *State* purpose at all. Legislation that so transmogrified the *constitutional* character of the Militia and turned the Constitution's federal structure upside down could not possibly be "necessary and proper" or binding in any way upon the States, because it would not be a "Law[ ] * * * made in Pursuance [of the Constitution]", but instead an usurpation of authority in defiance and even destruction of "the supreme Law of the Land".[2296]

Thus, on the basis of the express terms of the constitutionally delegated powers of Congress, and of the controlling principle of constitutional construction that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people",[2297] the States retain the authority to employ their Militia for any legitimate purpose of their own.

(2) Were more proof of this conclusion necessary, the Second Amendment would supply it. Because the Amendment declares the Militia to be "necessary to the security of a free State", they must be capable both in law and in fact of providing, in each and every State, *whatever* protective services are "necessary to the security of a free State" in addition to the three constitutionally enumerated services for which Congress is "[t]o provide for calling forth the Militia" (and even those services, too, in the event of a default by Congress). These three services, after all, are not the only protections that "the security of a free State" needed in the late 1700s or that it needs today. For example, at the present time, serious economic problems have arisen that probably the Militia alone can solve, and then perhaps only one State at a time.[2298] In addition, the exact challenges of "homeland security" will likely be different in each State, and will vary from time to time with changing

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[2294] *See* U.S. Const. art. I, § 8, cl. 16 *and* art. VI, cl. 2.

[2295] U.S. Const. art. I, § 8, cl. 16.

[2296] *See* U.S. Const. art. VI, cl. 2.

[2297] U.S. Const. amend. X.

[2298] *See post*, at 1208-1233.

circumstances—and only the people of each State, who are closest to the scene and most highly motivated to succeed, will be qualified to identify those challenges, to determine who and what may be necessary to meet them, and to mobilize the necessary personnel and resources to do the job.

(3) That is not all. The Constitution provides that "[t]his Constitution * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding", and that "the Members of the several State Legislatures, and all executive and judicial Officers * * * of the several States, shall be bound by Oath or Affirmation, to support this Constitution".[2299] In order to have actual functioning "Militia *of the several States*" and to provide whatever is "*necessary* to the security of a free State" in each State, the States *must* employ their Militia for all the possible purposes of "homeland security" other than the three the Constitution enumerates, because Congress lacks authority "[t]o provide for calling forth the Militia" for any of those other purposes. And to that end, "the Members of the several State Legislatures" *must* enact suitable legislation providing for "well regulated Militia" to perform all of the functions of "homeland security" appertaining to their respective States; the States' "executive * * * Officers" *must* execute such legislation; and the States' "judicial Officers" *must* hold such legislation constitutional and enforce it. Thus, rather than providing a pretext or an excuse for preventing the States from using their Militia for their own purposes, the very supremacy of the Constitution over State law *compels* them to do so.

(4) The foregoing, of course, are largely legal considerations. The same conclusion arises, though, from consideration of practicalities. At any particular time, there might exist no "Armies" or "Navy" capable of providing sufficient "homeland security" to all, or even any, of the several States.[2300] Or rogue Members of Congress or a rogue President might prevent the "Armies" and "Navy" that did exist from protecting one or more of the States—as is the case at present, when both Congress and the President refuse to employ the Armed Forces to seal America's border with Mexico against an inundation of illegal immigrants, let alone to threaten the narco-gangsters in the Mexican ruling class with forcible "régime change" if they do not deploy Mexico's own armed forces along her northern border for that purpose. Or the "Armies" and "Navy" might prove themselves to be the "large military establishments and standing armies" that afford "facile means * * * to ambitious and unprincipled rulers to subvert the government or trample upon the rights of the people"[2301]—as is the case at present, when the Department of Homeland Security is increasingly integrating units of the regular Armed Forces

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[2299] U.S. Const. art. VI, cls. 2 and 3.

[2300] *See* U.S. Const. art. I, § 8, cls. 12 and 13.

[2301] J. Story, *Commentaries on the Constitution*, *ante* note 576, Volume 2, § 1897, at 646.

into its domestic *para*-military police-state apparatus with, suspiciously, nary a dissenting voice being heard in the Pentagon.[2302] And Congress might withhold its "Consent" for the States to "keep Troops, or Ships of War in time of Peace"[2303]—which it has done, except for those raised for the National Guard, the Naval Militia, and so-called State "Defense Forces".[2304] In such circumstances, *only* the Militia would and do remain as *permanent constitutionally mandated* establishments capable of providing the States with forces adequate for self-defense.

It would be inane to contend that the States could be deprived of the independent use of their own Militia because they could always fall back upon State and Local police departments and kindred law-enforcement agencies for at least Local "homeland security". Typical police departments today are simply too small and too inadequately trained and equipped in too many areas to provide "the security of a free State". Besides being unable to "repel Invasions" by any foreign forces that could actually mount "Invasions", they cannot defend their communities against truly extensive "Insurrections" or outbreaks of "domestic Violence", particularly the massive social dislocations that would surely erupt out of a National economic breakdown characterized by hyperinflation, depression, or especially depression preceded by or coupled with hyperinflation. More to the point, the Constitution does not mention "police" establishments at all, let alone mandate them as "necessary to" (or even suggest that they might be sufficient for) "the security of a free State". To be sure, if police departments were not separate entities at all, but instead were subunits of the Militia (as they ought to be), then they could claim to be "necessary to the security of a free State"—but only because they were integral parts of the Militia, not in their own right.[2305]

B. The Militia more necessary today than ever before. Such detailed consideration of the federal structure and responsibilities of "the Militia of the several States" with respect to active service is not of merely academic interest. Contrary to the rationalizations seized upon by those citizens who are simply too slothful to contribute their due efforts to the defense of their community, and to the black propaganda generated by special-interest groups the nefarious political schemes of which depend upon suppression of the Militia, the Militia are not the

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[2302] *See post*, Chapter 47.

[2303] *See* U.S. Const. art. I, § 10, cl. 3.

[2304] 32 U.S.C. § 109(a) and (c). For the historical development, *see* An Act For making further and more effectual provision for the national defense, and for other purposes, Act of 3 June 1916, CHAP. 134, § 61, 39 Stat. 166, 198; AN ACT To amend section 61 of the National Defense Act of June 3, 1916, by adding a proviso which will permit States to organize military units not a part of the National Guard, and for other purposes, Act of 21 October 1940, CHAPTER 904, 54 Stat. 1206; *and* AN ACT To amend section 61 of the National Defense Act to permit the States to organize military forces, other than as parts of their National Guard units, to serve while the National Guard is in active Federal Service, Act of 27 September 1950, CHAPTER 1058, 64 Stat. 1072.

[2305] *See ante*, at 327-328, 1135-1138, *and post,* at 1194-1202, 1276-1277, 1291-1293, and 1482-1488.

somehow outdated, obsolete, impotent, and even slightly comical vestiges of a bygone era. Quite the contrary.

1. As a matter of law. The Second Amendment declares that "[a] well regulated Militia, *being* necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed".[2306] That the Amendment phrases its nominative absolute clause in the *present* tense compels the conclusion that "[a] well regulated Militia" is required *now*, whenever "now" may be. To the same effect, the powers of Congress, the status of the President, and the powers reserved to the States and to the people with respect to the Militia are all couched in the present-*cum*-future or the present imperative tense ("[t]he Congress *shall have* Power" and "[t]he President *shall be* Commander in Chief")[2307] or in the simple present passive tense ("*are reserved* to the States respectively, or to the people").[2308] The original Constitution and the Second Amendment have never been amended in any of these verbal particulars, and therefore mean today precisely what they meant in 1788 and 1791. And that meaning requires Americans in this era—whether public officials or private citizens—to maintain "the Militia of the several States" to exactly the same extent and in exactly the same state of readiness as Americans maintained their Militia during the *pre*-constitutional era, changing only what needs to be changed to comport that degree of readiness with the novel contemporary challenges of "homeland security" and to take advantage of the technological advances available in modern times.

Moreover, WE THE PEOPLE who "ordain[ed] and establish[ed] th[e] Constitution"[2309] still constitute both the sole sovereigns in this country and "the Militia of the several States". For that reason, to disparage the Militia as obsolete is to condemn popular self-government and "a free State" as obsolete, too—or, at a more basic level, to contend that the "'[p]olitical power [that] grows out of the barrel of a gun'"[2310] should be held in the hands of someone other than THE PEOPLE themselves, so that THE PEOPLE become the abject subjects of the gun, not its absolute masters. "Governments * * * deriv[e] their just powers from the consent of the governed" from day to day only when and to the degree that THE PEOPLE are fully capable of withdrawing that "consent" and making that withdrawal effective, even to the extent of "alter[ing] or * * * abolish[ing the Government], and * * * institut[ing] new Government".[2311] Self-evidently, that may require THE PEOPLE to

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[2306] Emphasis supplied.

[2307] U.S. Const. art. I, § 8, cl. 1 (applicable to all other clauses in that section), *and* art. II, § 2, cl. 1 (emphases supplied).

[2308] U.S. Const. amend. X (emphasis supplied).

[2309] U.S. Const. preamble.

[2310] *See Quotations From Chairman Mao*, *ante* note 28, at 61.

[2311] Declaration of Independence.

take up arms in their collective self-defense, perhaps sooner rather than later. So, ***Americans labor under a duty imposed by both the Constitution and the Declaration of Independence to find a way to make the Militia work in the contemporary context.***

If such is not the case—if the Militia are in fact useless for the Constitution's and the Declaration's purposes, or if those purposes are no longer relevant for modern Americans—then the Constitution and the Declaration should not simply be disregarded and the Militia left in disarray and desuetude, but instead the Constitution should be amended, or the Declaration should be abrogated, or both, after full and fair debate throughout the several States.

2. As a matter of fact. Properly revitalized Militia would be anything but useless today. It is not accurate to claim that "things were simpler" in the *pre-*constitutional era than they are now. In fact, the things most important to "homeland security" were *not* simpler. The technology in the service of the enemies who confronted Americans during *pre-*constitutional times—in terms of the armaments and tactics of pirates, hostile Indians, the French, and later the British—was essentially the same as the technology that Americans themselves brought into the field in response to those threats. Americans' enemies enjoyed the signal advantage, though, that systems of communications and transportation were primitive. If they struck suddenly in one vulnerable place, other places would be informed only much later, and could not always dispatch timely assistance even after the alarm had reached them. Thus, the disadvantages imposed simply by distance and the ignorance that distance caused greatly complicated planning for "homeland security". Which is why Americans in those days organized themselves in Militia units at the *Local* levels throughout their territories—so as to be sure to have some forces already on the ground whenever and wherever dangers might suddenly arise. Today, as long as modern forms of communications and transportation continue to function, the difficulties posed simply by distance have been largely attenuated, if not entirely obviated. In that respect, "things are simpler" *now* than they were then. In addition, if America's contemporary enemies, both at home and abroad, can dispose of advanced technology, so can her defenders, and probably to a far greater degree. Moreover, America can enlist far more men—and women, too—in revitalized "Militia of the several States" at the present time than at any other. So, to the extent that problems of "homeland security" can be solved through the dispersal of large numbers of well-trained Militiamen in Local communities with the commitment and ability not only to defend themselves but also to support one another in any conceivable crisis, this country is *far better* able to make such a system work today than it was ever before in its history.

Indeed, in this respect (as in so many others) the Constitution has proven to be, not anachronistic, but amazingly prophetic—for Militia revitalized today would be uniquely suitable for the provision of America's "homeland security". True

enough, much more so than the original thirteen Colonies and independent States, the contemporary United States are of immense size in terms both of territory and population, and of elaborate geographical, economic, and social diversity, containing great cities, small towns, suburbs of every description, rural areas, and extensive tracts of uninhabited land. Properly organized, however, revitalized Militia would have some physical presence everywhere that some of WE THE PEOPLE were to be found and could make their presence felt. Being essentially omnipresent, the Militia would enjoy excellent intelligence that would enable them to discern threats to "homeland security" in good time—and so forewarned they could employ the most modern means of communications and transportation to mobilize, bring forth, and deploy at a moment's notice the maximum forces available. Firearms, ammunition, and various accoutrements suitable for the Militia's first responsibility—that is, military, *para*-military, police, and in extreme situations *guerrilla* and other irregular operations—are already widely dispersed among tens of millions of individuals who know basically how to use them, and would require only a little more training to become reasonably proficient in their new duties. For the performance of all other responsibilities, an extremely wide variety of knowledge, skills, and experiences is diffused throughout the populace in every State, so that revitalized Militia drawing upon those talents could tailor-make their responses to whatever situations confronted them. Not only would revitalized Militia be extremely flexible and efficient, and therefore economical, because they were actual residents of the affected areas who intimately knew the lay of the land in every respect, but also and perhaps most importantly they would *not* constitute what people on the scene might consider an alien force of occupation (as would, for instance, detachments from the regular Armed Forces deployed for the first time in some area in which a major threat to "homeland security" had arisen). The Militia would uniquely sympathize with and enjoy the support of the Local population, and would carry out their duties with scrupulous regard for Local rights, customs, traditions, and *mores*, precisely because they *were* the Local population.

3. As a matter of permanent political principle. Even a passing conversance with contemporary political reality will convince any thoughtful American that revitalized Militia are needed now more than ever before. The Constitution has proven prophetic with regard to what is "necessary to the security of a free State" precisely because human nature—especially its darker side—has not changed since the end of the *pre*-constitutional era (or, for that matter, since the dawn of recorded history). The response to the threat is different today—for example, modern equipment and methods of deployment have supplanted flintlock firearms and linear battlefield tactics—but the ultimate source of the most pressing danger is always the same and always at work: namely, that "all power tends to

corrupt, and absolute power corrupts absolutely".[2312] Revitalized Militia would provide the best security that could be devised for "a free State" not only against invasions, insurrections, rebellions, widespread domestic violence, and wholesale violations of the laws by common criminals, but also against those especially dangerous *political* violations of the laws by faithless public officials known as "usurpation" and "tyranny". That, after all, is the Militia's perpetual task—the people's eternal political vigilance always being the price of their liberty.

As Americans of the *pre-*constitutional era learned from the English political philosopher John Locke (among others),

> *Usurpation* is a kind of Domestick Conquest, with this difference, that an Usurper can never have Right on his side, it being no *Usurpation* but where one *is* got into *the Possession of what another has Right to*.[2313]

> In all lawful Governments the designation of the Persons, who are to bear Rule, is as natural and necessary a part, as the Form of the Government it self, and is that which had its Establishment originally from the People. Hence all Common wealths with the Form of Government established, have Rules also of appointing those, who are to have any share in the publick Authority; and settled methods of conveying the right to them. * * * *Whoever gets into the exercise of any part of the Power, by other ways, than what the Laws of the Community have prescribed, hath no Right to be obeyed, though the Form of the Commonwealth be still preserved; since he is not the Person the Laws have appointed, and consequently not the Person the People have consented to.*[2314]

Usurpers, therefore, include not only those who contrive to insinuate themselves unlawfully into public office, but also those lawfully in office who purport to exercise powers that belong, not to their own offices, but to some other offices or persons altogether.

The latter circumstance is obviously more problematical than the former. The rule is simple enough: "The doing of one thing which is authorized cannot be made the source of an authority to do another thing which there is no power to do."[2315] Application of this rule, though, is not always self-evident. An individual brazenly impersonating a public official is usually easy enough to unmask and punish.[2316] But exposing an otherwise legitimate official's calculated misconstruction

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[2312] J. Dalberg-Acton, *Essays, ante* note 1563, at 519.

[2313] *Two Treatises of Government, ante* note 53, Book II, Chapter XVII, § 197 (emphasis in the original).

[2314] *Id.,* Book II, Chapter XVII, § 198 (emphasis supplied).

[2315] Wilson v. New, 243 U.S. 332, 345 (1917).

[2316] *See, e.g.,* 18 U.S.C. § 912.

and misapplication of the laws relating to his office may require complex legal analysis and the amassing of a detailed evidentiary record to make out a case against him.[2317] Yet, in any constitutional republic, ceaseless and resolute vigilance in this regard is essential, because an unremedied usurpation in the latter sense amounts to a denial and defeat of a government of delegated, and therefore limited, powers. For when a rogue public official attempts to exercise powers not delegated to him, he necessarily disregards some of the definitions of power, destroys some of the limitations on power, and thus circumvents a portion of the "checks and balances" against misuses or abuses of power built into the Constitution. If uncorrected, his misbehavior stands as a contradiction to, if not a mockery of, constitutionalism itself. For example, if some official in the General Government purports to exercise—for any purpose and to any degree—a particular power that WE THE PEOPLE have not delegated to the General Government, he is an usurper, because "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people".[2318] The particular *power* such an individual wrongly tries to exercise is not invalid in and of itself; and his exercise of *other* powers appurtenant to his office may still be proper; but *his* exercise of *that particular* power is illegitimate and without effect *ab initio* and *in toto*, because *that particular* power is capable of being exercised, not by anyone in the General Government (himself included), but only by the States or the people.

As Americans in *pre-*constitutional times also absorbed from such as Locke,

> [a]s Usurpation is the exercise of Power, which another hath a Right to; so *Tyranny* is *the exercise of Power beyond Right*, which no Body can have a Right to. And this is making use of the Power any one has in his hands; not for the good of those, who are under it, but for his own private separate Advantage. When the Governour, however intituled, makes not the Law, but his Will, the Rule; and his Commands and Actions are not directed to the preservation of the Properties of his People, but the satisfaction of his own Ambition, Revenge, Covetousness, or any other irregular Passion.[2319]
>
> 'Tis a Mistake to think this Fault is proper only to Monarchies; other Forms of Government are liable to it, as well as that. *For where-ever the Power that is put in any hands for the Government of the People, and the Preservation of their Properties, is applied to other ends, and made use of to impoverish, harass, or subdue them to the Arbitrary and Irregular Commands*

[2317] *See. e.g.,* 18 U.S.C. §§ 241 and 242.

[2318] U.S. Const. amend. X.

[2319] *Two Treatises of Government, ante* note 53, Book II, Chapter XVIII, § 199 (emphasis in the original).

> *of those that have it: There it presently becomes* Tyranny, *whether those that thus use it are one or many*.[2320]

Thus, tyranny may amount simply and obviously to a claim of some power that *no one* ought to have—a denial of the fundamental principles that governments may exercise only "*just* powers" derivable by right reason from "the Laws of Nature and of Nature's God",[2321] and that "there are * * * rights in every free government beyond the control of the State", "limitations on * * * [the] power [of public officials] which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist and which are respected by all governments entitled to the name".[2322] In this sense, tyranny does not qualify as a proper form of government at all, but instead amounts to the very negation of government.

More subtly, tyranny also may consist of the exercise of otherwise "just powers" for the manifestly unjust purpose of subordinating the public good to the selfish gain of the tyrant and his cronies. For example, if some official in the General Government purports to exercise a particular power that WE THE PEOPLE have actually delegated to the General Government, but in such wise as intentionally or recklessly to defeat, frustrate, or subvert "the *common* defence" or "the *general* Welfare",[2323] in order to feather his own nest and the nests of his hangers-on, he is a tyrant. To forefend which, no doubt, explicit limitations of governmental authority to "the *common* defence" and "the *general* Welfare" appear *twice* in the Constitution—once in the Preamble, which applies to all governmental powers, and once as a specific constraint on Congress's power "[t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the *common* Defence and *general* Welfare of the United States".[2324]

Of crucial importance in American jurisprudence is that, because by hypothesis neither an usurper nor a tyrant enjoys any license to misappropriate someone else's powers, to misuse "just powers" for malign ends, or to attempt to exercise unjust powers, therefore his supposed commands—whether labeled "statutes", "joint resolutions", "executive orders", "proclamations", "national-security decision directives", "administrative regulations", "judicial decisions", or the even more problematic "judicial opinions"—are purely and simply *void*. The acts of an usurper or tyrant as such are necessarily unconstitutional. And ***"an unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords***

[2320] *Id.*, Book II, Chapter XVIII, § 201 (emphasis supplied).

[2321] Declaration of Independence (emphasis supplied).

[2322] Loan Association v. City of Topeka, 87 U.S. (20 Wallace) 655, 662-663 (1875).

[2323] U.S. Const. preamble (emphasis supplied).

[2324] U.S. Const. art. I, § 8, cl. 1 (emphasis supplied).

no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed"[2325]***—"it binds no one, and protects no one"***.[2326]

This was the principle that animated the Declaration of Independence. Yet, long before the Declaration, Locke had already taught Americans that,

> if either the[ ] illegal Acts [of public officeholders] have extended to the Majority of the People; or if the Mischief and Oppression has light only on some few, but in such Cases, as the Precedent, and Consequences seem to threaten all, and they are perswaded in their Consciences, that their Laws, and with them their Estates, Liberties, and Lives are in danger, and perhaps their Religion too, how they will be hindered from resisting illegal force, used against them, I cannot tell.[2327]

> But if all the World shall observe Pretences of one kind, and Actions of another; Arts used to elude the Law, and the Trust of Prerogative (which is an Arbitrary Power in some things left in the Prince's hand to do good, not harm to the People) employed contrary to the end, for which it was given: if the People shall find the Ministers, and subordinate Magistrates chosen suitable to such ends, and favoured, or laid by proportionably, as they promote, or oppose them: If they see several Experiments made of Arbitrary Power * * * : if a *long Train of Actings shew the Councils* all tending one way, how can a Man any more hinder himself from being perswaded in his own Mind, which way things are going; or from casting about how to save himself * * * ?[2328]

Towards the close of the *pre-*constitutional era, Americans experienced serial usurpations by the British government—at that time, *their very own* government—that traveled the tortuous trail towards tyranny: As the Declaration of Independence charged, "[t]he history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States". This conduct, the Declaration averred, warranted the most serious political conclusion: namely, that "[a] Prince, whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people". As a consequence, Americans were "Absolved from all Allegiance" to, and could "totally dissolve[ ]" "all political connection" with, him. Moreover, they might forcibly resist his efforts to regain control over them. For, the Declaration asserted, "when a long train of abuses and

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[2325] Norton v. Shelby County, 118 U.S. 425, 442 (1886) (emphasis supplied).

[2326] Huntington v. Worthen, 120 U.S. 97, 102 (1887) (emphasis supplied).

[2327] *Two Treatises of Government, ante* note 53, Book II, Chapter XVIII, § 209 (emphasis in the original).

[2328] *Id.,* Book II, Chapter XVIII, § 210 (emphasis in the original).

usurpations, pursuing invariably the same Object evinces a design to reduce the[People] under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security".

Neither Locke nor the Declaration, however, specified *how* American patriots could or should "resist[ ] illegal force" and exercise their right and fulfill their duty "to throw off such Government". By July of 1776, though, every patriot already knew without being told. At the outbreak of hostilities, because no Colonial army existed anywhere from New Hampshire to Georgia, the Colonial Militia formed the indispensable first line of defense. Indeed, what had sparked the initial actual shooting in the War of Independence had been the attempt by British General Thomas Gage on 19 April 1775 to render the Massachusetts Militia impotent—and thereby to place that Colony at the mercy of her oppressors—by seizing the Colonists' martial stores at Concord. No patriot needed further evidence as to "which way things were going"—and of where he stood and what he stood to lose unless he stood to—when Captain John Parker commanded the Militiamen on Lexington Green to stand their ground: "Don't fire unless fired upon, but if they mean to have a war let it begin here."[2329]

The Declaration of Independence and the American Militia were perfectly matched as the purpose to its instruments, the reason to its resources—not just circumstantially and operationally, but also legally. The Declaration maintained that "it is the[People's] right, it is their duty, to throw off" any government that aimed at "reduc[ing] them under absolute Despotism", and then "to provide new Guards for their future security". Easily enough could the Colonists have found the "right" of resistance in "the Laws of Nature and of Nature's God": specifically, the privilege of communal self-defense, against not only common criminals, but also and especially political criminals. For, as Blackstone taught, "[s]elf-defence * * * as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society".[2330] So no purported "government" could lawfully disarm its citizens that it might the more easily plunder, oppress, and slaughter them. Even more readily could patriotic Americans have discovered their duty of resistance in the requirements of all the *pre*-constitutional Militia Acts that every able-bodied free man should keep and bear arms in his community's defense. Whether all men everywhere, in every society, then labored under such a duty in some theoretical sense, Americans certainly did as a matter of their actual traditions, history, experience, and personal practices—all codified and enforced by law, generation after generation. Therefore, even if the Declaration of Independence had exaggerated, and resistance to usurpation and tyranny had been a duty "natural" to no one else on earth, yet it surely was a duty peculiarly suited to and incumbent

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[2329] *See, e.g.,* E. Forbes, *Paul Revere*, *ante* note 127, at 268.

[2330] *Commentaries on the Laws of England*, *ante* note 142, Volume 3, at 4.

upon Americans, because their social and political order had long presupposed it and put it into operation.

In 1775, Lexington and Concord demonstrated more than that the Militia were necessary and sufficient for opposing usurpation and tyranny with lead and steel. For more had been at stake than simply brute force against force. The contest begun there was one of right against might. As Captain Parker warned his men, "if *they* mean to have a war let it begin here". The soldiery the British usurpers and tyrants sent into the field were agents of aggression and oppression. The Militia's resistance was defensive. That was the complete answer to Major John Pitcairn's contemptuous commands: *"Ye villains, ye Rebels, disperse; damn you, disperse!" "Lay down your arms; damn you, why don't you lay down your arms!"*[2331] Because free men with a duty to keep and bear arms never willingly lay down their arms. And at Lexington, none of them did.[2332]

As one of the patriots who mustered that day later recalled, "what we meant in going for those Redcoats was this: we always had governed ourselves and we always meant to. They didn't mean we should."[2333] So, this being the ultimate political lesson that Lexington teaches, one must conclude that *le plus ça change le plus c'est la même chose*—except that things have decidedly deteriorated since 1775. America is still plagued by actual usurpers and aspiring tyrants—now ensconced in both the General Government and the governments of many States, or grasping for unmerited public offices in the future—who most definitely do *not* want WE THE PEOPLE to govern themselves. And already the excesses of King George III's ministerial government pale in comparison to these modern miscreants' misdeeds. But far worse is near at hand, because even the King's most malevolent minions never set themselves to impose *totalitarianism* of the modern stripe on their American subjects. They were neither practitioners nor even students of Marxism, Leninism, Stalinism, Naziism, socialism, fascism, or other of the entries in the dark litany of convoluted ideologies and malignant political "isms" cobbled together during the Nineteenth and Twentieth Centuries in order to rationalize looting, oppressing, and enslaving the mass of common humanity, and kidnapping, falsely imprisoning, or even murdering those who might dare to resist under the aegis of "the Laws of Nature and of Nature's God". The most fanatical proponents of expanding the British Empire in the Eighteenth Century never imagined in their

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[2331] Jonas Clark, *The Fate of Blood-thirsty Oppressors, and GOD's tender Care of his distressed People*. A SERMON PREACHED AT LEXINGTON, April 19, 1776, TO WHICH IS ADDED, A Brief NARRATIVE of the principal Transactions of that Day (Boston, Massachusetts: Powers and Willis, 1776), *reprinted in The Battle of Lexington: A Sermon & Eyewitness Narrative* (Ventura, California: Nordskog Publishing, 2007), at 57. *See, e.g.*, E. Forbes, *Paul Revere*, *ante* note 127, at 268; David H. Fischer, *Paul Revere's Ride* (New York, New York: Oxford University Press, 1994), at 190-191.

[2332] D. Fischer, *Paul Revere's Ride*, *ante* note 2331, at 191.

[2333] *Quoted in id.* at 164.

wildest reveries that they could create a single *global* engine of complete political, economic, and social control, eclipsing the nations and amalgamating all of the peoples of the earth into one homogeneous crowd of submissive peons endlessly toiling for the benefit of a tiny ruling class of self-selected élitist masters. Yet that mad dream animates today's usurpers and tyrants, in America and throughout the world.[2334]

Inasmuch as the political dangers that confronted Americans in the past have not changed, or even abated, but rather have intensified in the modern era, contemporary patriots' responses to those dangers must not change either, but must become even *more* systematic, *more* thorough, and *more* determined than ever they were. If "well regulated militia" of the *pre*-constitutional pattern proved necessary then, they must be *absolutely indispensable* now—for, even more now than then, they constitute the *only* means to mobilize, organize, arm, discipline, and deploy "the body of the people, trained to arms" in self-defense against the monstrous machinery of repression and exploitation which the people's enemies have set up and set in motion.[2335] ***No compromise with these enemies is possible.*** One side in the struggle must emerge on top, the other must go under. WE THE PEOPLE—or at least the patriots who will come forward to lead them—can prevail because they enjoy the advantage of constituting "the big battalions" in overwhelming numbers; they are in, or are capable of easily taking, actual physical possession of almost all of the valuable property in America; they are already armed, and at least rudimentarily trained, to a very large degree; they are convinced of the justice of their cause; and they realize that this is America's and even the world's last stand. *For if America of the Declaration of Independence and the Constitution falls, then the whole world will enter a dark age without historical parallel, because no other country or people can possibly fend off the forces of global tyranny.*

C. Next to no limitations on who must actually serve in the Militia. The Militia could not provide *every* type of protection that might be "necessary to the security of a free State" unless they consisted of sufficient numbers of individuals who could actually be deployed in each and every form of service required, whenever and wherever required, for such "security". So limitations on Militiamen's duty to perform personal service must be few and far between. For that reason, although the principles of "[a] well regulated Militia" derived from *pre*-constitutional practices do allow for Congress and the States to exercise some discretion in organizing, arming, equipping, disciplining, and training the Militia, they simultaneously impose strictures on that discretion.

[2334] *See, e.g.*, an early candid summary of the basic teleology of and technology for this scheme, with illuminating charts, *in* Hans Heymann, *Plan for Permanent Peace* (New York, New York: Harper & Brothers Publishers, 1941).

[2335] *See* Virginia Declaration of Rights (1776) art. 13.

1. Performance of *some* useful service required of everyone capable of performing any service in the Militia. Because every "well regulated militia" consists of "the body of the people, trained to arms",[2336] and because training of so many individuals would be wasteful if not useless were each of them not to be called forth for *some* service at *some* time during his enrollment, Congress and particularly the States must take care to ensure that *everyone eligible for the Militia actually serves in some capacity at some time. To fulfill the Militia's purpose of maximizing "homeland security", service must be in some manner near-universal, ubiquitous, and compulsory*. To be sure, there can and should be different duties that may require some members of the Militia to be far more, or far less, active than others; for "[t]hey also serve who only stand and wait".[2337] But if "only stand" they must, then "only stand" they shall.

a. During "alarms", of course, every member of the Militia may be called upon to muster and serve in some manner in the field at the same time, albeit not necessarily in the very same way, in the very same place, or in the very same Local units as his neighbors.[2338] Because on such dire occasions everyone who is physically able will probably be impressed into service somehow or other, everyone must become ready to meet the challenge before those occasions arise. This is why possession of basic equipment and some minimum amount of training in its use and in related skills must be mandatory for everyone, including even those who might qualify for exemptions from most normal duty.

b. Except in the most extraordinary cases, though, even members of revitalized Militia who were excused from the full burden of normal service and enrolled on "the alarm list" because they were too old for rigorous work or were in an exempted public office or private occupation would still have some regular duties to fulfill. This, for two reasons. *First*, as a matter of principle, every member of the community who can do so should personally contribute in some degree to the provision of its security so that he can rightfully claim *by his own efforts* a share in the "'[p]olitical power [that] grows out of the barrel of a gun'" through the Militia.[2339] *Second*, as a practical matter, not all Militia services would need to be performed in the field, by individuals in top-flight physical condition, or every day. For example, personal possession of firearms and ammunition suitable for Militia service, and routine maintenance to assure that they were in good working order—which would be incumbent upon *every* member of the Militia (other than

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[2336] Virginia Declaration of Rights (1776) art. 13.

[2337] John Milton, Sonnet XIX: "When I consider how my light is spent", *Poems* (London, England: Thomas Dring, 1673).

[2338] As used here, "in the field" refers to activities undertaken outside of Militiamen's own homes. All Militiamen (other than conscientious objectors) will always serve in their homes, too, if only by maintaining possession there of firearms, ammunition, and accoutrements.

[2339] *Quotations From Chairman Mao, ante* note 28, at 61.

conscientious objectors)—would of necessity be done at home, and would require little effort. Then, too, no sound reason exists why during periods of tranquillity Militiamen of advanced years who could be assigned to or who would volunteer for various routine administrative and other "housekeeping" duties could not perform those tasks largely over the Internet in the relative comfort of their own homes on an "as-needed" basis. So, the age-limit for a modern "alarm list" could and should be expanded well beyond the fifty, fifty-five, or even sixty years that were customary during the *pre*-constitutional era. Today, the test for whether a particular individual ought to perform some service in the Militia should focus, not arbitrarily on his age, but realistically on his ability. This would have the advantage of retaining within the Militia individuals of advanced years whose extensive experience would have enabled them to cultivate such virtues as discernment, prudence, wisdom, humility, patriotism, and self-sacrifice.

c. Although those members of revitalized Militia not on "the alarm list"—who during the *pre*-constitutional period would have been enrolled in "the Trained Bands"—would be required to perform some active service on a regular basis, they would not all be engaged in the same types of Militia activity at all times and under all circumstances. Rather, in assigning duties, the Militia would take advantage of the larger number of Militiamen with more varied skills than were available in prior eras, and would take account of the necessity to spread the burden of active service widely in order to maintain the economic and social order in a state of normalcy to the greatest degree possible. After all, the Militia would not prove "necessary to the security of a free State" if their excessive demands on the most productive segments of the populace resulted in undermining the economy or generating social friction. Duties could be allocated in several ways:

(1) Some members of the Militia would volunteer for or be assigned to special full-time duty, for which they would receive adequate compensation—such as in Local and State police forces, Sheriffs' departments, fire and rescue units, and other law-enforcement and emergency-services agencies. As the Militia were revitalized, existing bodies of these kinds would simply be absorbed into them *in toto*, the members' service in such specialized agencies being accounted as their full Militia service.[2340]

(2) Some, perhaps many, members of the Militia could be expected to volunteer for other duties—particularly when common Americans finally realized that their continued freedom and prosperity are impossible of attainment without self-government, that self-government is impossible without personal participation, and that effective personal participation is impossible without the institutional structure of the Militia through which to mobilize and direct individuals' efforts.

[2340] *See ante*, at 337-328 and 1135-1138, *and post*, at 1194-1202, 1276-1277, 1291-1293, and 1482-1488.

Yet, because initially volunteers select themselves, reliance on them would always be a chancy business that required discernment and discrimination in any unit that might accept them. After all, on the one hand, an individual volunteer may be more valuable to the community serving in a civilian capacity than as a Militiaman serving in the field; or, on the other hand, an individual volunteer may be of little use in the civilian community, but at least minimally desirable for Militia duty. Without due care in the process of selection of volunteers, the Militia could end up absorbing too many of the bad along with too few of the good, or depriving the civilian community of too many of the good along with relieving it of too few of the bad. In any event, although anyone would be welcome to volunteer for some particular type of service in revitalized Militia, no one could claim a "right" to his own choice of service (except for conscientious objectors, who should be allowed to assert a right not to engage in any Militia service requiring them to use arms). Membership and service in "the Militia of the several States" is a constitutional duty for every eligible American—but, in each State, this is membership and service in "[a] *well regulated* Militia", which assigns duties according to *its* needs, not the personal likes or dislikes of its members.

(3) In most cases during normal times, because most Militiamen would be "citizen-soldiers" whose permanent vocations as "citizens" transcended their temporary occupations as "soldiers", actual service in the field could be neither continuous for any individual nor complete for the Militia as a whole. Rather, except for Militiamen serving in regular police and emergency-services forces, compulsory duties in revitalized Militia should be distributed throughout the membership on an equitable basis by rotation.

Where practicable, rotation would be required by the Militia's purpose—to provide "the security of a free State". In America, "a free State" has "a Republican Form of Government".[2341] "[A] Republican Form of Government" is "one constructed on th[e] principle, that the Supreme Power resides in the body of the people".[2342] So, because all, and particularly supreme, "'[p]olitical power grows out of the barrel of a gun'",[2343] in "a Republican Form of Government" "the body of the people" must control the guns. By definition, "the body of the people, trained to arms" comprises "a well regulated militia".[2344] Therefore, the ultimate purveyor of physical force in such a government must be the Militia. But, consisting of "the body of the people", and acting on its behalf, the Militia should fairly represent the population not just in formal composition but also in actual modes of service. After

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[2341] *Compare* U.S. Const. amend. II *with* art. IV, § 4.

[2342] Chisholm v. Georgia, 2 U.S. (2 Dallas) 419, 457 (1793) (opinion of Wilson, J.).

[2343] *Quotations From Chairman Mao, ante* note 28, at 61.

[2344] Virginia Declaration of Rights (1776) art. 13.

all, the Militia constitute the great institutions for "the *common* defence",[2345] in that they are truly "of the people, by the people, for the people". Except during "alarms", however, the entirety or even most of the Militia can not and need not be under arms in the field all or even most of the time, if the Militia are to act consistently with "the general Welfare".[2346] The burdens of service must be so distributed as to insure that the result is, not the menticidal regimentation of a "garrison state", but the economic productivity and social stability of a "free State". Thus, those burdens must be allocated among "the body of the people" with a concern for social justice—that is, what each individual, in solidarity with all, ought to contribute to the common effort so as to subserve the common good.[2347]

Rotation is feasible, of course, only when more than enough Militiamen are available to perform the necessary duties at any particular time. That was generally the situation even during the *pre-*constitutional era, because the Militia incorporated in principle *every* able-bodied adult free man. Today, rotation would be an eminently workable policy, because of the exceedingly large numbers of potential Militiamen available throughout America now, in comparison to the much smaller pool of recruits then. (Today's pool, after all, would be significantly increased simply by the addition of women, who performed only very minor rôles with respect to America's *pre-*constitutional Militia.) Moreover, rotation is feasible only when the Militiamen called forth are already at least minimally qualified for their assignments. That was generally the case even in *pre-*constitutional times, too, because the statutes required almost everyone eligible for the Militia to undergo at least rudimentary training, which typically served the purposes for which any part of the Militia might have been called forth. Today, revitalized "Militia of the several States" could do just as well as, if not quite a bit better than, their predecessors in spreading the burdens of service throughout their communities on an efficient and equitable basis. For, with far larger populations composed of more highly educated and experienced people—and with greater capital investment, technology, and productivity in every area of human endeavor—than any of the Colonies or independent States ever enjoyed, the States could allow for rapid rotation in service, and could even pay reasonable compensation or provide other benefits in exchange for many of the services part-time Militiamen performed.

(4) Akin to rotation is substitution, whereby one Militiaman can obtain a temporary exemption from his normal tour of duty by providing a qualified substitute to take his place. Again, because the available pool of Militiamen today probably exceeds by a large measure the average numbers required for day-to-day

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[2345] U.S. Const. preamble (emphasis supplied).

[2346] U.S. Const. preamble.

[2347] For a good introduction to this complex and often misunderstood subject, *see* Heinrich Pesch, *Ethics and the National Economy*, Rupert Ederer, Translator (Norfolk, Virginia: IHS Press, 2004).

service under normal conditions, substitution would likely be an eminently workable procedure. Considerations of social justice dictate, however, that it would have to be carefully controlled.[2348]

2. No "select militia" allowable. Precisely because "a well regulated militia" by definition consists of "*the body of the people*, trained to arms",[2349] no Militiaman on his own initiative can avoid or evade performing *some* service, can be granted a statutory dispensation from *all* service, or can be precluded by statute from *any* service in the Militia. Howsoever routine Militia service may be apportioned equitably throughout society, neither Congress nor any of the States enjoys any license to set up a so-called "select militia" (under that or any other name) by dividing "the body of the people" who should comprise the Militia into "organized" and "reserve" or "unorganized" components, with those individuals consigned to the "reserve" or "unorganized" component effectively excluded from the Militia by being assigned no duties and required to perform no services on a regular basis. Whatever the labels attached to the two components, legislation in this form would always be faulty in constitutional principle.

Neither Rhode Island, nor Virginia, nor any other of the original Thirteen Colonies and then independent States ever established a "select militia". This history establishes that "well regulated Militia" should *always* be *completely* organized, with the selection of different categories of Militiamen for different duties (where appropriate) being part of the organizational structure. *Never* should *any* category of Militiamen intentionally be left with *no* duties to perform.

The original Constitution plainly precludes the possibility of any "select militia". Congress cannot set up a "*select* militia", because its power is solely "[t]o provide for organizing * * * *the* Militia", not "[*Part of*] *the* Militia".[2350] In fact, in this very clause the Constitution differentiates between "*the* Militia" and "such *Part of them* as may be employed in the Service of the United States". So, when the original Constitution says "the", it means "the" *as a specific whole*, not something indefinitely less. And "*the* Militia" means the Militia just as they existed during *pre-*constitutional times—when *every* eligible individual was subject to some form of service. If Congress did enjoy the discretion "[t]o provide for organizing" only "Part of the Militia" by assigning actual duties to but a "select" few, rogue Congressmen could reduce the Militia to impotence by enlisting only a tiny fraction of eligible individuals, which could create a Praetorian Guard or *Schutzstaffel* out of those Congressmen's political cronies, partisans, and hangers-on. Rather than licensing rogue Members of Congress or State legislators to set up a *Schutzstaffel*, the Militia

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[2348] *See ante*, at 977-981.

[2349] Virginia Declaration of Rights (1776) art. 13 (emphasis supplied).

[2350] U.S. Const. art. I, § 8, cl. 16 (emphasis supplied).

Powers provide a complete *Schutzmaßregel* (preventative) and *Schutzstoff* (antidote) to any such pretensions.

The same conclusion should also be patent from the Second Amendment, which guarantees "the right *of the people* to keep and bear Arms" in order to ensure the continuation of "well regulated Militia" throughout America. If "well regulated Militia" could be nothing more than "select militia", consisting of something far less than "the people" *as a whole*, then an unqualified "right *of the people* to keep and bear Arms" would be unnecessary. Indeed, in that case the whole concept of a constitutional "right * * * to keep and bear Arms"—that is, a "right" of individuals the substance of which is not determined by, but is fully enforceable against, public officials—would be nonsensical. For then the only "people" with a need "to keep and bear Arms" would be the particular "people" public officials singled out to constitute their "select militia". And the "right of th[os]e people" would come into existence only with, and thereafter would depend entirely upon, that selection—that is, upon the decisions of those officials. Thus, it would be no constitutional "right" at all, but rather some species of governmental grant or license.

Although the Constitution does not permit the establishment of any "select militia", it does allow, and even encourages, selections to be made *within* the Militia in terms of the particular services various Militia units or particular Militiamen perform. These specialized units or types of duty would not purport to supersede or operate outside of the Militia, but instead would subsist as integral parts thereof, alongside the regular formations in which most Militiamen were enlisted. Thus, revitalized "well regulated Militia" could be sufficiently flexible in organization to combine a number of different units designed and assigned to perform different tasks, and for that purpose given different training and provided with different equipment.

3. Fulfillment of the Militia's responsibilities the essence of freedom. To some, it may appear paradoxical that "well regulated Militia"—near-universal in membership, compulsory in participation, and disseminated throughout every Locality—could truly be "necessary", in fact and law, "to the security of a *free* State".[2351] Does not a community totally organized, armed, disciplined, and ready to serve in the field along *para*-military lines amount at the Local level to "a garrison state" and across the country as a whole to a "national-security state"? How can WE THE PEOPLE be "free" when they are *compelled by law* to perform such duties?

It could just as easily be asked, though, how can THE PEOPLE be "free" when, being *self*-governing, they are compelled by law to perform the governmental function of serving on juries, or compelled by circumstances if not actual statutes

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[2351] U.S. Const. amend. II (emphasis supplied).

to perform the governmental function of voting, in order to maintain their freedom? The answer from general principles of political science, of course, is that freedom does not entail the absence of all individual and collective duties, but instead requires the fulfillment of certain responsibilities.

More specifically, is one to assume, in defiance of common sense, that WE THE PEOPLE—who constitute the Militia and exercise "the right * * * to keep and bear Arms" for that purpose—would ever become so politically deranged as to oppress themselves? Perhaps so. But, prior to the appearance of such derangement, would THE PEOPLE be better off if they lacked the power to defend themselves against oppression, on the plea that they might misuse such a power to their own destruction? Would then not oppression at someone else's hands be, not merely a possibility, but a certainty? What other lesson does History teach?

Certainly all Americans know as a matter of historical fact that the Militia have *never* been instruments of mass oppression. In the beginning, the States' "well regulated militia, composed of the body of the people, trained to arms",[2352] played leading rôles in securing WE THE PEOPLE'S independence and freedom. And if the Militia are not playing such a rôle today, it is only because, being almost completely unorganized everywhere, they are temporarily incapable of performing their historically proven function. Yet, what happened then could certainly happen now, if the Militia were revitalized in accordance with *pre*-constitutional standards.

In addition, as a matter of law, the Constitution denies that "[a] well regulated Militia" amounts to "a garrison state", because the Second Amendment declares such a Militia to be "necessary to the security of a free State", and the original Constitution incorporates "the Militia of the several States" as permanent institutions within its federal system, one of the purposes of which is to "secure the Blessings of Liberty to ourselves and our Posterity"[2353]—all of which would be self-contradictory and impossible were the Militia a nascent "garrison state" lurking within the Constitution's own structural framework. So, unless the Constitution is self-contradictory, its understanding of "[a] well regulated Militia" must exclude that possibility.

Of course, the Constitution does not explain the necessity for the compulsory character of service in the Militia. This is because it presumes that every thinking American understands what has come to be called "the logic of collective action"[2354]—or what more descriptively could be styled "the perverse incentives that tend to thwart effective collective action". In the final analysis, it is the *duty* "to

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[2352] Virginia Declaration of Rights (1776) art. 13.

[2353] U.S. Const. preamble.

[2354] *See, e.g.*, Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Cambridge, Massachusetts: Harvard University Press, Revised Edition, 1971).

keep and bear Arms" and to perform other services in the Militia that secures every right, power, privilege, and immunity that comprise "the Blessings of Liberty". Even absent compulsion, some of THE PEOPLE no doubt would serve voluntarily. But others would choose not to serve, in the selfish expectation that the volunteers' service would provide everyone with sufficient security, including those who contributed nothing to the effort. If, however, enough of these "free riders" refused to serve, the Militia that did exist would prove less than adequate for its purpose. That is, "free riding"—the spurious, even self-contradictory "freedom" to shirk one's duty—would subvert, even imperil, the community's security. As this would likely be discovered in practice only when in the course of some crisis that security proved insufficient, and then almost assuredly when that insufficiency could not be corrected in time, the prior elimination of "free riders" is "necessary to the security of a free State", and therefore must be part of the definition of "[a] well regulated Militia". So, in this case, compulsion turns out to be the foundation for freedom.

D. Few limitations on the Militia's requirement to serve. That revitalized "Militia of the several States"—consisting of "the body of the people, trained to arms"[2355]—are indispensably necessary to protect modern Americans' most vital individual and communal interests, and that *each and every* Militiamen must perform *some* service on behalf of the Militia during his period of enrollment, still leaves open the question of under what conditions the Militia as institutions would be *required* to serve. Inasmuch as the Militia must provide *every* type of protection "necessary to the security of a free State", the natural presumption must be that the Militia's duty of service applies under all conditions. Yet, because the Militia are *constitutional* establishments, they must be subject to *some* "checks and balances" and other principles of limitation in practice. "A well regulated Militia" it is not akin to a "garrison state" in which everyone can be impressed under arms and subjected to martial discipline for just any and every purpose and on any and every occasion whatsoever. Nonetheless, in keeping with the Militia's sweeping purposes, the constraints on their duty to serve are few in number and narrow in scope

1. Permissible purposes. The Constitution explicitly limits "calling forth the Militia" "in the Service of the United States" to only three purposes: namely, "to execute the Laws of the Union, suppress Insurrections and repel Invasions".[2356] Congress lacks the power to require the Militia to serve in any way for any other reason. On the other hand, because the Militia are "the Militia *of the several States*",[2357] the States may employ their Militia for any purpose consistent with provision of "the security of a free State" that does not interfere with Congress's

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[2355] Virginia Declaration of Rights (1776) art. 13.

[2356] U.S. Const. art. I, § 8, cls. 15 and 16. *See also* U.S. Const. art. IV, § 4.

[2357] U.S. Const. art. II, § 2, cl. 1 (emphasis supplied).

exercise of its authority "[t]o provide for calling forth the Militia" for the three constitutionally enumerated purposes.[2358]

2. The limited authority of any "Commander in Chief". The Constitution expressly confines the President's authority as "Commander in Chief * * * of the Militia of the several States" to those occasions "when [they are] called into the actual Service of the United States"[2359]—which means "called", not just ostensibly for one or more of the three purposes the Constitution enumerates, but *in "**actual**" fact and law* for such a reason and no other. The President cannot require even a single member of any of "the Militia of the several States" to submit to his command unless for such "*actual* Service".[2360]

In addition, because "[a] well regulated Militia" is "necessary to the *security* of a *free* State",[2361] it cannot be called forth by anyone to prop up by force of arms usurpers, tyrants, or other rogue public officials who threaten WE THE PEOPLE'S freedom. So any part of the Militia of any State may (and should) refuse to obey the orders of the State's Governor (or other commander in chief) if it concludes on sufficient evidence that it is being called upon to subvert "the security of a free State". This limitation applies doubly against the President, because "the actual Service of the United States" cannot entail an attack upon "the security of a free State" in any of the several States. Indeed, that "the United States shall guarantee to every State in this Union a Republican Form of Government",[2362] that under the Constitution "a free State" and "a Republican Form of Government" are closely interrelated,[2363] and that the President "shall take Care that the Laws be faithfully executed"[2364] together absolutely exclude the possibility that any Militiaman's obedience to a purported order from the President to strike at "the security of a free State" in any State could constitute "the actual Service of the United States".

3. Limitation on the source of the Militia's "Officers". Because the Constitution recognizes the Militia as "the Militia *of the several States*" and "reserv[es] to the States *respectively*, the Appointment of the Officers", the sole "Officer[ ] of the United States"[2365] who can command the Militia is the President himself, and then only when "such Part of the[Militia] as may be employed in the Service of the United States" is in fact and law "called into the *actual* Service of the

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[2358] *Compare* U.S. Const. amends. II and X *with* art. VI, cl. 2.

[2359] U.S. Const. art. II, § 2, cl. 1.

[2360] *See ante*, at 871-880.

[2361] U.S. Const. amend. II (emphasis supplied).

[2362] U.S. Const. art. IV, § 4.

[2363] *See ante*, at 890-893, 921-922, and 1038-1040, *and post*, at 1301-1307, 1451-1453, and 1497-1499.

[2364] U.S. Const. art. II, § 3.

[2365] U.S. Const. art. II, § 2, cl. 2.

United States".[2366] Even in such "Service", no "Officer[ ] of the United States" other than the President—whether of constitutional or statutory rank, and whether a civilian or a member of "the land and naval Forces"[2367]—may exercise any control whatsoever over the Militia. Moreover, as the phrase "reserv[es] to the States *respectively*" makes clear, *each State's* Militia must be commanded by *that State's* "Officers" and no one else. For, in this context, "respectively" means "[p]articularly; as each belongs to each"[2368]—and "as relating to each", and "as each refers to each in order".[2369] So, when a State's Militia is performing services for that State, or is deployed in coöperation with the Militia of one or more other States in all of those particular States' mutual interests, but not specifically "in the Service of the United States" as a whole, then no "Officer[ ] of the United States, including the President, may exercise any control whatsoever over the Militia. Even Congress is powerless to establish general rules for "governing" the Militia, whether by the President or the Militia's own "Officers", except as to "such Part of them as may be employed in the Service of the United States".[2370] And any such rules for "governing such Part" cannot license any officer of the United States, other than the President (and then only when he actually serves as "Commander in Chief"), to exercise command over anyone in the Militia, because those rules are subject to the limitation that "the Appointment of the Officers [in the Militia]" is "reserv[ed] to the States respectively".

Because from its very inception the National Guard has maintained a so-called "Federal" as well as a "State" face, embodied in a specifically "FEDERAL ENLISTMENT CONTRACT" and a specifically "FEDERAL OATH FOR NATIONAL GUARD OFFICERS" (that is, a contract with or oath to the General Government in addition to such formal commitments to the States),[2371] Americans may easily become confused as to the status of officers of the National Guard in relation to the Militia. Simply put, officers of the National Guard are not, and cannot be, "Officers" of "the Militia of the several States". *First*, the National Guard consists, not of Militiamen, but of those "Troops" which the States may "keep * * * in time of Peace" "with[ ] the Consent of Congress".[2372] The Constitution, however, "reserv[es] to the States

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[2366] U.S. Const. art. I, § 8, cl. 16 *and* art. II, § 2, cl. 1 (emphases supplied). *See ante*, at 871-880.

[2367] U.S. Const. art. I, § 8, cl. 14 *and* amend. V.

[2368] S. Johnson, *Dictionary*, *ante* note 50, definition 1 in both the First (1755) and the Fourth (1773) Editions. *Accord, Webster's Revised Unabridged Dictionary, ante* note 11, at 1227, definition 1.

[2369] *Webster's Revised Unabridged Dictionary, ante* note 11, at 1227, definition 1. Alternatively, the constitutional phrase could have been written, "reserves to the *respective* States", where "respective" would have meant "relating to [each] particular [State]". N. Webster, *An American Dictionary, ante* note 15, definition 2.

[2370] U.S. Const. art. I, § 8, cl. 16.

[2371] *See* An Act for making further and more effectual provision for the national defense, and for other purposes, Act of 3 June 1916, CHAP. 134, §§ 70, 71, and 73, 39 Stat. 166, 201.

[2372] *See ante*, at 786-793.

respectively, the Appointment of the Officers" in the Militia,[2373] not the appointment of officers for any "Troops" the States may raise in conjunction with Congress. The appointment of those officers will always depend upon the terms of "the Consent of Congress" which allows the States to "keep [those] Troops" in the first place. *Second*, from the very beginning, officers in the modern National Guard have been appointed pursuant to standards set by the General Government, not the States. Initially, some officers in the National Guard may have been commissioned solely by the States. For in 1903 Congress declared that "the regularly enlisted, organized, and uniformed active militia in the several States * * * , whether known and designated as National Guard, militia, or otherwise, shall constitute the organized militia";[2374] and in 1916, it decreed that "[c]ommissioned officers of the National Guard of the several States * * * now serving under commissions regularly issued shall continue in office * * * without the issuance of new commissions".[2375] So, in 1916, the "[c]ommissioned officers" of "the organized militia"—which up to that point was arguably still a constitutional Militia to some degree—were all presumably the products of "Appointment[s]" by the States, as the Constitution required. But that same statute required those officers, and all others to be commissioned thereafter, to take a specifically "FEDERAL OATH",[2376] and then set out particular qualifications for any future commissions: namely, that

> [p]ersons hereafter commissioned as officers of the National Guard shall not be recognized as such * * * unless they have been selected from the following classes and shall have taken and subscribed to the oath of office * * * : Officers or enlisted men of the National Guard; officers on the reserve or unassigned list of the National Guard; officers, active or retired, and former officers of the United States Army, Navy, and Marine Corps; graduates of the United States Military and Naval Academies and graduates of schools, colleges, and universities where military science is taught under the supervision of an officer of the Regular Army, and, for the technical branches and staff corps or departments, such other civilians as may be especially qualified for duty therein.
>
> * * * The provisions of this Act shall not apply to any person hereafter appointed an officer of the National Guard unless he first shall have successfully passed such tests as to his physical, moral, and professional fitness as the President shall prescribe. The examination to determine such qualifications for commission shall be conducted by a

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[2373] U.S. Const. art. I, § 8, cl. 16.

[2374] An Act to promote the efficiency of the militia, and for other purposes, Act of 21 January 1903, CHAP. 196, § 3, 32 Stat. 775, 775.

[2375] An Act for making further and more effectual provision for the national defense, and for other purposes, Act of 3 June 1916, CHAP. 134, § 73, 39 Stat. 166, 201.

[2376] Act of 3 June 1916, § 73, 39 Stat. at 201.

> board of three commissioned officers appointed by the Secretary of War from the Regular Army or the National Guard, or both.[2377]

Thus, after 1916, "the Appointment of the Officers" in what Congress called "the organized militia" was *not* "reserv[ed] to the States respectively" in the sense the Constitution employs that phrase, because the States neither settled the basic qualifications for commissions nor controlled even "the examination to determine such qualifications". From this arrangement, the only conclusion compatible with the Constitution is that, from 1916 onwards, officers of the National Guard were not "Militia" officers—which, of course, was hardly surprising, inasmuch as, from 1916 onwards, the National Guard was no constitutional "Militia" at all. *Third*, after 1916, Congress permitted officers from the regular Army to command National Guardsmen[2378]—which, of course, was entirely compatible with the status of the National Guard as "Troops" the States could "keep" only "with[ ] the Consent of Congress". *Fourth*, *if* the National Guard were, State by State, "the Militia of the several States", the States could not agree with Congress to allow Congress, the President, or some other officer of the General Government to control "the Appointment of the Officers", because the States cannot abjure the authority the Constitution explicitly "reserve[s]" to them. *Fifth*, Congress cannot grant its "Consent" to allow the States to "keep Troops, or Ships of War in time of Peace" on the condition that they allow their Militia to be commanded by officers the States themselves do not appoint. For the general rule is that public officials may not condition the grant of any benefit to a particular individual on a requirement that the recipient must waive or forfeit some constitutional right in the present or the future, or have refrained from exercising some constitutional right in the past, in order to qualify for the benefit.[2379] This rule certainly includes the explicit constitutional "reserv[ation to] the States respectively[ ] of the Appointment of the Officers [in the Militia]", which is not simply a constitutional "right", but a "power" and a "duty" as well.[2380] And this rule applies even if the benefit at issue—here, "keep[ing] Troops"—cannot properly be labeled a "right" at all, but instead is a

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[2377] Act of 3 June 1916, §§ 74 and 75, 39 Stat. at 201-202; *now codified as amended at* 32 U.S.C. §§ 305(a) *and* 307(a) and (b).

[2378] *See* Act of 3 June 1916, §§ 65, 100, and 111, 39 Stat. at 199, 208, 211.

[2379] *E.g.*, Branti v. Finkel, 445 U.S. 507, 513-516 (1980); Perry v. Sindermann, 408 U.S. 593, 597-598 (1972); Pickering v. Board of Education, 391 U.S. 563, 568 (1968); Keyishian v. Board of Regents, 385 U.S. 589, 605-606 (1967); Sherbert v. Verner, 374 U.S. 398, 403-406 (1963); Cramp v. Board of Public Instruction, 368 U.S. 278, 285, 287-288 (1961); Torcaso v. Watkins, 367 U.S. 488, 495-496 (1961); Shelton v. Tucker, 364 U.S. 479, 484-490 (1960); Speiser v. Randall, 357 U.S. 513, 518-519, 528-529 (1958); Slochower v. Board of Higher Education, 350 U.S. 551, 558-559 (1956); Wieman v. Updegraff, 344 U.S. 183, 191-192 (1952); Hannegan v. Esquire, Inc., 327 U.S. 146, 154-156 (1946); West Virginia State Board of Education v. Barnette, 319 U.S. 624, 630-631 (1943).

[2380] *See ante*, at 52-53.

mere "privilege" (in the sense of an indulgence from Congress) which negates the States' constitutional "no-right" and "duty" not to "keep Troops" at all.[2381]

4. Geographical restrictions on deployments of the Militia. The Militia of any State may be required to serve outside of that State's own territory in only two instances:

a. Congress may provide for "Part" (presumably, up to the whole) of the Militia of any State to be "call[ed] forth" for the purposes of "execut[ing] the Laws of the Union, suppress[ing] Insurrections and repel[ling] Invasions" in some other place[2382]—but, in the nature of things, any of these tasks would be performed only within or very close to the United States proper. For example, if some rogue *junta* seized control of the Mexican government and launched an "Invasion[ ]" of the United States, the Militia from one State could be called forth to "repel" the Mexican troops from American soil in another State, even perhaps to the point of advancing temporarily some little distance into Mexico in order to secure the international border. If, though, as the result of the "Invasion[ ]" Congress declared "War" on Mexico,[2383] and set about to deploy the Armed Forces into the heart of that country in order to overthrow the *junta*, the Militia could not take part in the campaign. "[R]epel[ling an] Invasion[ ]" by a foreign power and attacking the heartland of that power would both amount to participation in "War" (and in the posited case a just, and therefore constitutional, "War"). But that the Constitution explicitly permits Congress to require "the Militia of the several States" to engage only in the former action proves that Congress lacks any authority to require the Militia to participate in the latter. *Inclusio unius exclusio alterius*.[2384] Because they are the States' own governmental institutions, Congress would have no power whatsoever over "the Militia of the several States" did not the Constitution delegate it in so many words. Thus, as to that subject, the very statement of Congress's power is at once an expression of the limitations on it. In addition, the authority of the President in this regard depends entirely upon the circumscribed power of Congress. Because Congress cannot "provide for calling forth the Militia" to be "be employed in the Service of the United States" outside of the United States, the President cannot pretend that any such duty amounts to "the actual Service of the United States" as to which he may assume authority over the Militia as "Commander in Chief".

[2381] *E.g.*, Board of Regents v. Roth, 408 U.S. 564, 571 & note 9 (1972); Perry v. Sindermann, 408 U.S. 593, 597-598 (1972); Bell v. Burson, 402 U.S. 535, 539 (1971). *See* A. Corbin, "Legal Analysis and Terminology", *ante* note 23, at 167-168.

[2382] U.S. Const. art. I, § 8, cl. 15.

[2383] U.S. Const. art. I, § 8, cl. 11.

[2384] "The inclusion of one is the exclusion of the other."

b. Each of the several States may call forth her Militia for any proper purpose (including the three constitutionally enumerated ones, if Congress and the President default on their responsibilities in that regard) within her own territory. On an *ad hoc* basis, as well, one State suffering from (say) a natural disaster or industrial accident, or from a sudden attack that would justify her to "engage in War" because "actually invaded, or in such imminent Danger as will not admit of delay",[2385] may request assistance from another State, which (if that State's constitution and laws so allowed) could dispatch an appropriate part of her Militia to the stricken locality.

Such arrangements would not constitute the "Agreement[s] or Compact[s]" which "[n]o State shall, without the Consent of Congress, * * * enter into * * * with another State".[2386] For that "prohibition is directed to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States";[2387] whereas,

> [t]here are many matters upon which different states may agree that can in no respect concern the United States. * * * So in the case of threatened invasion of cholera, plague, or other causes of sickness and death, it would be the height of absurdity to hold that the threatened states could not unite in providing means to prevent and repel the invasion of the pestilence without obtaining the consent of Congress, which might not be at the time in session.[2388]

On the other hand, if these arrangements did constitute "Agreement[s] or Compact[s]", presumably Congress would extend its "Consent", as it has in the past.[2389] And in any event, although in these situations Militia "Officers" from a responding State would no doubt coöperate closely with the Militia of the State requesting their aid, they could not come under its actual command, because (as explained immediately above) "the Appointment of the Officers" in each State's Militia is "reserv[ed] to the States *respectively*".

5. Allowance for deployment of "Part" of the Militia only. That the Constitution carefully authorizes Congress "[t]o provide * * * for governing *such*

[2385] U.S. Const. art. I, § 10, cl. 3.

[2386] *See* U.S. Const. art. I, § 10, cl. 3.

[2387] Virginia v. Tennessee, 148 U.S. 503, 519 (1893).

[2388] *Id.* at 518. *Quoted with approval in* Wharton v. Wise, 153 U.S. 155, 168-169 (1894), *and in* Stearns v. Minnesota, 179 U.S. 223, 246-247 (1900).

[2389] *See* AN ACT Granting the consent and approval of Congress to an interstate compact relating to mutual military aid in an emergency, Act of 1 July 1952, Pub. L. 435, CHAPTER 538, 66 Stat. 315 (New York, New Jersey, and Pennsylvania).

Part of the[*Militia*] *as may be employed in the Service of the United States*"[2390] attests that Congress may find it "necessary and proper" in some instances "[t]o provide for calling forth [*only* a 'Part' of] the Militia" for one or another of the three constitutionally enumerated purposes.[2391] Inasmuch as the Constitution does not strictly define the term "Part", Congress must be allowed some practical discretion in applying it. Certainly, "Part" cannot refer solely to a *quantitative* selectivity, limiting its ambit simply to a "portion of the whole", such as one fourth, one third, or one half of the Militia. Except during an "alarm", when everyone capable of serving in any useful manner would likely be commanded to stand to, common sense would dictate a *qualitative* selectivity in "calling forth the Militia" for different tasks at different times and places. For example, many Militiamen of advanced years who nonetheless could effectively "execute the Laws", or even in some situations "suppress Insurrections", would not enjoy sufficient physical strength and stamina to be relied upon to "repel Invasions" mounted by crack foreign troops. So, in the case of such an "Invasion[ ]", only that "Part" of the Militia in the best physical condition (presumably, say, composed of men from eighteen to forty or forty-five years of age) would be deployed first (if possible) with other "Part[s]" brought forward only as reserves and replacements. Obviously, this type of selection—looking to the assignment to various duties of what in *pre-*constitutional times were often termed "*effective* Men"{EN-2032}—would be incorporated into Congress's exercise of its power "[t]o provide for organizing, arming, and disciplining, the Militia" from the very beginning,[2392] rather than being seized upon only as an afterthought when a crisis suddenly arose. This process would not create a so-called "select militia", membership in which was intentionally restricted to less than the *pre-*constitutional standard of "the body of the people, trained to arms",[2393] so that those not enrolled in the "select militia" would be deemed not members of the Militia at all, or members of some oxymoronic "unorganized militia". Instead, it would constitute *a selection from the Militia* for certain purposes, so that those not selected would nonetheless remain members of the Militia for all other purposes (and for those purposes as well, in an emergency).

Congress's authority "[t]o provide for calling forth [merely Parts of] the Militia"—and therefore "[t]o provide for organizing, arming, and disciplining [those Parts of] the Militia" on a qualitatively selective basis—is simply one aspect of the Second Amendment's requirement that the Militia be "well regulated" according to *pre-*constitutional principles. Flexibility in deployment is necessary, because a "*well regulated* Militia", by definition, must be capable of dealing effectively with *any*

[2390] U.S. Const. art. I, § 8, cl. 16 (emphasis supplied).

[2391] U.S. Const. art. I, § 8, cls. 18 and 15.

[2392] U.S. Const. art. I, § 8, cl. 16.

[2393] Virginia Declaration of Rights (1776) art. 13.

and every reasonably foreseeable threat to "the security of a free State". Thus, the Amendment is less a restriction on than a reiteration and reinforcement of the original Constitution in this regard. In addition, inasmuch as the Militia are "the Militia *of the several States*" first and foremost, the Amendment emphasizes that each of the States, in the exercise of her reserved powers over her own Militia, may be just as selective as Congress. Indeed, because the States' authority extends to problems of "homeland security" beyond the three the Constitution expressly enumerates, and which though of the same general types may in practice prove to be distinctly different in different States, the States' discretion in regulating their Militia so as to deal effectively with these matters must be more extensive than that of Congress.

E. Types of services revitalized Militia should provide. Against this background can be set out a survey of some of the most important of the services to be—because they must, or should, or can only be—performed by revitalized "Militia of the several States".

1. The basic components of "homeland security". In general, revitalized Militia will seek to predict and will work to prevent situations that in any way and to any degree might threaten, endanger, or compromise "homeland security" in any State and in the Union as a whole. If events of that nature prove unavoidable, the Militia will provide immediate, massive, and comprehensive responses, specifically designed for and directed to each affected Locality by citizens who reside near the scene, are intimately familiar with Local needs and resources, and have personal ties with and sympathy for Local inhabitants, institutions, customs, and ways of life. In particular—

a. Maintenance of the sovereignty, independence, and freedom of WE THE PEOPLE of every State and of the Union as a whole. Insofar as everything else in this country's system of popular self-government in future years will depend upon preserving for the American people, as "one people", "the separate and equal station" "among the powers of the earth * * * to which the Laws of Nature and of Nature's God entitle them", this category of service will include the exercise of every right and power necessary for the Militia in order

- to guarantee that no group which in any manner denies the self-evident truth "that all men are created equal" will ever exercise political authority within America;
- to "secure" the "certain unalienable Rights" with which "all men * * * are endowed by their Creator";
- if necessary, to "throw off" any purported "Government" that engages in "a long train of abuses and usurpations, pursuing invariably the same Object [which] evinces a design to reduce the[

People] under absolute Despotism", or to deprive them of their "separate and equal station" "among the powers of the earth";

- when appropriate, to "institute new Government, laying its foundation on such principles and organizing its powers in such form, as to the[People] shall seem most likely to effect their Safety and Happiness"; and, overall,

- to exercise "full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and * * * do all other Acts and Things which Independent States may of right do".[2394]

b. Execution of the laws of both the Union and the several States. This category of service will include every right and power through the exercise of which the Militia can deter, resist, and eradicate

- tyranny—the claim of every purportedly "governmental", but actually oppressive, power to which no one enjoys any legal or moral right, or the abuse of an otherwise legitimate governmental power for the private aggrandizement of the tyrant and his adherents rather than for the common good of the people;

- usurpation—the misuse of some otherwise legitimate governmental power as to which a particular actor enjoys no legal claim;[2395]

- oppression of the citizenry by rogue public officials in violation of the Constitution of the United States, the constitutions of the several States, and various statutes protecting individual liberties and other civil rights;[2396]

- corruption among rogue legislators, executive officials, bureaucrats, judges, police, and other public officeholders at every level of government;

- attacks by "terrorists", subversives, and other domestic or foreign criminal enterprises, gangs, or conspiracies working any political, economic, social, or cultural agenda; and

- ordinary domestic and international criminal commerce and activities of all kinds.

Importantly, instead of perpetuating "gun-free zones"—in which violent criminals in any of the categories just enumerated can ply their nefarious trades without fear

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[2394] Declaration of Independence.

[2395] *See, e.g.,* 18 U.S.C. § 912.

[2396] *See, e.g.,* 18 U.S.C. §§ 241 and 242. *See also* 18 U.S.C. §§ 1961 through 1963.

of encountering armed resistance from their victims—deployment of revitalized "Militia of the several States" will establish vast *zones of deterrence* which minimally rational criminals will tend to avoid, and will render those areas *zones of destruction* for perpetrators too irrational or fanatic to be deterred.

c. Suppression of insurrections and domestic violence wherever they may break out. This category of service will address overt activities, as well as conspiracies and other covert combinations, whatever their sources and composition, that aim to overthrow the General Government or the governments of the several States, or to defeat, prevent, impede, or pervert the execution of the laws, by means of mass violence. (Violence arising in the context of individual or small-scale criminal activity falls within the category of executing the laws.)

d. Repulsion of invasions in whatever form. This category of service will embrace

- attacks against the United States by foreign powers during "declare[d] War[s]"[2397] or other open hostilities of an international nature; and
- large-scale influxes and related illicit activities of aliens not lawfully entitled to enter this country, along with those individuals and institutions, public or private and foreign or domestic, who and which incite, aid, and abet such aliens, both outside as well as at and within the borders of the United States.

Even more than repulsion of open invasions by foreign powers (which the continental United States have not suffered since the War of 1812), repulsion of invasions by aliens with no even colorable claim to entry has become critically important for maintaining the sovereignty, independence, freedom, and prosperity of every State and of the Union as a whole. For America cannot remain sovereign if she cannot control her own borders and decide who is, and especially who is not, entitled to entry and residency, let alone citizenship—particularly if, because she cannot enforce her own laws as to citizenship, individuals unqualified therefor nonetheless end up voting in elections for, or even themselves serving in, high public offices.[2398] America cannot remain independent if aliens—and citizens as well—who still account themselves loyal to some foreign state can take over important segments of her economy, can gain oligopolistic control over and thus manipulate her mass media, and can intervene in her electoral and legislative processes—either quantitatively, taking advantage of their large numbers; or qualitatively, because, albeit relatively few in number, they have concentrated in

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[2397] U.S. Const. art. I, § 8, cl. 11.

[2398] *Compare* U.S. Const. art. I, § 2, cl. 2 and § 3, cl. 3, *and* art II, § 1, cl. 4 *with, e.g.,* 18 U.S.C. §§ 911 and 912.

their hands disproportionate amounts of wealth or other means of exerting influence. Thus tied involuntarily but increasingly tightly by "political bands" to one or more foreign countries and alien political systems and cultures, America can no longer enjoy "among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle" her.[2399] America cannot remain free if she becomes saturated with aliens—let alone purported citizens—who fail, neglect, or refuse master the language in which her laws and history are written and to study and adopt as their own the tenets of political philosophy and science on which her government is based—and, worse yet, who may be ideologically inimical to the fundamental political, legal, economic, and social principles on which she has always operated. And America cannot remain "one people" if huge influxes of unassimilated aliens and disloyal citizens who refuse to conform their behavior to those principles Balkanize her society. Everywhere it has taken hold, Balkanization has proven to be a dynamically destructive process that proves the truth of the old admonition, "a house divided against itself cannot stand". Once they sense themselves in the ascendency, aliens and citizens hostile to America's traditional way of life will set about to demolish every native institution that they can not or will not understand, and to replace them with new, but faulty institutions that reflect the folkways in the foreign lands to which they bear true allegiance—or perhaps will simply allow native institutions to be overthrown in a flood of political, economic, and social chaos. This intense internal dissension over and disregard of fundamental principles will deprive America, first of freedom in a vain attempt to retain security, and then of security, too.

The plain fact is that the flood of aliens now inundating the United States in blatant violation of the laws allowing for immigration has risen to such a height that only revitalized Militia could possible contain it, let alone deal with its consequences. Only the Militia could supply *para-*military and police forces of sufficient size to take control of America's borders (so as to keep aliens from crossing over illegally in the first place) and thoroughly to scour her heartland (so as to uncover the aliens who have unlawfully slipped in, and then see to it that they are thrown out). And only the Militia would be so completely organized throughout the country as to enable WE THE PEOPLE quickly and efficiently to determine who is rightfully resident in each Local community.

e. Protection of all aspects of "the general Welfare" subject to the States' Police Powers. The services in this category will be directed towards

- pandemics, epidemics, and other widespread dangerous conditions relating to public health;
- natural disasters;

[2399] *See* Declaration of Independence.

• disasters caused by some human agency, such as industrial accidents;

• famines, crop failures, and other serious shortages of basic foodstuffs;

• economic crises—of especial concern today, the social disorders and political instability that must inevitably arise out of an hyperinflationary explosion or depressionary implosion of, or other catastrophic malfunction within, America's faulty monetary and banking systems; and

• social crises—in particular, the chaos that would predictably ensue following a collapse of the Social Security System, the General Government's and the States' medical-care systems, underfunded private pension and retirement plans, and other such financially unstable entitlement schemes.

f. All permutations and combinations of the above. For example, in addition to marketing the most profitable products in modern criminal commerce, the global traffic in illicit drugs is closely tied to undeclared wars, "terrorism", political subversion, systematic governmental corruption (especially within "law-enforcement" agencies), money-laundering and other manipulations of the banking and financial systems, and illegal immigration.[2400]

2. Law-enforcement agencies to be subsumed in the Militia. In order to fulfill these tasks, upon revitalization "the Militia of the several States" will absorb all State and Local police forces, Sheriffs' departments that perform "police" functions, and other law-enforcement and kindred emergency-services and emergency-management agencies with "police" powers.[2401] New State and Local laws will stipulate that the services those forces were performing pursuant to the statutes that created them will thereafter be deemed (as rightly they should always have been deemed) Militia services, and that the personnel comprising those forces will satisfy their Militia obligations by continuing to perform those functions, and therefore will be exempted from all other Militia duties. Thus, this incorporation will define various categories of Militia services in which the personnel are differentiated from other members of the Militia by their distinctive uniforms, types and levels of training, extent and specificity of duties, and compensation and other terms and conditions of enrollment—being in such differentiation analogous to

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[2400] *See, e.g.*, Joseph D. Douglas, *Red Cocaine: The Drugging of America and the West* (London, England: Edward Harle Limited, Revised Second Edition, 1999).

[2401] Under various State and Local laws, some of the individuals in these agencies may be deemed to be public *officials*, others only public *employees*. Because which status may apply makes no difference here, they will all be treated as officials for simplicity of analysis.

specialized units such as the "Minutemen", "Rangers", and "slave patrols" that were established within the Militia during *pre-*constitutional times.

a. Nothing precludes the absorption of contemporary State and Local "law-enforcement" and kindred agencies into revitalized Militia. After all, the present hodge-podge of such agencies can claim no particular constitutional status:

(1) Although the purpose of each of these agencies is to provide some aspect of "homeland security" to the States or their Local communities, the Constitution recognizes *only* "well regulated Militia" as being "necessary to the security of a free State".[2402]

(2) Although many of these "homeland-security" forces are routinely armed, the Constitution recognizes *only* "well regulated Militia" as establishments in the several States that *must* be armed *at all times* as a consequence of their very nature. (Regular "Troops", of course, must be armed, too. But "[n]o State shall, without the Consent of Congress, * * * keep Troops * * * in time of Peace".[2403])

(3) Although many of these "homeland-security" forces are armed for the purpose of policing the general public, the Constitution recognizes *only* "well regulated Militia" as establishments that embody "the right *of the people* [*as a whole*] to keep and bear Arms".[2404]

(4) In contradistinction to its treatment of "the Militia of the several States", the Constitution does not incorporate any of these "homeland-security" forces as permanent components of its federal structure—nor could it have done so even in principle for any but one of them in 1788, because none of them other than Sheriffs or Constables (for the prime examples) ever existed as governmental officers or bodies in most jurisdictions during *pre-*constitutional times.

(5) The Constitution does not create any of these "homeland-security" forces.

(6) The Constitution does not ensure the continued existence of any of these "homeland-security" forces should the States or Local governments once have created them.

(7) The Constitution does not guarantee these "homeland-security" forces independence from the Militia by excluding or limiting to any degree the Militia's control over them.[2405]

[2402] U.S. Const. amend. II.

[2403] U.S. Const. art. I, § 10, cl. 3.

[2404] U.S. Const. amend. II (emphasis supplied).

[2405] This is in keeping with *pre-*constitutional practice. For instance, although the office of Sheriff was separate from the Militia during that era, Sheriffs exercised no power over the Militia; Sheriffs were often required to perform various of their official functions on behalf of the Militia; and the individuals who served as Sheriffs

(8) In contrast to its explicit recognition of the Militia's authority and responsibility "to execute the Laws of the Union",[2406] the Constitution extends to these modern-day "homeland-security" forces no authority or responsibility whatsoever "to execute" *any* "Laws", or even to perform any other activities. And,

(9) With the on-going erection of a National *para*-militarized police-state apparatus centered around the Department of Homeland Security, these "homeland-security" forces are being effectively removed from State and Local control and absorbed *de facto* into the General Government's table of organization, and thereby are becoming increasingly estranged in terms of control, direction, and even sympathy from the communities they are assigned to police. This obviously undermines federalism in general, because it substitutes bureaucratic centralism for democratic subsidiarity. But it is particularly dangerous because it weakens "the *security* of a free State" by depriving each State of what should be key components of her own Militia. And it threatens "the security of a *free* State" by deploying a nationwide apparatus capable of exerting police-state controls "from the top down" to the level of mere neighborhoods.

b. On the other hand, basic "police" functions should largely be the prerogatives of revitalized Militia, for at least three reasons:

(1) As a matter of law, the Constitution declares the Militia—and *only* the Militia—to be "necessary to the security of a free State".[2407] "[T]he state has no more important interest than the maintenance of law and order".[2408] The Constitution delegates to "the Militia of the several States"—*and to the Militia* ***alone***—the explicit responsibility and authority "to execute the Laws of the Union" and "suppress Insurrections", when "call[ed] forth" for those purposes.[2409] In addition, the Constitution imposes on the President of the United States the duty to "take Care that the Laws be faithfully executed"[2410]—for the achievement of which purpose it designates him as "Commander in Chief * * * of the Militia of the several States, when called into the actual Service of the United States",[2411] thus inextricably linking the President's duty with the Militia's authority. This same authority for law enforcement must reside in the Militia in each State and Locality, under those "Officers" whose "Appointment" the Constitution "reserv[es] to the

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were often not even exempted, in deference to their offices, from performing normal Militia duties in their own persons. *E.g., see ante*, at 113-116 (Rhode Island) and 319-328 (Virginia).

[2406] U.S. Const. art. I, § 8, cl. 15.

[2407] U.S. Const. amend. II.

[2408] Sterling v. Constantin, 287 U.S. 378, 399 (1932).

[2409] U.S. Const. art. I, § 8, cl. 15.

[2410] U.S. Const. art. II, § 3.

[2411] U.S. Const. art. II, § 2, cl. 1.

States respectively",[2412] because the Second Amendment declares that "[a] well regulated Militia" is "necessary to the security of a free State", a responsibility for the fulfillment of which the Militia must wield sufficient authority in every place to which their jurisdiction may extend.

(2) As a matter of practicality, revitalized Militia can be expected to perform basic "police" functions more satisfactorily than the contemporary hodge-podge of forces assigned those tasks. This, primarily, because contemporary State and Local law-enforcement and emergency-response agencies are relatively small, élitist units the few members of which simply cannot be everywhere at once, and usually (albeit not necessarily through any fault of their own) are absent when and where the most urgent needs for their presence suddenly arise. Revitalized Militia, conversely, will mobilize *huge* numbers of eyes and ears throughout their communities at all times. Being members of Militia Companies, residents of or workers in various areas will have been trained in basic law-enforcement and emergency-response techniques. Almost always on or very near the scenes of potential operations, they will be able to perform more and more useful surveillance than typical modern police units, because they will enjoy direct access to more, better, and (perhaps most importantly) more timely information, the significance of which they will be in particularly advantageous positions to understand and put to good use.

The dispersion of Militiamen throughout each Local community will inevitably enhance deterrence of *anti*-social behavior. And where deterrence fails, criminal activity will be subject to early detection and effective suppression. With Militiamen essentially everywhere, many criminal acts in preparation or actual perpetration will be observed immediately. Because Local residents or workers not only will know one another, but also will have been trained to be on the lookout for strangers generally and for aberrant behavior in particular, many perpetrators will likely be identified shortly after committing their crimes. If they are not, dragnets with exceedingly fine meshes will be thrown over large areas in little time, because *every* Militiamen will be authorized and at least minimally trained to exercise normal "police" powers to stop, question, search, and if necessary arrest suspicious characters.

Moreover, with the regular Militia performing these duties, the specialized Militia in formal law-enforcement and kindred units can be assigned to detective work, forensics, and other tasks that require the kind of extensive training, experience, and concentrated effort that cannot be expected, let alone demanded, of the vast majority of ordinary Militiamen.

(3) As a matter of fundamental political principles, an observation which has sounded from the very inception of professional police forces in America in the

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[2412] U.S. Const. art. I, § 8, cl. 16.

middle of the Nineteenth Century[2413]—and that takes on ever more cogency and urgency as they become increasingly nationalized, centralized, and *para*-militarized under color of providing "homeland security"—is that such forces are not just akin to, or adjuncts of, but even amount to manifestations of, "standing armies".[2414] The Second Amendment declares "[a] well regulated Militia * * * necessary to the security of a free State", because the Founding Fathers very well understood that, in the final instrumental analysis, "'[p]olitical power grows out of the barrel of a gun'",[2415] and that therefore "[i]t is against sound policy for a free people to keep up large military establishments and standing armies in time of peace, both from the enormous expenses with which they are attended and the facile means which they afford to ambitious and unprincipled rulers to subvert the government or trample upon the rights of the people".[2416] The Militia constitute the ultimate constitutional "checks and balances" against "standing armies". Therefore, the *only* way to forefend the danger that professional police forces will become, or will misbehave in the manner of, "standing armies"—while at the same time Americans can fully avail themselves of the useful services such specially trained forces can provide—is to incorporate all State and Local law-enforcement agencies into the Militia, where in light of their purpose they inherently belong.

Even if professional law-enforcement agencies were never to degenerate into "standing armies", in their present forms they would nonetheless constantly pose a distinct threat to "the security of a *free* State". If tyranny ever fastens itself upon America, it will arrive in the form of a "police state". The essence of a true "police state" lies in its officials' pretensions to total control over all aspects of the political, economic, social, and even cultural activity within the territory they administer. In service of their delusions of omnicompetence—for totalitarianism, or as it is often euphemistically expressed, "central planning", is nothing if not a psychopathic state of mind—they arrogate to themselves the worldly omnipotence of arbitrary power: superseding self-government of, by, and for the people with government over and against the people, administered by self-selected, self-appointed, and self-perpetuating élitists. Such individuals do not "exercise just powers", where the adjective "just" refers to "conform[ity] to rectitude or justice", "to the truth of things", and "to reason",[2417] as well as "to the divine will",[2418] under the aegis and constraints of "the Laws of Nature and of Nature's God".[2419] Rather, they "just

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[2413] *See, e.g.,* D. Sklansky, "The Private Police", *ante* note 844, at 1206-1207.

[2414] *See, e.g.,* C. Morris & B. Vila, *The Role of Police in American Society*, *ante* note 534, at 25.

[2415] *Quotations From Chairman Mao, ante* note 28, at 61.

[2416] J. Story, *Commentaries on the Constitution*, *ante* note 576, Volume 2, § 1897, at 646.

[2417] *Webster's Revised Unabridged Dictionary, ante* note 11, at 806, definitions 1 and 2.

[2418] N. Webster, *An American Dictionary, ante* note 15, definitions 5 and 6.

[2419] *See* Declaration of Independence.

exercise powers", where the adverb "just" imports "merely",[2420] implying the absence of any perceived requirement of "conform[ity] to rectitude or justice", "to the truth of things", "to reason", "to the divine will", or to any law higher than the vicious appetites of their practitioners. These, then, are powers the mere exercises of which purport reflexively to supply their own justifications under the doctrines of "might makes right" and *"l'étât c'est moi"*. Although oblivious to the consent of the governed, these totalitarians are obsessed with the obedience of the governed. To that end, they build up an apparatus of psychic and physical superordination (for them) and subordination (for everyone else). Because a perfectly foolproof mechanism of control requires omniscience with respect to all of the possible variables that may affect its operation, a thoroughgoing "police state" first establishes—and then expands and improves to the limits of the available manpower and technology—constant, comprehensive surveillance of the population, in order to ferret out every manifestation of opposition, no matter how apparently trivial. Then, to compel the masses to conform to the three foundational rules of subservience under totalitarianism—*"Know your place! Do as you are told! Keep your mouth shut!"*—the totalitarians apply four techniques to perpetuate their dominance: *fraud, favor, fear, and force*. *Fraud* always ranks first in the litany of oppression, because people steeped in official misinformation and disinformation, and otherwise deprived of reliable information, cannot come even to conceive of and understand their predicament, let alone devise some solution for it, and therefore are relatively easy to control. On such a politically lobotomized populace, the crude behaviorism of "stimulus and response" proves quite effective. *Favors* shrewdly dispensed induce some to become the régime's willing servitors in the commission of any crime against their fellow countrymen. But such largesse must be strictly limited, because the ultimate purpose of centralizing all power in a totalitarian state is not to allow society to disseminate wealth fairly among the vast majority of its members through the free market, but instead to concentrate most wealth in as few hands as possible through bureaucratic governmental "planning". What totalitarians always have in excess, capable of being spread around, is *fear*. Indeed, fear must inevitably be emphasized and employed universally, because even those in temporary favor must constantly be reminded of the precariousness of their privileges. Chronic, gnawing fear soon instills in all but the hardiest souls the realization that *the quiet enjoyment of your life—and even your life itself—depend upon living your life only as **they** want you to live it*; the resignation that *there is no way to live your life other than **their** way*; and the negation of any hope ever to discover any way to escape from ***them***. Finally, to render fear effective in the event that some people, fired by determination born of desperation, openly resist the régime, overwhelming *force* must be at hand—a brutal *para*-military police apparatus in every Locality,

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[2420] *Webster's Revised Unabridged Dictionary, ante* note 11, at 806, definition 3.

backed up by a large "standing army" which will shrink from no atrocity in "pacification" of an unruly populace. Of course, a case-hardened "police state" does not emerge from the furnace of history all at once. The people's own apathy, sloth, and ignorance pave the way for gradual inroads and restrictions on self-government. Repression of dissent then escalates, so that the few people still committed to a free society cannot organize for the restoration of self-government. Finally, oppression becomes the permanent way of life for the common man.

Self-evidently, a "police state" is the veriest opposite of a "free State". And—given that "a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state"[2421]—*if the Militia **are** the police, then a "police state" is impossible*. If the Militia are *not* the police, though, then the impossible becomes, not only possible, but even more than likely.

The bases for these conclusions should be obvious from most Americans' everyday experiences. A free society begins its transmogrification into a "police state" when those individuals regularly performing police functions degenerate into, then affirmatively assert themselves as, a group distinct and separate from, independent of, superior to, entitled to act with supercilious disdain towards, and even in an aggressively antagonistic position as against WE THE PEOPLE. They may work and even live *in* the community, but are neither *of* it nor *for* it. Rather, they conceive of themselves as set *over* the community—after all, they constitute "law *enforcement*"—forgetting that THE PEOPLE, under "the Laws of Nature and of Nature's God", are the source of law, that the purpose of law is to serve THE PEOPLE, and that therefore "law enforcement" must be subordinate to the will and welfare of THE PEOPLE. (And if significant amounts of their funding, equipment, and training come, not from the Local community, but instead from some other jurisdiction, their alienation from and disregard for the community can only intensify.) All too soon, such rogue police officers take to holding THE PEOPLE in contempt—adopting all of the disreputable and dangerous attitudes and practices Hamlet summarized in the phrase "the insolence of office".[2422] In their eyes, THE PEOPLE are not to be served, but instead controlled, by whatever means may prove expedient. All too soon, "the insolence of office" metastasizes into what Hamlet called "[t]h' oppressor's wrong": systematic bullying, harassment, and outright "police brutality". If THE PEOPLE resist this mistreatment (or even openly resent it), the police (echoed by their touts and apologists) denounce the most vociferous critics as potentially violent "extremists" and even "terrorists"—thus concocting the rationale for importuning legislators and judges to expand their powers of search, seizure, arrest, and interrogation; to provide them with heavy equipment for SWAT

[2421] Virginia Declaration of Rights (1776) art. 13.

[2422] William Shakespeare, *The Tragedy of Hamlet, Prince of Denmark*, Act III, Scene 1.

and "*anti*-terrorist" teams; to grant them immunities from lawsuits for violations of individuals' civil rights; and to impose ever-expanding "gun controls" on so-called "civilians". Inevitably, as justified hostility among the general public boils over, the police openly emerge as THE PEOPLE'S political enemies. At that point, official oppression, repression, and suppression of THE PEOPLE—without the possibility of redress in the kangaroo courts—become the order of the day. Whether this particularly benefits the police themselves, or primarily the factions and special-interest groups for which they function as mere myrmidons, the effect on THE PEOPLE is the same. Ordinary Americans are reduced from sovereigns to subjects—the degree of their subjection determined by their exploiters' amorality, arrogance, avarice, and appetite for abusive authority.

Conversely, when the Militia are the police, the first step in this descent into barbarism cannot be taken. Under those circumstances, the interests of the police will always coincide with the interests of THE PEOPLE, because the police and THE PEOPLE will be the selfsame individuals. And, in any event, the behavior of particular police officers will always be made to serve THE PEOPLE, because that behavior itself will be continually monitored "from the bottom up" by THE PEOPLE themselves. Having been absorbed into specialized units of the Militia, police personnel will be subject to continuous supervision and discipline by members of the Militia *outside of those units*. In that event, they will be unable to imagine for one instant that if they abuse their law-enforcement authority they will nevertheless enjoy immunity from exposure and punishment through the connivance of some "good old boy" network within the dark recesses of their Local or State government. This, because although each law-enforcement agency will organize its own specialized Militia Companies in which its personnel will be enrolled for the particular purposes of that service, the members of those specialized Companies will also be required to retain their enrollments in the regular Local Militia Companies in their own neighborhoods to which they otherwise would have been assigned as rank-and-file members of the Militia—and thereby will remain answerable to the members of those regular Companies for their behavior in their specialized capacities as law-enforcement officers. Any rogue policeman who steps even a single Ångstrom Unit out of line in his capacity as a policeman will have to answer to his friends, neighbors, and co-workers in his and their capacities as members of some Local Militia Company invested with the authority to commence disciplinary proceedings against him.[2423] Under these reforms, the modern scourge of "police brutality" will largely end, because by savaging one member of the community a rogue law-enforcement officer will be ensuring inquiry, exposure, and condemnation by everyone in his Local Militia Company, and then swift, sure, and severe punishment pursuant to Militia regulations. Similarly, the blight of "police

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[2423] *See ante*, at 956-963.

corruption" will largely disappear as well, because to ensure the success of a scheme to suborn key law-enforcement officers a criminal will have to bribe not just a few members of the relevant special unit, but also almost everyone in the various Local Militia Companies to which those members will be required to report.

Thus, *Local* policing of the community, ***with* Local *policing of the police***, by *Local* people in *Local* Militia units will thwart the development of a "police state" at the very point at which "police-state" tactics must be applied if they are to be effective. In no way can WE THE PEOPLE be sure to remain self-governing sovereigns, other than to scotch the snake when and where it first slithers, and before it strikes. For if THE PEOPLE are permanently to exercise political power as sovereigns—if "'[p]olitical power grows out of the barrel of a gun'"[2424]—and if in any community the first use of the gun with ostensible legal authority will usually be by the police—then THE PEOPLE themselves through their Militia must *be* the police, so that THE PEOPLE themselves will always control that first use of the gun, and thereby retain every scrap of "'[p]olitical power [that] grows out of [its] barrel'".

3. The Militia to investigate the constitutionality of the laws they execute. The authority and responsibility "to execute the Laws of the Union"[2425]—and, inasmuch as the Militia are "the Militia of the several States", the laws of the States, too—would be next to useless if the Militia had no recourse other than to rely in the manner of automatons on sources outside of themselves to know what "the Laws" supposedly were and how to execute them. Certainly, the Militia cannot be required to accept as final and binding the mere opinions of public officials on these matters, because the Militia might be called upon "to execute the Laws" against those very officials, who undoubtedly would misadvise the Militia that under some artful misconstructions "the Laws" did not proscribe, but rather permitted, protected, and empowered even the worst of rogue officials to perpetuate and profit from their own misbehavior.

First and foremost among "the Laws of the Union" that the Militia may be "call[ed] forth to execute" must be the Constitution itself. For, inasmuch as the validity of all other "Laws" depends upon their strict satisfaction of constitutional standards, whether and how to execute any "Law[ ]" always involves (or at least should involve) a preliminary assessment of that "Law['s]" constitutionality. In particular, "[a] well regulated Militia" will not prove "necessary to the security of a free State" if it unthinkingly executes purported "Laws" that, perforce of their unconstitutionality, are no "Laws" at all.[2426] Surely a State cannot claim to be

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[2424] *Quotations From Chairman Mao, ante* note 28, at 61.

[2425] U.S. Const. art. I, § 8, cl. 15.

[2426] *Contrast* U.S. Const. amend. II *with, e.g.,* Norton v. Shelby County, 118 U.S. 425, 442 (1886); Huntington v. Worthen, 120 U.S. 91, 101-102 (1887); *and Ex parte* Siebold, 100 U.S. 371, 376-377 (1880), *quoted with approval in* Fay v. Noia, 372 U.S. 391, 408 (1963).

"free"—or even rationally ordered—when those who enact her supposed "Laws" do so in violation of her own "supreme Law of the Land",[2427] and then disingenuously demand that their phony "Laws" be enforced by the very parties whom that "supreme Law" has explicitly designated as its executors. And surely a Militia cannot claim to be "well regulated" if it purports to perform its constitutional responsibilities in open violation or careless disregard of the very charter which assigns them. Therefore, the Militia of each State should establish a "Committee of Constitutional Inquiry and Compliance" (under that or some other suitable designation) in order to determine—independently, by and for the Militia itself—the constitutionality *vel non* of whatever purported "Laws" the Militia might be called forth to execute.

Although this body should include some members specifically trained in the law (of whom the Militia in any reasonably populated region will doubtlessly suffer no dearth), it should be composed primarily of laymen, serving by regular rotation, because WE THE PEOPLE intended the Constitution, not just at its inception but for all time thereafter, to be understood and applied by ordinary Americans in their every exercise of popular sovereignty and self-government. For example, conscientious voters will always decide upon the qualifications of candidates for public office by themselves assessing the compliance of those candidates' platforms, promises, and performances with the Constitution. For voters who do any less are in effect playing Russian roulette with the ballot box, particularly when the candidates are contending for high offices upon the proper administration of which America's very survival might depend. Similarly, conscientious jurors in criminal cases—which may pit the full force of the government against a solitary individual—will always render verdicts based upon their own judgments as to the constitutionality, and the justice under "the Laws of Nature and of Nature's God", of the statutes and applications thereof at issue before them.[2428] For jurors who

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[2427] U.S. Const. art. VI, cl. 2.

[2428] This was the law of jurors' authority at the time of ratification of the Constitution. Even in a civil case in which "arises * * * any difficult matter of law", "the jury may, if they think proper, take upon themselves to determine, at their own hazard, the complicated questions of fact and law". W. Blackstone, *Commentaries on the Laws of England, ante* note 142, Volume 3, at 377-378. And in a criminal case,

> the [old] practice * * * of fining, imprisoning, or otherwise punishing jurors, merely at the discretion of the court, for finding their verdict contrary to the direction of the judge, was arbitrary, unconstitutional, and illegal * * * and is treated as such * * * two hundred years ago * * * [.] For * * * it would be a most unhappy case for the judge himself, if the prisoner's fate depended upon his directions:—unhappy also for the prisoner; for, if the judge's opinion must rule the verdict, the trial by jury would be useless.

Id., Volume 4, at 354-355. So, in *Georgia* v. *Brailsford*, an early civil trial conducted within the original jurisdiction of the Supreme Court, the following instruction was given to the jury:

> It may not be amiss, here, Gentlemen [of the jury], to remind you of the good old rule that on questions of fact, it is the province of the jury, on questions of law, it is the province of

supinely accede to judges' instructions on the law are in effect denying individual defendants a "trial *by jury*" and, worse yet, depriving the entire judicial system and the country it serves *pro tanto* of the "checks and balances" that independently minded jurors can throw up against errant and arrant judges and prosecutors. So, too, conscientious Militiamen will always "execute the Laws" according to their own determinations of what "the supreme Law of the Land" requires or allows. For Militiamen who mechanically "follow orders"—even from the President as their ostensible "Commander in Chief"—are not "execut[ing] the Laws" as *they* understand them, in keeping with *their own personal* "Oath[s] or Affirmation[s], to support th[e] Constitution",[2429] but only accepting *someone else's* perhaps fallible, perhaps fatuous, perhaps even knowingly false opinion as to what "the Laws" may be. Surely neither voters, nor jurors, nor least of all Militiamen should neglect or

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> the court to decide. But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy. On this, and every other occasion, however, we have no doubt, that you will pay that respect, which is due to the opinion of the court: For, as on the one hand, it is presumed, that juries are the best judges of facts; it is, on the other hand, presumable, that the court are the best judges of law. But still both objects are lawfully, within your power of decision.

3 U.S. (3 Dallas) 1, 4 (1794) (Jay, C.J.). Shortly thereafter, even the infamous "Sedition Act" provided "[t]hat if any person shall be prosecuted under this act, * * * the jury who shall try the cause, shall have a right to determine the law and the fact, under the direction of the court, as in other cases". *An Act in addition to the act, entitled "An Act for the punishment of certain crimes against the United States"*, Act of 14 July 1798, CHAP. LXXIV, § 3, 1 Stat. 596, 597. And the power "to determine the law as well as the fact[s]" being a matter of the very definition of a "jury" in Anglo-American law for generations then past—as the Court in *Brailsford* described it, "the good old rule"—it could be changed thereafter only by a constitutional Amendment. Which points up the wisdom in Blackstone's admonition, that

> the more [trial by jury] is searched into and understood, the more it is sure to be valued. And this is a species of knowledge most absolutely necessary for every gentleman in the kingdom: as well because he may be frequently called upon to determine in this capacity the rights of others, * * * as because his own property, his liberty, and his life, depend upon maintaining, in it's legal force, the constitutional trial by jury.

Commentaries on the Laws of England, Volume 3, at 350-351. To be sure, this matter has long been controversial. *Contrast, e.g,* Sparf and Hansen v. United States, 156 U.S. 51, 52 (1895) (Harlan, J., for the Court), *with id.* at 110 (Gray, J., dissenting). And the erroneous view of such as Justice Harlan appears to have prevailed today (at least among the practitioners and proponents of judicial imperialism) in the denigration as "jury nullification" of the right of jurors to decide both the facts and the law. Yet nothing in legal principle precludes WE THE PEOPLE collectively, as America's supreme lawgivers, from returning this country to the constitutionally correct rule as enunciated by Justice Gray. For "neither the antiquity of a practice nor * * * steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack". Williams v. Illinois, 399 U.S. 235, 239 (1970). *See generally* Clay S. Conrad, *Jury Nullification: The Evolution of a Doctrine* (Durham, North Carolina: Carolina Academic press, 1999). Neither does anything in legal practice preclude WE THE PEOPLE individually, as actual jurors, from concluding in a criminal case that a "reasonable doubt" of a defendant's guilt exists, or from finding in a civil case that the plaintiff has not adduced a "preponderance of the evidence", whenever the purported "law" being applied appears to be unconstitutional or otherwise unjust. For no juror can ever be required to justify or even to explain his belief that a "reasonable doubt" exists or that a "preponderance of the evidence" is absent. After all, "[f]reedom to believe * * * is absolute". Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[2429] U.S. Const. art. VI, cl. 3.

refuse properly to perform their duties on the plea that the Constitution is too difficult for them to understand, or that they are too lazy to try to understand it, or that they may simply abdicate their own responsibilities by conforming their conduct to the unverified opinions of others willy-nilly. For, although they repeatedly elect the people who make this country's laws, voters labor under no constitutional duty to vote—yet no one would concede that they lack at least a political and moral obligation to educate themselves as to the candidates' (de)merits before casting their ballots. And although they decide who may have broken the laws, and are required to serve for that purpose, in the course of their lives particular jurors typically sit for only a very few cases involving a very small number of defendants—yet no one would contend that therefore none of them need consider consequential a breach of his duty to judge the law in any one case. In contrast, Militiamen labor under a constitutional duty "to execute the Laws" at any time, possibly against very large numbers of adversaries, and always in such a manner as to preserve "the security of a free State"—so no one could possibly conceive of any situation in which their neglect, let alone refusal, properly to execute the Constitution in the course of executing any other "Laws" could be excusable. And because properly executing the Constitution self-evidently requires properly understanding the Constitution, no one could possibly conceive of any justification for Militiamen to remain ignorant of what "the supreme Law of the Land" truly means, when they could easily overcome such ignorance through their own individual and especially collective efforts.

"Committees of Constitutional Inquiry and Compliance" will compel Militiamen in large numbers to educate themselves on the most important of all political subjects. Then the Committees' work will bring about the enlightenment of many others—for as Militiamen study the Constitution they will inevitably pass on their knowledge to those around them. This will usher in a veritable renaissance of constitutionalism, because once people actually understand how the Constitution secures their political liberties and economic prosperity, and why the efficacy of the Constitution depends upon their own efforts, they will demand and see to its strict enforcement in both letter and spirit. This will have two salient results. *First*, subversive political propagandists and agitators will no longer easily gull Americans in significant numbers. *Second*, routinely subjecting the words and deeds of public officials to close constitutional scrutiny will innoculate Americans against mentally and morally degenerating into zombies of authoritarianism, always ready to obey the orders of some supposed "superiors". The importance of this cannot be overemphasized. For, to succeed in their schemes, aspiring usurpers and tyrants, themselves always few in number, must recruit numerous "enforcers" to impose their wills on the people. To recruit enough actual "enforcers", they must appeal to even more "believers" who can be deluded, or will delude themselves, into accepting usurpation and tyranny as somehow "legitimate". But inasmuch as *all* usurpation

and tyranny violate the Constitution, and are therefore patently illegitimate, popular education and vigilance in constitutional matters will radically reduce the set of potential "believers", and even more the set of potential "enforcers", thereby rendering usurpation and tyranny highly unlikely to gain any foothold in this country.

4. The Militia to supervise honest elections. For the Militia "to execute the Laws", there must be "Laws" that sometimes may require the Militia's "execut[ion]"—and therefore lawmakers and other public officials to enact and administer those "Laws" in the first instance. Rather than themselves participating in direct democracy of the "town-meeting" variety, WE THE PEOPLE throughout America typically elect legislators and most other officials as their representatives. This, because every State must have "a Republican Form of Government";[2430] and, according to American political science, "[a] republic" is "a government in which the scheme of representation takes place".[2431] Obviously, however, "a Republican Form of Government" does not exist if those who pass for "THE PEOPLE'S representatives" have not in fact been fairly chosen by THE PEOPLE at all, but instead have insinuated themselves into office despite THE PEOPLE'S true desires by means of electoral dirty tricks.

Josef Stalin was acutely aware that who is allowed to vote in an election is not as important as who counts the votes, and how.[2432] But he was not the only political gangster in modern times who translated that insight into an effective program for rigging elections. Sadly, electoral fraud has long been and even now remains endemic throughout America, at every level of the federal system. Typically, schemes to steal elections can involve simply the employment of fictitious "voters"; the fraudulent counting of paper ballots or the stuffing of ballot-boxes; or the use of rigged voting machines operated at the electronic intersection of political and corporate crime.[2433] But whatever their provenance and form, all such schemes must be stamped out.

After the Constitution itself, "the Laws" providing for honest elections are arguably the most important. For no "free State" is possible where purported public

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[2430] U.S. Const. art. IV, § 4.

[2431] *The Federalist* No. 10 (James Madison). No reason can be found in political or legal theory why "a Republican Form of Government" could not function as a "town meeting", in which each individual actually represented himself. The problem with such an arrangement is merely practical: namely, how in most jurisdictions to accommodate the very large numbers of individuals who would have a right to participate in the process.

[2432] *See, e.g.,* Nikolai Tolstoy, *Stalin's Secret War* (New York, New York: Holt, Rinehart and Winston, 1982), at 29.

[2433] *See, e.g., Hacked! High Tech Election Theft in America*, Abbe W. DeLozier & Vickie Karp, Editors (Austin, Texas: Truth Enterprises Publishing, 2006); Richard Hayes Phillips, *Witness to a Crime: A Citizens' Audit of an American Election* (Rome, New York: Canterbury Press, 2008); John Fund, *Stealing Elections: How Voter Fraud Threatens Our Democracy* (New York, New York: Encounter Books, Second Edition, 2008).

officials are nothing more than usurpers from the onset, because they have been fraudulently elected. So seeing to it that the election "Laws" are properly "execute[d]" should be the province of the Militia, too. Actually, delegating to the Militia the responsibility to oversee elections is the most feasible means to guarantee that they are conducted honestly. *First*, with the large numbers of Militiamen available in any jurisdiction, votes can be counted by hand and eye without the use of machines, not only quickly but also redundantly so as to ensure accuracy. *Second*, because service in polling places during each election can be assigned by lot according to some system of rotation among the entire body of the Militia, it will be virtually impossible to suborn the individuals selected at any one time, inasmuch as no one will know whom to suborn until the last minute, too many will need to be suborned to falsify the count, and in any event so many will be checking on what others are doing that no attempts at falsification will pass undiscovered—or, when discovered, will escape unpunished. *Third*, the Militia can devise methods of identifying eligible voters and collecting, counting, and verifying their votes that will be safe from tampering. For example, lists of registered voters can be checked and double-checked by members of Militia Companies specially assigned to that duty—first, in the course of attending regular meetings of their Companies, and then by going door-to-door in their own neighborhoods, where every resident is likely to be known by someone. The ballot could consist of an integrated set, consisting of an original and three copies, uniquely serially numbered. After being marked by the voter, the original would be turned in to be counted by the first team of tabulators, and then stored for the period of time corresponding to the statute of limitations for judicial challenges to the election. Two copies would be turned in to be counted separately by the second and third team of tabulators, for confirmation. The remaining copy would be retained by the voter. The votes would be counted immediately upon closing the polls, and the results tabulated and announced as soon as possible. In addition, within some statutorily fixed number of days following the election, data taken from each ballot cast in each polling-place would be posted there, in order of serial number, showing the votes recorded for each candidate, referendum issue, and so on, so that each voter could personally verify that his own votes had been correctly tabulated and counted, and so that all voters and other interested persons could assure themselves that the totals for all ballots had been correctly summed. Thus, as each voter finished checking the final results, there would have been *four* separate counts, the last of them made by the individuals most personally interested in an accurate tabulation. Each voter would then have some statutorily fixed number of days to protest the counting of his own votes (using his copy of his ballot and his own testimony as evidence). And finally the results would be certified (subject to any later judicial challenges) a few days after the period for such protests ended. Simple, effective, and nearly foolproof—but, of course, dependent upon having the manpower of the Militia available to register voters and count their votes, the training of the Militia to oversee the process, the discipline

of the Militia to detect and crack down on any attempts at fraud, and the commitment of the Militia to supply the security necessary to preserve "[a] Republican Form of Government" for "a free State".

5. The Militia's authority and ability to serve as the locus and the means for the institution of a sound currency. The point of "[a] Republican Form of Government"—indeed, of *all* "Governments * * * instituted among Men, deriving their just powers from the consent of the governed"—is "to secure" everyone's "unalienable Rights", among which are "Life, Liberty and the pursuit of Happiness".[2434] "[T]he pursuit of Happiness" depends upon the ability of ordinary people to avail themselves of every advantage offered by both political and economic freedom. So "the security of a free State" must include *economic* as well as political security.

a. Political science has traditionally denoted the power to provide *political* "homeland security" as "the Power of the Sword", because "'[p]olitical power grows out of the barrel of a gun'".[2435] This is the power of government to "provide for the common defence" against enemies both foreign and domestic, without the successful exercise of which WE THE PEOPLE could not hope to "establish Justice" and "secure the Blessings of Liberty to ourselves and our Posterity".[2436] The power to provide *economic* "homeland security" political science has traditionally located within "the Power of the Purse", which includes the powers of government to tax, to spend, and to authorize for official use the particular money in which taxes will be assessed, public funds expended, and justice dispensed in the courts, so as to "promote the general Welfare".[2437] In fact, to a large degree *economic* "homeland security" and "the general Welfare" could be taken as synonymous or largely coincident. Moreover, economic "homeland security" is closely linked with *social* "homeland security", because the preservation of "domestic Tranquility" depends upon the promotion of "the general Welfare", too.[2438]

Of crucial importance, the Power of the Purse and the Power of the Sword are intimately interrelated, because economic power grows out of political power, or at least depends upon political power for its protection—and, therefore, just as "'[p]olitical power grows out of the barrel of a gun'" in the first instance, so too does economic power in the final analysis. To maintain economic power in WE THE PEOPLE'S own hands requires WE THE PEOPLE'S retention of political power in their own hands, and then their application of that power in aid of their own economic

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[2434] Declaration of Independence.

[2435] *Quotations From Chairman Mao, ante* note 28, at 61.

[2436] U.S. Const. preamble.

[2437] U.S. Const. preamble *and* art. I, § 8, cl.1.

[2438] *See* U.S. Const. preamble.

"homeland security". Within any society, after all, "the economy" is not simply an aggregation of transactions among otherwise isolated individuals and private organizations that have no collective significance other than their coincidental occurrences in time and space. Rather, it is a complex system of mutual coöperation that results in all sorts of interdependencies among its participants. Moreover, "the economy" exists only because and to the extent that society protects it politically. For example, in America a "free-market economy" depends upon specific legal guarantees for "private property" (from theft) and for "contracts" (from fraud). If public officials were to allow transactions that partook of theft and fraud to become commonplace, "the economy" would no longer be a "*free-market* economy". Neither would a society tolerating such misbehavior long remain stable. For a polity which licensed theft and fraud would hardly "establish Justice", and in the absence of "Justice" could never hope to preserve its "domestic Tranquility".

Under the division of labor and the rule of constitutional law established in America, each working individual—whether in the field, the shop, the factory, the office, or the home—contributes some part to the successful operation of the economic system as a whole. Yet, in almost every case, each individual receives more extensive benefits from his participation within that system than he could ever receive from the same level of personal effort without it. In that regard, "the whole is greater than the sum of its parts". And to compensate society for the unmerited benefits he receives from it, each individual must, as a matter of justice, fulfill various moral, political, and legal obligations of social solidarity—foremost of which is never to endanger, and wherever possible to advance, "the *common* defence" and "the *general* Welfare" through his own actions. This obligation does not subordinate the individual to society, but instead perfectly incorporates him within it. For if an individual desires fully to participate in society, he must partake not only of the rights it offers, but also of the duties its proper functioning imposes. Of course, this is not to contend that Americans will never disagree as to exactly what constitutes "the common defence" and "the general Welfare" at any particular historical juncture. But if honest disagreements do arise, the disputants will have an obligation to compose them in some rational fashion, precisely in order to achieve "the *common* defence" and "the *general* Welfare".

b. Specifically, in a society operating according to the principles of the free market, in which the prices of all goods and services are denominated in monetary units, economic "homeland security" depends upon *economically and politically sound* money. For the free market cannot function without rational economic calculation.[2439] And economic justice in a truly *free* market requires that everyone

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[2439] *See, e.g.,* L. von Mises, *Human Action, ante* note 1950, Chapter XXVI. *See also idem, Socialism: An Economic and Sociological Analysis*, J. Kahane, Translator (London, England: Jonathan Cape, New Edition, 1971).

participating in the market should receive remuneration according to the *real* value of the services he has rendered.[2440] But neither rational economic calculation nor economic justice is possible without a medium of exchange consisting of some valuable commodity the supply of which is tied directly to the workings of the market, with as little manipulation of that supply as possible by rogue public officials, speculators, or other selfish special-interest groups. (The qualification "as little . . . as possible" takes into account the historical record of ingenuity on the part of those miscreants in public office, private banking, and the underworld of financial speculation who have been ever eager and often able to subvert monetary systems for their personal gain at society's expense.) This, however, demands that *WE THE PEOPLE themselves, through reliance on the market and restrictions on their government, hold control over money firmly in their own hands*.

Historically, silver and gold have always proven to be the best commodities to use as money, because they are uniquely suited to perform the three functions of media of exchange: namely, (i) as *units of value*—for silver and gold coins and ingots are composed of known, fixed, and reproducible weights of elemental metals; (ii) as *measures of value*—for the free market can always determine rates of exchange between every nonmonetary good and service and either silver (under a monometallic "silver standard"), or gold (under a monometallic "gold standard"), or both (under a duometallic system in which one metal is the "standard" and the other metal takes its value in terms of the "standard" from the free-market rate of exchange between the two); and (iii) as *stores of value*—for over great expanses of time, throughout the world, silver and gold have always held their purchasing powers better than any other media of exchange.[2441] This is why the Constitution designates the (silver) "dollar" as America's standard of monetary value;[2442] delegates to Congress the powers "[t]o coin Money, regulate the Value thereof, and of foreign Coin";[2443] declares that "[n]o State shall * * * coin Money";[2444] prohibits every State from "mak[ing] any Thing but gold and silver Coin a Tender in Payment of Debts";[2445] grants no authority to Congress to emit "bills of credit" (the Founders' term for paper currency), with or without the character of "legal

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[2440] *See generally* Heinrich Pesch, *Ethics and the National Economy*, Rupert Ederer, Translator (Norfolk, Virginia: IHS Press, 2004).

[2441] As a store of value, silver has often *seemed* more volatile than gold in American experience. But that is because, although in principle the Constitution requires it, in practice America has never enjoyed a proper duometallic system in which: (i) both of the precious metals were treated as legally equivalent media of exchange; but (ii) the free market (rather than some governmental body) determined the fluctuating market value of one based upon the fixed legal value of the other. *See, e.g.,* E. Vieira, Jr., *Pieces of Eight, ante* note 39, Volume 1, at 119-126.

[2442] *See* U.S. Const. art. I, § 9, cl. 1 *and* amend. VII.

[2443] U.S. Const. art. I, § 8, cl. 5

[2444] U.S. Const. art. I, § 10, cl. 1.

[2445] U.S. Const. art. I, § 10, cl. 1.

tender";[2446] and absolutely prohibits every State from "emit[ting] Bills of Credit" of any description whatsoever.[2447] *Constitutional* money is to be *economically sound* money, the only form of money that can promote economic "homeland security".[2448]

Unfortunately, Americans today do not enjoy the benefits of constitutional, economically sound money. Rather, this country's present monetary and banking systems are based upon the shaky foundation of Federal Reserve Notes and bank-deposits payable therein. Although Federal Reserve Notes are "obligations of the United States" which "shall be redeemed in lawful money", they are redeemable in neither silver nor gold.[2449] And the supply of those notes is determined, not by the free market, but by the secretive decisions and for the recondite purposes of a corporative-state banking cartel.[2450] Moreover, the entire arrangement is thoroughly unconstitutional.[2451] And its continuation endangers not only America's economic "homeland security" but also her security as "a free State" and even as an independent sovereign nation.[2452]

c. It is unlikely, however, that any public officials in the General Government—other than, perhaps, a truly patriotic President, the improbability of whose election raises the total level of unlikelihood to the second or third power—will do anything to return America to a system of constitutional, economically sound money in the foreseeable future.[2453] And although in principle WE THE PEOPLE as private individuals could introduce a new economically sound currency into the free market, and employ it as an alternative to (if not even to the exclusion of) Federal Reserve Notes, in practice various onerous "transaction costs" associated with such action would seriously retard the process.[2454] WE THE PEOPLE, on the one hand, and the General Government, on the other, are not the only components of the federal system, however.

[2446] *Contrast* U.S. Const. art. I, § 8, cl. 2 *with* Arts. of Confed'n art. IX, ¶ 5.

[2447] U.S. Const. art. I, § 10, cl. 1.

[2448] *See generally* E. Vieira, Jr., *Pieces of Eight, ante* note 39, Volume 1, at 25-177.

[2449] *Compare and contrast* 12 U.S.C. § 411 *with* 31 U.S.C. § 5118(b) and (c).

[2450] E. Vieira, Jr., *Pieces of Eight, ante* note 39, Volume 1, at 689-866.

[2451] *Id.*, Volume 2, at 1401-1524.

[2452] *See generally id.*, Volume 2, at 1588-1600, *and* Edwin Vieira, Jr., "The Purse and the Sword: Imminent Dangers of U.S. Economic and Homeland Security Policies" (Metamora, Michigan: DVD produced by the Heritage Research Institute, 2010).

[2453] *See* E. Vieira, Jr., *Pieces of Eight, ante* note 39, Volume 2, at 1607-1620, 1631-1636. The proposal now current among certain circles within the Establishment to return the Federal Reserve System to some sort of "gold standard" is both unworkable and undesirable. *See* APPENDIX A, *post*, at 1899.

[2454] E. Vieira, Jr., *Pieces of Eight, ante* note 39, Volume 2, at 1636-1639. These costs must be exceedingly large, because in the some thirty-four years (as of this writing) since Americans have been permitted to use gold as an alternative currency, and even longer with respect to silver, next to no such use has emerged in the ordinary channels of commerce, notwithstanding both chronic depreciation in the purchasing power of Federal Reserve Notes and more recently the shocks of one banking and financial crisis after another. *See id.*, Volume 2, at 1269-1273.

(1) The several States both enjoy the constitutional authority and can employ efficacious means to introduce alternative media of exchange consisting of silver and gold into their governmental finances and private economies.[2455] Moreover, in the absence of constitutional money that Congress "coin[s]" or adopts by "regulat[ing] the Value * * * of foreign Coin" in amounts sufficient to serve all Americans' purposes,[2456] the States labor under a plain constitutional duty to provide their citizens with proper media of exchange in aid of their economic "homeland security". For the Constitution commands that "[n]o State shall * * * make any Thing but gold and silver Coin a Tender in Payment of Debts".[2457] This sets out not only an explicit disability—that the States may not "make * * * a Tender" out of "any Thing but gold and silver Coin"—and an explicit reservation of power for the States *to* "make * * * gold and silver Coin a Tender"—but also the mandate to do so, because the prohibition that "[n]o State shall * * * make any Thing *but* gold and silver Coin a Tender" amounts to the injunction that each State "*shall* * * * make * * * gold and silver Coin a Tender". In addition, inasmuch as the power *to* "make * * * gold and silver Coin a Tender" is explicitly "reserved to the States respectively", then an authority to negate that power cannot possibly have been "delegated to the United States".[2458]

Of course, the power of Congress "[t]o coin Money" must include an implied authority to declare that very "Money" to be "legal tender" for its constitutionally "regulate[d] * * * Value".[2459] That, after all, is an inescapable consequence of "regulat[ing] * * * Value".[2460] If (say) a particular coin contains a "dollar's worth" of silver (371-1/4 grains of pure metal), then its properly "regulate[d] * * * Value" must be "one dollar", and it must be "legal tender" for a "dollar" (being that it *is* a "dollar").[2461] But such an implied Congressional authority would not restrict the States in the exercise of their reserved power to "make * * * a Tender" of "gold and silver Coin" as to which Congress had failed, neglected, or refused to act. For, if Congress had so defaulted, the States could "*make* * * * gold and silver Coin a Tender" only by themselves doing what Congress should have done, not by doing nothing at all. Furthermore, inasmuch as each State must "make * * * gold and silver Coin a Tender", but cannot do so at an unconstitutional "Value"; and inasmuch as Congress is authorized to "regulate the Value" of "Coin"; and inasmuch as designating a "Coin" to be "legal tender" is merely another way for

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[2455] *Id.*, Volume 2, at 1620-1631.

[2456] *See* U.S. Const. art. I, § 8, cl. 5.

[2457] U.S. Const. art. I, § 10, cl. 1.

[2458] *See* U.S. Const. amend. X.

[2459] *See* U.S. Const. art. I, § 8, cls. 5 and 18.

[2460] *See* E. Vieira, Jr., *Pieces of Eight, ante* note 39, Volume 1, at 129-133.

[2461] *Id.,* Volume 1, at 134-141, 191-199.

Congress to "regulate the "Value" of that "Coin" as a consequence and in terms of its weight in silver or gold—therefore, the implied power of Congress to declare domestic and foreign "Coin" to be "legal tender" for their constitutional "Values" does not contradict the States' power to "make * * * gold and silver Coin a Tender", but instead assists the States in exercising that power properly. And, obviously, because the Constitution demands that every State "*make* * * * gold and silver Coin a Tender", Congress can neither require nor allow any State to do the opposite.[2462] So, perforce of the Constitution, the States can adopt silver and gold coins as their media of exchange, and can refuse to use Federal Reserve Notes—which neither are silver or gold coins themselves nor are redeemable in such coins[2463]—for any purpose, notwithstanding that Congress has purported to declare those notes to be "legal tender".[2464] And, constitutionally, Congress can do *nothing* to stop them. *How in practice*, though, the States can successfully go about introducing constitutional and economically sound media of exchange into their systems of governmental finance and private commerce—and maintaining them there in the face of opposition from, for example, rogue officials of the General Government—is another question altogether.

(2) That the States' adoption of silver and gold coins as their media of exchange is a matter of "homeland security" would justify calling forth their Militia for that purpose. Indeed, because "[a] well regulated Militia" is "necessary to the security of a free State" in *all* respects (for the Second Amendment in no way limits that declaration), and because *economic* "homeland security" is surely a critical component of the "security of a free State", as a matter of law the Militia should be in the forefront of the effort. Indeed, revitalization of the Militia should precede, or at least accompany in the same statute, adoption of an alternative currency, because it is "preposterous[ ] * * * [to] attempt[ ] to seize the [Power of the P]urse, before [one is] master of the [Power of the S]word".[2465] And, as a matter of fact, revitalized "well regulated Militia" would be establishments perfectly composed, positioned, prepared, and motivated to fulfill that mission quickly, completely, and safely. In outline, the plan would be as follows—

(a) The State would select her new media of exchange. In keeping with traditional practices, these could be actual silver and gold coins.[2466] Under contemporary conditions, however, the use of actual coinage for common day-to-day transactions is both problematic and unnecessary:

[2462] *Contrast* U.S. Const. art. I, § 10, cl. 1 *with* art. I, § 10, cls. 2 and 3. *See* E. Vieira, Jr., *Pieces of Eight, ante* note 39, Volume 1, at 104-112.

[2463] *Compare and contrast* 12 U.S.C. § 411 *with* 31 U.S.C. § 5118(b) and (c).

[2464] *Contrast* 31 U.S.C. § 5103 *with* E. Vieira, Jr., *Pieces of Eight, ante* note 39, Volume 2, at 1403-1422.

[2465] A. Fletcher, A DISCOURSE OF GOVERNMENT, *ante* note 31, at 22.

[2466] *See* E. Vieira, Jr., *Pieces of Eight, ante* note 39, Volume 2, Appendix B, at 1664-1666.

First, The States cannot "coin Money" at all.[2467] And the General Government does not provide for coinage of either silver or gold according to the constitution pattern of "free coinage". Under that system, an individual who brings some weight of gold or silver bullion to the Mint receives, after a time, coins containing the selfsame weight of metal, struck at no charge to him; or, if he prefers immediate receipt (and the Mint concurs), he can accept coins containing in the aggregate some lesser weight of precious metal, according to a fixed formula. For example, the first Coinage Act enacted under the Constitution provided that "any person" might

> bring to the * * * mint gold and silver bullion, in order to their being coined; and * * * the bullion so brought shall be * * * coined as speedily as may be after the receipt thereof, and that free of expense to the person * * * by whom the same shall have been brought. And as soon as the said bullion shall have been coined, the person * * * by whom the same shall have been delivered, shall upon demand receive in lieu thereof coins of the same species of bullion which shall have been so delivered, weight for weight, of the pure gold or pure silver therein contained: *Provided nevertheless,* That it shall be at the mutual option of the party * * * bringing such bullion, and of the director of the * * * mint, to make an immediate exchange of coins for standard bullion, with a deduction of one half per cent. from the weight of the pure gold, or pure silver contained in the said bullion, as an indemnification to the mint for the time which will necessarily be required for coining the said bullion, and for the advance which shall have been so made in coins.[2468]

Conversely, as of this writing, although the statutes that mandate general coinage of silver and gold provide that "the Secretary [of the Treasury] shall mint and issue" these coins "in quantities sufficient to meet public demand", they also provide that: (i) "[t]he Secretary shall sell the coins * * * to the public at a price equal to the market value of the bullion at the time of sale, plus the cost of minting, marketing, and distributing such coins"; and (ii) "[t]he Secretary shall make bulk sales of the coins * * * at a reasonable discount".[2469] This is neither identical with nor even equivalent in practice to "free coinage". For in a market wherein Federal Reserve Notes, irredeemable in either silver or gold but imbued with the status of

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[2467] U.S. Const. art. I, § 10, cl. 1.

[2468] *An Act establishing a Mint, and regulating the Coins of the United States*, Act of 2 April 1792, CHAP. XVI, § 14, 1 Stat. 246, 249. *See* E. Vieira, Jr., *Pieces of Eight, ante* note 39, Volume 1, at 191-199.

[2469] *See* An Act To authorize the minting of coins in commemoration of the centennial of the Statue of Liberty and to authorize the issuance of Liberty Coins, Act of 9 July 1985, Pub. L. 99-61, TITLE II—LIBERTY COINS, § 202 [§ 5112(e) and (f)], 99 Stat. 113, 115-116; *and* An Act To authorize the minting of gold bullion coins, Act of 17 December 1985, Pub. L. 99-185, § 2(b) [§ 5112(i)], 99 Stat. 1177, 1177-1178; *now codified at* 31 U.S.C. § 5112(e), (f), and (i).

"legal tender", constitute essentially the sole currency in circulation, the demand for silver and gold coins to be held for uses other than as actual currency (such as "investment" against depreciation of Federal Reserve Notes) will never be as large as the demand for silver and gold coins to be used directly and immediately as currency in a market wherein the *only* currencies are silver and gold coins, and all bank notes are treated, not as actual money, the most liquid of all assets, but instead as nothing more than instruments of debt. So, not being controlled by the free market, the amount of silver and gold coinage being produced today is far from optimal. In addition, that the Secretary "shall sell the coins * * * to the public at a price equal to the market value of the bullion at the time of sale, plus the cost of minting, marketing, and distributing such coins"—with that "price", "market value", and "cost" to be measured ultimately in Federal Reserve Notes—retains Federal Reserve Notes, rather than silver and gold coins, as the effective monetary standard of value.

Second, the coins struck by the United States and by various foreign nations that are readily available in the free market would surely prove inconvenient to use, because not enough different, and especially low, denominations exist to facilitate average day-to-day commercial transactions.

Third, no State can safely rely on private mints to generate new types of coinage, because: (i) Private mints will be unable to be granted or to partake of any governmental right, power, or immunity by being made parts or agents of the State. For, inasmuch as no State can herself "coin Money",[2470] she cannot authorize any private party to do so on her behalf under the aegis of her authority. Indeed, if a private mint were to claim any governmental right, power, or immunity in the premises, then the constitutional disability would immediately come into play, nullifying the supposed right, power, or immunity. But (ii) without such a governmental right, power, or immunity, a private mint would be exposed to possible interdiction by rogue officials of the General Government.[2471] So no prudent private mint would ever commence operations without some previously acquired judicial protection (such as a declaratory judgment)—which would entail a lengthy period of expensive litigation, more than likely with an ultimately unsuccessful outcome in view of the rogue nature of the Judiciary where fundamental questions of monetary law are concerned.[2472]

[2470] U.S. Const. art. I, § 10, cl. 1.

[2471] *See* 18 U.S.C. § 486. The part of this statute which purports to apply to honest private coinage is plainly unconstitutional. *See* E. Vieira, Jr., *Pieces of Eight*, *ante* note 39, Volume 2, at 1532-1534. That, however, would hardly deter the type of rogue officials who have long infested the Department of the Treasury and the Department of Justice.

[2472] *See, e.g.*, E. Vieira, Jr., *Pieces of Eight*, *ante* note 39, Volume 1, at 339-454, 599-666, 840-862; *and* Volume 2, at 1127-1211, 1311-1340, 1345-1399.

Fourth, even if gold and silver coinage were available in sufficient amounts and convenient denominations, no "gold and silver banks" or equivalent institutions exist to accept deposits, offer checking and savings accounts, make loans, and provide other banking and financial services necessary not only to average citizens but especially to businesses.

(b) Better than coinage would be so-called "electronic gold currency" and "electronic silver currency". "Electronic" refers to the method for recording and transferring legal title to specific amounts of gold or silver bullion actually held for depositors in special "bailment" accounts as "currency" by "electronic currency providers". "Electronic gold currency" and "electronic silver currency" offer numerous advantages over specie coins deposited in typical banks, the foremost being:

• *Security*—The gold and silver on deposit are owned by the depositors themselves and not by the "electronic currency providers" that hold those deposits. The depositors are "bailors" of the specie, the providers "bailees". With a typical bank, conversely, a deposit becomes the property of the bank, with the depositor merely a general creditor of the bank for the value of his deposit.

• *Ubiquity*—Anyone holding an account with an "electronic currency provider" can easily acquire silver and gold through the "provider" and then deal with anyone else holding such an account, anywhere in the world.

• *Convenience*—Transactions in gold and silver can be effected with "debit cards" or like instruments, so that payment of silver or gold is had immediately, but the actual specie never has to leave the "electronic currency providers'" vaults. Of course, transactions also can be effected on the basis of paper receipts, and actual physical delivery of silver or gold, if the parties so desire.

• *Flexibility*—Transactions of very small and exact values can be made, which is impossible with coins. And

• *Accuracy*—The details of every transaction can be automatically recorded for purposes of accounting, including *inter alia* the date; time; parties to the transaction; location of the transaction; nature of transaction; and value of the transaction in silver, gold, and Federal Reserve Notes (or any other medium of exchange).

• *Constitutionality*—Although the Constitution provides that "[n]o State shall * * * *coin* Money" or "make any Thing but gold and silver *Coin*

a Tender in payment of Debts",[2473] bullion is perfectly assimilable on a constitutional basis to coin if the government itself provides or oversees provision by a private party of an adequate certification of the weight and purity of the precious metal a bar, tael, or other form of bullion contains. This, because:

> "[T]he coined dollar of the United States" is "a certain quantity in weight and fineness of gold or silver, authenticated as such by the stamp of the government".[2474]

> "The design of all th[e] minuteness and strictness in the regulation of coinage * * * indicates the intention of the legislature to give a sure guaranty to the people that the coins * * * contain the precise weight of gold or silver of the precise degree of purity declared by the [coinage] statute", and "recognizes the fact, accepted by all men throughout the world, * * * that gold and silver * * * are the only proper measures of value; that these values are determined by weight and purity; and that form and impress are simply certificates of value, worthy of absolute reliance only because of the known integrity and good faith of the government".[2475]

> "Every * * * dollar is a piece of gold or silver, certified to be of a certain weight and purity, by the form and impress given to it at the mint * * * , and therefore declared to be legal tender in payments."[2476]

> "A contract to pay a certain number of dollars in gold or silver coins is, * * * in legal import, nothing else than an agreement to deliver a certain weight of standard gold [or silver], to be ascertained by a count of coins, each of which is certified to contain a definite proportion of that weight. It is not distinguishable * * * , in principle, from a contract to deliver an equal weight of bullion of equal fineness. It is distinguishable, in circumstance, only by the fact that the sufficiency of the amount to be tendered in payment must be ascertained, in the case of bullion, by assay and the scales, while in the case of coin it may be ascertained by count."[2477]

[2473] U.S. Const. art. I, § 10, cl. 1.

[2474] New York *ex rel.* Bank of New York v. Board of Supervisors, 74 U.S. (7 Wallace) 26, 30 (1869). Actually, by constitutional definition "[t]he coined dollar of the United States" is "a certain quantity in weight and fineness of * * * *silver*", not gold. United States gold coins are valued in "dollars", but are not themselves "dollars". *See* E. Vieira, Jr., *Pieces of Eight, ante* note 39, Volume 1, at 119-124, 134-141, 191-199.

[2475] Bronson v. Rodes, 74 U.S. (7 Wallace) 229, 249 (1869).

[2476] *Id.* (7 Wallace) at 250.

[2477] *Id.*

> "A contract to pay a certain sum in gold and silver coin is, in substance and legal effect, a contract to deliver a certain weight in gold and silver of a certain fineness, to be ascertained by count".[2478]

So, if gold and silver bullion in the "electronic" system can be "certified to be of a certain weight and purity" by a means at least as reliable as coinage of that amount of bullion, then that bullion is the perfect constitutional equivalent of coin, and can "therefore [be] declared to be legal tender in payments". The method of certification of a payment or other transfer of gold or silver in the "electronic" system must simply be as accurate as having: (i) "certifi[cation of a coin] to be of a certain weight and purity, by the form and impress given to it at the mint"; and (ii) "ascertain[ment] by count" of coins of the amount of gold or silver so transferred from one owner to another.

In fact, the certification of bullion could easily be made *far better* that the traditional certification that comes from simply counting coins that appear upon visual inspection to have the proper official form and impress, but are not actually weighed and submitted to chemical or other analysis in the course of each deposit or transfer. Because none of the gold and silver would enter the depository without the State's verification of its authenticity, none of it would be subject to substitution by counterfeits (as coins sometimes are in the course of their normal circulation in the marketplace); and because most of the gold and silver would not leave the depository, it would not be subject to diminution of value through abrasion or loss (as coins always are in circulation). So the "electronic" system would be capable of generating records of each individual depositor's holdings, and of how much was added to or subtracted from them with each transaction, that were far more accurate than a mere count of coins held on deposit and transferred from time to time—for the content of any coin in actual precious metal would always be subject to the possible minter's error in its fabrication, or to abrasion incurred through prior circulation; but the error in one coin or the cumulative error in several a count of those coins alone could not discover. Moreover, being completely computerized, the "electronic" system could record in each depositor's account an official certification with respect to each and every transaction effected through the depository—the modern equivalent of the official stamp on, together with a count of, coins, but of far greater accuracy, reliability, and especially convenience and usefulness in terms of record-keeping.

Because "mak[ing] * * * gold and silver Coin a Tender" is not distinguishable in constitutional principle from "mak[ing] * * * [an equal weight of bullion of equal fineness] a Tender", the only concern should be how to assure in practice that, in either case, an "equal weight" of metal of the same fineness is

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[2478] Butler v. Horwitz, 74 U.S. (7 Wallace) 258, 260 (1869).

delivered. This will depend, however, upon how "equal weight" is defined—whether physically or economically. Traditionally, a coin containing a certain weight of pure gold or silver has been considered to be of somewhat greater market value than—that is, has commanded a "premium" over—gold or silver bullion of the same weight. This, because each coin is so designed as to certify its source, substance, content, and in most cases nominal legal value as "money", and therefore on its face imparts more information than an equal physical weight of mere bullion that does not bear such information on its face.[2479] Also, coins have usually been fabricated in sizes deemed convenient for commerce, with a small amount of base metal added to the gold or silver in order to harden the resulting alloy so as to facilitate its use in hand-to-hand transactions—and therefore have usually been deemed more useful than bullion in that context. Such design and fabrication add economic value to the bullion a coin contains, and therefore justify a "premium" for coinage over bullion.

As explained above, traditionally the Treasury has minted gold and silver coins according to the constitutional principle of "free coinage". This, because the conversion of bullion into coinage has always been considered a prerogative of sovereignty that performs an indispensable public function,[2480] and therefore the cost of which is rightfully chargeable to the public—unless some special benefit is provided to the purveyor of the bullion, in which case any excess charge that has to be incurred may fairly be laid upon him. In addition, because "free coinage" constitutes an integral part of Congress's power "[t]o coin Money",[2481] and because recognition of any "premium" between coinage and bullion constitutes an integral part of "free coinage", that "premium" must be taken into consideration if a State chooses to employ bullion as an alternative currency in preference to or even in conjunction with "Coin", so that nothing the State does with respect to bullion conflicts with her power and duty to "make * * * gold and silver Coin a Tender in Payment of Debts".

Yet a further consideration must be taken into account on the other side. With "electronic gold currency" and "electronic silver currency", almost all transfers of ownership of bullion are effected not "by count", as with coins, but by weight.[2482] Nonetheless, these transfers do not require recourse to the cumbersome, expensive,

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[2479] Some contemporary private purveyors of gold and silver bullion fabricate small bars or other shapes stamped with such information, *except for a nominal legal value*. The absence of the latter distinguishes these forms from actual coins. Of course, if the legal unit of monetary value were a standard measure of weight—say, some number of troy grains—then a designation of weight on such a bar would simultaneously be a designation of its legal value in such units, and no practical difference would exist between "bullion" in that form and "coin".

[2480] *See, e.g.,* Ling Su Fan v. United States, 218 U.S. 302, 310-311 (1910); *and* Norman v. Baltimore & Ohio Railroad Company, 294 U.S. 240, 304 (1935).

[2481] *See* E. Vieira, Jr., *Pieces of Eight, ante* note 39, Volume 1, at 191-199.

[2482] Conceivably, some (but predictably few) transfers could be effected by actual physical delivery of some number of bars of bullion.

and time-consuming procedure of "assay and the scales", because the gold and silver bullion are so controlled upon entering and while within the depository that their susceptibility to improper valuation, substitution, adulteration, or other forms of accident or fraud is for all practical purposes precluded. Therefore transfers of ownership of various weights of bullion between account-holders can be effected with speed, security, accuracy, and confidence simply through electronic accounting rather than through anyone's physical transfer of the bullion. Indeed, the system can operate for most purposes without the least disturbance of the bullion at all, once it has been lodged within the depository. Also, because an "electronic currency" can be subdivided into very small units, transactions of almost any value can be conducted—a flexibility impossible to achieve with gold and silver coins alone, because coins of only a few different values are ever minted, which requires that so-called "token coinage" of base metals be generated for use in small transactions and to "make change". *So, with the advent of "electronic gold currency" and "electronic silver currency", the former advantages of gold and silver coins arising out of their special designs and fabrication have largely disappeared; and the few sizes of coins available have become a liability even more distinct than ever they were. As a result, it may be that any "premium" should now run in favor of gold and silver bullion in an "electronic-currency depository" over an equal weight of such metal in the form of "Coin".*

Obviously, recourse to how the free market ends up treating the matter will be necessary to determine whether any "premium" between bullion and "Coin" will arise, and if so what it may be and to the advantage of which form of specie it may accrue, when a State employs "electronic gold currency" and "electronic silver currency" as "a Tender in Payment of Debts" on an equal basis with "Coin". Whatever the answer may be, a State must so arrange her system that the "Tender" for any "Debt[ ]" will, as a matter of both fact and law, be some actual "gold [or] silver Coin" or the amount of gold or silver bullion of weight and fineness "equal" to the weight and fineness of that metal in the "Coin", corrected for the "premium" (if any) in favor of either "Coin" or bullion, as the case may be. Moreover, (i) bullion in the State's depository must always be fully and freely convertible into "Coin" (or small bars of bullion properly marked as to weight and fineness of precious metal), so that individuals may take personal possession of their own money on demand; and (ii) "Coin" in the free market must always be convertible into bullion in the depository, so that individuals may return to the "electronic" system whenever they wish. A depository might also find it convenient to employ "Coin" as well as bullion as the foundation for its "electronic currency", because the problem of *inter*-valuation between the two is merely a matter of arithmetic, once the formula for assigning and calculating any "premium" has been established. This, however, is a technical matter best left to experts to sort out.

To avoid the question of which way any "premium" may run is perhaps simple enough, though, by treating the system of "electronic gold currency" and

"electronic silver currency" to some degree as a public utility that provides an analogous form of "free coinage" when it puts and maintains bullion into a condition in and under controls through which the bullion can reliably be employed in "electronic" transfers. Specifically, a State could absorb the costs of: (i) exchanging depositors' gold or silver coins, or non-specie currency (say, for example, Federal Reserve Notes or bank-deposits solvable in such notes), for silver or gold bullion in the free market; (ii) certifying the weight and purity of all of the specie brought into and stored within her depository; (iii) providing the necessary security for that specie against theft, embezzlement, or other loss; and (iv) certifying the weight and purity of the amounts of specie transferred from one depositor to another electronically, or physically removed from the depository and delivered to some depositor or other customer. At most, a depositor would pay only a small fee for each actual transfer of gold or silver from his account to some other depositor's account. This would be fair, because, unlike a typical bank today, which may provide its depositors with ostensibly "free checking" while it uses their deposits as its own in order to make loans, and thus earns far more in interest on those loans than the costs of providing the "free checking"— and perhaps pays little or no interest on depositors' balances in their checking accounts to boot—a State's "electronic gold and silver depository" would operate on the principle of bailment, and thus could not itself earn anything through the use of the gold and silver it held for depositors. On the other hand, the depository's service of transferring specie from one account to another could be treated as another aspect of its rôle as a monetary public utility providing economic "homeland security", and its entire cost absorbed by the State, thereby obviating all charges to depositors (although this would have the obvious disadvantage of driving out of business private depositories attempting to compete with the State).

(c) The State would establish within her government: (i) an official "electronic silver and gold currency provider" staffed by properly trained members of her Militia who would be exempted from all other duty; along with (ii) a depository to secure the specie under the Militia's direct supervision, operation, *and physical control* at all times. (The State could also set up or contract out a non-profit public service for the refining, assaying, valuation, and casting into bars of convenient weights of gold and silver bullion brought to her depository by customers.[2483]) Because depositors' silver and gold would be held in separate bailment accounts, the system could not be accused of emitting unconstitutional "[electronic] Bills of Credit",[2484] or otherwise operating on the basis of economically unsound "fractional reserves". *Yet the depositors' specie would also be impressed with the attributes of the State's sovereign power, because the State had designated silver and*

[2483] *Compare* 31 U.S.C. §§ 5121 and 5122.

[2484] *See* U.S. Const. art. I, § 10, cl. 1.

gold as her official media of exchange and had certified the weight and purity of each depositor's holdings as well as of every transaction effected through the depository.[2485] Thus, the silver and gold in the State's depository would be serving, not only the particular purposes of the various depositors, both public and private, but also the overarching public purpose of guaranteeing the State's economic "homeland security". Indeed, inasmuch as "the security of a free State" depends upon her economic "homeland security", *all* of the silver and gold held in the depository would serve both governmental and private purposes. The new media of exchange would be necessary to perform *all* of the State's governmental functions—and thereby to maintain the State as a State—as well as to protect the health, safety, and welfare of all of her citizens. And insofar as much of the silver and gold would be deposited by members of the State's Militia in satisfaction of their statutory duty to do so,[2486] those deposits would be instrumentalities specifically of the Militia—in precisely the same way that firearms owned and possessed by members of the Militia for the purpose of performing their Militia service are, at one and the same time, both private property (because of who owns them) and instrumentalities of the State's government (because of the particular use to which their owners put them). Consequently, not only the gold and silver deposited by the State herself and all of the governmental bodies and agencies within her jurisdiction, but also the specie deposited by members of her Militia in their capacities and pursuant to their duties as such—which would include the vast majority of her population—would be protected in their possession and use by the State and most of her citizens by a *governmental immunity* from any form of interference on the part of rogue agents of the General Government. Arguably, this immunity would extend to the silver and gold used as media of exchange through the agency of the State's depository by every one of the State's citizens, whether members of the Militia or not, because all such use would be in aid of preserving the State's economic "homeland security".

(d) To introduce the new media of exchange into her public financial transactions and her private economy, the State should require the payment of a select groups of taxes in silver and gold, provide incentives for other taxpayers to pay in silver and gold voluntarily, and offer to pay the State's creditors with these tax receipts on a "first come, first served" basis until the fund of specie were exhausted. Presumably, creditors' requests for payment in silver and gold would quickly deplete the fund, whereupon the State would steadily expand the list of taxes and other public dues and charges subject to payment in specie so as to maintain a balance between receipts and expenditures. Thus, if the program were successful, after a time—and probably a short one, at that—all of the State's taxes

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[2485] *See* Ling Su Fan v. United States, 218 U.S. 302, 311 (1910); *and* Norman v. Baltimore & Ohio Railroad Company, 294 U.S. 240, 304 (1935).

[2486] *See post*, at 1223-1225.

and other receipts would be paid in silver and gold, and the State would pay out Federal Reserve Notes (or bank-deposits solvable in such notes) only to those few creditors who affirmatively refused to accept silver or gold (such as, presumably, banks in the Federal Reserve System). The State would obtain the Federal Reserve Notes necessary for this purpose by exchanging some of its silver or gold in the free market for such notes, just as she might obtain any other foreign currency. At that point, for all practical purposes the State would have separated herself from the Federal Reserve System and protected herself as much as possible from the dangers of using the System's economically unsound currency as her medium of exchange.

(e) To enable the participants in her private economy to insulate themselves from the Federal Reserve System, the State would require all adult members of her revitalized Militia—which would include most of her population from (say) eighteen to fifty-five or sixty years of age—to establish personal and business "electronic gold currency" and "electronic silver currency" accounts, so that they would be capable of using the new media of exchange in their day-to-day transactions, most likely through the convenient agency of "silver and gold debit cards". (Perhaps the State could require every one of her citizens, without exception, to establish such accounts—but no reason would exist to test the limits of the State's authority in this regard, because with near-universal participation through the Militia the vast majority of the population would be involved in any event.) ***No** exemption from this duty would be allowed for any member of the Militia within that range of ages.* In addition, anyone else could volunteer to use the new currency. For economic "homeland security" demands that the State's entire private economy be protected—everyone who participates in the economy should have access to whatever protective measures are instituted—therefore, near-universal participation is necessary. And economic "homeland security" achieved through the use of silver and gold as media of exchange requires no special physical condition, knowledge, skill, or experience on the average individual's part—so near-universal participation is possible.[2487]

[2487] Admittedly, achieving near-universal participation in this program will not prove easy. But practical solutions should be available for any conceivable problem. For example—

1. Many members of the Militia might not own personal computers, or be connected to the Internet in their homes or workplaces. Such individuals, however, could apply for their "silver and gold debit cards" either through the mail, using paper applications (as do many individuals whom banks solicit by post to take out credit cards today); or through their appearances at the offices of their Local government, in which the State would maintain staffers who would input the new depositors' personal information directly into the depository system.

Once their accounts were activated, these individuals could arrange to fund their depository accounts in several ways. If they maintained regular bank accounts (presumably payable in Federal Reserve Notes), they could instruct the banks to transfer some portion of their balances to the depository, which would immediately convert those balances from notes to silver, gold, or both. This might be done on an automatic basis, such as a fixed part of every paycheck, Social Security or private pension-fund payment, or other form of regular income as it arrives at the bank—so that little of the individuals' cash balances would long remain payable in ever-depreciating Federal Reserve Notes. The State could provide to all banks within her territory simple, efficient systems to fulfill this task. Banks the State chartered could be required to perform the service as a condition

(f) The State would require all members of her Militia who did business of any kind within her borders to post the prices of their goods and services, and to inform their employees of the values of their wages and other benefits, in silver and gold as well as in Federal Reserve Notes, using free-market data supplied electronically by the State's depository. *Again,* ***no*** *exemption from this duty would be allowed for any member of the Militia engaged in business within the State.* With almost all private prices and wage-rates stated in silver and gold (and the exchange-rates among silver, gold, and Federal Reserve Notes in the free market matters of easily accessible public record), businessmen, their customers, and their employees would know when it was to their advantage to use the new media of exchange in their transactions. And nothing would preclude businessmen or employees from accelerating this process by refusing to sell their goods and services or to work for any medium of exchange other than silver and gold; or would prevent businessmen from offering discounts to customers, or employees from accepting modifications in their wages, if they were paid in silver or gold rather than in Federal Reserve Notes. Thus, the State's entire private economy could substitute sound money for Federal Reserve Notes just as quickly, easily, and extensively as WE THE PEOPLE themselves desired. To encourage this transition, the State, through the Militia, would supply businessmen and labor leaders with the requisite computer software, together with instructions in its use, for setting prices and wage-rates, and accounting for sales, expenditures, values of inventories, and so on. Further incentives might include a waiver of any fees otherwise payable to the State's depository if an individual used his "silver and gold debit card" to pay for a transaction within the State, and special discounts on State and Local sales or other applicable taxes where the transactions were conducted in the new media of exchange. Inasmuch as allocating the costs of these incentives to the State would plainly be necessary and proper for accelerating the provision of economic "homeland security", the Militia could justifiably defray them out of fines imposed upon, or from fees for various exemptions paid by, other

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of their charters; and banks not chartered by the State would find themselves at a competitive disadvantage if they failed to follow suit. Individuals without regular bank accounts could bring cash to any bank chartered by the State, which would be obliged, for some nominal fee, to transfer those funds to the depository. The State could also assign "tellers" in the offices of Local governments for the purpose of accepting cash from depositors.

To manage their accounts, individuals without access to the Internet could simply telephone the depository, and obtain necessary information on balances, transactions, and other matters, just as most banks provide such information to their customers today.

2. If the State requires nearly everyone to use the depository system, and nearly everyone eventually becomes dependent upon it for perhaps all, and surely most, of their monetary transactions, then the State must insure that depositors be maximally protected against failure of the equipment, the effects of natural disasters, and possible sabotage or external attacks by rogue governmental agencies as well as private "hackers". This will necessitate, not only that the main operating system be properly "hardened", but also that redundant backup systems be available, and that complete paper records be generated in as close to real time as possible, and thereafter securely maintained for as long as necessary. Thus, proper economic "homeland security" will require, not merely physical security for the actual silver and gold on deposit, but electronic and archival security for all of the data relating to them as well.

Militiamen.[2488] The possible costs of such incentives would be trivial compared to the benefits the State and her citizens would reap from escaping the clutches of the Federal Reserve System, particularly if it exploded in hyperinflation.

(g) To facilitate and optimize the use of the alternative currency, the State could authorize the establishment of private "credit associations" empowered to deal in so-called "real bills" by discounting notes, drafts, and bills of exchange: (i) which were payable in either "electronic gold currency" or "electronic silver currency"; (ii) which were issued or drawn for agricultural, industrial, or commercial purposes arising out of actual transactions, and the proceeds of which were used for such purposes, or which were secured by staple agricultural products or other goods, wares, or merchandise—but which were not issued or drawn for the purpose of carrying or trading in stocks, bonds, "derivatives", or other real or purported "securities" of any sort, public or private; and (iii) which had a maturity at the time of discount of no more than ninety days. In order to prevent the exchange-rate between gold and silver in the free market from being unduly influenced by their operations, these "credit associations" would be required to have their capital subscribed in gold *or* silver, but not both, and thus would be eligible to discount notes, drafts, and bills only in one metal. The associations would be authorized, however, to divide "the real bills" which they discounted into whatever units of smaller face-values they deemed commercially convenient, but with the same maturity dates as the original discounted paper, and to transfer these smaller units to customers in the course of their business. Farms, manufacturing concerns, and other businesses could then use the smaller units as auxiliary media of exchange in order to purchase supplies and hire labor, and workers could use the units to maintain themselves and their families, until the dates of the underlying bills' maturity, at which point they would be paid in gold or silver. The ultimate effect would be that the gold and silver with which the underlying "real bills" were to be paid would be "recycled" through the Local economy potentially many times over before the bills finally matured—thus maximizing the utility of whatever gold and silver was available for such use within the State. Of course, the State would ensure through oversight administered by the Militia that these "real bills" were in fact paid in full in gold or silver upon the bills' maturity.[2489]

[2488] *See post*, Chapter 43.

[2489] As of this writing, the leading expositor of the use of "real bills" in this manner is Professor Antal E. Fekete, whose extensive work the reader should consult. *See* <www.professorfekete.com/moneycredit.asp>. Interestingly enough, though, even in the original Federal Reserve Act Congress provided for the use of "real bills" by the banks within the Federal Reserve System, and considered this matter so important as explicitly to identify it as one of the main purposes of the statute. *See* An Act To provide for the establishment of Federal reserve banks, to furnish an elastic currency, to afford means of rediscounting commercial paper, to establish a more effective supervision of banking in the United States, and for other purposes ("Federal Reserve Act"), Act of 23 December 1913, CHAP. 6, §§ 13 and 14(c), 38 Stat. 251, 263-264, 265; *now codified as amended at* 12 U.S.C. §§ 343, 344, 356, and 358.

Such a plan would offer WE THE PEOPLE of each State the alternative of continuing to rely on the Federal Reserve System's economically unsound paper currency or of substituting silver and gold for that currency as slowly or as swiftly as THE PEOPLE themselves deemed prudent. Initially, perhaps many among THE PEOPLE, out of ignorance or inertia, might choose not to avail themselves of the opportunity. Yet merely promulgating the plan, even without significant implementation, would inevitably educate large numbers of citizens on monetary matters critical to their State's economic "homeland security" but which they had never theretofore seriously considered. Meanwhile, the plan would remain as a form of inexpensive economic insurance through which THE PEOPLE, when they finally awakened to economic reality, could expeditiously enable their State's government and her private economy to continue to function in the event of a collapse of the Federal Reserve System's banking cartel and the destruction of its paper currency.

(3) Once well in operation, such a plan would also empower WE THE PEOPLE of each State to protect themselves against a wide variety of unlawful harassment by rogue officials of the General Government. Constitutional conflicts between the States and the General Government typically take the form of a State's contending that some power purportedly being exercised by rogue officials of the General Government has not, in fact, been "delegated to the United States by the Constitution, [ ]or prohibited by it to the States", but instead is "reserved to the States respectively, or to the people"[2490]—whereas the rogue "federal agents" (as they style themselves) claim that their authority derives from some "Law[ ] of the United States * * * made in Pursuance [of the Constitution]", which is therefore "the supreme Law of the Land".[2491] Although in many situations the constitutional conundrums in these mutually conflicting assertions are complex, in the monetary field they are easily resolved.[2492] In any event, the practical question to which all such disputes invariably reduce is simple: *"Which side can actually* ***enforce*** *its will upon the other?"* Usually, rogue officials and agents of the General Government can do little to a State herself, to her governmental institutions, or perhaps even to her public officials in their capacities as such. But they can attempt to retaliate against, punish, and generally intimidate the State by harassing her citizens as ordinary individuals, usually by despoiling them of their property. Therefore, to secure what are sometimes called "States' rights"—more properly, the powers that the Constitution "reserves to the States respectively, or to the people"—with respect to money, the States must be able to protect their people against such acts of thuggery emanating from the District of Columbia at the prompting of New York City.

[2490] *See* U.S. Const. amend. X.

[2491] *See* U.S. Const. art. VI, cl. 2.

[2492] *See ante*, at 1212-1213.

Rogue agents of the General Government will generally target their victims' most obvious, most easily seized, and most liquid assets. For individuals in the vast majority today, that is the money they hold in an account in some bank which is probably a member of the Federal Reserve System, and therefore can be expected to coöperate fully with the rogue agents in looting its own depositors. A State could easily provide effective economic "homeland security" to her citizens in this situation, though, by engaging in a form of "interposition". Pursuant to the State's statutory law, Militiamen would be encouraged—perhaps even required—to keep all of what economists call their "cash balances" in the form of silver and gold in the State's depository. Only such money as Militiamen needed, from time to time, to pay those of their creditors who refused to receive specie would be withdrawn, converted into whatever other currency those creditors desired, and then paid out to them immediately upon conversion through some regular bank. Or, even better, the State's depository itself—functioning as a moneychanger—would convert the specie into another currency and pay its depositors' creditors directly. In either case, the rest of the Militiamen's money would remain secure in the State's depository in the form of silver and gold, guarded at all times by WE THE PEOPLE themselves in and through their Militia. Moreover, while it remained in the depository, all of the money would be performing a State governmental function, and specifically a Militia function—providing the State and her citizens with economic "homeland security"—in addition to the private function of maintaining the "cash balances" individuals deemed prudent. Under these arrangements, rogue agents of the General Government could not gain direct access to any individual's money, except perhaps for the amounts he might have deposited from time to time (and those only very temporarily) in some private bank (and even in such cases, only if the agents knew which bank to approach and when). Moreover, the State would further decree by statute that any individual Militiaman presented by such rogue agents with a purported order to surrender any of his silver or gold on deposit should refuse to comply, but instead should refer the matter to the Militia Officers in charge of the depository, who would refer the matter to the appropriate Militia Committee of Constitutional Inquiry and Compliance,[2493] which would then investigate and pass on the order's legitimacy—so that the legal question would not be limited to the General Government's alleged claim against an individual who just happened to be a Militiaman, but would encompass as well the General Government's purported right to money which, precisely because it belonged to a Militiaman, was being employed by both him and the State herself for the very highest governmental purpose, "the security of a free State".

The State could extend this protection to whatever forms of gold and silver Militiamen might choose to hold in their personal possession outside of her

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[2493] *See ante*, at 1202-1206.

depository, by stipulating statutorily that any and all such specie would automatically bear the impress of the State's (that is, WE THE PEOPLE'S) sovereign power, because it served the State's economic "homeland security" by insuring that some gold and silver would always be immediately available to THE PEOPLE in the event of a catastrophic situation that might temporarily preclude normal "electronic" or other operations of the depository. All such gold and silver in Militiamen's personal possession would be declared to be instrumentalities of the Militia, and therefore of the State herself, to the selfsame extent as every Militiamen's firearms, ammunition, and accoutrements—*and, as such, would be absolutely immune from seizure, taxation, regulation, or other intervention by the General Government*. A Militiaman's actual personal possession of some form of gold, or silver, or both would constitute conclusive proof of such sovereign use under the State's Militia law. Arguably, Congress too could require Militiamen to maintain some holdings of gold or silver for the purpose of their possible "employ[ment] in the Service of the United States".[2494] But if Congress mandated no such action, or even affirmatively ordered Militiamen not to hold gold or silver in case of such possible "employ[ment]", it could not prohibit them from doing so in the service of their own States pursuant to those States' laws, because Congress's authority to regulate the Militia does not extend to the Militia's purely State service.

(4) Besides acting negatively by preventing rogue agents of the General Government from despoiling her Militiamen of their silver and gold, a State could use her depository to take affirmative action, too. Such as by withholding in a separate "escrow" account in her depository moneys her citizens arguably owed that Government for payments of their taxes—until officials of the General Government had complied in certain particulars to the State's satisfaction with "[t]h[e] Constitution, and the Laws of the United States which shall be made in Pursuance thereof".[2495] For what should be the most historically justifiable example, to the extent that rogue officials in the General Government violate the Constitution or other of "the Laws" of the Union, they are not properly "representing" either the States in which they are elected (if they are Members of Congress) or WE THE PEOPLE as individuals (if they occupy any other official positions whatsoever). After all, the Constitution commands that "[t]he United States"—including all the officials, agents, employees, and other operatives thereof—"shall guarantee to every State in this Union a Republican Form of Government".[2496] And "a Republican Form of Government" is based upon "the republican principle": namely, it is "a government in which the scheme of representation takes place".[2497] Therefore, *every*

[2494] *See* U.S. Const. art. I, § 8, cl. 16.

[2495] U.S. Const. art. VI, cl. 2.

[2496] U.S. Const. art. IV, § 4.

[2497] *The Federalist* No. 10 (James Madison).

official, agent, employee, and other operative of the United States must supply *true, honest, and complete* "representation" to each of the States and all of their inhabitants. Such "representation" is utterly incompatible with violations of the Constitution and other "Laws". Yet, when such violations occur, rogue officials continue to collect taxes the expenditure of which in some proportion subsidizes their *illegal and therefore "unrepresentative"* activities. WE THE PEOPLE have no constitutional duty to subsidize, through taxation or otherwise, the usurpation, tyranny, or both that always accompany violations of the Constitution and other "Laws". And the States have a duty, through their "Republican Form[s] of Government", to protect their citizens from being compelled to provide such subsidies. Thus, when such illegal activities are exposed, THE PEOPLE may invoke their right to oppose "taxation without representation"; and the States may assert their authority to "interpose" themselves between THE PEOPLE and those rogue officials in the General Government who attempt to oppress them. Moreover, because "[t]he United States shall guarantee to every State in this Union a Republican Form of Government", honest officials of the General Government must *support* the States in the assertion of this authority. So, in this situation, rather than constituting a challenge to "the supreme Law of the Land", *"interposition" is the highest expression of that "Law"*.

In the most general case, the States would hold in "political escrow" the proportion of the taxes their citizens supposedly owed to the General Government equal to the proportion of the General Government's expenditures to be funded by those taxes which the States determined were unconstitutional. If the States mandated this procedure for all members of their Militia, then the question of what constituted legitimate taxation would shift from an uneven contest between rogue officials of the General Government and solitary individuals, to one between those officials, on the one side, and the entire populations and full panoply of governmental power of the States, on the other. Thus, revitalization of the Militia and adoption of silver and gold as official media of exchange would enable THE PEOPLE, through their States, to mount effective resistance to usurpation and tyranny, thereby turning popular self-government and federalism from mere paper theories into political tigers with sharp teeth.[2498]

(5) Rogue officials of the General Government could not preëmpt or circumvent these arrangements through the simplistic expedient of promulgating a decree that purported—along the crooked lines of the Roosevelt Administration's

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[2498] True enough, even deprived of a large proportion of its tax revenues, the General Government's Treasury could still purport to pay its bills—albeit unconstitutionally—in nominal "dollars" by expanding the supply of legal-tender paper currency, either directly by emitting "Greenbacks" or indirectly through monetization of public debt by the Federal Reserve System or some other private banking apparatus. The States that had adopted silver and gold as their media of exchange could largely avoid the economic ill effects that such "currency finance" would cause, though.

infamous "gold seizure" in 1933 and 1934—to require all Americans to surrender their silver and gold to the Treasury of the United States.[2499] For *the several States through their Militia, not isolated individuals, would be in custody of the specie, and would not comply with any such decree*, on several constitutional grounds:

(a) Even if the Supreme Court were entitled to the final say on the matter (which it is not[2500]), it has never upheld or even considered the unconstitutionality of a promiscuous seizure of Americans' gold or silver by the General Government. Rather, when the question was squarely presented as to gold in the 1930s, the Court *fraudulently* refused to address it.[2501]

(b) No power to seize WE THE PEOPLE'S silver and gold has been delegated to the United States or reserved to the States, but instead all such putative power has been prohibited to the States and to the United States as well. The States, after all, are commanded not to "make any Thing but gold and silver Coin a Tender in Payment of Debts".[2502] In order, however, to obey that explicit mandate—which all "Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support"[2503]—neither any of the several States individually nor the United States collectively can prevent THE PEOPLE from possessing the very "Thing[s]" to which the Constitution guarantees them access. Self-evidently, the States cannot "make * * * gold and silver Coin a Tender" while at the same time some of them individually or all of them as "the United States" collectively withdraw gold and silver from the free market and withhold them from THE PEOPLE—or, for that matter, withdraw and withhold *either* gold *or* silver, for the constitutional injunction applies equally to *both*.

(c) Other than "coin[ed] Money" they themselves mint and "Bills of Credit" they themselves "emit",[2504] the several States in the exercise of their reserved sovereignty may adopt *any* medium of exchange for their own governmental purposes.[2505] So, rogue officials of the General Government cannot prohibit the possession and use of silver and gold as media of exchange either by the States themselves *or by those individuals who through their possession and use of the precious metals are performing governmental services, fulfilling governmental duties, or receiving governmental benefits*. Thus, silver and gold secured in a State's depository under the jurisdiction and for the use of her Militia and its members for the governmental

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[2499] *See* E. Vieira, Jr., *Pieces of Eight, ante* note 39, Volume 2, at 867-1127.

[2500] *See generally* Edwin Vieira, Jr., *How To Dethrone The Imperial Judiciary* (San Antonio, Texas: Vision Forum Ministries, 2004).

[2501] *See* E. Vieira, Jr., *Pieces of Eight, ante* note 39, Volume 2, at 1127-1207.

[2502] U.S. Const. art. I, § 10, cl. 1.

[2503] U.S. Const. art. VI, cl. 3.

[2504] *See* U.S. Const. art. I, § 10, cl. 1.

[2505] *See* E. Vieira, Jr., *Pieces of Eight, ante* note 39, Volume 2, at 1620-1631.

purpose of providing economic "homeland security" to the State and her citizens—or even specie held in Militiamen's personal possession to that end—would be beyond the control such officials.

(d) Any attempt by rogue officials of the General Government to seize silver or gold from a State's revitalized Militia would amount to an attempt to disarm the Militia of the means uniquely necessary to provide economic "homeland security", and would therefore constitute an attack on "the security of a free State" and "a Republican Form of Government". But the Constitution commands that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government"[2506]—which entails a guarantee of *all* of the means necessary and proper for a State to maintain the security of such a government in the face of *any* possible attack, be it physical, political, or economic. For if Congress, on behalf of the United States, is implicitly empowered to fulfill this guarantee by enacting such legislation as may be "necessary and proper" for that purpose,[2507] then surely the States, which are the beneficiaries of the guarantee, enjoy the reserved power to adopt whatever means they reasonably deem "necessary and proper" to that end. Furthermore, the States' choice of means must be binding on the United States. For although "[n]o particular government is designated [in the Constitution] as republican", and "neither is the exact form to be guaranteed in any manner especially designated", nonetheless

> [a]ll the States had governments when the Constitution was adopted. * * * These governments the Constitution did not change. They were accepted precisely as they were, and it is, therefore, to be presumed that they were such as it was the duty of the States to provide. Thus we have unmistakable evidence of what was republican in form, within the meaning of that term as employed in the Constitution.[2508]

And *all* the States at that time, as sovereign governments "republican in form", enjoyed the authority to adopt their own media of exchange for both public and private uses, which power the Constitution limited in only three particulars: namely, that "[n]o State shall * * * coin Money; emit Bills of Credit; [or] make any Thing but gold and silver Coin a Tender in Payment of Debts".[2509] So no action by any official, agent, or employee of the United States aimed at a seizure of WE THE PEOPLE'S gold or silver in any State—such that the State could *not* "make * * * gold and silver Coin a Tender"—can now or ever be even arguably legitimate.

[2506] U.S. Const. art. IV, § 4.

[2507] *See* U.S. Const. art. I, § 8, cl. 18.

[2508] Minor v. Happersett, 88 U.S. (21 Wallace) 162, 175-176 (1875).

[2509] U.S. Const. art. I, § 10, cl. 1.

To the contrary: Because the constitutional powers that the States exercised immediately prior to ratification of the Constitution, and that carried over into that document, effectively define "a Republican Form of Government", the United States are constitutionally bound to *support* the States in their exercise of those powers in fulfillment of the duty to "guarantee to every State in this Union a Republican Form of Government".[2510] Thus, the Constitution delegates to Congress the power "[t]o provide for calling forth the Militia to execute the Laws of the Union".[2511] Those "Laws" include the Constitution. And the Constitution secures to the States the absolute right and duty to "make * * * gold and silver Coin a Tender in Payment of Debts".[2512] Therefore, when Congress "provide[s] for organizing * * * and disciplining, the Militia" for the purpose of "execut[ing] the Laws of the Union",[2513] it must do so in a manner that will enable the Militia in each State—and ultimately *every individual* who is eligible to be a member of the Militia—to employ whatever alternative currency of silver and gold the State may adopt for her own purposes. So, Congress's duty "[t]o provide for organizing * * * the Militia" excludes any purported authority to seize silver or gold, or to withhold either of those metals, from the Militia, or otherwise to regulate the possession or use of the metals in any manner which would interfere with their employment by the Militia.

In sum, were WE THE PEOPLE through revitalized Militia to employ silver and gold as media of exchange in aid of their respective States' economic "homeland security", possession of that specie would never be surrendered at the insistence of and to agents of the General Government unless and until WE THE PEOPLE had first fully satisfied themselves that those agents' claims were entirely justified in both law and fact. This, because the silver and gold would be physically guarded by the Militia; the Militia would be asked to turn over the precious metal for other than their States' own governmental purposes; the Militia would be bound in duty to execute their States' laws as well as "the Laws of the Union"; "the Laws of the Union" would support retaining the silver and gold in THE PEOPLE'S own hands; and much of the specie would be THE PEOPLE'S own personal property, dispossession of which they naturally would resist.

Thus, with respect to the Militia, the Constitution adopts a permanent "four metals policy": In one way or another, Congress must see to it that the Militia are properly supplied with firearms and ammunition—which entails the Militia's possession of *steel* and *lead*. And in no way may Congress dispossess the Militia of *silver* or *gold*. Of course, of the two pairs, steel and lead are, in the final analysis,

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[2510] U.S. Const. art. IV, § 4.

[2511] U.S. Const. art. I, § 8, cl. 15.

[2512] U.S. Const. art. I, § 10, cl. 1.

[2513] U.S. Const. art. I, § 8, cls. 16 and 15.

more important than silver and gold. For, as Machiavelli wryly observed, "gold alone will not always procure good soldiers, but good soldiers will always procure gold".[2514]

6. The Militia's authority and ability to defeat the machinations of globalism. In the final analysis, the economic security of a country depends as much upon the extent of its economic independence as on the soundness of its currency—indeed, in some circumstances the former will turn out to be the precondition for the latter. And economic independence is closely linked to political independence. No country economically dependent upon others can long remain politically independent of the parties who can play upon that dependency. Perforce of the Declaration of Independence, Americans have "assume[d] among the powers of the earth[ ] *the separate and equal station* to which the Laws of Nature and of Nature's God entitle them", and have taken unto themselves "full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and do all other Acts and Things which Independent States may of right do". That is, Americans assert their right to economic as well as political independence, pursuant to which their interactions with the peoples of other nations—whether political in nature (such as "to levy War, conclude Peace, contract Alliances") or economic in character (such as "to * * * establish Commerce")—are always to be matters of Americans' own free choices and subsequent voluntary agreements with those nations. How this assertion is to be made good in the uncertain course of human events, though, poses a perennial question.

a. Maintaining America's "separate and equal station" "among the powers of the earth" might be problematic in principle if her economy were small, weak, narrow in its focus, and thus always vulnerable to internal and external shocks and pressures. Happily, this is not the case. America enjoys the inestimable advantages of a large land mass with varied types of soil and climatic conditions; abundant natural resources; the proven ability to feed her entire population adequately if her agricultural assets are properly managed; hundred of millions of educated and motived people, used to a high level of achievement and standard of living; and, especially, a constitutional republic supportive of a free market through which she can maximize the output of all of her human and material factors of production.

Nonetheless, maintaining America's "separate and equal station" "among the powers of the earth" *economically* as well as politically *has* become dangerously problematic in practice in recent years because of: (i) the dominance *supra*-national corporations have asserted over domestic and international finance, manufacturing, marketing, media, and entertainment; coupled with (ii) their ability, through intervention in elections and lobbying, to select, subvert, and suborn America's

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[2514] Niccolò Machiavelli, *Discourses on the First Ten Books of Titus Liv*y (1531), Second Book, Chapter X, *in The Historical, Political, and Diplomatic Writings of Niccolo Machiavelli*, Christian E. Detmold, Translator (Boston, Massachusetts: James R. Osgood and Company, 1882), Volume 2, at 252.

public officials—as well as officials of just about every other country in the world—into adopting policies that sell out the general welfare of their peoples to the globalists' special interests. In particular, Americans now find themselves in essentially the same position of economic and political subordination as did the Colonists under the English mercantile system of the 1700s. As a result of British imperial trade policies, the Colonists had to buy most of their manufactured goods from the Mother Country, while they produced mostly raw materials for export. Similarly, as the result of trade policies foisted upon this country in aid of *supra*-national private corporate imperialism, contemporary Americans are pressured by economic circumstances into buying whatever foreign products the globalists deign to import and sell in the domestic market. The globalists can stop Americans from buying goods manufactured within the United States either (i) by importing cheap substitutes with which American manufacturers cannot compete, or (ii) by moving domestic production of those things to foreign venues through expatriation of capital so that not even theoretical competition exists. In this manner, the globalists allow America to have only such a National economic life—in terms of education and training of her populace, extraction of natural resources from her lands and waters, creation and operation of means of mass production, manufacture and distribution of goods and services, and standards of living for individuals in all walks of life—as fits their agenda. As a result, globalism has destroyed American education, gutted this country's manufacturing base, forced more and more workers into an unsustainable "service economy", and flooded the land with illegal "guest workers" who drive down real wage-rates and overburden social services to their breaking-points. In short, America is being chocked to death economically—and politically, too—by the products the globalists shove down her throat.

The question is: "How can America's economy be extracted and then insulated from globalism, restored to its former state of almost complete self-sufficiency, and then preserved?"

b. To succeed, any program to confront, confound, and ultimately crush globalism will require political, economic, and social mobilization among WE THE PEOPLE. This must begin somewhere before it can be undertaken everywhere. The first step must be for THE PEOPLE to wake up to the futility of simply "petition[ing] the Government for a redress of grievances"[2515] through lobbying of legislators, litigation in the courts, and electoral campaigns that merely change the identities but never the pernicious policies of rogue public officials. These means of exercising "the right of the people * * * to petition" may let off considerable amounts of steam; but they almost never apply the pressure that steam has generated to productive political or economic work. Americans need to stop petitioning with words the

[2515] U.S. Const. amend. I.

efficacy of which depends upon public officials' concurrence, and start petitioning with deeds which they can accomplish on their own in the face of officialdom's incompetence or even open opposition. For example, if the plan were to constrain the inflow of cheap and shoddy foreign merchandise by having Congress "lay and collect * * * Duties, Imposts and Excises" on such importation,[2516] petitioning legislators would be useless, because common Americans do not now, and in the foreseeable future cannot expect to, control Congress; and because "[n]o State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for exercising it's inspection Laws".[2517] But, as individuals, families, and groups, average Americans on their own initiatives can simply stop buying foreign products to the greatest degree possible, thus imposing "Duties, Imposts and Excises" on the globalists indirectly through diminution of sales. Just as the Continental Congress in 1774 promoted "The Association" to boycott British goods,[2518] so, too, could contemporary Americans with the intent to secure "the separate and equal station" of this country "among the powers of the earth" shift from consumption of goods supplied by *supra*-national corporations to consumption of goods produced in America, by Americans, for Americans. Certainly such a program would be workable, because:

- America is a, if not the, major market for the outpouring of the globalists' merchandise—so Americans' widespread rejection of this junk will have an immediate and heavily negative impact on globalism.

- American industry once supplied this country with the types of things a boycott of globalist products would exclude from the domestic market, and could do so again were unfair competition from abroad curtailed.

- Americans need not depend upon their faithless political "representatives", but instead can resuscitate and rejuvenate their domestic industries through private action, because their country still retains a primarily free-market economy.

- While American manufacturers are expanding their production, American consumers can make do with less, or little, or even in some areas none at all of the foreign junk that high-quality American products will eventually replace. As the Continental Congress resolved in The Association, "[w]e will * * * encourage frugality, economy, and industry, and promote agriculture, arts and the manufactures of this country * * * ;

[2516] U.S. Const. art. I, § 8, cl. 1.

[2517] U.S. Const. art. I, § 10, cl. 2.

[2518] *See Journals of the Continental Congress*, *ante* note 42, Volume I (5 September to 26 October 1774), at 75-80. *See generally, e.g.,* T. Breen, *American Insurgents, American Patriots, ante* note 447, Chapters 6 and 7.

and will discountenance and discourage every species of extravagance and dissipation".[2519] And perhaps most importantly,

> • The present situation provides Americans with the occasion and the necessity for doing what must be done sometime if their country's survival as an independent polity is to be assured.

Such action will rejuvenate America economically, politically, and morally. The economic advantage is obvious: What Americans do not spend on disposable foreign junk they can save and invest at home, thereby establishing the new and building up the old productive facilities—whether in manufacturing, construction, agriculture, energy, transportation, or social services—that will provide Americans with sound long-term employment. The political advantage is equally patent: The whole enterprise not only will educate and mobilize the people but also will finally identify the true friends *and enemies* of American independence. Each American's own actions in the marketplace will identify him as a patriot or a quisling. And the moral advantage is incalculable: The globalists have long employed their favorite tactic of "divide and rule" to pit American consumers against American producers to the disadvantage of both—marshaling the consumers' desires for cheap goods as the means to destroy the producers, so that eventually not only will Americans in their capacities as consumers be at the mercy of the globalists with respect to what goods are available, but also American consumers in their capacities as producers will not be able to earn the incomes necessary to buy even the cheap foreign merchandise offered for sale, thus requiring that they perpetually enslave themselves to the big globalist banks through the fetters of "credit cards" and other forms of indebtedness. A popular boycott of globalist "free trade" will replace social division in the globalists' interests with social solidarity in common Americans' interests.

c. How can such a program be *enforced*? As to so many other questions critical to America's survival at the present time, the answer is: "By and through revitalized Militia of the several States!"

(1) The Militia are uniquely authorized to render effective a popular boycott of foreign goods. For the Constitution assigns to the Militia the responsibilities "to execute the Laws of the Union" and to "repel Invasions".[2520] The Declaration of Independence is the most important of "the Laws of the Union", because it is the foundation for *all* such "Laws", as well as for the laws of the States. It announced the "separate and equal status" "among the powers of the earth" of the several States. Under its aegis, neither any of the several States individually, nor the United States collectively, can ever be subordinated to any other of "the powers of the earth". Globalism denies this "separate and equal status" in both principle and

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[2519] ¶ 8, *in Journals of the Continental Congress, ante* note 42, Volume I, at 78.

[2520] U.S. Const. art. I, § 8, cl. 15.

practice, because it seeks to render the States and the United States subordinate and subservient to a shadowy cabal of *supra*-national private corporations and both national and international *quasi*-public and private institutions that support these corporations (in the monetary and banking fields, for example, the Federal Reserve System, the International Monetary Fund, and the Bank for International Settlements). After the Declaration of Independence, the Constitution is the next most important of "the Laws of the Union". The First Amendment guarantees for "the people" the rights of free speech, association, assembly, and petition; and the Second Amendment declares that "[a] well regulated Militia" is "necessary to the security of a free State". "[A] *free* State" enjoys the benefits of the Declaration of Independence—that is, is not subject to control, whether political or economic, by any foreign state or *supra*-national entity. Therefore, the Militia can and should be deployed to arrest the spread of globalism, by assisting common Americans in exercising their rights of free speech, association, assembly, and petition for the purpose of peacefully boycotting and ostracizing those who sell or buy foreign goods here at home.[2521]

Similarly, the Militia can and should be deployed to repel the on-going economic "Invasions" fostered by such international arrangements as the General Agreement on Tariffs and Trade (GATT) and the North American Free Trade Agreement (NAFTA). These schemes, after all, have little or nothing to do with "free trade", but instead actually amount to licenses for *supra*-national corporations to attack the United States by inundating her markets with shoddy foreign goods which have been produced at minimal cost by workers exploited under terms and conditions of employment far below America's standards, and which therefore can undersell goods of higher quality produced domestically. Furthermore, the Militia can protect individual Americans' efforts at economic self-defense from illegal retaliation by supporters of globalism, be they private merchants or rogue politicians. For it is self-evidently every American's absolute right as a private citizen *not* to engage in commerce, be it domestic or international;[2522] and he need not answer for, justify, or explain his behavior to anyone.

(2) No State, through the actions of her Militia or otherwise, could simply close her airports and harbors to international trade, or her domestic borders to interstate trade, in undesirable goods of foreign manufacture, because: (i) Congress exercises the power "[t]o regulate Commerce with foreign Nations, and among the several States";[2523] (ii) no State action can override a legitimate Congressional

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[2521] *See, e.g.,* NAACP v. Claiborne Hardware Company, 458 U.S. 886 (1982).

[2522] *See* National Federation of Independent Business v. Sebelius, No. 11-393, ___ U.S. ___, ___ (2012) (Roberts, C.J., announcing the judgment of the Court), Slip Opinion at 16-30, *and id.* at ___ (Scalia, J., dissenting), Slip Opinion at 4-16.

[2523] U.S. Const. art. I, § 8, cl. 3.

determination to allow foreign goods to enter and be transported throughout the United States;[2524] and (iii) at the present time, Congress is firmly under the noisome influence of globalists. The Militia, however, are uniquely qualified to mediate and render effective a popular boycott of foreign goods by citizens acting in their *private* capacities as consumers. Ultimately, an economic boycott must be enforced at the Local level, where sales are made. Revitalized Militia would be organized and would operate primarily at the Local level[2525]—so their members would be perfectly positioned to perform the functions assigned to the "Committees of Observation" or "Committees of Inspection" under "The Association" of 1774:

> That a committee be chosen in every county, city, and town, by those who are qualified to vote for representatives in the legislature, whose business it shall be attentively to observe the conduct of all persons touching this association; and when it shall be made known, to the satisfaction of a majority of any such committee, that any person within the limits of their appointment has violated this association, that such majority do forthwith cause the truth of the case to be published in the gazette; to the end, that all such foes to the rights of * * * America may be publicly known, and universally contemned as the enemies of American liberty; and thenceforth we respectively will break off all dealings with him or her.[2526]

(Indeed, "Committees of Observation" or "Committees of Inspection"might be formed first in various Localities for the purpose of enforcing a boycott there, and through that activity could then evolve into the precursors, or otherwise promote the establishment, of Independent Companies of Militia.[2527]) With their specialized knowledge, the Militia in each Locality could easily determine how best to publicize the terms of the boycott, educate the community as to the necessity for such action, and exert social pressure upon those recalcitrant individuals who refused to behave in the public interest. Modern Militia working as or with "Committees of Observation" or "Committees of Inspection" would be far more effective today than in the *mid-*1770s, though, because they could employ the Internet and other means of mass communications for instant dissemination of information throughout their own Localities and States, among the several States, and even worldwide. Thus, a contemporary "Association" aimed at resisting the economic imperialism of *supra-*national corporations would not require instigation, direction, or even assistance

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[2524] *See* U.S. Const. art. I, § 8, cl. 3 *and* art. VI, cl. 2.

[2525] *See ante*, Chapter 37.

[2526] ¶ 11, *in Journals of the Continental Congress, ante* note 42, Volume I, at 79.

[2527] *Compare* E. Vieira, Jr., *Constitutional "Homeland Security", ante* note 3, Chapters 7 through 11, *with* the experience in Colonial Virginia, *ante*, at 567-597.

from a central institution such as the Continental Congress. Rather, the people in any one State could initiate the effort, widely publicize their strategy and tactics, and urge others to coöperate on the basis of Benjamin Franklin's famous slogan, "Join or Die!"—because globalism will inevitably kill this country if allowed to run its course.

To be sure, a successful boycott would require leadership by people specially trained in various types of economic management, so that the operation could be conducted in an orderly, measured, and responsible fashion, with an eye towards maintaining social solidarity to the maximum degree possible. For example, some foreign goods ought not to be boycotted until comparable goods or acceptable substitutes could be produced domestically. And individuals in economically straitened situations ought to be offered financial assistance to enable them to overcome their dependence upon cheap foreign products. In most communities, however, it should not be difficult to find competent individuals who could perform these functions through Independent Companies.[2528]

The foregoing survey suggests only a few of the vital services—both political and economic—that revitalized "Militia of the several States" could provide. Additions to this list are limited only by the infertility of a sceptic's imagination.

[2528] *See post*, Chapter 44.

CHAPTER FORTY-THREE

The primary method for enforcing discipline as well as raising revenue within revitalized "Militia of the several States" should be the imposition of fines for their members' failures, neglects, or refusals to perform their duties.

To ensure that they were "well regulated", America's *pre-*constitutional Militia employed many different types of penalties to enforce Militiamen's fulfillment of their duties. In addition to fines and attendant seizures and sales of their property to make payments, defaulters could face corporal punishment, imprisonment, compulsory labor, conscription into service with the regular Armed Forces, and (if they were officers) forfeitures of their commissions in the Militia.[2529] All of these varieties of discipline can and should be continued in revitalized "Militia of the several States" today, depending on the seriousness of the particular delinquencies that may occur.

For at least two reasons, though, *fines* should be the preferred means of discipline for routine infractions:

A. Historical basis. A heavy reliance on fines would be in keeping with the practice applied throughout the Colonies and independent States during *pre-*constitutional times. No sound reason exists to suspect that what experience proved workable then would not be just as workable now.

B. Practical utility. Particularly during the initial period of revitalization of the Militia, fines should prove to be the most useful penalties for routine infractions.

1. Fines can be made specific and fair. A separate monetary penalty, precisely graded to the circumstances and seriousness of the particular infraction, can be assigned to each and every different offense and degree of default (although, of course, some might deserve harsher punishments yet). And, if carefully tailored to the offense, no fine would be subject to credible criticism as arbitrary or excessive.

2. Fines can be made universal, both (i) as to *all members* of the Militia—so that *everyone* will be exposed to *some* penalty for misbehavior, and (ii) as to *all infractions*—so that *some* punishment, howsoever small, will be imposed for *every* violation.

[2529] *See ante*, Chapters 12 and 23.

3. The universality of fines would emphasize the compulsory nature of the Militia, and each individual's duty to perform some function in aid of "the security of a free State".

4. Fines are immediately and infinitely adaptable to changing circumstances. Being simply numbers, they can be modified very quickly and easily as experience indicates is necessary.

5. Fines are administratively convenient and efficient. Every fine can be imposed and enforced according to the same simple (and at some point doubtlessly fully automated) procedure, without the employment of large numbers of highly trained personnel.

6. In the case of error or pardon, a fine can be remitted, unlike corporal or other punishments which cannot be undone.

7. Besides their prophylactic effect as punishments, fines can be uniquely useful in providing the financial support that will be crucial for successful revitalization of the Militia. In these times of economic stringency, little funding for that purpose can be expected from the States' governments. And even if the General Government could provide some funds, both the States and WE THE PEOPLE would be well advised to eschew its assistance, so as to avoid both dependence upon subvention from the District of Columbia, and exposure to the attempts to impose centralized, ham-handed bureaucratic control upon the Militia that invariably would be the concomitant of such subsidization. This leaves only THE PEOPLE themselves as the source of the necessary funds. Which is highly appropriate. For THE PEOPLE *are* the Militia. And if THE PEOPLE pay for revitalization of their own Militia they will both control the process and be most highly motivated to make it work. The use of fines will enable THE PEOPLE themselves to finance revitalization of the Militia through revitalization of the Militia.

Initially, revitalization will not require—and would probably proceed far more smoothly without—everyone's active participation in the field. Rather, the first steps—necessarily somewhat experimental in nature—should be taken through Local "Committees of Safety" and the recruiting and testing of various "Independent Companies" composed of volunteers.[2530] The rest of the population should be granted temporary exemptions from almost all duties, for which fines in the nature of fees, or fees in the nature of fines, or monetary equivalents exacted in exchange for exemptions, would be paid.[2531] The nomenclature adopted is unimportant. After all, if a Militia statute imposes a duty *D*, failure in the

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[2530] *See post*, Chapter 44.

[2531] On the last of these, *see ante,* at 1015-1016.

performance of which incurs a fine *F*, any individual subject to *D* can in effect grant himself an exemption simply by paying *F*. So the statute could simply grant everyone an exemption from *D* upon the payment of an equivalent fee *E* in the first place, and obviate the necessity to collect a fine *F* from each defaulter through some separate procedure. If (as may reasonably be anticipated) large numbers of people, unfamiliar with the history and constitutional importance of the Militia, and perhaps less patriotically motivated than they should be, will desire to avoid being involved in the early stages of revitalization, proportionately large sums will be forthcoming from them as fines or fees paid for exemptions. These funds, directed especially to Local Committees of Safety and Independent Companies, will enable the process of revitalization to become self-financing, and thereby "get off the ground". Thus, the very individuals who will not want to participate personally in the Militia *will* participate vicariously, and their participation will make revitalization a reality.

8. For these reasons (and particularly the last-mentioned of them), legitimate excuses for noncompliance with Militia duties that do not trigger fines should be sparse, select, and stringent. Although *pre-*constitutional Militia statutes often flexibly tempered justice with mercy, by allowing officials the discretion to take into account any "reasonable" or "sufficient" excuse for a Militiaman's default in his duty, the grounds for extenuation that they did recognize all derived from circumstances largely beyond a defaulter's desires or control—such as sickness or other physical disability; impoverishment; in the case of conscientious objectors the need to comply with the higher authority of religious precepts; or some other credible excuse peculiar to the circumstances.[2532] This same test of practical necessity should apply today.

9. For the sake of overall preparedness, the mere payment of a fine should not exempt anyone not entitled to some other exemption on that score from certain critical requirements, such as:

- studying Militia history, law, organization, discipline, training, and duties;
- learning how safely and effectively to operate and maintain in good order the major types of firearms, ammunition, and accoutrements suitable for Militia service;
- training to provide basic emergency medical assistance; and
- preparing to furnish shelter, food, water, sanitation, and like necessities to others in the course or aftermath of a natural disaster, major industrial accident, or other calamity.

[2532] *See ante*, Chapters 11 and 22.

Neither should the mere payment of a fine justify an exemption from any other particular requirement more than some reasonable proportion of the times that requirement becomes applicable to the same individual.

C. Equitable allowance. After revitalization of the Militia is well in hand, the major problem with reliance on fines to compel participation will sound, not in efficiency, but in equity. An individual's straitened economic circumstances may suffice as a valid reason (for example) why he simply cannot comply with a statutory requirement that he should provide himself with a suitable firearm, and therefore why he should not be fined for such noncompliance (and perhaps even should receive public assistance on that score). On the other hand, another individual's highly favorable economic situation should not privilege him to escape from all of his obligations—and thereby permanently deprive the community of what could be the unique benefit of his actual personal participation in the Militia—by simply paying the fines that less-affluent individuals cannot afford to pay.

Yet the reality remains that, when fines are employed as the penalties for defaults in duty, the economically well-to-do can buy their way out of personal participation in the Militia at prices they may consider cheap. To allow this to occur on a large scale in the initial stages of revitalization of the Militia is certainly expedient, and may even be necessary. And, with respect to some few duties, to suffer it thereafter may be acceptable. But it cannot be tolerated with respect to most, let alone all, duties at all times. Self-government is not "a spectator sport" in which the purse can substitute for the person. And as what the Constitution identifies as the most important instrument of self-government—the *only* one it describes as "*necessary* to the security of a free State"[2533]—"[a] *well regulated* Militia" requires, or at least should always strive for, the actual personal participation of all of the individuals eligible for service who live and work within its territorial bounds. The Militia is the ultimate instrument through which each individual can *and should* personally exercise his portion of the powers of sovereignty. The rightful use of any form of personal political power demands personal responsibility, which demands personal attention to duty. How much more so for the political power the Militia wields—the"'[p]olitical power [that] grows out of the barrel of a gun'"?[2534]

One possible solution to the problem would be to graduate the amounts of fines according to individuals' disposable incomes or total wealth. Everyone below some level of monetary wherewithal (howsoever estimated) would be charged fines fixed in amounts for various infractions, whereas those above that level would be charged fines that increased—and perhaps rapidly so—in proportion to their abilities to pay. This would be eminently fair in any event, because, on the one

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[2533] U.S. Const. amend. II (emphasis supplied).

[2534] *Quotations From Chairman Mao*, *ante* note 28, at 61.

hand, being "necessary to the security of a free State", "[a] well regulated Militia" is true "social insurance"—but, as with all insurance, the greater the value of the property protected, the larger the premiums that must be paid. On the other hand, as a matter of "social justice", the amount of service an individual ought to contribute to the community should be proportionate to the benefits he derives from it. So, the greater his wealth—which roughly reflects the value to him of his membership in the community—the greater the service he owes to the community. There being only one degree of actual personal attendance to duty, an individual who serves *in propria persona* can be required to do no more. But when mere money substitutes for personal service, the degree of the contribution can easily be proportioned to the amount of wealth the individual possesses—and the Militia, in which he does not want to participate personally, protects.

Such an approach to the problem was not unknown in *pre-*constitutional times. In 1779, Pennsylvania enacted several statutes to the purpose. The first provided that

> * * * [w]hereas it has been found by experience, that the fines and penalties laid on persons neglecting to perform * * * military duties * * * are insufficient for the good purposes intended:
>
> For remedy whereof:
>
> * * * Be it enacted * * * That * * * each and every person or persons within this state, who shall not do and perform his or their tour of militia duty as directed by law, shall forfeit and pay the sum of one hundred pounds * * * ; and for all neglects in performing the other military services required * * * shall pay six times what they were by law obliged to pay, except the inhabitants of the city of Philadelphia and the liberties thereof, who shall pay eight times the sum payable * * * for all neglects[.]{EN-2033}

Thus, Pennsylvania recognized that the especially advantageous economic positions of "the inhabitants of the city of Philadelphia and the liberties thereof" justified the imposition on them of fines fully one-third higher than the fines imposed on other Pennsylvanians.

The next statute (continued shortly thereafter) provided that

> whereas nothing is more just and equitable than that persons who neglect or refuse to turn out in defence of their liberty and property, should pay an equivalent in proportion to the property which is protected by those who do turn out at their country's call. In order to enable the legislature to make some recompense to such as perform their tour of duty, greatly to the prejudice of their private affairs, and often to the great distress of their families.

> * * * Be it enacted * * * That instead of the sum of one hundred pounds, which persons refusing to perform their tour of militia duty are now by law subject to, every person and persons who shall refuse or neglect * * * to perform their tour of militia duty, * * * it shall and may be lawful for the lieutenant * * * of the city of Philadelphia and the proper county and the judges of the court of appeal to fine each and every person so neglecting or refusing in any sum [n]ot exceeding one thousand pounds nor under one hundred pounds, except in cases of inability of body and estate: and in laying and judging of the amount of the said fine the said lieutenant * * * and judges shall have a due regard to the value of such delinquents estate and circumstances[.]{EN-2034}

In this Act, "except in cases of inability of body or estate"—as to which the imposition of a fine would have been unjust or ineffective—the State explicitly linked the size of an individual defaulter's fines directly to his "estate and circumstances", with the possible payments ranging from one hundred to one thousand pounds, no doubt depending upon both the severity of the default and the defaulter's ability to pay.

As a further incentive for the rich to perform their Militia duties personally, fines imposed upon individuals in the higher brackets of wealth could be further increased for serial usage, so that an effective exemption purchased in the second year would cost (say) twice what it cost in the first year, one purchased in the third year would cost twice what it cost in the second year, and so on. Being both initially graduated and then annually multiplied, at some stage even quite well-to-do defaulters would find fines at least inconvenient if not prohibitive.

Finally, the fines that individuals have paid, and the reasons for them, could be published within the Militia, so that serial shirkers would be shamed into coming forth to do their duty personally.

CHAPTER FORTY-FOUR

Under present conditions, raising Independent Companies composed of volunteers on a Local basis provides the best means to begin revitalization of "the Militia of the several States".

A. No true "Militia of the several States" extant today. The unfortunate but undeniable reality today is that "the Militia of the several States" are *not* constitutionally "organiz[ed], arm[ed], and disciplin[ed]", either by Congress for the three purposes the Constitution explicitly allows,[2535] or by their individual States for all other purposes (and for those first three purposes, too, should Congress continue to default in its duty in that regard).[2536] Indeed, *no* true constitutional Militia is "organiz[ed], arm[ed], and disciplin[ed]" for *any* purpose *anywhere* within the United States. Rather, the vast mass of Americans eligible—and therefore constitutionally required—to serve in some capacity in the Militia has been relegated to the unconstitutionally oxymoronic, impotent, and even imbecilic "unorganized militia".[2537] As a result, *no* "*well regulated* Militia" exists in *any* State, which means that *no* State can—and, in light of the National *para*-military police-state apparatus being elaborated as of this writing at an ever-accelerating pace around the United States Department of Homeland Security, *no* State now does or without affirmative action on her part will hereafter—enjoy "the security of a *free* State".[2538]

During the last hundred years, insouciant, incompetent, or intentionally rogue public officials have denied WE THE PEOPLE the proper organization of the Militia to which all Americans are constitutionally entitled. The history of "militia" in America during this period exhibits a sorry cavalcade of ignorance, confusion, conflicts, and exaggerated concerns for amassing institutional authority and advancing personal careers within the regular Armed Forces, the National Guard, so-called "State Guards" and "State Defense Forces", and among various public officials of both the General Government and the States.[2539] Perhaps even worse,

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[2535] *See* U.S. Const. art. I, § 8, cls. 15 and 16.

[2536] *See* U.S. Const. amends. II and X.

[2537] *See, e.g.*, 10 U.S.C. § 311(b); General Laws of Rhode Island §§ 30-1-4(4) and 30-1-5; Code of Virginia §§ 44-1 and 44-4. *See ante*, at 786-793.

[2538] *See* U.S. Const. amend. II (emphasis supplied).

[2539] *See generally, e.g.,* B. Stentiford, *The American Home Guard, ante* note 1058, *especially* Chapters 4 through 10.

devoid of a collective memory of the true state of affairs, deprived of relevant personal experience, and deluded by malign propaganda put out by the big media and various subversive special-interest groups, all too many Americans have come to treat the very noun "militia" as a dirty word that implies "extremism", "racism", "illegality", "violence", and even nascent "terrorism"—to the extent that not just a few patriots are reluctant even abstractly to advocate anything to do with the constitutional Militia any more, lest they be mocked, vilified, and politically ostracized for their efforts. *Certainly a nadir of constitutionalism has been plumbed when constitutionalists themselves shrink from affirming the one and only institution the Constitution itself declares to be "**necessary** to the security of a free State".*

B. Revitalization of the Militia WE THE PEOPLE'S responsibility. The main sources of this problem are two: *first*, the general antinomian notion that the Constitution is merely a set of "legal technicalities", many of them stodgily anachronistic, which can be disregarded whenever what passes for more modern political policy counsels the convenience of doing so; and *second*, the specific concern Joseph Story long ago pinpointed, that selfish individuals would desire to be dispensed from personal service in the Militia whenever they had no reason to fear the consequences—what he recognized even in the early 1830s as

> a growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burdens, to be rid of all regulations. How it is practicable to keep the people duly armed without some organization it is difficult to see. There is certainly no small danger that indifference may lead to disgust, and disgust to contempt; and thus gradually undermine all the protection intended by th[e Second Amendment.][2540]

The Constitution is a complex, fully integrated plan, not just for a federal system of government, but for the preservation of "free State[s]" throughout America of which that system is the primary agent. With any large edifice, though, if a supporting pillar is demolished or allowed to deteriorate—particularly if it is the one pillar the architects themselves emphasized in their blueprint as indispensable—the entire structure must first tip, then totter, then eventually tumble down. So, having pandered for far too long to the "strong disposition, from a sense of [the Militia's] burdens, to be rid of all regulations", and thereby having allowed the all-important constitutional pillar of "[a] well regulated Militia" to decay to insignificance in every one of the several States, WE THE PEOPLE now find—which should hardly surprise anyone—that their constitutional edifice has begun perceptibly, increasingly, menacingly to deviate from perpendicularity, endangering the survival of the entirety of America's "free State[s]" at the National,

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[2540] *Commentaries on the Constitution*, *ante* note 576, Volume 2, § 1897, at 646 (footnote omitted).

State, and Local levels. Not only are average Americans ill-fitted in general to deal with most run-of-the-mill emergencies that break out in their own back yards, but more ominously they are unprepared in particular to protect themselves against the consequences of a collapse of this country's monetary and banking systems, and the evisceration of the National, State, and Local economies that would accompany it. And that unpreparedness exposes them to the imposition of a *para*-military national-security police-state apparatus which rogue public officials undoubtedly would unleash from the District of Columbia in the event of a widespread economic breakdown.

The obvious response to this danger is to return the pillars of "well regulated Militia" in each and every one of the several States to their original positions and strength—immediately, if not sooner. That accomplished, WE THE PEOPLE will benefit from "the security of a free State", in which: (i) every Locality will be adequately prepared for all eventualities, with its manpower and resources under the control of its own inhabitants; (ii) proper divisions of constitutional responsibilities and labor will exist between "the Militia of the several States" and the Armed Forces; and (iii) no burgeoning *para*-military national-security police state apparatus centered in the Department of Homeland Security will any longer arguably be needed, on even the most paranoiac calculus, and therefore will no longer be tolerated. The requisite reconstruction will not occur, however, until WE THE PEOPLE themselves take charge of the project. For rogue public officials, professional politicians, and the factions and special-interest groups that pull their strings will not undertake the task, but instead will oppose it at every turn.

THE PEOPLE must presume that they still have the time necessary to put these reforms into practice—if ***they themselves*** begin as soon as possible to discover the most effective and efficient ***ways*** to proceed.

> • *They themselves*, because THE PEOPLE can not and should not rely upon aloof and élitist self-styled "security experts" from Congress, the Department of Homeland Security, the Department of Defense, and other governmental agencies and private organizations and special-interest groups who have serially proven their inability or unwillingness to face up to, let alone solve, the problem—and no doubt at least a few of whom are the witting agents of the enemies of American freedom who have brought the situation to its present sorry pass in the first place and fully intend to prevent its rectification in the future. Instead, THE PEOPLE must draw upon THE PEOPLE—who have the greatest and most pressing personal interests in the matter; who are available in large numbers; who, being on the scene, know the peculiarities of their Localities, their needs, and their resources; who can bring a wide mix of native talents, education, knowledge, skills, and experience to the job; and, perhaps most importantly, *who can be trusted to do the right thing for the right reason*.

• And THE PEOPLE will need to discover the most propitious *ways* to proceed, because self-evidently revitalization of the Militia after so many decades of disuse will have to be largely experimental, following different paths in different States and even in different Localities within the same State in response to and taking advantage of differing circumstances. The hidebound bureaucratic formula of "top-down", "one-size-fits-all" central planning and direction will not do. Instead, revitalization will call for new, innovative, and flexible methods of organization that THE PEOPLE will need to develop in the contexts and under the exigencies and constraints of their own unique environments.

C. The contemporary Swiss militia not a usable model under American conditions. Ideally, revitalization of the Militia could look for inspiration to the Swiss militia system.[2541] Having thoroughly proven itself over many generations, it could offer an excellent model for imitation here—*if* both it and America's Militia were properly understood. Unfortunately, even people who should know better become confused, as in the mistaken observation that "[t]he Swiss militia system is unique and is not comparable to the present Reserve and [National] Guard forces in the United States. The basis for conscription is the constitution, which mandates military service for every Swiss male from age 20 to 50 (55 in the case of officers)."[2542] True, the Swiss militia "is not comparable to the present Reserve and [National] Guard"—but that is because those forces are *not* "Militia" at all, in any constitutional sense of that term.[2543] On the other hand, "[t]he Swiss militia system" is *not* "unique" with respect to "conscription", but is actually a mirror-image in principle of "the Militia of the several States" under America's Constitution.

More problematic, though, is that trying to adopt "the Swiss militia system" at the present time would require asking too many Americans to do too much too soon, with too little appreciation for why it should be done. In addition, the Swiss system was developed over a long period of time *specifically for Switzerland*. Doubtlessly, some of its gross structure could be incorporated with little or no amendment into a program for revitalization of the Militia in this country. But many of its finer points are unlikely to be directly translatable to present conditions in the United States.[2544] So, at least initially, patriots intent on revitalizing the Militia in this country need to assess their own special needs and capabilities *State by State,* rather than simply hoping to be able to ape what the Swiss have done.

[2541] *See, e.g.,* George S. Patton & Lewis W. Walt, "The Swiss Report", *in Safeguarding Liberty, ante* note 1225, at 197.

[2542] *Id.* at 203.

[2543] *See ante*, at 786-793.

[2544] *See generally* John McPhee, *La Place de la Concorde Suisse* (New York, New York: Farrar/Straus/Giroux, 1984).

D. Independent Companies the best means to begin revitalization of the Militia. Independent Companies could play a crucial rôle in discovering how best to revitalize the Militia under contemporary conditions, State by State and even Locality by Locality. Just as Independent Companies in Virginia in 1774 and 1775 filled in until her Militia could be properly regulated in the tortuous course of the political crisis of that time,[2545] so too would Independent Companies be useful for that purpose in every State today. Moreover, Independent Companies could chart a *new* course for revitalization—a task not necessary during the *pre-*constitutional era because Virginians then enjoyed the luxury of *continuity* with respect to their Militia, which experienced an hiatus of less than two years from 1773 to 1775, rather than the decades upon decades of disuse and even derision of the Militia through which Virginia, and the rest of America as well, have suffered in recent times.

1. The historical hiatus. Admittedly, Independent Companies have suffered much the same sorry fate as the regular Militia since the early 1900s, although their suppression came somewhat earlier and has proven to be more thoroughgoing.

a. In conformity with *pre-*constitutional practices, the several States' Independent Companies were recognized by the General Government close upon ratification of the Constitution. In the Militia Act of 1792, Congress provided that,

> whereas sundry corps of artillery, cavalry, and infantry now exist in several of the * * * states, which by the laws, customs, or usages thereof have not been incorporated with, or subject to the general regulations of the militia:
> * * * *Be it* * * * *enacted*, That such corps retain their accustomed privileges, subject, nevertheless, to all other duties required by this act, in like manner with the other militia.[2546]

The language "such corps retain their accustomed privileges, subject, nevertheless, to all other duties required by this act, in like manner with the other militia", obviously did not purport to dissolve any then-existing Independent Companies "not * * * incorporated with, or subject to the general regulations of the militia", but simply declared that those Companies would be liable to and should be capable of being "call[ed] forth to execute the Laws of the Union, suppress Insurrections and repel Invasions", "in like manner with the other militia"—hardly a remarkable condition, in light of Congress's power "[t]o provide for organizing, arming, and disciplining, the Militia", and the practical need for imposing some

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[2545] *See ante*, at 567-597.

[2546] *An Act more effectually to provide for the National Defence by establishing an Uniform Militia throughout the United States*, Act of 8 May 1792, CHAP. XXXIII, §§ 10 and 11, 1 Stat. 271, 274.

uniformity within "the Militia of the several States" as a whole so as to maximize their force and efficiency if any "Part of them" were "employed in the Service of the United States".[2547] After all, being (as the statute provided) "subject * * * to all * * * duties required by this act, in like manner with the other militia", did not impose on Independent Companies statutory "duties" that Congress could not constitutionally have required from "the other militia". Yet, in one particular the statute arguably did raise a constitutional problem. Its reference to "sundry corps of artillery, cavalry, and infantry [which] *now* exist in several of the * * * states" might have implied that Congress intended to recognize a right to "retain their accustomed privileges" only for Independent Companies formed on or before 8 May 1792, the effective date of the Act—thus asserting a power to prohibit the formation of all other Independent Companies thereafter, notwithstanding that under *pre-*constitutional practice such Companies had often been parts of "well regulated Militia". Of course, "[t]he cardinal principle of statutory construction is to save and not to destroy",[2548] by "ascertain[ing] whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided".[2549] So perhaps the statute should have been construed to mean that not only Independent Companies already in existence as of 8 May 1792, but also those that came into existence while the Act of that date remained in force, would "retain their accustomed privileges". That is, "now" referred, not to a single moment in time, but to a present condition—the existence of the statute—which would continue until Congress took contrary action at some point in the future.[2550]

(1) Either Rhode Island (for one State) interpreted the statute in the latter sense, or she believed that, however the statute might be construed, the power to form Independent Companies within a State's "well regulated Militia" remained "reserved to the States respectively, or to the people"[2551]—so that, although Congress was authorized to subject Independent Companies "to all * * * duties * * * in like manner with the other militia" in order to suit them to be "call[ed] forth" for the three explicit constitutional purposes, it could not prohibit the States from otherwise forming and employing them as the States chose. For, from June of 1792 through October of 1799, Rhode Island's General Assembly chartered no less than

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[2547] U.S. Const. art. I, § 8, cls. 15 and 16.

[2548] National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U.S. 1, 30 (1937).

[2549] Crowell v. Benson, 285 U.S. 22, 62 (1932).

[2550] This would have been an uncommon and strained, but not an impossible, construction. For example, such ordinary usage as "I am *now* ready to go" does not imply that the individual can take action within only an unique instant in the immediate present, but instead indicates a general ability under the present circumstances to act throughout some indefinite future. *See Webster's New International Dictionary, ante* note 330, at 1671, definition 1; *Webster's Third New International Dictionary, ante* note 330, at 1546, definition 5. If the alternative, however, had been that the statute would have had to be deemed unconstitutional, even such a strained construction should have been adopted.

[2551] U.S. Const. amends. II and X.

twenty-three *new* Independent Companies, evidently without any concern whatsoever that its actions might have violated the Militia Act of 1792.{EN-2035} (As this study primarily concerns itself with the history of the Militia during the *pre-* and immediately *post-*constitutional periods, summoning even more owls to Athens on this subject by extending the inquiry into the Nineteenth Century would be supererogatory.) These Independent Companies were not merely ceremonial or honorary outfits, either. In 1795, for instance, the General Assembly "*Voted and Resolved*, That every Person belonging to either of the independent Companies in this State who shall not produce a Certificate from his commanding Officer, that he is uniformed, equipped and furnished agreeably to the Charter of such independent Company, shall be subject to do Duty in the Company of Infantry, or trained Band in the District in which he lives, in the same Manner as if he did not belong to such independent Company."{EN-2036} Revealingly, too, the General Assembly required that the members of Rhode Island's Independent Companies be "uniformed, equipped and furnished agreeably to the Charter[s] of * * * [*those particular*] Compan[ies]", even if this went beyond what Congress's Militia Act of 1792 required.

For a prime example, the charter of "The Bristol Grenadiers", granted in 1799, provided in pertinent part as follows:

> WHEREAS the preservation of this State and the maintenance of its liberties, at all times depend, under God, in a great measure, upon an acquaintance with military discipline; and at this critical and alarming period, when our country is threatened with foreign invasions, it becomes the indispensable duty of every American citizen, to place himself in a situation where he can be useful in repelling the attacks of its enemies. For that purpose, * * * [some thirty-seven named individuals], inhabitants of the town of Bristol, in the county of Bristol, have formed themselves into a military body, and prayed this Assembly to grant them a charter of incorporation, that they, and such others as may hereafter be joined to them, not exceeding sixty-four men rank and file, may be constituted an independent company, by the name of the Bristol Grenadiers.
>
> Wherefore this Assembly, to encourage their laudable design, promote military skill and discipline, have *Ordained*, *Constituted and Granted*, * * * That the said Petitioners, and such others as may be added to them, not exceeding sixty-four men rank and file, be * * * declared to be, an independent company, by the name of *The Bristol Grenadiers*, by that name to have perpetual succession, and to have and enjoy the privileges and immunities hereafter granted.
>
> Imprimis. The said company shall and may, * * * in every year, meet and assemble together and choose their officers, to wit: One Captain, one Lieutenant, and one Ensign, and such noncommissioned officers as are or may be necessary for training, disciplining and well

> ordering said company; at which election no officer shall be chosen but by the greater number of votes then present. The Captain, Lieutenant and Ensign, to be approved of by the Governor * * * , and to be commissioned * * * in the same manner as other military officers are in this State.
>
> Secondly. That the said company shall have liberty to meet and exercise themselves upon such days as they shall think proper, and shall not be subject to the orders and directions of the Colonel, or other field-officer of the [Militia] regiment in whose district they live, at any other time than when called into actual service, or upon regimental trainings, or general muster days; and that they be obliged to meet, at least four times a year, upon the penalty of paying, to and for the use of said company, the following fines, to wit: The Captain, for every day's absence six dollars, the Lieutenant and Ensign four dollars each, * * * noncommissioned officers three dollars each, and each private soldier two dollars; to be collected by warrant of distress * * * .
>
> Thirdly. That the said company * * * make such laws, rules and orders among themselves, as they shall deem expedient for the well ordering and disciplining of the said company: Provided that no fine exceed the sum of one dollar for any one offence * * * .
>
> Fourthly. That if any officer * * * shall be disapproved of by the Governor, or shall remove out of said town to any other place, or shall be removed by death, then and in such case the Captain of the said company, or other superior officer for the time being shall call a meeting for the election of another * * * in manner as aforesaid.
>
> Fifthly. That the persons aforesaid, and all those who shall be duly enlisted into said company, so long as they shall continue therein, shall be exempted from bearing arms, or doing other military duty, watching and warding excepted, in the several companies or training bands in whose district they live.
>
> Sixthly. that the commissioned officers of the said company * * * shall be of the Court-Martial in the district in which they live * * * .
>
> Seventhly. That the said company be accoutred, uniformed and equipped, in such manner as by a majority of them in a public meeting shall be agreed upon, at their own expense.{EN-2037}

A comparison of this charter with the Militia Act of 1792 easily demonstrates that in several respects Rhode Island's General Assembly granted The Bristol Grenadiers special privileges that would definitely have run afoul of that Act except for the allowance therein that Independent Companies could "retain their * * * privileges"—

- The Bristol Grenadiers were entitled to "choose * * * such noncommissioned officers as are or may be necessary for training, disciplining and well ordering said company"—whereas the Militia Act of

1792 required each "company" to muster "four sergeants, four corporals, one drummer and one fifer or bugler".[2552]

• The Bristol Grenadiers were licensed to "make such laws, rules and orders among themselves, as they shall deem expedient for the well ordering and disciplining of the said company"—whereas the Act of 1792 mandated "[t]hat the rules of discipline, approved and established by Congress" in 1779 "shall be the rules to be observed by the militia throughout the United States".[2553] And,

• The Bristol Grenadiers were free to "be accoutred, uniformed and equipped, in such manner as by a majority of them in a public meeting shall be agreed upon, at their own expense"—whereas the Act of 1792 spelled out in fine detail what arms and accoutrements members of the Militia, of whatever ranks, were required to furnish for themselves.[2554] Presumably, preparing themselves to be "grenadiers", the members of this Independent Company would have acquired sufficient equipment suitable for normal Militia service, yet not necessary the very same things that the Militia Act of 1792 stipulated.

(2) Distinguishably from Rhode Island, Virginia did not immediately allow for the establishment of Independent Companies in the *post-*constitutional period. Congress's first Militia Act decreed that, "out of the militia enrolled, * * * there shall be formed for each battalion at least one company of grenadiers, light infantry or riflemen"; "to each division there shall be at least one company of artillery, and one troop of horse"; and "each company of artillery and troop of horse shall be formed of volunteers".[2555] Virginia's Militia Act of the same year closely followed these directives, by creating "light companies" to be "distinguished by the denomination of grenadiers, light-infantry, or riflemen", and companies of artillery and cavalry to be filled "by voluntary enlistments".{EN-2038} In 1832, however, the General Assembly held it

> desirable that * * * Virginia should have at its command an efficient corps, at all times in readiness to meet any sudden emergency; and as it is manifest that such an object can be best attained by the organization of volunteer companies, with appropriate military uniform, to be frequently trained and disciplined, and to be well provided with suitable arms and accoutrements:

[2552] Act of 8 May 1792, § 3, 1 Stat. at 272.

[2553] Act of 8 May 1792, § 7, 1 Stat. at 273.

[2554] Act of 8 May 1792, § 1, 1 Stat. at 271-272.

[2555] Act of 8 May 1792, § 4, 1 Stat. at 272.

> * * * *Be it* * * * *enacted* * * * , That it shall and may be lawful for the governor * * * to commission volunteer companies, either of cavalry, artillery, grenadiers, light infantry, or riflemen * * * , upon the certificate of the commanding officer of the regiment, within the bounds of which the company is proposed to be raised, stating the names of the persons elected to be officers * * * ; that the members have procured some appropriate military uniform; that they have consented to abide by the provisions of this act; and that * * * the organization of said company will not * * * reduc[e] below the minimum number, any existing company of militia.
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> * * * It shall be the duty of the governor * * * to furnish, as soon as practicable, to the volunteer companies * * * such suitable arms and accoutrements as may be at his disposal, under such regulations, and upon such conditions, as he may deem proper.
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> * * * It shall be the duty of the * * * volunteer companies to attend the regimental and battalion musters, and in addition thereto, to attend a regular drill at least once in each month of the year * * * ; and for any delinquency * * * fines shall be assessed as in other cases of militia fines * * * the same to be collected as other militia fines are now collected * * * and appropriated in such manner as may be authorized or required by the by-laws of such company * * * .
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> * * * Any officer, non-commissioned officer, or private, who shall have served the term of seven successive years in one or more * * * volunteer companies, shall thereafter be exempt from militia duty of every kind, except in time of invasions, insurrection, or war.{EN-2039}

In 1834, Virginia provided that

> [t]here shall * * * be commissioned in each regiment of infantry of the line * * * not more than two light companies of volunteers, to be denominated light infantry or rifle, * * * and in the cities, towns and corporations of this commonwealth, there may be in addition to such light companies, any number of volunteer companies of infantry of the line, not exceeding four to each regiment, as may be recommended by the regimental court of enquiry * * * . All of which * * * shall be raised by voluntary enlistment within the bounds of the regiment to which they belong. And each man * * * shall enlist for a term not less than three years.
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> * * * All volunteer companies may adopt by-laws for their own government, and such laws, provided they do not conflict with the laws or constitution of the state, or of the United States, shall be obligatory upon their members.{EN-2040}

In1846, the General Assembly allowed "[volunteer] companies to fix the amount of the fines upon its members for absence from any of its musters: *Provided,* That no fine for absence from any regular muster shall be less than may be imposed by law for similar absences from the musters of the militia of the line"; and permitted "all fines imposed in such companies for offenses against their by-laws" to "be collected and accounted for in the same manner as * * * other fines belonging to the [regular] companies".{EN-2041} In 1851, the General Assembly provided that, "[w]henever there shall be in any of the cities or towns, with the counties adjacent thereto, volunteer companies, amounting in the aggregate to four hundred men * * * , including cavalry and artillery, the governor shall * * * organize one regiment of volunteers at each of the said cities and towns".{EN-2042} Other statutes with provisions concerning "volunteer companies" were enacted in 1852, 1853, and 1860.{EN-2043} Evidently, all of this went beyond what Congress had prescribed in the Militia Act of 1792, demonstrating that Virginia did not believe Congress's authority "[t]o provide for organizing * * * the Militia" with relation to their "be[ing] employed in the Service of the United States"[2556] precluded the States from supplementing that organization in order to prepare their own Militia for other service within their own territories.

b. With the revision of the statutes of the United States in 1873 to 1874, Congress altered the provision of the Militia Act of 1792 to mandate that

> [a]ll corps of artillery, cavalry, and infantry, now existing in any State, which, by any law, custom, or usage thereof, have not been incorporated with the militia, or are not governed by the general regulations thereof, shall be allowed to retain their accustomed privileges, subject, nevertheless, to all other duties required by law in like manner as the other militia.[2557]

Of consequence here is the change in language from simply "*retain* their accustomed privileges" in 1792 to "***shall be allowed to** retain* their accustomed privileges" in 1874. The language of 1792 could and should be construed as the statutory statement of two *constitutional facts*: namely, (i) the specific fact that Independent Companies formed pursuant to "the laws, customs, or usages" of the States, within the latters' "well regulated Militia", enjoy a right to exist perforce of the Constitution, so *of course* they always "retain" whatever "privileges" their States have granted to them (albeit "subject * * * to all other duties * * * in like manner with the other militia" that Congress may constitutionally prescribe); and (ii) the general fact on which the specific fact is grounded, that the States reserve to

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[2556] U.S. Const. art. I, § 8, cl. 16.

[2557] Revised Statutes of the United States (1873-1874), TITLE XVI, THE MILITIA, § 1641, 18 Stat. 285, 287.

themselves the power to form Independent Companies, no matter what Congress may want. Congress can observe Independent Companies' right to exist, but not obstruct its exercise. For, being *constitutional* in nature, that right neither derives from, nor needs, any "allow[ance]" from Congress. And the power to form Independent Companies being reserved to the States, Congress has no discretion to make an "allow[ance]" for it. (Indeed, any such "allow[ance]" would be more apt to sow confusion throughout the country than to clarify the situation.)

On the other hand, the language of 1874 can hardly be construed as anything other than a rather heavy-handed claim of Congressional authority to override the States with respect to Independent Companies. Evidently, from examples such as Rhode Island's over the years, Congress drew the obvious conclusion, and in an exercise of legislative imperialism sought to foreclose the States from asserting their reserved power in that particular. Presumably, if the only Independent Companies that had "retain[ed] their accustomed privileges" under the Militia Act of 1792 were those in existence when that statute was passed (which the actions of Rhode Island, for one State, denied), then the only Independent Companies "now [legally] existing in any State" under the statutory revision of 1874 were those within the original set that had somehow survived. But if all of the Independent Companies formed after 1792 had legal status (which the actions of Rhode Island, for one State, affirmed), then the terms "now existing" included them, too. And without new legislative restrictions (if any could be had, constitutionally), "now existing" could be construed to embrace any Independent Companies the States formed after 1874. In either event, the rogue Congressmen of that era surely intended to preclude the States from forming new, or even maintaining existing, Independent Companies after 1874 unless Members of Congress of their persuasion "allowed" it. Moreover, on the basis of its assertion of a discretionary power to "allow[ ]", Congress could at some future date have "[*dis*]allowed" any or all such Companies, as well.

c. Apparently, the enemies of the Militia did not believe that the statutory revision of 1873 to 1874 went far enough in the wrong direction, because in 1903 and 1908 rogue Members of Congress openly imposed very severe restrictions on Independent Companies, stipulating that

> any corps of artillery, cavalry and infantry existing in any of the States at the passage of the Act of May eighth, seventeen hundred and ninety-two, which, by the laws, customs or usages of the said States have been in continuous existence since the passage of said Act under its provisions and under the provisions of * * * the Revised Statutes of the United States relating to the Militia, shall be allowed to retain their accustomed

> privileges, subject, nevertheless, to all other duties required by law in like manner as the other Militia.[2558]

Under these statutes, only those Independent Companies already formed in 1792, and which had never experienced an hiatus from then until at least 1903, were "allowed to retain their accustomed privileges". Thus, a Company already chartered in 1792 which for whatever reason failed to remain "in continuous existence" (however that might have been defined) for the next hundred years could never be revived. And no State could charter a *new* Independent Company, for any reason. In this way, rogue Congressmen denied—just as Members of Congress continue implicitly to deny to this very day—that the States enjoy any reserved power in the premises.

2. No constitutional barrier to the raising of Independent Companies today. Where does this history of sabotage of the Militia leave contemporary America? *At the point at which WE THE PEOPLE themselves, through their States, must take this matter into their own hands*. The Constitution and laws of the United States place no obstacles in their path. Rather, rightly construed, they set up the clearest signposts that infallibly mark the way.

a. THE PEOPLE are not necessarily legally bound by every act that individuals who may happen to be Members of Congress may perpetrate. Whether an action taken by such individuals is entitled to be denoted an action "of Congress" depends, not upon its mere occurrence in the Capitol, but upon its strict congruence with the Constitution, because "Congress" enjoys no authority—indeed, has no legal existence—outside of, let alone contrary to, the Constitution. So, that Members of Congress may have purported to enact some statute, although necessary for that statute's bare existence, is not sufficient for its validity. "Illegality cannot attain legitimacy through practice."[2559] Moreover, if (as no one doubts) "a bold and daring usurpation might be resisted, after * * * [long and complete] acquiescence",[2560] then surely a mindless "[g]eneral acquiescence cannot justify departure from the law",[2561] no matter how long it may have continued. "[N]either the antiquity of a practice nor * * * steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack".[2562] "[N]o one acquires a vested or protected

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[2558] An Act To promote the efficiency of the militia, and for other purposes, Act of 21 January 1903, CHAP. 196, § 3, 32 Stat. 775, 775-776, *reënacted with nonsubstantive amendments*, An Act To further amend the Act entitled "An Act to promote the efficiency of the militia, and for other purposes," approved January twenty-first, nineteen hundred and three, Act of 27 May 1908, CHAP. 204, § 2, 35 Stat. 399, 400.

[2559] Inland Waterways Corporation v. Young, 309 U.S. 517, 524 (1940).

[2560] McCulloch v. Maryland, 17 U.S. (4 Wheaton) 316, 401 (1819).

[2561] Smiley v. Holm, 285 U.S. 355, 369 (1932).

[2562] Williams v. Illinois, 399 U.S. 235, 239 (1970), *quoted in* Pacific Mutual Life Insurance Company v. Haslip, 499 U.S. 1, 18 (1991).

right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it."[2563] Rather, "when the meaning and scope of a constitutional provision are clear, it cannot be overthrown by legislative action, although several times repeated and never before challenged".[2564] Constitutional questions "must be resolved not by past uncertainties, assumptions or arguments, but by the application of the controlling principles of constitutional interpretation".[2565]

As just described, since at least 1874 there has been "legislative * * * adherence" to the notion that Congress may prohibit the States from forming new Independent Companies. No occasion has arisen for "judicial adherence", however, because the issue has never come before the Supreme Court—and if it had, the Court's decision would hardly be conclusive, inasmuch as the Court has admitted error and reversed itself numerous times on constitutional questions.[2566] True enough, to one extent or another, the claim of Congressional power to prohibit the States from creating Independent Companies has persisted during a "span of time [that] covers [a large part of America's] national existence", arguably since 1874 and certainly since 1903. But such "[g]eneral acquiescence" in this claim as has festered among the public has manifested itself not as vocal approval but as ignorant silence, both because vanishingly few individuals have bothered to ponder the matter seriously as an abstract question, and because the dangers to America's

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[2563] Walz v. Tax Commission of the City of New York, 397 U.S. 664, 678 (1970).

[2564] Fairbank v. United States, 181 U.S. 283, 311 (1901).

[2565] Wright v. United States, 302 U.S. 583, 597-598 (1938).

[2566] *See, e.g.,* Payne v. Tennessee, 501 U.S. 808, 828-830 & note 1 (1991). Indeed, various Justices have often candidly admitted their duty to correct the Court's misreadings of the Constitution. *See, e.g.,* Mitchell v. W.T. Grant Company, 416 U.S. 600, 627-628 (1974) (Powell, J., concurring) ("especially with respect to matters of constitutional interpretation * * * if the precedent or its rationale is of doubtful validity, then it should not stand"); Coleman v. Alabama, 399 U.S. 1, 22-23 (1970) (Burger, C.J., dissenting) (denying "that what the Court said lately controls over the Constitution"); United Gas Improvement Company v. Continental Oil Company, 381 U.S. 392, 406 (1965) (Douglas, J., dissenting) ("issues of [constitutional] magnitude are always open for re-examination"); Gideon v. Wainwright, 372 U.S. 335, 346 (1963) (opinion of Douglas, J.) ("all constitutional questions are always open"); Pollock v. Farmers' Loan & Trust Company, 158 U.S. 601, 663 (1895) (Harlan, J., dissenting) ("in a large sense, constitutional questions may not be considered as finally settled, until settled rightly"). This is why the Supreme Court is an especially weak reed on which to lean when inquiring into the true meaning of the Constitution. Yes, the Court can set aside an incorrect opinion for a correct one. But until that happens, most public officials will treat the incorrect opinion as a valid "precedent" under the doctrine of *stare decisis*. *See, e.g.,* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 854-869 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.). Worse yet, being always subject to the fallibility of human reasoning, the Justices can arrive at an incorrect opinion in the first place, and even set aside a correct opinion for an incorrect one, and never hear another case that raises the issue on which they erred. Thus, a decision of the Supreme Court, by itself, can *never* answer a constitutional question definitively. Rather, each decision of the Court on such a question always poses the further conundrums of (i) whether the Justices have actually answered the original question *sub judice*, and if so (ii) whether what they have opined about that question is correct or incorrect. Sometimes, decisions of the Court are obviously correct, or can easily be proven to be so. In that eventuality, they can be cited as *prima facie* evidence on the points at issue. But more than that cannot be attributed to them.

"homeland security" have never heretofore risen to such an acute level as to render a thoroughgoing inquiry imperative.

b. So, today WE THE PEOPLE are confronted by what lawyers call "a question of first impression": namely, "*May Congress constitutionally preclude the States from authorizing the formation of new Independent Companies within their own 'well regulated Militia'?*" Although those who would answer this question in the negative would be justified in demanding that the affirmative case be presented first—because "[t]he burden of establishing a delegation of power to the United States or the prohibition of power to the states is upon those making the claim"[2567]—the matter is sufficiently clear that the negative can easily be proven directly.

(1) During the *pre-*constitutional era, Independent Companies were components of "well regulated Militia" in the Colonies and then the independent States.[2568] As a consequence of this historical practice, upon ratification of the original Constitution and the Bill of Rights they were implicitly subsumed within "the Militia of the several States" to which the original Constitution first referred and the "well regulated Militia" which the Second Amendment then declared to be "necessary to the security of a free State".

(2) Being component parts of "the Militia *of the several States*", Independent Companies derive in the first instance, as they have always derived, from *the States'* laws. Indeed, even Congress recognized as much in each of its relevant statutes on the subject: "which by the laws, customs, or usages [of the States] have not been incorporated with, or subject to the general regulations of the militia" (1792); "which, by any law, custom, or usage [of a State], have not been incorporated with the militia" (1874); and "which, by the laws, customs or usages of the said States have been in continuous existence" (1903 and 1908). And deriving from *the States'* own laws, Independent Companies are therefore the products of *the States'* own "powers", in the sense the Tenth Amendment uses that term.

(3) No explicit prohibition against the States' use of their own powers to establish Independent Companies can be found in the Constitution.

(4) Congress may override the States' exercise of their powers only perforce of such "Laws of the United States which shall be made in Pursuance [of the Constitution]".[2569] The authority for Congress to enact such "Laws", of course, must be found within the Constitution, and nowhere else.[2570]

[2567] Bute v. Illinois, 333 U.S. 640, 653 (1948).

[2568] *E.g., see ante*, at 224-234 (Rhode Island) and 567-597 (Virginia).

[2569] U.S. Const. art. VI, cl. 2.

[2570] *E.g.,* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-180 (1803); Martin v. Hunter's Lessee, 14 U.S. (1 Wheaton) 304, 326 (1816).

(5) The Constitution delegates to Congress no power whatsoever to establish a "Militia *of the United States*" with characteristics different from "the Militia *of the several States*"—in particular, being entirely separate from and independent of the States' laws.

- Such a "Militia of the United States" finds no precedent in *pre*-constitutional history. Even under the Articles of Confederation, the Militia were always separate establishments of the individual States.[2571]

- The term "Militia of the United States" appears nowhere within the Constitution.

- Even the first statute which adopted the term "militia of the United States" as a studied official designation did not see the light of day until 1916, more than a century after ratification of both the original Constitution and the Bill of Rights.[2572] And,

- Although "the Militia of the several States" "may be ***employed in the Service of*** *the United States*",[2573] they are not thereby even temporarily transformed into "the Militia ***of*** *the United States*". The distinction remains fundamental.

So Congress cannot prohibit the States from forming Independent Companies as a consequence of its defining an imaginary and unconstitutional "Militia of the United States".

(6) The Constitution carefully circumscribes Congress's actual authority over "the Militia of the several States", and thereby the supremacy of its "Laws" over the laws of the States relating to their own "well regulated Militia". Inasmuch as Congress may "provide for calling forth the Militia" with no limitation as to how extensive that "call[ ]" might be, every Militia unit is potentially subject to "be[ing] employed in the Service of the United States". That being true, pursuant to its power "[t]o provide for organizing * * * the Militia" Congress may and should require Independent Companies to satisfy standards applicable to whatever similarly situated regular Militia units might be "call[ed] forth", as it did through the proviso in the statutes of 1792, 1874, 1903, and 1908, which made Independent Companies "subject * * * to all other duties * * * in like manner as the other militia".

But so long as Independent Companies' performances of their Local duties do not interfere with their abilities to be "call[ed] forth" "in the Service of the United States" when necessary, Congress cannot prohibit the States from forming

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[2571] *See* Arts. of Confed'n art. VI, ¶ 4.

[2572] An Act For making further and more effectual provision for the national defense, and for other purposes, Act of 3 June 1916, CHAP. 134, § 57, 39 Stat. 166, 197. *See ante*, at 771 & note 1049.

[2573] U.S. Const. art. I, § 8, cl. 16 (emphasis supplied).

such Companies in order to perform "homeland-security" duties that do not fall within the three explicit constitutional purposes for which alone Congress may "provide for calling forth the Militia". For Congress's only express authority in the premises is "[t]o provide for calling forth the Militia" for *those* purposes, and "[t]o provide for organizing, arming, and disciplining, the Militia" *with respect to those purposes alone, because it cannot "call*[ ] *forth the Militia" for any other purpose*.[2574] Thus, it would be absurd to contend that, although Congress cannot "provide for calling forth the Militia" for any other purpose, nonetheless it may deny the States the authority to call forth *their own* Militia for *their own* purposes, and to organize, arm, and discipline *their own* Militia in *their own* manner in preparation for such deployment in *their own* territories. For, in that case, the Militia would not be "the Militia *of the several States*" at all, but instead *exclusively* "the Militia *of the United States*", because they could be employed *only* for the three limited purposes of the United States. And it would be no less absurd to contend that, although Congress cannot deny the States the authority to call forth their own Militia for their own purposes, nonetheless it may preclude them from organizing, arming, and disciplining their own Militia howsoever they may deem necessary in order to meet their own particular Local needs. For, in that case, although the Militia would remain "the Militia *of the several States*" in name, in substance they would amount to "the Militia *of the United States*" alone, because each of them would be unfitted for use by its own State.

(7) Congress enjoys no implied power to preclude the States from forming Independent Companies. True, the Constitution delegates to Congress the power (in pertinent part) "[t]o make all Laws which shall be necessary and proper for carrying into Execution * * * [Congress's enumerated] Powers".[2575] But (as explained immediately above) Congress's enumerated powers with respect to the Militia do not license its outright prohibition of Independent Companies. So, no express power for that purpose being given, no conceivable power can be implied to "make [any] Law[ ]" that could be "necessary and proper for carrying into Execution" such a nonexistent authority. Because no power, express or implied, enables Congress to outlaw Independent Companies, then no "Law[ ] of the United States made in Pursuance [of the Constitution]" can be enacted to that effect, and therefore any purported statute rogue Members of Congress enact for that purpose cannot quality as "the supreme Law of the Land" to which "the Constitution or Laws of any State" must yield.[2576]

(8) These principles take on critical importance today, when most Americans eligible for Militia service are consigned by Congress to a constitutionally

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[2574] *See* U.S. Const. art. I, § 8, cls. 15 and 16.

[2575] U.S. Const. art. I, § 8, cl. 18.

[2576] *See* U.S. Const. art. VI, cl. 2.

oxymoronic "unorganized militia".[2577] An "*un*organized *militia*" is constitutionally self-contradictory and impossible. Inasmuch as Congress lacks authority "[t]o provide for [*un*]organizing * * * the Militia",[2578] the statute which now purports to do so (or any such statute, for that matter) is no "law" at all.[2579] So, as to the constitutionally proper "organizing" of the Militia, no actual law of the United States exists at the present time—or will be enacted within the foreseeable future, because a Congress stuffed with rogue politicians beholden to selfish and subversive special-interest groups that hate and fear WE THE PEOPLE can never be expected to correct the situation.

c. As a consequence of all this, contemporary Americans find themselves confronted by circumstances not dissimilar from those Virginians faced between 1773 and 1775.[2580] Just as Virginia's Militia Act of 1771 had expired in 1773, leaving the Colony with no statutorily organized Militia, so today no statute "provide[s] for organizing, arming, and disciplining, the Militia" of any of the several States in a proper fashion, let alone recognizing the States' authority to form Independent Companies on their own initiatives. Just as Virginia's last Royal Governor, Lord Dunmore, prorogued that Colony's House of Burgesses in order to prevent the patriots from enacting a new Militia statute, so today rogue Presidents and rogue Members of Congress will not even consider the issue. And just as patriotic Virginians had to rebuild their Militia "from the bottom up" by themselves, and employed Independent Companies to begin the process of revitalization, so today must patriotic Americans follow the same course, if anything is to be accomplished before their country's "homeland security" is hopelessly compromised.

But Americans today need not engage in the arguably *extra*-legal actions that Patrick Henry and his associates took in the *mid*-1770s, because contemporary State legislatures still remain capable of providing adequate relief. Yes, the White House and Congress have largely been colonized by rogue politicians who have no idea of the true source and nature of "the right of the people to keep and bear Arms", or of the locus of final authority over the Militia in the States and "the

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[2577] *See* 10 U.S.C. § 311, *originally derived from* An Act For making further and more effectual provision for the national defense, and for other purposes, Act of 3 June 1916, CHAP. 134, § 57, 39 Stat. 166, 197. *See also* An Act To promote the efficiency of the militia, and for other purposes, Act of 21 January 1903, CHAP. 196, § 1, 32 Stat. 775, 775, *reënacted with amendments*, An Act To further amend the Act entitled "An Act to promote the efficiency of the militia, and for other purposes," approved January twenty-first, nineteen hundred and three, Act of 27 May 1908, CHAP. 204, § 1, 35 Stat. 399, 399, in which what later came to be styled "the unorganized militia" was called "the Reserve Militia", in contradistinction to what the statutes called "the organized militia".

[2578] *See* U.S. Const. art. I, § 8, cl. 16. *See ante*, Chapter 34.

[2579] *See, e.g.*, Norton v. Shelby County, 118 U.S. 425, 442 (1886); Huntington v. Worthen, 120 U.S. 97, 101-102 (1887); *and Ex parte* Siebold, 100 U.S. 371, 376-377 (1880), *quoted with approval in* Fay v. Noia, 372 U.S. 391, 408 (1963).

[2580] *See ante*, at 567-597.

people" rather than in the General Government. Nonetheless, America has not yet arrived at the point at which she must concede that her "Form of Government [has] become[ ] destructive of" the true ends of government, and that therefore "the People" should exercise their "Right * * * to alter or to abolish [that defective Form of Government], and to institute new Government, laying its foundations on such [*new*] principles and organizing its powers in such [*new*] form, as to them shall seem most likely to effect their Safety and Happiness".[2581] For America's "Form of Government" is not simply the General Government, but rather *the entire federal system*, in which the States are capable of exercising not only legislative powers concurrent with those of Congress, but also certain critically important powers reserved exclusively to them by the original Constitution as well as the Second and Tenth Amendments. Thus, if rogue Members of Congress obstinately refuse "[t]o provide for organizing * * * the Militia", thereby jeopardizing "the security of a free State" in every State and for the United States a whole, then the States may—indeed, *must*—organize their own Militia in any manner they might have employed during *pre*-constitutional times, especially including the formation of Independent Companies.

And even if the States' governments were to default in their responsibilities in this particular, Americans today would nonetheless be better positioned than ever were Patrick Henry and his supporters. For when Virginia's legislative process ground to a halt perforce of Lord Dunmore's pigheadedness, Henry and his adherents had no choice but to operate *extra*-legally from the perspective of the laws then on the books, falling back on the fundamental principles that "[s]elf-defence * * * , as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society", and that all men may invoke "the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression".[2582] Americans today, distinguishably, can assert their *constitutional* "right to * * * bear Arms" in "well regulated Militia" under the Second Amendment.[2583] So, if rogue Members of Congress were to persist in consigning most Americans to an "unorganized militia", and if in that context the States' governments were to fail, neglect, or refuse to revitalize "well regulated Militia", then "the people" would be compelled by circumstances, *and legally entitled*, to act on their own. Out of the necessities of the situation, the first units "the people" would form would be *Independent* Companies, because they would not be authorized by any particular statutes. Yet, even so, such Independent Companies would not be "private militia", because: (i) being formed pursuant to the Second Amendment they would be *governmental* entities; and (ii)

[2581] Declaration of Independence.

[2582] W. Blackstone, *Commentaries on the Laws of England*, *ante* note 142, Volume 3, at 4; *and* Volume 1, at 144.

[2583] *See post*, Chapters 45 and 46.

their goal would be to restore their States and the United States to the rule of constitutional law, whereupon their formation could be ratified and regularized through appropriate legislation.[2584]

d. Beyond doubt, both Congress and the States could constitutionally delegate to Independent Companies the authority to begin the revitalization of the Militia. This course would not only be practical, because raising Independent Companies has proven to be workable in the past; and prudent, because it would address the problem of revitalization one careful step at a time; but also shrewd from the perspective of political psychology. At present, most Americans have no idea, let alone any personal experience, of what a constitutional Militia truly is. If they are aware of the relevant statutes at all, they know of the paper existence of "the unorganized militia"—in which, contrary to the Constitution's command, no provision has been made by Congress or the States for actually "organizing, arming, [or] disciplining" anyone.[2585] In their own daily lives, the Militia are in effect nonexistent, or if existent in principle then utterly irrelevant in practice. Only a few Americans appreciate why the Militia must be revitalized, and are willing to expend the effort necessary to accomplish that end. So, if anything is to be done, the many must be educated and aroused to take action by the example of the few.

The indispensable first step in revitalization of the Militia must be to organize *some* Militia units, in order to prove that it *can* be done and that it is worthwhile doing. If confronted with compulsory organization on any large scale, though, most Americans would evince the negative attitudes that fostered the degeneration of the Militia in the *mid*-1800s: namely, an "indifference", if not outright hostility, "to any system of militia discipline, and a strong disposition, from a sense of its burdens, to be rid of all regulations".[2586] To obviate this problem, an initial reliance on volunteers—and, because whole Militia units must be formed from scratch, therefore on Independent Companies—is indicated. This will amount to a reversal of history. Ironically, Massachusetts was the first State largely to abolish compulsory service in her Militia, and to substitute an *ersatz* "militia" primarily dependent upon volunteers.[2587] Her statute of 1840 provided that

> [e]very able-bodied white male citizen, resident within this Commonwealth, who is or shall be of the age of eighteen years, and under the age of forty-five years, excepting persons enlisted into volunteer companies, persons absolutely exempted by law, idiots, lunatics, common

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[2584] *See, e.g.,* United States v. Heinszen & Company, 206 U.S. 370, 381-382 (1907).

[2585] *Contrast* U.S. Const. art. I, § 8, cl. 16 *with, e.g.,* 10 U.S.C. § 311(b); General Laws of Rhode Island §§ 30-1-4(4) and 30-1-5; *and* Code of Virginia §§ 44-1and 44-4.

[2586] J. Story, *Commentaries on the Constitution*, *ante* note 576, Volume 2, § 1897, at 646.

[2587] *See* J. Mahon, *The History of the Militia and the National Guard, ante* note 1695, at 83.

> drunkards, vagabonds, paupers, and persons convicted of any infamous crime in this or any other State, shall be enrolled in the militia.
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> * * * * *
>
> * * * The militia, thus enrolled, shall be subject to no active duty whatever, except in case of war, invasion, or to prevent invasion * * * .
>
> * * * * *
>
> * * * The active militia of this Commonwealth shall consist and be composed of volunteers, or companies raised at large; and in all cases shall first be ordered into service, in case of war, invasion, or to prevent invasion—to suppress riots, or to aid civil officers in the execution of the laws of this Commonwealth.
>
> * * * The commander in chief may grant petitions, or authorize the mayor and aldermen of any city, or the selectmen of any town in the Commonwealth, to grant petitions for raising companies at large, to the number of ten thousand men * * * .
>
> * * * The whole number of volunteers shall not exceed ten thousand men, and shall be divided, or apportioned, in each county, throughout the Commonwealth, according to population * * * .{EN-2044}

Today, the false steps that Massachusetts took down the road which eventually led to degeneration of all of "the Militia of the several States" provide a map for the retracement of that process—namely, to mandate in the initial statute that: (i) All able-bodied adult residents of a State are to be enrolled in her Militia. (ii) Most of those enrolled may be exempted from most, *but not all*, Militia duties by the payment of a small fee.[2588] (iii) Volunteers may form Independent Companies of various sorts, to devise and test methods for organizing, arming, disciplining, governing, and training the Militia as a whole. And (iv) as these methods are perfected, exemptions from Militia duties will be progressively narrowed, regular Militia Companies will be formed, and more and more individuals will be subject to more and more Militia duties, until the Militia in that State has been returned to at least the *pre-*constitutional level of preparedness . *This process will be perfectly constitutional, too, because at no point will it recognize anything akin to an "unorganized militia" in which (as in Massachusetts' statute of 1840) the vast majority of individuals "shall be subject to no active duty whatever".*

E. Practical steps for putting Independent Companies into operation. So much for the salient constitutional principles applicable to Independent Companies. The question of practical consequence today becomes how to put Independent Companies into operation on the presumption that State legislation appropriate for that purpose can be had. If Independent Companies are to be employed to revitalize the Militia, four matters need consideration: *first*, the need to rely on volunteers;

[2588] *See ante,* Chapter 43, *and post,* at 1274-1275.

second, the basic procedures and requirements for forming Independent Companies in the context of "[a] well regulated Militia" as a whole; *third,* the types and purposes of Independent Companies; and *fourth*, the special significance of Independent Companies as a consequence of their composition.

1. During *pre-*constitutional times, Independent Companies were always composed of volunteers. Today, a primary reliance on volunteers in revitalized "Militia of the several States" would likely be more successful than ever it was, or could have been in that era.

a. Very large numbers of contemporary Americans are (or can be) imbued with education, skills, and experience more varied and comprehensive than those most (if not all) of their Colonial predecessors enjoyed—so that the average volunteer today should be able to do more, more easily and effectively, than the average Militiaman could have done in those days. (Unless, of course, as the result of some extraordinarily severe crisis, conditions degenerate to or below the Colonial level, in which case contemporary Americans will have to relearn many necessary skills people took for granted in Colonial days.) In addition, with systems of communications and transportation far in advance of those in Colonial days, and other technological advantages, volunteers in this day and age could do far more man-for-man than volunteers in yesteryears—even if the levels of skills and experience were otherwise exactly the same within the two groups. Which means that, in principle, to achieve the same degree of readiness through Independent Companies, revitalized "Militia of the several States" would need a far smaller proportion of volunteers than did the Militia during the *pre-*constitutional era.

b. Because the pool of Militiamen in every State today is far larger than in Colonial times, even if the proportion of volunteers remained the same, far more volunteers in absolute numbers than ever before could be expected to come forward. In that eventuality, other than in periods of the most severe crises, more volunteers would likely be available than would be needed, so that even the burden of volunteering could be spread across a large group by rotation and substitution, and thereby attenuated for each individual.

c. Americans are coming to realize that this country now faces a crisis far more serious than any that confronted their Colonial forebears during the *pre-*constitutional period. They also recognize that they cannot trust, let alone rely upon, self-appointed "leaders", career public officials and bureaucrats, professional politicians, political parties, factions and other selfish special-interest groups, the big media, and the *intelligentsia*—indeed, that these are the main sources of the problems this country faces, not of any conceivable solutions. So if WE THE PEOPLE do not rectify this situation themselves, it will only worsen. In the crises of the *pre-*constitutional era, "[a] well regulated Militia" was "necessary to the security of a free State" in almost every Colony and then in every independent State. The

Constitution—and common sense informed by historical experience—teach that this practice is as valid today as it was then, if not even more so. True enough, contemporary Americans may not be able to muster volunteers for Militia service sufficient, all by themselves, to provide "homeland security" under present conditions. But without maximizing the number of volunteers as a foundation upon which to build revitalized Militia as quickly as possible, America will be finished as "a free State". Thus, the incentives for volunteering for Militia duty—at least among people who desire to live in "a free State"—are greater than ever before.

d. Reliance on volunteers from among the most highly motivated, enthusiastic, knowledgeable, skillful, and experienced individuals within the community would allow for the *immediate* implementation of a program for revitalizing the Militia—as well as promising the greatest likelihood of its success.

(1) Independent Companies that selected their own members from voluntary applicants would start out being composed of individuals who already knew and had confidence in one another.

(2) Such well-integrated and cohesive units would quickly settle upon what they needed to do to advance true "homeland security" in their Localities, and how they believed they could do it. After all, it would always be in the interest of the people actually on the spot to identify Local problems as accurately, to establish priorities for action as prudently, to devise solutions as quickly, and to apply those remedies as efficiently as possible. And organizing the most enthusiastic and capable of the citizenry in Independent Companies would take maximum advantage of Local incentives, interests, insights, input, and the ability to innovate through experimentation.

(3) Organized around members with common knowledge, skills, experience, and interests, and especially who know and have confidence in one another, such Independent Companies could start work with practical efficacy, as well as complete legal authority, as soon as their charters were approved.

(4) Because the public's perceptions of individuals' activities are oftentimes as important as their actual performances, Independent Companies could play a critical rôle at the very inception of revitalization of the Militia by making a good impression on the skeptics and nay-sayers among the proverbial "men in the street". Consisting of volunteers drawn from and well known within Localities throughout each State, Independent Companies would dispel the perverse propaganda peddled by the big media that members and supporters of any organization with the noun "militia" somewhere within its title are somehow "extremists", even when they faithfully comply with all applicable laws.

(5) Moreover, because their members would include many parents of children attending Local schools, Independent Companies would challenge the sensibleness of many contemporary school administrators' draconian policies of so-

called "zero tolerance" regarding even the discussion of firearms by their pupils, and the heavy-handed implications from these policies that firearms are inherently evil and the people who possess them deluded, disreputable, and even dangerous. With leading citizens from the community participating in Independent Companies, even the most prejudiced administrators would be unable to continue to insist that students should learn nothing about how the Militia and "the right of the people to keep and bear Arms" are—as the Second Amendment declares them to be—"necessary to the security of a free State", and why average Americans who "keep and bear Arms", even outside of "[a] well regulated Militia", thereby perform an invaluable public service. In addition, where Independent Companies recruited youth from sixteen to twenty-two years of age, many of their members would be students in public high schools and private secondary schools, junior and community colleges, and State colleges and universities all of whom would be entitled under the First and Second Amendments, and the new State Militia statutes, to speak to other students, teachers, and administrators about their participation in the Militia, notwithstanding any myopic institutional policies to the contrary.

e. Reliance on volunteers to form Independent Companies during the initial period of revitalization of the Militia would allow for an *incremental* program.

(1) Building the foundations of the revitalized Militia upon Independent Companies would neither demand nor expect that even enthusiastic volunteers should assay too much, too fast, too soon. Independent Companies could be chartered for many and varied purposes. The extent of their activities might be broad or narrow, their goals ambitious or modest. But, in any case, their structures and operations could readily be modified as experience might dictate. And those Companies as to which the performance did not match the promise could easily be reorganized or even dissolved. Thus, Independent Companies would exemplify the scientific method in "homeland security"—namely, Local people would devise an hypothesis in the form of an Independent Company; they would test that hypothesis by experimentation in the laboratory of their own Locality; on the basis of the experimental results they would revise their hypothesis and test it anew; and they would then reiterate that procedure as often as necessary, ultimately either proving or disproving the hypothesis. This is not only the scientific method in "homeland security", but also the method of self-government—namely, if WE THE PEOPLE are to govern themselves, then they themselves must be allowed to experiment with the provision of their own security, in order thereby to gain experience, prove their own competence, and develop self-confidence. Beyond that, this is the prudential course for discovering what works in "homeland security"—for, even if a few Independent Companies should occasionally fail here and there, they would constitute but a small fraction of all the Companies within the Militia; their missteps would not

necessarily cause others to stumble; and those few mistakes would teach invaluable lessons that would undergird many more successes later on.

(2) A program that initially relied mostly on volunteers in Independent Companies—and thereby did not attempt to push ahead too fast, before most average citizens were ready to accept their new duties—would avoid the "strong disposition, from a sense of [the Militia's] burdens, to be rid of all regulations" that probably would still fester in the breasts of all too many Americans when revitalization of the Militia commenced. By turning at first to enthusiastic and competent volunteers, the Militia would not need to depend to any significant degree upon the very individuals who harbored—or whose sloth might encourage them suddenly to develop—a "strong disposition" against it. For that reason, little legal coercion to participate in the Militia would need to be applied to these individuals—other than requiring their payment of modest fines or fees for effective exemptions from most Militia duties, which would be unlikely to sour them on a plan that took their negative "disposition" (real or feigned) so favorably into account. As revitalization progressed, the examples set and the peer pressure applied by their patriotic relatives, neighbors, friends, and co-workers would gradually compel them to assume their proper shares of Militia service, or become social pariahs.

2. Although they would be established by individuals acting on their own initiatives, and although they would operate separately from regularly constituted Militia units in many respects, Independent Companies would not in any sense constitute or affect the pretensions of "private militia". Rather, being integral parts of "[a] well regulated Militia" in their State, they would require and receive *governmental* authorization for their formation, would always be subject to *governmental* regulation in their operations, and would exercise *governmental* authority throughout the wide domain of "homeland security".

a. On a day-to-day basis, these matters should be handled primarily at the Local level. A proper statute revitalizing the Militia in one of the several States would establish (or "settle", as the *pre-*constitutional vernacular phrased it) an overall organization, consisting of: (i) a Militia Committee in each House of the State's Legislature, to review old and prepare new legislation on that subject; (ii) a Militia Department under the supervision of the State's Governor (or other Commander in Chief), to execute the Militia statutes as they are enacted; (iii) a State Militia Advisory Commission made up of selected legislators, members of the executive branch, Militia officers, and various experts in all matters related to "homeland security" (particularly in that State), to study the revitalization and operation of the State's Militia as they progress and to recommend needed reforms; and, perhaps most important of all to get the project off the ground, (iv) a Committee of Safety in each Local jurisdiction throughout the State to organize, oversee, and actually utilize on a day-to-day basis the Militia units set up there.

For purposes of illustration, assume that the Locality were a County, City, or Town with a Board of Supervisors, County Council, Town Council, Board of Selectmen, or equivalent chief governing body, with or without a County Executive or Mayor, but with a Chief of Police, Sheriff, or other chief law-enforcement officer. The Local Committee of Safety would be composed of some of these officials, who would also be members of the Militia: namely,

- Several officials selected from among the governing body and the chief executive (if one there were). Each of these individuals would be exempted from other Militia duty in deference to his normal public office and, of even more consequence, his service on the Committee of Safety.

- The chief law-enforcement officer of the Locality. His normal duty in that capacity would constitute his regular Militia duty, augmented by his service on the Committee of Safety. And,

- Representatives of the Militia Companies formed and active in that jurisdiction. These would include the Captains of whatever regular Militia Companies activated themselves and of whatever Independent Companies individuals formed on their own initiatives. At first, these individuals would play no more than an advisory rôle in their Committee of Safety; later on, they would be accorded the status of voting members. Ideally, so as to render the Local Militia a truly self-governing body, *all* of the Captains should be voting members of the Committee. If, however, the number of Captains with a right to vote should become unwieldy, the Captains could select from amongst themselves a less-numerous set of representatives. (The remaining Captains could always attend meetings of the Committee in the capacity of auditors and interlocutors.) An arrangement of this sort, though, would probably obtain only initially. As the number of Militiamen on active service expanded in highly populated Localities, experience might dictate the need to aggregate Companies into Battalions, Battalions into Regiments, Regiments into Brigades, and even Brigades into Divisions, each under some officer of a rank higher than Captain—and representation of Militia units on the Local Committee of Safety would then pass to these superior officers, with all of them subordinate to a Local Militia commander in chief. In any event, conclusions as to what might be the best forms of organization of a Committee of Safety in this regard must abide actual experimentation, the results of which will doubtlessly differ, perhaps significantly, in different Localities.

Howsoever it might be organized and in all of its operations, of course, the Committee of Safety and the Local Militia units it supervised would remain subject to the chief governing body of the Local jurisdiction, in the most scrupulous possible

deference to the principle that, "in all cases, the military should be under strict subordination to, and governed by, the civil power".[2589]

b. With respect to individuals, the State statute would further regulate the revitalized Militia as follows[2590]—

(1) The Act would declare that all able-bodied legal residents of the State, from (say) sixteen to fifty or fifty-five years of age, were members of the Militia of the State and subject to service therein perforce of both the Constitution of the United States and the constitution of the State herself. The Act would explain that the Militia is of *constitutional* stature; is a permanent governmental establishment *of the State*; and may be "employed in the Service of the United States" *only* for three specifically defined purposes.

(2) The Act would mandate the official enrollment in the Militia of all eligible residents in each Locality. Enrollment would be accompanied by completion of a personal profile providing details of each individual's education, knowledge, talents, skills, experience, and interests relevant to his possible service in the Militia, so that Local and State-wide inventories of personnel could be compiled.

(3) The Act would create a system by means of which the State's Militia Department, the Local Committees of Safety, the Captains of Militia Companies, the Militia Companies, and all individual Militiamen in their respective Localities could communicate amongst themselves, rapidly and securely, with respect to any and all aspects of Militia service.

(4) The Act would instruct the chief governing body of each and every Locality within the State to assign to a regular Militia Company each individual resident within its jurisdiction who might be eligible for Militia service, by subdividing the Locality into Companies composed of from (say) fifty or sixty to one hundred twenty or so members from mutually neighboring residences, on the basis of a simple grid that could take into account geography, population, and such additional matters as Local political subdivisions. For reasons of practicality, a Local Committee of Safety might delegate this task to some other Local agency that had already compiled the necessary data for its own separate purposes, such as bureaus dealing with taxation, registration of voters, real-estate records, or public-school enrollment. The initial survey would not need to be carried out with absolute mathematical precision, either, because the first assignments to Militia Companies

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[2589] Virginia Declaration of Rights (1776) art. 13.

[2590] Consideration of these few model provisions will suffice for purposes of quickly surveying the usefulness of Independent Companies. Obviously, however, to be effective in revitalizing the Militia, any actual statute would need to contain many other and far more detailed provisions, thoroughly integrated into the rest of the particular State's legislative code. The drafting of such a statute will not be a task that can with confidence be consigned to amateurs.

would be understood to be subject to amendment as experience was gained through the process of revitalization.

(5) The Act would require *all* individuals eligible for the Militia to perform certain essential duties, according to a set schedule, including at least—

• *Foundational training*. Each Militiaman would be required to complete: (i) a general course in the history, constitutional status, purpose, structure, and operations of the Militia; (ii) a specific course in the safe operation, maintenance, and storage of the firearms, ammunition, and related accoutrements that members of the Militia would be likely to encounter in the course of their service; (iii) a comprehensive course in individual and group survival under whatever adverse conditions were most likely in the Locality in question; and (iv) a concentrated course in emergency-rescue and emergency-medical procedures. Most individuals could satisfy significant portions of these educational requirements through study at home, over the Internet, at essentially no monetary cost and with little inconvenience, because automatic means of monitoring compliance with such a program are now available.

• *Physical security*. Every member of the Militia would be required to obtain and thereafter to maintain personal possession in his own home of at least one firearm, a minimum supply of ammunition, and accoutrements suitable for the basic *para*-military and police aspects of Militia service. Those individuals who could not afford to purchase such equipment could apply to their Local Committee of Safety for assistance. A "firearm suitable for Militia service" would be broadly defined, so that most people—at least during the initial phases of revitalization of the Militia—could use for that purpose just about any firearms they already possessed or could easily acquire, and as a consequence have those firearms immunized against "gun control" emanating from the machinations of rogue officials in the General Government.[2591]

• *Emergency subsistence*. Every member of the Militia would be required to obtain, and thereafter always to possess in his place of abode, at least a two-months' supply of basic foodstuffs and water for himself and each other individual not a member of the Militia living with and dependent upon him, together with a cache of basic survival equipment and a standard first-aid and medicinal kit sufficient for himself and those other individuals. Again, those Militiamen who could not afford to purchase such supplies could apply to their Local Committee of Safety for assistance.

[2591] *See ante*, at 1105-1111.

> • *Economic security*. Every member of the Militia over eighteen years of age would be required to establish his own individual alternative-currency account with the State depository so as to be able to use the new currency. In addition, every member of the Militia self-employed in a business, trade, or profession would be required to establish a set of prices in the alternative currency for his goods or services; and everyone who employed Militiamen in a business, trade, or profession would be required to establish a set of wage-rates and monetary benefits in the alternative currency; so that the State's private economy could use that currency as soon and as efficiently as possible should the people so desire.[2592]

No exemptions from these duties would be allowed—except for conscientious objectors, who would not be compelled personally to possess firearms, but would be required to pay a fine or fee, and perhaps perform other services, for the privilege. In the initial stages of revitalization of the Militia, "conscientious objection" could be broadly defined, so as to exempt on that score everyone who harbored any objection whatsoever to his own personal possession of firearms. This leniency would tend to minimize political resistance to revitalization of the Militia from individuals still favorable to "gun control". It would also be sweetly ironic, because the fines or fees partisans of "gun control" would pay in order to be excused from personally possessing firearms would be applied exclusively to Militia purposes, in particular the provision of firearms and ammunition to individuals financially unable to acquire such equipment on their own.

(6) The Act would establish an additional set of duties for Militiamen in a regular Militia Company which chose to become active. That the activation of regular Militia Companies should depend upon the choices of their members would be a practical necessity in the earliest stages of revitalization of the Militia. To expect individuals—suddenly assigned to Militia duties as to which neither they nor their fathers nor even their grandfathers had ever had any exposure—to enlist in that service with good grace, let alone alacrity, is too sanguine a hope to be entertained. And a program that depends upon the realization of such a hope is too ambitious to be undertaken with any expectation of success. If in Joseph Story's era—when the continuity of Militia service from *pre-*constitutional times had not yet been broken, and men who had served in the Militia during the crisis of the 1770s and 1780s were yet alive—many individuals nonetheless succumbed to "a strong disposition, from a sense of [the Militia's] burdens, to be rid of all regulations", even more individuals today would desire to avoid Militia service which was alien to their experience and the vital purpose of which had never even been explained, let alone emphasized, in the course of their education. So, until

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[2592] *See ante*, at 1208-1233.

most people have become familiar with the Militia as institutions, and understand the necessity for their personal participation, active duty beyond the set of foundational requirements must be allowed to be effectively optional (although the choice not to serve need not be costless to the individual making it).

Regular Militia Companies would be activated and would remain active when and for as long as more than fifty percent of the individuals assigned to them chose to fulfill the normal duties of active Militiamen (to be described immediately below). Those individuals who desired to avoid Militia service beyond the essential duties outlined above could pay fines or fees for their nonperformance, in effect purchasing exemptions from all other duties. Presumably, in the initial stages of revitalization of the Militia, a large majority of the population would select this option. So the few regular Militia Companies in which majorities could be had in favor of active service would function with what would amount to volunteers.

Upon activation, members of such Militia Companies would be required:

- to adopt and become familiar with the State's Militia Code of Justice and a set of standard Company by-laws promulgated by the State's Militia Department;
- to elect officers;
- to meet regularly at a prescribed location to conduct the Company's normal business;
- to take courses of education and training mandated by the Local Committee of Safety, some to be held at the Company's regular meetings, some to be conducted at special training sessions, and some to be assigned for study at home;
- to engage in simple field exercises of a general nature that would emphasize practical use of the education and training received; and otherwise
- simply to remain organized and active, albeit at only a low stratum of readiness, until revitalization of the Militia progressed to a higher stage.

The incentives for individuals to become active would include: (i) education and training subsidized with Militia funds; and (ii) the assumption of legal authority, such as being enrolled as auxiliary police officers or Sheriffs' deputies as a consequence of their specialized instruction.

(7) The Act would establish certain permanent Independent Companies, composed of "homeland-security" units already in existence under State or Local law. These Companies would be "independent", not because their members had formed them independently, but instead because they would perform essential specialized functions unique to them within the Local Militia. For example, before

the statute was enacted, a County might have: (i) an elected Sheriff in charge of a Sheriff's Department with numerous deputies; (ii) a County police force, with a Chief of Police appointed by the Local governing body; (iii) fire and emergency-rescue units, composed of both volunteers and professional workers, assigned to various fire-houses and like facilities; and (iv) doctors, nurses, technicians, and other medical-services personnel working in a County and perhaps several private hospitals or clinics. In such a case, the statute would establish one or more Independent Companies for each of these categories, with each such Company subdivided into subsidiary units headquartered in particular offices, barracks, fire-houses, or hospitals throughout the Locality. In deference to his position as the highest elected law-enforcement officer in the County, the statute would appoint the Sheriff as the County Lieutenant in personal command of the entirety of the County Militia (subject to the Committee of Safety) in times of "alarm", and invest him at all times with: (i) actual day-to-day supervision of the Sheriff's Department (acting through a Chief Deputy Sheriff) and any separate County police force (acting through a Chief of Police); (ii) a general supervisory authority over the other permanent Independent Companies (acting through their Captains); and (iii) a right and duty to oversee as the Committee of Safety's adjutant the compliance of all other Militia Companies with statutory requirements.[2593]

(8) The Act would also allow individuals on an *ad hoc* basis to form other Independent Companies, composed of volunteers, which would be chartered to perform all of the duties of active Militiamen and whatever additional duties the Independent Companies specially required of their members. This will be elaborated immediately below.

(9) Finally, the Act would require each Local Committee of Safety to provide to the Militia Advisory Commission, probably on a *semi*-annual basis, a detailed description and evaluation of the activities of the active regular Militia Companies and Independent Companies in that Locality, including what was done; what did or did not work; how and why these results were obtained; what regulations had been provisionally adopted in the Locality on the basis of this experience; what more needed to be accomplished at the Local level; and specific proposals for any necessary amendatory or new legislation to be enacted at the State level. Using the material in these reports, the Advisory Commission would recommend further legislation to the Militia Committees of the State Legislature and to the Governor. And, after that legislation had been enacted, the same process of Local experimentation, evaluations, reports, and recommendations could be serially repeated, with each iteration gradually improving the Militia's readiness.

[2593] *See, e.g.,* Const. of Virginia art. VII, § 4, ¶ 1: "There shall be elected by the qualified voters of each county * * * a sheriff * * * . The duties and compensation of such officer[ ] shall be prescribed by general law or special act."

c. The State Militia statute would also establish standard procedures and promulgate appropriate forms to be used: (i) to notify a Local Committee of Safety of the *activation* of each regular Militia Company within its jurisdiction (because each of them would already exist on paper); and (ii) to petition that Committee for *authorization* of each Independent Company within its territory (because each of them would be created from scratch).

(1) The realistic expectation must be, though, that early on in the process of revitalization of the Militia few regular Companies would be activated, because most of the individuals assigned to them probably would not even know each other, certainly would never have worked together, might not want to become involved in the Militia at all, and could effectively exempt themselves from most duties simply by paying the prescribed fines or fees. On the other hand, individuals who did desire to become active in the Militia right away would probably enlist in Independent Companies, because service therein would afford them many more degrees of freedom and other advantages than would participation in regular Companies.

(2) In principle, anyone eligible for service in the Militia could form or join an Independent Company.

(a) A not unreasonable surmise, though, is that the most effective organizers of and recruiters for the first Independent Companies would likely be found in and through the several prominent American veterans' organizations now in existence. These organizations are composed largely of patriots who can be expected to know what is at stake in the fight for freedom on the home front and to want to contribute to that effort to the greatest degree and in the most effective manner possible. Little persuasion should be necessary to convince those among them not already fully conversant with the problems of "homeland security" that revitalization of "the Militia of the several States" is "necessary to the security of a free State" everywhere in the United States, and that their participation in the process of revitalization could prove indispensable. Moreover, being familiar with the types of military and related subjects that would be central to many aspects of the Militia's operations, these veterans could easily be convinced of their unique abilities to serve effectively as organizers, leaders, and advisors of Independent Companies. And having many and varied social, business, and other connections throughout their communities, they could recruit friends, neighbors, and co-workers; could raise funds; could generate publicity; and could gain public support for Independent Companies more easily than members of almost any other group.

Inasmuch as the veterans' organizations themselves can boast of long and illustrious histories and deservedly enjoy high standing in their communities, their involvement would lend significant credibility and even prestige to the recruiting of Independent Companies. Also, because these organizations operate myriad posts

throughout the United States, they could supply convenient and adequate facilities for planning the establishment of such Companies, organizing them, recruiting members for them, and hosting their meetings. Indeed, no good reason exists why these posts should not be in the very forefront of those helping to establish, and even serve as the foci or nucleii for establishing, Independent Companies.

In addition, the involvement of veterans and veterans' organizations in revitalization of the Militia could build a bridge between the Militia and the regular Armed Forces, which would need to coöperate closely if America's "homeland security" is to be placed on a constitutionally solid foundation.

(b) Under a proper State Militia Act, the process of establishing an Independent Company would begin with submission of a petition to the Local Committee of Safety. The petition should include no less than:

- The name of the Independent Company. Typically, Independent Companies in *pre*-constitutional times sported descriptive names.[2594] Today, this tradition should be continued. For example, the first Independent Company established in Warren County, Virginia, located in one of the precincts to the east of the town of Front Royal, and specializing in heavy construction, might be named *The East Shenandoah Pioneers, Warren County Independent Company Number 1, Militia of the Commonwealth of Virginia*.

- Complete identification of the particular individuals who would be the Company's originators and initial, provisional set of officers.

- Where within the Local jurisdiction the Independent Company would be formed, recruit its members, and operate. This might be a legally defined neighborhood (such as an incorporated homeowners' association), a precinct, or generally throughout the territory; or within some particular line of business, avocation, or profession relevant to "homeland security". For example, a large corporation or a consortium of small businesses might be the source of the personnel and might provide the basic equipment for an Independent Company specializing in heavy construction, demolition, or earth-moving.

- What type of Independent Company it would be—that is, its purpose.[2595]

- How many members—whether a particular number, a maximum or minimum number, or some range of numbers—the Company would recruit and maintain on its roster. This, of course, would depend upon the type and extent of services it proposed to provide.

[2594] *See* the endnotes accompanying the text, *ante*, at 224-234.

[2595] *See post*, at 1285-1290.

• A detailed statement of the standards and requirements for membership in the Company. In the nature of things, an Independent Company—particularly one that provided highly specialized services—would have to be the final judge of the qualifications, and would have to exercise untrammeled discretion in the selection, of its own members—except that no individual who was a member of any other Militia unit could become a member of a different Independent Company unless and until he had properly resigned from the unit to which he had originally belonged. On the other hand, anyone who otherwise qualified might join an Independent Company even if he were exempt from regular Militia service, as for instance by dint of age or occupation.

• The proposed set of by-laws by which the Company would be organized, regulated, equipped, trained, disciplined, mobilized, and deployed. This would probably consist of a standard set of by-laws for regular Militia Companies prepared by the State's Militia Department, with amendments, additions, or other modifications that reflected the Independent Company's special circumstances. To the extent of such departures from the standard set of by-laws, the Company's proposed by-laws would be subject to disapproval by the Local Committee of Safety, but only on the grounds that in some particular they were palpably inconsistent with the Militia laws of the State.

The by-laws would include the schedule of regular meetings the Company would hold each year, and define the circumstances under, purposes for, and procedures by which the Company's officers or membership might call special meetings. An Independent Company should meet in regular session at least once every two months in order to maintain a reasonable level of preparedness. At any meeting, a majority of the membership should constitute a quorum; and any smaller number in attendance might adjourn the meeting from day to day, and compel the participation of all absent members in whatever manner the Company might determine was appropriate, consistent with the State's Militia Code of Justice.

The by-laws would also establish the procedure for selecting the Company's officers and members after its initial organization. Most likely, officers would be elected at a regular annual meeting designated at least in part for that specific purpose. Removal or replacement of officers for whatever reason could be accomplished at other regular or special meetings. New members could be enrolled at any meeting. Once selected by the Company's membership, its officers would request commissions from the Local Committee of Safety, subject to disapproval by the State's Militia Department. If a commission were refused, adequate grounds would have

to be stated, but not necessarily accepted by the Company's membership. Rather, if the Company persisted in selecting the same individual on three successive occasions, his commission would have to be granted, unless after a hearing the Local Committee of Safety (again, subject to review by the Militia Department) established clear and convincing evidence of good cause why that individual should not be a commissioned officer in the Militia.

The by-laws would further specify a suitable oath or affirmation to be taken orally and subscribed in their own hands by each and every member of the Independent Company upon his formal induction therein, such as:

> I, [...name of individual...], do hereby acknowledge and attest that I have voluntarily enlisted within the [...name of the Independent Company...] of the Militia of [...name of the State...], and in and upon so doing I solemnly swear or affirm that I shall support and defend the Declaration of Independence, the Constitution and laws of the State [...or Commonwealth...] of [...name of the State...], and the Constitution and laws of the United States against all enemies, foreign and domestic; that I shall bear true, complete, and undivided loyalty and allegiance to the same, renouncing loyalty or allegiance of any kind to every foreign state, nation, or country; that I shall obey the lawful orders of the Committee of Safety for [...name of the Locality...], of the Militia Department of [...name of the State...], of those officers of [...name of the Independent Company...] and the Militia of [...name of State...] who may be superior in rank to or otherwise properly placed over me, and of the President of the United States when the Militia of [...name of the State...] may be employed in the actual service of the United States; that I shall in all other particulars well, fully, and faithfully discharge the duties which I am about to assume as a member of the Militia of [...name of the State...]; and that I take this obligation in all of its particulars upon myself freely, without any mental reservation or purpose of evasion, and subject to whatever penalties the laws of the State [...or Commonwealth...] of [...name of the State...] and of the United States may impose for violation thereof.

•With what insignia, uniforms, arms, accoutrements, and other equipment the Company would be supplied, and from what sources they

would be obtained. Particularly in the case of an Independent Company proposing to provide highly specialized services, the Local Committee of Safety would require a detailed description of these matters, so as to be reasonably confident that the Company would in fact be capable of effective action at some determinate time after its initial organization. Otherwise, personal insignia and basic uniforms, and Company flags or colors, would be required generally to conform to standards adopted by the State Militia Department, with allowance for identification of the Independent Company by name and by the Locality in which it is organized, so as to differentiate it from all other Militia Companies. Initially, the selection and provision of arms, ammunition, and related accoutrements would be left to the Independent Company itself to determine, so as to enable its members as much as possible to take advantage of the equipment already in their possession.

• Acknowledgment that the Independent Company's commanding officer—presumably to be designated a "Captain", in keeping with historical usage—would take primary responsibility in the normal course of events for recruiting, organizing, arming and otherwise equipping, training, and disciplining, and on active service for mobilizing and deploying, the Company's members; and that all the other officers and members of the Company would be responsible in the first instance to its commanding officer—with all of the officers and members of the Company being subject to supervision by and accountability to the Local Committee of Safety.

• The particular courses of education and training to be required of the Company's members, in terms of the subject-matters, sources and qualifications of the instructors, locations of any specialized training-facilities, schedules, and standards for judging the students' satisfactory completion of those courses.

• The schedule of regular exercises in the field that the Company would undertake to perform. The mandatory minimum of these maneuvers should be four times each year. But inasmuch as they would consist entirely of volunteers particularly enthusiastic for the duty, most Independent Companies would be expected to conduct such exercises on a more-frequent basis.

• The methods by which the Company would discipline its members for failure, neglect, or refusal to perform their duties. In most cases, discipline would be imposed by levying fines and forfeitures that would be enforced pursuant to the State's Militia Code of Justice.

• Any procedures above and beyond those mandated for regular Militia Companies by the Local Committee of Safety and the State's Militia

Department that would be necessary for mobilizing the Independent Company whenever it might be called forth by any governmental body with authority over the Militia.

• A date certain by which the Company would be fully organized and operational—which ought not to exceed thirty days from the date the petition is submitted to the Local Committee of Safety.

Filing of this petition with the Local Committee of Safety would allow the Independent Company to begin the process of formation as a provisional unit in the Militia. During that period—which, absent special circumstances, ought not to extend beyond the date proposed by the Independent Company on which it would be fully operational—the Committee would review the petition and conduct whatever investigation it deemed appropriate. While the petition was under consideration, the Company could recruit and organize, and conduct such internal functions as meetings and training, but would not be entitled actually to operate within the jurisdiction with legal authority as an Independent Company. If the Company should fail to become operational by the date its petition had fixed (no application for an extension of time having been sought), its charter would be disapproved, whereupon the Company would be dissolved, but without prejudice to the filing of a future petition.

(c) Upon an Independent Company's receipt of a certificate attesting to its approval by a Local Committee of Safety—

• The Company would became fully operational, impressed with all of the legal rights, powers, privileges, immunities, and duties of a regular Militia Company, together with and augmented by any other special authority granted in or along with its charter. In the latter case, for example, an Independent Company specializing in the prevention and mitigation of industrial accidents that could endanger the general public might be invested with the power on its own initiative to instigate inspections and investigations of, and to impose immediate remedial actions as to, dangerous conditions subsisting within (say) chemical plants that operated in the Locality—an authority that would not be extended to regular Militia Companies, or even to those Militiamen serving as Sheriffs' deputies or police officers.

In all cases, the initial certificate from a Local Committee of Safety would be effective for one year after the date of issuance, at which point the Committee would review the Independent Company's performance. If that review proved satisfactory, or after any deficiencies that it disclosed had been corrected, the Committee would issue a final certificate effective indefinitely, unless revoked. The issuance of both an initial and a final certificate would be subject to review and disapproval, in whole or in part,

by the State Militia Department, for good cause shown after notice and hearing, with a right in the Independent Company to a restoration of its certificate upon its correction of any deficiencies that had been established.

• The Company's members would be immune from the orders or directions of, and free from any requirement to train or deploy with or under, any other Militia Company or other unit or officer within the Local jurisdiction, other than the Local Committee of Safety, except when their Company might be called into actual service during declared "alarms", or when some or all of the Militia units in that jurisdiction might participate in a general muster, general training exercise, or other general deployment.

• The Company's Captain would be entitled to attend the meetings of the Local Committee of Safety as an advisory or voting member, as the case might be.

• The Company could apply to the Local Committee of Safety for subsidies dispersed out of the funds collected by the Militia from fines and fees collected from the individuals in that jurisdiction who sought, by paying those moneys, to obtain effective exemptions from most Militia duties during the initial phase of revitalization.

(d) Once chartered, Independent Companies would report on a regular basis—probably *semi*-annually—to their Local Committees of Safety with respect to the state of each Company's membership, organization, equipment, training, discipline, readiness, general compliance with the State's Militia Laws and specific compliance with any applicable directives of the Committee, and (where relevant) the details of any active service on which its members had been or were then deployed. In addition, the Local Committee of Safety would conduct its own annual review and evaluation of each Independent Company within its jurisdiction. Furthermore, each Independent Company would be subject at all times to strict inquiry and examination as to these matters by its Local Committee of Safety or by the State Militia Department. If any such reports, inquiries, examinations, or reviews disclosed that an Independent Company or certain of its members had failed to perform according to the terms of its charter, or had failed or refused to carry out directives from its Local Committee of Safety or the State Militia Department (particularly with respect to being called forth to active service), the Committee or the Department could, after suitable notice and hearing, order corrective steps to be taken within the Company, suspend the Company's authority or operations in whole or in part until reforms were implemented, discipline particular officers or members (and, in egregious circumstances, even order their expulsion from the Company), or take other actions authorized in such cases under regulations promulgated by the Department. At any time, particular officers or members of an Independent Company could also be disciplined or discharged by the Company, the

Local Committee of Safety, or the State Militia Department for repeated failures or refusals to perform their duties, for consistently negligent performance of those duties, for serious breaches of Militia discipline, or for the commission of criminal acts that justified their severance from the Militia (that is, historic "[F]ELONIES" or other crimes appropriately punished by the imposition of "slavery [ ]or involuntary servitude" upon the perpetrator[2596]). Of course, an Independent Company could always surrender its charter and disband, its members then reverting to their normal status as subject to service in regular Militia Companies. And if an Independent Company should cease its operations at any time, or if it should violate the requirements of the State's Militia law in some sufficiently serious particular, its charter either would become void, or would be forfeited, whereupon the Company would be dissolved.

3. Only the infertility of one's imagination can impose limits on the types and purposes of Independent Companies that would be useful for providing "homeland security" in America today. Because possibly adverse conditions—and the abilities and resources that people possess to deal with them—vary so widely throughout the country, the possibilities are endless. So which types of Independent Companies might be established in which Localities will depend upon the particular circumstances on the ground there. But some generalizations can profitably be offered.

a. Because of their members' special education, skills, experience, and especially willingness to contribute extraordinary efforts, some Independent Companies could function as "demonstration" units—devising, testing, perfecting, and making available the most effective methods for organizing, equipping, training, and assigning different duties to Militia Companies. At least three types of "demonstration" units would be likely to emerge:

- Independent Companies engaged in *planning* would study theoretical standards, practical requirements, procedures, and other ways and means to revitalize the Militia.

- Independent Companies engaged in *instruction* would evaluate various methods for teaching subjects related to the Militia to members of the Militia. Within the Militia, they would become the teachers' teachers.

- Independent Companies engaged in *education and training* would supply the actual teachers for rank-and-file Militiamen. They would be trained first in the most effective techniques of instruction, then in various substantive disciplines to which they would be assigned on the basis of their own previous education, training, experience, aptitudes, and personal

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[2596] *See ante*, at 748-749, 993-998 and 1011-1013.

> interests. Some could also receive advanced training from the regular Armed Forces. Independent Companies in this category would train as units, but their members would serve as individuals, being seconded to Localities where they were needed to train the members of other Militia units. During the War of Independence, this method was adopted by Virginia,[2597] and by the Continental Army as well when, "[t]o speed the learning process, [George] Washington organized a provisional 'model company' as an adjunct to his guard. * * * Members of the model company and selected officers then spent six weeks instructing all other units at Valley Forge and later extended the system to the rest of the * * * Army."[2598] More recently, it has proven elsewhere to be an effective, time-saving technique even under extremely adverse conditions.[2599]

In each of these cases, a "demonstration" Company could be formed originally as a separate unit, or be composed of members drawn from other Independent Companies on account of their particular qualifications in these areas.

A good example of how one such "demonstration" unit might function today can be found in the Militia records of *pre*-constitutional Virginia. In 1784 and 1785, statutes created so-called "Light Companies", one purpose of which was to train some members of the Militia to a high standard, and then diffuse those Militiamen throughout the force, raising the general level of readiness:

> [W]hereas, it will be of great utility and advantage in establishing a well disciplined militia, to annex to each regiment a light company, to be formed of young men, from eighteen to twenty-five years old, whose activity and domestic circumstances will admit of a frequency of training, and strictness of discipline, not practicable for the militia in general, and returning to the main body on their arrival at the latter period, will be constantly giving thereto a military pride and experience, from which the best of consequences will result:
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> * * * *Be it therefore enacted*, That the governor * * * shall * * * appoint and commission for each regiment * * * [certain officers] of the most proper persons therefor, for a light company * * * ; and the said companies shall be distinguished by the following words "Light Company of ——— regiment of ——— militia," filling up the blanks with the number of the regiment, and name of the company. Every person belonging to the said light companies, shall wear while on duty, such caps and uniforms as the executive shall direct, to be purchased by the

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[2597] *See ante*, at 565-566.

[2598] R. Wright, Jr., *The Continental Army, ante* note 396, at 141 (footnote omitted).

[2599] *See, e.g.*, Commandant General Tom Barry, *Guerilla Days in Ireland* (Dublin, Ireland: Anvil Books, 1989), Chapter 4. *See generally* Meda Ryan, *Tom Barry: IRA Freedom Fighter* (Cork, Ireland: Mercier Press, 2003).

> commanding officer of the county, out of the monies arising on delinquents. The captain * * * shall * * * enroll in his company a sufficient number of young men * * * , and shall have a private muster twice in every three months. And as the men of such light company shall * * * arrive at the age of twenty-five years, * * * the county lieutenant * * * shall order them to be enrolled in the [regular] company whose districts they may respectively live in, and deficiencies shall be supplied by new enrollments. And the said companies shall in all respects be subject to the same regulations and orders as the rest of the militia.{EN-2045}

The principles that animated these statutes can profitably be applied today: namely,

- incorporating into Independent Companies individuals whose ages, abilities, and other qualifications and characteristics render them peculiarly fit to perform particular special duties;
- requiring these individuals to undergo frequent and comprehensive training in their specialities, to bring them to a very high standard of performance and readiness; and then,
- after their tours of duty are completed, returning them to the regular Militia, so as—in the manner of "folding leaven into the dough"— to diffuse their *élan*, expertise, and experience throughout the force.

b. In addition, because of their members' education, experience, extensive training, and elevated states of preparedness, Independent Companies engaged in day-to-day operations could serve as modern-day "Minutemen", ready and able on a moment's notice to deploy throughout their Localities and States in numerous capacities. For example, Independent Companies could provide the following specially trained personnel and perform the following functions:

- Line infantry—that is, frankly *para*-military ground forces, both mechanized and on foot, with at least basic training to levels of proficiency approaching those of the regular Armed Forces.
- Line cavalry. In many parts of America forces of this kind could prove to be both indispensable and invaluable, particularly in times of economic breakdown. "Cavalry" would include horses and mules as mounts for fully armed and trained Militiamen (in the historic jargon, "dragoons"), and as pack and draft animals. The "cavalry" could also serve as a base for training people in the raising, training, and use of draft animals for farming, certain light-industrial activities, and transportation under adverse conditions that prevented the use of normal motorized equipment.
- Sheriffs' special deputies, police auxiliaries, and other reserve law-enforcement officers attached to the then-existing Sheriffs' departments and

police forces that would be incorporated into the Militia as regular, albeit specialized, units immediately upon revitalization.[2600]

• Auxiliary fire fighters trained and equipped to operate in urban, suburban, and rural contexts.

• General medical teams, with particular emphasis on recruiting personnel familiar with emergency treatment and trauma surgery.

• Intelligence and counterintelligence teams.

• Internal-security personnel, including specially trained supervisors, guards, and patrollers at strategic geographical locations and critical points in the transportation-network (such as road and rail junctions, ports, and airports), for critical infrastructure and installations (such as factories, dams, reservoirs, power lines, and pipelines), and along any international borders that bounded the Locality.

• Specialists in the maintenance of public order and safety under emergency and other adverse conditions—including mass evacuations and relocations; temporary and long-term support of large numbers of displaced persons; and riot, crowd, and traffic control in the course of natural disasters (such as floods, hurricanes, tornadoes, and prolonged droughts), industrial accidents (such as massive contamination of land, water, and air by discharges of crude oil or nuclear, chemical, or biological agents), or like crises.

• Specialists in food security drawn from the ranks of farmers, ranchers, and other producers of foodstuffs who could design and supervise the implementation of programs aimed at maximizing each Locality's production, storage, and distribution of wholesome foodstuffs under all reasonably conceivable conditions, with a goal of achieving self-sufficiency for at least one year.[2601]

• Specialists in the generation and distribution of power, who could design and supervise the implementation of programs aimed at creating and maintaining public and private facilities, equipment, and supplies of fossil and other fuels, and especially alternative sources of energy, sufficient for the Locality's minimum needs for at least one year. These programs would seek to maximize both the use of renewable energy and the conservation of energy from nonrenewable sources.

[2600] *See ante*, at 327-328, 1135-1138, 1194-1202, and 1276-1277, *and post*, at 1291-1293 and 1482-1488.

[2601] Americans, especially, should be sensitive to the crucial importance of "food security" in any system of "homeland security". *See, e.g.,* Andrew F. Smith, *Starving the South: How the North Won the Civil War* (New York, New York: St. Martin's Press, 2011).

• Specialists in public health and sanitation, whose work would emphasize the prevention and control of communicable diseases, and the immediate provision of medical and nursing services during and adequate for any reasonably foreseeable emergency.

• Specialists in economic security, whose major responsibility would be to manage the State's alternative-currency system and specie depository so as to enable her government and private economy to continue to function in the event of a collapse of the National monetary and banking systems.[2602]

• Experts in communications and information-technology, whose task would be to establish and maintain redundant means of communications for the Militia—some of which would be not reliant upon electricity—throughout the State and her Localities.

• Specialists in transportation—by conventional road, rail, and air networks, as well as by off-road and other unconventional means—whose mission would be to secure the ability of each Locality during any reasonably foreseeable crisis to move large numbers of people and large amounts of things as efficiently as possible through the use of multiple means, some entirely independent of fossil fuels and motorized vehicles of any kind.

• Engineers and workers experienced in every facet of construction, reconstruction, and demolition from simple carpentry to the use of heavy equipment—somewhat along the lines of the Navy's Construction Battalions of World War II—who could be deployed to deal with any problem, from providing temporary housing for a few hundred displaced persons to reinforcing a dam that threatened to collapse.

• Environmental specialists well versed in the protection and management of farmlands, pasturage, forests, fisheries, rivers and streams, wetlands, game, and wildlife in general.

• Specialists in public relations who, among other duties, could document what was being accomplished through revitalization of the Militia in their own State, and could then broadcast that information to the people of other States in order to encourage them to revitalize their Militia.

• Administration—although paper work is prosaic and dull, it is always to some degree necessary.

And, in anticipation of and preparation for perhaps the worst situation imaginable,

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[2602] *See ante*, at 1208-1233.

• Strategists and tacticians who would devise and test methods for "total resistance" unto "the last ditch" by WE THE PEOPLE as *guerrilleros*, partisans, irregulars, and *résistants* in the event of a successful invasion of the United States or a take-over of the General Government or a majority of the States' governments by insurrectionists or rogue public officials.[2603] Because the techniques *résistants* could employ would depend to a decisive degree on the types of geographical terrain over, economic and social structures within, and the size and composition of the populations among which they would have to operate, a great deal of very careful thinking ahead would need to be done in every Locality throughout each State in order to be adequately prepared for these sorts of eventualities.

c. The mere differentiation of Independent Companies on paper being insufficient without actual training in their different specialities, the Local Committee of Safety would endeavor to make available to such Companies the use of all such public facilities, equipment, or other property in the Local jurisdiction which could facilitate the training of those Companies' members. Through the State Militia Department, facilities in other jurisdictions could be made available as well. (For example, members of Independent Companies specializing in "law enforcement" or "fire fighting" could be trained at State policemen's and firemen's academies.) The Department could also arrange with the regular Armed Forces of the United States (including the National Guard) to provide such assistance when Independent Companies were training to perform one or more of the constitutional functions for which "the Militia of the several States" may be "called into the actual Service of the United States".[2604]

d. Whatever the specialties of Independent Companies might be, their terms and conditions of service would need to be carefully specified.

(1) Unless the State Militia Department had authorized mobilization of Militia units pursuant to an "alarm", no Independent Company would be required to serve on active duty for more than (say) fourteen consecutive days. And even during an emergency mobilization, Independent Companies should be afforded the benefit of rotation in service to the fullest extent possible.

(2) Unless the State Militia Department had authorized such deployment of Militia units, no Independent Company would be required to serve on active duty

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[2603] *See, e.g.,* H. von Dach, *Der Total Widerstand: Kleinkriegsanleitung für Jedermann* (Biel, Switzerland: Schweizerischen Unteroffiziersverband, Dritte Auflage, 1966), published in translation from an earlier edition as *Total Resistance: Swiss Army Guide to Warfare and Undergrounds* (Boulder, Colorado: Paladin Press, 1965); Friedrich August Freiherr von der Heydte, *Modern Irregular Warfare in Defense Policy and as a Military Phenomenon*, George Gregory, Translator (New York, New York: New Benjamin Franklin House Publishing, 1986).

[2604] *See* U.S. Const. art. II, § 2, cl. 1 *and* art. I, § 8, cls. 15 and 16.

outside of its own Local jurisdiction and those Local jurisdictions contiguous thereto, and in the latter case only pursuant to an agreement among those jurisdictions delineating the terms of such service.

(3) During active service, members of an Independent Company should be entitled to a *per diem* stipend from the Militia. They should be reimbursed for whatever ordinary and necessary expenses the Company might require its members to incur, and for the fair market value of such equipment and supplies that the Company might require its members to bring with them, and that might be lost, damaged, destroyed, or consumed, without fault on the part of the owners. They should be covered by the standard workers'-compensation insurance already provided under their State's law, or equivalent insurance procured by the Militia, for any injuries they might suffer as a consequence of active duty. If they were compelled to absent themselves from their regular employment, they should be entitled to whatever benefits of leaves of absence the State's law provided for public or private employees who were called to active service in the regular Armed Forces or the National Guard. And they should be granted immunity against personal liability in civil actions for damages to persons or property arising out of their service, except to the extent that their actions could be proven to have been grossly negligent, reckless, or criminal in nature.

(4) The entirely predictable success of Independent Companies would derive from the type of individuals who would form and join them. True enough, some material incentives would encourage certain individuals' participation—such as specialized training in their areas of expertise and access to equipment made available through the Militia and subsidized with Militia funds, as well as possibly even personal monetary compensation when they were actually on active duty. But basically their primary motivation would be *patriotism*, not personal profit or the satisfaction of some other narrow self-interest. Individuals inspired by patriotism to form Independent Companies would be their communities' natural leaders, who would recognize their duty, come forth on their own initiatives, take charge, and inspire others to emulate their examples. Perhaps of even greater consequence, they would be more likely than any others to possess both the foresight to discern what would be needed to provide their communities with *true* "homeland security" and the willingness to take appropriate action long before the necessity for it would have become painfully obvious to everybody else.

4. Even without a specific State statute, steps could be taken to lay the practical and political groundwork for revitalizing the Militia by organizing Sheriffs' *posses* in "independent companies". In *pre-*constitutional English law,

> [a]s the keeper of the king's peace, * * * [the Sheriff] is the first man in the county * * * . He may apprehend[ ], and commit to prison, all persons who break the peace or attempt to break it * * * . He may, and is

> bound *ex officio* to, pursue and take all traitors, murderers, felons, and other misdoers, and commit them to gaol for safe custody. He is also to defend his country against all of the king's enemies when they come into the land: and for this purpose, as well as for keeping the peace and pursuing felons, he may command all the people of his county to attend him; which is called the *posse comitatus*, or power of the county; which summons every person above fifteen years old * * * is bound to attend upon warning, under pain of fine and imprisonment.[2605]

Today, in contrast, a Sheriff is not necessarily "the first man in the county", with all of the powers Sheriffs in England enjoyed during *pre-*constitutional times, but may exercise only such authority as the State's constitution and laws delegate to him[2606]—which authority must be carefully ascertained, because "it is of the utmost importance to have the sheriff appointed according to law, when we consider his power and duty".[2607] Certainly, no Sheriff can claim any authority peculiar to that office under the Constitution of the United States, in which the noun "Sheriff" does not appear. Even in his own County, a Sheriff cannot put himself forward as the supreme commander of the Militia—or as *any* officer of the Militia for that matter—solely by virtue of his office. Merely as Sheriff, he cannot command members of the Militia when they are in actual service, let alone override the commands of the Militia's own officers. To be sure, a State statute could empower Sheriffs as County Lieutenants of (or other officers in) the Militia—which might be advisable, inasmuch as revitalization of the Militia would in effect incorporate into the Militia essentially everyone eligible for the *posse comitatus* in every County. Absent such a statute, however, a Sheriff cannot under color of his own authority establish a purported "militia" in his County.

Nevertheless, prior to revitalization of the Militia, a Sheriff *can* mobilize and deploy a *posse comitatus* in his own County, if the applicable State and Local laws allow. Although a limited power, this could be just enough to catalyze revitalization of the Militia throughout the State. Initially, the Sheriff could authorize volunteers from among his *posse* to organize "independent companies" throughout his County, their members deputized to provide specialized services to assist the Sheriff in "keeping the peace", in the broadest sense of guaranteeing all of those aspects of Local "homeland security" which, if neglected, could result in economic, social, or political dislocations, civil unrest or disobedience, or other like threats to public safety, health, and good order. Once sufficient "independent companies" of the

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[2605] W. Blackstone, *Commentaries on the Laws of England, ante* note 142, Volume 1, at 343-344 (footnotes omitted). At that time, an individual's "neglecting to join the *posse comitatus* * * * being thereunto required by the sheriff" was deemed a "high misprision and contempt". *Id.*, Volume 4, at 122.

[2606] *See, e.g.,* Const. of Virginia art. VII, § 4, ¶ 1.

[2607] W. Blackstone, *Commentaries on the Laws of England, ante* note 142, Volume 1, at 343.

posse had been set up and deployed to prove the viability of the plan, the Sheriff could assign all individuals eligible for the *posse* but not members of any "independent company" to "regular companies" in their own neighborhoods, and then cause them to be organized, armed, and trained as might be appropriate to perform general "homeland-security" duties suitable for their County under the Sheriff's direction. Successful in one County, the plan would likely be adopted in others throughout the State. When enough Counties had adopted it, the Sheriffs in the forefront of the movement could submit to or support in the State's legislature a proposed statute for revitalizing the Militia, with Sheriffs to be designated County Lieutenants, and the "independent" and "regular companies" of the *posse comitatus* in each County to be dissolved as such and thereupon incorporated directly into the Militia as full-fledged Local Companies. A precedent for this exists in *pre-*constitutional Virginia law, when Virginia's Convention decreed that "the several volunteer companies, raised in pursuance of the resolutions of a former convention,[2608] shall be disbanded, as soon as the battalions [of Minutemen] in the several districts where the said volunteer companies respectively reside are fully and completely embodied".{EN-2046} Even were such a statute not enacted, though, the Counties in which the Sheriffs had mobilized the *posse comitatus* in "independent" and perhaps even "regular companies" would have prepared themselves as much as possible for the trying times this country will face in the years to come.

[2608] This referred to the Convention's Resolution of 25 March 1775. *See ante*, at 592-593.

CHAPTER FORTY-FIVE

The Second Amendment explains the purpose of, and renders absolute, the position of "the Militia of the several States" in the Constitution's federal system and WE THE PEOPLE'S right to be organized, armed, disciplined, and trained for Militia service.

From what this study has already elucidated as to the accepted meanings of "the Militia of the several States" and "[a] well regulated Militia" during the *pre*-constitutional period—and therefore the meanings of those terms in the Constitution—the proper construction of the Second Amendment should be pellucid. Knowing what WE THE PEOPLE knew in the late 1700s, they could hardly have adopted a more succinct, straightforward, and intelligible statement than ***"[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed"***—or been in any way undecided about that statement's meaning, in each and every one of its particulars. Nevertheless, inasmuch as, in disregard and even defiance of its clarity, the Amendment has been made the subject of endless controversy, convoluted special pleading, and attendant confusion—among, for example, panegyrists of a so-called "individual right" to possess firearms, propagandists for comprehensive "gun control", and even proponents of "private militia"—it would be prudent to review and summarize in one place the most important components of the Amendment's true construction. If the principles of the Second Amendment to be set out at this point appear self-evident, it is only because this study has taken the trouble to examine the subject first and foremost through the lens of *pre*-constitutional legal history, which brings everything into as sharp a focus as WE THE PEOPLE of that era themselves enjoyed.[2609]

A. The relevant rules of constitutional interpretation. As with any other part of the Constitution, the Second Amendment must be construed in accordance with certain fundamental rules. Although these are more or less commonsensical, a brief review of the most important of them at this point would not be unprofitable.

[2609] If any reader wishes to wrack his brain in the sort of superficial yet tortuous exegeses and pilpulistic disputations that delight members of the contemporary legal *intelligentsia*, but leave the Constitution tangled in a rat's nest of conundrums (thus providing even more grist for the *intelligentsia's* mill), he has only to peruse the mutually conflicting opinions of the Justices in the Supreme Court's recent decisions in *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), and *McDonald* v. *City of Chicago*, 561 U.S. ___ (2010), ***none of which correctly construed the Second Amendment***.

1. The General Government may exercise only such powers as the Constitution assigns to it. "The government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution."[2610] "[N]o department of the government of the United States * * * possesses any power not given by the Constitution."[2611] "The government * * * of the United States can claim no powers which are not granted to it by the constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication."[2612] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[2613] And, perhaps most importantly, "[t]he burden of establishing a delegation of power to the United States or the prohibition of power to the states is upon those making the claim."[2614]

2. In determining what powers have been delegated to the United States, prohibited to the States, or reserved either to the States or to WE THE PEOPLE, the original Constitution and the Bill of Rights must be read and understood as they would have been parsed at the times of their ratifications by the individuals most concerned with the matter: "the good People of the[American] Colonies", in whose name and by whose authority "*The unanimous Declaration of the thirteen united States of America*" was put forth in 1776; and who then identified themselves as "WE THE PEOPLE of the United States", who "ordain[ed] and establish[ed] th[e] Constitution" in 1788, and whose legislatures ratified the Bill of Rights by 1791. And whatever its language might signify to modern ears, an Amendment to the Constitution must be read in the sense most obvious to the common man's understanding at the time of its ratification—for it was proposed for adoption by the public at that time.[2615] So no Americans of that era would ever have doubted that the original Constitution and the Bill of Rights said exactly what THE PEOPLE meant them to say, according to the documents' literal terms. "As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said."[2616] "It cannot be supposed that the framers of the Constitution did not use th[e]

[2610] United States v. Cruikshank, 92 U.S. 542, 551 (1876).

[2611] *Ex parte* Milligan, 71 U.S. (4 Wallace) 2, 136-137 (1866) (opinion of Chase, C.J.). *Accord*, *Ex parte* Quirin, 317 U.S. 1, 25 (1942); Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 477 (1939).

[2612] Martin v. Hunter's Lessee, 14 U.S. (1 Wheaton) 304, 326 (1816).

[2613] U.S. Const. amend. X.

[2614] Bute v. Illinois, 333 U.S. 640, 653 (1948).

[2615] *See* Adamson v. California, 332 U.S. 46, 63 (1947) (Frankfurter, J., concurring).

[2616] Gibbons v. Ogden, 22 U.S. (9 Wheaton) 1, 188 (1824).

expression[s they chose] with deliberation or failed to appreciate [those expressions'] plain significance. * * * To disregard such a deliberate choice of words and their natural meaning would be a departure from the first principle of constitutional interpretation."[2617] Furthermore, no Americans of that era would ever have denied that, as their country's "supreme Law of the Land",[2618] the Constitution was to be construed in none other than "the light of the law as it existed at the time it was adopted".[2619]

3. As with the Constitution in general, the Second Amendment in particular must be interpreted as a coherent whole, in which every term and phrase relates inextricably to every other. "'In expounding the Constitution * * * , every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added.'"[2620] So, one cannot correctly construe the Amendment's clause, "the right of the people to keep and bear Arms, shall not be infringed" except in connection with and in the context of the preceding clause, "[a] well regulated Militia, being necessary to the security of a free State".

B. The meaning of the Second Amendment. As with all of the Constitution, the meaning of the Second Amendment must be gleaned from its own words and phrases. These should first be examined as a whole, then considered separately.

1. The Amendment's meaning controlled by its grammatical structure. In its entirety, the Second Amendment consists of two clauses: an introductory subordinate or modifying clause—"[a] well regulated Militia, being necessary to the Security of a free State", followed by an independent or main clause—"the right of the people to keep and bear Arms, shall not be infringed".

Grammatically, "[a] well regulated Militia, being necessary to the security of a free State" is denoted a "nominative absolute clause". Even contemporary American high-school students—as poorly educated as too often they are—should understand what an "absolute clause" is and does:[2621] An "absolute clause" modifies the whole of the sentence in which it is contained, adding important information,

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[2617] Wright v. United States, 302 U.S. 583, 587-588 (1938).

[2618] U.S. Const. art. VI, cl. 2.

[2619] Mattox v. United States, 156 U.S. 237, 243 (1895). *Accord*, United States v. Barnett, 376 U.S. 681, 693 (1964).

[2620] Williams v. United States, 289 U.S. 553, 572-573 (1933), *quoting* Holmes v. Jennison, 39 U.S. (14 Peters) 540, 570-571 (1840) (opinion of Taney, C.J.). *Accord*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803). *See also* Griswold v. Connecticut, 381 U.S. 479, 490-491 (1965); Myers v. United States, 272 U.S. 52, 151-152 (1926); Knowlton v. Moore, 178 U.S. 41, 87 (1900); Blake v. McClung, 172 U.S. 239, 260-261 (1898).

[2621] *See, e.g.,* Donald W. Emery, John M. Kierzek, & Peter Lindblom, *English Fundamentals, Form B* (Needham Heights, Massachusetts: Allyn and Bacon, Eleventh Edition, 1999), at 114-115.

sometimes (as in the case of the Second Amendment) the most important information in the sentence. An "absolute clause" identifies relationships between ideas expressed within the sentence—quite often, the reason for or the cause of what is expressed in the main clause.

In the late 1700s, no one fluent in the English language, let alone literate in *pre-*constitutional American law, would have read the Second Amendment with any other rule of grammatical construction in mind:

> Anyone studying * * * English grammar in the eighteenth century would have understood how an absolute phrase works. And since the absolute phrase already had become a normal, naturalized English construction by then, any competent English writer at the time would have been able to use the absolute construction without having taken any formal grammar lessons.
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> Most American readers in the federal period, including those without formal grammar study, would have had no trouble understanding that the Second Amendment's absolute construction functioned to make the Amendment effectively read: because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.[2622]

This grammatical analysis is controlling, because the rule employed for construing statutes in the late 1700s required that if "the reason of the law" is "expressed in such clear and precise words, as to leave no doubt at all about the ultimate effect which the lawmaker designed to produce, or about the end which he designed to obtain", then "the meaning of the law is to be determined by the reason of it".[2623] "If, from the imperfection of human language, there should be

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[2622] BRIEF FOR PROFESSORS OF LINGUISTICS AND ENGLISH DENNIS E. BARON, Ph.D., RICHARD W. BAILEY, Ph.D. AND JEFFREY P. KAPLAN, Ph.D. IN SUPPORT OF PETITIONERS, District of Columbia v. Dick Anthony Heller, Supreme Court of the United States, No. 07-290 (filed 11 January 2008), at 11, 14. Ironically, the Professors submitted their brief in support of *denying* average Americans in the District of Columbia a right to possess a handgun even for the purpose of individual self-defense in those citizens' own homes. Although they correctly observed that, as a matter of linguistics, the Amendment inextricably links "the right of the people to keep and bear Arms" with "[a] well regulated Militia", the Professors apparently had no inkling that, as a matter of legal history, "a well regulated militia" is always "composed of *the body of the people*, trained to arms". Virginia Declaration of Rights (1776) art. 13 (emphasis supplied). Therefore they were unaware that, *the closer the connection between "the right" and "*[*a*] *well regulated Militia", the greater the number of individuals entitled to be armed at all times—with military-grade rifles, as well as handguns*—quite in contradiction of the result the Professors desired the Supreme Court to reach. Proving once again that "a little learning is a dangerous thing".

[2623] T. Rutherforth, INSTITUTES OF NATURAL LAW, *ante* note 1872, Book II, Chapter VII, at 415. *See also* W. Blackstone, *Commentaries on the Laws of England*, *ante* note 142, Volume 1, at 59-62. As elucidated by Rutherforth especially, the rules of statutory construction had antecedents both in international and in English law, and were doubtlessly well known to and accepted by Americans during the *pre-*constitutional period. *See, e.g,* W. Crosskey, *Politics and the Constitution, ante* note 206, Volume 1, at 364-365.

serious doubts respecting the extent of any given power, * * * the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction."[2624] Which in the case of the Second Amendment means that the pith (if not the entire substance) of "the right of the people to keep and bear Arms" must be ascertained by reference to the preceding clause. For, plainly enough, "the reason", "effect", "end", and "objects" of the Amendment are "expressed in * * * clear and precise words" in the Amendment itself, with an emphasis to be found nowhere else in the Constitution: "[a] well regulated Militia, *being necessary to the security of a free State*".

And because (as just noted), "'[i]n expounding the Constitution * * * , every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added'", therefore, whatever else the "right of the people" might entail, it must to a decisive degree always conduce to, operate within, and advance "[a] well regulated Militia", so that "[a] well regulated Militia" can conduce to, operate within, and advance "the security of a free State". Reciprocally, "a free State" must be one with "[a] well regulated Militia". And "[a] well regulated Militia" must be one in which "the people" participate through the untrammeled exercise of their "right * * * to keep and bear Arms". "[T]he right of the people to keep and bear Arms" is not merely incidental to "[a] well regulated Militia" and *vice versa*; instead, each is integral to and inextricable from the other. So, "the right of the people to keep and bear Arms" cannot be interpreted without reference to "[a] well regulated Militia"; and "[a] well regulated Militia" cannot be understood without reference to "the right of the people to keep and bear Arms".[2625]

Moreover, neither the Second Amendment's ultimate or intermediate purposes, nor the means it singles out to effectuate them, can be dismissed as mere anachronisms or anachorisms. To the contrary, in the grammatically clearest fashion, the Amendment declares itself pertinent always and everywhere through the United States. *First,* in general, "we must never forget, that it is a *constitution* we are expounding".[2626] The Constitution "was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence".[2627] Therefore, every provision of the original Constitution and its Amendments is "to be adapted

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[2624] Gibbons v. Ogden, 22 U.S. (9 Wheaton) 1, 188-189 (1824).

[2625] In the Wonderland of contemporary "judicial review", however, this self-evident constitutional proposition falls by the intellectual wayside. For, as of this writing, a majority of the Justices of the Supreme Court contend that "the right of the people to keep and bear Arms" need have no interpretive connection at all with "[a] well regulated Militia". *See* District of Columbia v. Heller, 554 U.S. 570, 576-628 (2008) (Scalia, J., for the Court).

[2626] McCulloch v. Maryland, 17 U.S. (4 Wheaton) 316, 407 (1819).

[2627] Martin v. Hunter's Lessee, 14 U.S. (1 Wheaton) 304, 326 (1816).

to the various *crises* of human affairs".[2628] The Second Amendment embodies precisely this understanding: "A well regulated Militia, *being* necessary to the security of a free State" expresses not only causation, but also temporality. The Amendment's "absolute clause" is not phrased in the *past* tense—"[a] well regulated Militia *having been* necessary to the Security of a free State"—so as to suggest that perhaps in the present or the future Congress or the several States could determine that such a Militia is not necessary. Neither is the clause phrased in the *future* tense—"[when a] well regulated Militia *shall become* necessary to the security of a free State"—so as to leave undefined under what circumstances that necessity might arise, thereby implicitly licensing Congress or the several States to deny that such circumstances obtain now, or would ever obtain. Rather, being in the *present* tense, "the absolute clause" sets out a relationship of cause and effect that exists now and will continue on into the indefinite future—so as to dispel any doubt that *at all conceivable times* the Second Amendment is and will be operative, and thereby to strip from Congress and the several States every thread of discretion to disregard the Amendment's command on the specious ground that it is somehow "out of date".

Second, because the Second Amendment is *always* germane, it is *everywhere* germane as well—not just in the original fourteen States that comprised the Union when the Second Amendment was ratified in 1791, but in the much larger territory, embracing the far greater number of States, that the Union was to and has become, through application of the provision that allows for adherence to the Constitution by new States, each with "a Republican Form of Government".[2629] The original Constitution set no limits on how large the Union might grow. But, perforce of the Second Amendment, each and every one of the new States (as well as the old) was upon her admission to the Union and forever after to be "a free State", and nothing else, and therefore would always require and be entitled to "[a] well regulated Militia" to provide for her "security".

Overall, then,

• The ultimate goal of the Second Amendment is to preserve a very special type of polity: namely, "a free State".

• As does any other polity, "a free State" requires appropriate "security".

• To provide the "security" proper for "a free State", and only for such a "State", "[a] well regulated Militia" is "necessary".

• For "[a] well regulated Militia" to exist, "the people" must themselves exercise "the right * * * to keep and bear Arms".

[2628] McCulloch v. Maryland, 17 U.S. (4 Wheaton) 316, 415 (1819).

[2629] U.S. Const. art. IV, § 3, cl. 1, *and* art. IV, § 4.

•In order for "the people" themselves to exercise their "right" freely and fully, "the supreme Law of the Land"[2630] must prohibit any and all "infringe[ments]" upon that "right". And,

•That prohibition must not simply exist in principle, but must be perfectly effective in practice, everywhere throughout the Union, at all times and under all possible circumstances—and if it is not, as is the case today, then something is profoundly and dangerously amiss.

2. The meaning of each part of the Amendment. Whether or not the whole is greater than the sum of its parts, it must be at least equal to them in aggregation. So it is worth examining each part of the Second Amendment's components, and evaluating its particular meaning.

a. "[A] free State". The word "State" is never defined anywhere in the original Constitution or the Bill of Rights. Furthermore, the word "State" takes on various usages the differences in which are apparent from their contexts. For example, it can refer to a foreign polity (organized on whatever basis),[2631] and even to a condition, rather than a political entity.[2632] In most instances, though, the word "State" refers specifically to one, some other number, or all of "the several States".[2633] In general, as so used, the term "State"

> describes sometimes a people or community of individuals united more or less closely in political relations, inhabiting * * * the same country; * * * not infrequently it is applied to the government under which the people live; at other times it represents the combined idea of people, territory, and government.
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> It is not difficult to see that in all these senses the primary conception is that of a people or community. The people, in whatever territory dwelling, * * * and whether organized under a regular government, or united by looser and less definite relations, constitute the state.
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> This is undoubtedly the fundamental idea upon which the republican institutions in our own country are established. * * *

[2630] U.S. Const. art. VI, cl. 2.

[2631] U.S. Const. art. I, § 9, cl. 8 ("foreign State"); art. III, § 2, cl. 1 ("foreign States"). *See also* U.S. Const. art. I, § 8, cl. 3 ("foreign Nations") *and* art. I, § 10, cl. 3 ("foreign Power"), in which "Nations" and "Power" appear to have been used so as to assure a clear delineation from "the several States" and "another State [in the Union]", respectively.

[2632] U.S. Const. art. II, § 3 (The President "shall from time to time give to the Congress Information of the State of the Union").

[2633] U.S. Const. art. I, § 2, cls. 1 through 4; § 3, cls. 1 through 3; § 4, cl. 1; § 8, cls. 3, 16, and 17; § 9, cls. 1, 5 and 6; *and* § 10, cls. 1 through 3. U.S. Const. art. II, § 1, cl. 2; *and* § 2, cl. 1. U.S. Const. art. III, § 2, cls. 1 through 3. U.S. Const. art. IV, § 1; § 2, cls. 1 through 3; § 3, cls. 1 and 2; *and* § 4. U.S. Const. art. V; art. VI, cls. 2 and 3; *and* art. VII. U.S. Const. amends. II, VI, *and* X.

> In the Constitution the term state most frequently expresses the combined idea * * * of people, territory, and government. A state, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed.[2634]

As the Constitution itself makes clear, though, when it declares that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government",[2635] a "State" is *not* just, or simply to be conflated with, a "government". To the contrary,

> the distinction between the government of a State and the State itself is important, and should be observed. In common speech and common apprehension they are usually regarded as identical; and as ordinarily the acts of the government are the acts of the State, because within the limits of its delegation of power, the government of the State is generally confounded with the State itself, and often the former is meant when the latter is mentioned. The State itself is an ideal person, intangible, invisible, immutable. The government is an agent, and, within the sphere of the agency, a perfect representative; but outside of that, it is a lawless usurpation. The Constitution of the State is the limit of the authority of its government, and both government and State are subject to the supremacy of the Constitution of the United States, and of the laws made in pursuance thereof. So that, while it is true in respect to the government of a State * * * that the maxim, that the king can do no wrong, has no place in our system of government; yet, it is also true, in respect to the State itself, that whatever wrong is attempted in its name is imputable to its government, and not to the State, for, as it can speak and act only by law, whatever it does say and do must be lawful. That which, therefore, is unlawful because made so by the supreme law, the Constitution of the United States, is not the word or deed of the State, but is the mere wrong and trespass of those individual persons who falsely speak and act in its name. * * *
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> This distinction is essential to the idea of constitutional government. To deny it or blot it out obliterates the line of demarcation that separates constitutional government from absolutism, free self-government based on the sovereignty of the people from that despotism, whether of the one or the many, which enables the agent of the State to declare and decree that he is the state; to say "*L'État, c'est moi.*" Of what avail are written constitutions whose bills of right for the security of

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[2634] Texas v. White, 74 U.S. (7 Wallace) 700, 720-721 (1869).

[2635] U.S. Const. art. IV, § 4.

> individual liberty have been written, too often, with the blood of martyrs shed upon the battlefield and the scaffold, if their limitations and restraints upon power may be overpassed with impunity by the very agencies created and appointed to guard, defend, and enforce them; and that, too, with the sacred authority of law, not only compelling obedience, but entitled to respect? And how else can these principles of individual liberty and right be maintained if, when violated, the judicial tribunals are forbidden to visit penalties upon individual offenders, who are the instruments of wrong, whenever they interpose the shield of the State? The doctrine is not to be tolerated. The whole frame and scheme of the political institutions of this country, State and Federal, protest against it. Their continued existence is not compatible with it. It is the doctrine of absolutism, pure, simple, and naked; and of communism, which is its twin; the double progeny of the same evil birth.[2636]

The distinction between "a free State" and a mere governmental apparatus is critical. "A well regulated Militia" is always "necessary to the security of a free State", but not always to the security of the form of government that happens to be in existence in that State at any particular time. Indeed, under some circumstances, "the security of a free State" may depend, not upon preserving its form of government, but upon *overthrowing* it. For if "any Form of Government becomes destructive of the[ ] ends" for which "Governments are instituted among Men", the Declaration of Independence avows that "it is the Right of the People to alter or to abolish it, and to institute new Government"—which may require "the People" *forcibly* "to throw off such [abusive] Government" through deployment of "well regulated Militia" for the sake of preserving "the security of a free State".

The Second Amendment employs the phrase "a free State" in a dual fashion: (i) As a term of political philosophy, signifying a particular type of polity, just as it was used in Virginia's Declaration of Rights of 1776—namely, "[t]hat a well regulated militia * * * is the proper, natural, and safe defence of *a free state*";[2637] and even earlier by Blackstone—namely, "[t]he liberty of the press is indeed essential to the nature of *a free state*".[2638] And (ii) as a term that refers to the *legally obligatory character* of the States which make up the Union. For the Second Amendment was added to the original Constitution as a "further declaratory and restrictive clause[ ]" "in order to prevent misconstruction or abuse of its powers".[2639] And the original Constitution was adopted into order to put into practice the

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[2636] Poindexter v. Greenhow, 114 U.S. 270, 290 (1885).

[2637] Art. 13 (emphasis supplied).

[2638] *Commentaries on the Laws of England, ante* note 142, Volume 4, at 151 (emphasis supplied).

[2639] RESOLUTION OF THE FIRST CONGRESS SUBMITTING TWELVE AMENDMENTS TO THE CONSTITUTION (4 March 1789), *in Documents Illustrative of the Formation of the Union of the American States*, *ante* note 1, at 1063.

principles of the Declaration of Independence. Therefore, in America's political system—

> • Every member of the Union must be "[a] free State" (as all of the fourteen States which composed the Union were taken to be when the Bill of Rights was ratified in 1791). Although "[n]ew States may be admitted by the Congress into this Union",[2640] they, too, must satisfy the specific requirements of the Second Amendment, as well as general constitutional prohibitions against schemes for perpetuating oligarchy such as "Title[s] of Nobility".[2641] Congress cannot condition admission of a new State into the Union upon the State's waiver, surrender, forfeiture, or even dilution of her right—*and especially her people's right*—to "[a] well regulated Militia". For the general rule is that officials may not condition the grant of any benefit to a particular individual on a requirement that the individual must waive or forfeit some constitutional right in the present or the future, or must not have exercised some constitutional right in the past, in order to obtain the benefit.[2642] And this rule applies irrespective of whether the benefit at issue can or should properly be labeled a "right" or a "privilege".[2643] So, just as Congress cannot deny the benefits of the Second Amendment to any State already in the Union, it cannot deny them to a new State as a condition of her admission into the Union. Neither can any new State affirmatively agree on her own to any such waiver, surrender, forfeiture, or even dilution of her right (and especially her people's right) to "[a] well regulated Militia"—because, as shall be discussed hereafter, that constitutional right is also a constitutional *duty*.[2644]
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> • Inasmuch as every State in the original Union, the Union itself, and every new State admitted to it are legally justified only to the extent that they adhere to the Declaration of Independence as their fundamental law,[2645] "a free State" among "the several States" must fully satisfy the

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[2640] U.S. Const. art. IV, § 3, cl. 1.

[2641] *See* U.S. Const. art. I, § 9, cl. 8 *and* § 10, cl. 1.

[2642] *E.g.*, Branti v. Finkel, 445 U.S. 507, 513-516 (1980); Perry v. Sindermann, 408 U.S. 593, 597-598 (1972); Pickering v. Board of Education, 391 U.S. 563, 568 (1968); Keyishian v. Board of Regents, 385 U.S. 589, 605-606 (1967); Sherbert v. Verner, 374 U.S. 398, 403-406 (1963); Cramp v. Board of Public Instruction, 368 U.S. 278, 285, 287-288 (1961); Torcaso v. Watkins, 367 U.S. 488, 495-496 (1961); Shelton v. Tucker, 364 U.S. 479, 484-490 (1960); Speiser v. Randall, 357 U.S. 513, 518-519, 528-529 (1958): Slochower v. Board of Higher Education, 350 U.S. 551, 558-559 (1956); Wieman v. Updegraff, 344 U.S. 183, 191-192 (1952); Hannegan v. Esquire, Inc., 327 U.S. 146, 154-156 (1946); West Virginia State Board of Education v. Barnette, 319 U.S. 624, 630-631 (1943).

[2643] *E.g.*, Board of Regents v. Roth, 408 U.S. 564, 571 & note 9 (1972); Perry v. Sindermann, 408 U.S. 593, 597-598 (1972); Bell v. Burson, 402 U.S. 535, 539 (1971).

[2644] *See post*, at 1331-1333 and 1351-1353

[2645] *See ante*, at 22-27.

principles of the Declaration, in that: (i) she "deriv[es]" her "just powers"—and *only* "*just* powers"—"from the consent of the governed", for the purpose of "secur[ing]" men's "unalienable Rights" in conformity with "the Laws of Nature and of Nature's God"; and (ii) she never exceeds the limits that justice imposes on her powers, so as to "become[ ] destructive of these ends".

• "[A] free State" among "the several States" must have "a Republican Form of Government", because she is a member of the Union and "[t]he United States shall guarantee to every State in this Union a Republican Form of Government"[2646]—presumably to preserve the "Form of Government" which the State already has, but in the event that such "Form of Government" has been subverted or overthrown then to restore it to its proper character.

• Whatever else "a Republican Form of Government" may be, it must be "constructed on this principle, that the Supreme Power resides in the body of the people".[2647]

• So "a free State" must be one in which "the Supreme Power resides in the body of the people", because the government—which is a mere instrumentality of the "State"—can hardly be "constructed on th[at] principle" if the "State" herself is not.

• And because, in every form of "State", "free" or otherwise, inevitably the full measure and force of "'[p]olitical power grows out of the barrel of a gun'",[2648] when "the Supreme Power resides in the body of the people" then "the body of the people" must control the guns.

• For that reason, "a free State" must base her "security" on "[a] well regulated Militia", because, by definition in America, "the body of the people, trained to arms" comprises "a well regulated militia".[2649]

Indeed, it should be self-evident from history that, as the government of "a free State", "a Republican Form of Government" in America must include a Militia "well regulated" pursuant to statutes that embody principles drawn from *pre*-constitutional practice.

> No particular government is designated [in the Constitution] as republican, neither is the exact form to be guaranteed, in any manner

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[2646] U.S. Const. art. IV, § 4.

[2647] Chisholm v. Georgia, 2 U.S. (2 Dallas) 419, 457 (1793) (opinion of Wilson, J.).

[2648] *Quotations From Chairman Mao, ante* note 28, at 61.

[2649] Virginia Declaration of Rights (1776) art. 13.

> especially designated. Here, as in other parts of the instrument, we are compelled to resort elsewhere to ascertain what was intended.
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> * * * * *
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> The guaranty necessarily implies a duty on the part of the States themselves to provide such a government. All the States had governments when the Constitution was adopted. * * * These governments the Constitution did not change. They were accepted precisely as they were, and it is, therefore, to be presumed that they were such as it was the duty of the States to provide. Thus we have unmistakable evidence of what was republican in form, within the meaning of that term as employed in the Constitution.[2650]

Besides having governments, all of the States had settled what were considered "well regulated Militia" when the Constitution was adopted. The Constitution neither abolished nor even materially changed these establishments. Rather, it explicitly incorporated them into its federal structure as "the Militia of the several States". All of these Militia were *components of the States' governments*, formed and operated according to certain principles embodied in the States' *pre-*constitutional Militia statutes. This constitutes "unmistakable evidence" of what were then, *and what must be now*, "well regulated Militia"—and that "a Republican Form of Government" in each State must incorporate within itself such "[a] well regulated Militia". Moreover, inasmuch as "[t]he guaranty [of a 'Republican Form of Government'] necessarily implies a duty on the part of the States themselves to provide such a government", that guarantee alone implies a duty for each of the several States to maintain "[a] well regulated Militia" as a permanent, integral part of her government. Thus, even without the Second Amendment "the right of the people to keep and bear Arms" would be constitutionally protected within the guarantee of "a Republican Form of Government".

These conclusions must be true in every conceivable case in theory, too, as well as in actual historical fact. "A well regulated Militia", the Second Amendment declares, is "necessary to the security of a free State". If a "free State" actually exists, then it must already have some "security", and therefore must already have a Militia at least minimally "well regulated" for that purpose. In the extremely rare event that "a free State" comes into existence from nothing, the people having no preceding polity or government at all, the Militia must be created prior to or contemporaneously with the "free State", because at every moment of its existence "a free State" must have *some* "security" that only "[a] well regulated Militia" can provide. In contrast, if the "free State" arises only out of the abolition of a previously existing but abusive "Form of Government", which allowed the people no Militia, then the Militia must precede the "free State", because it is the means to establish

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[2650] Minor v. Happersett, 88 U.S. (21 Wallace) 162, 175-176 (1874).

the "free State" on the rubble of that bad "Government". If the Militia precedes or arises contemporaneously with the "free State", its authority must derive from some body of law higher, because it must operate earlier, than the laws of the "free State". Only from the people themselves—proceeding in conformity with "the Laws of Nature and of Nature's God"—could arise the authority for the people themselves to call forth the Militia from amongst themselves.

So much the Tenth Amendment confirms. It provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, *or to the people*".[2651] Some powers of sovereignty *neither* the United States *nor* the States, *but only "the people" themselves*, possess. In tranquil times, "the people" may find no occasion to exercise their unique powers, because other powers they have delegated to the United States or to the States suffice for the political tasks at hand. But when the General Government and the governments of the States are subverted by rogue public officials and turned against the people—when those governments, so corrupted, lie beyond all hope of redemption by the ordinary political means of honest elections and petitions for redress of grievances—then "the people" must exercise their reserved powers independently of and in opposition to each and every one of those rogue political establishments. And because at that point the restoration of "a free State", within each State and for the Union as a whole, will critically depend upon the Militia, the power to call themselves forth in the Militia on their own recognizance—and of necessary, too, to organize, arm, and discipline themselves in order to render the Militia effective—must be among "the people['s]" reserved powers, as a matter of explicit constitutional principle, as well as perforce of "the Laws of Nature and of Nature's God".

b. "[T]he security of a free State". The phrase "the security of a free State" has two interconnected meanings. Obviously, it means "[p]rotection" and "defence" *for the "free State" herself*, as an institution, against all enemies, both external and internal.[2652] Yet not just *any* kind of "[p]rotection" and "defence" will do. Rather, the necessary "[p]rotection" and "defence" must be characterized by the immediacy, universality, totality, and pertinacity that only "[a] well regulated Militia"can provide. More subtly, "the security of a free State" refers as well to the very special type of "security" that only "a free State" can offer *to her citizens*. This is not simply "[s]afety" of a generic sort, which to some degree any "state" can manage to arrange, but instead that unique form of "[s]afety" characterized by every citizen's "certainty" and "confidence" in the permanent efficacy of a specific system of collective security aimed first and foremost at guaranteeing the people's

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[2651] Emphasis supplied.

[2652] *See* S. Johnson, *Dictionary*, *ante* note 50, definition 3 in both the First (1755) and the Fourth (1773) Editions.

freedom—this "certainty and confidence" being bottomed upon an "assurance" of mutual aid made by the people, to and for themselves, in and through "[a] well regulated Militia"—and that "assurance" providing every member of the community with meaningful "freedom from fear" of a wholly uncertain future, because everyone knows that, whatever crisis may supervene, anyone can always depend upon everyone else to coöperate for the common defense.[2653]

Of course, in the final analysis, both of these aspects of the "security" with which the Second Amendment concerns itself are instrumental to an higher goal. The Constitution aims at preserving "the security of a free State", not for the sake of "a free State" alone, but so that each of the "free State's" inhabitants may be able to enjoy "Life, Liberty and the pursuit of Happiness" to the fullest. In this, the Constitution serves to fulfill the Declaration of Independence: "[T]he right of the people to keep and bear Arms" is instrumental to "[a] well regulated Militia". "A well regulated Militia" is instrumental to "the security of a free State". "[A] free State" is instrumental to a government "instituted among Men" which derives its "just powers from the consent of the governed". And a government of this sort "secures" men's "unalienable Rights", in large measure through or with the support of the Militia.

Finally, inasmuch as the Second Amendment states no limitation in this regard, it encompasses *every* subject and form of "security" that the Militia can in principle provide by themselves or assist others in providing. This includes:

- *Physical security*—maintaining the "free State's" existence against all threats, through the deployment of military, *para*-military, police, fire-fighting, and emergency-services personnel.

- *Economic security*—maintaining the community's productivity and prosperity, through a well regulated free market with a sound currency, and provisions for the greatest possible degree of Local self-sufficiency with respect to food, health care, energy, and transportation.

- *Political security*—maintaining popular sovereignty, and limited, accountable, and responsible government, through supervision of honest elections and the exposure, purging, prosecution, and punishment of incompetent, corrupt, and criminal public officials. And even

- *Social and cultural security*—maintaining common, constructive attitudes within the community concerning the best ways to judge and to achieve a good life for all, through education and activism

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[2653] *See id.*, definitions 5, 2, 4, and 1 in both the First (1755) and the Fourth (1773) Editions.

aimed at defeating "the long march through the institutions" by such destructive movements of the modern political underworld as cultural bolshevism and cultural fascism.[2654]

c. "A well regulated Militia". This phrase contains two components, the noun "Militia" and the adjectival phrase "well regulated". Self-evidently, the Amendment understands that a "Militia" could conceivably *not* be "well regulated", but that *only* a "Militia" which *is* "well regulated" in fact and law qualifies as "being necessary to the security of a free State". Moreover, the Amendment emphasizes that a "Militia" cannot be "well regulated" unless "the people" actually exercise in fact their "right" in law "to keep and bear Arms" without "infringe[ment]" from any quarter.

(1) "Militia". Plainly enough, when the Constitution empowers Congress "[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States",[2655] "the Militia" and "them" must refer to "the Militia" in the Constitution's next relevant clause: namely, "the Militia of the several States", of which the President "shall be Commander in Chief * * * when [they are] called into the actual Service of the United States".[2656] The "Militia of the several States" must include every "well regulated Militia * * * necessary to the security of a free State" of which the Second Amendment then speaks, and every "well regulated Militia" must be one of "the Militia of the several States", because each and every State in the Union (that is, "the several States", as the Constitution always describes them collectively[2657]) must be taken to be "a free State" within the Amendment's understanding of that term. Certainly, the Amendment did not purport to create "well regulated Militia" different from "the Militia of the several States", because it is not a delegation of new powers for either the General Government or the States, but instead is a

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[2654] The subversive "long march" is usually associated with so-called "left-wing" movements of a Marxist cast. *See, e.g.,* Antonio A. Santucci, *Antonio Gramsci* (New York, New York: Monthly Review Press, 2010). But it has also been employed by "right-wing" movements which the likes of Benito Mussolini, the proponents of Franklin D. Roosevelt's National Industrial Recovery Act, and the crooked characters who control the contemporary Federal Reserve System have promoted. *Compare, e.g.,* An Act To provide for the establishment of Federal reserve banks, to furnish an elastic currency, to afford means of rediscounting commercial paper, to establish a more effective supervision of banking in the United States, and for other purposes ("Federal Reserve Act"), Act of 23 December 1913, CHAP. 6, 38 Stat. 251, *with* AN ACT To encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes ("National Industrial Recovery Act"), Act of 16 June 1933, CHAPTER 90, 48 Stat. 195. Doubtlessly, this is because "left wing" and "right wing" are simply deceptive labels used to conceal from the ignorant public that these two ostensibly opposed "wings" are in fact entirely complementary and mutual coöperant parts of the selfsame political bird of prey which aims to strip every common American of the "Life, Liberty and * * * pursuit of Happiness" the Declaration of Independence guarantees.

[2655] U.S. Const. art. I, § 8, cl. 16.

[2656] U.S. Const. art. II, § 2, cl. 1.

[2657] *See* U.S. Const. art. I, § 2, cls. 1 and 3, *and* § 8, cl. 3; art. II, § 2, cl. 1; art. IV, § 2, cl. 1; art. V; art. VI, cl. 3.

"declaratory and restrictive clause[ ]" calculated "to prevent misconstruction or abuse of [the original Constitution's] powers".[2658]

In addition, each "well regulated Militia" among "the Militia of the several States" must consist of "the people" of each State, because the Second Amendment guarantees "the right of the people to keep and bear Arms" in order to provide for "well regulated Militia"; and that "right" would not extend to "the people" as a whole unless "the people" as a whole were to participate in the Militia. So, "the Militia of the several States" that Congress is empowered "[t]o provide for organizing, arming, and disciplining" must also be understood as consisting of "the people" as a whole in each of the States—which, of course, is entirely consistent with the *pre-*constitutional understanding, as exemplified in Virginia, that "a well regulated militia" is to be "composed of the body of the people, trained to arms".[2659]

Finally, all "well regulated Militia" under the Constitution must always be *governmental* establishments, because they are none other than "the Militia *of the several States*", which were always *governmental* establishments during the *pre-*constitutional era, and were incorporated into the Constitution's federal system just as the Constitution found them. No Colonial or State "Militia" during *pre-*constitutional times had ever been a merely private establishment. Indeed, in the traditional Anglo-American understanding, no private group could ever have qualified as a "militia" at all, by definition, because it would not have been "the standing force of a nation".[2660]

(2) "[W]ell regulated". To Americans during the *pre-*constitutional period, the verb "regulate" meant "[t]o adjust by rule or method" and "[t]o direct".[2661] And the adverb "well" meant "[s]kilfully; properly"—"[i]t is used much in composition, to express any thing right, laudable, or not defective".[2662] By themselves, though, these general dictionary definitions are not conclusive of the constitutional question, because they do not specify by *what* "rule or method" the Militia are to be "adjust[ed]" and "direct[ed]", and in comparison to *what* standard any particular "adjust[ment]" and "direct[ion]" should be deemed "right, laudable, or not defective".

Legal definitions tend to be more precise than ordinary dictionary definitions. For example, "to regulate" in the constitutional sense means "to foster,

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[2658] RESOLUTION OF THE FIRST CONGRESS SUBMITTING TWELVE AMENDMENTS TO THE CONSTITUTION (4 March 1789), *in Documents Illustrative of the Formation of the Union of the American States*, *ante* note 1, at 1063.

[2659] Virginia Declaration of Rights (1776) art. 13.

[2660] *See* S. Johnson, *Dictionary, ante* note 50, in both the First (1755) and the Fourth (1773) Editions.

[2661] *Id.*, definitions 1 and 2 in both First (1755) and the Fourth (1773) Editions.

[2662] *Id.*, definition 3 in both the First (1755) and the Fourth (1773) Editions; *and* definitions 13 in the First Edition and 16 in the Fourth.

protect, control and restrain, with appropriate regard for the welfare of those who are immediately concerned and of the public at large".[2663] Thus, there must exist "a real and substantial relation" between the "regulation" and "the suitable maintenance of th[e] service, or * * * the discharge of the responsibilities which inhere in it".[2664] Yet these, too, amount only to generalizations that, for correct application, must be placed squarely within a specific textual or other factual context.

The bare text of the Constitution provides some assistance. Although the original Constitution did not explicitly define "[a] well regulated Militia", it did so implicitly by listing those areas in which "regulation" was always to operate, and therefore was necessary for a Militia to be "*well* regulated": namely, "organizing", "arming", "disciplining", "governing", and "training".[2665] Nonetheless, this litany laid out no specific standards by which the suitability or sufficiency of any particular regulation in respect of any of these matters could be judged. To be sure, the Second Amendment then focused on one regulation—and from its being singled out in an Amendment adopted so early in the life of the Republic it must be deemed to be of the very highest importance—namely, that "the people" were always "to keep and bear Arms" without any "infringe[ment]". Yet even this declaration did not obviate the need for further investigation, because the Amendment did not explicitly define its terms.

Nonetheless, although the Constitution did not supply painstakingly detailed definitions, it cannot have left the meanings of its key terms—"well regulated", "organizing", "arming", "disciplining", "governing", "training", "the people", "keep", "bear", "Arms, and "infringe[ ]"—to be settled by the editors of popular dictionaries. When ratifying the Constitution in 1787 and 1788, WE THE PEOPLE would never have assigned to "the Militia of the several States" the vital responsibility and authority "to execute the Laws of the Union, suppress Insurrections and repel Invasions"[2666] without some measure of certainty that the Militia would always be "well regulated" for those tasks, and therefore without some expectation, *firmly based on experience*, as to *how* they would be "well regulated". As any American of that era could see on inspection, the Constitution's federal system itself precluded a delegation to Congress of unlimited discretion to fix—in any whimsical manner its Members might choose—all of the standards to be applied within the general categories of "organizing", "arming", "disciplining", "governing",

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[2663] Second Employers' Liability Cases, 223 U.S. 1, 47 (1912) ("regulate" as used in Article I, Section 8, Clause 3 of the Constitution).

[2664] Railroad Retirement Board v. Alton Railroad Company, 295 U.S. 330, 376 (1935) (Hughes, C.J., dissenting).

[2665] U.S. Const. art. I, § 8, cl. 16.

[2666] U.S. Const. art. I, § 8, cl. 15.

and "training". For the Militia incorporated in that system were "the Militia *of the several States*", already in existence throughout the country, not some new "Militia of the United States" the characteristics of which Congress would be entitled to stipulate. Yet the federal system also precluded unlimited authority for the States to regulate their Militia in some possibly slipshod fashion, because the Militia were constitutional establishments that might be "call[ed] forth" to "be employed in the Service of the United States",[2667] and on the preparedness of which the very survival of the Union might depend. Moreover, in ratifying the Second Amendment between 1789 and 1791, WE THE PEOPLE emphasized that the Militia must always and everywhere be sufficiently "well regulated" to be capable of fulfilling all of the duties "necessary to the security of a free State". In *that* context, the meaning of "well regulated" could not possibly have been treated as an empty vessel into which public officials, politicians, special-interest groups, legal theorists among the *intelligentsia*, or anyone else could in the future pour whatever tendentious or even spurious legalistic bellywash they might wish.

Immediately prior to the Constitution, the Articles of Confederation provided that "every state shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutred".[2668] Once again, though, the document did not specify what "well" and "sufficiently" actually entailed. Instead, the Articles left to the States the responsibilities to fix and apply the necessary standards. Such an approach was perfectly satisfactory at that time, though, because the States *were* then fixing and applying adequate standards—and as States or Colonies had been doing so for more than a century theretofore—in a manner that was certain, consistent, comprehensive, and completely ascertainable, because it had been and was being written down in hundreds of Militia statutes enacted throughout the *pre*-constitutional period. These statutes supplied the actual, *fully verifiable* meaning of "well regulated and disciplined militia, sufficiently armed and accoutred" as Americans had understood those terms for decades and even generations prior to ratification of the Articles, the Constitution, and the Bill of Rights.

This legal history formed the context in which the Articles, the Constitution, and the Second Amendment were adopted. It provided the standards according to which Militia were judged to be "well regulated"—standards which were already fixed, which had proven eminently workable over time, and with which everyone in every State was or could easily have become familiar. Indeed, the very source of the term "regulated" in respect of the Militia is the body of *pre*-constitutional Militia Acts.[2669] And the principles these Acts applied uniquely defined "*well* regulated"—or legislators would never have persisted in employing

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[2667] U.S. Const. art. I, § 8, cls. 15 and 16.

[2668] Art. VI, ¶ 4.

[2669] *See ante*, at 63-81.

them in one statute after another, decade after decade. So no need existed for the Articles, then the Constitution, and finally the Second Amendment to specify in detail what these standards were. The "well regulated and disciplined militia" required by the Articles; "the Militia of the several States" which the original Constitution incorporated into its federal system under the authority of Congress "[t]o provide for organizing, arming, and disciplining"; and the "well regulated Militia" the Second Amendment identified as "necessary to the security of a free State" *then existed in fact* within each of the several States, "well regulated" in both fact and law according to the principles developed, proven, and universally applied during *pre-*constitutional times. Thus, because they arose out of a long and consistent history, and their meanings were well known in fact and well settled in law, the words and phrases used in the Articles, in the original Constitution, and in the Second Amendment must be taken to have been used or incorporated by reference in the exact sense they had acquired during the *pre-*constitutional era.[2670] Surely WE THE PEOPLE would never have included "the Militia of the several States" as permanent parts of their federal system, and assigned explicitly to them alone the all-important responsibilities "to execute the Laws of the Union, suppress Insurrections and repel Invasions", had they not believed, for good and sufficient reasons on adequate evidence, that those very Militia, *as they existed in 1788 and were anticipated to continue to exist throughout the immediate future*, were "well regulated" in both fact and law.

From the *pre-*constitutional Militia Acts, four salient principles of "[a] well regulated Militia" stand out:

> *First*, the Militia are *governmental* institutions, in and through which WE THE PEOPLE *themselves* directly exercise the sovereign "'[p]olitical power [that] grows out of the barrel of a gun'".[2671]
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> *Second*, the Militia are always *thoroughly* organized, disciplined, and trained. *Every* able-bodied resident of the community from sixteen to fifty or sixty years of age has a *duty* to serve in some capacity that matches his abilities with the community's needs. *An "unorganized militia" is constitutionally impossible.*
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> *Third*, every member of the Militia, not specially exempted for some reason supportive of "the common defence" and "the general Welfare",[2672] is required at all times to possess in his home (and usually to own as his personal property) at least one firearm, ammunition, and related

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[2670] *See, e.g.,* Kepner v. United States, 195 U.S. 100, 121-124 (1904).

[2671] *Compare* Chisholm v. Georgia, 2 U.S. (2 Dallas) 419, 454, 456 (opinion of Wilson, J.), 471-472 (opinion of Jay, C.J.) (1793), *with Quotations From Chairman Mao, ante* note 28, at 61.

[2672] *See* U.S. Const. preamble.

accoutrements ("to keep * * * Arms"), and whenever necessary to bring forth that equipment into the field ("to * * * bear Arms").

Fourth, "Arms" should be suitable specifically for the most exacting forms of Militia service—and therefore at least equivalent to those the regular Armed Forces carry. In addition, "the people" should have access to *any and all* kinds of "Arms" that might be useful for *any* type of Militia service.

All of these principles the original Constitution addressed, in its incorporation of "the Militia of the several States" into its federal system, and in its delegation to Congress of the power "[t]o provide for organizing, arming, and disciplining, the Militia".[2673] The third and fourth, though, are the Second Amendment's special concerns. To be sure, the Constitution does delegate to Congress the power "[t]o provide for * * * arming * * * the Militia".[2674] As a "declaratory and restrictive clause[ ]" designed "to prevent misconstruction or abuse of [the original Constitution's] powers",[2675] however, the Second Amendment points out, clarifies, and renders certain what should be obvious from the power itself: namely, that Congress labors under an *affirmative duty* "[*t*]*o provide* ***for*** * * * arming * * * the Militia". Congress lacks any authority to fail, neglect, or refuse to perform this duty, let alone "[t]o provide for * * * [*dis*]arming * * * the Militia"—and its Members should be censured and punished for any dereliction or flouting of their duty. (Perhaps only moral and political culpability should attach to a mere failure; but every willful neglect or refusal should be treated as a *criminal* violation of every defaulting legislator's "Oath or Affirmation, to support th[e] Constitution".[2676]) Of course, this duty may be fulfilled in various ways. Nonetheless, the ultimate effect must be that *"the people" are fully armed at all times*. This, because "the people" have "the right * * * to keep and bear Arms, [which] shall not be infringed". And that right would be "infringed" if Congress did not provide "Arms" itself, or did not allow the States to provide "Arms", or did not allow "the people" by themselves to provide "Arms" to and for themselves.

Now, under their *pre*-constitutional statutes, all but one of the Colonies and all of the independent States regulated their own Militia according to such principles. Under the Constitution, the matter is more complicated. During tranquil times, regulation of the Militia is appropriately left to public officials of the General Government and the States, as temporary agents for the permanent true sovereigns,

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[2673] *See* U.S. Const. art. II, § 2, cl. 1 *and* art. I, § 8, cl. 16.

[2674] U.S. Const. art. I, § 8, cl. 16.

[2675] RESOLUTION OF THE FIRST CONGRESS SUBMITTING TWELVE AMENDMENTS TO THE CONSTITUTION (4 March 1789), *in Documents Illustrative of the Formation of the Union of the American States*, *ante* note 1, at 1063.

[2676] *Compare* U.S. Const. art. VI, cl. 3 *with* 18 U.S.C. §§ 241 and 242.

WE THE PEOPLE. Presumably, "our elected representatives * * * know the law",[2677] and enact and enforce legislation with their constitutional powers *and disabilities* in mind.[2678] Thus, following a standard legal definition of "regulate",[2679] they will know that:

> • They must "foster" the Militia, by treating the power of Congress "[t]o provide for organizing, arming, and disciplining, the Militia",[2680] and the equivalent reserved powers of the States,[2681] not simply as powers, but also as *affirmative duties*.[2682]
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> • They must "protect" the Militia in their unique constitutional position and authority by maintaining their separation and independence from, and in some regards their superiority to, the regular Armed Forces. No purported "draft" or other form of impressment can be suffered to build up State "Troops" or a National "standing army" at the excessive expense of the Militia.[2683]
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> • They must "control" the Militia through proper governance—by the provision of Congress, when some "Part of the[Militia] * * * may be employed in the Service of the United States"; and at all other times by the States.[2684] And,
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> • They must "restrain" the Militia, so that no "Part of them * * * [will] be employed in the Service of the United States" except "to execute the Laws of the Union, suppress Insurrections and repel Invasions",[2685] which necessarily entails immunizing the Militia from Congressional interference with their organization, armament, discipline, training, governance, and employment by the States for all other legitimate purposes.

All of this must be accomplished "with appropriate regard for the welfare of those who are immediately concerned and of the public at large"—so that, in the first step as well as the final analysis, every regulation of the Militia conduces directly to "the security of a free State". For such "appropriate regard" to be had, though, there must exist "a real and substantial relation" between the regulation and "the suitable maintenance of th[e] service, or * * * the discharge of the responsibilities which

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[2677] Cannon v. University of Chicago, 441 U.S. 677, 696-697 (1979).

[2678] *See, e.g.,* Albernaz v. United States, 450 U.S. 333, 341-342 (1981).

[2679] *See* Second Employers' Liability Cases, 223 U.S. 1, 47 (1912).

[2680] U.S. Const. art. I, § 8, cl. 16.

[2681] *Compare* U.S. Const. art. II, § 2, cl. 1 *with* amends. II and X.

[2682] *See ante, at* 50-54.

[2683] *See post*, Chapter 49.

[2684] *Compare* U.S. Const. art. I, § 8, cl. 16 *with* amend. X.

[2685] U.S. Const. art. I, § 8, cls. 16 and 15.

inhere in it".[2686] Thus, for example, a regulation purporting to consign most Americans to an "unorganized militia", or to impose "gun controls" that hinder common Americans from "keep[ing]" or "bear[ing] Arms", does not suitably maintain the service—because "[a] well regulated Militia" is always *fully* organized and *fully* armed, to the very last man or woman with the very last firearm. And a regulation purporting to separate Local police forces and kindred law-enforcement agencies from the Militia, or to excuse or even exclude the Militia from being deployed to seal America's borders against an influx of illegal aliens, does not suitably discharge the responsibilities which inhere in the Militia—because two of their most important functions are "to execute the Laws * * * and repel Invasions".[2687]

History teaches, moreover, that, even if they know (or should know) the law, rogue public officials often flout it in service of their own and their clients' corrupt or even criminal agenda—misusing the law in the name of the law in order to break the law, while denying everyone else the protection of the law against their violations of the law. A country as strong as the United States can withstand even a horde of such political rats gnawing at its legal foundations for a long time. Nevertheless, at *some* point, when sufficiently eaten away those foundations will finally crumble, and the social superstructure built upon them will collapse, as the inevitable and unavoidable political, economic, and cultural ill effects arising out of disloyal officials' disregard for their constitutional responsibilities engender ever-increasing turmoil.

At that point, Prudence would counsel that the Militia should be deployed. But because rogue officials have dominated the country for such an extended period of time, such deployment may not be possible through normal statutory procedures. Perhaps the Militia are not properly organized, armed, and disciplined, because Members of Congress and the States' legislators have failed, neglected, or refused to regulate them according to constitutional principles. Perhaps next to no constitutional Militia exist at all, because most Americans have been shunted off instead into an imaginary "unorganized militia". Perhaps a National *para*-military police-state apparatus—equivalent to the old Nazi *Reichssicherheitshauptamt* or the Communist East German *Stasi* or Romanian *Securitate*—is being set up; and Americans who simply advocate revitalization of the Militia are being denounced and demonized as "extremists" or even "domestic terrorists" in the print and electronic *Pravda* of the big media. Perhaps (as is true as of this writing) *all* of these conditions obtain at once. In each case, and especially the last, "the security of a free State" will be in jeopardy.

[2686] Railroad Retirement Board v. Alton Railroad Company, 295 U.S. 330, 376 (1935) (Hughes, C.J., dissenting).

[2687] U.S. Const. art. I, § 8, cl. 15.

Nonetheless, even were the Constitution in practical abeyance because WE THE PEOPLE'S enemies had subverted or seized control over most of the governmental apparatus, the situation would be far from hopeless. For, through the Militia, THE PEOPLE could legitimately assert the principles of the Declaration of Independence in their own defense. The Second Amendment, after all, does not itself grant "the right of the people to keep and bear Arms"—rather, it recognizes that right as independently existing. And the Amendment does not guarantee that right simply for the sake of enabling "the people" to possess firearms, but instead in order for them to participate in "well regulated Militia"—so that they themselves can exercise the "'political power [that] grows out of the barrel of a gun'", and thereby live in and enjoy the benefits of "a free State".

Now, inasmuch as the Constitution is "the supreme Law" of a "Union" composed of "free State[s]",[2688] and inasmuch as "[a] well regulated Militia" is "necessary to the security of a free State", therefore "well regulated Militia" throughout the States are necessary to maintain the purity, authority, and efficacy of the Constitution as America's "Form of Government". The Declaration of Independence attests, however, that "*any* Form of Government [may] become[ ] destructive of the[true] ends" for the attainment of which "Governments are instituted among Men, deriving their just powers from the consent of the governed"—and at that juncture arises "the Right of People to alter or to abolish" such "Form of Government". Thus, the Declaration asserts the right of "the governed", not simply "to throw off" a bad government in its entirety ("to abolish"), but also to reform a wayward government and to restore a corrupted government to its original rectitude ("to alter"). Presumably, because "Prudence * * * will dictate that Governments long established should not be changed for light and transient causes", any such reform and restoration should be, if they can be, accomplished as much as possible through the existing "Form of Government".[2689]

"[T]he Militia of the several States" are integral components of America's federal "Form of Government". They are quintessentially *governmental* establishments, because through them "the people" directly exercise the greatest power of government, the Power of the Sword. So, *even if America's "Form of Government" has otherwise been corrupted, nonetheless it has not completely failed* ***while the Militia can still be deployed in its defense***. The question then reduces to: "*Who* may exercise the authority to regulate the Militia under such circumstances?"

The answer is *not* "public officials, and they alone"—so that a failure, neglect, or refusal of legislators to revitalize the Militia precludes WE THE PEOPLE from acting on their own initiative. If public officials refuse to take the steps

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[2688] *Compare* U.S. Const. art. VI, cl. 2 *with* art. IV, § 4 *and with* amend. II.

[2689] *See ante*, Chapter 32.

necessary to provide for "well regulated Militia"—and particularly if they attempt to disarm common Americans through one form of "gun control" or another—they are most likely rogues who intend to usurp power and tyrannize over the citizenry. In which case, THE PEOPLE have the right *and the duty* to oppose them in self-defense. Effective resistance—through deterrence, defeat, and deposition of such rogues—will require the deployment of "well regulated Militia". In these circumstances, THE PEOPLE as sovereigns can regulate themselves in their own Militia under the aegis of powers the Constitution reserves to them.[2690] Rather than being in any sense illegal or even *extra*-legal, this will be *governmental regulation by the supreme governors themselves for the purpose of protecting their own government*. By this action, merely incompetent public officials may be brought to their senses. And the rogues who will not learn the error of their ways will be brought to justice.

Nonetheless, before WE THE PEOPLE deploy themselves in Militia "well regulated" through their own efforts, they must explore every other available avenue of political redress and reform—particularly through exercise of "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances", by demanding the enactment of statutes to revitalize the Militia;[2691] and then through the electoral process of replacing incompetent or rogue officials with qualified and loyal ones, so that such demands will be satisfied. But if no positive results are obtained in one or two iterations of the electoral cycle and legislative sessions, while at the same time oppression continues unabated or even intensifies, then—as should be obvious to anyone conversant with American history of the 1770s—THE PEOPLE must turn to direct action.

d. "[T]he people". *Who*, though, *are* "the people" to whom the Second Amendment refers? This term, too, finds no explicit definition either in the original Constitution or in the Second Amendment (or, for that matter, in any other Amendment). For that reason, its definition must be gleaned from the textual and historical context.

(1) A variety of uses in the Constitution. Constitutional construction in this particular is not always straightforward. Other than in the Second Amendment, the original Constitution and its Amendments employ the term "the people" in various senses, indicating different groups, some more inclusive than others. Yet, in all cases, "the people" are composed of individual human beings who perform the actual actions, or enjoy the benefits, to which the document refers:

(a) The Constitution's Preamble asserts that "WE THE PEOPLE * * * do ordain and establish this Constitution for the United States of America". These are the *sovereign* PEOPLE, THE PEOPLE *who exercise supreme and permanent political*

[2690] *See* U.S. Const. amends. II and X.

[2691] *See* U.S. Const. amends. I and II.

authority—specifically, the right, power, and privilege to form and control governments on behalf both of themselves directly and of all others in the polity in a representative capacity. Typically, they are the individuals qualified to vote (as opposed as minors, resident aliens, and citizens who have been lawfully deprived of that right).[2692] In this case, the ultimate result—"ordain[ing] and establish[ing] th[e] Constitution" in 1787 and 1788—was the product of a necessarily collective effort, but was accomplished through the specific actions of identifiable individuals in and through various State Conventions.

(b) The Constitution refers to "the People of the several States" who choose the Members of the House of Representatives "every second Year"—but simultaneously it distinguishes these "People" from the actual "Electors in each State", thus establishing that the "Electors" are a *sub*-set of "the People" who act on behalf of "the People" as a whole (again, because "the People" includes minors and others who lack "the Qualifications requisite for Electors").[2693] Here, too, the ultimate result—choosing the Members of the House of Representatives—is the product of a necessarily collective effort, but is accomplished through the specific actions of particular individuals in voting booths throughout this country "every second Year".

(c) The First Amendment guarantees "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances". True enough, some among "the[se] people" must act collectively and coöperatively if they are "to *assemble*" for the purpose of "petition[ing] the Government". Yet no one has ever proffered a convincing argument that a single individual, acting alone, cannot claim the selfsame "right * * * to petition" as one of "the people".[2694] Neither has anyone ever proven that a minor, an individual citizen lawfully deprived of the right to vote, a person convicted of any crime (whether or not imprisoned), or even a resident alien cannot claim "the right * * * to petition * * * the Government", either by himself or in concert with others of like or unlike character. So they, too, must be components of "the people" for the purposes of this Amendment.

(d) The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures". Here, collective action is entirely irrelevant. "The right of the people" is the right of each and every individual among "the people" who can justifiably

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[2692] *See, e.g.,* U.S. Const. art. I, § 2, cl. 1; *and* amends. XIV, § 1, XV, XIX, and XXVI.

[2693] *See* U.S. Const. art. I, § 2, cl. 1.

[2694] Through its reference to "people peaceably * * * assembl[ing]" in groups of *indeterminate* size, the Amendment intended to break with the old English limitation "that no petition * * * for any alterations in church or state, shall be signed by above twenty persons, unless the matter thereof be approved by three justices of the peace or the major part of the grand jury * * * : nor shall any petition be presented by more than ten persons at a time". W. Blackstone, *Commentaries on the Laws of England, ante* note 142, Volume 1, at 143.

complain of an "unreasonable search[ ] and seizure[ ]", even if he is the only person in the entire world subjected to it. Moreover, an individual need not be an adult, a qualified voter, a person with no record of criminal convictions, or even a citizen or resident alien to avail himself of "[t]he right" this Amendment secures.

(e) The Ninth Amendment declares that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people". Although the Amendment identifies none of these "certain rights", *some* of them must be the rights of solitary individuals, unconnected to any particular groups, in the same way that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" is a right of individuals. Of course, the number of individuals entitled to any of these "certain rights" depends upon the nature of the particular "right" at issue.

(f) The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people". In legal parlance, of course, the word "power[ ]" refers to an ability to create or change particular legal relations—extending from "sovereign power" (to create, alter, or abolish an entire "Form of Government"), through "legislative power" (to enact or repeal laws), to "personal power" (to make private contracts, transfer ownership or use of property, and so on). Thus, depending upon what particular "power[ ]" may be involved, "the people" in this Amendment could be taken in either a collective or an individual sense—although, ultimately, the "power[ ]", whatever it may be, will always be exercised in fact by an identifiable individual or some requisite number of individuals. And, if a group or an individual is invested with a "power[ ]", the members of that group or that individual typically may claim a corresponding "right" to exercise that "power[ ]". And,

(g) The Seventeenth Amendment declares that "[t]he Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years". Self-evidently, "the people" referenced here are the same "People of the several States" who participate directly or vicariously in elections of Members of the House of Representatives (discussed immediately above)—and therefore identical considerations of constitutional construction should apply.

(2) In the Second Amendment specifically. The Second Amendment declares that "the right of the people to keep and bear Arms, shall not be infringed".

(a) The text of the Amendment establishes that the purpose of "the right" is to enable "the people" to serve in "well regulated Militia", by guaranteeing their ability "to keep and bear [those] Arms" necessary and sufficient for that result. "A well regulated Militia" is, of course, a collective undertaking; but it requires for its success individual participation of a specific kind. So, "the right of the people to

keep and bear Arms" is *both* "a collective right" with respect to the end ("[a] well regulated Militia") *and* "an individual right" with respect to the means ("keep[ing] and bear[ing] Arms"). As Virginia correctly declared, "a well regulated militia" is "composed of *the body of* the people, trained to arms".[2695] As such, "a well regulated militia" does not necessarily include every single soul in the community. For "the body of the people" means, not all, but "[a] collective mass; a joint power" and "[t]he main part; the bulk".[2696] Nonetheless, inasmuch as "the body of the people" imports "the main, central, or principal part" and "[a] number of individuals spoken of collectively, usually as united by some common tie, or as organized for some purpose; a collective whole or totality",[2697] "the people" to whom the Second Amendment refers surely includes *everyone who is capable of serving in the Militia*—even if, perforce of some legitimate exemption, a particular individual is not required to serve in the same manner or to the same degree as others.

On the grounds of political philosophy, too, because "the people" to whom the Amendment refers are always to be armed as individuals, and collectively are to supply "the security of a free State"—thus exercising the "'[p]olitical power [that] grows out of the barrel of a gun'" for a just purpose[2698]—those "people" must be identified with WE THE PEOPLE, who are the true sovereigns in this country.[2699] For, as Aristotle taught in his taxonomy of forms of government, "in a democracy the supreme power is lodged in the whole people"; "[w]hen the citizens at large govern for the public good, it is called a state"; and although it will be "almost impossible to meet with the majority of a people eminent for every virtue", "if there is one common to a whole nation it is valour * * * for which reason in such a state the profession of arms will always have the greatest share in the government".[2700]

Self-evidently, "the people" in the Second Amendment is a term more inclusive than "the people" in the typical political sense of qualified voters, because even those citizens who cannot vote at all (such as minors from sixteen to eighteen years of age), or who have lawfully been deprived of the right to vote (as the result of their convictions for some crimes), can and usually must serve in the Militia. On the other hand, "the people" in the Second Amendment is a term less inclusive

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[2695] Virginia Declaration of Rights (1776) art. 13 (emphasis supplied).

[2696] S. Johnson, *Dictionary*, *ante* note 50, definition 5 in both the First (1755) and the Fourth (1773) Editions, and definitions 9 in the First Edition and 8 in the Fourth Edition.

[2697] *Webster's Revised Unabridged Dictionary*, *ante* note 11, at 162, definitions 2 and 5. *Accord, Webster's New International Dictionary, ante* note 303, at 301, definitions 2 and 13.

[2698] *Compare and contrast* Declaration of Independence ("Governments * * * deriv[e] their just powers from the consent of the governed") *with Quotations From Chairman Mao, ante* note 28, at 61 ("[t]he seizure of power by armed force, the settlement of the issue by war, is the central task and the highest form of revolution").

[2699] *See* Chisholm v. Georgia, 2 U.S. (2 Dallas) 419, 454, 456 (opinion of Wilson, J.), 471-472 (opinion of Jay, C.J.) (1793).

[2700] *Politics*, Book III, Chapters VI and VII, *in* A TREATISE ON GOVERNMENT OR, THE POLITICS OF ARISTOTLE, ante note 73, at 76 and 79.

than "the people" for whom the First Amendment guarantees "the right * * * to petition", because (for example) minors of less than sixteen years of age, individuals sentenced to "slavery * * * as a punishment for crime",[2701] and persons punished with permanent disarmament as the consequence of being "convicted of Treason"[2702] can be excluded or disbarred from service in the Militia, but nevertheless can "petition the Government for a redress of [their] Grievances". Similarly, "the people" in the Second Amendment is a concept narrower than "the people" mentioned in the Fourth Amendment, because (for instance) little children, individuals convicted of certain crimes, and otherwise eligible adults who are physically or mentally disabled may be exempted or excluded from the Militia altogether, whereas persons within all of those categories retain the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures".

(b) The same conclusions flow from consideration of the historical context in which the Second Amendment arose. Under the Colonies' and independent States' *pre*-constitutional Militia Acts, "the body of the people" with a duty to serve included every adult able-bodied free White male from sixteen to fifty or sixty years of age. Some of these individuals were granted certain exemptions, because they held important public offices, were engaged in critical private occupations, or were conscientious objectors—but the very necessity that they be explicitly exempted proved that they labored under an original duty to serve. Children, as well as adults with severe physical, mental, or emotional impairments, were excluded from the Militia because they were simply incapable of performing any requisite duty. Superannuated free males were exempted because of the quite reasonable presumption that most of them were physically or mentally incapable of useful service (although no Militia Act ever precluded anyone of advanced years who was actually fit for duty from volunteering for it). Slaves (and often free people of color, too) were excluded from the Militia because they were considered alien to "the people" in every sense of those terms; whereas disloyal citizens through their own misbehavior forfeited any claim to be counted among "the people" for any purpose. Finally, women were never explicitly excluded from the Militia, but were exempted from all but the duty to provide certain kinds of financial assistance. This exemption was based on three considerations: namely, that (i) women were not as physically capable as men of performing arduous Militia duties; (ii) women were not considered part of "the people" politically, because of various legal disabilities, including most prominently the lack of any legal claim to a right to vote, and therefore had no claim to wield the "'[p]olitical power [that] grows out of the barrel of a gun'"; and (iii) social, cultural, and religious *mores* treated women as the

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[2701] *See* U.S. Const. amend. XIII, § 1. *See ante*, at 748-749, 993-998, and 1011-1013.

[2702] *See* U.S. Const. art. III, § 3, cl. 1. *See ante,* at 748-749 and 814-821.

subjects, not the providers, of protection, and therefore strongly disapproved of women's service in the field under arms.

Today, except in regard to women, the same practical definition of "the people" with respect to "[a] well regulated Militia" and "the right * * * to keep and bear Arms" should obtain.

• Every able-bodied male from sixteen to sixty years of age (or perhaps beyond, because such ranges are inevitably practical matters) would always be included, notwithstanding that some of them might be granted various exemptions. Able-bodied males above sixty would always be included if they volunteered for service, and could be required to serve in times of extreme danger (or "alarms", as the *pre*-constitutional terminology put it).

• Children generally, and those adults with utterly incapacitating physical ailments or mental impairments, would justifiably be excluded from "the people", because of the impossibility of their participation in the Militia.

• Adults with minor afflictions would be exempted from most duties, but could still perform some Militia functions—at the least the possession of firearms suitable for personal self-defense, which, being the immediate execution of the laws against aggressors, is part of Militia service—and therefore they would be included within "the people".

• "[P]art[ies]" who were held in "slavery * * * as a punishment for crime whereof the[y] * * * shall have been duly convicted"[2703] would be excluded from "the people" (as that term relates to the Militia), because the primary "badge and incident" of slavery is personal disarmament, and with it the loss of all possible political rights, powers, privileges, and immunities.

• Individuals "convicted of Treason" could be excluded from "the people", because "Congress shall have Power to declare the Punishment of Treason",[2704] which could include the imposition of slavery; and, even in the absence of such a sentence, personal disarmament often coupled with loss of a citizen's political status were typical punishments visited on disloyal persons during the *pre*-constitutional era, and therefore could be imposed today.

• As for women, today nothing precludes either their inclusion in the Militia in some capacities or their complete exemption from any and every duty not deemed suitable for them—in particular, actual service in the field

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[2703] U.S. Const. amend. XIII, § 1.

[2704] U.S. Const. art. III, § 3, cls. 1 and 2.

as combatants.[2705] On the one hand, considerations of natural physical capabilities (or, more accurately put, limitations) still counsel restricting the rôles of women in any "*well regulated* Militia" by granting them extensive exemptions from various kinds of arduous service. On the other hand, if "the people" in *pre-*constitutional times embraced only free men—because only free men were *eligible* to vote in principle (even if not all of them in practice were allowed to vote for one sometimes invidious reason or another)—that constraint could apply only until women were included among "the people" in the political sense by being granted the right to vote—a process that ratification of the Nineteenth Amendment completed in 1920.[2706] So, even if the provisions relating to the Militia in the original Constitution and the Second Amendment needed revision in order to bring women within "the people" in relation to "[a] well regulated Militia", the Nineteenth Amendment performed that task. Furthermore, social and cultural *mores* with respect to women have changed significantly since the *pre-*constitutional era. And any purely religious tenets as to their exclusion from "the people" for purposes of "well regulated Militia" can no longer be embodied in law.[2707]

(3) No "select militia" possible. This definition of "the people" proves beyond cavil the constitutional impossibility of a so-called "select militia". A "select militia" is always one composed, *not* of "the people" in the broad sense just explained, but of a relatively small segment of the community—with everyone else excluded from this *ersatz* "militia" or simply left in an "unorganized" condition. The members of a "select militia" may perhaps be chosen on the basis of some *bona fide* consideration for the efficiency of the service—such as that young men are better suited than old ones for arduous duty in the field. But they may also be picked on the basis of invidious economic or social discriminations—so that poor and obscure individuals end up performing the hard and dangerous work, while their rich and prominent fellow-citizens shirk those duties. Or they may be enrolled even to serve politically subversive ends—such as creating a compact armed force loyal to an entrenched Establishment in order to cow and put down dissenters. Had any such "select militia" ever been considered legally or politically desirable or even possible in *pre-*constitutional times when the regulation of the Militia was a matter purely of statute (which apparently none ever had been), it would be self-evidently unlawful now.

[2705] *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57 (1981) (Congress may limit registration for the Selective Service System to men, because Congressional policy excludes women from combat assignments in the Armed Forces).

[2706] U.S. Const. amend. XIX provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex".

[2707] *See* U.S. Const. amend. I.

(a) The Second Amendment guarantees "the right *of the people* to keep and bear Arms" in order to ensure the continuation of "well regulated Militia" throughout America. Thus, "the right of the people to keep and bear Arms" entails "the right of the people" to "well regulated Militia". And because "well regulated Militia" are establishments in which "the people" themselves participate, "the people" must enjoy a "right" to such participation that (as the Amendment promises) "shall not be infringed". The Amendment does not in any way limit "the people" to a select few. Therefore, *all* of "the people" must enjoy "the right * * * to keep and bear Arms", the right to "well regulated Militia", *and the right themselves to serve in such Militia with their own "Arms" in their own hands*. By its very operation, though, a "select militia" *absolutely denies*—and therefore by any possible definition of the word "infringe[s]"—the right of many (if not most) of "the people" to participate in the Militia. Therefore, a "select militia" is unconstitutional.

If "[a] well regulated Militia" could be nothing more than a "select militia", consisting of far less than "the people" as a whole, then "the right *of the people* to keep and bear Arms" would be unnecessary. Indeed, in that case the whole concept of a constitutional "right * * * to keep and bear Arms"—that is, a "right" of individuals the substance of which is not determined by, but is fully enforceable against, public officials—would be nonsensical. For then the only "people" with a need for a "right * * * to keep and bear Arms" would be the relatively few particular individuals public officials selected to constitute their "select militia". And "the right of *th*[*ose few*] people" would come into existence only with, and thereafter would depend entirely upon, that selection—that is, upon the decisions of those officials. Thus, it would be no constitutional right at all, but rather some species of governmental grant or license. From being a constraint on the powers of public officials, the Second Amendment would be transmogrified into a limitless expansion of those powers!

(b) The foregoing analysis undeniably applies to Congress, because everyone agrees that the Second Amendment limits Congress's powers, including its power "[t]o provide for organizing, arming, and disciplining, the Militia".[2708] Because the Second Amendment applies to the States as well as to the General Government,[2709] it precludes them, too, from organizing "select militia". But even if (as some people erroneously contend) the Second Amendment did not apply to the States, they would nevertheless be powerless to organize "select militia", either on their own or with the consent of Congress. After all, through the General Government the United States enjoy the right to call upon the *entirety* of "the Militia of the several States" to "be employed in the Service of the United States" if the circumstances so warrant. Because "a well regulated militia" is "composed of the body of the

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[2708] U.S. Const. art. I, § 8, cl. 16.

[2709] *See post,* at 1504-1529.

people, trained to arms",[2710] or (from another perspective) consists of "the people" who exercise "the right * * * to keep and bear Arms",[2711] the United States have the right to call upon "the body" of *those* "people" *as a whole*. Therefore, as against the United States, no State can claim any right, power, or privilege to create a "select militia" which would withhold any portion of "the body of the people" from "the Service of the United States".[2712] Now, the constitutional right of the United States to call upon "the people" as a whole necessarily entails a corresponding constitutional duty incumbent upon every constituent of "the people" to come forth when called forth in the Militia in order to "be employed in the Service of the United States". No State may prevent any individual constituent of "the people" within her jurisdiction from fulfilling this duty by refusing to enroll him in a "select militia". Therefore, every individual among "the people" enjoys a right as against his State not to be excluded from a "select militia"—which right, in effect, denies the State the ability to create a "select militia" at all.

At first blush, to denote an individual's duty to serve in the Militia as encompassing a "right" may seem strange. But fulfillment of that duty enables each individual to participate, on an equal basis with all others, in the exercise of popular sovereignty, the supreme "'[p]olitical power [that] grows out of the barrel of a gun'"[2713]—which is a consequential "right" by any standard. A "select militia" is "select" precisely because it does *not* include everyone within "the body of the people". Thus, a "select militia" necessarily deprives some of "the people"—usually, the vast majority of "the people"—of the opportunity actually to function as *sovereigns* in the most direct and puissant sense of that term. *A "select militia", then, is a means of political discrimination which leads to effective political disenfranchisement of the individuals not "selected"*. Section 1 of the Fourteenth Amendment, however, declares that no State shall "deny to any person within its jurisdiction the equal protection of the laws". The "law[ ]" which protects all of "the people" from being excluded from a State's "select militia" is, of course, the Constitution itself, which implicitly defines "[a] well regulated Militia" as composed of "the body of the people, trained to arms" or "the people" who enjoy "the right * * * to keep and bear Arms", *without exception*. Therefore, no State can create a "select militia" without deny[ing] * * * equal protection of th[at] law[ ]" to those among "the people" whom she does not "select". Moreover, Section 5 of the Fourteenth Amendment delegates to Congress the "power to enforce, by appropriate legislation, the provisions of [Section 1]". This power imposes a corresponding duty upon Congress

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[2710] Virginia Declaration of Rights (1776) art. 13.

[2711] U.S. Const. amend. II.

[2712] *See* U.S. Const. art. VI, cl. 2.

[2713] *See Quotations From Chairman Mao, ante* note 28, at 61.

to prevent any State from creating a "select militia",[2714] because Congress cannot sit idly by and suffer any State to violate the Constitution, not only when the Constitution explicitly empowers Congress to prevent such a violation, but especially when that violation undermines the power of Congress "[t]o provide for organizing, arming, and disciplining, the Militia". And if Congress labors under a duty to prevent each and every State from setting up a "select militia", it cannot on any rational constitutional calculus be privileged to encourage, allow, enable, or assist—let alone command—the States to do so.

(c) All this is not to say, however, that the Constitution disallows the creation of any and all distinct subdivisions within "[a] well regulated Militia", specially organized, equipped, and trained on an appropriately selective basis—such as were the Rangers and the Minutemen in *pre*-constitutional times, and such as should be State and Local Sheriffs' departments, police forces, fire-fighters, and emergency-response outfits today.[2715] For these would constitute "selections *from within* the Militia", not "selections *for* the Militia". "[*T*]*he* Militia" and "*well regulated* Militia" would still consist of "the people" as a whole, only with some of "the people" deployed in special-service units for which they were peculiarly fitted, and the rest of "the people" assigned to more general duties.

(4) Individuals not eligible to participate in the Militia. From the foregoing, does it follow that individuals not classified as within "the people"—that is, who are not eligible to participate in the Militia—can claim no constitutional "right * * * to keep and bear Arms"? Hardly. The number of Americans who are truly *not eligible* to participate in "the Militia of the several States" is quite small.

(a) Few individuals are so severely physically disabled as to be utterly incapable of performing any useful service in the Militia. Of course, if they are incapable of service, then they are ineligible. Their conditions exclude them. A statute that required them to serve would demand the impossible, and therefore would be unconstitutional as patently *irrational* legislation.[2716] In those instances in which the debilitating conditions might be cured or mitigated, the disabilities could be treated as the bases for *exemption*, rather than exclusion. These, however, would be exemptions that the individuals could not waive, because their attempted participation in a State's Militia while still debilitated would create all sorts of administrative difficulties that would undermine its being "well regulated". In any

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[2714] *See ante*, at 50-54.

[2715] *See ante*, at 327-328, 1135-1138, 1194-1202, 1276-1277, and 1291-1293, *and post*, at 1482-1488.

[2716] *See* U.S. Const. amends. V and XIV, § 1. *See, e.g.*, United States v. Carolene Products Company, 304 U.S. 144, 152-154 (1938); Borden's Farm Products Company v. Baldwin, 293 U.S. 204, 208-213 (1934); *and* Covington & Lexington Turnpike Road Company v. Sandford, 164 U.S. 578, 595-597 (1896) (a statute may always be challenged on the grounds that it lacks a rational basis as applied to the particular complainant, and therefore denies him due process of law, or equal protection of the laws, or both).

event, some severely physically disabled individuals might nonetheless be able to use a firearm for self-protection in their own homes or places of employment. On that score, they would be performing a Militia service, and would have the "right" to possess that firearm as members of "the people". If, however, an individual were so physically disabled that he could not use a firearm at all, then for him to claim membership in a group with a "right * * * to * * * *bear* Arms" would be nonsensical. One cannot exercise a personal right to do what he physically cannot do. On the other hand, even a physically disabled individual could claim a "right to *keep* * * * Arms", in the sense of mere ownership and possession of personal property, for any other legitimate reason.

Individuals suffering from incapacitating mental defects or diseases are not truly "free". They are always someone's wards, subject to and needful of protection, never the source of their own or anyone else's protection. So, being unable to protect even themselves, and therefore not being part of "the people" even to the limited degree that derives from one's ability to engage in self-defense, they are not deprived of any right if they are not allowed to possess a firearm. Moreover, as their conditions preclude them from being sentient participants in WE THE PEOPLE'S sovereignty, they can claim no right to the "'[p]olitical power [that] grows out of the barrel of a gun'",[2717] and therefore no right to possess "a gun" on that score, either.

(b) Children under (say) sixteen years of age have always been deemed unqualified for the Militia by dint of their presumed physical, mental, and emotional immaturity. And under normal circumstances, underage children who might happen to be sufficiently mature to serve have nonetheless not been enlisted. (Presumably, though, during "alarms" that threatened the community's survival, any child who could serve in some useful capacity would be allowed, if not required, to serve, no matter his age.) Although selecting any age in the *mid*-teens as the threshold for entry into the Militia draws something of an arbitrary line, the validity of *some* exclusion on that basis cannot be seriously questioned. Of course, this exclusion could also be seen as merely a temporary exemption, because most children do grow up.

In any event, any "right * * * to keep and bear Arms" for underage children can, and in the nature of things usually should, be different from "the right of the people". Because of their perceived immaturity, and the impracticality of making prior individualized determinations in every possibly disputable case, the possession of "Arms" by such children may be regulated in ways beyond what is allowable in relationship to "the people" who are eligible for service in "well regulated Militia". Yet the validity of any such regulation cannot be predicated upon "an irrebuttable

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[2717] *Quotations From Chairman Mao*, *ante* note 28, at 61.

presumption often contrary to fact",[2718] or on "a permanent and irrebuttable presumption" that "is not necessarily or universally true in fact, * * * when the [governmental official with jurisdiction over the matter] has reasonable alternative means of making the crucial determination".[2719]

During their early years children's access to firearms should be tailored to their capabilities and closely supervised. But, because most of them will eventually be integrated within the Militia, all of them should be allowed the maximum exposure to arms consistent with their abilities to profit from the training and experience. Thus, their right with respect to firearms should include a right to training in schools (both public and private), at private shooting ranges and clubs, and in governmentally sponsored Militia auxiliaries for youth. Certainly, too, all children should enjoy a thoroughgoing right not to be exposed to the libertycidal inanity (even insanity) of so-called "zero tolerance" for firearms that pervades America's public educational establishments today, and poisons the minds and hearts of youth against the one institution and its implements that the Constitution declares to be "necessary" for their "security [in] a free State".

(5) Individuals exempted from the Militia. Individuals exempted from the Militia for mild physical or mental handicaps, or simply old age, nonetheless remain eligible, and perhaps immediately liable, for service. So they are part of "the people", even if their exemptions license them not to possess any arms at all. Conscientious objectors, for example, can always change their minds. Even so, does their "right * * * to keep and bear Arms" as part of "the people" allow them to possess "Arms" *not* suitable for Militia service?

In *pre*-constitutional America, the requirement that Militiamen personally possessed arms suitable for their Militia service precluded no one from possessing either more or better arms than were necessary for that purpose, or arms not suitable for Militia service but that might be put to other lawful purposes. Neither did the requirement that Militiamen personally possessed arms suitable for their Militia service entail disarmament of anyone who reached the upper limit of age at which his compulsory participation was no longer statutorily mandated, or who became too disabled to serve at any age. Nor were such individuals ever prohibited from acquiring new firearms after their compulsory participation in the Militia ceased. Nor, for that matter, were adult women, whose gender exempted them from almost all Militia duties, ever prohibited from possessing firearms for any legitimate purpose. Indeed, it is impossible to imagine how modern "gun control" could have operated in communities in which every free adult able-bodied White male was required by statute to possess in his own home at least one firearm and a large

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[2718] United States Department of Agriculture v. Murry, 413 U.S. 508, 514 (1973).

[2719] Vlandis v. Kline, 412 U.S. 441, 452 (1973).

supply of ammunition—and in which the common law held that the natural right of self-defense, effectuated with whatever lawful implements are at hand, "is not, neither can it be in fact, taken away by the law of society".[2720] So, being part and parcel of the practical definition of "the right of the people" with respect to "well regulated Militia", what were the statutory requirements then must continue to be the rules now that those Militia and that "right" have been incorporated into the Constitution.

e. "[T]he right * * * to keep and bear Arms". The meaning of "the right * * * to keep and bear Arms" has been made far more complex, confusing, and controversial than it really is.

(1) "[*T*]*he* right". A "right" can be defined most generally as "[a] legal relation between two persons" that entails "[a]n enforceable claim [by one] to performance (action or forbearance) by another".[2721] As opposed to the amorphous term "*a* right", which often leaves to speculation exactly whom the parties to and what the anticipated performance of a "legal relation" may be, "*the* right" as the Second Amendment employs that term implies "[a]n enforceable claim" (or, more descriptive of the actual complexity of the situation, "claim[s]") the specific parties to and the content, extent, and effect of which are so well understood in context that they require no elaborate explicit definition.

(2) The subjects and substance of "the right". The subjects of "the right" fall into two obvious classes: (i) the parties whose freedom of action with respect to "Arms" and to participation in "well regulated Militia" it protects—namely, "the people"; and (ii) the parties whose freedom of action in regard to those particulars it constrains—namely, in most cases rogue public officials, but potentially *anyone* whose aberrant behavior might "infringe[upon]" "the people['s]" freedom.[2722]

When they ratified the original Constitution and the Bill of Rights, WE THE PEOPLE knew—most of them from personal experience—that the substance of "the right * * * to keep and bear Arms" was to be found in America's *pre-*constitutional Militia statutes in that pattern of behavior relative to firearms that had proven itself necessary for the formation and maintenance of "well regulated Militia" throughout this country's history. In particular, the requirement that every adult able-bodied free White male (not a conscientious objector or otherwise specially exempted) should always maintain personal possession in his own home of at least one firearm and ammunition suitable for Militia service ("keep * * * Arms"), and be ready to bring that equipment into the field whenever called forth to duty ("bear Arms").[2723]

[2720] W. Blackstone, *Commentaries on the Laws of England, ante* note 142, Volume 3, at 4.

[2721] A. Corbin, "Legal Analysis and Terminology", *ante* note 23, at 167.

[2722] The Amendment's prohibition against "infringe[ment]" will be analyzed *post*, at 1386-1398.

[2723] The specific meanings of "Arms", "keep", and "bear", will be examined in detail *post*, at 1353-1386.

In order to secure for themselves the permanent benefits of "the right * * * to keep and bear Arms" as Americans had always understood and applied it, THE PEOPLE knew that they had to render its meaning, as well as the meanings of "[a] well regulated Militia" and "a free State", utterly independent of and immune from misconstruction and manipulation by anyone and everyone in public office in both the General Government and the governments of the several States as well—because "the right *of the people* to keep and bear Arms" (not any discretionary power of public officials) made "[a] *well regulated* Militia" possible, and therefore formed the foundation for "the security of a *free* State". If "*the* right" were merely "*a* right" *the substance of which Congress or the States' legislatures determined*, those bodies could never "infringe[ ]" it, because its very definition would depend entirely upon legislators' discretion, or the prodding of factions and other private special-interest groups. And then even the meanings of "[a] *well regulated* Militia" and "a *free* State" could be transmogrified at the will of whomever happened to hold public office. To forefend this possibility, THE PEOPLE declared that "*the* right * * * shall not be infringed", *without any limitation as to whom that prohibition extended, or any allowance for purportedly special circumstances under which it might be deemed to be inoperative, or especially any license for anyone to redefine* "the *right*" *so that it could effectively be denied through verbal legerdemain.* Thus, in one fell swoop, the Second Amendment preëmptively snatched from the rhetorical armamentarium of false judges the perverse modern doctrines of "reasonable regulation", "compelling governmental interests" and "least-restrictive alternatives", and "the living Constitution" where "the right * * * to keep and bear Arms" is concerned.

(3) A personal constitutional "duty". Besides being "the *right*" of each and every individual counted among "the people", the constitutional relationship of Americans to "Arms" also sounds in a *personal duty*. When a Militia is "well regulated" by statute as the Constitution requires, everyone among "the people", not properly exempted, *must* "keep and bear Arms" suitable for his particular service, or be subject to some punishment.[2724] Indeed, because a fully armed citizenry is necessary for "[a] well regulated Militia" and "[a] well regulated Militia" is "necessary to the security of a free State", ***the primary constitutional right should be framed as the right of each constituent of "the people" to fulfill his duty "to keep and bear Arms" in order to be capable of serving in the Militia.*** If such a statute has not been enacted, the duty has not been perfected. Nonetheless, everyone among "the people" is *liable* or *exposed* to the creation of the duty through some future exercise of legislative authority.[2725] And everyone has a *political and moral duty* to press for enactment of such a statute, and in the interim to take appropriate direct action, such as by arming himself through the free market.

[2724] *See* A. Corbin, "Legal Analysis and Terminology", *ante* note 23, at 167.

[2725] *See id.* at 169-170.

Inasmuch as neither the original Constitution nor the Second Amendment defined the term "Militia", its meaning must be drawn from the great mass of *pre*-constitutional Colonial and State Militia statutes. A salient principle of these statutes was that every member of "the body of the people" was a member of the Militia, and every member of the Militia, not specially exempted for some good and sufficient reason supportive of the common defense and the general welfare, was required at all times to possess in his own home at least one firearm, ammunition, and necessary accoutrements suitable for Militia service ("to keep * * * Arms"), and whenever necessary to bring forth that equipment into the field ("to * * * bear Arms"). Thus, what the Second Amendment later described as "the *right* of the people to keep and bear Arms" was first and foremost a *duty*. Yet it was a right as well—because, if an individual has a duty of citizenship, embodied in law, "to keep and bear Arms", he must as well have a corresponding right to do so, protected against any interference not only from rogue public officials but also from other private citizens.

When the Constitution incorporated into its federal structure "the Militia of the several States" just as they existed at that time,[2726] this explicit statutory duty and implicit statutory right became a *constitutional* duty and right, respectively. The first clause in the Second Amendment focuses on the locus of the duty (service in "[a] well regulated Militia") and the second clause on the right instrumental thereto ("to keep * * * and bear Arms"). "[T]he right of the people to keep and bear Arms" is simply the constitutional guarantee that "the people" can freely engage in the behavior that conduces to the presence, at all times, of "[a] well regulated Militia" in each State—namely, *the personal possession in his own home by every adult able-bodied individual (not a conscientious objector) of at least one firearm and ammunition suitable for Militia service*. The purpose of "the right" is to guarantee that all of "the people" possibly eligible for the Militia will always be able to fulfill their duty to serve. And inasmuch as the duty to serve in the Militia necessarily includes a duty "to keep and bear Arms" (for all but conscientious objectors), "the right to keep and bear Arms" is inseparable from—indeed, is the mirror image of— the duty "to keep and bear Arms". "[T]he people" simultaneously exercise that right and enforce that duty by and on themselves: They exercise the right by fulfilling the duty; and they fulfill the duty by exercising the right.

Thus, the Second Amendment secures to each individual "the right to keep and bear Arms", not just for his own benefit, but primarily for the benefit of everyone else. "[T]he right to keep and bear Arms", translated through the duty "to keep and bear Arms", emphasizes the obligation of each and every member of "the people", not only to himself, but also to his community. Were acquisition of a

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[2726] *See* U.S. Const. art. I, § 8, cls. 15 and 16, *and* art. II, § 2, cl. 1.

firearm simply a matter of personal choice, an individual could imagine that his own firearm in his own hands was nothing more than an instrument for preserving his own life and property.[2727] But when "the supreme Law of the Land"[2728] requires just about everyone to possess a firearm, it compels almost every individual to recognize through his own behavior that his own firearm in his own hands is not simply an efficacious means for protecting his own life, but something of social significance. Each individual's personal possession of a firearm suitable for Militia service constitutes his own participation in, responsibility for the exercise of, and benefit from the community's political power. Because, in any society, "'[p]olitical power grows out of the barrel of a gun'",[2729] the firearm in any individual's hands represents his own personal bit of theoretical political power, which becomes effective when aggregated with the similar powers of many others. Only those individuals who hold firearms *in sufficient numbers* possess in principle, and usually will come to wield in practice, effective power over their society, for good or for ill. In a society formed specifically pursuant to "the Laws of Nature and of Nature's God", "[a] well regulated Militia" is rightly understood to be "necessary to the security of a free State". In such a society, *the people themselves must retain in their own hands the instruments of physical force necessary and sufficient to maintain their own freedom through their own efforts against every possible enemy*. *Each individual must possess his very own firearm, not just for himself alone, but so that the whole community will be armed—and, being armed, can remain free*. So, the individual duty "to keep and bear Arms" reflects the commitment of each member of the community to the freedom of the community, because its freedom is essential to his, as well as the commitment of all members of the community to each individual's freedom, because his freedom is essential to theirs.

(4) A constitutional "privilege" and "immunity". "[T]he right of the people to keep and bear Arms" is as well both a "privilege" and an "immunity" in the strict legal senses of those terms. It is a privilege, because anyone and everyone among "the people" is always free or at liberty "to keep and bear Arms" with no need of anyone else's permission to do so and no fear of incurring some punishment or penalty for doing so.[2730] It is, however, only a limited privilege, because it embraces solely the freedom "*to* keep and bear Arms", but no freedom "[*not*] *to* keep and bear Arms". The duty "to keep and bear Arms" in "[a] well regulated Militia", after all, necessarily excludes any contrary privilege to behave in a manner

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[2727] This is the so-called "individual-right" theory of the Second Amendment, which has gained a following among purported champions of the Amendment. Unfortunately, the height of its acceptance is inversely proportional to the depth of its insight into the true meaning of "the right of the people to keep and bear Arms". *See post*, at 1339-1351.

[2728] U.S. Const. art. VI, cl. 2.

[2729] *Quotations From Chairman Mao*, *ante* note 28, at 61.

[2730] *See* A. Corbin, "Legal Analysis and Terminology", *ante* note 23, at 167-168.

inconsistent with proper "regulat[ion]".[2731] This is true even with respect to conscientious objectors, because WE THE PEOPLE are not constitutionally required to respect conscientious objection where "the security of a free State" is concerned.[2732]

"[T]he right * * * to keep and bear Arms" is also an immunity for "the people" as against both rogue public officials and intermeddling private parties, because everyone labors under a disability (or lack of legal power) to interfere with—in the language of the Second Amendment, to "infringe[ ]"—both "the people['s]" exercise of "th[at] right" and their compliance with their duty "to keep and bear Arms" for the purpose of service in "well regulated Militia".[2733] Other than through a formal Amendment of the Constitution[2734]—and probably not even by that route, if the principles of the Declaration of Independence are consulted—no one can repeal, alter, or otherwise claim to change the meaning of either "the right" or the duty "to keep and bear Arms".

The foregoing is no matter of merely *hyper*-technical theoretical legal definitions, either. The Constitution itself declares that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States".[2735] This provision was designed to guarantee a certain measure of legal equality for "[t]he Citizens of each State" who traveled among "the several States", so as to secure for individuals a palpably beneficial practical effect from the Union. Its precursor appeared in the Articles of Confederation:

> * * * The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restriction shall not extend so far as to prevent the removal of property imported into any state, to any other state, of which the Owner is an inhabitant * * * .[2736]

[2731] *See id.* at 167.

[2732] *See ante*, at 969-973.

[2733] *See* A. Corbin, "Legal Analysis and Terminology", *ante* note 23, at 170.

[2734] *See* U.S. Const. art. V.

[2735] U.S. Const. art. IV, § 2, cl. 1.

[2736] Arts. of Confed'n art. IV, ¶ 1. Besides the obvious linguistic link, that this was the source for the constitutional clause is evidenced by comparing Arts. of Confed'n art. IV, ¶ 2 *with* U.S. Const. art. IV, § 2, cl. 2 *and* Arts. of Confed'n art. IV, ¶ 3 *with* U.S. Const. art. IV, § 1.

Now, in each of the several States at the time the Articles were adopted, the laws—reinforced by the Articles[2737]—required everyone among "the body of the people" (unless released pursuant to a specific exemption) to possess a firearm, ammunition, and accoutrements necessary for Militia service. This requirement embodied a duty, a right, a privilege, and an immunity for each citizen eligible for his State's Militia. When the original Constitution incorporated "the Militia of the several States" within its federal system, the substance of these State statutes acquired constitutional status, because the States were then required to maintain their "Militia" in conformity with *pre*-constitutional principles.[2738] At that point, under the original Constitution every "Citizen of each State" was entitled to "all Privileges and Immunities of Citizens in the several States". So, with respect to firearms in particular, if "Citizens" of one State were privileged to acquire and possess firearms, and immune from having their firearms seized by public officials—as almost all of them were, perforce of their eligibility for Militia service—so too were "Citizens" of other States who traveled to that State with their arms or to acquire arms. Drawing upon the practical effect of "privileges and immunities" as embodied in the Articles, these "Citizens" would enjoy "free ingress and regress", not only for themselves but also for their firearms, to the same degree as "Citizens" of that State could transport their own firearms within her territory. The "Citizens" of other States would "enjoy [in that State] all the privileges of trade and commerce" in firearms, "subject [only] to the same * * * restrictions as the inhabitants" of that State—which meant that if any "Citizen" of that State could purchase and personally possess firearms there, or train with firearms, or engage in other related activities (as almost all of them could, and most were required to do), then every "Citizen" of every other State could do so, too. And no "restriction" in any State's laws could "extend so far as to prevent the removal of [firearms] imported into [that] state, to any other state, of which the Owner [was] an inhabitant"—so that a "Citizen" from another State who brought his firearm with him to, or acquired a firearm in, some other State could always take that property back to his own home. Plainly, too, Congress could not interfere with this equality of "Privileges and Immunities", under color of any of its powers, because: *(i) all such "Privileges and Immunities" were constitutionally reserved to "*[t]*he Citizens of each State"; and (ii) Congress itself labored under a constitutional duty "*[t]*o provide for * * * arming * * * the Militia",*[2739] *which would have required it to enforce such "Privileges and Immunities" under its own authority had any State refused to honor them.*

The Second and Tenth Amendments added emphasis to the "Privileges and Immunities" of "[t]he Citizens of each State" and the disabilities of the States and

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[2737] Arts. of Confed'n art. VI, ¶ 4.

[2738] *See* U.S. Const. art. VI, cls. 2 and 3.

[2739] U.S. Const. art. I, § 8, cl. 16.

Congress with respect to WE THE PEOPLE'S interstate acquisition, possession, and transportation of firearms. Section 1 of the Fourteenth Amendment went even further, though, in its declarations that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside", and that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States". Self-evidently, inasmuch as "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States",[2740] and inasmuch as "[t]he Citizens of each State" are also "citizens of the United States", therefore the right, privilege, and immunity of "[t]he Citizens of each State * * * to all Privileges and Immunities of Citizens in the several States" is a "privilege[ ] or immunit[y] of citizens of the United States", which no State may "abridge" by "mak[ing] or enforc[ing] any law". So, inasmuch as the substance of "the right of the people to keep and bear Arms" to its fullest extent, and of the concomitant duty "of the people to keep and bear Arms" to a large extent, undoubtedly fall within "the Privileges and Immunities of Citizens in the several States", and inasmuch as "the people" certainly include most of the "citizens of the United States and of the State[s] wherein they reside", therefore "the right of the people to keep and bear Arms" and its associated duty are undeniably among "the privileges or immunities of citizens of the United States". And because "[n]o State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States", the substance of the Second Amendment must apply to officials of the States through the Fourteenth Amendment, to the selfsame degree that it applies directly to officials of the General Government, even if it did not apply to officials of the States directly.[2741] Nonetheless, were the original Constitution accorded its obviously proper construction on this point, these Amendments would not be needed to protect "the right of the people to keep and bear Arms"—proving once again that the original "Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS" with respect to WE THE PEOPLE'S "right to keep and bear Arms".[2742]

(5) A reserved constitutional "power". Ultimately, "the right of the people to keep and bear Arms" derives from and supports the duty "to keep and bear Arms", which itself serves the duty and the right of "the people" to participate in

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[2740] U.S. Const. art. IV, § 2, cl. 1.

[2741] *See post*, at 1504-1529.

[2742] *See The Federalist* No. 84 (Alexander Hamilton). A *fortiori*, no mere statutory protection for interstate transportation of firearms would ever be needed, either, were the Constitution actually enforced according to its terms. So, on this score, the so-called "Firearms Owners' Protection Act" is something of a misnomer, because, although it has some useful effect, it does not provide anything equivalent to the level of protection the Constitution mandates. *See* An Act To amend chapter 44 (relating to firearms) of title 18, United States Code, and for other purposes, Act of 19 May 1986, Pub. L. 99-308, § 107(a) [§ 926A], 100 Stat. 449, 460; *now codified at* 18 U.S.C. § 926A.

"well regulated Militia" in order to provide by and for themselves "the security of a free State". For most of "the people", such participation is not voluntary, but is compelled by law. To establish such an obligation requires a legal *power*—an act that creates, continues, alters, amends, rescinds, or extinguishes a legal relation.[2743] Typically, WE THE PEOPLE assign the day-to-day authority to create legal relations with respect to their Militia—that is, the power to "regulate", with the goal of producing "well regulated Militia"—to the General Government and the governments of the several States, which enact and enforce appropriate statutes. Thus, the Constitution delegates to Congress the power "[t]o provide for organizing, arming, and disciplining, the Militia", so that they will be prepared to be "call[ed] forth * * * to execute the Laws of the Union, suppress Insurrections and repel Invasions".[2744] No power with respect to the Militia is explicitly "prohibited by [the Constitution] to the States", though.[2745] And an implicit prohibition can arise only if Congress properly exercises its own regulatory power, and then only to the extent of that exercise—otherwise, all powers over the Militia "are reserved to the States respectively, or to the people".[2746] So even the power THE PEOPLE have temporarily delegated to Congress must revert in practice "to the States respectively, or to the people" if Congress defaults on its responsibility.

Legislators to whom the Constitution has delegated a power as against individuals also enjoy a right to exercise that power; and the individuals as against whom that power is exercised have a duty to comply with whatever regulations legislators enact within the scope of their power. Generally, legislators must exercise their delegated powers whenever necessary and proper to advance the public interest. After all, "WE THE PEOPLE * * * ordain[ed] and establish[ed] th[e] Constitution" in order to empower the General Government to perform certain vital functions, not to license it to evade those responsibilities, or to allow the States to stand idly by in that eventuality that it did.

Where the Militia are concerned, moreover, legislators' power and right are controlled by an emphatic explicit *duty* to legislate. The Second Amendment is a "declaratory and restrictive clause[ ]" designed "to prevent misconstruction or abuse of [the original Constitution's] powers".[2747] Even if anyone, acting in good faith, could have imagined in 1788 that the original Constitution extended to Congress the discretion "[*not* t]o provide for * * * arming the Militia", or "[t]o provide for *

[2743] *See* A. Corbin, "Legal Analysis and Terminology", *ante* note 23, at 168-169.

[2744] U.S. Const. art. I, § 8, cls. 16 and 15.

[2745] *Contrast* U.S. Const. art. I, § 10, cl. 3 as to a State's "Troops, or Ships of War in time of Peace".

[2746] *Contrast* U.S. Const. art. VI, cl. 2 *with* amends. II and X.

[2747] RESOLUTION OF THE FIRST CONGRESS SUBMITTING TWELVE AMENDMENTS TO THE CONSTITUTION (4 March 1789), *in Documents Illustrative of the Formation of the Union of the American States*, *ante* note 1, at 1063.

* * [*dis*]arming * * * the Militia" to some significant degree, in 1791 the Second Amendment excluded that "misconstruction" through its command that "the right of the people to keep and bear Arms, *shall not be infringed*".[2748] This rendered undeniable that Congress has *no option but* "[*t*]*o provide for* * * * arming * * * the Militia"—that is, to guarantee, in one manner or another, that "the people" *actually possess "Arms" suitable for Militia service*. In addition, inasmuch as the purpose of "the right * * * to keep and bear Arms" is to enable "the people" to fulfill their *constitutional duty* to serve in "well regulated Militia" that are "necessary to" and therefore actually capable of providing "the security of a free State", Congress has *no option but* "[*t*]*o provide for* organizing * * * and disciplining" "the people" for such service, too. And, with respect to these matters, the States have no greater options than does Congress, for the obvious reason that the "well regulated Militia" of which the Second Amendment speaks are "the Militia *of the several States*" which the original Constitution permanently incorporated into its federal system. If "the people" have a constitutional right and especially duty "to keep and bear Arms" for the purpose of serving in "well regulated Militia", and these are "the Militia of the several States" the permanent existence of which the original Constitution demands, then how could the States ever be suffered to "infringe[ ]" upon "the people['s]" right and duty, in derogation of the Second Amendment, when the necessary consequence would be to destroy those Militia?!

If Congress and the States' legislatures were to default on their obligations, "the people" might possibly still possess "Arms" as the result of their own private efforts; but they would not, as the consequence of such possession alone, be members of "well regulated Militia". If "the people" did not actually participate in "well regulated Militia", then they could not provide "the security of a free State"—and, as the Second Amendment teaches, *no one else could*. So, under such conditions, "a free State" could not long survive. (Of course, the situation would be far worse if the General Government, or the States, or both attempted to impose general "gun control" on "the people".) The demise of "free State[s]" anywhere, let alone everywhere, throughout America is constitutionally unthinkable, however. Therefore, WE THE PEOPLE cannot allow their Militia not to be "well regulated" (or, for that matter, not to exist at all). Or, *the power to ensure that the Militia are* ***always*** *"well regulated" can never fall into abeyance*.

No doctrine of constitutional law could require THE PEOPLE to stand idly by in the face of public officials' serial defaults in their duties. True, THE PEOPLE have delegated the power to regulate the Militia to those officials as "representatives" or (to employ the general legal term) "agents", in the normal course of human events. *But no delegation implicitly carries with it the principals' abdication and irreversible*

[2748] Emphasis supplied.

surrender of their original authority to feckless agents, let alone the principals' agreement to acquiesce in disloyal agents' intentional violations of the very conditions upon which the delegation is made. Rather, the agents' failure, neglect, and especially outright refusal to employ their delegated authority in the principals' interests, especially according to the principals' explicit instructions, creates conditions the abnormality of which justifies the principals' rescission and subsequent disregard of the agents' authority and reassertion of their own direct control over the subject matter. Thus, *upon public officials' defaults—and* ***well before*** *those defaults can irreversibly undermine "the security of a free State"—WE THE PEOPLE can, should, and must translate their "right * * * to keep and bear Arms" into a power to regulate their Militia themselves*. This should hardly surprise anyone, inasmuch as: legislative power is one aspect of political power; "'[p]olitical power grows out of the barrel of a gun'";[2749] "the Sword and Soveraignty always march hand in hand";[2750] and THE PEOPLE'S right to the full measure of political power—that is, *sovereignty*—is embodied in their very own constitutional command that "the right of the people to keep and bear Arms, shall not be infringed".

(6) A "collective right" as well as an "individual right". The antagonists in the contemporary political debate over to what extent (if at all) "the right of the people to keep and bear Arms" is compatible with "gun control" fall into two major camps: (i) those who contend that "the right of the people to keep and bear Arms" is a "*collective* right", to which no one who is not actually a member of some Militia has any constitutional claim, and which (should a legislature so decide) may be exercised only for the purposes of actual service in that Militia in conformity with statutory regulations; and (ii) those who assert that "the right of the people to keep and bear Arms" is an "*individual* right", to which every competent free adult man and woman enjoys a constitutional claim, even if he is not a member of a Militia, or no Militia exists at all. Both of these contending factions agree that children, persons suffering from serious mental illnesses, and criminals incarcerated in prison cannot exercise "the right of the people to keep and bear Arms"—the former, because the people in these groups cannot be members of a Militia; the latter, because such people are either immature, or incompetent, or unfree. Although the adherents of these two camps are numerous and noisy, neither of their positions is correct, because both groups—being composed primarily of ideologues, rather than scientific legal historians—take too narrow and tendentious a view of the matter.

To differentiate an "individual" from a "collective" "right of the people" requires more insight than is contained in the observation that "'the people' seems to have been a term of art employed in select parts of the Constitution * * * [to]

[2749] *Quotations From Chairman Mao, ante* note 28, at 61.

[2750] AN ARGUMENT, Shewing, that a Standing Army Is inconsistent with A Free Government, *ante*, note 27, at 7.

refer[ ] to a class of persons who are part of a national community".[2751] Because the effective exercise of a "collective right" requires the coördinated actions of more than one individual, "the right of the people to keep and bear Arms" does appear to be a "collective right", as its evident purpose is to enable "the people" to participate—necessarily in a concerted and coöperative fashion—in "*well regulated* Militia". Because the effective exercise of an "individual right" requires no more than the action of a single individual, though, "the right of the people to keep and bear Arms" also appears to be an "individual right", inasmuch as each and every member of "the people" can personally possess a firearm and ammunition in his home, and personally bring that equipment into the field with him when circumstances so demand, no matter what any other person may do or not do. The right is exercised in a "collective" manner on those occasions when "the people" muster together for Militia training or service in the field. At all other times—which embrace most of the time—it is exercised in an "individual" manner by each of "the people" in his own home, even when he himself is not at home but his firearm and ammunition are.

The ambident character of "the right of the people to keep and bear Arms" is not constitutionally unique. For the most obvious example, the First Amendment protects "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances". Taken literally, this right exhibits a "collective" character, because "people" do not "peaceably *assemble*" unless more than one of them are at hand. Yet no one has ever seriously contended that a *single* individual, solely in his own interest, cannot assert "the right * * * to petition the Government for a redress of" his own, even unique, "grievances".

A great deal of confusion has been generated within this rather ill-conceived and worse-conducted debate by the contention that the primary concern of "the right of the people to keep and bear Arms" is the possession of firearms by isolated individuals for the purpose of personal self-defense. Hordes of intellectuals have labored for decades to obtain an opinion from the Supreme Court of the United States that squarely upheld, or rejected, this thesis. With the Court's decisions in *District of Columbia* v. *Heller* and *McDonald* v. *City of Chicago*,[2752] the proponents of the theory that "the individual right" to self-defense lies at the heart of the Second Amendment have temporarily prevailed. But theirs is a hollow victory.

First, being based upon only two interrelated five-to-four decisions from a sharply and irreconcilably divided Bench, it threatens to prove evanescent: If the composition of the Court should change by only a single Justice, or a single Justice

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[2751] United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990).

[2752] Respectively, 554 U.S. 570 (2008) (Scalia, J., for the Court) *and* 561 U.S. ___ (2010) (Alito, J., for the Court).

should change his mind, contrary opinions could—and probably would—be rendered in the very next cases that raised issues under the Second Amendment.[2753]

Second, the *Heller* and *McDonald* opinions are exceedingly narrow in scope and niggardly in the judicial guarantees they afford: They uphold only individuals' possession of handguns in their own homes for the purpose of personal self-defense[2754]—thus exhibiting no greater concern for the personal possession of firearms under the Second Amendment than the Court has evinced for the personal possession of pornography under the First Amendment.[2755]

Third, even if in the future these decisions receive judicial adherence to the full extent of their terms, *nothing* in them will promote "well regulated Militia" or "the security of a free State" anywhere within America. To the contrary: By accepting as presumptively valid contemporary "gun controls" that hinder common Americans from possessing the very "Arms" most suitable for "*well regulated* Militia"[2756]—in which point *all* of the Justices concurred—these decisions will assist rogue public officials to prevent "the people" from providing themselves with "the security of a free State" as the Constitution requires. If the Justices did not knowingly intend this result, they manifested willful blindness to the true meaning of the Second Amendment and reckless disregard for the inevitably disastrous effects of deviating from it.

Fourth and most important, no matter how many jurists and intellectuals may embrace it, the theory that "the individual right" to personal self-defense lies at the heart of the Second Amendment is plainly wrong. This is not to say that the Amendment, correctly construed, does not *effectively* ensure for almost all individuals a right of personal self-defense with firearms. It does, but (in most cases) *with every kind of firearm that is in any way suitable for any type of Militia service*, not just handguns kept in one's home. Moreover, it guarantees for almost all individuals various rights to employ firearms for purposes far beyond the narrow confines of their own personal self-defense at home.

The right of individual self-defense is not mentioned in the original Constitution or in the Second Amendment—because it did not have to be. Self-defense is a *foundational* right. Everything else in America's legal system builds upon

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[2753] Such a reversal would not be particularly peculiar when the Justices were at such ideological odds. *Compare and contrast, e.g.,* Maryland v. Wirtz, 392 U.S. 183 (1968); Fry v. United States, 421 U.S. 542 (1975); National League of Cities v. Usery, 426 U.S. 833 (1976); *and* Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985).

[2754] *See* 554 U.S. at 635 (Scalia, J., for the Court); 561 U.S. at ___ (Alito, J., for the Court), Slip Opinion at 33-41.

[2755] *Contrast* Stanley v. Georgia, 394 U.S. 557 (1969), *with* United States v. Reidel, 402 U.S. 351, 354-356 (1971); United States v. Thirty-seven Photographs, 402 U.S. 363, 375-377 (1971); *and* Paris Adult Theatre v. Slaton, 413 U.S. 49, 65-67 (1973).

[2756] *See* Heller, 554 U.S. at 626-628 (Scalia, J., for the Court).

it. It precedes the institution of government. Finding its basis directly in "the Laws of Nature and of Nature's God"—in service to and conformity with which proper "Governments are instituted among Men, deriving their just powers from the consent of the governed"[2757]—the right of personal self-defense does not depend upon the existence of "a free State" in particular, or even of any "government" in general. It does not depend upon the existence of a Militia, "well regulated" or not. And it does not depend upon any "right to keep and bear arms" specifically enumerated in some constitution or statute. Moreover, as Blackstone emphasized, "[s]elf-defence * * * , as it is justly called the primary law of nature, * * * is not, neither can it be in fact, taken away by the law of society".[2758]

As a matter of fact, exercise of the right of personal self-defense does *not* depend upon one's possession of a firearm. If an individual does have a "right * * * to keep and bear Arms" for any purpose, and in reliance on that right has happened to obtain a firearm, and has it at hand, then of course he is capable of defending himself with it when the occasion arises. Yet, if that same individual has no "right * * * to keep and bear Arms", and therefore finds himself without a firearm when danger threatens, he is still capable of defending himself with *some other* implement—or even with his bare hands, feet, and teeth. Thus, the exercise of the right of personal self-defense has no logically or existentially necessary connection with "the right * * * to keep and bear Arms". Banning the right of personal self-defense might provide a rationale for outlawing the possession of firearms. But banning the possession of firearms would not in and of itself deny anyone the right to defend himself.

For example, throughout American history slaves were generally denied any right to possess firearms, except under the most stringent controls. As Blackstone observed,

> [t]wo precautions are * * * advised to be observed in all prudent and free governments: 1. To prevent the introduction of slavery at all: or, 2. If it be already introduced, not to intrust those slaves with arms; who will then find themselves an overmatch for the freemen.[2759]

No one ever doubted, however, that as human beings even slaves were entitled physically to defend themselves in some circumstances. And today, under the Thirteenth Amendment, an individual who has been "duly convicted" of a crime the just punishment for which is "slavery [ ]or involuntary servitude" can constitutionally be denied the possession of firearms, without thereby depriving him

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[2757] Declaration of Independence.

[2758] *Commentaries on the Laws of England, ante* note 142, Volume 3, at 4.

[2759] *Id.*, Volume 1, at 416.

of the right of personal self-defense. Similarly, ordinary prisoners in jail are universally prohibited from possessing firearms; but, notwithstanding that, they all have a right to defend themselves against assaults by their fellow inmates or rogue officials. Children of tender years are never (or ought never to be) allowed the unsupervised possession of firearms; yet they surely enjoy a right of self-defense. And even mentally defective individuals (including homicidal maniacs) may lawfully defend themselves against aggressors, although they may lack a right to possess *any* implement potentially dangerous to themselves or others, let alone a firearm.

On the other hand, even a cursory reading of the *Heller* decision should instruct anyone that no inconsistency whatsoever exists in principle, under the Court's reasoning, between an "individual right" "to keep and bear Arms" predicated exclusively upon the right to personal self-defense in the home with *some* type of firearm, and *exceedingly extensive* "gun control". For instance, if rogue public officials enacted a purported statute that allowed common Americans to possess a break-open, single shot, .22-caliber handgun—*but disallowed the possession of every other kind of firearm*—they would deprive no one of the bare "right to personal self-defense with a handgun in one's home" concocted in *Heller*. And this would be true even if that statute also banned average Americans from possession of all ammunition except for a single anemic round that developed only the minimal power to discommode an aggressor with a shot perfectly placed.

Thus, at least insofar as it is made to rest upon the right of personal self-defense, the supposed "individual right" to possess firearms is the spawn of confusion. Worse yet, it is the source of delusion as to what actually needs to be done to enforce the Second Amendment. For, notwithstanding that all too many naive patriots believe it to be correct, and even though it may provide some protection for "the right of the people to keep and bear Arms" in isolated instances, at base the notion that the Amendment primarily concerns itself with only an "individual right" is part and parcel of the strategy America's enemies are employing in order so to befuddle "the people" that they will not seek to organize themselves in the *one and only* way the Constitution itself tells them is "necessary to the security of a free State".

Initially, these miscreants contend that *no* real "*right* of the people to keep and bear Arms" exists at all, but that public officials may impose whatever "gun controls" they deem politically expedient. When that balderdash meets too much political backlash, they concede that a "right" does exist in principle, but that it is merely an "*individual* right" related in practice either to personal self-defense, or to hunting, target-shooting, or some other so-called "sporting purpose"—and, being no more than an "*individual* right", must always yield to all "reasonable regulations" enacted in the service of "compelling governmental interests", as public officials may stretch the definitions of those elastic terms. Which inevitably results in the transmogrification of a true "*right* of the people to keep and bear Arms" into nothing

more than a temporary license controlled by officialdom for its own purposes—thus returning the argument to its starting-point.

The goal of this black propaganda is to prevent average Americans from thinking through, *and acting upon*, the constitutional directive that "the security of a free State" absolutely depends upon the maintenance of "[a] well regulated Militia", and that the existence of "[a] well regulated Militia" absolutely depends upon "the people['s]" permanent personal possession of, and continuous training with, firearms and ammunition suitable for Militia service. Aspiring usurpers and tyrants expect that, if an armed people will not organize themselves for collective self-defense—that is, the defense of their community by the members of the community themselves—during times of domestic tranquility, they will be unable to organize themselves during the confusion and even panic of a major social crisis, when time is short and perhaps radical steps must be taken in the face of repression by the usurpers' and tyrants' armed forces and *para*-militarized police. Therefore, in order to prevail against a country in which vast numbers of private citizens already possess firearms, all contemporary schemes of usurpation and tyranny adopt as a working premise that "the people" be kept as disorganized as possible for as long as possible, so that "gun control" can gradually reduce the supplies of arms in private hands to a nadir at which "well regulated Militia" cannot be formed. This is no new stratagem. As America's Founding Fathers learned from their own hard experience, "the best and most effectual way to enslave the[people]" is to "weaken them, and let them sink gradually, by totally disusing and neglecting the militia".[2760]

If, in the course of such subversion, aspiring usurpers and tyrants for reasons of political camouflage must temporarily concede *any* "right of the people to keep and bear Arms", "the individual right" to possess a firearm solely for hunting, target shooting, and other purely "sporting purposes" would always be most meet for their purposes—precisely because, as a *completely personal* right, it would have next to no collective character of any consequence. As of this writing, however, "gun controllers" have failed to deceive a majority of Americans into swallowing the line that the right to possess firearms does not embrace personal self-defense. This complicates their task, because such an "individual right" does in practice have a useful collective aspect. After all, individual self-defense invariably amounts to *enforcement of the law* in a situation in which regularly constituted authorities are incapable of intervening in a timely fashion. Thus, even in the most isolated instance, individual self-defense is fundamentally a Militia function, enforcement of the law being the very first constitutional responsibility of the Militia.[2761] Moreover, the ability of individuals to defend themselves with firearms in the

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[2760] George Mason, in the Virginia Convention of 1788, *in* J. Elliot, THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *ante* note 110, Volume 3, at 380.

[2761] *See* U.S. Const. art. I, § 8, cl. 15.

absence of regularly constituted authorities deters and even punishes the perpetrators of crimes of all sorts.[2762] Thus, the capability for individual self-defense among the citizenry can provide the community with some degree of protection, because every armed individual can potentially function as an *ad hoc* "law-enforcement officer" whenever personally confronted with criminal activity.

Nonetheless, that is not enough. "The individual right" "to keep and bear Arms" based on personal self-defense does afford an immediate remedy for violations of particular persons' rights to personal security—but this amounts to the execution of only a small part of the laws and only in unique instances. In the nature of things, personal self-defense can only adventitiously, sporadically, and unsystematically contribute to "the security of a free State". To achieve that "security" to a necessary and sufficient degree demands *collective action consciously undertaken by all eligible citizens on the community's behalf*. WE THE PEOPLE must exercise the right of collective self-defense to the fullest. "The collective right" based on self-defense of the community by the community provides a remedy for violations of any and all rights within "a free State"—enabling "the people" to execute all of the laws, everywhere, under all circumstances, all of the time. "The collective right" generalizes, organizes, and mobilizes individual self-defense so as to marshal the full strength of the community for the community's protection. ***But this requires a permanent political institution infused with broad legal authority through which THE PEOPLE themselves can aggregate, direct, and deploy whatever measure of force may be required to enforce their rights.*** So "the right of the people to keep and bear Arms" must be understood, not as pertaining only to and exercised by and primarily for the benefit of individuals as individuals, with only happenstance benefits accruing to the community, but as forming the essential legal foundation for a collective enterprise the primary purpose of which is the community's welfare, with benefits accruing to all the individual members thereof.

The Second Amendment identifies this enterprise as "[a] well regulated Militia". Now, the essence of "[a] *well regulated* Militia" is *organization*. By definition, however, an "*individual* right" eschews organization. And unorganized, untrained individuals typically prove helpless against organized groups of human predators—another lesson the Founders took to heart: "When, against a regular and disciplined army, yeomanry are the only defence,—yoemanry, unskilful and unarmed,—what chance is there for preserving freedom?"[2763] In both principle and practice, therefore, an "individual right" directly contradicts the purpose of "the

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[2762] *See, e.g.*, John R. Lott, Jr., *More Guns, Less Crime: Understanding Crime and Gun Control Laws* (Chicago, Illinois: University of Chicago Press, 3d Edition, 2010); Gary Kleck, "Crime Control Through the Private Use of Armed Force", *in Safeguarding Liberty, ante* note 1225, at 323.

[2763] George Mason, in the Virginia Convention of 1788, *in* J. Elliot, THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *ante* note 110, Volume 3, at 380.

right of the people to keep and bear Arms". Besides, collective self-defense often demands that individual self-defense be sacrificed for the common good. The defense of the community may require that some, perhaps many, individuals expose themselves to the risk of serious injury or even death.

Precisely because "[a] well regulated Militia" is a *governmental* entity, "the right of the people to keep and bear Arms" is least of all an "individual right", and first and foremost:

> • A "collective right" that in the most dramatic terms reflects WE THE PEOPLE'S sovereignty, because it locates the repository of supreme legal authority through application of the general axiom, "'[p]olitical power grows out of the barrel of a gun'",[2764] modified by the specifically American corollary that the "gun" must always be held by THE PEOPLE themselves, acting under and in conformity with "the Laws of Nature and of Nature's God".[2765]
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> • A "collective right" that enables WE THE PEOPLE to preserve the "Form of Government" that can "establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to [THE PEOPLE] and [their] Posterity".[2766] And
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> • A "collective right" that provides WE THE PEOPLE with the means to impose their sovereignty on, and preserve their "Form of Government" against, rogue public officials. For both the General Government and the governments of the several States "deriv[e] their just powers from the consent of the governed"—not just once upon a time, when THE PEOPLE of the late 1700s ratified the original Constitution and then the Bill of Rights, or in later years when they ratified other Amendments, but each and every day since then, unto the present age. "[T]he consent of the governed" is a meaningless limitation on public officials, however, unless it can be asserted, enforced, *and if necessary withheld entirely* whenever necessary. If it cannot be asserted and enforced through elections, or by exercise of "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances",[2767] then it must be withdrawn—and, if so, probably in the face of attempts by rogue public officials' armed agents to compel THE PEOPLE to knuckle under to the oppressors' régime. An effective withdrawal of consent, then, will require collective action of the most comprehensive

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[2764] *Quotations From Chairman Mao, ante* note 28, at 61.

[2765] Declaration of Independence.

[2766] U.S. Const. preamble .

[2767] U.S. Const. amend. I.

> and tenacious sort by as large a part of the community as can be mustered, with the greatest amount of force that can be deployed. Under these conditions, no mere "individual right" "to keep and bear Arms" could possibly suffice.

So, burdened with all of these deficiencies in comparison to "the collective right" "to keep and bear Arms", how did the notion of an "individual right" ever gain intellectual currency, let alone rise to such prominence? The theory of an "individual right" emerged in its full form during the 1960s (perhaps in reaction to a discordant crescendo of "gun control" during that period), and by the *mid*-1990s ensconced itself as the so-called "standard model" and "new consensus" amongst intellectuals who considered themselves advocates of the Second Amendment.[2768] The efforts of these scholars are as praiseworthy as they are prodigious; and much, if not most, of their work is meritorious. Unfortunately, they have largely mistaken the point of the Second Amendment.[2769] To be sure, the errors of proponents of "the individual right" do not arise out of a slavish adherence to some malign political agenda aimed at utterly nullifying that Amendment. Presumably, all of these people (and many others of similar persuasions) were and remain motivated by good intentions. Yet good intentions, not sufficiently scrutinized, all too often end up paving the road to Hell.

[2768] *See, e.g.,* Stewart R. Hays, "The Right to Bear Arms, A Study in Judicial Misinterpretation", 2 *William & Mary Law Review* 381 (1960); Ronald B. Levine & David B. Saxe, "The Second Amendment: The Right to Bear Arms", 7 *Houston Law Review* 1 (1969); David T. Hardy & John Stompoly, "Of Arms and the Law", 51 *Chicago-Kent Law Review* 62 (1974); David I. Caplan, "Restoring the Balance: The Second Amendment Revisited", 5 *Fordham Urban Law Journal* 31 (1976); Stephen P. Halbrook, "The Jurisprudence of the Second and Fourteenth Amendments", 4 *George Mason Law Review* 1 (1981); Robert Dowlet & Janet A. Knoop, "State Constitutions and the Right to Keep and Bear Arms", 7 *Oklahoma City University Law Review* 177 (1982); Stephen P. Halbrook, "To Keep and Bear Their Private Arms: The Adoption of the Second Amendment, 1787-1791", 10 *Northern Kentucky Law Review* 13 (1982); Robert E. Shalhope, "The Ideological Origins of the Second Amendment", 69 *Journal of American History* 599 (1982); Don B. Kates, Jr., "Handgun Prohibition and the Original Meaning of the Second Amendment", 82 *Michigan Law Review* 204 (1983); Joyce Lee Malcolm, "The Right of the People to Keep and Bear Arms: The Common Law Tradition", 10 *Hastings Constitutional Law Quarterly* 285 (1983); Robert E. Shalhope, "The Armed Citizen in the Early Republic", 49 *Law and Contemporary Problems* 125 (1986); Stephen P. Halbrook, *That Every Man Be Armed* (Albuquerque, New Mexico: University of New Mexico Press, 1984); Don B. Kates, Jr., "The Second Amendment: A Dialogue", 49 *Law and Contemporary Problems* 143 (1986); Stephen P. Halbrook, "What the Framers Intended: A Linguistic Analysis of the Right to 'Bear Arms'", 49 *Law and Contemporary Problems* 151 (1986); Nelson Lund, "The Second Amendment, Political Liberty, and the Right to Self-Preservation", 39 *Alabama Law Review* 103 (1987); Sanford Levinson, "The Embarrassing Second Amendment", 99 *Yale Law Journal* 637 (1989); William Van Alstyne, "The Second Amendment and the Personal Right to Arms", 43 *Duke Law Journal* 1236 (1994); Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* (Cambridge, Massachusetts: Harvard University Press, 1994); Glenn Harlan Reynolds, "A Critical Guide to the Second Amendment", 62 *Tennessee Law Review* 461(1995), at 463 (using the term "Standard Model"); Randy E. Barnett & Don B. Kates[, Jr.], "Under Fire: The New Consensus on the Second Amendment", 45 *Emory Law Journal* 1139 (1996); Stephen P. Halbrook, *The Founders' Second Amendment: Origin of the Right to Bear Arms* (Chicago, Illinois: Ivan R. Dee, Publishers, 2008). The present author wishes to thank David T. Hardy for supplying references to many of the scholarly articles in the foregoing list.

[2769] A much more balanced approach appears in Robert H. Churchill, "Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment", 25 *Law and History Review* 139 (2007).

Inasmuch as "the individual right" "to keep and bear Arms" as generally formulated under "the new consensus" cannot easily be reconciled with "[a] well regulated Militia", it is fair to conclude that advocates of "the individual right" seized upon it out of considerations of convenience as much as conviction, because it enabled them to avoid dealing in their analyses and advocacy with the untidy complication that the Second Amendment itself explicitly declares "[a] well regulated Militia" to be "necessary to the security of a free State". Perhaps some of them simply deceived themselves into imagining that the National Guard and the Naval Militia are the true, and only, constitutional Militia. Perhaps others of them, although better informed, were not willing to challenge what was then and still remains the errant consensus on that subject—although, of course, a few of them did.[2770] Perhaps yet others were *ultra-*"libertarians" who opposed in principle the sort of near-universal compulsory service "well regulated Militia" require. And perhaps some recognized that, if they once admitted in public the centrality of the Militia to the Second Amendment, they would be compelled by considerations of intellectual integrity, if not patriotism and civic duty, to speak out politically in favor of revitalization of the Militia—thus exposing themselves to ridicule, vituperation, and marginalization as "extremists" from subversive special-interest groups, the big media, rogue public officials, and even many of their erstwhile colleagues. Whatever the explanation in any particular instance, instead of thoroughly debunking with sound historical research and legal analysis the fallacies that "the National Guard is the Militia" and that "the right of the people to keep and bear Arms is separate from the Militia", determining the true interrelation between "[a] well regulated Militia" and "the right of the people to keep and bear Arms", and concluding that "the collective right" and "the individual right" (properly defined) are the obverse and reverse of the selfsame constitutional coin, the constituents of "the new consensus" consigned to the dust-bin of utter irrelevance thirteen of the Second Amendment's twenty-seven words.

For example, one prominent academic opined that "the Second Amendment has exactly the same meaning that it would have had if the preamble had been omitted, or indeed if the preamble is demonstrably false".[2771] Of course, the first half of this observation is accidentally accurate: For if one scientifically investigates "the right of the people to keep and bear Arms" in *pre-*constitutional American history, as has the author and any reader of the present study, he will inevitably discover the inextricable connection between that "right" and "[a] well regulated Militia"—such that the phrases "the right of the people to keep and bear Arms" and "[a] well regulated Militia" organized for the purpose of providing "the

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[2770] *See, e.g.,* David Hardy, "The Militia Is Not the National Guard", *in Safeguarding Liberty*, *ante* note 1225, at 99.

[2771] Nelson Lund, "D.C.'s Handgun Ban and the Constitutional Right to Arms: One Hard Question?", 18 *George Mason University Civil Rights Law Journal* 229 (2008), at 237 (footnote omitted).

security of a free State" largely mean the same thing for all practical purposes. The second half of the statement, however, is premissed upon a ridiculous supposition: For, in constitutional analysis, "we are to place ourselves as nearly as possible in the conditions of the men who framed" the original Constitution and the Bill of Rights.[2772] *Those* men never doubted that "[a] well regulated Militia" is "necessary to the security of a free State", or they never would have incorporated "the Militia of the several States" as permanent components of the Constitution's federal system. And, as a matter of law, WE THE PEOPLE today must accept that declaration as true.

Nonetheless, proving once again that simple-minded errors are always far easier to sell in the vaunted "marketplace of ideas" than are complex truths, the hierophants of "the individual right" "to keep and bear Arms" have prevailed among defenders of the Second Amendment in that cacophonous forum. Yet having been adopted as a "standard model" among a "new consensus" within some gaggle of intellectuals does not guarantee that their theory is either correct or beneficial. A bare majority of the Supreme Court in the *Heller* and *McDonald* cases did endorse "the standard model". Inasmuch, though, as the Court has opined that "[u]nder the First Amendment there is no such thing as a false idea"[2773]—and therefore by an equipoise of judicial logic "there is no such thing as a [true] idea", either—the Justices' acceptance of "the individual right" "to keep and bear Arms" cannot inspire an abundance of confidence. Indeed, when it comes to the Power of the Purse and the Power of the Sword,[2774] an healthy suspicion of the Judiciary's work is always in order. For the Supreme Court has uniformly been wrong, and sometimes blatantly dishonest, with respect to such vitally important matters as money,[2775] public-sector unionism,[2776] and the power to draft men for service in the

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[2772] *Ex parte* Bain, 121 U.S. 1, 12 (1887).

[2773] Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974).

[2774] *See generally* Edwin Vieira, Jr., "The Purse and the Sword: Imminent Dangers of U.S. Economic and Homeland Security Policies" (Metamora, Michigan: DVDs produced by the Heritage Research Institute, 2010).

[2775] *See, e.g.,* Knox v. Lee, 79 U.S. (12 Wallace) 457 (1871); Juilliard v. Greenman, 110 U.S. 421 (1884); Norman v. Baltimore & Ohio Railroad Co., 294 U.S. 240 (1935); Nortz v. United States, 294 U.S. 317 (1935); *and* Perry v. United States, 294 U.S. 330 (1935), *discussed in* E. Vieira, Jr., *Pieces of Eight, ante* note 39, at 599-651, 651-666, 1127-1211.

[2776] *See, e.g.,* Abood v. Detroit Board of Education, 431 U.S. 209 (1977), *and* Knight v. Minnesota Community College Faculty Association, 460 U.S. 1048 (1983), and 465 U.S. 271 (1984), *discussed in* Edwin Vieira, Jr., "Travesty, Tragedy and Treason: *Abood* v. *Detroit Board of Education* and the Supreme Court's Betrayal of the Constitution in Public-Sector Labor Relations", *Government Union Review*, Volume 19, Number 2 (2000), at 27; *idem,* "Poltroons on the Bench: The Fraud of the 'Labor-Peace' Argument for Compulsory Public-Sector Collective Bargaining", *Government Union Review*, Volume 18, Number 3 (1998), at 1. *See also* Edwin Vieira, Jr., "Compulsory Public Sector Collective Bargaining: the Trojan Horse of Corporativism", *Government Union Review*, Volume 2, Number 1 (1981), at 56; *idem*, *"To break and control the violence of faction": The challenge to representative government from compulsory public-sector collective bargaining* (Arlington, Virginia: Foundation for the Advancement of the Public Trust & Public Service Research Council, 1980); *idem*, "Of Syndicalism, Slavery and the Thirteenth Amendment: The Unconstitutionality of 'Exclusive Representation' in Public-Sector Employment", 12 *Wake Forest Law Review* 515 (1976).

regular Armed Forces[2777]—with disastrous consequences for this country in the long term in every such instance.

Overall, the theory of an "individual right" "to keep and bear Arms" has done a signal disservice to America in many ways:

First, it has deflected the stream of academic discourse from the task of construing in a mutually coherent fashion *all* of the words in the Second Amendment together with related provisions in the original Constitution.

Second, it has dissected the Constitution by amputating "the individual right" "of the people to keep and bear Arms" from "[a] well regulated Militia", as if "the people" and "[a] well regulated Militia" were entirely different groups that ought not to be connected to each other.

Third, it has largely and dangerously disarmed "the people" by at least implicitly denying that they enjoy *a constitutional right to a Militia and therefore a constitutional right to "Arms" specifically suitable for a Militia*.

Fourth, it has put at imminent risk Americans' "unalienable Rights" and "the Blessings of Liberty to ourselves and our Posterity",[2778] by convincing all too many citizens that they need not revitalize the Militia—indeed, that they need not, should not, must not even think let alone talk, about revitalizing the Militia, or about equipping "the people" with the firearms, ammunition, and accoutrements most useful to that end. Admittedly, if the courts do not contrive to eviscerate *Heller* and *McDonald*, "the individual right" "to keep and bear Arms" will leave *some* firearms in *some* people's hands for *some* purposes— which is better than nothing. Of more concern, though, is that the exegetes of "the individual right" offer nothing by way of explanation as to either: (i) *how* usually isolated, always disorganized individuals in possession of the marginally effective firearms that right protects could possibly prevail against usurpers and tyrants whose edicts were enforced by *para*-military "law-enforcement agencies" equipped with modern military-grade firearms; or (ii) *how* "the Militia of the several States" could be resurrected from disuse when they would need to be armed with the very firearms, ammunition, and accoutrements that "the individual right" does *not* encompass, is not capable of encompassing, *and apparently was never intended to encompass*. To be sure, in keeping with the old adage that "it is a poor workman who blames his tools", inventive Americans *could* find ways in which to employ the limited freedom "the individual right" does afford, so as to assist them in the early stages of revitalizing the Militia. But,

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[2777] *See* Selective Draft Law Cases, 245 U.S. 366 (1918), *discussed post*, at 1807-1835.

[2778] Declaration of Independence *and* U.S. Const. preamble.

as soon as discussion of (let alone actual work on) those subjects began, it would necessarily leave the domain of "the individual right" and enter the territory of "the collective right". Thus, for all serious constitutional purposes, focusing on "the individual right" is a waste a time (of which precious little remains to squander). Worse than that, accepting "the individual right" as the highest barrier the Second Amendment erects against "gun control" and the National *para*-military police state "gun controllers" intend to impose upon this country amounts to little more than a half-hearted rear-guard action in a retreat along the road leading to the eradication of "a free State" throughout America.

(7) Not exclusively a "State's right". Finally, although in its most significant aspects "the right of the people to keep and bear Arms" is a "collective right", it is not exclusively a "State's right" in the common acceptation of that term as a right only the State herself, through her government and public officials, can exercise.

True, the original Constitution referred to "the Militia of the several States", not to any "right of the people", let alone to any "individual right", "to keep and bear Arms". And by focusing on the words "of the several States", while forgetting what the noun "Militia" actually means in terms of *pre*-constitutional principles, perhaps someone might have misread the Constitution: (i) to allow only the States as polities, but not their citizens as individuals, to assert any right as against the General Government to maintain their Militia; and, reciprocally, (ii) to allow the General Government to assert its powers with respect to regulation and deployment of the Militia only as against the States as polities, not as against their individual citizens who comprised the Militia. Such a misconstruction would not have been utterly implausible on practical grounds, because, if these imagined purely intergovernmental assertions of rights and powers had required judicial enforcement, they would have fallen within "[t]he judicial Power" which "extends to all Cases, in Law and Equity, arising under th[e] Constitution" and "to Controversies to which the United States shall be a Party", and would have been required to be heard in the "original Jurisdiction" of the Supreme Court inasmuch as in all such situations "a State shall be a Party".[2779] Nonetheless, although this would have proven to be an exceedingly clumsy way to administer Militia required to perform the vital tasks of "execut[ing] the Laws of the Union, suppress[ing] Insurrections and repel[ling] Invasions" when "call[ed] forth" pursuant to some "provi[sion]" made by Congress for that purpose,[2780] it would not have been impossible for the General Government and the States to proceed in that manner.

[2779] U.S. Const. art. III, § 2, cls. 1 and 2.

[2780] U.S. Const. art. I, § 8, cl. 15.

Now, it certainly is true that every State does enjoy a constitutional right—and a *duty*, together with associated powers and immunities—as against the General Government to maintain her own Militia, precisely because they are "the Militia *of the several States*" and *permanent* parts of the federal system with *constitutional* status. Nonetheless, this legal authority and responsibility do not coalesce into an exclusive "*State's* right", because the Militia are not bloodless mechanisms, but assemblies of individuals drawn from and so historically identified with "the people" that the word "Militia" *means* a certain type of involvement by "the people" in public affairs. So, because "the Militia of the several States" are permanent components of the federal system, with particular rights, powers, privileges, and immunities therein, "the people" who compose them are entitled to those rights, powers, privileges, and immunities, too.[2781]

On the other side, the General Government has a right to command individuals in the Militia directly, albeit in a limited way. For the Constitution empowers Congress "[t]o provide * * * for governing such Part of the[Militia] as may be employed in the Service of the United States".[2782] To be sure, this governance must be enforced primarily through "Officers" "the Appointment" of which the Constitution "reserv[es] to the States respectively".[2783] For the only "Officer[ ]" of the General Government who is also an "Officer[ ]" in the Militia is the President, whom the Constitution appoints as "Commander in Chief * * * of the Militia of the several States, when called into the actual Service of the United States".[2784] Nevertheless, the source of this governance is Congress; its operation does not require Congress to command the States, as States, to take any action; and it is directed ultimately at individuals within the Militia, not at the States. (This, in contrast to the situation under the Articles of Confederation, perforce of which every State was required "always [to] keep up a well regulated and disciplined militia, sufficiently armed and accoutred", but Congress exercised no specific authority to enforce this requirement.[2785])

The Second Amendment corrects any confusion that might have arisen on this score under the original Constitution, by declaring that the ultimate right with respect to the Militia is "the right of *the people*" themselves, not "of the States" as representatives of "the people". If the Amendment guaranteed a "right of the States" alone, it would read (say), "[a] well regulated Militia, being necessary to the security of a free State, the right of the several States respectively to maintain such Militia shall not be infringed". In that event, it would be obvious that such a right

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[2781] *See* Bond v. United States, No. 09-1227, ___ U.S. ___ (2011).

[2782] U.S. Const. art. I, § 8, cl. 16.

[2783] U.S. Const. art. I, § 8, cl. 16.

[2784] *Compare and contrast* U.S. Const. art. II, § 2, cl. 1 *with* § 2, cl. 2.

[2785] *Compare* Arts. of Confed'n art. VI, ¶ 4 *with* art. II.

ran in favor of the States as polities against the General Government. Of course, that would not mean that every individual among "the people" was powerless to enforce such a "State's right" on his own behalf in a particular case in which he could show that he had been injured by an infringement on that right.[2786] And by a parity of reasoning, the right that the Second Amendment does secure—"the right *of the people* [*of each State*] to keep and bear Arms" for the purpose of maintaining "well regulated Militia" *in each State* among the several States—must be a right of each State, too. If "the people" can assert the rights of a State against the General Government on the grounds of federalism, a State can invoke the rights of "the people" on those same grounds, particularly when those rights are directed towards maintaining the State herself as "a free State" within the federal system. So, in this instance, "States' rights" and "the right of the people" amount to the very same thing.

In sum, both the Militia Clauses of the original Constitution and the Second Amendment guarantee not only a "collective right" of "the people" to participate in "well regulated Militia" as establishments within the federal system but also an "individual right" of each American among "the people" who compose *or could compose* the Militia to acquire and possess firearms suitable for Militia service, *whether he actually trains and deploys in the field or not*. The significance of these simultaneous guarantees cannot be overemphasized, because they present *the only instance in which the original Constitution and an Amendment cover exactly the same ground from exactly the same direction for exactly the same purpose, and thus mutually confirm and reinforce each other* (rather than an Amendment's sole purpose being to impose a limitation on a misconstruction or abuse of some power in the original Constitution). Nonetheless, the Second Amendment is not merely redundant, because it explicitly highlights what is only implicit in the original Constitution: namely, that "[a] well regulated Militia" is "*necessary* to the security of a *free* State"—thereby making clear that *"the Militia of the several States", predicated upon "the right of the people to keep and bear Arms", are indispensable structural components of America's constitutional edifice*.

f. "Arms". Because the "Arms" to which "the right of the people" pertains must be the kinds of "Arms" possession of which will enable "the people" to participate effectively in "well regulated Militia", the noun "Arms" in the Second Amendment must be construed in the selfsame *functional* sense as the verb "arming" in the power of Congress "[t]o provide for * * * arming * * * the Militia".[2787] That is, Congress must "provide for * * * arming" "the people" with the same types of "Arms" they have "the right * * * to keep and bear". And "the people" have "the

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[2786] *See* Bond v. United States, No. 09-1227, ___ U.S. ___ (2011).

[2787] *Compare* U.S. Const. amend. II *with* art. I, § 8, cl. 16.

right * * * to keep and bear" the same types of "Arms" with which Congress is "[t]o provide for * * * arming * * * the Militia".

(1) Self-evidently, "Arms" of this sort must relate to some form of service, actual or potential, in or for the Militia, rather than to some other activity. First and foremost, "well regulated Militia" must possess "Arms" suited for the deadly serious work of community self-preservation against every possible enemy—domestic as well as foreign, from private criminals to rogue public officials to invading armies. So "the people" must enjoy "the right * * * to keep and bear Arms" that are *of standard military type or better, at least as serviceable for military purposes as the "Arms" carried by troops performing equivalent duties in America's regular Armed Forces.* Of course, not every individual among "the people" may need to be provided with such "Arms" in order to perform the specific Militia duties to which he is assigned. But all of them must be ready and able to exercise "the right" to acquire and permanently to possess such "Arms" in order, if called forth, to perform duties for which "Arms" of that type are requisite.

(2) Although the ideal must be to provide first-class military-grade "Arms" to everyone eligible for the Militia, that goal may not always be achievable in practice. Especially during the initial stages of revitalizing the Militia today, sufficient quantities of firearms of standard military types may simply not be available. "Substitute standards" will have to be adopted, then.

Conceivably, the Second Amendment does not guarantee "a right * * * to keep and bear Arms" that are utterly unsuited to any service in or for "[a] well regulated Militia".[2788] Yet to imagine what sort of "Arms" would always prove *wholly unsuitable* for *any* Militia service is exceedingly difficult, if not impossible. Even airguns, which some contemporary statutes treat as equivalent to firearms,[2789] could be used to train Militiamen in marksmanship, which undoubtedly would enhance their ability to perform some of their duties with actual firearms. And in extreme situations airguns could profitably be employed by Militiamen deployed as irregulars, partisans, *guerrilleros*, *francs-tireurs*, or *résistants*.[2790] Considerations of this kind establish that a class of functional firearms (and, of course, ammunition and accoutrements to go with them) not to *any* degree suitable for *any* Militia service under *any* conditions probably has never existed, and certainly does not exist

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[2788] Such arms might well find protection under some other constitutional provision, though. *See* U.S. Const. amend. IX.

[2789] *See, e.g.,* Code of Virginia § 18.2-282(A) (emphasis supplied): "It shall be unlawful for any person to point, hold or brandish any firearm *or any air or gas operated weapon* or any object similar in appearance, whether capable of being fired or not, in such manner as to reasonably induce fear in the mind of another[.]"

[2790] *See, e.g.,* H. von Dach, *Der Total Widerstand: Kleinkriegsanleitung für Jedermann* (Biel, Switzerland: Schweizerischen Unteroffiziersverband, Dritte Auflage, 1966), *published in translation from an earlier edition as Total Resistance: Swiss Army Guide to Warfare and Undergrounds* (Boulder, Colorado: Paladin Press, 1965). *See generally Encyclopedia of Firearms, ante* note 428, at 141-142.

now.[2791] Rather, depending upon circumstances, *essentially **any** working firearm can be found suitable, or can be made suitable, for **some** kind of Militia service*.

Especially during revitalization of the Militia, "substitute standards" should include the best firearms "the people" can acquire in the free market; or, if nothing better is available, then whatever "the people" already possess. Whatever *can* be put to Militia use *must* be, whenever the need arises. For something is invariably better than nothing. After all, the first goal today must be to arm Militiamen, if necessary with whatever happens to be available, so as to enable the Militia to begin providing "the security of a free State" to a meaningful degree—and thereby enable "the people" to compel the dissolution of the National *para*-military police-state apparatus centralized in the Department of Homeland Security. Only after that has been accomplished should extra efforts be expended to standardize Militiamen's "Arms" as to type; then to bring all of their "Arms" to the same high level of quality; and finally to take advantage of innovations in technology. At every stage of this process, though, the rule upon which the entire sequence rests—that, all other things being equal, availability equals acceptability—must always be employed, inasmuch as something unavailable can never be acceptable. And that rule can always be satisfied, inasmuch as, in good hands, whatever is available can be made at least marginally serviceable.

So, because *essentially **all** working firearms are or can be made suitable for **some** Militia service, "the right of the people to keep and bear Arms" embraces essentially **any and every** working firearm*. Moreover, the sources from which "the people" obtain their firearms are irrelevant to their "right" to possess those firearms. The Second Amendment applies to whatever "Arms" "the people" may provide for themselves—whether: (i) collectively through the efforts of "the people['s]" representatives in the General Government and their States' governments, or (ii) collectively through the Militia of the several States; or (iii) individually through their own efforts in the free market; or even (iv) individually through their own manufacture in home workshops.

(3) Although certain types of firearms may be preferred for certain purposes in "well regulated Militia", nonetheless, because in the final analysis *all* types of firearms are suitable for *some* kinds of Militia service, ***no particular class of firearms is the unique subject of "the right of the people to keep and bear Arms"***. This is worthy of very heavy emphasis, in order to expose and overcome the disinformation "gun controllers"—in both public office and private station—regularly promulgate

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[2791] "Functional" is the necessary qualification here, because firearms that have fallen into serious disrepair, and gunpowder that has spoiled (as black powder especially is wont to do), are unfit for Militia (or perhaps any other) service. Those firearms that cannot be put right are properly treated more as collections of possibly salvageable parts than as *actual* "firearms". Similarly, decomposed gunpowder is not *really* "gunpowder" at all, because it can neither function as such nor be restored to its previous usable state.

to the effect that the Second Amendment protects only firearms specifically designed or typically used for so-called "sporting purposes" and perhaps for personal self-defense, but does not guarantee "the people['s]" possession of "Arms" of standard "military" types or better that would be especially suitable for service with the Militia.[2792]

Firearms particularly suitable for various "shooting sports" and for personal self-defense cannot be excluded from "the right of the people to keep and bear Arms", because even such firearms can be employed for Militia purposes; but neither can they be the exclusive subjects of "the right", precisely because other kinds of firearms can be employed, and to better effect, for the Militia's most important purposes. The *political* purpose of "the right of the people to keep and bear Arms"—the goal of fielding truly "well regulated Militia" that can provide "the security of a free State" against all enemies—could never be achieved if that "right" were confined to "the people['s]" possession of firearms which, in some public officials' views, were solely or even particularly suitable for "sporting" purposes or for personal self-defense. After all, firearms designed for hunting, target shooting, trap and skeet shooting, so-called "practical" competition, and personal self-defense may or may not be suitable for general use in the Militia, depending upon their caliber, rate of fire, type of sights, ruggedness of construction, ease of maintenance, initial cost, and so on. For instance, a highly accurate, single-shot target rifle in .22 long rifle caliber, or a pocket-sized semiautomatic pistol in .25 ACP caliber, could conceivably be effective for some of the clandestine activities of an irregular, partisan, *guerrillero*, *franc-tireur*, or other *résistant*; and either *could* be used for personal self-defense. But neither would be fit for service as the primary type of firearm for most members of "[a] well regulated Militia". So the ultimate test of whether a firearm qualifies for protection under the Second Amendment obviously cannot be its adequacy, let alone superiority, for some "sporting" use or even for personal protection. Nonetheless, "sporting" uses and personal protection are the criteria for "the people['s]" possession of firearms that tend to be stressed these days to the exclusion of the arms' suitability for true "Militia" service, not simply in public debate on the Second Amendment, but especially in legislation and judicial decisions.

(a) For the prime legislative example, the General Government's major "gun-control" enactments of the 1960s—the basic structures of which still dominate the legal scene today—eschewed an intent "to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of *firearms appropriate to the purpose of hunting, trap*

[2792] The qualification "perhaps" is necessary, because the most doctrinaire "gun controllers" deny that the Amendment guarantees any right to possess firearms intended primarily for individuals' use in self-defense, such as semiautomatic pistols equipped with high-capacity magazines.

shooting, target shooting, personal protection, or any other lawful activity".[2793] Apparently, however, both of these statutes implicitly reserved for Congress a supposed discretion to impose through some future enactment whatever restrictions and burdens its then-Members might desire with respect to the acquisition, possession, or use of *all other firearms*—or even *all firearms whatsoever*, if rogue Congressmen should determine that no "lawful activity" is "appropriate" for the use of any firearms by "law-abiding citizens", or that citizens in very large numbers are not sufficiently "law-abiding" to be allowed access to firearms.

Moreover, an explicit reference to service in "the Militia of the several States" in this Congressional litany of temporarily permissive uses for firearms was conspicuous by its absence—indeed, glaringly so, in light of Congress's power *and duty* "[t]o provide for * * * arming * * * the Militia",[2794] and of the "right of the people to keep and bear Arms" which the Second Amendment ties inextricably to "[a] well regulated Militia". For, taken together, these mandate that Congress "provide for * * * arming * * * the [people]". To be sure, the statutes' list of allowable purposes might be taken implicitly to embrace service in the Militia, because it included "personal protection, or any other lawful activity". After all, in each individual's own life, "personal protection" involves direct enforcement of the laws against some aggressor, which is the very first of the three functions of "the Militia of the several States" when "employed in the Service of the United States",[2795] as well as at all other times when they are employed in the service of their respective States. And service in the Militia is not only a "lawful activity" but even a constitutional duty for all free, adult, able-bodied Americans. Yet the suspicion that Members of Congress did not have common Americans' service in the Militia in mind when they adopted the phrase "personal protection, or any other lawful activity" another *sub*-section of the very same section of the first statute confirmed, when it complained that "the United States has become the dumping ground of *the castoff surplus military weapons of other nations, and that such weapons, and the large volume of relatively inexpensive pistols and revolvers (largely worthless for sporting purposes)*, has [*sic*] contributed greatly to lawlessness and to the Nation's law enforcement problems".[2796] Surely, however, "surplus military weapons of other

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[2793] An Act To assist State and local governments in reducing the incidence of crime, to increase the effectiveness, fairness, and coordination of law enforcement and criminal justice systems at all levels of government, and for other purposes ("Omnibus Crime Control and Safe Streets Act of 1968"), Act of 19 June 1968, Pub. L. 90-351, TITLE IV—STATE FIREARMS CONTROL ASSISTANCE, § 901(b), 82 Stat. 197, 226 (emphasis supplied). *Accord*, AN ACT To amend title 18, United States Code, to provide for better control of the interstate traffic in firearms ("Gun Control Act of 1968"), Act of 22 October 1968, Pub. L. 90-618, TITLE I—STATE FIREARMS CONTROL ASSISTANCE, § 101, 82 Stat. 1213, 1213-1214 (same declaration). The latter Act superseded the former with respect to its substantive provisions on "gun control".

[2794] U.S. Const. art. I, § 8, cl. 16. *See ante*, at 50-54.

[2795] *See* U.S. Const. art. I, § 8, cls. 15 and 16.

[2796] Act of 19 June 1968, § 901(a)(7), 82 Stat. at 226 (emphasis supplied).

nations" are anything but "worthless" for the purpose of arming tens of millions of Americans in "the Militia of the several States" at minimal expense. And are "relatively inexpensive pistols and revolvers" really "worthless" for the "personal protection" of individuals the statute claims to favor? Moreover, even if some "surplus military weapons" and "relatively inexpensive pistols and revolvers" do become involved in domestic "lawlessness" on the part of true *criminals*, how can that justify imposing any "Federal restrictions or burdens on *law-abiding citizens*"? The past, let alone the merely possible future, criminal behavior of one individual neither defines nor can confine the constitutional rights, let alone the constitutional duties, of any other, law-abiding citizen:

> The constitutional rights of [innocent citizens] are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of [others]. * * * "[I]mportant as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the * * * Constitution." * * * Thus law and order are not * * * to be preserved by depriving [innocent citizens] of their constitutional rights.[2797]

Indeed, stripping common Americans of firearms they can use for their Militia service will *end* true "law and order" by removing the possibility of maintaining in operation what the Constitution itself declares is "necessary to the security of a free State". And to what degree would "the Nation's law enforcement problems" likely be attenuated, if not largely solved, were most of those "surplus military weapons" delivered into the hands of millions of trained Militiamen deployed to execute the laws throughout every State and Locality?

Even more obviously, "the Militia of the several States" can never be adequately armed if public officials can deny private citizens the right to possess the very firearms particularly suitable for Militia service, on the ground that they are not designed for some "sporting" purpose. A notorious case in point is the now-defunct "Public Safety and Recreational Firearms Use Protection Act of 1994".[2798] The

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[2797] Cooper v. Aaron, 358 U.S. 1, 16 (1958).

[2798] An Act To control and prevent crime ("Violent Crime Control and Law Enforcement Act of 1994"), Act of 13 September 1994, Pub. L. 103-322, TITLE XI—FIREARMS, Subtitle A—Assault Weapons ("Public Safety and Recreational Firearms Use Protection Act"), 108 Stat. 1796, 1996. This statute expired in 2004. § 110105(2), 108 Stat. at 2000. But its noxious principles could be resurrected at any time, and therefore warrant scrutiny.

Indeed, one can expect that the fundamental poisonous principle at work in this statute—that is, "condemnation by adjective"—*will* be raised, again and again. The basic verbal scam is a simple application of the folk wisdom: *To kill a dog, you must first call it mad*. If the wordsmiths in factions and other special-interest groups can convince legislators and judges to affix an emotionally charged, opprobrious modifier to some constitutional term, then supposedly the activity subsumed within or connected with that term can be severely "regulated" or even prohibited altogether. Thus, in order to rationalize limiting WE THE PEOPLE'S possession of certain "Arms", "gun controllers" attack "*assault* weapons" or "*cop-killer* bullets". Self-evidently, however,

malign animus behind this statute emerged most clearly in the portion of its title that emphasized "*Recreational* Firearms Use". The adjective took for granted that "the people['s]" possession of such firearms *alone*—on the basis of public officials' definition of them *alone*—is entitled to Congressional protection. In line with that unwarranted and dangerous assumption, the statute purported to ban private citizens' acquisition of newly manufactured so-called "semiautomatic assault weapons", including both certain specifically designated semiautomatic rifles then on the market "or copies or duplicates of th[os]e firearms in any caliber", and every other semiautomatic rifle that thereafter might be produced with certain characteristics typical of modern firearms used by the regular Armed Forces, including "an ability to accept a detachable magazine" and at least two other attributes from among: "a folding or telescoping stock", "a pistol grip that protrudes conspicuously beneath the action", "a bayonet mount", "a flash suppressor or threaded barrel designed to accommodate a flash suppressor", and "a grenade launcher".[2799] In conjunction with an earlier statute ironically entitled the "Firearm Owners' Protection Act" (and as of this writing still in force) which effectively precludes most private individuals from possessing machine guns and other fully automatic firearms,[2800] the "assault-weapons" ban struck—and no doubt was intended to strike—directly at the heart of "the Militia of the several States", by denying most Americans eligible for the Militia the very types of firearms undeniably most suitable for Militia service.

(b) A bare majority of the Justices put the Supreme Court's imprimatur on part of this nonsense in the *Heller* opinion.[2801] In its earlier opinion in *Miller*, the Court had correctly stated that the proper inquiry where the Second Amendment is concerned is whether the firearm in question "at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia"[2802]—which "reasonable relationship" would, upon proper analysis, encompass *all* firearms "at

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every contemporary firearm of military grade will qualify as an "assault weapon" under one or another common definition; and *every* type of ammunition for such a firearm—and for most high-powered rifles, for that matter—will be capable of defeating the low-grade body armor Local police forces typically use, and therefore qualifies as "cop-killer bullets". So, on the basis of this verbal legerdemain, THE PEOPLE'S possession of *every* type of firearm and ammunition *peculiarly suitable for the Militia*—and therefore in the front rank of the "Arms" "the people" enjoy "the right * * * to keep and bear"—can be severely "regulated" or prohibited. There is, of course, no limit to what classes of "Arms" can be vilified in this manner: for example, calling every common hunting rifle equipped with an optical sight a "*sniper* rifle", or every 12-gauge shotgun with a large-capacity magazine and a pump or semiautomatic action a "*riot* shotgun". Thus the Second Amendment can be nullified step by step through the application of adjectival invective.

[2799] Act of 13 September 1994, § 110102(b), 108 Stat. at 1997-1998.

[2800] An Act To amend chapter 44 (relating to firearms) of title 18, United States Code, and for other purposes ("Firearms Owners' Protection Act"), Act of 19 May 1986, Pub. L. 99-308, § 102(9) [§ 922(o)], 100 Stat. 449, 452-453; *now codified at* 18 U.S.C. § 922(o).

[2801] District of Columbia v. Heller, 554 U.S. 570 (2008) (Scalia, J., for the Court). *Heller* was followed in *McDonald* v. *City of Chicago*, 561 U.S. ___ (2010) (Alito, J., for the Court).

[2802] United States v. Miller, 307 U.S. 174, 178 (1939) (emphasis supplied).

this time" (or essentially any time). Contrary to the preposterous assertions in the majority opinion in *Heller*, the Court in *Miller* did *not* "uph[o]ld against a Second Amendment challenge two men's federal convictions for transporting an unregistered short-barreled shotgun in interstate commerce"; and it did *not* rule that "the *type of weapon at issue* was not eligible for Second Amendment protection".[2803] As no trial had yet been held in *Miller* when the case arrived at the Supreme Court, there were (and could have been) no "convictions". Rather, the *Miller* Court reversed a trial court's *pre*-trial dismissal of criminal charges on the narrow ground that, in the absence of actual evidence in the record, "it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense"[2804]—thus leaving that issue to be decided by the trial court on remand of the case (which, in the event, it never was).

In direct contradiction of *Miller*, the majority in *Heller* opined that the "Arms" to which the Second Amendment refers need have no "reasonable relationship to the preservation or efficiency of a well regulated militia", but that the Amendment merely "guarantee[s] the individual right to possess and carry weapons in case of confrontation".[2805] Typically, however, this opinion then added the weasel-words that "we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation"[2806]—thus reserving for the Judiciary the special license to misconstrue the Second Amendment in the future in whatever fanciful ways might suit the jurists' proclivities. According to the *Heller* majority, *Miller* "say[s] only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns" or "machineguns".[2807] *Yet "machineguns"—and other modern firearms carried by infantrymen in the regular Armed Forces—are "not typically possessed by* [*many*] *law-abiding citizens for lawful purposes" today* ***only and precisely because some statute purports to ban, or renders onerous, such possession***[2808]—a situation the *Heller* majority plainly approved in its comments that: (i) it "would be a startling reading of the opinion [in *Miller*]" to suggest that "the National Firearm Act's restrictions on machineguns * * * might be unconstitutional":[2809] and (ii) because

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[2803] *Pace* 554 U.S. at 621-622 (Scalia, J., for the Court) (emphasis in the original).

[2804] 307 U.S. at 178.

[2805] 554 U.S. at 592 (Scalia, J., for the Court).

[2806] *Id.* at 595.

[2807] *Id.* at 625, 624.

[2808] *See, e.g.,* 18 U.S.C. § 922(o).

[2809] 554 U.S. at 624 (Scalia, J., for the Court). The reference is to the statute originally enacted as AN ACT To provide for the taxation of manufacturers, importers, and dealers in certain firearms and machine guns, to tax the sale or other disposal of such weapons, and to restrict importation and regulate the interstate transportation thereof, Act of 26 June 1934, CHAPTER 757, 48 Stat. 1236; *now codified at* 26 U.S.C. Chapter 53, §§ 5801 through 5872.

"nothing in [the *Heller* decision] should be taken to cast doubt on longstanding prohibitions on * * * the carrying of 'dangerous and unusual weapons'", it should not be objectionable "if weapons that are most useful in military service—M-16 rifles and the like—may be banned".[2810] Thus, the Justices in the majority in *Heller* excised from the Second Amendment the very firearms perhaps most suitable today for Militia service: "M-16 rifles and the like". But they held that, because "the inherent right of self-defense has been central to the Second Amendment right", and because handguns form "an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose", therefore "banning [*handguns*] *from the home* * * * fail[s] constitutional muster". A "ban on *handgun* possession *in the home* violates the Second Amendment, as does [a] prohibition against rendering any lawful firearm *in the home* operable for the purpose of immediate self-defense"; and therefore public officials "must permit [an individual] to register his *handgun* and must issue him a license to carry it *in the home*".[2811]

Although often touted as a great victory for the Second Amendment, this decision exhibits two rather sinister aspects that give the lie to its undeserved reputation among the credulous:

First, *Heller* did not secure for average Americans a "right * * * to keep and bear Arms" anywhere near as extensive as the right their forebears enjoyed during *pre-*constitutional times. Rather, *Heller* endorsed only the highly truncated "right" to possess certain types of firearms for certain limited purposes which *pre-*constitutional English and American law had allowed to *the most highly* ***disfavored*** *classes* of individuals.

For example, English Catholics as a class (disparaged as "Papists" in the idiom of that day) were suspected of disloyalty, because they were presumed to oppose the legalized Protestant monopoly over the British Crown.[2812] "As to *papists*", Blackstone explained,

> a general toleration of them [would be allowable]: provided their separation [from the Established Church of England] was founded only upon difference of opinion in religion, and their principles did not also extend to a subversion of the civil government. If once they could be

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[2810] 554 U.S. at 626-627 (Scalia, J., for the Court).

[2811] *Id.* at 628-629, 635 (emphasis supplied). Although the Justices in the minority went even further, being willing to exclude from the Amendment's protection even the handguns the majority included, their views sounded only in dissent. And inasmuch as no one's possession of "M-16 rifles and the like" was at issue in the case, even the statements on that score in the majority's opinion were merely *obiter dicta*. Nonetheless, a minority of four can easily enough become a majority of five through a change in one Justice's viewpoint or in the composition of the Court. And unsupportable *dicta* from the Court have a bad habit of becoming the bases for actual holdings in the opinions of inferior courts—and in this instance will surely serve as grist for the propaganda-mills of "gun controllers".

[2812] *See, e.g.,* W. Blackstone, *Commentaries on the Laws of England, ante* note 142, Volume 1, at 210-217.

> brought to renounce the supremacy of the pope, they might quietly enjoy [the other tenets of Catholicism] * * * . But while they acknowledge a foreign power, superior to the sovereignty of the kingdom, they cannot complain if the laws of that kingdom will not treat them upon the footing of good subjects.[2813]

On the basis of their supposedly ineradicable disloyalty to the Protestant Kingdom, and to prevent them from posing any threat of effective revolt or resistance, Catholics were prohibited from possessing arms suitable for military service. Without such arms in their hands, of course, they could neither deter nor defend themselves against oppression, could not pressure the government to redress their grievances, could not demand political and religious equality with Protestants, and could not prove their loyalty by keeping and bearing arms in defense of King and country.

Hawkins described the particular "Restraint[ ] * * * which relates to the keeping of Arms" imposed perforce of a statute of King James I upon English Catholic "Recusants" who refused to attend "the Established Church":

> *That all such Armour, Gun-powder, and Munition of whatsoever Kinds, as any Popish Recusant convict shall have in his own House or elsewhere, or in the Possession of any other at his Disposition, shall be taken from him by Warrant of four Justices of Peace * * * (except such necessary Weapons, as shall be allowed him by the said four Justices, for the Defence of his Person or House) and that the said Armour, &c. so taken, shall be kept at the Costs of such Recusant * * * .* And it is further enacted, *That notwithstanding the taking away such Armour, &c. yet such Recusant shall be charged with the maintaining of the same, and with the providing of a Horse, &c. in such Sort as others of his Majesty's Subjects.*[2814]

This basic scheme "relating to the keeping Arms" was continued in the reign of King William I and Queen Mary against Catholics who, putting the King of Kings ahead of the King of England, "refus[ed] to make a Declaration against some of the Principal Doctrines of the Popish Religion":

> [A]*ny two Justices of Peace may and ought to tender * * * [a] Declaration to any Person whom they shall know or suspect * * * as being a Papist * * * ; and * * * no such Person so required, and not making and subscribing the said Declaration, * * * shall keep any Arms or Ammunition, or Horse above the Value of five Pounds, in his own Possession, or in the Possession of any other*

[2813] *Id.*, Volume 4, at 54.

[2814] A *Treatise of The Pleas of the Crown, ante* note 434, Book I, Chapter XII, § 17, at 22, 25-26.

> *Person to his Use, (other than such necessary Weapons, as shall be allowed him by the Quarter-Sessions for the Defence of his House or Person)* [.][2815]

This, and no more, is precisely what* Heller *allowed to the average American as against the General Government: *no* complete right of a free man to possess "weapons that are most useful in military service—M-16 rifles and the like", but instead the highly constrained right of a member of a religiously and politically disfavored minority only to possess in his home a handgun "operable for the purpose of immediate self-defense", "to register his handgun" with public officials, and to be "issue[d] * * * a license to carry it in [his] home".[2816]

Similarly, during the French and Indian War, American Catholics were suspected of disloyalty throughout the Colonies, because France was largely a Catholic country and the British Empire predominately Protestant. For that reason, a Virginia statute of 1756 prescribed that,

> WHEREAS it is dangerous at this time to permit Papists to be armed, * * * it shall, and may be lawful, for any two or more justices of the peace, who shall know, or suspect any person to be a Papist, * * * to tender to such person * * * the oaths appointed by act of parliament to be taken * * * ; and if such person * * * shall refuse to take the said oaths, * * * or shall refuse, or forebear to appear * * * for the taking the said oaths, * * * such person * * * shall * * * be liable and subject to all and every the penalties, forfeitures, and disabilities hereafter in this act mentioned.
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> * * * And for the better securing the lives and properties of his majesty's faithful subjects, * * * no Papist, or reputed Papist so refusing, or making default * * * , shall, or may have, or keep in his house or elsewhere, or in the possession of any other person to his use, or at his disposition, any arms, weapons, gunpowder or ammunition, (other than such necessary weapons as shall be allowed to him, by order of the justices of the peace * * * , for the defence of his house or person) and that any two or more justices of the peace * * * may authorise and impower any person or persons in the day-time, with the assistance of the constables * * * to search for all arms, weapons, gunpowder or ammunition, which shall be in the house, custody, or possession of any such Papist, or reputed Papist, and seize the same for the use of his majesty and his successors * * * .
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> * * * [E]very Papist, or reputed Papist, who shall not, within the space of ten days after such refusal, or making default * * * , discover and

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[2815] *Id.*, Book I, Chapter XIV, Introduction and § 4, at 28, 29. Blackstone mentioned but the bare bones of these prohibitions against English Catholics' possession of arms; but his reference to Hawkins enabled his reader to fill in the details. *Commentaries on the Laws of England, ante* note 142, Volume 4, at 54-56 & note c.

[2816] 554 U.S. at 635 (Scalia, J., for the Court).

> deliver * * * to some of his majesty's justices of the peace, all arms, weapons, gunpowder or ammunition, which he shall have in his house or elsewhere, or which shall be in the possession of any person to his use, or at his disposition, or shall hinder or disturb any person or persons, authorised * * * to search for, and seize the same; that every such person so offending * * * shall be committed to the goal of the county where he shall commit such offence, * * * there to remain without bail or mainprize for the space of three months, and shall also forfeit and lose the said arms, and pay treble the value of them to the use of his majesty and his successors * * * .
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> * * * *Provided always*, That if any person who shall have refused or made default * * * shall desire to submit and conform * * * and shall * * * in open court take the said oaths, * * * he shall from thenceforth be discharged of and from all disabilities and forfeitures[.]{EN-2047}

Thus, Catholics who refused to take the prescribed oaths were not entirely disarmed, even if they were believed on good grounds to be actually disloyal. For the statute permitted them to retain "such necessary weapons as shall be allowed * * * by order of the justices of the peace * * * for the defence of * * * house or person"—the imperative "*shall* be allowed" indicating that perhaps the justices could not deny any such allowance at all, although they surely retained the leeway in each particular case to determine what constituted "*necessary* weapons" for purposes of an individual's personal defense. ***Again, this is precisely the "right" that* Heller *so graciously allowed to the average American as against the General Government.***

Of course, Catholics were not the only individuals whom Protestant Americans during *pre*-constitutional times kept in a state of complete or partial disarmament. Far outnumbering them were slaves and free persons of color. To Americans of that era, "arms * * * [we]re the only true badges of liberty; and ought never, but in times of utmost necessity be put into the hands or mercenaries or slaves".[2817] Indeed, disarmament was considered the indispensable "badge and incident" of slavery.[2818] Disarmament often extended as well to free persons of color who, although emancipated, were generally considered to "ha[ve] no rights or privileges but such as those who held the power and the Government might choose to grant them"—or, more bluntly put, "no rights which the white man was bound to respect".[2819] This was probably as much a practical necessity of the social situation as the outgrown of some sort of racialist ideology among "those who held

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[2817] A. Fletcher, A DISCOURSE OF GOVERNMENT, *ante* note 31, at 43.

[2818] *See* W. Blackstone, *Commentaries on the Laws of England, ante* note 142, Volume 1, at 416.

[2819] Scott v. Sandford, 60 U.S. (19 Howard) 393, 405, 407 (1857) (opinion of Taney, C.J.).

the power and the Government". For had the slaves regularly observed free people of color moving about with arms in their hands, they might have begun to question their servile status, and to harbor dangerous ideas about "equality" and "rights" that arms in their own hands could have secured for them. So, in Virginia throughout the *pre*-constitutional period, disarmament of these people was the norm:

> • [1639] "ALL persons except negroes to be provided with arms and amunition or be fined[.]"{EN-2048}
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> • [1680] "[I]t shall not be lawfull for any negroe or other slave to carry or arme himselfe with any club, staffe, gunn, sword or any other weapon of defence or offence[.]"{EN-2049}
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> • [1705] "That no slave go armed with gun, sword, club, staff, or other weapon * * * : And if any slave shall be found offending herein, it shall be lawful for any person or persons to apprehend and deliver such slave to the next constable or head-borough, who is hereby * * * required, without further order or warrant, to give such slave twenty lashes on his or her bare back, well laid on, and so send him or her home[.]"{EN-2050}
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> • [1723] "[N]o negro, mulatto, or Indian whatsoever; (except as is hereafter excepted,) shall * * * presume to keep, or carry any gun, powder, shot, or any club, or other weapon whatsoever, offensive or defensive; but that every gun, and all powder and shot, and every such club or weapon * * * found or taken in the hands, custody, or possession of any such negro, mulatto, or Indian, shall be taken away; and * * * be forfeited to the seisor and informer, and moreover, every such negro, mulatto, or Indian, in whose hands, custody, or possession, the same shall be found, shall * * * receive any number of lashes, not exceeding thirty-nine, well laid on, on his or her bare back, for every such offence.
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> " * * * *Provided nevertheless*, That every free negro, mullatto, or indian, being a house-keeper, or listed in the militia, may be permitted to keep one gun, powder, and shot; and that those who are not house-keepers, nor listed in the militia * * * , who are now possessed of any gun, powder, shot, or any weapon, offensive or defensive, may sell and dispose thereof, at any time before the last day of October next ensuing. And that all negros, mullattos, or indians, bond or free, living at any frontier plantation, be permitted to keep and use guns, powder, and shot, or other weapons, offensive or defensive; having first obtained a license for the same, from some justice of the peace of the county wherein such plantations lie * * * upon the application of such free negros, mullattos, or indians, or of the owner or owners of such as are slaves[.]"{EN-2051}
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> • [1748]"[N]o negroe, mulattoe, or Indian whatsoever, shall keep, or carry any gun, powder, shot, club, or other weapon, whatsoever, offensive, or defensive, but all and every gun, weapon, and ammunition, found in the custody or possession of any negroe, mulattoe, or Indian, may be seized by any person, and * * * be forfeited to the seizor, for his own

> use; and moreover, every such offender shall * * * receive * * * any number of lashes, not exceeding thirty nine, on his, or her bare back, well laid on, for every such offence.
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> " * * * *Provided nevertheless*, That every free negroe, mulattoe, or Indian, being a house keeper, may be permitted to keep one gun, powder, and shot: And all negroes, mullattoes, or Indians, bond or free, living at any frontier plantation, may be permitted to keep and use guns, powder, shot, and weapons, offensive, or defensive, by license, from a justice of peace, of the county wherein such plantations lie, to be obtained upon the application of free negroes, mulattoes, or Indians, or of the owners of such as are slaves[.]"{EN-2052}
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> • [1785] "No slave shall keep any arms whatever, nor pass unless with written orders from his master or employer, or in his company with arms, from one place to another. Arms in possession of a slave contrary to this prohibition, shall be forfeited to him who will seize them."{EN-2053}

Thus, in most cases a slave was suffered to possess no firearms at all, "unless with written orders from his master * * * or in his company with arms". Those slaves who happened to be "living at any frontier plantation" were "permitted to keep and use guns, powder, and shot", but only after "having first obtained a license * * * from some justice of the peace * * * upon the application of * * * [their] owners". Free people of color were slightly better off. Not unlike the slaves, those who were "living at any frontier plantation" were "permitted to keep and use guns, powder, and shot, * * * having first obtained a license * * * from some justice of the peace * * * upon the[ir own] application". But those "being a house-keeper, or listed in the militia" were "permitted to keep one gun, powder and shot", wherever they might have lived. The latter allowance was not intended to arm these people for actual Militia service, however, as free people of color who were "listed in the militia" in Virginia were instructed *not* to bring their firearms to Militia musters.[2820]

Rather depressingly for the *Supreme* Court in "the land *of the free*", the majority opinion in *Heller* could have been written by the draftsmen who composed these oppressive statutes. Like slaves in *pre-*constitutional times, common Americans under *Heller* must obtain the permission of their masters, the judges, to possess such firearms as the judges condescend to allow, and that only after years of expensive litigation. Like free people of color in that era, with the permission of judges common Americans under *Heller* may possess firearms perhaps suitable for personal defense in their homes—but certainly not suitable for most Militia service. Actually, free persons of color in Virginia during the *pre-*constitutional period were better off than common Americans today under *Heller*, because the statutes did not limit them to any particular kind of firearm—so they might have possessed muskets

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[2820] *See ante*, at 468.

or even rifles as good as or even better than the standard "military" types of their day. Fundamentally, then, *this* is the majestic "individual right" "to keep and bear Arms" protected by *Heller*: the narrow "right" niggardly allowed during *pre-*constitutional times to distrusted if not despised Catholics, to some slaves, and to free people of color who had "no rights or privileges but such as those who held the power and the Government might choose to grant them". And *Heller* grudgingly extended this "right" to Americans by only a gossamer five-to-four majority of the Justices—with the dissenters keen on reducing it effectively to nonexistence.

Second, besides truncating "the right of the people to keep and bear Arms" for Americans as individuals, *Heller* eviscerated that right for the community. A handgun would not be considered suitable as the average contemporary Militiaman's primary firearm. And to confine the possession and use of a handgun as of "right" to an individual's home would in almost all cases exclude the possibility that the individual would be able to interact with other armed individuals in a concerted, organized fashion. So, if (as *Heller* held) "the inherent right of [*personal*] self-defense" becomes so "central to the Second Amendment right" that "M-16 rifles and the like * * * may be banned" without offending the Amendment, what happens to "the inherent right of [*community*] self-defense" through "well regulated Militia"? If the Second Amendment protects average Americans' possession only of handguns useful for personal self-defense, and not of firearms particularly suitable for Militia service, the possession of which public officials may ban at will; and if public officials may restrict the possession of even such handguns to the limited confines of an individual's home—then under *Heller's* misconstruction of the Amendment no "well regulated Militia" can ever exist as a matter of constitutional right, and soon enough as a matter of fact. In such circumstances, what must befall "the security of a free State"? Inasmuch as the personal possession of handguns solely within the walls of one's home is plainly insufficient for the operation of any "well regulated Militia", no "free State" can exist as a matter of constitutional right, and soon enough as a matter of fact, either.

These perverse consequences should hardly surprise anyone. Firearms particularly adapted to Militia service, although usually sufficient, are generally not necessary, and may even be problematic, for personal self-defense. In the *pre-*constitutional era, for instance, a musket fitted for a bayonet *could* have been used for personal self-defense in a "civilian" setting. Yet the bayonet, or the musket's ability to mount a bayonet, would not have been necessary for that purpose, because self-defense with that or any other firearm would not have been seriously hindered by the firearm's lack of a bayonet, or even by the firearm's incapability to mount a bayonet (and under some circumstances might even have been impeded had the bayonet been attached). Whereas, the bayonet—and therefore the firearm's ability to mount a bayonet—and therefore perhaps a particular type of firearm—*would* have been necessary (or at least highly desirable) for military service against regular

enemy troops, particularly when they were so equipped. Similarly, today, the "Arms" to which "the right of the people" most strongly pertains are firearms that would be *contra*-indicated in practice for personal self-defense in most situations: For example, neither an M-16 or AR-10 type automatic rifle loaded with fully jacketed 5.56 x 45 mm or 7.62 x 51 mm ammunition would be an informed individual's first choice for defending his own home against a single burglar, when a good .40, .44, or .45 caliber pistol or revolver, or a pump-action 12-gauge shotgun loaded with (say) No. 4 buckshot were available. And being *contra*-indicated, the most effective of Militia "Arms" are almost always never even proposed by knowledgeable people for the purpose of personal self-defense under normal circumstances in one's abode, his place of business, or on the street. Where in the contemporary United States do typical courses for average Americans on self-defense with firearms actually teach, recommend, or even describe the use of the bayonet, let alone the fully automatic rifle or submachine gun? So, *of course* if firearms particularly suited for individual self-defense are the essential concern of the Second Amendment, then firearms ill-suited for that purpose do not enjoy the full (or perhaps any) protection of "the right of the people to keep and bear Arms", and for that reason arguably may even be banned from private possession altogether, notwithstanding that they are preëminently suitable for Militia service. Now that the Supreme Court in *Heller* has identified personal self-defense as the Second Amendment's focus, rogue public officials employing that legal fiction as their fulcrum will be emboldened to lever out of "the right of the people to keep and bear Arms" those firearms most valuable for Militia service, or at least to continue radically to restrict their use by "the people". Whereas, if *all* firearms *in any way* suitable for the performance of *any conceivable* Militia duties are included in that "right" (as they should be), then *both* personal *and* community self-defense will be served—and the depredations of both private *and public* criminals will be deterred or defeated. The only question that remains to be answered, then, is whether the majority opinion in *Heller* should be taken as the inadvertent product of stupidity or the intentional result of subversion.

More than idle curiosity prompts this concern. For the majority of the Justices in *Heller* traveled well outside of the confines of the issue before the Court in an attempt to deceive Americans into believing that the Second Amendment guarantees no "right of the people to keep and bear" "'dangerous and unusual weapons'" which are not "'in common use at the [present] time'". Unfortunately for their credibility, in this endeavor the Justices stumbled on the rocks of self-contradiction as well as perverse consistency. The self-contradiction being that they accepted as "true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large"; while they also took for granted that "weapons that are most useful in military service—M-16 rifles and the like" may be rendered "highly unusual in society at large" precisely by "be[ing] banned" through some form of "gun control"

from "the people['s]" possession, and thereby from their use in the Militia.[2821] The perverse consistency being that, across the board, the Justices denied that common Americans enjoy *any* rights in the premises: *no* "right * * * to keep and bear [sophisticated] Arms"; therefore *no* right to participate in Militia "well regulated" in that particular—and, because "'[p]olitical power grows out of the barrel of a gun'", with the degree of power being directly proportional to the number and sophistication of the guns, *no* right to "the security of a free State", either.

In this instance, "[a] foolish consistency is [worse than even] the hobgoblin of little minds".[2822] It spills over into *anti*-constitutional absurdity. For, contrary to the majority in *Heller*, *no* so-called "modern development" *could* "limit[ ] the degree of fit between the prefatory clause [in the Second Amendment]"—that is, "[a] well regulated Militia, being necessary to the security of a free State"—and "the protected right" "of the people to keep and bear Arms".[2823] The Second Amendment defines "the degree of fit" as both perfect and permanent. Thus, absent a new Amendment of the Constitution, "the right of the people to keep and bear Arms" *must* relate, in the nature of cause and effect, to "[a] well regulated Militia". So *of course* "the people" must possess the "sophisticated arms" such a Militia requires—even if, initially, these might be considered "'dangerous and unusual weapons'" which are not "'in common use at the [present] time'". The supposed problem posed by such "arms", after all, is self-eradicating: Once "the people" have come to possess them, they will be "in common use" and thus no longer "'unusual'"; and once "the people" have trained with them, they will no longer be "'dangerous'" (except, naturally, to the enemies of "the people").

"[S]ophisticated arms" would doubtlessly include, not just fully automatic rifles (such as the M-16), but also submachine guns, heavy machine guns, hand grenades, mortars, *anti*-tank and *anti*-aircraft rockets, and even light artillery. *All* of these "Arms" would serve an undeniable Militia purpose. *All* of these "Arms" "the people" could "keep and bear" in the same sense of personal possession that they can "keep and bear" ordinary rifles and pistols. Therefore *all* of these "Arms" must come within "the right of the people". To be sure, many of these "Arms" would not be available for purchase by just anyone at the corner gun store, because they are specialized "crew-served" arms. Relatively few Militiaman would be assigned to use mortars, *anti*-tank and *anti*-aircraft rockets, and especially light artillery. The few who were selected would be highly trained. Their initial possession of those arms would be contingent upon their having completed comprehensive courses of instruction. And thereafter they would be subject to Militia supervision, with severe

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[2821] 554 U.S. at 627 (Scalia, J., for the Court).

[2822] *See* Ralph Waldo Emerson, "Self-Reliance", *in Essays* (Boston, Massachusetts: James Munroe and Company, 1841).

[2823] *Pace* 554 U.S. at 627-628 (Scalia, J., for the Court).

penalties for any infractions of applicable regulations. Nonetheless, "the people" would have a true right to these "Arms", because such regulations would be necessary and proper for "well regulated Militia" (which "the right of the people to keep and bear Arms" subserves)—would be promulgated for the benefit of the Militia—and would be executed within the Militia by members thereof, not by potentially rogue public officials with a malign interest in trying to strip the Militia of "sophisticated arms" so as to render them less than "well regulated" and thereby incapable of providing "the security of a free State". (Indeed, regulations of this sort would not differ in principle from the inspections conducted within the Militia in *pre-*constitutional times in order to ensure that Militiamen were actually supplied with adequate arms.)

(4) Just as the "Arms" "the people" enjoy "the right * * * to keep and bear" are not limited to firearms suitable only for "sport" or personal self-defense, and must include "sophisticated arms that are highly unusual in society at large" today only because of long-standing violations of the Second Amendment and the Militia Clauses of the original Constitution by rogue public officials, so too are those "Arms" not frozen in their development at the technological level of one particular era. Even the majority of the Justices in *Heller* mocked as "bordering on the frivolous" the argument that "only those arms in existence in the 18th century are protected by the Second Amendment"—opining instead that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding".[2824] "*Prima facie*", though, has nothing to do with the matter. Firearms are not simply presumed to fall within the "Arms" protected by the Second Amendment unless and until public officials contrive some argument to the contrary. For, *all* firearms being suitable for *some conceivable* Militia service, no such argument can be credited. So, too, with the technology of firearms. The proper inquiry where the Second Amendment (or any other constitutional provision relevant to the Militia) is concerned is whether the firearm in question "*at this time* has some reasonable relationship to the preservation or efficiency of a well regulated militia".[2825] Therefore, where "the right of the people" to provide themselves with the most advanced "Arms" is in issue, the technological capabilities and possibilities of the particular time and place will be highly relevant.

By definition, in "*well regulated* Militia" "the people * * * keep and bear Arms" that are, to the greatest degree possible, fit for service according to the highest technological standards for firearms and ammunition available. Moreover, because "the security of a free State" is not a static, unchangeable concern, "well regulated Militia" that are "necessary" to such "security" must be capable of

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[2824] *Id.* at 582.

[2825] United States v. Miller, 307 U.S. 174, 178 (1939) (emphasis supplied).

continuous, evolutionary adaptation to the threats confronting them as (or, better yet, well before) those threats actually arise. Therefore, "the people" must be able quickly to acquire up-to-date "Arms" at least equivalent, and preferably superior, in effectiveness to those that might be fielded by either: (i) foreign aggressors—which "the Militia of the several States" might have to oppose in fulfillment of their duty to "repel Invasions"; or (ii) rogue elements in this country's own regular Armed Forces or professional police departments—which the Militia might be required to confront in fulfillment of their duties "to execute the Laws of the Union" and to "suppress Insurrections".[2826]

Necessarily, then, "the right of the people to keep and bear Arms" must allow for, encourage, and protect from "infinge[ment]" the on-going application of imagination, innovation, invention, and improvement with respect to the "Arms" "the people" possess. WE THE PEOPLE must be at liberty to demand, and the commercial market free to supply, not only "Arms" that are particularly suitable for the military, *para*-military, and police aspects of Militia service according to the highest standards of the present day (such as contemporary M-16 automatic rifles), and not only various "substitute standards" that "the people" can stockpile against any conceivable emergency (and perhaps use primarily for other than standard Militia purposes, such as hunting, target shooting, and personal self-defense), but also entirely new firearms or even types of firearms that exceed current military, *para*-military, and police requirements. No plausible reason exists why revitalized "Militia of the several States"—with membership in the tens of millions throughout the country, including large numbers of individuals imbued with originality, creativity, intelligence, and practical skills—with large discretionary budgets drawn from their collection of internal fines—with widely differing "homeland-security" challenges and consequently missions in each State—and therefore with the ability and incentive to experiment—should not be interested in and capable of developing an extremely wide variety of new firearms, ammunition, accoutrements, and other equipment, as well as tactics for employing them.

(5) Finally, should any political controversy arise over exactly what "Arms" the Second Amendment guarantees to "the people" "the right * * * to keep and bear"—for example, with public officials declaring that "'dangerous and unusual weapons'" which are not "'in common use at the [present] time'" can be banned, while "the people" demand a right to possess *all* "Arms" which are in any way suitable for service in "well regulated Militia", those "Arms'" supposedly "'dangerous and unusual'" character notwithstanding —"*the people" themselves, rather than their mere representatives, must have the last word*. After all, "the people" hardly enjoy a "right" to "Arms", if officialdom may define that term to extinction at pleasure.

[2826] U.S. Const. art. I, § 8, cl. 15. *See* J. Story, *Commentaries on the Constitution*, *ante* note 576, Volume 2, § 1897, at 646.

(a) As surprising as it may seem in an era in which "judicial supremacy" is widely mistaken for Holy Writ,[2827] as to "Arms" and everything else this is *the* fundamental rule of constitutional interpretation. As America's Founders learned from Blackstone, "whenever a question arises between the society at large and any magistrate vested with powers originally delegated by that society, it must be decided by the voice of the society itself: there is not upon earth any other tribunal to resort to".[2828] So, when WE THE PEOPLE "ordain[ed] and establish[ed] th[e] Constitution",[2829] they knew that "[t]he power to enact carries with it *final* authority to declare the meaning of the legislation".[2830]

THE PEOPLE never surrendered that authority to public officials. Indeed, they *could not have* surrendered it. The Declaration of Independence attests that "whenever any Form of Government becomes destructive of [men's unalienable Rights], it is the Right of the People to alter or to abolish it", and "when a long train of abuses and usurpations * * * evinces a design to reduce the[People] under absolute Despotism, it is their right, it is their duty, to throw off such Government". Arising out of "the Laws of Nature and of Nature's God", this "right" and especially this "duty" remain with "the People" always. Self-evidently, in such circumstances "the People" may exercise "their right" and fulfill "their duty" against rogue public officials *notwithstanding whatever those officials may claim about the alleged lawfulness of their actions*. But how can "the People" reliably identify such officials' actions as "becom[ing] destructive" of their "unalienable Rights", and constituting "a long train of abuses and usurpations", unless it lies within *their very own* "right" and "duty" to determine, *by and for themselves and with finality*, the extent to which those acts violate the Constitution, and therefore unless it lies within *their very own* "right" and "duty" to determine, *by and for themselves* ***and with finality in both fact and law***, what the Constitution actually means, and how in particular circumstances it applies?

(b) In addition to the general rule, the Second Amendment explicitly reserves to "the people" the authority to determine with specificity and finality what "Arms" it protects. This is no merely whimsical license, because any such determination must comport with the *pre*-constitutional principles that define "[a] well regulated Militia". Yet, even subject to these standards, in the final analysis "the right * * * to keep and bear Arms" is "the right *of the people*", and of no one else. To be sure, in the necessary and proper exercise of their powers, public officials may define "Arms" in conformity with *pre*-constitutional principles—as, for

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[2827] *Contrast* Edwin Vieira, Jr., *How To Dethrone the Imperial Judiciary* (San Antonio, Texas: Vision Forum Ministries, 2004).

[2828] *Commentaries on the Laws of England, ante* note 142, Volume 1, at 212.

[2829] U.S. Const. preamble.

[2830] Propper v. Clark, 337 U.S. 472, 484 (1949) (emphasis supplied).

example, when Congress "provide[s] for * * * arming * * * the Militia".[2831] But any attempt by rogue officeholders to define "Arms" in some manner *not* in conformity with *pre*-constitutional principles "infringe[s]" "the right * * * to keep and bear Arms". After all, if officials may dictate at discretion which "Arms" "the people" are allowed "to keep and bear" *and particularly which they are not*, then "the right * * * to keep and bear Arms" reduces to nothing more than those officials' temporary and ever-mutable, ever-reducible grant to "the people". It becomes a "right" which officials cannot possibly "infringe[ ]", because they alone define its content.

(c) Finally, the general rule of constitutional construction and the Second Amendment are controlling, not for their own sakes, but because they are instruments to an higher end—namely, that the very survival of "a free State" depends upon WE THE PEOPLE'S supreme authority to define "Arms". Public office presents many temptations, opportunities, and facilities for aspiring usurpers and tyrants. And their own amorality, arrogance, avarice, ambition, and appetite for abusive powers never counsel such men to obey the law. So resistance to their schemes and shenanigans must be imposed *ab extra*. To prove effective, though, "checks and balances" must be *entirely* outside of their control, securely in the hands of other individuals with the greatest incentives to apply them seasonably and forcefully. The ultimate "checks and balances" against usurpation and tyranny are WE THE PEOPLE themselves, thoroughly armed and aware of their situation, authority, and power. This is largely a matter of necessity. THE PEOPLE are the usurpers' and tyrants' intended victims. THE PEOPLE can count on no succor other than an appeal to "the Laws of Nature and of Nature's God"—and in the final analysis "God helps those who help themselves".[2832] Inasmuch as "'[p]olitical power grows out of the barrel of a gun'",[2833] the only way in which THE PEOPLE can adequately defend themselves against political oppression that itself grows out of the barrel of a gun is to deploy more guns, more resolutely, than the oppressors and their minions can. Such a disproportion of potential firepower can be marshaled only if THE PEOPLE are thoroughly organized and armed in "well regulated Militia". Which requires that THE PEOPLE always retain the ability "to keep and bear" whatever "Arms" they deem necessary and proper for Militia service. Which necessitates that the ultimate power to decide what "Arms" THE PEOPLE should possess remains solely in THE PEOPLE'S own hands, entirely out of public officials' control.

Political common sense counsels that, "when the contest is between the magistrate and the people * * * the question is only, whether the magistrate should depend upon the judgment of the people, or the people on that of the magistrate;

[2831] U.S. Const. art. I, § 8, cls. 16 and 18.

[2832] A. Sidney, *Discourses Concerning Government, ante* note 54, at 210.

[2833] *Quotations From Chairman Mao, ante* note 28, at 61.

and which is most to be suspected of injustice".[2834] Today, with respect to "Arms", the "injustice" of public officials is not merely to be "suspected":

> • As a result of *whose* actions have the "Arms" most suitable for Militia service been demonized as "'dangerous and unusual weapons'", and so restricted and regulated that they are not "'in common use at the [present] time'", but are effectively banned from common Americans' possession? The actions of *public officials*.[2835]
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> • To *whom* are these "'unusual weapons'" most "'dangerous'" at the present time? Where they now reside—in the hands of the regular Armed Forces and *para*-militarized police whose first loyalty is to the bureaucracies that pay their salaries—they are perfectly safe *for public officials*. But if recent political history is any guide, in those hands they may prove exceedingly "'dangerous'" *to THE PEOPLE*.[2836]
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> • And *why* have public officials sequestered these "'dangerous and unusual weapons'" in the arsenals of their mercenaries? Out of *knowledge, suspicion, and fear*, surely. Rogue public officials know full well that they are oppressing THE PEOPLE, and intend to continue victimizing them as long as THE PEOPLE submit. Rogue officials suspect, however, that THE PEOPLE have awakened to what is going on, or soon will, and then will attempt to "secure the Blessings of Liberty to [them]selves and [their] Posterity", as the Constitution entitles them to do.[2837] Naturally, then, rogue officials fear "'dangerous and unusual weapons'"—even *any* effective arms in large numbers—that would enable THE PEOPLE to "throw off [an abusive] Government", as it is "their right" and "their duty" to do under "the Laws of Nature and of Nature's God".[2838] That knowledge, suspicion, and fear are the root causes of the official mumbo jumbo which rationalizes banning "'dangerous and unusual weapons'" not "'in common use at the [present] time'". Indeed, that a public official supports a ban on common Americans' possession of these "'dangerous and unusual weapons" supplies conclusive evidence that he *is* a rogue. For no one with no good reason to fear THE

[2834] A. Sidney, *Discourses Concerning Government, ante* note 54, at 225 (emphasis supplied).

[2835] Admittedly, the big media, the *intelligentsia*, and various well-funded factions and other special-interest groups have provided so much assistance that they are all equally culpable, morally, politically, *and legally*. *See* 18 U.S.C. §§ 241 and 242, *and, e.g., In re* Quarles, 158 U.S. 532 (1895); Logan v. United States, 144 U.S. 263, 293-295 (1892); United States v. Waddell, 112 U.S. 76, 77-81 (1884); *Ex parte* Yarborough, 110 U.S. 651 (1884).

[2836] *Compare* Rudolph J. Rummel, *Death by Government: Genocide and Mass Murder in the Twentieth Century* (New Brunswick, New Jersey: Transaction Publishers, 1994), *with* David I. Caplan, "Weapons Control Laws: Gateways to Victim Oppression and Genocide", *in Safeguarding Liberty, ante* note 1225, at 307.

[2837] *See* U.S. Const. preamble.

[2838] Declaration of Independence.

> PEOPLE would not trust them with arms. And no one would have good reason to fear THE PEOPLE who had not harmed, or was not harming, or did not intend to harm them.
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> To be sure, if these "'unusual weapons'" were "'in common use'" in THE PEOPLE'S hands they would inevitably prove "'dangerous'" to the rogue public officials who have usurped Heaven knows how many forbidden powers already, and lust after still more. But even successful usurpers and tyrants can lay no legitimate claim to be forever free from such peril. To the contrary: They deserve it, should expect it at any time of the day or night—and should live every moment of their lives in mortal dread of its arrival.

g. "[T]o keep and bear Arms". That the Second Amendment would not have referred to "*the* right of the people to keep and bear Arms" unless "*the* right" had been quite familiar to Americans in *pre-*constitutional times does not mean that "*the* right" embraces only a single simple idea rather than embodying a multiplicity of perhaps complex claims. "Arms", it has just been shown, is a term easy to define. To elucidate the full meaning of "to keep and bear" requires more subtle analysis, however.

First, from one perspective, "the right * * * to keep and bear Arms" is plainly an unified concept: "*the* right [that is, *one* right] * * * to *keep* ***and*** *bear* Arms [that is, *both* actions as integral parts of the *same* pattern of behavior]". This is the common sense of the matter. Except for collectors and speculators, who acquire and deal in "Arms" which they themselves most likely never even consider using as such, a "right * * * to keep * * * Arms" would be pointless unless the possessor could also "bear" them in some manner for their intended purpose. In almost all cases, an individual "keep[s]" "Arms" *so that* he can "bear" them. Moreover, an individual cannot "bear Arms" at all unless he "keep[s]" them during the time he is "bear[ing]" them; and he cannot conveniently "bear Arms" that he does not "keep" in his possession, ready to "bear". Indeed, if an individual has no "right * * * to keep * * * Arms" at all, because some other party can prevent him from coming into possession of them in the first place, he has no "right * * * to * * * bear Arms", only a revocable license to "bear" them if and how that other party so allows. Thus, because typically an individual "keep[s]" the very "Arms" he intends to "bear", and "bear[s]" the very "Arms" he "keep[s]", "the right * * * to keep * * * Arms" presupposes "the right * * * to * * * bear" them, and "the right * * * to * * * bear Arms" presupposes "the right * * * to keep" them.

Not surprisingly, the full text of the Second Amendment confirms this commonsensical construction. Because the absolute clause of the Amendment controls its interpretation, "keep" and "bear" must be construed in mutually close conjunction. The Amendment guarantees "the right * * * to keep and bear Arms"

so that "the people", individually and collectively, will always be capable of serving in "the Militia of the several States". This requires that they always be able "[*both*] to keep *and* bear Arms", not just in some happenstance fashion, but in a manner suitable for their participation in "*well regulated* Militia" according to *pre*-constitutional principles—which means with "Arms" in their permanent personal possession, ready at all times for "the people" to bring forth into the field for service. Importantly, because the Second Amendment guarantees to "the people" "the right * * * to keep *and* bear Arms" without let or hindrance from public officials, and because the purpose of this guarantee is to maintain "well regulated Militia" in each of the States, therefore the Amendment guarantees to "the people" "the right" to participate in "well regulated Militia"—either (in the normal conditions the Constitution presumes) under the aegis of appropriate statutes enacted by Congress and their States' legislatures, or (upon their representatives' default in times of crisis) under the aegis of the sovereign authority reserved to "the people" through the Tenth Amendment and the Declaration of Independence.

Of course, even an unitary "right * * * to keep and bear Arms" must include a number of subordinate rights, encompassing every particular action that makes up "keep[ing]" and "bear[ing]" as distinct types of behavior.

Second, from another perspective, the phrase "to keep and bear Arms" can be interpreted in a bifurcated manner, to embrace "the right * * * to keep * * * Arms" as a concept separate in certain particulars from "the right * * * to * * * bear Arms". To some degree, both common sense and the principles of the *pre*-constitutional Militia allow for this reading of the Amendment, too. For, in the Militia, although most individuals would both "keep and bear Arms", some would always "keep * * * Arms" but not necessarily always "bear" them (such as Militiamen exempted on the grounds of public office or private occupation from turning out for regular musters, or superannuated individuals who might be called forth only during "alarms"); and some might "bear Arms" who did not necessarily "keep" them (such as poor Militiamen to whom firearms owned by the public were distributed when they were called forth for Militia service, or minors whose parents owned and maintained custody over the firearms their children used to fulfill their duties).

Moreover, because individuals with no direct personal duty in the Militia "to keep and bear Arms"—such as free adult women—were never precluded from possessing and using "Arms" during the *pre*-constitutional era, today such individuals could "keep * * * Arms", or "bear Arms", in various ways unrelated to Militia service. That "the right * * * to keep and bear Arms" is enumerated in the Second Amendment for the vast majority of "the people" who are eligible for the Militia does not mean that the few "people" not so eligible cannot claim a cognate (although perhaps in some particulars different) right of that kind—for, as the

Ninth Amendment commands, "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people".

Overall, then, to examine all of the possibilities, the meanings of both "keep" and "bear" should be treated separately.

(1) "[T]o keep * * * Arms". "[T]o keep" has many obvious meanings relevant to a "right" to "Arms", including: "[t]o retain", "[t]o have in custody", "not to let go", "[t]o preserve in a state of security", "[t]o protect; to guard", and simply "[t]o have in the house".[2839] Thus, "to keep * * * Arms" is a rather broad, yet also a remarkably precise, concept. Coupled with "the right *of the people*", definitions such as "[t]o have in the house", "[t]o retain", and "not to let go" compel the conclusion that "to keep * * * Arms" embraces *average Americans' actual personal physical possession of "Arms"*, not simply their abstract titles to them as their personal property. And, because the Amendment does not temporally limit "the right * * * to keep", this actual personal physical possession is to be *permanent*.

This is not the result of an accidental choice of words. If the Amendment guaranteed (say) "the right * * * [*to own*] * * * Arms", rogue public officials could concede individuals' claims to *formal ownership*, yet also deny them any right to *untrammeled actual personal physical possession*, of those very "Arms", and thereby deprive them of all of the legitimate *uses* such possession would allow, except under whatever constraints suited those officials' fancies. In contemporary judicial jargon, private ownership would be recognized in principle, but would be "regulated" in practice, perhaps unto its effective extinction. Actual legal ownership of "Arms" is not necessary for their possession; but without actual possession (notwithstanding ownership) their *use* is impossible. And the Second Amendment's goal is their *use* by "the people" themselves whenever "the people" determine the need for it.

Definitions of "to keep" such as "[t]o have in custody", "[t]o protect; to guard", and "[t]o preserve in a state of security" go even further, indicating "the people['s]" *permanent and complete legal authority* to retain the personal physical possession of "Arms", because the Amendment excludes or exempts from its prohibition against "infringe[ments]" *no* individuals, offices, or institutions of *any* kind, at *any* time, or for *any* reason.

The best way to harmonize definitions of "keep" such as "[t]o have in the house" with definitions such as "[t]o have in custody"—which connect personal physical possession of "Arms", on the one hand, with specific legal authority as to "Arms", on the other—is to conclude that "the right * * * to keep * * * Arms" relates *primarily* to "the people['s]" ability to participate in "well regulated Militia". The Justices in the majority in the *Heller* case reversed this conclusion. They

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[2839] S. Johnson, *Dictionary*, *ante* note 50, definitions 1, 2, 3, 4, 5, and 23 in the First Edition (1755), and 1, 2, 3, 4, 5, and 22 in the Fourth Edition (1773), respectively.

contended that "[t]he phrase 'keep arms' was not prevalent in the written documents of the founding period that we have found, but there are a few examples, all of which favor viewing the right to 'keep arms' as an individual right unconnected with militia service." The Justices did concede that "militia laws of the founding period * * * required militia members to 'keep' arms in connection with militia service". Notwithstanding that, they opined that "'[k]eep arms' was simply a common way of referring to possessing arms, for militiamen *and everyone else*".[2840] Obviously, though, the Justices forgot that "[a] well regulated Militia" includes just about "everyone". In any event, no matter whom they might have imagined "everyone *else*" to be, they explicitly admitted that "the right * * * to keep * * * Arms" *can and does* relate to "militia members"—that is, the part of WE THE PEOPLE eligible to participate in "well regulated Militia", who "keep * * * Arms" in anticipation of and readiness for Militia service. Moreover, because "the right * * * to keep * * * Arms" appears in an Amendment that links it instrumentally to "[a] well regulated Militia", the only plausible conclusion is that *the Constitution's primary concern* with the "keep[ing]" of "Arms" relates to "the people" eligible for the Militia and *not* to "everyone *else*". If "everyone *else*" were its focus, its nominative absolute clause would be not only unnecessary but even misleading.

In addition, plainly contrary to the notion floated by the majority in *Heller*, "the right * * * to keep * * * Arms" does *not* relate to "*everyone else*" without exception. For the most prominent example, the Second Amendment does *not* apply to the Armed Forces as such. Distinguishably from members of the Militia, members of the Armed Forces can claim *no* right even to temporary personal possession (let alone ownership) of the firearms, ammunition, and accoutrements with which the General Government may supply them, except in conformity with the "Rules for the Government and Regulation of the land and naval Forces" that Congress "make[s]".[2841] Rather, upon the lawful command of their superior officers at any time, regular soldiers and sailors must lay down whatever arms they happen to possess. In contrast, members of the Militia who possess *their own* arms can *never* be compelled to surrender them to public officials, even when they may be properly exempted from part or all of their Militia duties because of physical or mental disability, superannuation, or other reason consistent with "the common defence" and "the general Welfare".[2842]

If Congress or a State's legislature supplies the Militia with *public* arms, it must invest every Militiaman who receives such arms with actual personal physical possession thereof—that is, recognize his "right * * * to keep * * * [those] Arms"—throughout his period of service. True enough, because public arms always

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[2840] 554 U.S. at 582-583 (Scalia, J., for the Court) (footnote omitted; emphasis in the original).

[2841] *See* U.S. Const. art. I, § 8, cl. 14.

[2842] U.S. Const. preamble.

remain public property in terms of ownership, Militiamen who receive them should deliver those arms to their Militia officers as soon as their own service in the Militia ends or when other Militiamen may need those arms (for example, in the case of rotation in duty). But, save for those unavoidable (and presumably short) periods of time during which Militia officers transfer possession from one Militiaman to another, public arms should never leave the personal custody of *some* Militiaman required to employ them in the fulfillment of his own Militia duties. While they are being used for Militia service, public arms must be treated as each Militiaman's personal property in terms, not only of actual possession, but also of a right to possession.[2843]

These arrangements make perfect practical and political sense. The Founders recognized that "[a] well regulated Militia" requires the full participation of *all* eligible individuals within the community, which demands that *each and every* such individual be guaranteed a "right * * * to keep * * * Arms". For any individual's ability "to * * * bear Arms" could easily be frustrated if rogue public officials simply denied him possession of "Arms" by sequestering them in public armories or magazines, from which they would be handed out only to the officials' cronies and partisans, thereby destroying the Militia in order to make room for a species of Praetorian Guard or *Shutzstaffel*. *The only way to insure that everyone in the community is able "to * * * bear Arms" in the Militia whenever his own service is "necessary to the security of a free State"—which may be at* ***any*** *time—is to insure that everyone in the community is able "to keep * * * Arms" by him at* ***all*** *times.*

Furthermore, an individual's "right * * * to keep * * * Arms" implies more than just "hav[ing Arms] in [his] house". "[T]he people" have a constitutional right and duty "to keep * * * Arms" so that they are will be able "to * * * bear Arms" whenever necessary. "[T]he people" cannot "bear Arms" without access to "Arms". "[T]he right * * * to keep * * * Arms" presupposes, however, that an individual can always obtain suitable "Arms", because one cannot "keep" what one cannot procure in the first place. So, if "the right * * * to keep * * * Arms" is to have any practical effect, it must include the right to acquire "Arms". Which means that *sufficient sources of suitable "Arms" must always be available to "the people" everywhere throughout America*. Now, "Arms" can be acquired lawfully from two sources: the government and the free market. The Constitution delegates to Congress the power and duty "[t]o provide for * * * arming * * * the Militia"[2844]—by causing the General Government to provide sufficient arms to the States or to individual Militiamen; by directing each State to provide "Arms" to her own Militia; by

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[2843] Although Militiamen's personal possession of crew-served armaments presents its own practical complexities, it should nonetheless be guided by the same rule: namely, that in some effective manner *the crew* itself must retain possession of the arms it uses.

[2844] *See* U.S. Const. art. I, § 8, cl. 16.

requiring "the people", as individuals, to provide themselves with "Arms" from the free market; or by some combination of two or more of these means. Interestingly enough, were Congress to require "the people" to arm themselves in the free market, its action would not exemplify what is called "deregulation", but would simply recognize that today, just as in *pre-*constitutional times, the success of any comprehensive "regulation" of the Militia necessitates reliance on the free market. If, however, Congress fails, neglects, or refuses to fulfill its duty "[t]o provide for * * * arming * * * the Militia", then each of the States may arm her own Militia, or direct her own people as individuals to do so themselves in the free market, or both.[2845] And if both Congress and the States' governments fail, neglect, or refuse to arm "the Militia of the several States", in whole or in part, then "the people" themselves not only may, but also *must*, do so—because "[a] well regulated Militia, being necessary to the security of a free State", cannot be left in abeyance through the defaults or derelictions of incompetent or rogue public officials. This means that "the people" must never find themselves in the position of having to depend entirely upon public officials—and therefore "the right * * * to keep * * * Arms" must include a "right of the people" to a *truly free* market in "Arms" *at all times*.

Self-evidently, though, no market can be *truly* "free" to supply suitable equipment for all of the purposes of the Militia if rogue officials in either the General Government or the States can prohibit private manufacturers, distributors, and retailers from providing common Americans with firearms equivalent to those the regular Armed Forces and *para-*militarized police carry. For, in that event, such officials will prevent "the people" from arming themselves directly if their governments fail, neglect, or refuse to so—and thus will deny "the people" "the right * * * to keep * * * [such] Arms"—and thus will disable "the people" from participating in "well regulated Militia"—and thus will subvert "the security of a free State". "[T]he right of the people to keep * * * Arms", then, must include not only "the right" of all of "the people" to possess, and therefore to acquire, "Arms", but also the right of some people in particular to design, manufacture, distribute, sell, and repair "Arms" for everyone else's use. For how could "the people" have a "right * * * to keep * * * Arms" if they could not acquire them in the first instance by their own actions? How could "the people" acquire "Arms" that were not readily available to them? How could "Arms" be available to "the people" that were not produced for and distributed to them? And what purpose would it serve for "the people to keep" unserviceable or outdated "Arms"?

The affirmative rôle of public officials in all of this is merely to assist "the people" in "keep[ing] * * * Arms", by supplementing, but never attempting to supplant, the free market—for example, by establishing public armories or other

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[2845] U.S. Const. amends. II and X.

facilities for the manufacture and repair of "Arms" where private services are insufficient; by selling the regular Armed Forces' surplus firearms, ammunition, and accoutrements to Militiamen; and by supplying "Arms" to Militiamen too poor to purchase them on their own. Any more extensive involvement is both historically unsupportable and politically dangerous. Particularly the latter. *For "[t]he right of the people to keep * * * Arms" can never be secure unless and until—and will remain secure only while—WE THE PEOPLE have access to a sufficient source of all suitable "Arms" with which public officials cannot interfere.* The negative rôle of public officials, simply put, is to stay out of the way in every other way: neither to suppress, nor to stifle, nor to subvert access by all Americans eligible for the Militia to a free market in all firearms that are or can be made suitable for Militia service.

To be sure, today "a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large".[2846] But that such "sophisticated arms"—such as heavy machine guns, mortars, *anti*-tank and *anti*-aircraft rockets, and even light artillery—might be "highly unusual" does not mean that "the people" could not or should not "keep" them, in the same sense they could and should "keep" ordinary rifles, pistols, shotguns, and the like. Even if such "unusual" "Arms" needed crews, rather than simply individuals, to serve them, they could nonetheless be "ke[pt]" in "the people['s]" possession, if not in their own homes then at least in Local armories under the crews' control.

(2) "[T]o * * * bear Arms". Even during the Founding Era, the transitive verb "bear" "[wa]s a word with such latitude, that it [wa]s not easily explained".[2847] It can mean simply "[t]o * * * carry", in the sense of physical possession and transportation.[2848] Or, in a more complex vein, "[t]o carry *as a mark of authority*" or "[t]o carry *as in trust*"[2849]—importing the dual signification of physical possession coupled with some particular legal position, power, and even duty. The latter definitions are especially fitting with respect to "the right of the people to * * * bear Arms", because in relationship to "well regulated Militia" "the people" "carry [Arms] as a mark of [their own sovereign] authority", and "carry [them] as in trust" for "the security of a free State".

"To bear arms" has several meanings, too. It can mean simply "[t]o possess or carry * * * to wear; as, to bear a sword "[2850]—under which definition "the right

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[2846] Heller, 554 U.S. at 627 (Scalia, J., for the Court).

[2847] S. Johnson, *Dictionary, ante* note 50, definition 1 in both the First (1755) and the Fourth (1773) Editions.

[2848] *Id.*, definition 3 in both the First (1755) and the Fourth (1773) Editions.

[2849] *Id.*, definitions 4 and 7, respectively, in both the First (1755) and the Fourth (1773) Editions (emphases supplied). *Accord, Webster's Revised Unabridged Dictionary, ante* note 11, at 128, definition 6.

[2850] *Webster's Revised Unabridged Dictionary, ante* note 11, at 128, definition 6. *Accord, The Compact Edition of the Oxford English Dictionary*, *ante* note 11, Volume 1, at 183, definition 6.a.

to * * * bear Arms" takes on the color of an "individual right". Or, more specifically, "to bear arms" could mean to carry in a military organization or for a military purpose[2851]—under which definition "the right * * * to * * * bear Arms" appears as a "collective right". And, of course, both definitions largely overlap, because people who simply "carry about * * * or wear * * * weapons of * * * defence" perform through their acts of personal self-defense a quintessential function of the Militia: namely, the execution of the law against aggressors at the very moment of their aggression.

In historical context, however, the phrase "to * * * bear Arms" *in the Second Amendment* should primarily be taken in the "collective" sense. As a brief *amicus curiae* in *Heller* pointed out,

> [t]he term "bear arms" is an idiomatic expression that means "to serve as a soldier, do military service, fight." * * *
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> * * * At the time of the Second Amendment's adoption, the word "arms" had an overwhelmingly military meaning. * * *
>
> Examples of the idiomatic usage of "bear arms" during the time of the founding abound. In each instance where "bear arms" (or "bearing arms" or "bear arms against") is used without additional language modifying the phrase, it is unquestionably used in its ordinary idiomatic sense. * * *
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> For example, the Declaration of Independence denounces the British monarch for "constrain[ing] our fellow Citizens taken Captive on the high Seas to *bear Arms against* their Country." * * * No one doubts that "bear Arms against" in that passage means "to be engaged in hostilities with."
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> * * * [T]he term "bear arms" or "bearing arms" appears 30 times in the Library of Congress database containing all of the official records of debates in the Continental Congress and U.S. Congress between 1774 and 1821. * * * In each instance the usage was unquestionably the military usage. * * * Taking that research a step further, [one] historian * * * surveyed the use of the term "bear arms" (with and without qualifying language) in books, pamphlets, broadsides and newspapers from the period between the Declaration of Independence and the adoption of the Second Amendment. He found 115 texts employing the term, all but five of which were used in the military sense. * * * We have reviewed the "bear arms" language in the[se] texts * * * and concluded that in four of the five instances of non-military use, the use was expressly qualified by further language indicating a different meaning (e.g., "bear arms in time of peace" or bear arms . . . for the purpose of killing game"). Of the 110

[2851] *See, e.g., Webster's New International Dictionary, ante* note 330, at 238.

> that were used in a clearly military context, 99 employed the idiom in its ordinary, unadorned state, "bear arms" or "bear arms against," without any additional specifying language. The remaining 11 all used additional specifying language (e.g., "for the purposes of"). We otherwise have been unable to find unidiomatic uses of the phrase "bear arms" or "bearing arms" or "bear arms against" from the founding era in the United States. But even if one were to produce a few instances of actual non-idiomatic uses, that would not affect the meaning of the idiom in the Second Amendment.
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> * * * By simply (i) giving the idiom "bear Arms" the meaning it had at the time (to serve as a soldier, do military service, fight), (ii) reading the term "well regulated Militia" as it was used at the time (to refer to a militia that not only is subject to regulation under the militia laws, but also well functioning and disciplined), and (iii) looking to the absolute clause's statement of causation (the right to "bear Arms" is protected to perpetuate "a well regulated Militia) to determine the scope of military service covered by the right (that which is in a well regulated Militia), one finds a balanced text that protects the right of the people to serve in a well regulated militia and keep arms for such service.[2852]

In response to this evidence, the Justices in the majority in *Heller* conceded that "at the time of the founding" "an idiomatic meaning" of the phrase "to * * * bear Arms" was "'to serve as a soldier, do military service'". But they then claimed that this "idiomatic meaning * * * was significantly different from [that phrase's] natural meaning", and that the phrase "bear Arms" "*unequivocally* bore that idiomatic meaning only when followed by the preposition 'against,' which was in turn followed by the target of the hostilities".[2853] This, however, is poor historical fiction. For example, throughout the 1600s and 1700s, every American who appeared at a Militia muster for purposes of training with firearms during times of peace was surely "bear[ing] Arms", but just as certainly was not "bear[ing]" them "against" anyone in particular.

It may, of course, be true, as the majority in *Heller* pointed out, that during the 1700s the phrase "bear arms" was "frequently used * * * in nonmilitary contexts" in both legal and *non*-legal sources.[2854] But the context in which that phrase appears *in the Second Amendment*—which in the final analysis is the only

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[2852] BRIEF FOR PROFESSORS OF LINGUISTICS AND ENGLISH, *ante* note 2622, at 18-21, 23-24, 29 (footnote omitted). Admittedly, this was somewhat porous research, because it investigated only the periods from 1774 to 1821 in one instance and from 1776 to 1791 in the other—with the material from 1792 to 1821 being historically and legally irrelevant in any event because the usages of words from 1792 onwards could not have influenced events before that date.

[2853] 554 U.S. at 586 (Scalia, J., for the Court) (emphasis in the original).

[2854] *Id.* at 587-588.

context that counts—is plainly a "military" one: namely, with explicit connection to "[a] well regulated Militia". So the use of the phrase in *other* contexts is hardly probative, let alone dispositive, of its meaning in the Amendment. In the light of the Amendment's nominative absolute clause, "to * * * bear Arms" must primarily (perhaps even to the point of exclusivity) relate to participation in "well regulated Militia" by "the people". That is, ***the "right of the people to * * * bear Arms" (and, as well, "to keep * * * Arms" for the purpose of "bear[ing]" them) entails "the right of the people" to have and to serve in "well regulated Militia" composed of "the body of the people" themselves***[2855]—and not to be told by rogue Members of Congress, State legislators, or judges that no such Militia are to be had.

This is of the very highest significance. The majority of the Justices in *Heller* opined that, to "[g]iv[e] 'bear Arms' its idiomatic meaning would cause the protected right to consist of the right to be a soldier * * * —an absurdity that no commentator has ever endorsed".[2856] The question, however, is what *the Constitution*, not some commentator or gaggle of jurists, "endorse[s]". If "the ablest * * American statesmen" in history incorporated such a right into the Constitution, then as a matter of law it cannot be deemed "absurd", notwithstanding that it has been neglected, suppressed, and even ridiculed by feckless or faithless public officials over many years.[2857] The Second Amendment guarantees "the right of the people" not simply to be armed as atomistic individuals ("keep * * * Arms") but also to employ their equipment ("bear Arms") in a particular manner: not "the right to be a soldier" in some general sense, but "the right to be a soldier [*specifically in* '[a] *well regulated Militia*']". The Amendment protects *that* "right" because it aims ultimately at "the security of a free State", and because "the people" must provide this "security" themselves through Militia in which they *all* participate in one manner or another.

By dismissing as "an absurdity" the very collective activity—the participation of "the people" in "well regulated Militia"—which the Second Amendment explicitly declares to be "necessary to the security of a free State", the majority of the Justices in *Heller* exposed themselves as "obviously and flatly opposed to the manifest truth" of the matter (which is one definition of "absurdity").[2858] Although manifest madness thus pervaded their method, nonetheless a malignant method lurked within that madness. For, by tossing them the insubstantial crust of an "individual right" for which they had so long hungered, the Justices won the plaudits of the Amendment's self-styled defenders, even as they withheld from "the people" the invaluable collective loaf of the "'[p]olitical power

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[2855] *See* Virginia Declaration of Rights (1776) art. 13.

[2856] 554 U.S. at 586 (Scalia, J., for the Court).

[2857] *See* Lake County Commissioners v. Rollins, 130 U.S. 662, 672 (1889).

[2858] *See Black's Law Dictionary, ante* note 368, at 24.

[that] grows out of the barrel of a gun'",[2859] without the nourishment from which WE THE PEOPLE'S sovereignty will soon waste away. (In point of fact, *all* of the Justices concurred on this point—the five in the majority, because they jury rigged the specious "individual right"; the four in the minority, because they denied that *any* true "right * * * to keep and bear Arms", exempt from extensive "regulation" by public officials, exists at all.)

Yet, notwithstanding that the primary purpose of "the right of the people to * * * bear Arms" is to secure their right to serve in "well regulated Militia", the Second Amendment also protects the "bear[ing of] Arms" even when an individual eligible for the Militia is not fulfilling some Militia duty in the field. Obviously, "bear[ing] Arms" from a place of purchase to an individual's home must be deemed to be part and parcel of his Militia duty to "keep * * * Arms". Otherwise, how could anyone eligible for the Militia ever assume possession of a firearm he is to "keep" in the location where he is to "keep" it? But that firearm need not thereafter always be "ke[pt]" sequestered at home until its owner is called forth for actual Militia duty. No *pre*-constitutional Militia statute ever required everyone to lock their "Arms" away unless on active duty, or ever penalized anyone for "bear[ing]" his "Arms" outside of his home for lawful purposes other than Militia service. This, because essentially all imaginable lawful purposes for which firearms may be carried abroad—such as repair and improvement, target-practice, and hunting and other "shooting sports"—are related to each individual's responsibility to be prepared to serve effectively in "[a] well regulated Militia". A firearm which is mechanically unsound, and an individual who is personally unskilled in its use, after all, are equally unserviceable for the Militia.

Because of the misplaced emphasis put upon it in *Heller*, personal self-defense needs to be treated as a special case. If one has a right to possess some object that *can* be used for self-defense in a particular place and at a particular time, he has a right to use it for that purpose then and there, because the right of self-defense is absolute.[2860] Certainly no *pre*-constitutional Militia statute ever denied any individual the right to employ in defense of himself (or anyone else) "Arms" that he possessed for Militia purposes. Now, an act of self-defense never amounts simply "to keep[ing] * * * Arms". Rather, even within one's own home, it is always a form of "bear[ing] Arms" for the fundamental Militia purpose of enforcement of the law against an aggressor. So, too, for an act of self-defense outside of the home. For example, when an individual is transporting a firearm for some legitimate reason (such as those suggested above), and therefore has a right to possess that firearm under those circumstances, he can use it for personal self-defense with perfect propriety. Certainly no *pre*-constitutional Militia statute ever denied that, either. So

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[2859] *Quotations From Chairman Mao, ante* note 28, at 61.

[2860] *See* W. Blackstone, *Commentaries on the Laws of England, ante* note 142, Volume 3, at 4.

why may an individual not "bear Arms" outside of his home for the very purpose of personal self-defense? Certainly no *pre*-constitutional Militia statute ever prohibited such conduct. To be sure, under *pre*-constitutional English law "[T]HE offence of * * * *going armed*, with dangerous or unusual weapons, [wa]s a crime against the public peace, by terrifying the good people of the land".[2861] But, in a society in which everyone has a constitutional duty to be armed, an individual who merely "bear[s]" a firearm outside of his home for purposes of self-defense—especially if he carries it concealed from common observation—should not "terrify" anyone not already needful of psychiatric care.[2862]

Finally, one restriction on "the right of the people to * * * bear Arms" inheres within that "right": namely, the *duty* to "bear Arms [*sufficient for Militia service*]". If essentially any firearm can in principle, and especially during revitalization of the Militia should in practice, suffice for Militia service even though it may not be the best firearm among all types, or even if better firearms in its particular class are known to exist, it nevertheless must be a firearm that *actually works* and is *actually usable for the particular Militia duty to which its possessor is assigned*. So firearms Militiamen themselves supply when called forth for service will need to be approved by their officers in that context. Because their ultimate duty will be to ensure that the Militiamen in their Companies are armed with *something* in proper working order, though, during revitalization Militia Captains will be neither arbitrary nor punctilious in grading their men's firearms for fitness, but will likely approve whatever is available, if it is mechanically capable of functioning, because the wholly unacceptable alternative may be that some of their men will field no firearms at all.

h. "[S]hall not be infringed". The ultimate goal of the Second Amendment—indeed, of the whole Constitution and especially the Declaration of Independence—is "a free State" at every political level throughout America. To provide "security" for such a "State", "[a] well regulated Militia" is "necessary". For "[a] well regulated Militia" to exist, "the people" themselves must exercise "the right * * * to keep and bear Arms". And in order for "the people" themselves to exercise that "right" freely and fully, the parties who might "infringe[ ]" it must be *effectively* prohibited by law from doing so. The Amendment does not define *what* constitutes an "infringe[ment]" of "the right of the people to keep and bear Arms", and does not identify *by whom* that "right * * * shall not be infringed". Those matters are easily specified, however.

(1) A "right" is generally defined as "[a] legal relation between two persons" that entails "[a]n enforceable claim [by one] to performance (action or forbearance)

[2861] *Id.*, Volume 4, at 148.

[2862] *See ante*, at 1093-1103.

by another".[2863] Thus, to "infringe" a right means to deny, to some injurious degree, such "[a]n enforceable claim". That denial may arise directly through the infringer's refusal to perform some "action or forbearance", which prevents the holder of the right from exercising it. Such behavior in effect denies the existence of the right itself. Or the infringement may arise indirectly through a third party's disallowance of a legal remedy for the infringer's wrongful conduct. For "'every right, when withheld, must have a remedy'"[2864] —because "[a] right without a remedy is as if it were not. For every beneficial purpose it may be said not to exist."[2865] Such behavior in effect denies the efficacy of the right by preventing its enforcement.

Infringements of *constitutional* rights usually are effected by rogue public officials acting under color of law, through their promulgation of abusive "regulations". Any purported "regulation" of a right that is not inherent in that right (by way of its definition) or necessary and proper for its exercise (by way of material or legal assistance) infringes it. The definition of "the right of the people to keep and bear Arms" (delineated above) sets the limits to allowable regulation. *First*, any reasonable regulation that *requires* "the people to keep and bear Arms" suitable for Militia service—including all regulations specifically with respect to "Arms" that are necessary and proper for organizing, arming, disciplining, training, and governing "[a] well regulated Militia"—is permissible, because that "right" is also a *duty* which must be performed if "the Militia of the several States" are to be "well regulated" through WE THE PEOPLE'S participation in them. *Second*, any regulation, even though not necessarily connected in a direct manner to "[a] well regulated Militia", that *actually assists or encourages* "the people to keep and bear Arms" is permissible.

(2) "[T]he right of the people to keep and bear Arms, *shall not be infringed*" imposes a *duty* not to interfere, and establishes a *disability* (or absence of power) to interfere, on all others with respect to exercise of that "right" by each and every individual among "the people". Others may, however, employ whatever rights, powers, and privileges they have in order to *assist* "the people" in that exercise. So, using the taxonomy of the Tenth Amendment (which focuses on powers)—

(a) The original Constitution delegated no power to the United States to "infringe[ ]" "the right of the people to keep and bear Arms"—and if it had purported to delegate any such power, the Second Amendment subsequently nullified that delegation. So the sole power (and duty) of the General Government in the premises is to ensure that "the Militia of the several States" be "well

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[2863] A. Corbin, "Legal Analysis and Terminology", *ante* note 23, at 167.

[2864] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803), *quoting* W. Blackstone, *Commentaries on the Laws of England*, *ante* note 142, Volume 3, at 109.

[2865] United States *ex rel.* Von Hoffman v. City of Quincy, 71 U.S. (4 Wallace) 535, 554 (1867). *Accord*, Poindexter v. Greenhow, 114 U.S. 270, 303 (1885).

regulated" with respect to "Arms", by "provid[ing] for * * * arming" them,[2866] according to the Amendment's principle that "the people" themselves must always "keep and bear Arms" for that purpose.

(b) The original Constitution implicitly prohibited the States as well from exercising any power to "infringe[ ]" "the right of the[ir] people to keep and bear Arms". During the *pre*-constitutional era, the Colonies and then the independent States *never* exercised any such abusive power. Even "the exception that proved the rule", Colonial Pennsylvania—which refused over many years to enact proper legislation to settle "[a] well regulated Militia"—never claimed an affirmative power to "infringe[ ]" "the right of [her] people to keep and bear Arms" by prohibiting them from doing so on their own as private parties. And, of course, as an independent State, Pennsylvania finally did establish her own Militia, "well regulated" according to the principles long adopted elsewhere throughout America.[2867] By statute, "the people" in the other Colonies and then the independent States were always organized in Militia and thoroughly armed, usually with firearms they obtained for themselves in the free market. And the Articles of Confederation required the States to "always keep up a well regulated and disciplined militia, sufficiently armed and accoutred".[2868] The complete absence of any evidence that the Colonies and then the independent States ever even attempted to exercise a contrary power to "infringe[ ]" "the right of the[ir] people to keep and bear Arms" provides strong evidence that no one ever imagined such a power to exist.[2869] That being so, the original Constitution could not have implicitly reserved such a nonexistent power to the States. Moreover, even if the Colonies and the independent States had always enjoyed a power to disarm "the people", but simply had never found any occasion to employ it during the *pre*-constitutional period, they always did exercise the contrary power in order to settle and regulate their Militia, according to the principle of near-universal armament of "the people". So, when the original Constitution incorporated "the Militia of the several States" as permanent components of its federal system—according to the legal principles of their regulation consistently applied throughout the *pre*-constitutional era—it necessarily precluded the States from employing a supposed power to disarm "the people" which would alter the federal system. That is, by incorporating "the Militia of the several States" into the federal system, the original Constitution turned the power which the Colonies and independent States had always exercised to arm "the people" into a duty (as well as a power), and

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[2866] U.S. Const. art. I, § 8, cl. 16.

[2867] *See ante*, at 87-88 and 845-848.

[2868] Arts. of Confed'n art. VI, ¶ 4.

[2869] *See, e.g.*, Federal Power Commission v. Panhandle Eastern Pipe Line Company, 337 U.S. 498, 513 & note 20 (1949); Printz v. United States, 521 U.S. 898, 905, 907-910 (1997).

transformed the power which the Colonies and independent States arguably might have exercised (but never did) to disarm "the people" into a disability (or confirmed it as such). The Second Amendment then amplified the States' duty and disability with its special emphasis on the necessity "to the security of a free State" of "well regulated Militia" founded and operated on "the right of the people to keep and bear Arms".

(c) Thus, where "the right of the people to keep and bear Arms" begins, any and all powers of the General Government and of the States, not exercised in perfect conformity with that "right", either have no beginning or abruptly end. Putting this into the fashionable mumbo jumbo of contemporary "judicial review" that rationalizes the exercise of the General Government's powers—

> *First*, "the right of the people to keep and bear Arms" is not subject to mere "reasonable regulation". Under what the courts denote as their "rational-basis test", "the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators"; "inquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts known or which could reasonably be assumed affords support for it"; and if "the question is at least debatable * * * th[e] decision [i]s for [the legislature]".[2870] Now, most modern "gun-control" legislation has been (and hereafter doubtlessly will be) enacted under color of Congress's power "[t]o regulate Commerce" (or the cognate powers of the States).[2871] As the old saying goes, although this is true it is not right. For the average American's acquisition, possession, and use of firearms, ammunition, and related accoutrements are not just "ordinary commercial transactions". Rather, "the right of the people to keep and bear Arms" connects that equipment inextricably with their participation in "well regulated Militia" that are "necessary to the security of a free State", upon which depends the continuance of an economy characterized by "ordinary commercial transactions". Therefore, the only *constitutionally reasonable* "regulat[ions of] Commerce" with respect to firearms are those which promote, produce, protect, and preserve "well regulated Militia" within each State and throughout America. "[T]he facts" as to what this entails can be "made known or generally assumed" from studying the *pre*-constitutional Militia Acts. The preëminent of these facts is that "well regulated Militia"

[2870] United States v. Carolene Products Company, 304 U.S. 144, 152-154 (1938) (footnote omitted).

[2871] U.S. Const. art. I, § 8, cl. 3.

> are always based upon "the right of the people to keep and bear Arms". Being ascertainable to the highest degree of historical certainty, *these* "facts" are not "debatable". So, by these standards, modern "gun control" lacks any "rational basis within the knowledge and experience of * * * legislators".
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> *Second*, "the right of the people to keep and bear Arms" is not subject to limitation in purported aid of so-called "compelling governmental interests", even by the means arguably "least restrictive" of that "right". For "[a] well regulated Militia" is "necessary to the security of a free State", which is the *most* "compelling governmental interest" possible. And *any* "restricti[on]" on "a free State" is too much, because it renders the State to that degree "[*un*]free".

In sum, the injunction "shall not be infringed" means, at the minimum, that no individual who may be eligible for the Militia—which includes almost all adult Americans, both men and women—may lawfully be denied, deprived, or delayed in the exercise of "the right" to acquire and possess any firearms, ammunition, and accoutrements that could conceivably be employed in some profitable manner in some form of Militia service, somewhere, at some time. *Or, no conditions could possibly exist under which any significant segment of "the people", not enlisted within the regular Armed Forces, must not take up "Arms" in the first instance, or must lay down such "Arms" as they already possess, simply because some public official commands them to do so.* No public official can claim any such power. And no one among "the people" labors under a duty to obey any such unconstitutional command.[2872]

To be sure, contemporary legislators may provide narrow exemptions from some individuals' constitutional *duty* "to keep * * * Arms", *if* those exemptions provably enhance the efficiency and good order of the Militia and otherwise promote "the common defence" and "the general Welfare".[2873] Such exemptions are not inconsistent with the constitutional duty to possess "Arms", because they derive from the very *pre*-constitutional principles which originally defined that duty. Moreover, they have no effect whatsoever on the constitutional "right * * * to keep and bear Arms". For exemptions from a duty are not exclusions from, let alone prohibitions of, the enjoyment of a right. Except in the case of some mentally disabled individuals, it is impossible to imagine an exemption from Militia duty which if waived would detract from "the common defence" or "the general Welfare", and therefore which should not be allowed to be waived by a beneficiary who voluntarily chooses to bear the extra burden as his special personal contribution to "the security of a free State". After all, at the most, a waiver would

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[2872] *See, e.g.*, Norton v. Shelby County, 118 U.S. 425, 442 (1886); Huntington v. Worthen, 120 U.S. 97, 101-102 (1887); *Ex parte* Siebold, 100 U.S. 371, 376-377 (1880).

[2873] *See* U.S. Const. preamble.

simply provide the community with another fully armed member of the Militia. Moreover, an individual exempted from the constitutional duty "to keep * * * Arms" for purposes of immediate Militia service can always invoke the constitutional right to acquire and possess "Arms" simply for *possible* service. The mere status of that individual as exempted from the Militia can never be a basis for his disarmament, because an exemption does not extinguish his *legal obligation* to serve if called—and therefore he always remains a potentially active member of the Militia: If his exemption arose from some severe personal disability, he could possibly be cured. If his exemption were founded upon his superannuation, if still healthy he could volunteer for further service in the Militia. And if his exemption rested on some other ground, it could be disallowed by legislative action, because no exemption from Militia service is of constitutional stature other than the physical impossibility of a Militiaman's performance of any duty whatsoever.

In addition, nothing in the Second Amendment precludes public officials from *affirmatively assisting* individuals to acquire and maintain possession of "Arms" for the purposes of their Militia service. That should be obvious enough from just the inclusion in the original Constitution of the power and duty of Congress "[*t*]*o provide for* * * * arming * * * the Militia",[2874] coupled with the implicit constitutional definition of "the Militia of the several States". As a "further declaratory and restrictive clause[ ]" appended to the original Constitution "in order to prevent misconstruction or abuse of its powers",[2875] the Second Amendment emphasizes that exercise of the power "[t]o provide for * * * arming * * * the Militia" must always result in protection and furtherance of "the right of the people to keep and bear Arms", and therefore must secure *permanent personal possession of those "Arms" by "the people" themselves*. So, to the extent that Congress (or, for that matter, any State) "provide[s] for * * * arming * * * the Militia" by causing *public* "Arms" to be distributed to Militiamen, it must allow—indeed, require—the recipients to maintain personal possession of those "Arms" for as long as they remain eligible for Militia service.

On the other hand, the Second Amendment cannot possibly prohibit Militia officers from conducting inspections along the lines of those performed in *pre*-constitutional times, in order to determine whether or not individuals enrolled in revitalized "well regulated Militia" actually possess the firearms, ammunition, and accoutrements their enlistments require. For in "[a] *well regulated* Militia" compliance with the requirement that everyone other than individuals excused on the basis of conscientious objection or perhaps some other exemption must

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[2874] U.S. Const. art. I, § 8, cl. 16 (emphasis supplied).

[2875] RESOLUTION OF THE FIRST CONGRESS SUBMITTING TWELVE AMENDMENTS TO THE CONSTITUTION (4 March 1789), *in Documents Illustrative of the Formation of the Union of the American States*, *ante* note 1, at 1063.

maintain personal possession of suitable arms in his own home at all times must always be subject to verification at any time.[2876] Thus, because in "[a] well regulated Militia" each member has a *constitutional duty* to be properly armed and accoutred; and because in "[a] well regulated Militia" each member has a further *constitutional duty* to prove the state of his preparedness, such as by submitting to inspections at his home for that purpose; therefore no member of "[a] well regulated Militia" can assert a constitutional right under the Second Amendment to object to such inspections. To be sure, the Fourth Amendment now prohibits "searches" not justified by "Warrants * * * issue[d] * * * upon probable cause, supported by Oath or affirmation". But regular, and even unannounced "spot", inspections at private homes conducted today exclusively for the purposes served by the inspections carried out during the *pre*-constitutional era would not run afoul of that stricture. After all, because the Fourth Amendment was ratified along with the Second Amendment as two parts of the very same Bill of Rights, each must be construed consistently with the other.[2877] Inspections at private homes to determine if individuals possessed the requisite firearms and ammunition in proper working order were part of what being "well regulated" meant with respect to the Militia in those days—and what that term continues to mean in the Second Amendment today, there having been no change in the Constitution on that score in the interim. So, "[a] well regulated Militia" being one the members of which are subject to inspections of their firearms and ammunition, the Fourth Amendment can impose no obstacle to continuation of that practice. Besides, inasmuch as the particular purpose of the Fourth Amendment is to guarantee "[t]he right of the people to be *secure* in their persons, houses, papers, and effects", it could hardly operate to impede a process that ensures the effectiveness of the Militia, which the Second Amendment declares are "necessary to the *security* of a free State" in *all* particulars. And of course, the concern of the Fourth Amendment is with searches for the purpose of discovering "persons or things *to be seized*". Whereas, an inspection conducted with the approbation of the Second Amendment would be for the purpose of assuring that the individuals to be inspected always maintained personal possession of firearms, ammunition, and accoutrements suitable for their Militia service—that they were, in fact, "*keep*[*ing*] * * * Arms" so that they could "*bear* Arms" immediately when called upon to do so—not for depriving them of such possession or preventing them from performing that duty.[2878] This conclusion, however, is apt only insofar as rogue public officials possess no power to disarm WE THE PEOPLE by inventing purported "crimes" for the prevention, investigation, or punishment of which they would claim a further power to search for and seize

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[2876] *See ante*, Chapter 8 (Rhode Island); *and* at 472-480, 648-649, and 652-657 (Virginia).

[2877] *E.g.,* Hostetter v. Idlewild Bon Voyage Liquor Corporation, 377 U.S. 324, 332 (1964).

[2878] Emphases supplied in quotations of the Amendments.

firearms and ammunition as the supposed instrumentalities, fruits, or other evidence of such "crimes".

Finally, the Second Amendment does permit public officials to deny certain individuals in certain situations a right to possess firearms. For example, stolen firearms may be taken from persons not lawfully in possession of them, notwithstanding the possessors' ignorance of their provenance and no matter to what arguably legitimate purposes in the Militia they are being put. Individuals under arrest on suspicion or incarcerated as the result of conviction of a crime may be prohibited from possessing firearms while in custody. Perpetrators convicted of true "[F]ELON[IES]" in the constitutional sense may forfeit any firearms (together with all other personal property) they owned at the time of their convictions for those crimes—although upon their reincorporations into society they should not be prohibited from acquiring possession of new firearms. "[P]art[ies]" sentenced to "slavery * * * as a punishment for crime whereof the[y] * * * shall have been duly convicted" may be prohibited from possessing firearms at all times during which that sentence is in effect.[2879] And individuals who visit inmates or patients, or meet with officials, in a prison, mental institution, or like facility may be required to "check" their firearms with the establishment's security personnel during the time they are within a secured area, so as to minimize the possibility that any of those firearms, by any twist of Fate, could come into any inmate's or patient's possession.

(d) So much for an "infringe[ment]" of "the right * * * to keep and bear Arms" by dint of ordinary legislation. What about extraordinary legislation? An Amendment of the Constitution is an extraordinary legislative act of the individual States, through "Legislatures" or "Conventions", perforce of which the States constituting a *super*-majority bind the rest.[2880] Could not an Amendment of the Constitution simply repeal the Second Amendment (and perhaps, to be fully effective, the three Militia Clauses in the original Constitution, as well)? In a word—*No*.

If repeal of the Second Amendment were taken to negate "the right of the people to keep and bear Arms" entirely, then the very possibility of "well regulated Militia" would cease to exist. What is "necessary to the security of a free State" would no longer be available. With her security hopelessly compromised, each and every erstwhile "free State" in the Union would soon fall into the clutches of a tyranny centrally administered in her own capital, or more likely from the District of Columbia. Common sense counsels, then, that, under a Constitution explicitly dedicated to "secur[ing] the Blessings of Liberty to ourselves and our Posterity",[2881]

[2879] *See* U.S. Const. amend. XIII, § 1. *See ante*, at 748-749, 993-998, and 1011-1013.

[2880] U.S. Const. art. V.

[2881] U.S. Const. preamble.

even a *super*-majority of the States could not have such a power to destroy "a free State" in the dissenting States.

True enough, in the original Constitution the only explicit limitation on Amendments is that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate".[2882] The original Constitution, however, is not America's foundational law. The Declaration of Independence is. The Declaration attests that the political independence—the sovereignty—of the American people arises out of "the Laws of Nature and of Nature's God". Under those "Laws", no "free State" can claim a power to commit political suicide, or to agree with other States to acquiesce in assisted political suicide by majority vote. A power to destroy itself and its citizens, or to allow others to do so, cannot be found among the "*just* powers" that any government could "deriv[e] * * * from the consent of the governed", because "Governments are instituted among Men" to "*secure* [unalienable Rights]", not to allow them to be violated, let alone affirmatively to participate in their violation. If such a "Government" purported to exercise such an "*un*just power[ ]", it would be the people's *duty*, as well as their right, under "the Laws of Nature and of Nature's God", immediately "to throw off such Government, and to provide new Guards for their future security". So, inasmuch as ratification of such an Amendment, by purporting to eliminate all "free States" within America, would constitute the capstone of "a design to reduce the[People of every dissenting State] under absolute Despotism", which would justify their "abolishing" the entire present constitutional "Form of Government" by whatever means were available, no authority even to propose such an Amendment can lurk within the Constitution.

Presumably, the proponents of such an hypothetical Amendment would contend in its defense that "[a] well regulated Militia" is no longer "necessary to the security of a free State" anywhere within America, and that therefore the elimination of "the right of the people to keep and bear Arms" would pose no threat to "the Blessings of Liberty". But is America's actual historical experience consistent with such a claim? For how many decades upon decades have the several States deployed not a single "well regulated Militia" according to *pre*-constitutional principles? And, during that time, have they not steadily deteriorated as "free States" to the point at which they are now on the verge of being submerged within a National *para*-military police state? Perhaps if the *presence* of "well regulated Militia" within the several States had not prevented this outcome, their utility would be doubtful. But surely their *absence* supports the contrary conclusion.

(e) But if both the General Government and the States lack any semblance of original, delegated, or reserved power to "infringe[ ]" "the right of the people to keep and bear Arms", might such a power somehow be "reserved to the people" as

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[2882] U.S. Const. art. V.

a whole?[2883] Certainly it is not reserved within the interstices of the original Constitution or the Bill of Rights, because the Tenth Amendment cannot be construed to contradict the Second.[2884] Perhaps, though, it is reserved *extra*-constitutionally within WE THE PEOPLE'S ultimate sovereign power, perforce of which they might establish an entirely new constitution in which they disarmed themselves or empowered their government to disarm them.

Even THE PEOPLE'S sovereignty, though, is constrained by "the Laws of Nature and of Nature's God". If, after THE PEOPLE have suffered from "a long train of abuses and usurpations", "it is their right, it is their duty, to throw off [a bad] Government", it cannot be "their right" let alone "their duty" to establish a new government that is *both* equally bad if not worse *and* beyond their power "to alter or to abolish" thereafter. Obedient to "the Laws of Nature and of Nature's God", they must always retain the capability to exercise "their right" and fulfill "their duty" "to throw off [any] Government" that becomes despotic. So, whatever "Form of Government" they set up, it must provide that "the Sword and Soveraignty always march hand in hand"[2885]—in *their own* hands. Therefore, THE PEOPLE must always reserve to themselves "the right * * * to keep and bear Arms".

It matters not that some temporary majority among THE PEOPLE might, for whatever reason, be willing to surrender the right and to traduce the duty "to throw off [a despotic] Government". That right and especially that duty are the most important incidents of THE PEOPLE'S sovereignty. And if THE PEOPLE might waive their right, surely they cannot evade their duty. So no part of THE PEOPLE can appoint others in the guise of "government" to absolve THE PEOPLE as a whole of, or to prevent them from performing, that duty. Particularly when, as a consequence, most of THE PEOPLE will then find themselves slaves, bound by chains of tyranny they cannot break. Any part of THE PEOPLE that attempted, by disarming THE PEOPLE as a whole, to render them incapable of performing their sovereign duty "to alter or to abolish" an abusive "Form of Government" would constitute a *faction*—that is, "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community". No mere faction can establish or administer a legitimate government. For factionalism is a "dangerous vice"—and the purpose of every true government is "to break and control the violence of faction".[2886] So,

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[2883] Involving "the people" *as a whole*, this case differs from the one just discussed, in which a *super*-majority *of the States* purports to ratify a new constitutional Amendment that repeals the Second Amendment, in the face of opposition from a minority *of the States*.

[2884] *See, e.g.*, Dick v. United States, 208 U.S. 340, 353 (1908).

[2885] AN ARGUMENT, Shewing, that a Standing Army Is inconsistent with A Free Government, *ante* note 27, at 7.

[2886] *The Federalist* No. 10 (James Madison).

confronted by a part of THE PEOPLE composed of individuals "united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community", the remainder of THE PEOPLE may, *and should*, take the exercise of sovereignty upon themselves, in the name and interest of the entire community. At that point, the loyal remainder of THE PEOPLE must speak and act for THE PEOPLE as a whole.

(3) Because "the right of the people to keep and bear Arms" is part of a *supra*-constitutional complex of legal relations that forms the foundation for *all* of WE THE PEOPLE'S, the States', and the Union's rights, powers, privileges, immunities, duties, and disabilities, the Second Amendment's command that "the right * * * shall not be infringed" allows for *no* exceptions whatsoever. Logically, the duty not to "infringe[ ]" upon the "the security of a free State"—for "the right of the people" ultimately guarantees no less than that—should extend as broadly and comprehensively as possible. And, linguistically, the Amendment wisely sets no limits to it: *Anyone and everyone* who might interfere with the exercise of "the right of the people" is covered.

(a) Rogue public officials—whether in legislative, executive, judicial, or administrative positions—are the most obvious, and deserving, targets. The Second Amendment guarantees the near-universal possession by common Americans of firearms, ammunition, and accoutrements useful for possible service in "well regulated Militia". So any scheme through which any officials purport to deny Americans the liberty to acquire and possess that equipment "infringe[s]" "the right * * * to keep and bear Arms". The *actual* enactment, promulgation, and enforcement of an abusive statute, regulation, executive order, judicial decision, or other edict is not required, however. A *threat* of enforcement, or a *claim* of authority to impose such a restriction, is enough. For such threats and claims will deter—or "chill", in the contemporary judicial argot—far more individuals than will ever have some supposed law actually enforced against them. Even mere judicial *dicta*, such as that "weapons that are most useful in military service—M-16 rifles and the like—may be banned",[2887] amount to unconstitutional "infringe[ments]", because they discourage "the people", confuse honest officials, and embolden rogues.

Of course, various degrees of "infringe[ment]" are possible. For example, if Congress failed, neglected, or refused "[t]o provide for * * * arming * * * the Militia",[2888] nevertheless the States might interpose to "arm[ ]" "the people", and "the people" might be able to "arm[ ]" themselves. This would constitute the lowest level of "infringe[ment]"—and might actually amount to an arguably *constitutional* policy, if Congress honestly determined that it ought to leave the matter to the

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[2887] District of Columbia v. Heller, 554 U.S. 570, 627 (2008) (Scalia, J., for the Court).

[2888] U.S. Const. art. I, § 8, cl. 16.

States and "the people", because that promised to be the most efficient way to "arm[ ] * * * the Militia". If rogue Members of Congress attempted to impose National "gun control" on individuals, "the people" who chose to acquiesce in the purported "law" could not "arm[ ]" themselves; but the States might still be able to "arm[ ]" them. This would constitute a serious "infringe[ment]", because it directly attacked "the right of the people". And it might ignite a crisis in which the States challenged the General Government. As James Madison predicted,

> ambitious encroachments of the [General G]overnment on the authority of the State governments would not excite the opposition of a single State, or of a few States only. They would be signals of general alarm. Every government would espouse the common cause. A correspondence would be opened. Plans of resistance would be concerted. One spirit would animate and conduct the whole. * * * [A]nd unless the projected innovations should be voluntarily renounced, * * * a trial of force would be made * * * .[2889]

If rogue Members of Congress and State legislators together imposed comprehensive "gun control" on their constituents, "the people" who chose to acquiesce would be utterly disarmed, and those who resisted would doubtlessly be detracted and physically attacked as "lawbreakers". This state of affairs could constitute a veritably *fatal* "infringe[ment]", because it probably would qualify as the culmination of "a long train of abuses and usurpations" that would justify "the people" in "throw[ing] off such Government" entirely.

Public officials may not "infringe[ ]" "the right of the people" indirectly, either. For example, if Members of Congress simply shirk their responsibilities by failing, neglecting, or refusing to enact legislation that is "necessary and proper for carrying into Execution" their power "[t]o provide for organizing, arming, and disciplining, the Militia",[2890] under circumstances in which neither the States nor "the people" can provide enough "Arms" to equip "well regulated Militia", they violate the Second Amendment (as well as the Militia Clauses of the original Constitution). For legislators who knowingly evade their duties are as culpable as those who intentionally exceed their powers.[2891]

(b) Inasmuch as the Constitution guarantees that "the right of the people * * * shall not be infringed" by public officials in aid of some supposed public interest, it certainly secures that "right" from being "infringed" by officials in the interest of private parties, even when the latter may have an arguably legitimate

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[2889] *The Federalist* No. 46.

[2890] *See* U.S. Const. art. I, § 8, cls. 18 and 16.

[2891] *See* U.S. Const. art. VI, cl. 3.

claim. For example, seizure and sale of individuals' "Arms" in order to satisfy judgments for monetary damages entered against them in civil cases should not be allowable today, any more than they were during the *pre-*constitutional period.[2892] Even where commonplace consumer goods are concerned, as a matter of "due process of law" an individual may not be dispossessed of "property" until a rival claimant's superior entitlement to possession of that "property" has been judicially established.[2893] So, except when a plaintiff proves his prior right to the very firearm, ammunition, and accoutrements in a defendant's possession, no judicial remedy in civil cases should ever strip an individual of the equipment he holds for the purpose of possibly performing Militia duties.

(c) Finally, contemporary America is plagued with private factions and subversive special-interest groups plumping for "gun control". Whatever possibly benign if benighted motives lie behind these efforts, their inevitable effect must be to leave common Americans disarmed and helpless in the face of a National *para-*miliary police state the elaboration of which many of these very same groups are even now promoting. As a matter of fact, though, most of these "gun controllers" consciously aim at nothing less than "infring[ing]", *to extinction if possible*, "the right of the people to keep and bear Arms". Their activities are intended to constitute "infringe[ment]" of that "right" as a matter of politics and morals. So do they not constitute "infringe[ment]" as a matter of law, as well?

The answer must be "Yes". For the Second Amendment premonishes this country that loss of the "right * * * to keep and bear Arms" will lead to the demise of "a free State"—which will fasten on every American outside of a narrow ruling clique a form of bondage far more onerous than even chattel slaves endured in antebellum times. One need be no apologist for the Peculiar Institution in America to observe that its rigors paled in comparison to the horrors perpetrated in the concentration camps, labor camps, and death camps set up by the Twentieth Century's psychopathic dictators—none of whose victims enjoyed a right to possess "Arms" for their own defense. Aspirant tyrants in the Twenty-first Century pose dangers no less severe. Nothing that could pave their way to power, let alone entrench them in it so that they can drench the land with innocent blood, should be tolerated. So attempts by private parties to subvert "the right * * * to keep and bear Arms" ought to be suppressed in every way consistent with the Constitution, to the same degree that attempts by rogue public officials are.

i. "[P]eople" and "Arms" unrelated to actual Militia service. Proponents of "the individual right" "to keep and bear Arms" often express the concerns that, if "the right of the people to keep and bear Arms" primarily relates to "well

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[2892] *See ante*, at 295-296 (Rhode Island); 460-463 and 715-717 (Virginia).

[2893] *E.g.,* Fuentes v. Shevin, 407 U.S. 67 (1972).

regulated Militia", then "th[os]e people" not actually enrolled in the Militia (or even those not on active duty) will be unable to claim "the right" at all, and no one will be able to assert "the right" with respect to "Arms" that are unsuitable for Militia service. Such anxiety is baseless, however.

(1) An extraordinarily inventive imagination would be requisite to envision any "Arms" or uses of "Arms" that are wholly unrelated to Militia service. If any such could be posited, they would be so few and insignificant that no "gun controller" would ever bother to attempt to prohibit them—so that, as a practical political matter, they would be irrelevant to "the right * * * to keep and bear Arms".

(2) The possession and use of "Arms" by vanishingly few individuals would be unrelated to some possible Militia service on their part. As Thomas M. Cooley pointed out,

> [t]he meaning of the [Second Amendment] undoubtedly is, that *the people, from whom the militia must be taken, shall have the right to keep and bear arms; and they need no permission or regulation of law for the purpose*. But this enables government to have a well-regulated militia; for to bear arms implies something more than the mere keeping; it implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use; in other words, it implies the right to meet for voluntary discipline in arms, observing in doing so the laws of public order.[2894]

"[T]he people, from whom the militia must be taken" are not those individuals actually enrolled, let alone on active duty, in the Militia. Rather, they are "the people" *possibly eligible* for service in the Militia. That is, *everyone* within the statutory limits of age (such as from sixteen to sixty years old), as well as *everyone* outside of the upper limit who might volunteer or be called forth in an "alarm"—which amounts to *every able-bodied free adult in the community*. *All* of these people "have the right to keep and bear arms" and "need no permission or regulation of law for the purpose".

So, who else is left who might be denied "the right * * * to keep and bear Arms"? Children ineligible for the Militia because of their tender years would typically be under the control of their parents or guardians, so that their own rights "to keep and bear Arms" would be a moot point. Of course, even children could be trained to arms by their parents or guardians—but, in that case, the rights at issue would be the adults' not the children's. Individuals of any age who suffered from utterly incapacitating physical handicaps could not "bear Arms" in any event, so a

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[2894] *The General Principles of Constitutional Law*, *ante* note 1410, at 271 (emphasis supplied).

right in that particular would be a moot point, too. Some of these individuals could "keep * * * Arms" in the capacities of collectors, dealers, and speculators who might acquire and deal in "Arms" as a special form of personal or commercial property. Most of the "Arms" they "ke[pt]" in the course of those pursuits, though, would be protected by the Second Amendment because other individuals might find them usable for Militia purposes. Finally, individuals suffering from seriously debilitating mental diseases or defects, who would pose dangers to themselves as well as to others, would not be allowed "to keep and bear Arms" of any kind for any purpose. Such individuals would not be considered "free men", because they would be simply incapable of living as such, and therefore would usually be put under the care and control of others. Even the most radical proponent of "the individual right" "to keep and bear Arms" would not contend that any such right extends to them.

History should assuage any lingering fears on this point: Throughout the *pre-*constitutional era, when common Americans' liability for service in the Militia began at (say) sixteen years of age and ended at (say) sixty, every able-bodied free man who lived past his sixtieth birthday had at one time been fifty, forty, thirty, and less years of age. During all of those years after his sixteenth birthday, unless he claimed the status of a conscientious objector or received some other exemption, he was required by statute personally to possess in his own home at least one firearm suitable for Militia use. Similarly, every able-bodied free man who at some time during the course of his life after his sixteenth year became so disabled that he was exempted from Militia service on that account had theretofore in the absence of some other exemption always been required to possess a firearm in compliance with the law. So when the average man reached his sixtieth birthday, or became physically disabled, he was still likely as a matter of fact, and was supposed as a matter of law, to possess one or more firearms. The author of this study has been unable to discover a single Militia statute (or any other statute, for that matter) in any Colony or independent State that disarmed any individual when he attained the age of sixty, or became so physically disabled at any age that he could at that point no longer perform any Militia function. (Perhaps even more revealingly, no such statute was cited by any party or *amicus curiae* in the *Heller* case, although hordes of lawyers friendly to "gun control" descended on the Court.) Neither was personal disarmament of the old or the disabled a social custom anywhere within *pre-*constitutional America. Instead, superannuated and physically infirm individuals retained their firearms, and when necessary brought them into the field (as many old men did at Lexington and Concord)[2895]—or at least they enjoyed the liberty to do so, *which no one ever questioned, let alone attempted to deny under color of law*. Similarly, no statute of that era prohibited free adult women from possessing firearms. The only classes of individuals who were generally disbarred from the

[2895] *See ante*, at 248.

possession of firearms, except under strict supervision, were: (i) slaves always, and Indians, free Negroes, and people of mixed race sometimes; and (ii) disloyal individuals.[2896] The unique route by which any loyal free adult White male could be dispossessed of a firearm in those days was "impressment", whereby his firearm would be taken for, and only for, the public use for which it was competent—namely, Militia or other military service—and even then only with just compensation to the expropriated party.[2897]

3. An "absolute" right. The most extraordinary and important attribute of "the right of the people to keep and bear Arms" is its *absolute* nature—that it is "[u]nconditional" and "complete and perfect in itself", an "absolute law" because it arises out of "[t]he true and proper law of nature, immutable * * * in principle".[2898] It is a right without exceptions and the exercise of which can be subject to no restraint.

a. The sources of WE THE PEOPLE'S authority are the permanent and unchangeable "Laws of Nature and of Nature's God" that the Declaration of Independence invokes, not the transient and mutable positive laws of any mere government or other political body. "[T]he Laws of Nature and of Nature's God" are absolute by definition. A "free State" is one in which, perforce of "the Laws of Nature and of Nature's God", the "Government[ ] * * * deriv[es its] * * * just powers from the consent of the governed"—that is, one in which "the governed" themselves determine in the first instance and thereafter enforce the form, the powers, and especially the disabilities of their government—because, in the final analysis, they are *self*-governors. The Declaration affirms that this authority and responsibility of "the People" allow for no exceptions: "*whenever* any Form of Government becomes destructive of [their unalienable Rights], it is the Right of the People to alter or to abolish it, and to institute new Government".[2899] To be sure, this ultimate "Right of the People" is conditional, in the sense that a certain set of circumstances should exist before "the People", under the counsel of "Prudence", exercise it—namely, "when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce the[People] under absolute Despotism, it is their right, it is their duty, to throw off such Government". But once those circumstances do obtain, within the bounds of "the Laws of Nature and of Nature's God" *vox populi suprema lex*.[2900] "[T]he security of a free State" demands that "abuses and usurpations" by rogue public officials be suppressed before they can ripen into "absolute Despotism". "A well regulated Militia" is "necessary to the

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[2896] *See ante*, at 300-302 (Rhode Island); 363-369, 468, and 733-742 (Virginia).

[2897] *See ante*, at 187-192 (Rhode Island) and 437-439 (Virginia).

[2898] *Black's Law Dictionary, ante* note 368, at 23, 22.

[2899] Emphasis supplied.

[2900] "The voice of the people is the supreme law."

security of a free State". "[T]he right of the people to keep and bear Arms" is the fundamental operative principle of any "well regulated Militia". Therefore, "the right of the people to keep and bear Arms" must be absolute.

b. Being absolute, "the right of the people to keep and bear Arms" is "[c]omplete in itself", "[l]oosed from any limitation or condition; uncontrolled; unrestricted", free from "a dependence on any other" authority, and "[u]nlimited by extraneous power or control".[2901]

(1) "[T]he right * * * to keep and bear Arms" is "[c]omplete in itself" because it is of *supra*-constitutional provenance and legitimacy. For through its exercise "the people" themselves set up or pull down all constitutions and all governments. Thus, in principle "th[at] right" represents WE THE PEOPLE'S supreme power, and in practice effectuates it: ***"[T]he Sword and Soveraignty always march hand in hand".***[2902]

(2) "[T]he right * * * to keep and bear Arms" is free from "a dependence on any other" authority and "[u]nlimited by extraneous power or control", because: inasmuch as "'[p]olitical power grows out of the barrel of a gun'";[2903] and inasmuch as "*well regulated* Militia" throughout the several States can field overwhelming might against any combination of rogue public officials and private factions; and inasmuch as "the people" need look to or depend upon no one else in order to exercise "the[ir] right"—therefore "the people" always wield in their own hands a plenitude of force coupled with authority sufficient for the enforcement of all of their rights.

(3) Because "the right of the people to keep and bear Arms" is "[l]oosed from any limitation or condition; uncontrolled; unrestricted", the Second Amendment's command that "the right * * * shall not be infringed" plainly requires that "the right" "[i]s to be protected in whatsoever form it might be assailed"—for no one "can be justified in restricting such comprehensive words to a particular mischief, to which no allusion is made".[2904] "[W]here no exception is made in terms, none will be made by mere implication or construction".[2905] Thus, "the right * * * to keep and bear "Arms" is subject to no limitation not implicit in the concept of "[a] well regulated Militia". The prohibition against its "infringe[ment]" reaches anyone and everyone, both public and private actors, who might interfere with its

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[2901] *Webster's Revised Unabridged Dictionary, ante* note 11, at 7, definitions 2 and 4; *and* N. Webster, *An American Dictionary, ante* note 15, definition 5.

[2902] AN ARGUMENT, Shewing, that a Standing Army Is inconsistent with A Free Government, *ante* note 27, at 7 (emphasis supplied).

[2903] *Quotations From Chairman Mao, ante* note 28, at 61.

[2904] *See* Sturges v. Crowninshield, 17 U.S. (4 Wheaton) 122, 200, 205 (1819).

[2905] Rhode Island v. Massachusetts, 37 U.S. (12 Peters) 657, 722 (1838). *Accord,* Martin v. Hunter's Lessee, 14 U.S. (1 Wheaton) 304, 338-339 (1816).

exercise. And that prohibition encompasses and eviscerates every conceivable rationale that ignorant, incompetent, or rogue public officials might put forward in order to justify their attempts to "violate", "destroy", or "hinder" "the right of the people to keep and bear Arms".[2906] Indeed, none of the various *extra*-constitutional "tests" that judges have contrived in order to whitewash rogue officials' dilutions, adulterations, circumventions, and subversions of the Constitution—from the mere "rational-basis test" at the nadir of judicial laxity,[2907] to the "compelling-governmental-interest test" at the zenith of what contemporary lawyers stupidly praise as "strict scrutiny"[2908]—can even be applied to such attempts. And not just because these "tests" are patently invalid and bereft of intellectual merit by any scientific standard,[2909] are capable of rationalizing just about every conceivable form of *anti*-constitutional oppression,[2910] and have served over the years to drive this country farther and farther away from the principles that informed its founding.[2911] Rather, the Second Amendment instructs every American—public officials as well as private citizens—that such "tests" are simply out of place as a matter of law: *No* limitation of "the right of the people to keep and bear Arms" can rationally serve the public interest, because the most "rational" and "compelling" of all "governmental interests" is the maintenance of "a free State", which depends upon the enforcement of that "right" to the fullest possible degree.

(4) Most importantly, being *coupled with a duty*, "the right * * * to keep and bear Arms" must not be "infringed" even by "the people" themselves, by acts of commission or omission. Rather, "the people" must exercise "the[ir] right * * * to keep and bear Arms" to the fullest extent possible at all times. And because that duty attaches directly to "the people", both it and its corresponding right ultimately depend for their fulfillment and enforcement upon neither any specific act of government nor even the existence of any particular "Form of Government".

(a) The Constitution—which can never contradict, but must always confirm and conform to the Declaration of Independence—explicitly recognizes that *powers of sovereignty* are reserved to "the people". The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor

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[2906] *See* S. Johnson, *Dictionary, ante* note 50, definitions 1 and 2 of the verb "infringe" in both the First (1755) and the Fourth (1773) Editions.

[2907] *See, e.g.,* Ferguson v. Skrupa, 372 U.S. 726, 729-732 (1963); Railway Employes' Department v. Hanson, 351 U.S. 225, 233-235 (1956); Williamson v. Lee Optical Company, 348 U.S. 483, 487-488 (1955).

[2908] *See, e.g.,* United States v. O'Brien, 391 U.S. 367, 376-377 (1968); United States v. Robel, 389 U.S. 258, 264-268 (1967); Aptheker v. Secretary of State, 378 U.S. 500, 512-514 (1964); NAACP v. Button, 371 U.S. 415, 438-444 (1963).

[2909] *See, e.g.,* E. Vieira, Jr., *Pieces of Eight, ante* note 39, Volume 1, at 32-38; *idem*, *Imperial Judiciary, ante* note 188, at 308-314.

[2910] *See, e.g.,* Scales v. United States, 367 U.S. 203, 262 (1961) (Black, J., dissenting).

[2911] *See generally* Edwin Vieira, Jr., "Rights and the United States Constitution: The Declension From Natural Law to Legal Positivism", 13 *Georgia Law Review* 1447 (1979).

prohibited by it to the States, are reserved to the States respectively, *or to the people*".[2912] Self-evidently, the "powers not delegated to the United States" and the powers "no[t] prohibited * * * to the States" or "reserved to the States" are *sovereign* powers, and can be nothing else. Therefore, the "powers * * * reserved * * * to the people" must be *sovereign* powers, too. For, as lawyers say, *noscitur a sociis*.[2913] These powers must include the *greatest* power of sovereignty, the power "to alter or to abolish" the very "Form of Government" then extant. The Declaration locates this power within "the Right of the People" alone. The Preamble to the Constitution attests that WE THE PEOPLE (and no one else) actually exercised this power to "ordain and establish th[e] Constitution". And the Constitution nowhere suggests that this power was then surrendered by THE PEOPLE and "delegated to the United States" or "reserved to the States". So, because "the right * * * to keep and bear Arms" is explicitly reserved to "the people" and "shall not be infringed" (perforce of the Second Amendment); and because, through their exercise of "the right * * * to keep and bear Arms" "the People" can render effective their sovereign power "to alter or to abolish" any and all "Form[s] of Government" (under the aegis of the Declaration of Independence); therefore that exercise must always be within their competence prior to any formal statutory settling or regulation of the Militia. Indeed, WE THE PEOPLE'S ability to put "the[ir] right * * * to keep and bear Arms" successfully into practice is the political precondition for any such statute—because, without the physical power to control their "Form of Government" already resting firmly in THE PEOPLE'S own hands, no guarantee can exist that a proper statute will ever be forthcoming.

(b) Similarly, what may befall a particular "Form of Government" is absolutely inconsequential to "the right of the people to keep and bear Arms". That "Form" may prove fallible, it may falter or fail—it may even descend into such corruption and criminality that it deserves to be destroyed—nonetheless, "the people" will always retain "the right * * * to keep and bear Arms", because they labor under the permanent duty to do so, a duty assigned to them, not by any "Form of Government", not even by the Declaration of Independence, but by the very "Laws of Nature and of Nature's God" that recognize "[s]elf-defence * * * as the primary law of nature" which cannot be "taken away by the law of society".[2914] As moral and political actors, WE THE PEOPLE are responsible not to any evanescent "Form of Government", but instead to one another for "the security of a free State" in which all of them can enjoy the "unalienable Rights" with which "they are [equally] endowed by their Creator". WE THE PEOPLE constitute the substance of

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[2912] Emphasis supplied.

[2913] "It is known from [its] associates." Specifically, in the construction of a law the meaning or character of one word may be deduced from the meaning or character of words associated with it.

[2914] W. Blackstone, *Commentaries on the Laws of England, ante* note 142, Volume 3, at 4.

society, any "Form of Government" merely the shadow which only imperfectly "represents", and often mistakes, their interests and will. Indeed, sometimes THE PEOPLE must preserve "the security of [their] free State" through their own efforts against homicidal opposition from a degenerate "Form of Government". Thus ridiculous is the notion that, if rogue Members of Congress and the States' legislators should utterly fail, neglect, or refuse "[t]o provide for organizing, arming, and disciplining, the Militia"[2915]—or should turn deaf ears to THE PEOPLE'S repeated "petition[s] * * * for a redress of grievances" on that score[2916]—or even should enact comprehensive "gun controls" that purported to disarm "the people" entirely and thereby render "well regulated Militia" impossible under color of that "Form of Government", then no effective "right of the people to keep and bear Arms" would any longer exist. If Congress and the States' legislatures took such aberrant steps, it would signal, not the end of "the right of the people to keep and bear Arms", but instead the occasion for "the people" to stand upon that "right" to the bitter end. After all, History confirms that the final and most effective remedy for rogue public officials' attempts to eliminate "the right * * * to keep and bear Arms" is always WE THE PEOPLE'S unstinting application of precisely "th[at] right" against those officials. That "the right * * * to keep and bear Arms" provides its own remedy is the ultimate proof of its absolute nature.

c. Although "the right * * * to keep and bear Arms" has always been absolute for "the people", the composition of "the people" has not always been so fixed and inclusive that it could fairly be deemed "absolute". During *pre-*constitutional times and until 1865 (with ratification of the Thirteenth Amendment), 1868 (with ratification of the Fourteenth Amendment), and 1870 (with ratification of the Fifteenth Amendment), slaves almost always and even free persons of color all too frequently were denied a "right * * * to keep and bear Arms". This was considered no "infringe[ment]" upon any "right *of the people*", however, because of the perverse theory that "neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were * * * acknowledged as a part of the people"; and even free Negroes and other people of color were "considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them".[2917] When the first section of the Thirteenth Amendment declared that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any

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[2915] U.S. Const. art. I, § 8, cl. 16.

[2916] U.S. Const. amend. I.

[2917] Scott v. Sandford, 60 U.S. (19 Howard) 393, 407, 404-405 (1857) (opinion of Taney, C.J.).

place subject to their jurisdiction", and the first section of the Fourteenth Amendment declared that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside", and the first section of the Fifteenth Amendment declared that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude"—then people of color not "duly convicted" of "crime[s]" for which "slavery" was a just punishment became undeniably part of "the people", and in every sense fully entitled to all of the privileges and immunities of citizens, which included not only "the full liberty of speech" and the right "to hold public meetings upon political affairs" (guaranteed by the First Amendment), but also the right "to keep and carry arms wherever they went" (secured by the Second).[2918]

As the first section of the Fourteenth Amendment also makes clear, because "[n]o State shall make * * * any law which shall abridge the privileges or immunities of citizens of the United States", no rogue legislators in any State may jury rig a purported "exception" from the "the right of the people to keep and bear Arms" based upon race. And because (perforce of that same section) "[n]o State shall * * * enforce any law which shall abridge the privileges or immunities of citizens of the United States", if rogue Members of Congress were to enact a supposed "law" to that effect, no State could constitutionally impose it on individuals within her territory by any act of commission or omission on the part of her own officials, or suffer any rogue agents of the General Government to attempt to impose it there, either. But, of course, because presumably "our elected representatives * * * know the law",[2919] may be expected to discharge their duties "faithfully",[2920] and therefore will perform the functions of their offices with their constitutional powers *and disabilities* in mind,[2921] no Members of Congress true to their "Oath[s] or Affirmation[s], to support th[e] Constitution"[2922] would ever vote for such a specious "law". For Section 5 of the Fourteenth Amendment delegates to Congress the "power to enforce, by appropriate legislation, [the Amendment's] provisions", not to enact phony "laws" that contravene those "provisions" or attempt to compel public officials in the States to do so. Therefore, any such "law" would obviously not "be made in Pursuance [of the Constitution]" and could not possibly be any part of "the supreme Law of the Land".[2923]

[2918] *Compare id.* (19 Howard) at 416-417 (opinion of Taney, C.J.) *with* U.S. Const. amend. XIV, § 1.

[2919] Cannon v. University of Chicago, 441 U.S. 677, 696-697 (1979).

[2920] Myers v. United States, 272 U.S. 52, 183 (1926) (McReynolds, J., dissenting).

[2921] *See* Albernaz v. United States, 450 U.S. 333, 341-342 (1981).

[2922] U.S. Const. art. VI, cl. 3.

[2923] U.S. Const. art. VI, cl. 2.

Inasmuch as no exception from "the right of the people to keep and bear Arms" on the basis of race is constitutionally permissible today, that right and its correlative duty have constitutionally *expanded* in comparison to their statutory scope during the *pre*-constitutional era and even their constitutional scope during the immediately *post*-constitutional period. Thus today it would be impossible for Congress to enact a statute, such as it did in 1792, which provided "[t]hat each and every free able-bodied *white* male citizen of the respective states * * * shall * * * be enrolled in the militia".[2924] Of course, notwithstanding these constitutional imperatives, for decade upon decade after ratification of the Civil War Amendments rogue public officials in the States systematically and shamelessly denied people of color "the right * * * to keep and bear Arms", with next to no interference from officials in the General Government—proving that, when "*th*[*is*] right *of the people*" is involved, "the people" of all races and socio-economic classes must depend upon *themselves*, not upon faithless "public servants".[2925]

d. Self-evidently, within an *absolute* right no room can exist for interpolated "exceptions". Unfortunately, contemporary "gun controllers" have sold all too many credulous Americans a laundry-list of supposed "exceptions" to "the right of the people to keep and bear Arms". None of the most common of these stands up to analysis, though.

(1) *"Public safety"*. In "a free State", "public safety" means the safety *of the public* from foreign and domestic enemies, *including rogue public officials*. Today, however, where firearms in private hands are concerned, "public safety" has been perverted into effectively meaning the safety *of rogue public officials and their clients* from the public. Outspoken "gun controllers" contend that complete disarmament of all individuals other than those in the regular Armed Forces, police departments, and sundry governmental "law-enforcement agencies" is necessary for "public safety"—the underlying presumption being, of course, that a thoroughly armed public itself threatens "public safety". The Second Amendment, conversely, declares that "[a] well regulated Militia" is "necessary to the security of a free State", and that "the right of the people to keep and bear Arms" is the critical precondition for such a Militia—which means that every able-boded adult (other than conscientious objectors) must be suitably armed if America is to experience lasting "public safety". Obviously, these two positions are diametrically opposed, mutually antagonistic, and irreconcilable: Under the Second Amendment, "public safety" demands pervasive armament of, by, and for the public, as was the norm throughout *pre*-constitutional times. Under "gun control", "public safety" equates with pervasive *dis*armament of

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[2924] *An Act more effectually to provide for the National Defence by establishing an Uniform Militia throughout the United States*, Act of 8 May 1792, CHAP. XXXIII, § 1, 1 Stat. 271, 271 (emphasis supplied).

[2925] *See, e.g.,* Robert J. Cottrol and Raymond T. Diamond, "The Second Amendment: Toward An Afro-American Reconsideration", *in Safeguarding Liberty, ante* note 1225, at 135.

the public, without precedent in America's *pre*-constitutional history. Therefore, to invoke "public safety" as an "exception" to "the right of the people to keep and bear Arms" requires that one first rejects "the right of the people to keep and bear Arms" as being the true (or even any) source of "public safety". "Public safety" becomes an "exception" to the Second Amendment by eradicating it!

(a) The now-defunct National ban on so-called "semiautomatic assault weapons" illustrates with respect to firearms what, in the mouths of most public officials today, "public safety" really means. Of all of the private crimes of violence perpetrated annually within the United States, only a small fraction has ever involved the type of firearms subject to that ban: namely, semiautomatic rifles that have "an ability to accept a detachable magazine" and at least two other attributes from among "a folding or telescoping stock", "a pistol grip that protrudes conspicuously beneath the action", "a bayonet mount", "a flash suppressor or threaded barrel designed to accommodate a flash suppressor", and "a grenade launcher".[2926] But *public* crimes of violence in huge numbers, many of truly genocidal magnitude and sadistic cruelty, have been and are being perpetrated throughout the world by armed forces and professional police agencies to which rogue governments have issued firearms with exactly such characteristics—as well as the capability of fully automatic fire—*for the very purpose of committing such atrocities efficiently*.[2927] "[T]he Militia of the several States" might not need firearms of that type "to execute the Laws of the Union" against a relatively few domestic private criminals so armed;[2928] but they certainly would need such armament to deter—and where deterrence fails, to resist—domestic public criminals who had subverted and enlisted rogue elements in the Armed Forces or State and Local police departments and other "law-enforcement agencies" as co-conspirators in complots to oppress common Americans. So the purpose of "gun control" in this instance is transparent: namely, to minimize if not eventually eliminate the possession of such firearms in civilians' hands, so that common Americans can neither resist, nor even deter, aspiring usurpers and tyrants—the most effective of which, one can be sure, will turn out to be psychopaths.

(b) With respect to ammunition, the point is perhaps best illustrated by emerging legislative proposals for so-called "microstamping" of bullets in all newly

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[2926] An Act To control and prevent crime ("Violent Crime Control and Law Enforcement Act of 1994"), Act of 13 September 1994, Pub. L. 103-322, TITLE XI—FIREARMS, Subtitle A—Assault Weapons ("Public Safety and Recreational Firearms Use Protection Act"), § 110102(b) [§ 921(a)(30)(B)(i) through (v)], 108 Stat. 1796, 1998. This Subtitle expired of its own force in 2004. *See* § 110105(2), 108 Stat. at 2000. "Gun controllers" continue to call for its reënactment in one form or another, though.

[2927] *See, e.g., on the global stage*, Rudolph J. Rummel, *Death by Government: Genocide and Mass Murder in the Twentieth Century* (New Brunswick, New Jersey: Transaction Publishers, 1994); *and specifically within the United States*, Radley Balko, *Overkill: The Rise of Paramilitary Police Raids in America* (Washington, D.C.: Cato Institute, 2006).

[2928] *See* U.S. Const. art. I, § 8, cl. 15.

manufactured ammunition, coupled with registration of purchasers of such ammunition and mandatory disposal of all the old unstamped ammunition in private citizens' possession, so as eventually to enable investigators (in theory) to trace every bullet from the scene of some crime to the original registrant. As is usual in this area, the push for microstamped ammunition is a combined effort by "gun-control" propagandists and businessmen eager to make a profit even at the expense of Americans' security from usurpation and tyranny—another glaring example of the sorry truth that all too often businessmen have no country.[2929] Such schemes are open to numerous criticisms on account of their impracticality. But whether such legislation could actually assist investigators in tracking down real criminals in significant numbers is irrelevant in the last analysis to its ulterior purpose, which is nothing less than *to eliminate the huge stocks of old, but still effective, ammunition that otherwise would remain in private hands for many years; to limit the supply and control the distribution of new, microstamped ammunition that enters the market; and to conduct surveillance and assemble complete intelligence on everyone who purchases such ammunition*. The requirement of microstamping will exclude from the free market all new ammunition not so marked. And if, thereafter, only limited amounts of permissible ammunition are produced for civilians to buy, doubtlessly at exorbitant prices—or only a few selected calibers are made available for private purchases at any prices—or all microstamped ammunition is required to be secured in governmental magazines, to be doled out only to licensed shooters in carefully controlled amounts for specific permissible uses as to which the recipients must account with scrupulous accuracy—then most (if not all) firearms in the possession of common Americans will effectively be rendered useless except as clubs. Thus, "gun control" can be accomplished without the necessity for politically destabilizing attempts by public officials to seize the firearms in private citizens' hands.

Moreover, when seizure becomes the preferred policy after all, with microstamped ammunition being the only form available to private citizens, "gun controllers" will need no spies, only computers, to know whose residences to search for arms. In the absence of organized Militia, they likely will meet only sporadic, and certainly no significant, resistance. Even the few self-organized patriots who dare to muster will soon find themselves impotent, because they will lack sufficient (or perhaps any) ammunition for many (if not all) of their firearms—so that a modern-day Major Pitcairn will not bother to demand, "Lay down your arms, damn you, why don't you lay down your arms?!", because those arms will be useless in their owners' hands. *What better evidence of how America has degenerated, primarily because of the decay of "the Militia of the several States", than that the very policy which precipitated "the*

[2929] *See* <www.ammunitionaccountability.org> *and* <www.ammocoding.com> as examples of how business interests collude with *anti*-constitutional political activism.

shot heard 'round the world" has reappeared in an even more insidious and dangerous form, but with little or no alarm amongst the great majority of Americans?

(2) *Conviction for a "felony" or some other infraction of law*. One means to achieve "public safety" as "gun controllers" misunderstand it is to reduce private citizens' ability to possess arms by jury rigging as many supposed legal disqualifications for as many people as possible. In the burgeoning police state now taking form throughout the United States, in which so many laws and so-called "regulations with the force of law" exist that next to no one can avoid violating some of them in the course of his life, the route to that end with the greatest potential is to deny "the right * * * to keep and bear Arms" to every individual convicted of some infraction of the law. Such a conviction enables public officials to claim an "exception" to "the right" as to that individual in a most ironic, as well as illogical, manner: namely, the very operation of the police state becomes the means for creating endless "exceptions" to, and thereby eventually overthrowing, the very constitutional guarantee set up to prevent the imposition of a police state! Obviously, then, such an "exception" is unjustifiable.[2930]

(3) *Prevention of crime*. Even more effective for the purposes of "gun control" than disarming those individuals who have committed some "infraction of the law" in the past is to disarm individuals so that they cannot commit "crimes" in the future. That is, a broad "exception" to "the right of the people to keep and bear Arms" is deemed necessary, not just to *punish* "crime" after the fact, but to *prevent* it in the first place.[2931] Under this preëmptive approach to "public safety", the "exception" eliminates "the right" entirely—because, if *any* individual *could* commit a "crime", and if no (or very few) crimes with firearms would ever occur if no "unauthorized" individuals could possess firearms, then every "unauthorized" individual must be disarmed. At that point, "the right of *the people* to keep and bear Arms" devolves into "the right of [*public officials and their minions*] to keep and bear Arms". Not surprisingly, this rationale for gutting the Second Amendment suffers from two fundamental problems: its own non-rationality, and the unconstitutionality of the means it employs to sever the connection between firearms and crime at both the individual and the community levels.

(a) The mere availability of firearms in private hands cannot *cause* a single *crime*. By definition, "*criminal* action" is *human* action. Intelligible *purpose* is the defining characteristic of human behavior.[2932] And all truly criminal action involves purposeful behavior of a special sort: namely, knowing, intentional, and willful

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[2930] *See ante*, at 981-1014.

[2931] *See, e.g.,* McDonald v. City of Chicago, 561 U.S. ___, ___ (2010) (Breyer, J., dissenting), Slip Opinion at 11-14.

[2932] *See* L. von Mises, *Human Action, ante* note 1950, at 11.

misconduct, as contrasted with misbehavior that proceeds from accident or an individual's inability to distinguish right from wrong. Inanimate objects do not engage in behavior of any kind, let alone purposeful misconduct. They do not act knowingly, intentionally, or willfully. They cannot distinguish right from wrong. Neither can they control the minds or overbear the wills of human beings. An inanimate object is capable of being put to a malign purpose only if some human actor personally entertains such a purpose in employing that object. If a criminal action involves some inanimate object as its instrument, the object is not the cause of the action, but its subject. Thus, no firearm causes—or could ever cause—criminal misconduct by any human being; rather, the human actor causes criminal misuse of the firearm. Firearms no more cause crimes than money (or any other valuable property) causes theft. Similarly, firearms can facilitate crimes only in the hands of the criminally minded. First, there must be the cause—some human being's criminal appetite; then, that individual's selection of the end—the particular crime itself; then, his application of the means—the firearm or other implement to be misused in committing the crime.

Moreover, were "gun controllers" correct in their contention that the mere possession of firearms can and will somehow "cause" the possessors to commit crimes, they could not eliminate the danger to true "public safety" by prohibiting only private citizens, but not public officials, from possessing firearms (as does every proposal for "gun control" not advancing a program of pure philosophical pacifism). Rather, the danger would be concentrated and exacerbated. For (according to the logic of "gun control"), if the only firearms in existence were in the hands of the regular Armed Forces, *para*-military police departments, and other governmental "law-enforcement agencies", many if not all of the members of those very entities—being no less subject to the supposed "cause and effect" that "gun controllers" contend derive from the mere possession of firearms—would likely become criminals themselves, if not in the service of usurpers and tyrants, then on their own accounts as mere gangsters operating under color of the law to break the law in the name of the law. As the Founding Fathers well knew, "they who are in Power (by the pretence they have to Authority, the temptation of force they have in their hands, and the Flattery of those about them)" are the likeliest to "set up force * * * in opposition to the Laws".[2933] So, if carried to its limits, "gun control" would change only the identities and political status of the criminals plaguing society, by substituting rogue public officials and their myrmidons for private gangsters. And the extent, severity, and heinousness of crime would increase by orders of magnitude.[2934]

[2933] J. Locke, *Two Treatises of Government*, *ante* note 53, Book II, Chapter XIX, § 226. *See The Federalist* No. 51.

[2934] *See*, e.g., Rudolph J. Rummel, *Death by Government: Genocide and Mass Murder in the Twentieth Century* (New Brunswick, New Jersey: Transaction Publishers, 1994).

(b) Whether "public safety" involves purported protection of society against criminal behavior—or, for that matter, negligence, clinically diagnosable mental illness, or the aberrant self-destructive impulses that lead to suicides—it can never override the rights of those individuals whose behavior is neither criminal, nor negligent, nor psychologically unbalanced.[2935] That one person's constitutional *rights* cannot be held hostage to another person's wrongs must be doubly true for constitutional *duties*. As the Second Amendment declares, the highest form of "public safety" is "the security of a free State"—for "the security of a free State" "[a] well regulated Militia" is "necessary"—and to provide for "[a] well regulate Militia" "the right of the people to keep and bear Arms, shall not be infringed". Thus, "the right of the people to keep and bear Arms" is actually a consequence of the duty of every eligible individual to possess in his home at all times at least one firearm, ammunition, and appropriate accoutrements suitable for Militia service. That being so, does not the existence of crimes committed with firearms require, not the cancellation of every innocent Americans' constitutional duty to possess, train with, and employ firearms for such service, but instead the fulfillment of that very duty to whatever degree is necessary in order to suppress those crimes? After all, the Constitution assigns to "the Militia of the several States" the explicit authority and responsibility "to execute the Laws of the Union" when "call[ed] forth" for that purpose,[2936] and the implicit authority and responsibility to execute the laws of their own States at all other times.[2937] Perforce of the Constitution, then, the Militia are the ultimate "police force" at every level of the federal system. Self-evidently, it is constitutionally self-contradictory to the point of absurdity to disable America's ultimate police force by depriving its members of the tools they need to perform their function, on the grounds that doing so will supposedly eliminate the problem for which the Militia supply the corrective mechanism. (On that reasoning, the Militia, not criminals, constitute the problem!) The best method for promoting law and order is "[t]o provide for organizing, arming, and disciplining, the Militia" as quickly and thoroughly as possible,[2938] so that *tens of millions* of Militiamen can be "call[ed] forth to execute the Laws of the Union" and of their States as the Constitution intends.

(4) *"Mental illness"*. This supposed "exception" to "the right of the people to keep and bear Arms" offers truly *unlimited* possibilities for "gun controllers", because it does not necessarily depend upon an individual's *actually doing* something demonstrably *anti*-social. It is enough that some "authority figure" or "expert" perceives him as exhibiting that *potential*. What passes for evidence may be no more

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[2935] *See* Cooper v. Aaron, 358 U.S. 1, 16 (1958), *quoted ante*, at 1358.

[2936] U.S. Const. art. I, § 8, cl. 15.

[2937] *See* U.S. Const. amends. II and X.

[2938] *See* U.S. Const. art. I, § 8, cl. 16.

than the strident expression of a "politically incorrect" opinion or other "thought crime" which suggests to some paranoiac public official that the individual *might* become "dangerous" in the future.

Whether such statutory disabilities relating to "mental illness" as exist today are constitutional depends in the first instance upon the objectivity and reliability of the relevant medical sciences that supposedly validate them.[2939] Individuals with well-defined psychiatric conditions that so impair their moral, mental, emotional, or mechanical abilities to handle firearms responsibly that they are demonstrably incapable of engaging in the behavior to which "the right * * * to keep and bear Arms" is addressed, and therefore can never rationally claim that right, might justifiably be restricted in their possession and use of firearms, or in extreme situations even disarmed. To reach that result demands circumspection and prudence, however. Disarmament of such persons almost always must follow, not precede, notice, hearing, and a right of appeal consistent with due process.

The problem with applying this "exception" to "the right of the people to keep and bear Arms" is that judicial hearings are likely to turn out to be little more than empty formalities, when the underlying "science" has been corrupted for political purposes, but ignorant and insouciant judges nonetheless mechanically defer to "expert opinion". Certain factions within the contemporary medical profession itself are aggressively pushing an agenda of medically mediated "gun control" thinly disguised in the garb of "science", and in aid of that agenda are conveniently discovering new psychological problems which they claim justify disarmament of the individuals supposedly suffering from them (such as the highly elastic "*post*-traumatic stress disorder" being diagnosed to an ever-increasing degree in veterans of the Armed Forces returning from a combat zone). Even worse, judicial hearings may amount only to kangaroo courts that camouflage with *pseudo*-scientific mumbo jumbo the disarmament of people whose real problem is that their political beliefs offend the authorities. Especially in a burgeoning police state, only a short sequence of goose-steps separates describing individuals as "extremists" from denouncing them as "terrorists"[2940]—and then defining them as "psychiatric cases"

[2939] *See, e.g.*, 18 U.S.C. §§ 922(d)(4) ("[i]t shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person * * * has been adjudicated as a mental defective or has been committed to any mental institution") and 922(g)(4) ("[i]t shall be unlawful for any person * * * who has been adjudicated as a mental defective or who has been committed to a mental institution * * * to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce").

[2940] *See, e.g.,* Extremism and Radicalization Branch, Homeland Environment Threat Analysis Division, Office of Intelligence and Analysis, United States Department of Homeland Security, *Rightwing Extremism: Current Economic and Political Climate Fueling Resurgence in Radicalization and Recruitment* (7 April 2009); Commonwealth of Virginia, Department of State Police, Virginia Fusion Center, *2009 Virginia Terrorism Threat Assessment* (March, 2009); Missouri Information Analysis Center, *MIAC Strategic Report: The Modern Militia Movement* (20 February 2009).

in need of incarceration in governmental asylums.[2941] Perhaps the most serious deficiency of this "exception", though, is that the particular variety of apparent mental aberration or personality disorder most dangerous to society—and to defend against which "the right of the people to keep and bear Arms" in "well regulated Militia" is most necessary—is never discussed.

Next to no one ever suggests that scientific and particularly criminal investigators should focus primarily on individuals *in public office and allied political activities* whose behavior exhibits psychopathic symptoms. This lacuna is disconcerting, because:

- Throughout not just modern Western civilization but the entire world, "the political class" has proven to be heavily larded with personalities steeped in psychopathic tendencies.

- In every country, "the political class" is tightly knit and highly organized to the point of being institutionally incestuous; has access to the major social instruments of force; claims to exercise that force with "legal authority" of a monopolistic character; and therefore in principle poses several orders of magnitude more danger to society than the sum of all of the lone psychopaths in existence, not just today, but perhaps from the very dawn of recorded history.

- In practice during just the last century, undoubted psychopaths within "the political class" have brought about death and destruction the extent of which is still being assessed, and have thrown up barriers to social progress and human happiness which will require generations upon generations of effort to overcome.[2942]

- Against this background, it becomes obvious that the suspiciously low standards for judging the trustworthiness and competence of members of "the political class" are likely being set by and in the perverse self-interests of individuals with psychopathic personalities, rendering those standards useless for the proper ordering of political life, and making their rectification as difficult as it is necessary.

So, rather than casting around for ways to disarm average citizens on the grounds of "mental illness", Americans should demand instead that revitalized Militia

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[2941] This technique for suppressing dissent became highly developed in the Soviet Union. *See, e.g.,* Theresa Smith and Thomas Oleszczuk, *No Asylum: State Psychiatric Repression in the Former USSR* (New York, New York: New York University Press, 1996).

[2942] *See* Rudolph J. Rummel, *Death by Government: Genocide and Mass Murder in the Twentieth Century* (New Brunswick, New Jersey: Transaction Publishers, 1994). As to communist "governments" in particular, *see* Stéphane Courtois, Nicholas Werth, Jean-Louis Panné, Andrzej Paczkowski, Karel Bartošek, and Jean-Louis Margolin, *The Black Book of Communism: Crimes, Terror, Repression*, Jonathan Murphy and Mark Kramer, Translators (Cambridge, Massachusetts: Harvard University Press, 1999).

institute and oversee a process whereby, to qualify for public office in the first instance, an individual should have to establish that his record is devoid of instances of psychopathological behavior, and should then be reëxamined on a regular basis to insure that no such instances have occurred during his term in office.[2943] This procedure would offend no one's rights; for no one can claim any "right" to public office at all, let alone a "right" to pervert public office into an *anti*-social instrument of his psychopathological proclivities—whereas WE THE PEOPLE have an undoubted right *and duty* to protect themselves from every individual of aberrant personality whose occupancy of public office poses even the least threat to "the security of a free State". And the surest sign that such a threat exists is a public official's or politician's tolerance for, advocacy of, let alone actual efforts to carve out, specious "exceptions" from "the right of the people to keep and bear Arms".

(5) "*Gun-free zones*". Where "gun controllers" cannot disarm large numbers of individuals directly, they try to disarm them indirectly, by designating as "gun-free zones" expansive geographical areas the general public frequents. That "gun-free zones" do not make practical, let alone constitutional, sense is beside the point.[2944] For the purpose of the exercise is, not to make sense, but to shift the locus of political power away from common Americans to rogue public officials by means of a semantic trick. The idea is to dupe a critical mass of uncritical citizens into imagining that this "exception" to "the right * * * to keep and bear Arms" is innocuous, because it attaches, not to all people in general, but only to certain places in particular. Presumably, legally myopic Americans will not notice that, because "gun-free zones" operate to disarm people in those places, the "exception" attaches to people after all—and that, there being no theoretical limit to the places in which the "exception" can be made to operate, there is no practical limit to the number of people who can be disarmed, either. If enough "gun-free zones" are established, everyone other than the regular Armed Forces and civilian "law-enforcement agencies" will be disarmed, except (under the perhaps only temporary protection of *Heller*) within the confines of his own home.[2945]

With respect to protecting the public, the concept of "gun-free zones" is patently non-rational. They are designed supposedly to prevent the misuse of firearms by criminals, crackpots, and reckless individuals, on the theory that if no

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[2943] *See generally, e.g.,* Andrew M. **Ł**obaczewski, *Political Ponerology: A Science on the Nature of Evil Adjusted for Political Purposes* (Grande Prairie, Alberta, Canada: Red Pill Press, Second Edition, 2008). The latter study presumes that psychopathological political behavior is fundamentally involuntary, and therefore constitutes a form of "mental *illness*" which requires psychiatric intervention rather than criminal punishment. The distinct possibility exists, however, that in a very large number of cases such patterns of behavior only mimic true mental illness, and are actually voluntarily adopted by their practitioners as a strategy for advancing their careers—in which event severe punishment, not therapy, is indicated.

[2944] *See ante*, at 1001-1007.

[2945] *See ante*, at 1359-1370.

firearm is allowed to be present in some place, no firearm can be misused there. But, of course, criminals, crackpots, and reckless individuals will not heed any such restriction.

With respect to their proponents' real goal of subverting "the right of the people to keep" and especially to "bear Arms", however, the strategy of establishing "gun-free zones" is eminently rational. The concept of a "gun-free zone" rests on the premiss that the conjunction of certain places and firearms is bad. The implicit message is, not that the places (such as schools) are bad, but that firearms are bad in and of themselves. And, by logical extension, "the right of the people to keep and bear Arms"—which its proponents insist allows for their possession of firearms in such places—must be bad, too. Indeed, it must be worse than the firearms themselves, because the exercise of that right is how firearms in the hands of average law-abiding Americans come to be found in those places. So, if firearms—and "the right of the people to keep and bear Arms"—are bad, and therefore some places should be "gun free", why should not *all* places the public owns (such as schools) or *all* privately owned places of so-called "public accommodation" (such as shopping malls, hotels, theater complexes, and so on) be "gun free"?

In those locales that are placed off-limits to the private possession of firearms under the "gun-free" rubric, WE THE PEOPLE are precluded, not simply from defending themselves with firearms as individuals, but also from performing through such individual self-defense the basic collective Militia function of executing the law against aggressors. So, *"gun-free zones" turn out to be places in which, not just firearms, but the one establishment "necessary to the security of a free State" and therefore "the security of a free State" are excluded, too*. Of course, public officials must and do provide *some* kind of "security" in those places. In the absence of the Militia, however, that "security" can be only "the security of a[n *un*]free State". Typically today, the "security" of a *para*-military police state, with beetle-browed thugs in black *ninja* outfits—festooned with body armor, helmets, and an assortment of rifles, pistols, stun guns, chemical sprays, batons, and handcuffs—patrolling with studied menace the halls of public schools, airports, railway stations, and an ever-increasing number of other public venues. Rogue public officials consider this consequence of establishing "gun-free zones" neither accidental nor undesirable. To the contrary: It advances their ultimate agenda, by acclimatizing Americans to the dark realities of life within "a[n *un*]free State".

An additional reason exists for the profusion of "gun-free zones" and "security check-points" springing up specifically around and within buildings that house public offices. These edifices are coming more and more to resemble, and to operate in the manner of, miniature fortresses of feudal lords. No one can pass through the barbicans without being searched by the lords' armed retainers, not just for firearms, but for anything that might function as a "weapon". The implicit

presumption of these arrangements is that any individual drawn at random from the general public might be so disgusted, disgruntled, and distraught as to intend physically to attack some officeholder. The important question, though, is *why* officeholders imagine that common Americans so distrust and despise them as to compass disposing of them by violent means. All rogue public officials may be knaves; but most of them are neither paranoids nor fools. They have excellent reasons to believe that they have *real* enemies, whose ranks they themselves are enlarging every day. Rogue officials recognize the cost to society of the tens of thousands of counterproductive, if not patently ridiculous, laws and regulations they themselves have enacted solely to fatten the wallets of the greedy special-interest groups that maintain them in office. They realize that nameless, faceless citizens in huge numbers groan under the weight of this oppression, ready to embrace almost any means to lift it from their shoulders. They understand that common Americans increasingly attribute their plight to politicians' and officials' ignorance, incompetence, dishonesty, and insufferable insolence. So they presume that just about anyone and everyone could be, and probably is, their enemy. More than that, they suspect that the citizenry not only has found them out, but also has come to the conclusion that normal political procedures—the phony dichotomy between the "two" major parties, the rigged elections, the absence of any effective means to petition the government for a redress of grievances—cannot rout them out. So they expect that, sooner rather than later, some victims of their depredations—coming to the end of their tethers with frustration, loathing, and even desperation because of the absence of any other means for relief—will determine to take them out.

Were rogue officials foresighted, their fear of vengeance from particular individuals whom they have wronged would pale in comparison to the fear of *mass* retaliation that should grip their hearts. Each individual tends to envision himself as an unique victim of some specific act of official oppression. The very last thing on his mind is how he might ally with other victims in a concerted, coherent, organized fashion in order to bring their common oppression to an end and their oppressors to justice. But when (say) the Federal Reserve System's Ponzi pyramid finally explodes, and common Americans as a whole find themselves treading water in the same septic tank of economic distress, social chaos, and civil unrest—and then start searching *en masse* for culprits—the public officials who refused to adopt an alternative currency to mitigate the effects of a collapse of the monetary and banking systems, or who refused to revitalize the Militia in preparation for such a catastrophe, or who refused to do both will have the Devil to pay. Then their public offices will become just the opposite of "gun-free zones"—and perhaps of "rope-free zones" as well.

The proper corrective measure for this situation is not promiscuously to disarm WE THE PEOPLE in "gun-free zones" so that rogue public officials can oppress them even more thoroughly and viciously, and push them beyond their breaking-

points even sooner, but instead to eliminate all "gun-free zones" by revitalizing the Militia so that THE PEOPLE can expose the perpetrators of official wrongdoing and subject them to condign punishment by other than vigilante methods.[2946] At which point good public officials can live in "the security of a free State", with all the benefits of Franklin D. Roosevelt's vaunted "freedom from fear".[2947]

(6) *"Limited" infringements, "reasonable regulation", "necessity", and "emergency".* Other putative "exceptions" to "the right of the people to keep and bear Arms" are rather general in nature (as befits legalistic double-talk), but are nevertheless subject to specific refutations.

(a) No one can give credence to the argument of today's "gun controllers" that rogue Members of Congress or State legislatures have not exceeded their powers, and that "the right of the people to keep and bear Arms" has not been "infringed", when such officials prohibit the sale or even the mere possession of certain types of firearms or ammunition that they deem especially obnoxious—such as so-called "semiautomatic assault weapons"[2948]—on the duplicitous plea that *other* types of firearms or ammunition that those officials are temporarily willing to tolerate remain generally available to the public.[2949] "[T]he people" are not secure in their "right * * * to keep and bear Arms" simply because rogue public officials have not yet "infringed" it to extinction. The issue of "infringe[ment]" is concerned, not with what *remains of* that "right" (and therefore by definition has not been "infringed"), but what has been *excised from* it, and on what legal authority. That what survives of "the right" exceeds what has been sliced away does not validate the exercise of the purported power under color of which the butchery was accomplished. "The question of power is not to be determined by the amount of the burden attempted to be cast."[2950] "[T]he constitutional question cannot * * * be settled by the simple process of ascertaining that the infraction * * * is unimportant when compared with similar but more serious infractions which might be conceived."[2951] WE THE PEOPLE are entitled to—and should vociferously—complain of usurpation whenever rogue officials overstep their constitutional bounds by even a single Ångstom Unit in some particular, notwithstanding that in all other

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[2946] *See ante*, at 956-968, 1138, and 1197-1206.

[2947] Annual Message to Congress, 6 January 1941, *in* Records of the United States Senate, SEN 77A-H1, Record Group 46, National Archives, at 21.

[2948] *See, e.g.,* An Act To control and prevent crime ("Violent Crime Control and Law Enforcement Act of 1994"), Act of 13 September 1994, Pub. L. 103-322, TITLE XI—FIREARMS, Subtitle A—Assault Weapons ("Public Safety and Recreational Firearms Use Protection Act"), § 110102(b), 108 Stat. 1796, 1996. This Subtitle expired of its own force in 2004. *See* § 110105(2), 108 Stat. at 2000.

[2949] *See, e.g.,* McDonald v. City of Chicago, 561 U.S. ___, ___ (2010) (Breyer, J., dissenting), Slip Opinion at 30.

[2950] Fairbank v. United States, 181 U.S. 283, 291 (1901). *Accord*, *e.g.*, Abington School District v. Schempp, 374 U.S. 203, 225 (1963); Looney Company v. Crane, 245 U.S. 178, 189-190 (1917).

[2951] Patton v. United States, 281 U.S. 276, 292 (1930).

particulars they remain strictly within those limits. So, for example, where taxes are levied on firearms, "[t]he matter of amount does not determine the question of right, and the party who has a legal right may insist upon it, if only a shilling be involved".[2952]

(b) That a purported "regulation" of "the right * * * to keep and bear Arms" appears "reasonable" according to some practical legislative or judicial calculus cannot excuse it.[2953] With respect to firearms, the Second Amendment defines the *only* "reasonable regulation" for "[a] *well regulated* Militia" as being "the right of the people to keep and bear Arms". The parameters of that "right" can be derived objectively from the *pre*-constitutional Colonial and State Militia Acts. No matter how "reasonable" some new and different "regulation" of firearms seems to be in other ways as a supposition of fact, if it limits "the right * * * to keep and bear Arms" as so defined it is "*un*reasonable" as a matter of constitutional law.

(c) "Necessity" as the rationale for exceeding constitutional limitations is the ever-ready excuse of all usurpers and tyrants. Its usefulness for their purposes lies largely in its illogicality. For if some measure that violates the Constitution succeeds, its success will be taken to prove its "necessity", according to the fallacy *post hoc ergo propter hoc*, even if some untried constitutional measure could have done just as well and thus have made the violation *un*necessary. Whereas, if the unconstitutional measure fails, its defenders will claim that it was not carried forward to a sufficient degree, according to the fallacy *petitio principii*, which conclusively presumes that the unconstitutional measure could somehow have succeeded, rather than being open to the possibility that it was destined to fail under any and all circumstances.

As an "exception" to "the right * * * to keep and bear Arms", "necessity" is particularly vicious, because it strikes from WE THE PEOPLE'S hands the very tools they need to oppose usurpation and tyranny. Such an "exception" is also particularly vacuous, because both the original Constitution and the Second Amendment exclude it:

First, the one power of Congress that relates to "necessity" is the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers [of Congress]".[2954] This is not, however, a power of Congress separate from and independent of all others which performs its own peculiar function; rather, its sole purpose is to serve "the foregoing Powers" found elsewhere in the Constitution. "[T]he foregoing Power[ ]" relevant here is the power "[t]o

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[2952] Gulf, Colorado and Santa Fé Railway Company v. Ellis, 165 U.S. 150, 153-154 (1897).

[2953] *Pace, e.g.,* McDonald v. City of Chicago, 561 U.S. ___, ___ (2010) (Breyer, J., dissenting), Slip Opinion at 29.

[2954] U.S. Const. art. I, § 8, cl. 18, *referring to* art. I, § 8, cls. 1 through 17.

provide for organizing, *arming*, and disciplining, the Militia".[2955] What is "necessary and proper for carrying [*this* Power] into Execution" is to ensure that each of "the Militia of the several States" is properly "arm[ed]". And because each Militia consists of "the body of the people" in that State,[2956] to see that "the people" are "arm[ed]". And because "the people" cannot be "arm[ed]" unless individuals are "arm[ed]", it is "necessary and proper" to "provide for * * * arming" individuals, not for disarming them. That being so, constitutional logic denies that any "necessity" for "[dis]arming" individuals can ever arise. And the impossibility of any "necessity" for "[dis]arming" individuals entails recognition that "the right of the people to keep and bear Arms" is absolute.

Second, leaving nothing to implication, the Second Amendment explicitly identifies what is "necessary and proper" with respect to WE THE PEOPLE'S relationship with firearms: "A well regulated Militia" is "*necessary* to the security of a free State".[2957] "[T]he right of the people to keep and bear Arms, shall not be infringed", so that "the people" will always be prepared to participate in "well regulated Militia". Therefore, "the right of the people to keep and bear Arms" is "necessary to the security of a free State"—indeed, even more "necessary" than "[a] well regulated Militia", because the very existence of "[a] well regulated Militia" depends upon the untrammeled exercise of that "right". That being so, no "necessity"can ever arise for limiting that "right". Or, "necessity" can never provide an "exception" to the necessity of that "right".

(d) "Necessity" as the rationale for exceeding constitutional limitations often appears garbed in the cloak of "emergency powers". Thus, rogue public officials might claim that the existence of some "emergency" creates an "exception" to "the right of the people to keep and bear Arms", which can be enforced through the exercise of "emergency powers"—with both the ostensible "emergency" and the "powers" that supposedly flow from it unilaterally defined by those officials with reference to nothing particular in the Constitution. Both in general and specifically with respect to "the right of the people to keep and bear Arms", however, this contention amounts to undiluted hogwash.

First, the doctrine—or, more accurately put, the *dodge*—of "emergency powers" affronts the common sense of constitutional law, because it negates constitutionalism in general. By definition, every true "constitution" is a charter of *defined and therefore limited* government. In contrast, the dodge of "emergency powers" is an arrant apology for *un*defined and therefore *un*limited government. No so-called "constitution" subject to public officials' unilateral assertion of "emergency

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[2955] U.S. Const. art. I, § 8, cl. 16 (emphasis supplied).

[2956] *See* Virginia Declaration of Rights (1776) art. 13.

[2957] Emphasis supplied.

powers" could possibly survive. For no such "constitution" would constrain those officials, who on their own initiatives could relax, or remove, or refuse to recognize its paper restrictions simply by claiming that some extraordinary situation had arisen which of its own force licensed them to overstep the putative "constitution's" boundaries. If, however, all of a sudden some "emergency"—as self-interested, power-hungry officials and special-interest groups might define it—could beget new, theretofore unheard-of powers, constitutionalism itself would disappear, ushering in "government" limited only by politicians' and propagandists' rhetoric, with orchestrated political hysteria the measure of "law". Indeed, in any country populated by minimally rational citizens, such a suicidal "constitution" could never even come into existence. Only veritable political idiots would propose or write, let alone ratify, such a ridiculously self-contradictory, self-destructive instrument of their own enslavement.

Second, precisely because America's Founding Fathers were among the most legally and historically literate and politically astute men of modern times, the dodge of "emergency powers" can find no even colorable support in the Constitution they crafted. The Constitution contains no sentence, no clause, no phrase—not a single word—related to "emergency powers". It delegates to the General Government no "emergency power" under that rubric; no power that can come into existence, or may be exercised, only in an "emergency"; no power to define or describe an "emergency"; no power to declare that an "emergency" exists—and, most decisively of all, it does not even employ the word "emergency" with respect to any part of "the supreme Law of the Land".[2958] So, finding neither place, nor meaning, nor authority, nor justification in the Constitution, "emergency" can serve as the source or measure of *no* power whatsoever.

Even the Supreme Court has recognized, as a fundamental constitutional principle, that

> [e]mergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency and they are not altered by emergency.[2959]

The existence of some situation that self-serving public officials label an "emergency" has no constitutional effect in and of itself. Neither a "grave national crisis" nor any other "[e]xtraordinary conditions" can

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[2958] U.S. Const. art. VI, cl. 2.

[2959] Home Building & Loan Association v. Blaisdell, 290 U.S. 398, 425 (1934).

> create or enlarge constitutional power. The Constitution established a national government with powers deemed to be adequate, * * * but these powers * * * are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary.[2960]

Third, the conspicuous absence in the Constitution of anything referring to, or even redolent of, "emergency powers" is not the product of the Founders' negligence. They did not simply overlook the possibility of "emergencies" in this country's future. For example, the Constitution empowers Congress "[t]o declare War"[2961]—surely an "emergency" in the commonsensical understanding of that term. Yet even the "existence of a state of war could not suspend or change the operation upon the power of Congress of the guarantees and limitations of the Fifth and Sixth Amendments",[2962] or any other Amendment or constitutional limitation, for that matter.

In addition, the Constitution recognizes other extraordinary situations, which might without exaggeration be termed "emergencies", as predicates or conditions precedent for the exercise of powers or the release from disabilities it explicitly grants or imposes. For instance, Congress may "provide for calling forth the Militia *to execute the Laws of the Union, suppress Insurrections and repel Invasions*".[2963] "The Privilege of the Writ of Habeas Corpus shall not be suspended, *unless when in Cases of Rebellion or Invasion the public Safety may require it*".[2964] "No State shall, without the Consent of Congress, * * * keep Troops, or Ships of War in time of Peace, * * * or engage in War, *unless actually invaded, or in such imminent Danger as will not admit of delay*."[2965] "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, *nor in time of war, but in a manner to be prescribed by law*."[2966] And "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, *when in actual service in time of War or public danger*".[2967] In each of these cases, without once using the term "emergency", the Constitution explicitly specifies the extraordinary circumstances that alone can justify the employment of some expressly delegated power, or the relaxation of some express disability, leaving nothing for public

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[2960] A.L.A. Schechter Poultry Corporation v. United States, 295 U.S. 495, 528-529 (1935) (footnote omitted).

[2961] U.S. Const. art. I, § 8, cl. 11.

[2962] United States v. L. Cohen Grocery Company, 255 U.S. 81, 88 (1921).

[2963] U.S. Const. art. I, § 8, cl. 15 (emphasis supplied).

[2964] U.S. Const. art. I, § 9, cl. 2 (emphasis supplied).

[2965] U.S. Const. art. I, § 10, cl. 3 (emphasis supplied).

[2966] U.S. Const. amend. III (emphasis supplied).

[2967] U.S. Const. amend. V (emphasis supplied).

officials to interpolate or extrapolate. If these can be styled "emergency powers", then the constitutional rule they illustrate is that "emergency powers" are always defined with particularity and can be exercised only within narrowly defined channels.

Furthermore, ***every one of these "emergency powers" presupposes and is consistent only with the existence of "well regulated Militia" composed of people who exercise "the right * * * to keep and bear Arms"***—

- Congress obviously could not "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions" unless the Militia existed.

- The "Cases of Rebellion or Invasion" which would justify suspension of "[t]he Privilege of the Writ of Habeas Corpus" would constitute two of the reasons for which the Militia could be "call[ed] forth".

- If a State were "actually invaded, or in such imminent Danger as will not admit of delay", she would likely have to depend upon her Militia to repel the attack initially, because there would be no time to raise regular "Troops, or Ships of War" of her own, or to await the arrival of contingents from the Armed Forces of the United States.

- A "Soldier * * * quartered in any house * * * in time of war" could be a member of the Militia "call[ed] forth" to "repel [an] Invasion[ ]". And,

- "[T]he Militia" would be expected to be "in actual service in time of War or public danger".

So much for the contention that "emergency powers" constitute a set of "exceptions" to the command that "the right of the people to keep and bear Arm, shall not be infringed".

4. Summary. The full meaning of "the right of the people to keep and bear Arms" can now be set forth in outline:

✶ *To what purposes is "the right" directed*—the maintenance of "well regulated Militia" in order to guarantee "the security of a free State" in each of "the several States" and for the Union as a whole.

✶ *Who enjoys "the right"*—essentially every able-bodied free American above the age of no more than sixteen years.

✶ *What "Arms" does "the right" encompass*—(i) *every* type of firearm that *could* find a profitable use with respect to Militia service, including so-called "assault rifles", "sniper rifles", "combat shotguns", "concealable handguns", and other small arms in any way suitable for contemporary light infantry, irregulars, partisans, *guerrilleros*, *franc-tireurs*, or *résistants*; (ii) ammunition of *every* type available for such firearms; and (iii) all related accoutrements.

✶*What are the sources of such "Arms"*—the free market, the States, and the General Government, in that order, with primary emphasis on the first.

✶*How and where can "the right" be exercised*—(i) in common Americans' performance of whatever duties may be assigned to them when called forth for active Militia service; (ii) by their personal acquisition of firearms, ammunition, and accoutrements, particularly in the free market; (iii) by their personal possession of that equipment at all times in their own homes and businesses, on the streets, and in other public places and places of public accommodation; and (iv) by their use of such "Arms" for training, sport, and hunting at target ranges, shooting clubs, and all other appropriate venues.

✶*When and for what reasons may public officials prohibit or restrict "the people's" exercise of "the right"*—never and for no reason.

✶*When and for what reasons may public officials validly "regulate" "the right"*—whenever it may be necessary and proper: (i) "[t]o provide for organizing, arming, and disciplining, the Militia", for "governing such Part of them as may be employed in the Service of the United States", and for "training the Militia according to the discipline prescribed by Congress";[2968] (ii) "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions";[2969] otherwise (iii) to provide for "[a] well regulated Militia", according to *pre*-constitutional standards, in each State under the laws thereof; and (iv) to exclude from the Militia individuals convicted of crimes who are incarcerated or for whose violations of the criminal law the just punishment is slavery.

[2968] U.S. Const. art. I, § 8, cl. 16.

[2969] U.S. Const. art. I, § 8, cl. 15.

CHAPTER FORTY-SIX

The Second Amendment ensures that, with respect to "the right of the people to keep and bear Arms", the original Constitution will be "the bill of rights" it is intended to be.

The Second Amendment is one of the ten "further declaratory and restrictive clauses" that, compiled in the Bill of Rights, were "added" to the original Constitution "in order to prevent misconstruction or abuse of its powers".[2970] Its purpose is both didactic and prophylactic—namely, to provide a pellucid statement that: (i) teaches the true interrelation among "the people", "Arms", "Militia", and "a free State"; (ii) repeats and reinforces certain principles embodied in the original Constitution that relate to those matters; (iii) prevents (or at least renders incredible) any misinterpretation by errant public officials of the constitutional provisions that deal with "Militia"; (iv) supplies the controlling legal basis for correction of rogue officials' and private parties' misbehavior with respect to "the right of the people to keep and bear Arms"; and thereby (v) confines the General Government, the States, and private parties within the boundaries the original Constitution defined. Its place as an *Amendment* renders it *superior* to any antecedent provision in the original Constitution to the extent of any perceived conflict between the two. Reading the original Constitution through the magnifying glass of the Second Amendment proves, however, that no inconsistency between the two is possible—and that, in fact, *both the original Constitution and the Second Amendment constitute mutually complementary and supportive "bills of rights" with respect to "the right of the people to keep and bear Arms"*.

A. The relevant rules of constitutional interpretation. In its relationship to other parts of the Constitution, the Second Amendment must be construed in accordance with certain fundamental rules.

1. A valid application of the Amendment must relate all of its particulars to every other provision in the Constitution that deals with the same subject-matter, so that "the supreme Law of the Land"[2971] is read as an entirety, harmonizing all of its mutually interrelated provisions. Because, as with every complex statute, all of the parts of the original Constitution and the Bill of Rights are parts of the same

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[2970] RESOLUTION OF THE FIRST CONGRESS SUBMITTING TWELVE AMENDMENTS TO THE CONSTITUTION (4 March 1789), *in Documents Illustrative of the Formation of the Union of the American States*, *ante* note 1, at 1063.

[2971] U.S. Const. art. VI, cl. 2.

legal instrument, "each [of them] must be considered in the light of the other[s]",[2972] "must be read in relation to each other",[2973] and "must be reconciled so as to produce a symmetrical whole".[2974] With the caveat that any purported construction of any of the General Government's or the States' powers which is not completely consistent with the Second Amendment must be erroneous.

2. As with any statute, all other things being equal, "identical words used in different parts of the [Constitution and its Amendments] are intended to have the same meaning".[2975] So "[w]hen the same term which has been used" in one clause of the original Constitution is used in the Second Amendment, "it must be understood as retaining the sense originally given to it".[2976] This is especially true inasmuch as the purpose of the Second Amendment is, not to add something new, but instead (as noted above) merely "to prevent misconstruction or abuse of [the original Constitution's] powers"—which the Amendment could never accomplish if its words meant something different from the selfsame words in the Constitution. For the most obvious examples pertinent here—"the Militia" and "the Militia of the several States" incorporated within the original Constitution[2977] must be the selfsame "well regulated Militia" of which the Second Amendment speaks; and the "Arms" which the Amendment recognizes as within "the right of the people to keep and bear" must be (at least in type and serviceability) the selfsame "Arms" as to which Congress is "[t]o provide for * * * arming * * * the Militia".[2978]

3. The Constitution is not psychotic. One of its provisions cannot detract from, contradict, or least of all nullify either itself or any other provision. Just as some particular positive "effect [must] be given to each word of the

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[2972] Hostetter v. Idlewild Bon Voyage Liquor Corporation, 377 U.S. 324, 332 (1964). *Accord*, United States v. Wong Kim Ark, 169 U.S. 649, 653 (1898); Cherokee Intermarriage Cases, 203 U.S. 76, 89 (1906); Talbott v. Silver Bow County, 139 U.S. 438, 443-444 (1891); Reid v. Covert, 354 U.S. 1, 44 (1957) (opinion of Frankfurter, J.).

[2973] United States v. Universal C.I.T. Credit Corporation, 344 U.S. 218, 222 (1952).

[2974] Federal Power Commission v. Panhandle Eastern Pipe Line Company, 337 U.S. 498, 514 (1949). *Accord, e.g.,* Richards v. United States, 369 U.S. 1, 11 (1962).

[2975] Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 433 (1932). *Accord*, *e.g.*, Commissioner of Internal Revenue v. Lundy, 516 U.S. 235, 249-250 (1996); Gustafson v. Alloyd Company, Inc., 513 U.S. 561, 569-570 (1995); Ratzlaf v. United States, 510 U.S. 135, 143 (1994); Department of Revenue of Oregon v. ACF Industries, Inc., 510 U.S. 332, 342 (1994); Brooke Group Ltd. v. Brown & Williamson Tobacco Corporation, 509 U.S. 209, 230 (1993); Commissioner of Internal Revenue v. Keystone Consolidated Industries, Inc., 508 U.S. 152, 159 (1993); Estate of Cowart v. Nicklos Drilling Company, 505 U.S. 469, 479 (1992); Sullivan v. Stroop, 496 U.S. 478, 484 (1990); Sorenson v. Secretary of the Treasury, 475 U.S. 851, 860 (1986); Morrison-Knudson Construction Company v. Director, Office of Workers' Compensation Programs, 461 U.S. 624, 633 (1983). Of course, if all other things are *not* equal, then this rule becomes merely presumptive, not absolute. Helvering v. Stockholms Enskilda Bank, 293 U.S. 84, 86-87 (1934); Atlantic Cleaners & Dyers, 286 U.S. at 433-434.

[2976] *See* Hepburn and Dundas v. Ellzey, 6 U.S. (2 Cranch) 445, 453 (1805).

[2977] U.S. Const. art. I, § 8, cls. 15 and 16, *and* art. II, § 2, cl. 1.

[2978] U.S. Const. art. I, § 8, cl. 16.

Constitution",[2979] no negative effect can be assigned to the selfsame words, or read into other words in the Constitution. For "[t]he doing of one thing which is authorized cannot be made the source of an authority to do another thing which there is no power to do".[2980] Because all of the Constitution's powers—and its duties and disabilities, too—"are of equal dignity", none of them may "be so enforced as to nullify or substantially impair [any] other".[2981] All of "these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution".[2982]

B. The effect of the Second Amendment on the General Government. To understand the effect of the Second Amendment on the powers of the General Government requires a close examination of the original Constitution in several particulars.[2983]

1. "[T]he right of the people to keep and bear Arms" under the original Constitution. Were close attention paid to what the original Constitution actually provided, the Second Amendment would be recognized as something of a redundancy. For, as Alexander Hamilton pointed out, "[t]he truth is * * * that the [original] Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS"[2984]—with respect to *all* of the General Government's rights, powers, duties, and disabilities, including every one that could touch upon the Militia.

The very purpose of the Second Amendment proved Hamilton correct. Primarily, the Amendment aimed at preventing "misconstruction * * * of [the original Constitution's] powers"—that is, the "[w]rong interpretation of [its] words".[2985] Not at detracting from exorbitant powers that had been carelessly delegated to the General Government, but instead at ensuring that no error would occur in the application of the *already properly limited* powers that had been delegated. So, what the Amendment meant, the original Constitution meant as well. But because the original Constitution could and should have been construed consistently with the meaning of the Second Amendment in the first place, with the Amendment thereafter serving at the most as a mere guide to and confirmation of

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[2979] Knowlton v. Moore, 178 U.S. 41, 87 (1900).

[2980] Wilson v. New, 243 U.S. 332, 345 (1917).

[2981] Dick v. United States, 208 U.S. 340, 353 (1908).

[2982] Williams v. Rhodes, 393 U.S. 23, 29 (1968).

[2983] Throughout the following analysis, the original Constitution and the meaning and operation of its powers, duties, and disabilities will be described in the *past* tense, so as to focus on the state of the law between June of 1788 (when ratification of the Constitution was completed) and December of 1791 (when ratification of the Second Amendment was completed). The reader should recall, though, that, except insofar as some later Amendment may have modified it, what the Constitution meant then it still means now.

[2984] *The Federalist* No. 84.

[2985] S. Johnson, *Dictionary, ante* note 50, in both the First (1755) and the Fourth (1773) Editions.

that construction, then the original Constitution could and should have been so correctly interpreted and applied even before the Amendment's ratification, and even thereafter without the Amendment's aid.

The Second Amendment was adopted also to forefend "abuse" of the original Constitution. Then (as now), "abuse" imported something far more serious than mere "misconstruction". It was not simply "[t]he ill use of any thing",[2986] but an "[i]mproper treatment or use; application to a wrong or bad purpose; misuse"[2987]—and, if long continued, "[a] corrupt practice or custom; offense; [or] crime",[2988] such as, specifically, "the abuses of government".[2989] An "abuse" implies an action the perpetrator undertakes in knowing violation of some clear legal duty, or with wilful blindness to or in reckless disregard of the consequences of his misbehavior. Inasmuch as the United States was a "body politic or corporate", and the original Constitution its "franchise" or "charter" from WE THE PEOPLE, acting in their capacity as sovereigns, one could justly have said that an "abuse * * * of [the Constitution] * * * signifie[d] any positive act in violation of the charter and in derogation of public right, wilfully done or caused to be done; the use of rights * * * as a pretext for wrongs and injuries to the public".[2990] So every "abuse" of the original Constitution was also a violation of it, and every significant violation of it was an "abuse", before the Second Amendment was ratified. For the Amendment did not add to, subtract from, or otherwise change the Constitution. Any "abuse" that Americans could have exposed with the Amendment's aid—whether an "ill use", an "application to a wrong or bad purpose", a "corrupt practice", or rogue public officials' "use of rights * * * as a pretext for wrongs and injuries to the public"—they could and should have been able to expose without it. An "abuse" of the original Constitution, then, should always have been apparent, both to the abusers and to their victims.

Not surprisingly, then, analysis demonstrates that, *as to "the right of the people to keep and bear Arms", the original Constitution already contained all of the basic protections the Second Amendment later provided.*

a. The original Militia Powers. As to both Congress and the President, the original Constitution's Militia Powers—construed according to the historical record and the common sense of the matter—fitted Hamilton's characterization perfectly.

[2986] S. Johnson, *Dictionary, ante* note 50, definition 1 in both the First (1755) and the Fourth (1773) Editions.

[2987] *Webster's Revised Unabridged Dictionary, ante* note 11, at 7, definition 1. *Accord, The Compact Edition of the Oxford English Dictionary, ante* note 11, Volume 1, at 11, definition 2.

[2988] *Webster's Revised Unabridged Dictionary, ante* note 11, at 7, definition 3. *Accord, The Compact Edition of the Oxford English Dictionary, ante* note 11, Volume 1, at 12, definition 3.

[2989] N. Webster, *An American Dictionary, ante* note 15, definition 2.

[2990] *See Black's Law Dictionary, ante* note 368, at 222, 786, 298, 25.

(1) The absence of Militia Powers in the Judiciary. Because the original Constitution delegated no Militia Powers to the Judiciary, the courts need receive no detailed separate treatment here. It suffices to point out the Supreme Court's shameful failure to exercise "the judicial Power of the United States"[2991] properly in the *Heller* case.[2992] In *Heller*, the Justices in the majority ruled that "a ban on handgun possession in the home violates the Second Amendment"; nevertheless, they also opined—albeit only in *dicta* but with the concurrence of the Justices in the minority as well, so that on this point the Court was *unanimous*—that the Amendment does *not* prohibit the General Government from "bann[ing]" "weapons that are most useful in military service—M-16 rifles and the like" as well as other "sophisticated arms that are highly unusual in society at large" precisely because they have been "banned".[2993] According to *Heller*, at best the Second Amendment imposes only a *partial* impediment upon the exercise of some general power of Congress—the exact location of which power in the Constitution the Justices did not identify—to "ban[ ]" certainly some, and perhaps all, firearms from WE THE PEOPLE'S possession. This perverse result emphasizes the wisdom in Hamilton's warning that

> bills of rights * * * [we]re not only unnecessary in the [original] Constitution but would even be dangerous. They would contain various exceptions to powers which [we]re not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? * * * I will not contend that [a right set out in a bill of rights] would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power. They might urge with a semblance of reason that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given * * * . This may serve as a specimen of the numerous handles which would be given to the doctrine of constructive powers, by the indulgence of an injudicious zeal for bills of rights.[2994]

(2) The Militia Powers of Congress. In the original Constitution, Congress's *only* powers with respect to the Militia were:

- "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions";[2995]

[2991] U.S. Const. art. III, § 1.

[2992] District of Columbia v. Heller, 554 U.S. 570 (2008).

[2993] *Id.* at 635, 627 (Scalia, J., for the Court).

[2994] *The Federalist* No. 84.

[2995] U.S. Const. art. I, § 8, cl. 15.

- "[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress";[2996] and

- "[t]o make all Laws which shall be necessary and proper for carrying into execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof".[2997]

(a) Limited by definition. These provisions both explicitly defined *and by their definitions limited* Congress's authority with respect to the Militia, excluding all other conceivable powers in that regard. For "[a]ffirmative words are * * * negative of other objects than those affirmed".[2998] Neither—if rationality were to prevail—could self-contradictory effects have been suffered to arise out of the selfsame words in these clauses. For, if "[t]he doing of one thing which is authorized cannot be made the source of an authority to do another thing which there is no power to do",[2999] then surely a power delegated for a particular purpose cannot be perverted into a power to do the very opposite.

(b) Duties as well as powers. More than that, under the original Constitution, Congress's powers with respect to the Militia were, perforce of the subject of those powers, *inflexible legal duties* as well.[3000] The delegation of each and every one of Congress's powers imposed a moral, a political, and a legal duty on its Members to exercise those powers whenever that exercise might have been "necessary and proper".[3001] Yet, in some situations, Members might have determined in good faith and for sufficient reasons that no necessity or propriety for the exercise of a particular power existed. For instance, the original Constitution allowed, but did not compel, Congress "[t]o constitute Tribunals inferior to the supreme Court".[3002] Congress might honestly have determined that no such "Tribunals" were "necessary", because State courts could have provided sufficient judicial services for the country's needs; and, if such "Tribunals" were not "necessary", then expending scarce public resources on them, at the cost of attending to other needs, would not have been "proper". In that case, Members of Congress would have fulfilled their

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[2996] U.S. Const. art. I, § 8, cl. 16.

[2997] U.S. Const. art. I, § 8, cl. 18.

[2998] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803).

[2999] Wilson v. New, 243 U.S. 332, 345 (1917).

[3000] *See ante*, at 50-54.

[3001] *See* U.S. Const. art. I, § 8, cl. 18 *and* art. VI, cl. 3.

[3002] U.S. Const. art. I, § 8, cl. 9.

duty to investigate the matter, but would have invoked their privilege not to exercise their power in a wasteful fashion.

The inflexibility of Congress's duties with respect to the Militia arose out of the special constitutional character of the Militia, and Congress's peculiarly circumscribed relationship to them. The original Constitution did not create the Militia. Neither did it empower either the General Government or the States to create any *ersatz* "militia" from scratch, according to some pattern unknown to American history. Instead, the Constitution adopted and incorporated as permanent parts of its federal system "the Militia *of the several States*",[3003] just as they existed in 1788 and had existed for decade upon decade before anyone even imagined anything like the Constitution, the Articles of Confederation, or the Declaration of Independence. The Militia thus became (and remain) constitutional entities in their own right, even more than the States or the three branches of the General Government—which should hardly be surprising, inasmuch as the Militia consist of almost the entirety of WE THE PEOPLE themselves, whereas the General Government and the States are merely THE PEOPLE'S creations, representatives, and ultimately servants. Indeed, because of their composition and prior existences, the Militia's constitutional pedigree was obviously superior to that of the General Government, which WE THE PEOPLE created from nothing, and not inferior even to that of the States, because the Militia existed as parts of all but one of the Colonies' governments long before the States came into existence as political establishments independent of Great Britain. Under the original Constitution, therefore, Congress was as devoid of power to dissolve the Militia, to change their character, to alter their composition, to substitute different entities in their places, or to create new institutions to compete with them, as it was to take any such actions with respect to the States. And even in the face of a purported constitutional Amendment to such effect, the Militia will retain that status, as to both Congress and the States—because in the final analysis the Militia arise out of WE THE PEOPLE'S authority under the Declaration of Independence, which itself derives from "the Laws of Nature and of Nature's God", not the positive laws of the General Government or the States, and therefore which no mere Amendment of the Constitution or any State's law can negatively affect.

The original Constitution incorporated "the Militia of the several States" as permanent parts of its federal system, because WE THE PEOPLE considered them instruments perfectly fitted to serve at least four of the purposes of its Preamble—namely, "to form a more perfect Union, establish Justice, insure domestic Tranquility, [and] provide for the common defence". The Constitution explicitly authorized Congress to "call forth the Militia" from any and every State

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[3003] U.S. Const. art. II, § 2, cl. 1 (emphasis supplied).

to "be employed in the Service of the United States" (thereby "form[ing] a more perfect Union"), and assigned to the Militia the authority and responsibility to "execute the Laws of the Union" (thereby "establish[ing] Justice"), "to * * * suppress Insurrections" (thereby "insur[ing] domestic Tranquility"), and "to * * * repel Invasions" (thereby "provid[ing] for the common defence").[3004] The Militia also served the other two of the Preamble's goals—namely, "to * * * promote the general Welfare * * * and secure the Blessings of Liberty to ourselves and our Posterity"—because the Militia were soon to be described as "necessary to the security of a free State", of which equality and liberty have ever been the hallmarks.[3005] (As the reader's attention is being directed at this point to the original Constitution alone, this matter need simply be noted, but not harped on. It should be apparent, though, that if Americans understood the relationship among the Militia, "a free State", "the general Welfare", and "the Blessings of Liberty" when the Second Amendment was ratified in 1791 they more than likely understood it just as well when the Constitution was ratified in 1788.)

The original Constitution did delegate to Congress some very specific authority with respect to "the Militia of the several States", so that they could be organized, armed, disciplined, trained, and governed in an uniform manner in anticipation of their possibly being "employed in the service of the United States" for three limited, albeit critically important, National purposes.[3006] This delegation was necessary because, inasmuch as the Militia always had been and remained integral parts of *the States'* governmental structures—and, ultimately, within WE THE PEOPLE'S reserved authority under the Declaration of Independence—without it Congress could have exercised *no* power whatsoever over the Militia. After all, the only other authority of the General Government in the original Constitution which could have impinged directly upon the States' governments was the duty that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government".[3007] And this duty was coupled with the power adequate to fulfill it.[3008] So, because "a Republican Form of Government" required that a State field a Militia (which all of the independent States had done prior to 1788), the United States were bound to "guarantee" a Militia "to every State in this Union". Absent a delegation of authority to Congress with respect to the Militia, however, each such Militia would have had to subsist entirely within and under the control of its own State's "Republican Form of Government", not to any degree subject to Congress. For the United States could no more have "guarantee[d] to every State

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[3004] *Compare* U.S. Const. preamble *with* art. I, § 8, cls. 15 and 16.

[3005] *Compare* U.S. Const. preamble *with* amend. II.

[3006] U.S. Const. art. I, § 8, cls. 15 and 16.

[3007] U.S. Const. art. IV, § 4.

[3008] *See* U.S. Const. art. I, § 8, cl. 18.

* * * a Republican Form of Government" in which each State's Militia was subservient to Congress than it could have "guarantee[d] * * * a Republican Form of Government" in which each State's legislature, executive, or judiciary was under Congress's control.[3009]

(c) Specific parts of the Militia Powers. In the original Constitution, the power "[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively * * * the Authority of training the Militia according to the discipline prescribed by Congress"[3010] was plainly *unitary*: *All* of these activities were to be performed simultaneously or at least in some rationally interrelated sequence, in order properly to prepare the Militia to be "call[ed] forth to execute the Laws of the Union, suppress Insurrections and repel Invasions".[3011] Self-evidently, there would have been no point in "organizing * * * the Militia" without "arming" and "disciplining" them; or in "arming" them, without "organizing" and "disciplining" them; or in "disciplining" them without "organizing" and "arming" them. Certainly the States could not have exercised "the[ir reserved] Authority of training the Militia according to the discipline prescribed by Congress" unless Congress had actually "provide[d] for * * * disciplining, the Militia". And "training" according to the best theoretical plan for "discipline" would have been next to useless in practice had the Militia not been "arm[ed]", and probably impossible had they not been "organiz[ed]". (Although, of course, upon default by Congress, the States themselves could have "organiz[ed], arm[ed], and disciplin[ed]" their own Militia.) For the sake of analysis, though, this power can profitably be subdivided into its parts.

(i) General considerations. The purposes the Preamble identified in the original Constitution WE THE PEOPLE intended to be permanent. And, since 1788, no one has ever proposed that even one of those purposes should be expunged from the Constitution. The original Constitution incorporated "the Militia of the several States" as permanent establishments within its federal system so that the goals of the Preamble would be served. To that end, the original Constitution empowered Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its enumerated powers with respect to the Militia.[3012] Moreover, the original Constitution explicitly assigned and entrusted to the Militia, *and to only the Militia*, the critical authority and responsibility "to execute the Laws of the Union,

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[3009] The critical interrelationship between the Militia and "a Republican Form of Government" receives more extensive treatment *ante*, at 890-893, 921-922, 1038-1040, and 1301-1307, *and post*, at 1451-1453 and 1497-1499.

[3010] U.S. Const. art. I, § 8, cl. 16.

[3011] U.S. Const. art. I, § 8, cl. 15.

[3012] U.S. Const. art. I, § 8, cl. 18.

suppress Insurrections and repel Invasions"—without the fulfillment of which, when necessary, the Union could have been expected not to survive. So, from 1788 onwards, in order to satisfy the Preamble, it was always "necessary and proper" as a matter of law for Congress *actually* "[t]o provide for organizing, arming, and disciplining, the Militia" *in some sufficient manner at all times*. Congress's powers with respect to the Militia, then, constituted *duties* which it was required to fulfill to the maximum extent practically possible either through the General Government's own action or through reliance on the States or the people—*whether the Second Amendment had existed or not*.

Under the original Constitution, Congress's power "[t]o provide for organizing, arming, and disciplining, the Militia" extended to preparation of the Militia to "be employed in the Service of the United States" for three purposes *only*: "to execute the Laws of the Union, suppress Insurrections and repel Invasions". And the President could have exercised the office of "Commander in Chief * * * of the Militia" *only* when they were "called into the actual Service of the United States",[3013] necessarily for one or more of those three purposes *only*. All other possible employments for the Militia—everything else that today would fall within the rubric of "homeland security", such as executing the laws of the States, and preparing to deal with the effects of natural disasters, industrial accidents, epidemics, monetary and banking crises, and like calamities—were left to the States, because the Militia were, both originally and as incorporated within the federal system, "the Militia *of the several States*". Had the Constitution assigned to Congress the sole authority to organize, arm, discipline, train, and govern the Militia, and had Congress exercised this authority in such a manner that the Militia were organized, armed, disciplined, trained, and governed so as to be capable solely of "execut[ing] the Laws of the Union, suppress[ing] Insurrections and repel[ling] Invasions", then in effect the Militia would have been, not "the Militia *of the several States*" at all, but instead "the Militia *of the United States*", because they would have been prepared to "be employed in the Service of the United States" but not to serve any of the myriad other purposes for which the States might have found it necessary to call them forth. On the other hand, inasmuch as Congress could never have "provide[d] for organizing, arming, and disciplining, the Militia" both for the three constitutional purposes and for all of the peculiar needs that might have arisen in each State in the course of human events, WE THE PEOPLE would never have delegated to Congress an exclusive authority in the premises on the tacit assumption that Congress could have done the impossible. So, with respect to all of those matters, the States retained the authority to organize, arm, discipline, train, and govern their Militia as they saw fit, as long as they did not interfere with how Congress had "provide[d] for" the Militia so that they could be "call[ed] forth" "in

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[3013] U.S. Const. art. II, § 2, cl. 1.

the Service of the United States"[3014]—*whether the Second Amendment had existed or not.*

(ii) The power "[t]o provide for organizing * * * the Militia". On the face of the original Constitution, Congress's power "[t]o provide for organizing * * * *the* Militia" referred to "*the* Militia of the several States" *as they existed in 1788*. A basic principle of "*the* Militia" in 1788, and for generations theretofore, was that *everyone eligible for the Militia* was to be "organized" in *some* manner, even those who might have qualified for exemptions from certain Militia duties. And because of the nature of the three purposes for which the Militia might have been "call[ed] forth" "in the Service of the United States"—especially "repel[ling] Invasions" which might have threatened the very survival of the entire Union—under the original Constitution Congress should have "provide[d] for organizing, arming, and disciplining" *everyone* eligible for "*the* Militia" in *some* appropriate manner. That is, "*the* Militia" should have been composed of "the body of the people" as a whole.[3015] Therefore, by definition, Congress's power "[t]o provide for organizing * * * the Militia" excluded any license to decide, in some invidiously discriminatory fashion, who would or would not compose "the Militia". In the guise of "organizing * * * the Militia", Congress could not have jury rigged a "select militia", with everyone else consigned to an "unorganized militia" (or to no "militia" at all)—*whether the Second Amendment had existed or not*.

To be sure, although Congress could not constitutionally have "provide[d] for organizing * * * the Militia" by making narrow selections *for* the Militia from "the body of the people", it could have made judicious selections *within* the Militia, so that every individual could have been assigned duties commensurate with his particular ability or any exemption his special situation justified. The three constitutional purposes for which the Militia might have been "call[ed] forth" to "be employed in the Service of the United States" did not require that everyone be "organiz[ed]" in exactly the same way. For example, the youngest individuals could have been assigned no more than educational duties; older individuals, *para*-military duties; the infirm or elderly, administrative duties; whoever was qualified, of whatever age, duties in the medical or administrative services; and so on.

The individuals whom Congress "organiz[ed]" for the three constitutional purposes the States could also have "organiz[ed]" for their own purposes—and for the three constitutional purposes as well, in response to or even in anticipation of a possible default on the part of Congress. After all, WE THE PEOPLE could never have intended for such critical purposes to be left unfulfilled simply because officials of the General Government fell down on their jobs. And they surely recognized that

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[3014] *See* U.S. Const. art. VI, cls. 2 and 3.

[3015] *See* Virginia Declaration of Rights (1776) art. 13.

the most pressing need "to execute the Laws of the Union, suppress Insurrections and repel Invasions" would likely arise in one of more of the States, which would then be the parties most exposed to the danger, and best situated to deal with it, too, provided that they could call forth *organized* Militia in their defense. Moreover, if both Congress and the States had defaulted in these particulars, then WE THE PEOPLE could have "organiz[ed]" the Militia themselves, because "the Militia of the several States" were establishments in which THE PEOPLE were not only entitled but even required to participate, perforce of the original Constitution itself (as well as the Declaration of Independence), no matter what Congress or the States did or did not do—*whether the Second Amendment had existed or not*.

The majority of the Justices in the *Heller* case staggered in the right direction when they recognized that

> the militia is assumed by [the Constitution] already to be *in existence*. Congress is given * * * the power not to create, but to "organiz[e]" it—and not to organize "a" militia, which is what one would expect if the militia were to be a federal creation, but to organize "the" militia, connoting a body already in existence * * * . This is fully consistent with the ordinary definition of the militia as all able-bodied men.[3016]

Having said this, however, these Justices then stumbled into the error that,

> [f]rom that pool [of all able-bodied men] Congress has plenary power to organize the units that will make up an effective fighting force. * * * Congress need not conscript every able-bodied man into the militia, because nothing in [the Constitution] suggests that in exercising its power to organize, discipline, and arm the Militia, Congress must focus upon the entire body. Although the militia consists of all able-bodied men, the federally organized militia may consist of a subset of them.
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> * * * Congress retains plenary authority to organize the militia, which must include the authority to say who will belong to the organized force.[17]
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> 17. * * * It could not be clearer that Congress's "organizing" power * * * can be invoked even for that part of the militia not "employed in the Service of the United States." * * * Both the Federalists and Anti-Federalists read the provision as it was written, to permit the creation of a "select" militia.[3017]

[3016] 554 U.S. at 596 (Scalia, J., for the Court) (emphasis in the original) (*dicta*).

[3017] *Id.* at 596, 600 & note 17 (*dicta*).

Any constitutionalist must almost despair at the amount of ignorance, or duplicity, compressed within the latter passages:

First, apparently the Justices did not realize (or care) that the constitutional term "the Militia" is not singular, but plural—"the Militia of the several States", from which a "Part of *them* * * * may be employed in the Service of the United States". The Militia are not "a [single] body already in existence", but as many "bod[ies] already in existence" as there are States. That the plurality of the Militia—and especially their status as *State* institutions—might have some constitutional significance entirely escaped the Justices (or was intentionally put to one side because it ran counter to their purpose).

Second, if (to use the Justices' verbiage) "the militia" is "a body already in existence" which consists of "*all* able-bodied men"; and if the power and duty of Congress is "[t]o provide for organizing * * * *the* Militia", without any limitation or qualification stated on the face of the original Constitution; then on exactly what basis may Congress *not* "focus on the entire body"? How can Congress legitimately "organiz[e] * * * [only *Part* of] *the* Militia" under the power "[t]o provide for organizing * * * *the* Militia"? What then becomes of the remainder of "*the* Militia"? And may Congress "organiz[e]" parts of "the Militia" solely in specially selected States, or among certain specially selected classes or special-interest groups within particular States, so that one section of the country, or one segment of a community, can be pitted against another? Although the original Constitution foresaw that only "Part of the[Militia]" might be "call[ed] forth" to "be employed in the Service of the United States" at a particular time, nowhere did it indicate that only some indefinite "Part" needed to be "organiz[ed]" in the first place. Indeed, the original Constitution allowed that only "Part of the[Militia]" might be "call[ed] forth" precisely because it presumed that, with "the Militia" "organiz[ed]" *in their entireties*, most situations would not require the whole of "the Militia" to "be employed in the Service of the United States". And, with "the Militia" "organiz[ed]" in their entireties, if only a "Part" were "call[ed] forth" for *illegitimate* purposes, and that "Part" turned rogue and complied with such an illegal summons, the remainder could still resist.

Third, why did the Justices focus only on Congress's supposedly "plenary power to organize the units that will make up an effective fighting force"? "[A]n effective *fighting* force" would be needed to "suppress Insurrections and repel Invasions", but not necessarily "to execute the Laws of the Union". So the power "to organize * * * units" for "an effective fighting force" does not exclude the power "to organize * * * units" for *other* purposes, in which "able-bodied men" not suited for a "fighting force" could serve.

Fourth, of course "Congress need not conscript every able-bodied man into the militia"—but only because *the Militia, by definition, are already composed of every*

able-bodied man, impressed into service by the Constitution itself. For Congress to "organiz[e]" a "select militia", and consign everyone else to some "unorganized militia" or to no "militia" at all, thus excluding them from the Militia, would be to "*de*conscript" individuals whom the Constitution has conscripted.

Fifth, "the federally organized militia" *as a whole* "may [not] consist of a subset of [all able-bodied men]" alone. Different units within the Militia may consist of "subset[s]" of individuals chosen on the basis of age, physical abilities, special skills, and so on. But "*the* Militia" must consist of *every* eligible individual in the community, each one assigned to *some* appropriate duty.

Sixth, it is not true that "[b]oth the Federalists and the Anti-Federalists read" Congress's power "[t]o provide for organizing * * * the Militia" "as it was written, to permit the creation of a 'select' militia". On its face, that power is *not* so "written", but excludes "a 'select' militia" if the term "*the* Militia" is given its commonsensical reading—*precisely as the Justices themselves read it, as "connoting a body" consisting of "all able-bodied men"*. Moreover, for the Justices to have relied upon contentions from the Anti-Federalists in this situation was disingenuous at best. For in their writings the Anti-Federalists often put forward strained constructions and outright misconstructions of the Constitution in order to make out a political case against its ratification.[3018] To the extent that any "legislative history" is useful in this regard,[3019] the position espoused by the Federalists must be accorded more credence, because they were intent upon convincing WE THE PEOPLE to ratify the Constitution, and their views prevailed. Unfortunately for the Justices, though, the single Federalist they cited (but refrained from actually quoting), Alexander Hamilton, did *not* contend that the Constitution permitted Congress to create "a 'select' militia" of the narrow sort the Justices imagined.

As Hamilton argued,

> "[t]he project of disciplining all the militia of the United States is as futile as it would be injurious if it were capable of being carried into execution. * * * To oblige the great body * * * of the citizens to be under arms for the purpose of going through military exercises and evolutions, as often as might be necessary to acquire the degree of perfection which would entitle them to the character of a well-regulated militia, would be a real grievance to the people and a serious public inconvenience and loss. * * * [T]he experiment, if made, could not succeed, because it would not long be endured. Little more can reasonably be aimed at with respect to the people at large than to have them properly armed and equipped; and

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[3018] *See generally* Jackson T. Main, *The Anti-Federalists: Critics of the Constitution, 1781-1788* (New York, New York: W.W. Norton & Company, Inc., 1974).

[3019] *See ante*, at 35-45.

> in order to see that this be not neglected, it will be necessary to assemble them once or twice in the course of a year.
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> "But though the scheme of disciplining the whole nation must be abandoned as mischievous or impracticable; yet it is a matter of the utmost importance that a well-digested plan should, as soon as possible, be adopted for the proper establishment of the militia. The attention of the government ought particularly to be directed to the formation of a select corps of moderate size, upon such principles as will really fit it for service in case of need."[3020]

Evidently, as his references to "'disciplining *all the Militia of the United States*'", "'oblig[ing] *the great body * * * of the citizens* to be under arms'", "'*the people at large * * ** properly armed and equipped'", and "'the scheme of disciplining *the whole nation*'" proved, Hamilton was well aware that "the Militia of the several States" were not narrow, "select militia", but instead encompassed just about every adult able-bodied free male American. Neither did he propose that "'the people at large'" should be excluded from the Militia, and what he called "'a select corps of moderate size'" substituted for them. Hamilton's concern was not with the near-universal character of the Militia, but instead that "'disciplining the whole nation'"—other than by "'assembl[ing] them once or twice in the course of year'" in order to insure that they were "'properly armed and equipped'"—would be "'mischievous or impractical'". This, however, was something of a straw man as a matter of law, because nothing in the original Constitution required Congress to attempt to "'disciplin[e] [everyone in] the whole nation'" *to exactly the same degree, or even necessarily to an extraordinarily high degree*, of purely military proficiency. And Hamilton's prediction that "'disciplining all the militia'" would be "'futile'" and "'injurious'", because it would prove so expensive that "'it would not long be endured'", rang hollow in the context of the historical fact that Americans *had* "'endured'" precisely that system throughout *pre-*constitutional times and then incorporated within the federal system the very "Militia of the several States" then in existence. In addition, Hamilton's warning that extensive participation by the citizenry in the Militia "'would be a real grievance to the people and a serious public inconvenience and loss'" partook of the myopia of "economic man", who views everything in the impurely materialistic terms of immediate personal comfort and monetary gain. For even the most thoroughly trained Militia would likely cost far less, and certainly would pose far fewer political and other dangers, in the long run than a professional "standing army" within an overblown "military-industrial complex". And even if securing freedom does demand a high price, being deprived of it invariably entails far greater "'inconvenience and loss'". In any event, even under Hamilton's view, not just a "select" group, but instead the entirety of "'the

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[3020] *The Federalist* No. 29.

people at large'", *would* have been "organiz[ed]"—to be sure, only for the purpose of becoming "'properly armed and equipped'", and only subject to a minimum number of actual musters, *but "organiz[ed]" to the last man nonetheless*. So, although what Hamilton proposed was extreme in practice, and smacked of his personal élitism and ironically *anti*-federalist bias for political centralization, it was nonetheless consistent in principle with the kind of "organiz[ation]" the Militia employed in *pre*-constitutional times, when Rangers, Minutemen, and other highly trained units *were formed within*, but by themselves alone *did not constitute the entirety of*, the Militia. Thus, Hamilton provided no support for, *but rather contradicted*, the *Heller* majority's contention that "Congress retains plenary authority to organize the militia, which must include the authority to say who will belong to the organized force".

As a capstone to that contradiction, upon ratification of the Constitution, Congress did not follow Hamilton's suggestion, but adopted a plan more in line with the *pre*-constitutional pattern.[3021] The *Heller* majority attempted to shore up its tottering house of argumentative cards by pointing out that the first Militia Act enrolled only "able-bodied white male citizens of the * * * states".[3022] This begged the question, however. For under the law and social *mores* of the time, Congress could have excluded all people of color from the Militia, not because it enjoyed the unfettered discretion to exclude anyone and everyone, but because those particular individuals were not considered part of "the body of the people" who comprised the Militia in the first place.[3023] People of color did not need to be affirmatively barred from the Militia to be excluded from enrollment—their race alone was usually the sufficient cause of that effect. Rather, they needed to be affirmatively included.

Seventh, to be sure, even if under the original Constitution Congress had properly "organiz[ed]" the entirety of "the Militia of the several States", depending upon circumstances it could still have "provide[d] for calling forth" only selected "Part[s] of them" to "be employed in the service of the United States". For example, if the problem at hand had been to "suppress [an] Insurrection[ ]" or "repel [an] Invasion[ ]", the first "Part" of the Militia "call[ed] forth" would surely have consisted of the mostly young, physically fit men equipped and trained as "an effective fighting force". Whereas, if the problem had been "to execute the Laws of the Union", men of different ages with different training would likely have been wanted. This obviously constitutional selectivity *within the Militia* is not what the *Heller* majority had in mind, however.

[3021] *An Act more effectually to provide for the National Defence by establishing an Uniform Militia throughout the United States*, Act of 8 May 1792, CHAP. XXXIII, § 1, 1 Stat. 271, 271.

[3022] *See* 554 U.S. at 600 (Scalia, J., for the Court).

[3023] *Compare and contrast* Virginia Declaration of Rights (1776) art. 13 *with* Scott v. Sandford, 60 U.S. (19 Howard) 393, 403-412 (1857) (opinion of Taney, C.J.).

So, in this regard (as in many others), the opinion of the majority of the Justices in *Heller* must be condemned as pernicious.[3024] For, if Congress may exclude any eligible individual from the Militia, it may exclude just about everyone. In that case, *no one* can assert a *constitutional right* to participate in the Militia, just as no one can claim a constitutional right to participate in "Armies" or "a Navy" if Congress determines that it is not "necessary and proper" to create such establishments (although, in the case of "Armies" and "a Navy", the absence of such a constitutional right is plainly justified under any circumstances).[3025] Therefore, no one can assert a *constitutional right* to possess a first-class "Militia-grade" firearm—that is, a contemporary "military-grade" firearm. Which absence of right the majority of the Justices in *Heller* explicitly endorsed[3026]—in which endorsement, of course, the minority concurred, making unanimous the subversion of the Constitution on this point. And no one can assert a *constitutional right* to participate in the exercise the Militia's constitutional and statutory authority. Which means that, according to the entire Supreme Court in *Heller*, *the only "militia" that can exist are such "'select' militia" as Congress deigns to create*. Thus, once again, the Court has blatantly erased part of the Constitution from the pages of the *United States Reports*—adding further evidence to the indictment that the *United States Reports* are the most compendious, as well as the most transparent, work of poor legal fiction ever written.

(iii) The power "[t]o provide for * * * arming * * * the Militia". Because under the original Constitution Congress was obviously required to exercise all of the separate powers within the power "[t]o provide for organizing, arming, and disciplining, the Militia" simultaneously or at least in some rational sequence; and because the power "[t]o provide for organizing" required the *entirety* of "the Militia"—that is, the *whole* "body of the people" (or, in Hamilton's phrase, the whole of "'the people at large'")—to be "organiz[ed]"; therefore the power "[t]o provide for * * * arming * * * the Militia" required that the *entirety* of the Militia—that is, the *whole* "body of the people"—be "arm[ed]" in *some* manner. So the power "[t]o provide for * * * arming * * * the Militia" could not have been mangled into a license for Members of Congress "[*t*]*o* [*fail, neglect, or refuse in every way to*] provide for * * * arming * * * the Militia" either in whole or in part. Moreover, Members of Congress surely could not have affirmatively "[dis]arm[ed]" them. For that would effectively have destroyed "the Militia of the several States". But Congress could have claimed no more authority to destroy the Militia than to destroy any other parts of the States' governmental structures, or to destroy the States themselves, or

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[3024] Of course, the two opinions for the minority of the Justices were even worse. *See* 554 U.S. at 636-680 (Stevens, J., dissenting), 681-723 (Breyer, J., dissenting).

[3025] *See* U.S. Const. art. I, § 8, cls. 12 and 13.

[3026] *See* 554 U.S. at 626-628 (Scalia, J., for the Court).

to destroy the Constitution's federal system of which the States and their Militia were installed as permanent components. Thus, inasmuch as every individual within "the body of the people" by definition was eligible for service in the Militia,[3027] Congress could not have denied "the people" a "right * * * to keep and bear Arms"—*whether the Second Amendment had existed or not*.

Conceivably, Congress might have done nothing at all, simply allowing the States and "the people" to provide "the people" with whatever arms they thought fit and could acquire on their own. Such benign neglect, however, would not have promoted the uniformity in armaments "necessary and proper" in practice were Militia from different States "call[ed] forth" to "be employed in the Service of the United States". So it was not the policy Congress adopted and followed for more than a century, while its Members still paid a modicum of attention to the Constitution.[3028] Only in 1903 did Congress introduce the policy of authorizing "the Secretary of War" "to issue" to the so-called "organized militia, to be known as the National Guard" "such number of the United States standard service magazine arms, with bayonets, bayonet scabbards, gun slings, belts, and such other necessary accouterments and equipments as are required for the Army of the United States"—while neither arming "the remainder [of the Militia] to be known as the Reserve Militia" out of the General Government's or the States' martial stores, nor explicitly directing the members of this "Reserve Militia" to arm themselves in the free market.[3029] In 1916, Congress renamed "the Reserve Militia" "the Unorganized Militia".[3030] So, today, the so-called "organized militia" (that is, the National Guard and the Naval Militia) is armed by Congress; whereas the so-called "unorganized militia", which consists of the vast majority of Americans eligible for the true Militia, is armed (if at all) by those Americans themselves, but at best only to the extent that various forms of "gun control" do not prevent them from acquiring sufficient arms.

Now, the power "[t]o provide for * * * arming * * * the Militia" under the original Constitution did not explicitly describe any particular types of arms. Self-evidently, however, they had to be arms *suitable for "the Militia"*. In that era, though, just as they are today, ***all*** *firearms* were suitable for *some* kind of Militia service. Therefore, under the original Constitution, an effective "right of the people to keep

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[3027] *See* Virginia Declaration of Rights (1776) art. 13.

[3028] *Compare An Act more effectually to provide for the National Defence by establishing an Uniform Militia throughout the United States*, Act of 8 May 1792, CHAP. XXXIII, § 1, 1 Stat. 271, 271, *with* Revised Statutes of the United States (1873-1874), TITLE XVI, THE MILITIA, § 1628, 18 Stat. 285, 285.

[3029] An Act To promote the efficiency of the militia, and for other purposes, Act of 21 January 1903, CHAP. 196, §§ 1 and 13, 32 Stat. 775, 775, 777.

[3030] An Act For making further and more effectual provision for the national defense, and for other purposes, Act of 3 June 1916, CHAP. 134, § 57, 39 Stat. 166, 197.

and bear Arms" encompassed *all* firearms—*whether the Second Amendment had existed or not.*

Which means that, today, Congress may surely exercise its power "[t]o provide for * * * arming * * * the Militia" in a protective fashion, so as to secure for Americans the possession of whatever firearms they may legally have acquired on their own by whatever means. In fact, Congress has provided that:

> (a) PROHIBITION ON CONFISCATION OF FIREARMS.—No officer or employee of the United States (including any member of the uniformed services), or person operating pursuant to or under color of Federal law, or receiving Federal funds, or under control of any Federal official, or providing services to such an officer, employee, or other person, while acting in support of relief from a major disaster or emergency, may—
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> (1) temporarily or permanently seize, or authorize seizure of, any firearm the possession of which is not prohibited under Federal, State, or local law, other than for forfeiture in compliance with Federal law or as evidence in a criminal investigation;
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> (2) require registration of any firearm for which registration is not required by Federal, State, or local law;
>
> (3) prohibit possession of any firearm, or promulgate any rule, regulation, or order prohibiting possession of any firearm, in any place or by any person where such possession is not otherwise prohibited by Federal, State, or local law; or
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> (4) prohibit the carrying of firearms by any person otherwise authorized to carry firearms under Federal, State, or local law, solely because such person is operating under the direction, control, or supervision of a Federal agency in support of relief from the major disaster or emergency.
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> (b) LIMITATION.—Nothing in this section shall be construed to prohibit any person in subsection (a) from requiring the temporary surrender of a firearm as a condition for entry into any mode of transportation used for rescue or evacuation during a major disaster or emergency, provided that such temporarily surrendered firearm is returned at the completion of such rescue or evacuation.
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> (c) PRIVATE RIGHTS OF ACTION.—
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> (1) IN GENERAL.—Any individual aggrieved by a violation of this section may seek relief in an action at law, suit in equity, or other proper proceeding for redress against any person who subjects such individual, or causes such individual to be subjected, to the deprivation

> of any of the rights, privileges, or immunities secured by this section.
>
> (2) REMEDIES.—In addition to any existing remedy in law or equity, under any law, an individual aggrieved by the seizure or confiscation of a firearm in violation of this section may bring an action for return of such firearm in the United States district court in the district in which that individual resides or in which such firearm may be found.
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> (3) ATTORNEY FEES.—In any action or proceeding to enforce this section, the court shall award the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.[3031]

This statute is good as far as it goes. Its coverage is broad, extending to *any* "major * * * emergency"; to "*any* firearm the possession of which is not prohibited under Federal, State, or local law"; and to such standard means of "gun control" as seizure, registration, and prohibition of the possession and carrying of firearms. It even embraces a "major * * * emergency" in which some sort of "martial law" might be declared, because it applies, without exception, to each and every "officer or employee of the United States (*including any member of the uniformed services*)", which takes in both the regular Armed Forces and the National Guard. Nonetheless, the statute does not go far enough:

First, it applies only to individuals with some "Federal" connection. True enough, these days most State and Local police departments and other law-enforcement and emergency-services agencies are "receiving Federal funds", are being trained by various "Federal" agencies, and might likely come "under control of [some] Federal official, or provid[e] services to such an officer, employee, or other person, while acting in support of relief from a major disaster or emergency". Yet "emergenc[ies]" can readily be foreseen in which State and Local officials would act entirely on their own, with no "Federal" involvement. Under such circumstances, no reason exists to allow them to engage in any of the misbehavior this statute prohibits. Although Congress could eliminate this lacuna pursuant to its authority under Section 5 of the Fourteenth Amendment, as well as under its Militia Powers, the necessary legislation has yet to be enacted.

Second, the present statute applies to various "officer[s]", "employee[s]", or "person[s]" only "while [they are] acting in support of relief from a major disaster

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[3031] An Act Making appropriations for the Department of Homeland Security for the fiscal year ending September 30, 2007, and for other purposes, Act of 4 October 2006, Pub. L. 109-295, TITLE V GENERAL PROVISIONS, § 557 [§ 706], 120 Stat. 1355, 1391-1392; *now codified at* 42 U.S.C. § 5207. *See to similar effect* Code of Virginia § 44-146.15(3), which exemplifies a State statute coming within the ken of § 557(a)(3).

or emergency"—implying that those individuals *might* still be licensed to confiscate firearms in other situations. Far better would be for this or a new statute to deny the existence of such authority in *all* events—that is, to declare unequivocally that all Americans are entitled to and even should possess firearms, and that no American should ever be disarmed who is not charged with a crime and taken into custody, or not actually convicted of certain crimes, or not a visitor to a prison or like facility. After all, if confiscation of common Americans' firearms is improper in an admitted "emergency", how can it be any less so at all other times?

Third, the present statute applies only to "any place * * * *where such possession is not otherwise prohibited by Federal, State, or local law*"—which leaves it open for officials to assert that confiscation is proper in so-called "gun-free zones". Inasmuch as the ultimate purpose of "gun controllers" is to expand such zones to the maximum degree politically possible, in principle this exception alone vitiates the entire statute.[3032]

Fourth, the statute seems to make a distinction between "*possession* of any firearm" and "*carrying* of firearms". Yet, self-evidently by dint of language and logic, an individual who is "carrying" a firearm must be in "possession" of it. So the statute should be read to say that "carrying of firearms by *any* person otherwise authorized to carry firearms under Federal, State, or local law" cannot be "prohibit[ed]" *at all*, *even if* "such person is operating under the direction, control, or supervision of a Federal agency". This should be constitutionally self-evident, too, because if individuals eligible for Militia service are "operating under the direction, control, or supervision of a Federal agency", and therefore under color of "Federal" law, then in a manner of speaking they have been "call[ed] forth * * * to execute the Laws of the Union", and in the performance of that duty should always be properly "organiz[ed], *arm*[*ed*], and discipline[d]", not ever "[*dis*]arm[ed]".[3033]

Fifth, in an apparent self-contradiction, the statute licenses various "officer[s]", "employee[s]", and "person[s]" to "requir[e] the temporary surrender of a firearm as a condition for entry into any mode of transportation used for rescue or evacuation". This is suspiciously peculiar, because it is precisely during a "rescue or evacuation" under "emergency" and therefore presumably chaotic conditions that displaced persons may most need their firearms to fend off human predators acting under color of law as well as in open violation of it. In addition, the statute nowhere guarantees that the firearms "temporarily surrendered" will travel along

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[3032] *See ante*, at 1001-1007. *See, e.g.,* Code of Virginia § 44-146.15(3).

[3033] *See* U.S. Const. art. I, § 8, cls. 15 and 16. This, of course, is an hypothetical argument, because members of "the Militia of the several States" in actual service can *never* "operat[e] under the direction, control, or supervision of a Federal agency", only under "the direction, control, or supervision" of their own "Officers". *See* U.S. Const. art. I, § 8, cl. 16. And, as Militiamen in actual service, they can *never* be disarmed, either—because, if they were, they would hardly comprise "*well regulated* Militia". *See* U.S. Const. amend. II.

with their owners, so as to ensure and facilitate their *immediate* "return at the completion of such rescue or evacuation". Neither does the statute define what constitutes "the completion of such rescue or evacuation", or designate who shall determine when it has occurred. Moreover, if the "rescue or evacuation" transports an individual from a State or Locality in which he is legally entitled to possess some firearm into a State or Locality in which such possession is illegal or otherwise restricted, will the authorities in that place be entitled to confiscate his firearm? And may an individual *refuse* "rescue or evacuation" in the first place, precisely on the ground that he is not willing to "surrender[ ]" his firearm even "temporarily"?

Sixth, the statute does provide judicial remedies for violations, but only at some indeterminate time in the future, perhaps long after the violations have occurred. This is hardly satisfactory, inasmuch as aspiring usurpers and tyrants may employ "a major * * * emergency" (which, of course, they may unilaterally declare) as the pretext for widespread confiscations of firearms, leading to the imposition of a full-blown police state in which the judicial remedies originally promised are later disallowed. "[T]he right of the people to keep and bear Arms" is hardly secured by a purported judicial remedy that must fail, because the initial "infringe[ment]" of "the right" is aimed precisely at negating that remedy. In such a situation, the *only* security for "the right of the people to keep and bear Arms" is for "the people" to rely upon *themselves*, by never surrendering their "Arms" to anyone else in the first place, so that they will never find themselves in the position of suppliants having to rely upon judges in order to retrieve their "Arms" from some interlopers to whom the judges answer or by whom they can be overawed.

(iv) The power "[t]o provide for * * * disciplining, the Militia". Once again, because the original Constitution required Congress to exercise *all* of the separate but interrelated powers within its omnibus authority "[t]o provide for organizing, arming, and disciplining, the Militia" simultaneously or at least in some rational sequence; and because the powers "to provide for organizing" and "arming" required the *entirety* of the Militia—that is, the *whole* of "the people at large"—to be "organiz[ed]" and "arm[ed]"; therefore the power "[t]o provide for * * * disciplining, the Militia" also required that the *entirety* of the Militia—that is, the *whole* of "the people at large"—be "disciplin[ed]" in some fashion. This, of course, followed as well from the definition common in those days of "a well regulated militia" being "composed of the body of the people, *trained to arms*",[3034] and the original Constitution's explicit recognition that "training" was part and parcel of "discipline" in its reference to "the Authority of training the Militia according to the discipline prescribed by Congress", which it exclusively "reserv[ed] to the States respectively", each of which was to "train[ ]" her own Militia.[3035]

[3034] Virginia Declaration of Rights (1776) art. 13 (emphasis supplied).

[3035] U.S. Const. art. I, § 8, cl. 16.

Interestingly, because *the States* were to take in charge the actual "training" of their Militia; and inasmuch as such "training" would have been largely useless, if not impossible of performance, without proper "organizing" and "arming", as well as "disciplining, the Militia"; therefore the States could have demanded that Congress should have fulfilled its responsibilities in those particulars. For, plainly, the original Constitution did not "reserv[e] * * * th[at] Authority" to the States while also licensing insouciant, incompetent, or ill-intentioned Members of Congress to render it nugatory. So, had Congress failed, neglected, or refused "[t]o provide for organizing" and "arming * * * the Militia", the States could have undertaken those tasks themselves, as the necessary predicates for their exercise of their "reserv[ed] * * *Authority of training the[ir] Militia"—*whether the Second Amendment had existed or not*.

(v) The power "[t]o provide * * * for governing * * * Part of the[Militia]". Self-evidently, under the original Constitution, the successful exercise of the power "[t]o provide * * * for governing such Part of the Militia as may be employed in the Service of the United States"[3036] depended upon Congress's proper exercise of the totality of its power "[t]o provide for organizing, arming, and disciplining, the Milita", and on the States' due exercise of their own "Authority of training the Militia". Trying to "govern[ ] such Part of the[Militia] as m[ight have] be[en] employed in the Service of the United States" would have constituted a fool's errand indeed, had the men arrived in a state of utter confusion (that is, "[*un*]organiz[ed]"), poorly equipped (that is, "[*un*]arm[ed]"), and without at least rudimentary training (that is, "[*un*]disciplin[ed]"). Perhaps the power "[t]o provide * * * for governing" could have been invoked at that point, for the purpose of correcting those faults and filling in those lacunae at the last moment—but then it would in effect have amounted to an exercise, howsoever tardy, of the power "[t]o provide for organizing, arming, and disciplining, the Militia". So, under whatever circumstances might have obtained, the power "[t]o provide * * * for governing" would have relied upon, reinforced, or to some degree filled in for the power "[t]o provide for * * * arming" (and to the same effect as if the latter power had been exercised directly)—*whether the Second Amendment had existed or not*.

(vi) The power "[t]o provide for calling forth the Militia". Finally, under the original Constitution it would have been useless for Congress "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions"[3037] had they consisted of nothing more than unstructured, unequipped, and uninstructed mobs. Indeed, in light of the three critical purposes for which the Militia might have been "call[ed] forth", leaving the Militia "[un]organiz[ed], "[un]arm[ed], [and un]disciplin[ed]" would have constituted at

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[3036] U.S. Const. art. I, § 8, cl. 16.

[3037] U.S. Const. art. I, § 8, cl. 15.

least criminal negligence, if not perhaps even "Treason". For example, if Members of Congress, either intentionally or with willful blindness towards or reckless disregard of the facts, had relegated the Militia to such a state of discombobulation as to be incapable of offering any assistance in "repel[ling] [an] Invasion[ ]" when "call[ed] forth" to do so, would those Members not have been guilty, by willful omission if not commission, of "adhering to the[ ] Enemies [of the United States], giving them Aid and Comfort"?[3038] Therefore, the ability to exercise the power "[t]o provide for calling forth the Militia" in a constitutionally effective manner depended upon the correct and complete exercise of the power "[t]o provide for organizing, arming, and disciplining, the Militia"—*whether the Second Amendment had existed or not*.

(vii) Intervention by the States and the President. Presumably, even had Congress shirked all of its responsibilities on this score, the Militia would have been at least rudimentarily prepared, because the States in their own self-interests would have "organiz[ed], arm[ed], and disciplin[ed]" their Militia in order to provide Local "homeland security", which to some degree would have involved the Militia in exercises that stressed "execut[ing] the Laws * * * , suppress[ing] Insurrections and repel[ling] Invasions". This, too, would have occurred under the aegis of the original Constitution's incorporation of "the Militia of the several States" into its federal system—*whether the Second Amendment had existed or not*.

In addition, Congress could not have exercised unfettered discretion with respect to the powers "[t]o provide for organizing, arming, and disciplining, the Militia", and "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions", because Congress was not the only coördinate branch of the General Government with a vital constitutional interest in the matter. As "Commander in Chief * * * of the Militia of the several States, when called into the actual Service of the United States",[3039] the President would desperately have needed "Militia" *properly and sufficiently* "organiz[ed], arm[ed], and disciplin[ed]" in order to "suppress Insurrections and repel Invasions". And, to perform his duty to "take Care that the Laws be faithfully executed",[3040] he could have required the "actual Service[s]" of "Militia" capable of "execut[ing] the Laws of the Union". Presumably, then, in compliance with his "Oath or Affirmation * * * 'to the best of [his] Ability, [to] preserve, protect and defend the Constitution'",[3041] the President could and would have demanded that Congress provide him with such "Militia"; which Congress would have been required to do—*whether the Second Amendment had existed or not.*

[3038] *See* U.S. Const. art. III, § 3, cl. 1.

[3039] U.S. Const. art. II, § 2, cl. 1.

[3040] U.S. Const. art. II, § 3.

[3041] U.S. Const. art. II, § 1, cl. 7.

(3) The status and duty of the President with respect to the Militia. Under the original Constitution, the President posed even less of a threat to "the right of the people to keep and bear Arms" than did Congress. For the President's *only* authority with respect to the Militia derived from: (i) his status as "Commander in Chief * * * of the Militia of the several States, when called into the actual Service of the United States", which depended upon Congress's having "provide[d] for calling forth the Militia" for some constitutional purpose;[3042] and (ii) his duty to "take Care that the Laws be faithfully executed",[3043] which in some cases he could have fulfilled only with the assistance of "such Part of the[Militia] as m[ight have] be[en] employed in the Service of the United States" in the manner Congress established pursuant to its specific power "[t]o provide for calling forth the Militia to execute the Laws of the Union".[3044]

From the beginning, the President's authority as "Commander in Chief * * * of the Militia" was quite narrow. Under *pre*-constitutional Anglo-American imperial law, the King—not Parliament—enjoyed "the sole supreme government and command of the militia".[3045] But other than the office of "Commander in Chief * * * of the Militia of the several States, when called into the actual Service of the United States", the original Constitution *denied* the President—the executive in the American Union analogous to the King in the British Empire—this authority, and assigned it instead exclusively to Congress: namely, "the [King's] sole supreme government * * * of the militia" became the Congressional powers "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions",[3046] and "[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States".[3047] The President retained no more than the King's status of "sole supreme * * * command[er] of the militia"—and even in that capacity always subject to the rules Congress promulgated "for governing such Part of the[Militia]" as might have come under the President's command when "employed in the Service of the United States". For the "powers actually granted" by the Constitution to any branch of the General Government "must be such as are expressly given, or given by necessary implication".[3048] "[T]he President * * * possess[es] no power not derived from the Constitution."[3049] Consequently, "powers not granted are

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[3042] U.S. Const. art. II, § 2, cl. 1 *and* art. I, § 8, cl. 15.

[3043] U.S. Const. art. II, § 3.

[3044] U.S. Const. art. I, § 8, cls. 16 and 15.

[3045] W. Blackstone, *Commentaries on the Laws of England, ante* note 142, Volume 1, at 262.

[3046] U.S. Const. art. I, § 8, cl. 15.

[3047] U.S. Const. art. I, § 8, cl. 16.

[3048] Martin v. Hunter's Lessee, 14 U.S. (1 Wheaton) 304, 326 (1816).

[3049] *Ex parte* Quirin, 317 U.S. 1, 25 (1942).

prohibited".[3050] Whatever "Laws" might have been "necessary and proper for carrying into Execution * * * the Powers vested" in the President as "Commander in Chief * * * of the Militia" were for Congress to enact.[3051] Moreover, as part of his duty to "take Care that the Laws be faithfully executed"[3052]—pursuant to his "Oath or Affirmation" that he would "'faithfully execute the Office of President of the United States, and w[ould] to the best of [his] Ability, preserve, protect and defend the Constitution of the United States'"[3053]—the President was bound to conform to these limitations on his "Office".

Plainly, too, Congress could not have delegated, let alone abdicated, to the President any of its powers with respect to the Militia. *First*, notwithstanding their origin in British law, by their very placement in the Constitution these powers became "*legislative* Powers * * * vested in * * * Congress", not "*executive* Power * * * vested in [the] President".[3054] As a general matter, "[t]hat Congress cannot delegate [*any*] legislative power to the President is a principle [that has been] universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution".[3055] *Second*, and even more decisively, Congress could not have delegated to the President any of its powers with respect to the Militia in particular, because that would have reversed WE THE PEOPLE'S specific determination—consciously made in the face of and directly contrary to centuries of *pre*-constitutional Anglo-American legal tradition—to remove these powers from executive jurisdiction and transfer them to the legislative domain.

Thus, under color of the authority the original Constitution delegated to him, the President could have done *nothing* to interfere with "the right of the people to keep and bear Arms"—*whether the Second Amendment had existed or not*. He could not to any degree have disarmed the Militia as institutions, or "the people" possibly eligible for the Militia as individuals, because by any such usurpation he would have destroyed *pro tanto* the very forces the Constitution assigned to him as "Commander in Chief". Self-evidently, his status as "Commander in Chief" did not empower the President to disable himself from functioning as "Commander in Chief", by eliminating the very subjects of his command—particularly when those subjects were parts of the federal system entitled to at least the same constitutional permanence as the States, Congress, and "the Office of President" itself. Self-evidently, too, the part of the Constitution which designated the President as "Commander in Chief * * * of the Militia of the several States" did not

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[3050] United States v. Butler, 297 U.S. 1, 68 (1936).

[3051] *See* U.S. Const. art. I, § 8, cl. 18.

[3052] U.S. Const. art. II, § 3.

[3053] U.S. Const. art. II, § 1, cl. 7.

[3054] *Compare and contrast* U.S. Const. art. I, § 1 *with* art. II, § 1, cl. 1 (emphasis supplied).

[3055] Marshall Field & Company v. Clark, 143 U.S. 649, 692 (1892).

simultaneously license him effectively to nullify the other part of the Constitution which required him to "take Care that the Laws be faithfully executed"—let alone to negate his "Oath or Affirmation" to "'preserve, protect and defend the Constitution'"—by denying himself the very forces that might have been necessary to fulfill those duties. For no provision of the Constitution can "be so enforced as to nullify or substantially impair [any] other".[3056]

In addition, the President could have claimed the status of "Commander in Chief * * * of the Militia of the several States" only when they were "called into the *actual* Service of the United States".[3057] So if a rogue President had purported to call the Militia forth, but had commanded them to lay down their arms, that and any subsequent command predicated upon it could not have constituted the "*actual* Service of the United States", because such "Service" could not require the Militia to commit suicide by divesting themselves of the very implements that made them "Militia". Being other than "the *actual* Service of the United States", the Militia could have refused to perform it, not as an act of defiance or nullification, but as an act of enforcement, of the Constitution. Thus, "the people" themselves could have secured their "right * * * to keep and bear Arms" against even a rogue "Commander in Chief"—*whether the Second Amendment had existed or not*.

Finally, under the original Constitution the President did enjoy the "Power, by and with the Advice and Consent of the Senate, to make Treaties".[3058] But, inasmuch as no "Treaties" could then (or can now) override the Constitution,[3059] "the right of the people to keep and bear Arms" could not have been held hostage to political deals contrived with foreign nations or international or *supra*-national organizations—*whether the Second Amendment had existed or not*.

b. The duty to maintain "a Republican Form of Government" in each State. The original Constitution commanded that "the United States shall guarantee to every State in this Union a Republican Form of Government"[3060]—and recognized no exception whatsoever from this duty. Therefore, *every* power of the General Government had to be so construed that its exercise could not have undermined "a Republican Form of Government" in any State, let alone in all of the States; and *every* disability of the General Government had to be so construed that

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[3056] Dick v. United States, 208 U.S. 340, 353 (1908).

[3057] U.S. Const. art. II, § 2, cl. 1 (emphasis supplied). *See ante*, at 871-880.

[3058] U.S. Const. art. II, § 2, cl. 1.

[3059] *See, e.g.*, Doe v. Braden, 57 U.S. (16 Howard) 635, 657 (1853); The Cherokee Tobacco, 78 U.S. (11 Wallace) 616, 620-621 (1871); Holden v. Joy, 84 U.S. (17 Wallace) 211, 242-243 (1872); Geofroy v. Riggs, 133 U.S. 258, 267 (1890); United States v. Wong Kim Ark, 169 U.S. 649, 701 (1898); Asakura v. City of Seattle, 265 U.S. 332, 341 (1924); United States v. Minnesota, 270 U.S. 181, 208 (1926); Reid v. Covert, 354 U.S. 1, 16-18 (1957) (opinion of Black, J., announcing the judgment of the Court).

[3060] U.S. Const. art. IV, § 4.

its enforcement would have supported "a Republican Form of Government" in every State.

When the Constitution was ratified in 1788, every American could easily have gleaned the interrelation between "a Republican Form of Government" and a Militia from both history and political science:

(1) American history provided "unmistakable evidence of what was republican in form, within the meaning of that term as employed in the Constitution", because in 1788 each of the States had "a Republican Form of Government".[3061] Leading up to that, each of the States (and, earlier, all but one of the Colonies) had long maintained Militia *of a certain type* as integral parts of their governmental structures. Indeed, the Articles of Confederation had required that "every state shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutred".[3062] The Articles did not bother to define "a well regulated and disciplined militia", because everyone knew that such a "militia" was always "composed of the body of the people, trained to arms",[3063] according to the principles of the *pre-*constitutional Colonial and State Militia Acts. By the late 1780s, then, no one could have doubted that "a Republican Form of Government" in America meant a government which had settled a Militia *of that type and only that type*. So it was hardly accidental that the Constitution incorporated both the States and "the Militia of the several States" as permanent components of its federal system, and thereby protected the Militia within each State as a permanent component of the "Republican Form of Government" the United States were to "guarantee".

(2) American political science supported the same conclusion. In the late 1700s, the "definition of * * * a [republican] Government [wa]s * * * one constructed on th[e] principle, that the Supreme Power resides in the body of the people".[3064] "Supreme Power" was a synonym for sovereignty. As Blackstone pointed out,

> there is and must be in all [forms of government] * * * a supreme, irresistible, absolute, uncontrolled authority, in which * * * the rights of sovereignty, reside. And this authority is placed in those hands, wherein * * * the qualities requisite for supremacy, wisdom, goodness, and power, are the most likely to be found.[3065]

[3061] Minor v. Happersett, 88 U.S. (21 Wallace) 162, 175-176 (1874).

[3062] Arts. of Confed'n art. VI, ¶ 4.

[3063] Virginia Declaration of Rights (1776) art. 13.

[3064] Chisholm v. Georgia, 2 U.S. (2 Dallas) 419, 457 (1793) (opinion of Wilson, J.).

[3065] *Commentaries on the Laws of England, ante* note 142, Volume 1, at 49.

So "a Republican Form of Government" was one founded on popular sovereignty—the "supreme, irresistible, absolute, uncontrolled authority" *in WE THE PEOPLE'S own hands*. Every American knew, moreover, that "the Sword and Soveraignty always march hand in hand"[3066]—and from that insight would have taken to heart the ancient wisdom that "[w]hen the citizens govern for the public good * * * in such a state the profession of arms will always have the greatest share in the government".[3067] Therefore, an essential characteristic of "a Republican Form of Government" was "a well regulated and disciplined militia, sufficiently armed and accoutred", through which "the body of the people" wielded the Power of the Sword by their exercise of "the right * * * to keep and bear Arms".

All that being so, if any State under the original Constitution had infringed her own people's "right * * * to keep and bear Arms"—and thereby undermined her own "Republican Form of Government"—"the people" could have demanded that the United States intervene to protect that "right" in order to "guarantee" that "Form of Government"—*whether the Second Amendment had existed or not.* On the other side, the General Government was disabled from infringing "the right * * * to keep and bear Arms" of the citizens of every State, because any such infringement would have contravened its duty to "guarantee to each State * * * a Republican Form of Government"—again, *whether the Second Amendment had existed or not.*

c. The powers of Congress "[t]o lay and collect Taxes" and "[t]o regulate Commerce". Under the original Constitution, the General Government, through purported exercises of any of its other powers, could not have overridden the powers, duties, and disabilities of Congress with respect to the Militia, or the duty of the United States to "guarantee to each State in th[e] Union a Republican Form of Government" and therefore a proper Militia.

(1) General principles. In "vest[ing]" "[a]ll legislative Powers herein granted" in Congress,[3068] the original Constitution enumerated each of those "Powers" separately and independently of every other power, and directed each of them to a distinctly different subject. Thus, for pertinent examples, the power "[t]o lay and collect Taxes" appeared in one clause,[3069] the powers "[t]o regulate Commerce",[3070] "[t]o raise and support Armies",[3071] "[t]o provide and maintain a

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[3066] AN ARGUMENT, Shewing, that a Standing Army Is inconsistent with A Free Government, *ante* note 27, at 7.

[3067] Aristotle, *Politics*, Book III, Chapter VII, *in* A TREATISE ON GOVERNMENT OR, THE POLITICS OF ARISTOTLE, *ante* note 73, at 79.

[3068] U.S. Const. art. I, § 1.

[3069] U.S. Const. art. I, § 8, cl. 1.

[3070] U.S. Const. art. I, § 8, cl. 3.

[3071] U.S. Const. art. I, § 8, cl. 12.

Navy",[3072] and "[t]o provide for calling forth the Militia" and "for * * * arming * * * the Militia"[3073] in other clauses. Sometimes, more than one power appeared in a single clause, because those particular powers were cognate. For instance, the original Constitution linked the power "[t]o coin Money, regulate the Value thereof, and of foreign Coin" in the same clause with the power "[t]o * * * fix the Standard of Weights and Measures", because "regulat[ing] the Value" of "Money" was a special case of "fix[ing] the Standard of Weights and Measures".[3074] And, of course, the specific power "[t]o provide for * * * arming * * * the Militia" was conjoined with other particular powers "[t]o provide for organizing * * * and disciplining, the Militia", "for governing such Part of them as may be employed in the Service of the United States", and for "precrib[ing]" "the discipline" for "training the Militia"—because the subjects of all of these powers were the very same "Militia of the several States".[3075]

Certain fundamental principles informed this procedure:

First, no power could be taken to be, to any degree, unintelligible—because a statute couched "in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law".[3076]

Second, the delegation of a power constituted the only, and the precise, definition of that power.

Third, the definition of a power excluded every authority not within that definition, and thereby established limitations on that power. Inherent in every power was a corresponding disability as to the subject of that power.

Fourth, the definition of one power constituted a limitation on all other powers. Inherent in each power were corresponding disabilities to be read into every other power with respect to the subject of the first power. For that reason, no power could have the capacity to add to, subtract from, frustrate, or negate any other power. And,

Fifth, because the definition of a power excluded every authority not within that definition, and because the definition of one power constituted a limitation on all other powers, therefore no supposed combination of any two or more powers could generate some purportedly new power (that is, the whole could never be greater than the sum of its parts).

[3072] U.S. Const. art. I, § 8, cl. 13.

[3073] U.S. Const. art. I, § 8, cls. 15 and 16.

[3074] *Compare* U.S. Const. art. I, § 8, cl. 5 *with* E. Vieira, Jr., *Pieces of Eight, ante* note 39, Volume 1, at 112-141.

[3075] *Compare* U.S. Const. art. I, § 8, cls. 15 and 16 *with* art. II, § 2, cl. 1.

[3076] Connally v. General Construction Company, 269 U.S. 385, 391 (1926).

All of which can be compressed into the general rules, still applicable today, that "powers not granted are prohibited",[3077] and that all of "[t]he powers conferred upon the Congress are harmonious".[3078]

Thus, the original Constitution made crystal clear, for pertinent examples, that:

- "Armies" and "a Navy" were not "the Militia"—and therefore the special principles according to which "Armies" and "a Navy" were regulated could not be applied to regulation of "the Militia".

- "[T]he Militia" were not any form of "Commerce", but instead were component parts of the States' governments and potential instrumentalities of the General Government—and therefore "regulat[ions]" that might have been appropriate for "Commerce" were not appropriate for "the Militia".

- Although "lay[ing] and collect[ing] Taxes" might incidentally assist Congress in "regulat[ing] Commerce" and in "provid[ing] for * * * arming * * * the Militia", it was not a primary means for accomplishing either of those ends. And,

- No claim by Congress "t[o] lay and collect Taxes", "[t]o regulate Commerce", or "[t]o raise and support Armies" and "provide and maintain a Navy" could evade, frustrate, or contradict the duty of "the United States" to "guarantee to every State * * * a Republican Form of Government", including a properly organized, armed, trained, and otherwise disciplined "Militia".

Because "gun controls" emanating from the General Government in recent times have usually been rationalized as exercises of Congress's powers "[t]o lay and collect Taxes" and "[t]o regulate Commerce with foreign Nations, and among the several States",[3079] consideration of these two provisions will adequately exemplify

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[3077] United States v. Butler, 297 U.S. 1, 68 (1936).

[3078] Perry v. United States, 294 U.S. 330, 353 (1935).

[3079] U.S. Const. art. I, § 8, cls. 1 and 3. *See, e.g., as to taxation:* AN ACT To provide for the taxation of manufacturers, importers, and dealers in certain firearms and machine guns, to tax the sale or other disposal of such weapons, and to restrict importation and regulate interstate transportation thereof ("National Firearms Act"), Act of 26 June 1934, CHAPTER 757, 48 Stat. 1236; AN ACT To amend title 18, United States Code, to provide for better control of the interstate traffic in firearms ("Gun Control Act of 1968"), Act of 22 October 1968, Pub. L. 90-618, TITLE II—MACHINE GUNS, DESTRUCTIVE DEVICES, AND CERTAIN OTHER FIREARMS, 82 Stat. 1213, 1227. *See, e.g., as to commerce:* AN ACT To regulate commerce in firearms ("Federal Firearms Act"), Act of 30 June 1938, CHAPTER 850, 52 Stat. 1250; AN ACT To assist State and local governments in reducing the incidence of crime, to increase the effectiveness, fairness, and coordination of law enforcement and criminal justice systems at all levels of government, and for other purposes ("Omnibus Crime Control and Safe Streets Act of 1968"), Act of 19 June 1968, Pub. L. 90-351, TITLE IV—STATE FIREARMS CONTROL ASSISTANCE, 82 Stat. 197, 225; AN ACT To amend title 18, United States Code, to provide for better control of the interstate traffic in firearms ("Gun Control Act of 1968"), Act of 22 October 1968,

why, quite contrary to the contemporary legal *intelligentsia's* suppositions and pretenses, the original Constitution, construed according to the principles just outlined, amounted to no less than a "bill of rights" with respect to "the right of the people to keep and bear Arms".

(2) The power "[t]o lay and collect Taxes". Amazingly, in light of the prevalence of the notion that "gun control" can be effected under aegis of the power "[t]o lay and collect Taxes", the very opposite conclusion stands out on the face of the original Constitution, when read as "those who framed and adopted it underst[ood its] * * * terms to designate and include".[3080]

(a) During the late 1700s no less than today, Americans knew perfectly well that a tax on some item or activity always decreases the amount of that item produced or the level of that activity undertaken in society. Through the imposition of a crushing financial burden, a tax can effectively prohibit its subject entirely.[3081] A tax can also be employed as a vehicle for imposing onerous regulations, restrictions, and supervision on the taxpayers.[3082] Parliament's so-called "Townshend Acts" had taught them as much.[3083] Thus they never doubted that "the power to tax involves the power to destroy", and "the power to destroy may defeat and render useless the power to create".[3084] Moreover, they were aware that "[a] tax * * * does not become more constitutional because it is a small tax"[3085]—for "illegitimate and unconstitutional practices get their first footing * * * by silent approaches and slight deviations from legal modes of procedure".[3086]

All that being so, they would have inferred that the allowance of a power to tax the initial acquisition, continued possession, or use of firearms necessarily

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Pub. L. 90-618, TITLE I—STATE FIREARMS CONTROL ASSISTANCE, 82 Stat. 1213, 1213; An Act To amend chapter 44 (relating to firearms) of title 18, United States Code, and for other purposes ("Firearms Owners' Protection Act"), Act of 19 May 1986, Pub. L. 99-308, 100 Stat. 449; An Act To control crime ("Crime Control Act of 1990"), Act of 29 November 1990, Pub. L. 101-647, TITLE XVII—GENERAL PROVISIONS, § 1702 ("Gun-Free School Zones Act of 1990"), 104 Stat. 4789, 4844; An Act To control and prevent crime ("Violent Crime Control and Law Enforcement Act of 1994"), Act of 13 September 1994, Pub. L. 103-322, TITLE XI—FIREARMS, Subtitle A—Assault Weapons ("Public Safety and Recreational Firearms Use Protection Act"), 108 Stat. 1796, 1996; An Act Making omnibus consolidated appropriations for the fiscal year ending September 30, 1997, and for other purposes, Act of 30 September 1996, TITLE VI—GENERAL PROVISIONS, § 657 [reënactment of "Gun-Free Schools Zones Act of 1990"], 110 Stat. 3009, 3009-369.

[3080] Pollock v. Farmers' Loan & Trust Company, 157 U.S. 429, 558 (1895).

[3081] Today, *see, e.g.,* McCray v. United States, 195 U.S. 27, 56-61 (1904); United States v. Sanchez, 340 U.S. 42, 44-45 (1950).

[3082] Today, *see, e.g.,* Felsenheld v. United States, 186 U.S. 126, 131-134 (1902); *In re* Kollock, 165 U.S. 526, 536-537 (1897).

[3083] *See, e.g.,* John Dickinson, *Letters from a Farmer in Pennsylvania to the Inhabitants of the British Colonies*, Historical Introduction by R.T.H. Halsey (New York, New York: The Outlook Co., 1903).

[3084] McCulloch v. Maryland, 17 U.S. (4 Wheaton) 316, 431 (1819).

[3085] Forsyth County, Georgia v. Nationalist Movement, 505 U.S. 123, 136 (1992).

[3086] Boyd v. United States, 116 U.S. 616, 635 (1886).

implied the acceptance of some degree of *politically imposed disarmament* across society. And at the limit *complete* disarmament. For, if a tax could be imposed on the acquisition, possession, or use of any firearm then it could be imposed on all firearms; and if it could be imposed to any degree of financial burden then it could be imposed even to the extent of effective prohibition. Thus, if public officials could tax firearms for the specific purpose or with the inevitable effect of inhibiting (let alone prohibiting) their acquisition, possession, and transfer by and among private citizens—and under color of such taxes could regulate the private possession of firearms with strict requirements for the sort of licensing and registration usurpers and tyrants would find most expedient in order to expand their powers and cement their rule—they could "defeat and render useless" or even entirely destroy the Militia.

So, knowing that "the legality of [any governmental] power must be estimated not by what it will do but by what it can do",[3087] Americans would have concluded that no government should be trusted with a power to tax WE THE PEOPLE'S acquisition, possession, or use of firearms, or under color of taxation to regulate those activities—at least with respect to such firearms as THE PEOPLE might hold for Militia purposes. And as the set of such firearms then included essentially every working firearm, for all practical purposes no such power to tax could have existed.

(b) Reading the original Constitution in 1788, any legally and historically literate American would have recognized that WE THE PEOPLE had provided for exactly that result. Although it was potentially dangerous, the power "[t]o lay and collect Taxes" was not an omnipotent authority the Constitution had set above everything else, but merely one power of the new General Government among many. No less than any other power, it was subject to the rule that all "fundamental [constitutional] principles are of equal dignity, and n[one] must be enforced as to nullify or substantially impair [any] other".[3088]

Americans would have read that the Constitution delegated to Congress the power specifically "[t]o provide for * * * arming * * * the Militia". And they would have construed those words in terms of the operational definition of "Militia" drawn from *pre-*constitutional Colonial and State laws, which uniformly required almost all individuals within "the body of the people" to acquire, permanently possess, and usually own firearms, ammunition, and related accoutrements suitable for Militia service. Because they knew that the Constitution could not be self-contradictory, Americans would have deduced that the "[a]ffirmative words" of that clause had to be "negative of other objects than those affirmed", and an "exclusive sense [had

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[3087] Block v. Hirsh, 256 U.S. 135, 162 (1921) (McKenna, J., dissenting).

[3088] Dick v. United States, 208 U.S. 340, 353 (1908).

to] be given to them",[3089] and that therefore those words defined not simply an explicit power—"[t]o provide for * * * *arming* * * * the Militia", but also an implicit reciprocal disability—"[*not* t]o provide for [*dis*]arming" or "[*not* t]o provide [*against*] * * * arming * * * the Militia".[3090]

At that point, everyone would have realized that, inasmuch as a fictional power for "[dis]arming * * * the Militia" was incapable of being interpolated into the real power "[t]o provide for * * * arming" them, which at least specifically referred to "arm[s]", it could not conceivably be insinuated into the Constitution anywhere else through the backhanded agency of other powers not specifically related to "arm[s]". For WE THE PEOPLE would never have precluded the power "[t]o provide for * * * arming * * * the Militia" from negating itself, while at the same time allowing other powers, unrelated to the Militia, to negate it. That is, the power "[t]o provide for * * * arming * * * the Militia" imposed on all other powers the selfsame limitation it imposed on itself. Which meant that the power "[t]o lay and collect Taxes" could not be used in effect "[t]o provide for * * * [dis]arming * * * the Militia", or "[t]o provide for * * * [dis]arming" anyone within "the body of the people" who were eligible for the Militia.

In addition, Americans would have observed that Congress's power was not simply "[t]o lay and collect Taxes" for any reason at all, but instead "[t]o lay and collect Taxes" *for three particular purposes only*: "to pay the Debts and *provide for the common Defence* and general Welfare of the United States".[3091] Not only that. WE THE PEOPLE considered this limitation on the power "[t]o lay and collect Taxes" so consequential that they included it in the Constitution *twice*: once in general in the Preamble, which identified "provid[ing] for the common defence" as one of the purposes of the entire Constitution, and therefore as a direction for and limitation on the exercise of *all* constitutional powers;[3092] and again specifically in the power "[t]o lay and collect Taxes" itself. And from this express limitation set out in its very delegation, Americans would have inferred that the power "[t]o lay and collect Taxes" is utterly incapable, *by constitutional definition*, of being employed "to * * * provide [*against*] the common Defence".

Now, the original Constitution itself declared that one vitally important power for effectuating "the common Defence" was "[t]o provide for * * * arming

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[3089] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803).

[3090] As a famous example of this principle's application in modern times, Congress cannot invoke its power "[t]o borrow Money on the credit of the United States" in order to repudiate public debts incurred under color of that very same power. *See* U.S. Const. art. I, § 8, cl. 2, *applied in* Perry v. United States, 294 U.S. 330, 350-354 (1935), *discussed in* E. Vieira, Jr., *Pieces of Eight, ante* note 39, Volume 2, at 1191-1204.

[3091] U.S. Const. art. I, § 8, cl. 1 (emphasis supplied).

[3092] *Compare* Gibbons v. Ogden, 22 U.S. (9 Wheaton) 1, 188-189 (1824), *with* W. Crosskey, *Politics and the Constitution*, *ante* note 206, Volume 1, at 363-379.

* * * the Militia", and therefore arming "the body of the people". Consequently, that power had to be interpolated affirmatively into the power "to lay and collect Taxes", so that in this particular the latter in effect read: "[t]o lay and collect Taxes * * * to provide for [arming * * * the Militia, and therefore 'the body of the people']". And that power had to be interpolated negatively into the power "to lay and collect Taxes" as an explicit limitation thereupon or disability thereof, so that the latter in effect read: "[t]o lay and collect Taxes * * * [but not] to provide for * * * [disarming the Militia or 'the body of the people']". The only possible alternative was to misread the power "[t]o lay and collect Taxes"—notwithstanding its own internal self-constraint, as well as the external constraints derived from the power "[t]o provide for * * * arming * * * the Militia" as well as from the Preamble—as capable of overriding the power "for * * * arming". This was plainly inadmissible, though, because it would have entailed, not only the general blunder of construing one provision of the Constitution so as to confound two others, but also the particular idiocy of *construing that provision of the Constitution so as to negate one of* ***its very own*** *explicit objects, and thereby to negate* ***itself***!

Thus, the original Constitution established a ***triple*** *negative* on the power "[t]o lay and collect Taxes" where firearms were concerned. That power could not possibly have been applied to WE THE PEOPLE'S acquisition, possession, and use of firearms suitable for Militia service, because: (i) the Constitution declared in its Preamble that "to * * * provide for the common defence" was a condition of its delegation of *every* power to the General Government; (ii) the Constitution explicitly defined and thereby limited the power "[t]o lay and collect Taxes * * * to * * * provide for the common Defence"; and (iii) the disability as to "[dis]arming" that arose directly out of the power "[t]o provide for * * * arming * * * the Militia" (as well as the effect of the Preamble on that power) had to be interpolated into the power "[t]o lay and collect Taxes". And if Congress could not have applied its power "[t]o lay and collect Taxes" to firearms suitable for Militia service in the first place, it could not have subjected any such firearms to "regulations" under color of a scheme of supposed "taxation", either. Rather, any such manifest *abuse* of the power "[t]o lay and collect Taxes"—for it could hardly have been explained away as a merely negligent misuse of that power, being in blatant violation of WE THE PEOPLE'S pellucid three-fold prohibition in the Constitution—would have amounted to "imposing Taxes on us without our Consent", a political crime familiar to all Americans as one of the most damning charges "the good People of the[ ] Colonies" had leveled against King George III in the Declaration of Independence.

(c) Even if under the original Constitution Congress could have refused "[t]o provide for * * * arming * * * the Militia" itself, its disability to disarm common Americans by taxing their acquisition, possession, and use of firearms

suitable for Militia service would nevertheless have remained fully operative. For the Constitution incorporated into its federal system "the Militia *of the several States*",[3093] which the States were constitutionally authorized and required to maintain no matter what Congress might have failed, neglected, or refused to do. Therefore the States could have designated as "Militia" arms whatever firearms and ammunition in WE THE PEOPLE'S hands they deemed necessary to their security, thereby rendering those arms the equipment of *State establishments* engaged in the performance of *State governmental* functions, and as a consequence absolutely immunizing from taxation by the General Government the production, acquisition, possession, and use of those arms for and by members of those establishments. Against such a State designation, Congress could have done *nothing*: For "the instrumentalities, means and operations whereby the States exert the governmental powers belonging to them are * * * exempt from taxation by the United States"—and "[t]he maintenance of a police service by * * * [a State] * * * is a governmental function" which "extends * * * to the purchase of equipment and supplies needed to render the particular service efficient".[3094] Indeed, in later years, Congress itself recognized by statute its constitutional disability to tax the States on this score.[3095]

(d) Being familiar with fines levied against Militiamen for infractions of their duties during *pre-*constitutional times, Americans in 1788 would have presumed that Congress could have relied upon fines as means "[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States".[3096] In fact, Congress did not explicitly mandate any fines in its first Militia Act in 1792[3097]—although States such as Rhode Island and Virginia on their initiatives provided for fines in the Militia Acts they subsequently enacted in pursuance of the Congressional statute.{EN-2054} In any event, the power of Congress in that regard would not have supported the

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[3093] U.S. Const. art. II, § 2, cl. 1 (emphasis supplied).

[3094] Indian Motorcycle Company v. United States, 283 U.S. 570, 575, 579 (1931).

[3095] *E.g.,* AN ACT To provide for the taxation of manufacturers, importers, and dealers in certain firearms and machine guns, to tax the sale or other disposal of such weapons, and to restrict importation and regulate interstate transportation thereof ("National Firearms Act"), Act of 26 June 1934, CHAPTER 757, § 13, 48 Stat. 1236, 1240 ("[t]his Act shall not apply to the transfer of firearms * * * to * * * any State * * * or to any political subdivision thereof"); AN ACT To amend title 18, United States Code, to provide for better control of the interstate traffic in firearms ("Gun Control Act of 1968"), Act of 22 October 1968, Pub. L. 90-618, TITLE II—MACHINE GUNS, DESTRUCTIVE DEVICES, AND CERTAIN OTHER FIREARMS, § 5853(a) and (b), 82 Stat. 1213, 1233-1234 ("[a] firearm may be transferred without the payment of a transfer tax * * * to any State, * * * any political subdivision thereof, or any official police organization of such a government entity engaged in criminal investigations"; and "[a] firearm made be made without payment of the making tax * * * by, or on behalf of, any State, * * * any political subdivision thereof, or any official police organization of such a government entity engaged in criminal investigations").

[3096] U.S. Const. art. I, § 8, cl. 16.

[3097] *See An Act more effectually to provide for the National Defence by establishing an Uniform Militia throughout the United States,* Act of 8 May 1792, CHAP. XXIII, 1 Stat. 271.

inference that Congress could "lay and collect *Taxes*" with respect to firearms, ammunition, and necessary accoutrements suitable for the Militia.

True enough, then just as now, a "fine" and a "tax" were *economically* equivalent in general principle, because both: (i) imposed financial burdens on, and thereby prohibited or at least created disincentives against, some activity; and (ii) collected revenue to be applied to some public purposes. *Legally, politically, and practically*, however, as to the Militia they would have been recognized as so completely distinguishable from each other that no one would have thought it sensible to conflate or interchange the two terms. After all, the Colonies and independent States imposed "fines" *within* their Militia solely in order to *improve* the Militia's performance. Specifically, "fines" were levied against Militiamen who failed to obtain firearms, to maintain them in their own personal possession, or to bring them into the field in good working order when called forth for duty. The goal was *to create strong disincentives against individuals' voluntarily disarming themselves.* Moreover, "fines" were usually paid into the Militia and applied to their peculiar expenses—typically, for the purchase of arms.[3098] In contradistinction to "fines", if true to their normal office (and particularly to the purposes for which they are levied these days) "taxes" would have been imposed on the Militia in order to *impair* their performance. With respect to firearms specifically, "taxes" would have been designed to punish some individuals for, and to deter or impede others from, acquiring or maintaining personal possession of firearms—that is, to promote *dis*armament of individuals against their wills. If the "taxes" had been extensive in scope, so too would have been the resulting disarmament. Moreover, receipts from such "taxes" would not have been applied to the Militia's costs. The Colonies and independent States, however, not only imposed no "taxes" on individuals as a condition precedent to or as a consequence of their acquiring, possessing, or using firearms, but also used funds derived from other "taxes" for the very purpose of purchasing firearms for poor citizens' use—so that "taxes" facilitated, rather than hindered, WE THE PEOPLE'S "right * * * to keep and bear Arms".[3099]

(e) Finally, Americans in 1788 would also have been familiar with the protection the *pre*-constitutional Colonial and State Militia Acts had provided for individuals' possession of firearms against various sorts of monetary judgments.[3100] So, they would have expected that Congress, in the exercise of its power "[t]o provide for * * * arming * * * the Militia" could have done the same, even with respect to taxes. Which, of course, is exactly what Congress *did* provide, in its very first Militia Act: "[E]very citizen * * * enrolled [in the Militia], and providing himself with the arms, ammunition and accoutrements required * * * , shall hold

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[3098] *See ante*, at 158-160 (Rhode Island) and 692-696 (Virginia).

[3099] *See ante*, at 160-161 (Rhode Island) and 424-428 (Virginia).

[3100] *See ante*, at 295-296 (Rhode Island); 460-463 and 715-717 (Virginia).

the same exempted from all suits, distresses, executions or sales, for debt *or for the payment of taxes*".[3101]

In sum, under the original Constitution, proper exercises of the power "[t]o lay and collect Taxes * * * to * * * provide for the common Defence" could not have "infringed", but would have protected, "the right of the people to keep and bear Arms"—*whether the Second Amendment had existed or not.*

(3) The power "[t]o regulate Commerce". Just as "the power to tax involve[d] the power to destroy",[3102] so, too, under the original Constitution the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"[3103] entailed the power to restrain or even prohibit "Commerce" in pernicious articles or activities in order to prevent criminality, immorality, public nuisances, or other evils or harms from spreading throughout the Union.[3104] Nonetheless, the power "[t]o regulate Commerce" "d[id] not carry with it the right to destroy or impair those limitations and guarantees which [we]re also placed in the Constitution"—or, later on, "in any of the amendments to that instrument".[3105]

Of course, it would have been just as easy in 1788 as it was in 1934 or 1968 for aspiring usurpers to concoct some chain of spurious reasoning to float the fiction that the power "[t]o regulate Commerce" licensed Congress to enact "gun control". For example, (i) firearms must be manufactured and distributed; (ii) typically, this occurs in the free market; (iii) even if a firearm is manufactured, marketed, and kept within only one State, that process results in some *other* firearm's not being transported from some *other* State to the first State for such use; thus, (iv) *all* firearms are the subjects of "Commerce", directly or indirectly; for that reason, (v) *all* firearms fall within the power of Congress to "regulate"; (vi) "regulat[ion]" can include licensing and even prohibition; (vii) Congress's "Laws" are supreme over the State's laws; therefore, (viii) comprehensive National "gun control" is permissible. It would also have been no less easy in 1788 than it is today, though, to point out

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[3101] *An Act more effectually to provide for the National Defence by establishing an Uniform Militia throughout the United States*, Act of 8 May 1792, CHAP. XXXIII, § 1, 1 Stat. 271, 272 (emphasis supplied). *Continued,* Revised Statutes of the United States (1873-1874), TITLE XVI, THE MILITIA, § 1628, 18 Stat. 285, 285. Something of this protection still exists in the provision of the General Government's tax code that "[t]here shall be exempt from levy * * * [s]o much of the fuel, provisions, furniture, and personal effects in the taxpayer's household, *and of arms for personal use,* livestock, and poultry of the taxpayer, as does not exceed $6,250 in value". 26 U.S.C. § 6334 (emphasis supplied).

[3102] McCulloch v. Maryland, 17 U.S. (4 Wheaton) 316, 431 (1819).

[3103] U.S. Const. art. I, § 8, cl. 3.

[3104] *See, e.g.,* Champion v. Ames, 188 U.S. 321, 354-364 (1903); Brooks v. United States, 267 U.S. 432, 436-439 (1925); *and* United States v. Darby, 312 U.S. 100, 113-115 (1941), which correctly stated the principle, even if perhaps they did not properly apply it.

[3105] United States v. Joint Traffic Association, 171 U.S. 505, 571 (1898). *Accord*, Interstate Commerce Commission v. Brimson, 154 U.S. 447, 479 (1894).

that, had such contentions been correct, then the power "[t]o regulate Commerce" would have amounted to a power over the Militia with respect to firearms far broader than the actual power the Constitution explicitly delegated to Congress, because the Constitution specifically limited that power "[t]o provide *for* * * * arming", rather than extending to Congress an open-ended license to "regulate" in any way that struck its Members' fancies. Self-evidently, the narrow power "[t]o provide for * * * arming * * * the Militia" would have been unnecessary if the broad power "[t]o regulate Commerce" encompassed every possible aspect of access to, or denial of, arms. In which case, the power "[t]o provide for * * * arming" would have been, not only superfluous, but no less than a fraudulent misstatement that, by drawing the reader's attention to those specific words, concealed Congress's actual, albeit recondite, authority under the general terms "[t]o regulate Commerce". Americans in 1788, however, would never have "presumed that any clause in the constitution [wa]s intended to be without [its own particular] effect".[3106] And certainly—although they were undoubtedly aware of the legal maxim *fraus in generalibus latet*[3107]—they would have rejected with scorn the suggestion that the Framers had included in the Constitution the general power "[t]o regulate Commerce" (or anything else) with the intention to bamboozle future generations with respect to *other* powers that were set out in their own specific terms. From the original Constitution's very structure and terms, Americans would immediately have concluded that the power "[t]o regulate Commerce" was utterly inapplicable both to the Militia themselves and to whomever and whatever were inextricably connected to the Militia and their operations. In particular, that the original Constitution precluded all ostensibly "commercial" controls with respect to firearms which were suitable for Militia service and to individuals who were actual or potential members of the Militia.

(a) The Militia not "Commerce", but "government". Most obviously, the power "[t]o regulate Commerce" under the original Constitution could not have encompassed either the Militia, or "the body of the people" who composed or were eligible for the Militia, or the equipment without which the Militia could not have functioned.

(i) Self-evidently, "the Militia of the several States" could not have been comprehended within the term "Commerce" in 1788, because they were not, in any capacity or for any purpose, mere private entities, but at all times and for all purposes were integral parts of each State's "Republican Form of Government", and some of the time could have functioned as instrumentalities of the Union

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[3106] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803). *Accord*, Myers v. United States, 272 U.S. 52, 151-152 (1926); Knowlton v. Moore, 178 U.S. 41, 87 (1900); Blake v. McClung, 172 U.S. 239, 260-261 (1898); Williams v. United States, 289 U.S. 553, 572-573 (1933).

[3107] "Fraud is concealed in generalities."

"employed in the Service of the United States" for certain National purposes.[3108] And for Americans of that era, "Commerce" and "Government" were conceptions distinctly separate in both fact and law.

"Commerce" was generally defined as "exchange of one thing for another; interchange of any thing; trade; traffick"[3109]—whereas "government" was defined as the "[f]orm of a community with respect to the disposition of the supreme authority", "[a]n establishment of legal authority", the "[a]dministration of publick affairs", and "[a]n established state of legal authority".[3110] In terms of legal particulars, Blackstone described "the King of England's prerogative, so far as it related to mere domestic commerce", under three heads: namely,

> • "the establishment of public marts, or places of buying and selling, such as markets and fairs";
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> • "the regulation of weights and measures", which, "for the advantage of the public, ought to be universally the same, throughout the kingdom; being the general criterions which reduce all things to the same or an equivalent value"; and
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> • "money [a]s the medium of commerce", which "it is the king's prerogative, as the arbiter of domestic commerce, to give it authority or make it current".[3111]

Thus, as a matter of law, Americans in the late 1700s understood "Commerce" as akin to what contemporary economists call "the market economy", based upon places and procedures for exchanges of goods and services, physical standards for trade, and a socially accepted medium of exchange. In addition, Americans knew "Commerce" to be distinct from, and subordinate to, "government"—because Blackstone described the King as "the *arbiter* of commerce";[3112] and an "arbiter" was generally understood to be "[o]ne who has the power of direction or regulation".[3113] In the original Constitution, these principles found their embodiments in the delegations to Congress of the power "[t]o regulate Commerce" (Blackstone's "public marts, or places of buying and selling"),[3114] and the cognate powers "[t]o * * * fix the Standard of Weights and Measures" (Blackstone's "regulation of weights

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[3108] *See* U.S. Const. art. II, § 2, cl. 1; art. IV, § 4; *and* art. I, § 8, cl. 16.

[3109] S. Johnson, *Dictionary*, *ante* note 50, the sole definition in the First Edition (1755) and definition 1 in the Fourth Edition (1773).

[3110] *Id.*, definitions 1 through 3 in the First Edition (1755) and definition 2 in the Fourth Edition (1773).

[3111] *Commentaries on the Laws of England, ante* note 142, Volume 1, at 274, 276.

[3112] *Id.*, Volume 1, at 273 (emphasis supplied).

[3113] S. Johnson, *Dictionary, ante* note 50, definition 2 in both the First (1755) and the Fourth (1773) Editions.

[3114] U.S. Const. art. I, § 8, cl. 3.

and measures") and "[t]o coin Money, regulate the Value thereof, and of foreign Coin" (Blackstone's "give [money] authority or make it current").[3115]

(ii) Inasmuch as "the Militia" were not "Commerce", the appearances in public of individuals eligible for or actually enrolled in the Militia, in anticipation or fulfillment of their Militia duties, with firearms and ammunition suitable for Militia service were not "Commerce" either. *A fortiori* when those individuals simply possessed such firearms and ammunition in their own homes. Thus, *no* "keep[ing] and bear[ing of] Arms" by "the body of the people"[3116] could have been the subject of Congress's power "[t]o regulate Commerce", any more than the keeping and bearing of arms by members of the regular Armed Forces could have constituted "Commerce".

(iii) Although Americans in 1788 doubtlessly accepted that, in many if not most cases, activities within the free market were properly the subjects of the power "[t]o regulate Commerce", they also knew that activities within the free market *closely connected to the Militia* constituted a special case, because in that particular an inextricable partnership existed between the economic and political spheres of human endeavor which necessarily removed arms suitable for the Militia from the category of "Commerce" altogether. During the *pre-*constitutional era, the Colonies and the independent States had provided for arming their Militiamen primarily by requiring them as individuals to furnish themselves with firearms, ammunition, and accoutrements through the free market.[3117] Over the course of decades and generations, a striking interdependence had developed: The extent of the free market in arms had come to depend upon the demand for arms from the Militia, while the effectiveness of the Militia had come to depend upon the supply of arms from the free market. And American governments had made sure both that most individuals among "the body of the people" would procure their arms in the market, and that the market could function with efficiency sufficient to provide the arms "the people" needed. Indeed, even early on, the free market in arms had become so essential to the proper regulation of all of the Colonial and State Militia that it had in effect been adopted as a working component of America's governmental structures everywhere. In incorporating "the Militia of the several States" into the constitution's federal system, WE THE PEOPLE took to heart this lesson of history: ***A well-functioning free market in which individuals who are eligible for the Militia can obtain firearms, ammunition, and accoutrements suitable for Militia service is absolutely necessary for the Militia to function properly***.

[3115] U.S. Const. art. I, § 8, cl. 5.

[3116] *Compare* U.S. Const. amend. II *with* Virginia Declaration of Rights (1776) art. 13.

[3117] *See ante*, Chapters 6, 7, 17, 18, 19, and 20.

Any regulation of *that* market—with respect to either the individuals or the arms—would necessarily have affected each and every one of the Militia *as a Militia*. And, insofar as "the Militia of the several States" were parts of the States' permanent governmental establishments, any such regulation would necessarily have affected each and every one of the States *as a State*. Thus, because the power "[t]o regulate *Commerce*" under the original Constitution was, by its own definition, neither the power "[t]o regulate [the Militia of the several States]" nor the power "[t]o regulate [the States themselves]" it could not have reached the free market in arms through the indispensable assistance of which the Militia, and the States through their Militia, exercised their constitutional prerogatives.

(b) The Militia not "Commerce * * * among the several States". If the unbridgeable gulf between "the Militia of the several States" and "Commerce" was apparent to every legally literate American in 1788, that the Militia could not have been treated as "Commerce *among the several States*" must have been even more glaringly patent. Had Harvard Law School then existed, no one would have needed to attend it to have learned that, if WE THE PEOPLE had meant to empower Congress "[t]o regulate" *all* "Commerce", they would have delegated simply the power "[t]o regulate Commerce". "[T]he enumeration of the particular classes of commerce * * * would not have been made, had the intention been to extend the power to every description. The enumeration presuppose[d] something not enumerated".[3118] The added words "with foreign Nations, and among the several States, and with the Indian Tribes" were *terms of specific limitation*. Thus, the phrase "among the several States" plainly implied "Commerce" that involved activity occurring in more than one State at the same time or in the course of the same extended transaction. Had WE THE PEOPLE intended to empower Congress "[t]o regulate Commerce" wholly inside any one State alone, their natural choice of words would have been "within the several States", because physically all domestic "Commerce" must take place somewhere, whether it be interstate or intrastate.

> Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more States than one. * * * The genius and character of the whole [General G]overnment seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the [General G]overnment. The completely internal commerce of a State, then, may be considered as reserved for the State itself.[3119]

[3118] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194-195 (1824).

[3119] *Id.*

Now, every free White adult American of the constitutional era knew, in the case of males from their own direct personal experience, that each of "the Militia of the several States" was the Militia of a single State. Unless it were "call[ed] forth" to "be employed in the Service of the United States",[3120] each Militia's origin, authority, and operations were and would remain "completely within a particular State", would "not affect other States", and would "be considered as reserved for th[at] State [her]self". So even if the operations of "Militia" in principle somehow fell within the broad category "Commerce", the operations of each actual Militia in each of the several States were not "Commerce among the several States"—and not being the latter could not be "regulate[d]" simply because they could have been comprehended within the general rubric "Commerce" alone. Moreover, if some of the Militia were "call[ed] forth" "in the service of the United States"—and as a result then temporarily performed functions "among the several States"—nonetheless Congress was "[t]o provide * * * for governing such Part of them" *as Militia*,[3121] not to "regulate" them as "Commerce". In addition, no two or more States by themselves could have called together their Militia in some *ad hoc* enterprise, because the original Constitution prohibited each State, "without the Consent of Congress", from "enter[ing] into any Agreement or Compact with another State".[3122] Had Congress granted such "Consent", though, it would have provided such a dispensation through the exercise of its power "[t]o make all Laws which shall be necessary and proper for carrying into Execution th[at] * * * Power [of 'Consent']"[3123] with respect to its power "[t]o provide for organizing * * * the Militia", not its power "[t]o regulate Commerce". And certainly no "Agreement or Compact" among two or more States, so sanctioned by Congress, could rationally have been deemed "Commerce" in any event.

(c) No "regulat[ion of] Commerce" in "Arms" suitable for the Militia but what was permissible under the power and duty "[t]o provide for * * * arming". Americans in 1788 would have accepted the generality that the power "[t]o regulate Commerce", "like all others vested in Congress, * * * acknowledge[d] no limitations, other than [we]re prescribed in the [original] constitution".[3124] As to the Militia, however, the question would have remained: "What were those limitations?" The answer was that, because "[t]he powers conferred upon the Congress [we]re harmonious",[3125] Congress could not have "regulate[d] Commerce" in a manner that negated any of its other powers and especially that contravened

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[3120] *See* U.S. Const. art. I, § 8, cls. 15 and 16.

[3121] U.S. Const. art. I, § 8, cl. 16.

[3122] U.S. Const. art. I, § 10, cl. 3.

[3123] U.S. Const. art. I, § 8, cl. 18.

[3124] Gibbons v. Ogden, 22 U.S. (9 Wheaton) 1, 196 (1824).

[3125] Perry v. United States, 294 U.S. 330, 353 (1935).

any of its duties. Thus, even if the "keep[ing] and bear[ing of] Arms" suitable for Militia service by "the people" eligible for the Militia—and therefore the production, distribution, and acquisition of such "Arms" in the free market—could have been taken in some sense to constitute "Commerce", the ostensible authority of Congress to "regulate" those matters would have been circumscribed and controlled in several ways:

(i) By the duty of "the United States"—and therefore of Congress, too—to "guarantee to every State in th[e] Union a Republican Form of Government".[3126] For under the original Constitution a "militia, composed of the body of the people, trained to arms",[3127] was an integral component of "a Republican Form of Government".[3128] And what "the United States" needed to "guarantee" with respect to the Militia was not left to conjecture under the power "[t]o regulate Commerce", but was specifically spelled out in other powers of Congress and in the status of the President.[3129]

(ii) Importantly, this result would have obtained even in the absence in the original Constitution of an explicit "guarantee" of "a Republican Form of Government". For any permissible Congressional intervention in the free market for firearms would have had to have found its source, substance, and operation in the power explicitly directed to that very subject, and in the specific manner that power was to be exercised, rather than in some other power addressed to an amorphous subject, and the possible exercises of which were undefined—in this case, the power "[t]o provide for * * * arming * * * the Militia" in particular, rather than the power "[t]o regulate Commerce" in general. After all, the original Constitution was not legally psychotic. It did not delegate to Congress the explicit, specific power and duty "[t]o provide for * * * arming * * * the Militia" while simultaneously delegating an implicit (but supposedly superior) license to "[dis]arm[ ] * * * the Militia" through "regulat[ions of] Commerce". The power of Congress "[t]o provide for * * * arming * * * the Militia" defined and thereby constrained its power "[t]o regulate Commerce" in arms suitable for Militia service. No such "regulat[ion]" could have extended beyond what Congress could have done under its power "[t]o provide for * * * arming"—that is, the only proper "regulat[ion]" of such "Commerce" would have been to assist in (or at least not to interfere with) "arming" WE THE PEOPLE, rather than "[dis]arming" them. This, of course, would have entailed not merely allowing the free market to function with the least degree of hindrance, but also encouraging, fostering, and even relying upon the market.

[3126] U.S. Const. art. IV, § 4.

[3127] Virginia Declaration of Rights (1776) art. 13.

[3128] *See ante*, at 890-893, 921-922, 1038-1040, 1301-1307, 1451-1453, and 1497-1499.

[3129] U.S. Const. art. I, § 8, cls. 15 and 16, *and* art. II, § 2, cl. 1.

(iii) The principle that all of Congress's powers were "of equal dignity", and none could have been "enforced [so] as to nullify or substantially impair [any] other"[3130] also appeared in the power of Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution * * * [its other delegated] Powers".[3131] Under color of this power Congress could not have enacted some "Law[ ]" supposedly "necessary and proper for carrying into Execution" one of its "Powers" that simultaneously was "[*un*]necessary and [*im*]proper for carrying into Execution" some other "Power[ ]", because it would have negated, frustrated, or interfered with the "Execution" of the first "Power[ ]". Thus, the standard for what amounted to a "necessary and proper" "regulat[ion of] Commerce" in firearms had to be that "regulat[ion's]" perfect coincidence with Congress's power and duty "[t]o provide for * * * arming * * * the Militia". Applied to the same subject at the same time, both of those powers would have had to be capable of being "carr[ied] into Execution" with the very same result, or the exercise of the more general power ("[t]o regulate Commerce") would have had to be denounced as "[un]necessary and [im]proper" in relation to the more specific power.

So, even if under the original Constitution Congress could have "regulate[d]" firearms and ammunition suitable for Militia service pursuant to its power over "Commerce", it would have been obliged to "regulate" them only so as to "arm[ ]", or so as to facilitate or otherwise aid in "arming", or at least so as to leave alone with the "arm[s]" they already possessed or could have acquired on their own every able-bodied adult American eligible for service in the Militia. But, if the power "[t]o regulate Commerce" could not have been exercised to impose restraints on "the people" beyond what would have been permissible under the power "[t]o provide for * * * arming * * * the Militia", then, as to the free market in firearms, the power "[t]o regulate Commerce" was simply irrelevant. The power "[t]o provide for * * * arming" covered the field. *It and it alone* was the original Constitution's special "regulat[ion] of Commerce" with respect to firearms suitable for Militia service in the hands of individuals eligible for the Militia.

(d) Permissible "regulat[ions of] Commerce" in firearms. Nonetheless, under the original Constitution, Congress did enjoy a power "[t]o regulate Commerce * * * among the several States" which involved firearms *un*suitable for Militia service, or individuals *in*eligible for the Militia. For example—

(i) Although the category of truly "unsuitable" firearms would have been quite narrow, Congress could certainly have penalized, or even prohibited, the marketing of palpably *unsafe* firearms, or the employment of false or deceptive advertising in the marketing of any firearms.

[3130] Dick v. United States, 208 U.S. 340, 353 (1908).

[3131] U.S. Const. art. I, § 8, cl. 18.

(ii) The category of "unsuitable" firearms would surely also have included *stolen* firearms being trafficked from State to State by people who enjoyed no claim of right to possess them.[3132]

(iii) Controls over "Commerce" in firearms "among the several States" could have been justifiable, too, had they been specifically limited to "criminals" whose sentences had excluded them from the Militia, "juveniles" not old enough to serve in the Militia but who had sought to acquire firearms without the knowledge or consent of their parents or guardians, certain types of "mental defectives" who had been exempted or excluded from the Militia on the grounds of their conditions (of course, on the basis of sufficient psychiatric evidence submitted pursuant to the full panoply of due process of law), and "armed groups" which had attempted without warrant to "supplant the functions of duly constituted public authorities" (that is, insurrectionists) the actions of which the Militia might have been called upon to suppress.[3133]

In sum, under the original Constitution, *no* proper exercise of the power "[t]o regulate Commerce * * * among the several States" could have infringed "the right of the people to keep and bear Arms"—*whether the Second Amendment had existed or not.* The original "Constitution [wa]s itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS" with respect to that particular "right".[3134]

2. The additional effect of the Second Amendment. Although the original Constitution did secure to WE THE PEOPLE what amounted to a complete "right * * * to keep and bear Arms", the Second Amendment added important elements of constitutional elucidation and protection:

> • *Elucidation*, by explicitly connecting in a single constitutional provision "the right of the people to keep and bear Arms" to "[a] well regulated Militia", and "[a] well regulated Militia" to "the security of a free State". These connections were less obvious, and to some degree only implicit, in the original Constitution. By historical definition, "the body of the people, trained to arms" comprised the Militia in every State;[3135] and the original Constitution established both that "the Militia of the several States" were necessary "to execute the Laws of the Union, suppress Insurrections

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[3132] *See, e.g.,* AN ACT To regulate commerce in firearms ("Federal Firearms Act"), Act of 30 June 1938, CHAPTER 850, § 2(g) and (h), 52 Stat. 1250, 1251.

[3133] *See, e.g.,* AN ACT To assist State and local governments in reducing the incidence of crime, to increase the effectiveness, fairness, and coordination of law enforcement and criminal justice systems at all levels of government, and for other purposes ("Omnibus Crime Control and Safe Streets Acts of 1968"), Act of 19 June 1968, Pub. L. 90-351, TITLE IV—STATE FIREARMS CONTROL ASSISTANCE, § 901(a)(2), 82 Stat. 197, 225.

[3134] *See The Federalist* No. 84 (Alexander Hamilton).

[3135] Virginia Declaration of Rights (1776) art. 13.

and repel Invasions" (or it would not have incorporated them into its federal system),[3136] and that all of those "Laws" were aimed at "secur[ing] the Blessings of Liberty to ourselves and our Posterity".[3137] But one had to draw these separate sources together, and examine them carefully, in order to arrive at the conclusion the Second Amendment set out so clearly.

• *Protection*, by explicitly directing on the basis of those connections that "the right of the people to keep and bear Arms, shall not be infringed". This command, too, was less obvious in the original Constitution. Again, by historical definition, "the body of the people, trained to arms" comprised the Militia in every State; and the Constitution required Members of Congress, not only "[t]o provide for * * * arming * * * the Militia",[3138] but also to be "bound by Oath or Affirmation, to support th[e] Constitution" in that particular.[3139] One needed, however, to associate and parse all of these provisions in their mutual interrelation in order to infer what the Second Amendment recited in its last fourteen words.

In short, the Second Amendment's inestimable contribution is to render pellucid and undeniable that "the right of the people to keep and bear Arms" is *absolute*.[3140] On its face, the injunction issued by WE THE PEOPLE themselves that "the right * * * shall not be infringed" admits of no limit, because it contains *no* exception, excuse, equivocation, or evasive expression on the purported basis of which any violation could be even imagined to be tolerable. In legal principle it must be without limit, because it guarantees "the right *of the people*" who are America's sovereigns, and therefore whose rights cannot be constrained. And in political practice it can have no limit, either, because it secures "the right of the people to keep and bear *Arms*"—and, in the final analysis, all "'[p]olitical power grows out of the barrel of a gun'".[3141] The absolute nature of "the right * * * to keep and bear Arms" is a matter of practical logic, too. For the perdurance of every one of "the several States" as "a free State" under the Constitution is not subject to compromise—the survival of "a free State" in a world hostile to freedom is impossible without adequate "security"—the deployment of "[a] well regulated Militia" is no less than "necessary to the security of a free State"—and the existence of "[a] well regulated Militia" absolutely depends upon the unfettered exercise of "the right of the people to keep and bear Arms".

[3136] *See* U.S. Const. art. I, § 8, cl. 15.

[3137] *See* U.S. Const. preamble.

[3138] U.S. Const. art. I, § 8, cl. 16.

[3139] U.S. Const. art. VI, cl. 3.

[3140] *See ante*, at 1401-1423.

[3141] *Quotations From Chairman Mao*, *ante* note 28, at 61.

a. The effect of the Second Amendment on Congress's Militia Powers. Being that the Second Amendment was "added" to the original Constitution "in order to prevent misconstruction or abuse of its powers",[3142] and being that the Amendment itself is absolute, its ultimate purpose must be to make Americans absolutely sure that the duties of Congress in the original Constitution as they relate to "the right of the people to keep and bear Arms" are absolute, too.

This is a matter with serious practical consequences in the realm of legislation. After all, when Congress exercises its powers "[t]o make all Laws which shall be necessary and proper for carrying into Execution the * * * Power[ ]" "[t]o provide for organizing, arming, and disciplining, the Militia",[3143] it must determine what is "necessary and proper" according to some *objective* standard against which WE THE PEOPLE can judge how well or ill Congress has performed its duties. Its very language proves that the original Constitution did not license Members of Congress to decide what might be "necessary and proper" on an *ad hoc*, subjective basis, with their personal opinions to be accepted as the final words on the subject. Had that been the Constitution's intent, the limiting phrase "which shall be necessary and proper" would have been supererogatory. *All* "Laws" which Congress enacted would have had to be taken as "necessary and proper" simply because Congress enacted them. "It cannot be presumed", however, "that any clause in the constitution [wa]s intended to be without effect."[3144] The Constitution cannot be "interpret[ed] * * * as if th[ose words] were not to be found" there.[3145] Rather, "effect [must] be given to each word of the Constitution".[3146]

To be sure, with respect to some exercises of some powers, what might be "necessary and proper" could safely be consigned to Members of Congress to determine in the first instance, subject to later disapproval by the electorate if their decisions crossed into the pale of political unacceptability. Exercises of the power "[t]o provide for organizing, arming, and disciplining, the Militia", however, are too crucial to leave to the unfettered discretion, ignorance, incompetence, or possibly malign motives of Members of Congress, and the vagaries and frequent corruptions of the electoral process, especially when elections for the House of Representatives and the Senate occur only every two, four, or six years—leaving time for usurpation, tyranny, or some other disaster to fester while WE THE PEOPLE as voters can do nothing to correct the situation. And because "[t]he very purpose of [the entire]

[3142] RESOLUTION OF THE FIRST CONGRESS SUBMITTING TWELVE AMENDMENTS TO THE CONSTITUTION (4 March 1789), *in Documents Illustrative of the Formation of the Union of the American States*, *ante* note 1, at 1063.

[3143] U.S. Const. art. I, § 8, cls. 18 and 16.

[3144] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803).

[3145] Blake v. McClung, 172 U.S. 239, 261 (1898).

[3146] Knowlton v. Moore, 178 U.S. 41, 87 (1900).

Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles", so that "[o]ne's * * * fundamental rights may not be submitted to vote; they depend on the outcome of no elections",[3147] then certainly "the right of the people to keep and bear Arms" for the purpose of participating in "well regulated Militia"—the *only* "right" that the Bill of Rights ties directly to "the security of a free State"—must be "beyond the reach of majorities and officials". To that end, the Second Amendment provides an *absolute* standard for what is "necessary and proper" "[t]o provide for organizing, arming, and disciplining, the Militia". As before, although this is a single power in which the several component powers are plainly intended to be exercised simultaneously or at least sequentially in some rational relationship to one another, for purposes of analysis the component powers will be addressed separately.

(1) The power "[t]o provide for organizing * * * the Militia". The Second Amendment does not explicitly identify a "right of the people" to be "organiz[ed]" in "well regulated Militia". That right plainly inheres there, however. The Amendment commands that "the right of the people to keep and bear Arms, shall not be infringed", not for reasons it refrains from cataloguing, but instead for the single, specific purpose of maintaining "well regulated Militia" in every State. The Amendment would never have mentioned "[a] well regulated Militia" unless it intended inextricably to connect that "right" to such a "Militia" in a relationship of cause and effect. Thus, "the right of the people to keep and bear Arms" for the purpose of maintaining "[a] well regulated Militia" in every State necessarily implies a "right of the people" in every State *actually to serve* in such a "Militia", which "right" also "shall not be infringed". This would be true even if the foundational right were phrased simply as "the right * * * *to keep* * * * Arms", because the purpose of "keep[ing]" them would be to enable "the people" to perform Militia service. But the foundational right also includes "the right * * * *to* * * * *bear* Arms", which in the context of the Amendment's nominative absolute clause can only mean "to * * * bear Arms" in "well regulated Militia". So, "the right of the people" to participate in "well regulated Militia"—and therefore to have such Militia properly "organiz[ed]" to that end—is implicit in "the right * * * to keep * * * Arms" and explicit in "the right * * * to * * * bear Arms".

That "the right of the people" to participate in "well regulated Militia" as a consequence of their "right * * * to keep and bear Arms" "shall not be infringed" imposes a corresponding duty on public officials to organize the totality of "the people" into such Militia at all times. This, of course, is just what the original Constitution provided, when its words were interpreted as, "prior to its adoption,

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[3147] West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638 (1943).

[they had] been frequently used",[3148] and in the light of the law as it existed at the time.[3149] Under the original Constitution, Congress's power and duty "[t]o provide for organizing" were informed and controlled by the principle of the *pre*-constitutional Militia Acts that always required near-universal service.

The Second Amendment emphasizes that the power and duty are *absolute*, and must be exercised according to an objective standard by which "the Militia" so "organized" can be adjudged to be "well regulated" or not. The power and duty are absolute, because the Amendment allows for no exception; and as they are to be employed and fulfilled ultimately in aid of "the security of a free State", no exception can be tolerated. The standard for their exercise is near-universal participation. As the *pre*-constitutional Militia Acts evidence, "[a] well regulated Militia" invariably consists of *all* eligible citizens, "the body of the people, trained to arms".[3150] "[T]he body of the people, trained to arms" consists of the selfsame "people" who enjoy "the right * * * to keep and bear Arms" for the purpose of Militia service. Therefore, *no "Law[ ] for carrying into Execution the * * * Power[ ]"* of Congress "[t]*o provide for organizing * * * the Militia" can be "necessary* [*or*] *proper" unless it promotes, or at least does not hinder, the participation of all of "the people" in some way or other in "well regulated Militia" that are capable of taking whatever action may be necessary "to execute the Laws of the Union, suppress Insurrections and repel Invasions".*[3151]

Because the Second Amendment recognizes no limitation on "the people" (other than some of the exceedingly narrow exclusions embodied in the *pre*-constitutional Militia Acts, and for otherwise eligible individuals rightfully convicted of crimes for which the proper punishment could be slavery), "well regulated Militia" cannot be truncated "select militia"—and assuredly not "militia" which are intentionally "[*un*]organiz[ed]" in any part or to any degree. "Select militia" on the one extreme and "[un]organiz[ed] * * * Militia" on the other are *constitutionally impossible*, because the final purpose of "well regulated Militia" is to provide "the security of a *free* State" in which "the people" themselves exercise supreme political authority. Inasmuch as "'[p]olitical power grows out of the barrel of a gun'",[3152] "the people" *as a whole* cannot exercise supreme political power unless "the people" *as a whole* control the guns; and "the people" *as a whole* cannot effectively control the guns unless "the people" *as a whole* are "organiz[ed]" in "well regulated Militia".

[3148] *See* Knowlton v. Moore, 178 U.S. 41, 96 (1900).

[3149] *See* Mattox v. United States, 156 U.S. 237, 243 (1895); United States v. Barnett, 376 U.S. 681, 693 (1964).

[3150] Virginia Declaration of Rights (1776) art. 13.

[3151] *See* U.S. Const. art. I, § 8, cls. 16 and 18.

[3152] *Quotations From Chairman Mao, ante* note 28, at 61.

Nonetheless, even though "the right of the people to keep and bear Arms" is inextricably linked with "well regulated Militia", if Congress should fail, neglect, or refuse "[t]o provide for organizing * * * the Militia" it still could not *dis*arm "the people" who were thus "[un]organiz[ed]", or prohibit them from arming themselves, either through their State governments or on their own through the free market. WE THE PEOPLE'S "right * * * to keep and bear Arms" exists even outside of an actually "organiz[ed] * * * Militia", because that "right" is in effect the cause, the Militia only the effect. Because an "[un]arm[ed] * * * Militia" is constitutionally a contradiction in terms, "the right of the people to keep and bear Arms" is the condition precedent *sine qua non* for "well regulated Militia" to exist. In the final analysis, without adequate "Arms" organization is useless, discipline meaningless, training worthless, and security nonexistent. But *with* "Arms" "the people" can eventually achieve all of the rest. So, under the Second Amendment, WE THE PEOPLE'S temporary lack of "organiz[ation]" cannot rationalize denying them "Arms". This insight is important to emphasize, because it defeats the strategy of "gun controllers" who, on the one hand, opine that "the right of the people to keep and bear Arms" applies only to individuals actually enrolled in some sort of a "militia", but, on the other hand, oppose any revitalization of "the Militia of the several States" which in keeping with constitutional principles would enroll most Americans. If Americans remain unorganized, "gun controllers" argue, they need not be armed; and eventually, "gun controllers" hope, those Americans who happen to possess firearms can be *dis*armed completely and permanently. Once Americans realize, though, that "organiz[ation]" is not the predicate for "the right of the people to keep and bear Arms", but that "the right of the people to keep and bear Arms" is the foundation upon which "organiz[ation]" can be made useful, this strategy collapses.

(2) The power "[t]o provide for * * * arming * * * the Militia". With respect to this matter, the Second Amendment is eminently realistic. Overall, in the spirit of the Declaration of Independence, the Amendment implicitly recognizes that rogue public officials may someday control the General Government (and perhaps the States' governments as well); that these miscreants will set about to exploit, oppress, and even terrorize common Americans; and that one of their first steps will be to disarm "the people", so that, without the instruments of resistance, their victims cannot transform inchoate mass anger into effective collective action. By guaranteeing "*the right of the people* to keep and bear Arms", rather that any right or privilege of disloyal public officials or of defective governmental institutions, the Amendment identifies whom those "Arms" are to protect. By defining that "right" as "the right of the people *to keep and bear* Arms", the Amendment mandates that those "Arms" are actually to be wielded by "the people" themselves, in their very own hands, not by someone else purporting to "represent" them. By declaring "[a] well regulated Militia * * * *necessary* to the security of a free State", the

Amendment confirms that "the right of the people to keep and bear Arms" is indispensable to "a free State". By focusing on "the security of a *free* State", the Amendment recognizes that the "'[p]olitical power [which] grows out of the barrel of a gun'"[3153] is WE THE PEOPLE'S own sovereignty, maintained by the "Arms" they personally possess, because "the Sword and Soveraignty always march hand in hand".[3154] And by commanding that "the right of the people * * * *shall not be infringed*", the Amendment denies even loyal public officials any colorable claim to superior authority over "the people", and strips disloyal officials of any claim to any authority whatsoever.

Thus, *no "Law*[ ] *for carrying into Execution the * * * Power*[ ]" "[*t*]*o provide for * * * arming * * * the Militia" can be "necessary* [*or*] *proper" unless it promotes, or at least does not hinder, the permanent personal possession of "Arms" by each and every one of "the people" themselves*—either in a positive manner, by actually supplying "the people" with "Arms"; or in a neutral fashion, by eliminating incompetent or rogue officials' interference with WE THE PEOPLE'S acquisition of "Arms" on their own; and in any event never in a negative way, by purporting to compel "the people" to remain "[*un*]arm[ed]", let alone to "[*dis*]arm[ ]" them.[3155]

(3) The power "[t]o provide for * * * disciplining, the Militia". As pointed out above, the Constitution relates the power of Congress with respect to "disciplining" the Militia largely to "training". The Second Amendment not only emphasizes this link but also elucidates and elaborates on its meaning.

(a) The Amendment guarantees, without exception or limitation, "the right of the people to keep and bear Arms" so that they can participate in "well regulated Militia". By *pre*-constitutional definition, "a well regulated militia" must be "composed of the body of the people, *trained to arms*".[3156] Therefore, "the people" must enjoy a right to be "trained to arms" for Militia purposes with the very "Arms" they "keep and bear". This should be self-evident: For "the people * * * keep * * * Arms" *in order to be* "trained to arms"; they "bear Arms" *in the course of being* "trained to arms"; and they cannot otherwise competently "keep and bear Arms" *without having been sufficiently* "trained to arms". Moreover, because it derives from and effectuates "the right * * * to keep and bear Arms", the right to be "trained to arms" "shall not be infringed" by anyone, either.

(b) "[T]he right *of the people*" to be "trained to arms" is not the sole right of that nature the Second Amendment protects. The Amendment also guarantees a

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[3153] *Quotations From Chairman Mao*, *ante* note 28, at 61.

[3154] AN ARGUMENT, Shewing, that a Standing Army Is inconsistent with A Free Government, *ante* note 27, at 7.

[3155] *See* U.S. Const. art. I, § 8, cls. 18 and 16.

[3156] Virginia Declaration of Rights (1776) art. 13 (emphasis supplied).

right *of the States* on that score. The original Constitution "reserv[ed] to the States respectively * * * the Authority of training the Militia according to the discipline prescribed by Congress", so that the Militia would be competent to perform the three purposes for which they might be "call[ed] forth".[3157] This "Authority" was and remains *exclusive* to the States. Therefore, the States enjoy a constitutional right, as against the General Government, to train "the body of the people" in their Militia; and Congress labors under a duty, in favor of the States, to "prescribe[ ]" a proper "discipline" for such "training", and then not to interfere with its implementation. Inasmuch as such "training" would be useless without proper "organizing" and "arming" of the Militia, the States enjoy a further right to demand that Congress fulfill its responsibilities as to those particulars, too. And if Congress fails, neglects, or refuses to do what is necessary to render effective the States' "reserv[ed] * * * Authority of training the Militia", then the States may fill the gap. In addition, because the original Constitution delegated no power to Congress to "organiz[e]", "arm[ ]", or "disciplin[e]" the Militia for any purpose other than the three for which the Militia could be "call[ed] forth" to "be employed in the Service of the United States", it implicitly "reserv[ed] to the States respectively" the unlimited "Authority"—and therefore an equally comprehensive right as against the General Government—to train their Militia for all other purposes.[3158]

(c) Importantly, the Second Amendment also recognizes that the States as political establishments have significant constitutional interests in making sure that "the right of the[ir] people to keep and bear Arms" is not "infringed" with respect to "training". For the purpose of training the Militia—whether "according to the discipline prescribed by Congress" with respect to the three constitutionally mandated tasks, or according to various "discipline[s]" the States may prescribe for other duties—is to render that "right" effective in the most practical manner possible where it counts the most: namely, in the field. Without such "training", "the security of a free State" would be jeopardized in every State; and the very existence of each State as a State would be compromised. Self-evidently, the General Government can claim no legal right or power to endanger the survival of the States as States, because the General Government and all of its parts—that is, the entire constitutional "Union"—depend, not only for their legitimacy but also for their very existence, upon the States' perdurance. "The States disunited might continue to exist. Without the States in union there could be no such political body as the United States."[3159] *A fortiori*, without the States in existence the Union would dissolve into nothingness. Thus, the very continuance of the General Government

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[3157] U.S. Const. art. I, § 8, cls. 16 and 15.

[3158] *Compare* U.S. Const. art. I, § 8, cl. 16 *with* amend. X.

[3159] Lane County v. Oregon, 74 U.S. (7 Wallace) 71, 76 (1869).

itself hinges upon its recognizing and to the maximum degree assisting the States in the exercise of their "reserv[ed] * * * Authority of training the Militia".

(d) The Second Amendment is a statement, not simply of States' rights, but of States' *duties* as well. "[T]he right of the people to keep and bear Arms" cannot prove effective in practice unless "the body of the people" is properly "trained to arms". Therefore, "the right * * * to keep and bear Arms" includes the right to be "trained". In the first instance, "the people" must look to the States for "training", because the States enjoy the undoubted constitutional "Authority of training the Militia", and all of the rights and powers appertaining thereto. This "Authority" was not granted in order to and cannot remain dormant, however, because "[a] well regulated Militia" is "necessary to the security of a free State". So it constitutes a duty, too. Therefore, if the States fail, neglect, or refuse to provide their "people" with such "training" although they are lawfully entitled and have the ability to do so, they "infringe[ ]" "the right of the people to keep and bear Arms". In that event, "the Authority of training the Militia" does not "revert" to the General Government, because it was never "delegated to the United States by the Constitution" in the first place, but was "reserved to the States respectively". If the States default on their responsibilities, that "Authority" must devolve directly upon "the people" who, as sovereigns, are the residual claimants of *all* governmental powers.[3160]

In sum, *no "Law[ ] for carrying into Execution the * * * Power[ ]" "[t]o provide for * * * disciplining, the Militia" can be "necessary [or] proper" unless it promotes, or at least does not hinder, the States in the exercise of their "*reserv[ed] * * * Authority of training the Militia", and the ability of "the people" to train themselves to "Arms" in the event the States default on their responsibilities.*[3161] In *no* instance may any supposed "Law[ ]" purport to assign to any officer or agency of the General Government either a simulacrum of "Authority" for "training the Militia" or a license to attempt to prevent such "training".

(4) The powers "[t]o provide for calling forth the Militia" and "for governing such Part of them as may be employed in the Service of the United States". The Second Amendment's effects on these powers can be easily summarized. To be "call[ed] forth" as "the Militia", and to perform as such "in the Service of the United States", "the people" must be so "organiz[ed], arm[ed], and disciplin[ed]" as to constitute "*well regulated* Militia" that are capable of maintaining "the security of a free State". Thus, exercises of Congress's powers "[t]o provide for calling forth" and "for governing [any] Part of" the Militia must always be contingent and must depend upon prior *proper* exercises of its power "[t]o provide

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[3160] *Compare* U.S. Const. art. I, § 8, cl. 16 *with* amend. X.

[3161] *See* U.S. Const. art. I, § 8, cls. 18 and 16.

for organizing, arming, and disciplining, the Militia" in compliance with the Amendment's standard. If "the people" are *not* properly "organiz[ed], arm[ed], and disciplin[ed]" they can neither be "call[ed] forth" nor "govern[ed]", because they are not, strictly speaking, "*well regulated* Militia" (or perhaps even any kind of "militia" at all). So, inasmuch as the exercise of its power "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions" is obviously *mandatory* on Congress due to the especially critical nature of the purposes for which the Militia may be "call[ed] forth"[3162]—and inasmuch as the exercise of its power "for governing such Part of them as may be employed in the Service of the United States" is also *mandatory*, because it would be absurd for Congress to be required to "call[ ] forth the Militia" but not also required to "govern[ ] such Part of them" as might be "call[ed] forth"—and inasmuch as any exercise of those powers depends upon the prior proper exercise of the power "[t]o provide for organizing, arming, and disciplining, the Militia"—and inasmuch as the exercise of that power must conform to the Second Amendment's standard of "[a] well regulated Militia"—and inasmuch as "[a] well regulated Militia" is one in which "the people" exercise "the right * * * to keep and bear Arms"—therefore, *no "Law*[ ] *for carrying into Execution the * * * Powers*" "[*t*]*o provide for calling forth the Militia" and "for governing* [*any*] *Part of them" can be "necessary* [*or*] proper" *unless it relies upon and promotes, or at least does not hinder, "the right of the people to keep and bear Arms".*[3163]

(5) The locus of final authority to decide what is "necessary and proper" in the execution of Congress's Militia Powers. The Constitution does not identify *who* will have the last word in determining whether the actual execution of any of Congress's Militia Powers is, in fact and law, "necessary and proper". The Second Amendment makes clear, however, that final authority in that regard cannot rest with Congress itself, or with any branch, department, or officer of the General Government.

The qualification that "Laws * * * *shall be necessary and proper*" is neither a mere hope, nor even an hopeful admonition, but instead is *an actual legal duty*, or it would not appear in the Constitution at all—rather, the clause would read simply, "[t]o make all Laws for carrying into Execution the foregoing Powers [of Congress]".[3164] (For one would always hope, without having to say so, that Congress would refrain from exercising any of its powers if such exercise were other than "necessary and proper".) As opposed to a mere moral duty, which sounds only in the consciences of the parties subject to it, and then all too often only according to their own subjective interpretations of it, a legal duty requires: (i) an objective standard

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[3162] *See ante*, at 50-54.

[3163] *See* U.S. Const. art. I, § 8, cls. 18 and 16.

[3164] U.S. Const. art. I, § 8, cl. 18 (emphasis supplied).

of performance, (ii) a set of beneficiaries who can assert a right to have that standard enforced on their behalf, (iii) a tribunal competent to inquire into whether the standard has been properly applied, and (iv) an effective remedy for any violation so discovered. In this case—

(a) With respect to Congress's Militia Powers, the Second Amendment sets out an objective standard of necessity and propriety: namely, whether the exercise of those powers produces "[a] well regulated Militia" capable of maintaining "the security of a free State". Not the facile, fallible, and even fraudulent political notions of men, but "the Laws of Nature and of Nature's God" establish what constitutes "a free State".[3165] The Amendment establishes beyond the possibility of legal contradiction that "the security of a free State" depends upon "[a] well regulated Militia". The principles of "[a] well regulated Militia" derive from the *pre-*constitutional Militia statutes—all of which are subject to *scientific* corroboration, in that any researcher who examines the historical record can verify or falsify them to the same degree of certainly. And the foremost of these principles, upon which the practical application of all the others depends, is "the right of the people to keep and bear Arms".

(b) "[T]he right *of the people* to keep and bear Arms" identifies the real parties in interest who are to benefit from the standard of necessity and propriety. This is corroborated by the connection the Second Amendment makes between "the right *of the people* to keep and bear Arms" and "the security of a *free* State"—in which "the people" are sovereign,[3166] "Governments * * * deriv[e] their just powers from the consent of the governed", and "it is the Right of the People to alter or to abolish" "any Form of Government [that] becomes destructive of the[ir unalienable Rights]".[3167] Moreover, as the Amendment declares,"the right of the people * * * shall not be infringed" by anyone. "[T]he right" is *absolute* in its terms, without limitation, exception, qualification, or equivocation. So no one can claim a colorable entitlement to Militia "Laws which shall [not] be necessary and proper". Indeed, even "the people" themselves can assert no such dispensation, because "the *right* of the people" is also their *duty*.

(c) The only tribunal competent to investigate and if necessary indict Congress for violations of the standard of "necess[ity] and prop[riety]" with respect to America's Militia "Laws" is "the court of public opinion"—for, being composed of WE THE PEOPLE themselves rather than their mere representatives, it alone contains judges with constitutional authority sufficient to that end. If Members of

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[3165] *See* Declaration of Independence.

[3166] *See* Chisholm v. Georgia, 2 U.S. (2 Dallas) 419, 454, 456 (opinion of Wilson, J.), 471-472 (opinion of Jay, C.J.) (1793).

[3167] Declaration of Independence.

Congress are trying in good faith to the best of their abilities to enact "necessary and proper" legislation, and if time and other circumstances allow, they may temporarily be given the benefit of the doubt. If "the people" observe questionable behavior, they can immediately inform ignorant legislators of their errors by "petition[ing] the Government for a redress of grievances".[3168] Or, if time allows, THE PEOPLE as voters can remove incompetent or incorrigible legislators through the electoral process. If, however, Members of Congress are *not* proceeding in good faith, "petition[ing] the Government" will prove worse than useless—because rogue officials who have set out to destroy "a free State" will hardly be swayed from their evil purpose by complaints that they are actually achieving their end, but instead will be encouraged by their past successes to expand their efforts. And, even if they are not rigged, elections may come too late to provide succor. In that event, THE PEOPLE themselves must decide, in the present moment, whether Congress's actions are "necessary and proper" or not—because they may never be afforded another chance to do so.

To render such a decision, of course, is their absolute right. For, as Blackstone taught Americans in the Founding Era, "whenever a question arises between the society at large and any magistrate vested with powers originally delegated by that society, it must be decided by the voice of the society itself: there is not upon earth any other tribunal to resort to".[3169] And specifically with respect to the Constitution, which WE THE PEOPLE themselves "ordain[ed] and establish[ed]",[3170] no less than with any other statute "[t]he power to enact carries with it final authority to declare the meaning of the legislation".[3171]

(d) The appropriate remedy then becomes the issue. "The court of public opinion" is no toothless paper tiger which can growl but not bite. In a conflict between THE PEOPLE, on one side, and a Congress saturated with rogues, on the other, who would serve most effectively as "the voice of the society"? Initially, the States. The States are not entities without rights and powers within the federal system. If rogue Members of Congress refuse "[t]o provide for organizing, arming, and disciplining, the Militia", then the States, upon petitions from their citizens, can "organiz[e]" their own Militia, simply by authorizing their people to form Independent Companies; can "arm[ ]" their own Militia, simply by manufacturing or purchasing firearms, ammunition, and accoutrements on their own account, and then distributing that equipment to their citizens, or by assisting their citizens to acquire "Arms" on their own through the free market; and can "disciplin[e]" their own Militia, simply by allowing their citizens to train themselves according to some

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[3168] U.S. Const. amend. I.

[3169] *Commentaries on the Laws of England, ante* note 142, Volume 1, at 212.

[3170] U.S. Const. preamble.

[3171] Propper v. Clark, 337 U.S. 472, 484 (1949).

common plan. Indeed, clear-eyed and foresighted State officials, recognizing the problem even before most of their constituents did, might take the lead in mobilizing the citizenry against rogues in the District of Columbia. But in a conflict between THE PEOPLE, on one side, and rogues in control of *both* Congress *and* the States' governments, on the other, who would be "the voice of the society"? THE PEOPLE themselves. They are not without their own constitutional—and, perforce of the Declaration of Independence, *supra*-constitutional—rights and powers. If rogues in the District of Columbia and their State capitals refused to "organiz[e], arm[ ], and disciplin[e], the Militia", THE PEOPLE throughout America could proceed on their own initiative, just as patriotic Virginians did when Lord Dunmore refused to revive that Colony's Militia in 1774 and 1775.[3172] And if no less-drastic means of redress were available, "the People" not only could organize themselves in Militia, but also through those Militia could "throw off such Government" entirely, and "provide new Guards for their future security".[3173]

b. A special effect of the Second Amendment on the powers of the President. Most of the effects of the Second Amendment on the powers of the President should be obvious to any reader who has reached this point. One peculiar to these times warrants special examination, though.

The Constitution requires the President to "take Care that the Laws be faithfully executed".[3174] After the Declaration of Independence, first and foremost among these "Laws" is the Constitution itself,[3175] which the President must "'swear (or affirm) * * * to the best of [his] Ability, [to] preserve, protect and defend'".[3176] One important part of the body of constitutional "Law[ ]" which relates to the Militia is the appointment of the President as "Commander in Chief * * * of the Militia of the several States, when called into the actual Service of the United States",[3177] along with the authorization for the Militia "to execute the Laws of the Union, suppress Insurrections and repel Invasions" when "call[ed] forth" for those purposes.[3178] Another is the Second Amendment. And inasmuch as "the people" have both a right and a duty to participate in "well regulated Militia", they have both a right and a duty "to execute the Laws of the Union" in and through the Militia in support of and coöperation with the President. In this unique respect it can be said that "the people" and the President partake of a constitutional identity and share a constitutional responsibility.

[3172] *See ante*, at 567-597.

[3173] Declaration of Independence.

[3174] U.S. Const. art. II, § 3.

[3175] *See* U.S. Const. art. VI, cl. 2.

[3176] U.S. Const. art. II, § 1, cl. 7.

[3177] U.S. Const. art. II, § 2, cl. 1.

[3178] U.S. Const. art. I, § 8, cl. 15.

These provisions assign to the President, at the National level, constitutional authority analogous to, but even more extensive than, the common-law and statutory authority Sheriffs exercised in their Counties under *pre*-constitutional English law. As Blackstone explained,

> [A]S the keeper of the * * * peace, both by common law and special commission, [a sheriff] is the first man in the county, and superior in rank to any nobleman therein, during his office. He may apprehend[ ], and commit to prison, all persons who break the peace or attempt to break it * * * . He may, and is bound *ex officio* to, pursue and take all traitors, murderers, felons, and other misdoers, and commit them to gaol for safe custody. He is also to defend his county against any * * * enemies when they come into the land: and for this purpose, as well as for keeping the peace and pursuing felons, he may command all the people of his county to attend him; which is called the *posse commitatus*, or power of the county: which summons every person, above fifteen years old * * * is bound to attend * * * under pain of fine and imprisonment.[3179]

Mutatis mutandis, this passage perfectly describes the powers of the President entailed in his "tak[ing] Care that the Laws be faithfully executed", and in his commanding the Militia to attend him in that endeavor. This description would also apply in principle to the "commander in chief" of the Militia—usually the Governor—in each of the several States, as well as "the County Lieutenant" or other chief commanding officer of the Militia in Local jurisdictions (such as Counties, Cities, or Towns) within each State. Which demonstrates that, although the call of many contemporary patriots for Sheriffs to assume responsibility as the supreme law-enforcement officers within their jurisdictions lacks any constitutional basis, the same effect could and should be achieved by recognizing that the various commanders of the Militia enjoy precisely such plenary authority, *and with complete constitutional approbation*, at the National, State, and Local levels.

In fulfillment of its duty "[t]o provide for calling forth the Militia to execute the Laws of the Union",[3180] Congress should enact statutes necessary and sufficient for that purpose. And such statutes—albeit not as comprehensive as they ought to be—do exist today:

> Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings, he may

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[3179] *Commentaries on the Laws of England, ante* note 142, Volume 1, at 343-344 (footnotes omitted).

[3180] U.S. Const. art. I, § 8, cl. 15.

> call into Federal service such of the militia of any State * * * as he considers necessary to enforce those laws or to suppress the rebellion.[3181]
>
> The President, by using the militia * * * , shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it—
>
> > (1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or
> >
> > (2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.[3182]

More than ever before, application of such statutes is desperately needed, because America is beset by "unlawful obstructions, combinations, or assemblages * * * against the authority of the United States" that "make it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings", and "so hinder[ ] the execution of the laws of th[e] State[s], and of the United States within the State[s]" that untold numbers of "people [are] deprived of * * * right[s], privilege[s], immunit[ies], or protection[s] named in the Constitution and secured by law". These "unlawful combination[s]" or "conspirac[ies]" include:

- rogue public officials in both the General Government and the States, especially in so-called "administrative agencies" and "law-enforcement agencies" the personnel of which all too often pervert and subvert the laws, or behave lawlessly or as if they were laws unto themselves, because no effective "checks and balances" restrain them;

- political parties that function shamelessly as quintessential "factions"—that is, "number[s] of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests

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[3181] 10 U.S.C. § 332.

[3182] 10 U.S.C. § 333.

of the community"[3183]—their main occupation being the rigging of fraudulent elections;

• racketeering enterprises that masquerade as legitimate businesses, especially in the banking and financial sectors of the economy; as well as outright criminal syndicates that ply their nefarious trades on a nationwide and international scale—especially in the distribution of narcotics, in which they are more or less openly allied with banks that launder dirty money, and protected by thoroughly corrupted police, prosecutors, and judges; and

• renegade public officials and private special-interest groups that labor tirelessly at the direction of and for the benefit of foreign powers at America's expense. *Pre*-constitutional English law denounced these activities as "[C]ONTEMPTS against the king's *prerogative*, * * * by preferring the interests of a foreign potentate to those of our own, or doing or receiving any thing that may create an undue influence in favour of such extrinsic power".[3184] Today, such behavior would constitute "contempts" against WE THE PEOPLE'S sovereignty—as well as clear-cut violations of the criminal law.[3185]

Yet, although these and other contemporary problems are so widespread and serious—threatening fatal consequences for this country—America has next to no Militia worthy of the name, anywhere "from sea to shining sea", ready to be "call[ed] forth" to deal with them!

Of course, the absence of "well regulated Militia" throughout the several States is anything but accidental. No country with an electoral system consisting of a single political party (even one with two faces) can claim to be "a free State". In America, however, notwithstanding several generations of political domination by one hermaphroditic party of an ever-increasingly totalitarian cast, so many common citizens remain armed that "the people" could still organize themselves in proper Militia and resuscitate "a free State" in most of the States—particularly if an economic crisis occasioned by an hyperinflationary explosion of the Federal Reserve System supplied the motivation. Aware of this potential danger, the Money Power, through its Pinocchios in the General Government, is feverishly erecting a National *para*-military police-state apparatus, centered around the Department of Homeland Security, which is rapidly festooning itself with all the trappings of a typical "Ministry of the Interior" from some East-European Stalinist "People's Republic" of

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[3183] *The Federalist* No. 10 (James Madison).

[3184] W. Blackstone, *Commentaries on the Laws of England, ante* note 142, Volume 4, at 122.

[3185] *See, e.g.,* 18 U.S.C. § 953.

the early 1950s. Critical to the Department's operations is its absorption of all State and Local police, Sheriffs', and other "law-enforcement" departments and agencies into a single nationwide network, to be followed by their permanent administration "from the top down" out of a central headquarters in the District of Columbia. Not accidentally, this program conforms perfectly to the axiom that, in a one-party totalitarian state, if "the Party" can maintain its complete control over only one institution, that institution must be the secret police within the ministry of internal security.[3186] Once the Department of Homeland Security has established a monopoly over "law enforcement" across the length and breadth of this country, attempts will be made to eliminate the private possession of most, if not all, firearms and especially ammunition as quickly as circumstances allow, so that the possibility of WE THE PEOPLE'S revitalization of the Militia will be eradicated.

An even more ominous development is the increasing participation of the regular Armed Forces in this "homeland-security" régime. Even as the present study is being written, the Establishment's faucets of mass brainwashing are spewing forth floods of propaganda and agitation to condition the public into acquiescing in the imposition throughout America of "martial law" at the hands of a "military-industrial-bureaucratic complex".[3187]

To be sure, a patriotic President together with WE THE PEOPLE could stir up significant political controversy, by demanding that Congress disband the Department of Homeland Security and "provide for organizing, arming, and disciplining, the Militia" in its place. By itself, though, such controversy alone could not correct the situation. For if recalcitrant Members of Congress, beholden to selfish special-interest groups that hate and fear THE PEOPLE (as all such groups do and should), refused to accede to that eminently constitutional proposal, the President could not enact the necessary "Laws" by himself. Even in that eventuality, however, all would not be lost on this front, because *"the Militia of the several States" do not depend upon Congress for their existences*. They are *State* establishments that the Constitution has permanently incorporated into its federal system, *no matter what Congress may do or refuse to do*. So the President could appeal directly to the States and to THE PEOPLE for assistance.

In fact, the Second Amendment plainly instructs the President to embark upon that very course of action. The Constitution commands the President to "take Care that the Laws be faithfully executed".[3188] The Second Amendment declares that "[a] well regulated Militia" is "necessary to the security of a free State". To

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[3186] *See, e.g.,* Mátyás Rákosi, Secretary General of the Hungarian Workers' [Communist] Party, *quoted in* Francois Fejtö, *History of the People's Democracies: Eastern Europe Since Stalin*, Daniel Weissbort, Translator (London, England: Pall Mall Press, 1971), at 99.

[3187] *See post*, Chapters 47 and 48.

[3188] U.S. Const. art. II, § 3.

"take Care that the [Amendment] be faithfully executed", the President must "take Care" that "well regulated Militia" exist in every State. No such Militia exist at the present time. No likelihood exists that Congress will enact legislation providing for the revitalization of the Militia, or that the Supreme Court will rule that Congress is required to do so. As "Commander in Chief * * * of the Militia of the several States", however, the President could "call into Federal service such of the militia of [all of the several] State[s] * * * as he consider[ed] necessary", in the persons of the Governors (or perhaps other individuals) to whom the laws of the various States gave "Appointment" as "commanders in chief" or equivalent "Officers" of their Militia,[3189] and could *order* (not simply request) the Governors, *as Militia "Officers" answerable directly to him*, to use their best efforts, under his personal supervision, to revitalize the Militia in their States. At a meeting in the White House, the President could present all fifty Governors with comprehensive model bills, each tailor-made for a particular State within a common pattern, which they would be commanded to shepherd through the legislative processes in their States as quickly as possible. The President could further order the Governors, under the aegis of the laws already in existence in their States if the new laws could not be passed in time, to raise no less than (say) 1,000 Militiamen in each State, organized in Independent Companies according to set criteria that would guarantee the men's competence and above all loyalty, to be put at his disposal in order to assist him in "tak[ing] Care that the Laws be faithfully executed".

Although not all of the States might initially comply, *some* of them would enact these bills and raise the necessary men—and that would surely prove to be enough. For with several thousand Militiamen under his personal command, the President could immediately institute throughout the bureaucracy in the District of Columbia what might be styled "the Eight I's Policy": *illuminate, investigate, interrogate, implicate, indict, inculpate, incarcerate, and infame*. As transparency swept away "state secrets" and accountability replaced "governmental immunity", cover-ups would be exposed and evildoers in dark corners spotlighted. Even those miscreants who, for one reason or another, could not be prosecuted would be driven in disgrace from office—and likely driven out of this country entirely—by the notoriety of their misdeeds and WE THE PEOPLE'S clamor for their scalps.

For the greatest effect, this method of revitalizing the Militia should be combined in each State with: (i) the incorporation within the Militia of all State and Local police forces, Sheriffs' departments, and other "law-enforcement" and "emergency-response" agencies;[3190] and (ii) the introduction through the Militia of an alternative currency.[3191] Once the members of all State and Local police forces

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[3189] *See* U.S. Const. art. I, § 8, cl. 16.

[3190] *See ante*, at 327-328, 1135-1138, 1194-1202, 1276-1277, and 1291-1293.

[3191] *See ante*, at 1208-1233.

and related agencies became "Officers" of the Militia, they would be constitutionally immune from Congressional control, except when "call[ed] forth" for the three purposes the Constitution allows—and then they would be under the direct command, not of a possibly rogue Congress, but only of the President (who, for the purposes of this discussion, would presumably be a true constitutionalist). Moreover, at *no* time would they be subject to interference from, let alone control by, any other "Officers" of the General Government, whether in the Armed Forces or such civilian agencies as the Department of Homeland Security.[3192] *Thus, at one stroke, the nascent National* para-*military police-state apparatus would be irreparably smashed to smithereens, and the Power of the Sword would return to WE THE PEOPLE'S hands*. Similarly, the States' adoption of an alternative currency could not be prevented by the Money Power's stooges in Congress or the Judiciary. *Thus, at one stroke, the axis of financial fraud extending from New York City to the District of Columbia would be irreparably shattered, and the Power of the Purse would return to THE PEOPLE'S control.*[3193]

c. The effect of the Second Amendment on the duty of the United States to "guarantee to every State * * * a Republican Form of Government". In the original Constitution, the connection between "a Republican Form of Government" and the Militia was essentially historical. When they entered the Union, each of the States had what was then deemed to be a "Republican Form of Government", and each of those governments included within it a settled and regulated Militia—so such a Militia was taken to be an integral part of that "Form of Government". Yet, although this relationship existed in *every* State, skeptics could have described the connection as merely coincidental or even accidental, and therefore somehow dispensable. The Second Amendment dispelled all such speculation. Being "necessary to the security of a free State" perforce of constitutional declaration, and being a governmental establishment by definition, "[a] well regulated Militia" must therefore always be a "necessary" characteristic and component of the specifically American conception of "a Republican Form of Government" as a matter of law. *No State without "[a] well regulated Militia" has or can have "a Republican Form of Government"*. Therefore, the United States must guarantee to each State "[a] well regulated Militia" as an *essential* part of her "Republican Form of Government". *A fortiori*, no branch of the General Government can take any action that prevents such a Militia from coming into existence, or hinders its operations. Just as the General Government is powerless to deny to any State "a Republican Form of Government" by act of commission or omission, so too it is powerless to deny to any State, in any way or for any reason,

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[3192] *See* U.S. Const. art. II, § 2, cl. 2.

[3193] *See generally* Edwin Vieira, Jr., "The Purse and the Sword: Imminent Dangers of U.S. Economic and Homeland Security Policies" (Metamora, Michigan: DVDs produced by the Heritage Research Institute, 2010).

"[a] well regulated Militia"—rather, the General Government must exert its powers to the utmost in order to insure that such Militia exist at all times within every State.

d. The effect of the Second Amendment on the powers of Congress "[t]o lay and collect Taxes" and "[t]o regulate Commerce". Because sycophantic and unscrupulous "court lawyers" have always proven adept at concocting slick rationalizations to disguise rogue public officials' usurpations of authority, tyranny, and other wrongdoing, the Second Amendment was "added" to the original Constitution "in order to prevent misconstruction or abuse of its powers".[3194] And well that it was. Because, where "gun control" has been concerned, the most tortuous "misconstruction[s] [and] abuse[s] of [the Constitution's] powers" have been and continue to be the order of the day.

(1) For example, propagandists for "gun control" argue that, if Congress directs its powers "[t]o lay and collect Taxes" and "[t]o regulate Commerce" at solitary *individuals*, or at particular *things*, or at certain kinds of *individuals' behavior with certain things*, rather than at "the Militia of the several States" as establishments, it may constitutionally tax and regulate the former even though its "Taxes" and "regulat[ions]" inevitably impact adversely upon the latter. To "gun controllers", that a potential inconsistency, or even contradiction, can arise between the powers "[t]o lay and collect Taxes" and "[t]o regulate Commerce", on the one hand, and the power "[t]o provide for * * * arming * * * the Militia", on the other, is simply a minor legal friction that cannot be allowed to retard Congress from arriving at a politically desirable goal. Thus, according to this line of argument, it lies within Congress's powers even to prohibit: (i) certain classes of so-called "civilians" from possessing any firearms at all; (ii) the marketing of certain classes or types of firearms to all "civilians"; (iii) law-abiding "civilians" from possessing certain classes or types of firearms often misused by criminals; and (iv) all "civilians" from engaging in private *para*-military training with firearms. "Civilians" is the necessary qualifier here, because even "gun controllers" do not contend that Congress should disarm the regular Armed Forces or all of the General Government's or the States' various "law-enforcement agencies"—inasmuch as they plan to employ those very forces to repress WE THE PEOPLE as soon as THE PEOPLE are sufficiently disarmed.

Such contentions, however, the Second Amendment refutes, because it guarantees "the right of the people to keep and bear Arms" for the purpose of enabling "the people" to participate in "well regulated Militia" in every one of the several States. Thus, the Amendment protects all individuals among "the people";

[3194] RESOLUTION OF THE FIRST CONGRESS SUBMITTING TWELVE AMENDMENTS TO THE CONSTITUTION (4 March 1789), *in Documents Illustrative of the Formation of the Union of the American States*, *ante* note 1, at 1063.

all things that fall within the term "Arms", including firearms, ammunition, and related accoutrements; and all activities that relate to what "well regulated Militia" do. So, whether a purported "Tax[ ]" or a "regulat[ion of] Commerce" is directed at individuals ("the people"), or at specific things ("Arms"), or at particular activities (such as individuals' training with "Arms" for the purpose of preparing themselves to perform Militia service), if it interferes with the personal possession or use of "Arms" by individuals who are actual or potential members of the Militia, or if it constrains the free market in firearms suitable for Militia service, or if it prohibits activities that are intended to qualify or prepare individuals for such service, then it is unconstitutional.

It is bootless to attempt to evade the Second Amendment by contending (as many "gun controllers" do) that "the people" remain mere "civilians" until they are formally enrolled in some manner in a "militia". Constitutionally, the label "civilian" means nothing, one way or the other.[3195] As a matter of constitutional law, everyone among WE THE PEOPLE becomes a member of the Militia immediately upon and as the result of becoming constitutionally eligible for the Militia—and that eligibility occurs as soon as an individual becomes an able-bodied adult capable of exercising "the right * * * to keep and bear Arms". At that point, the individual becomes subject to a constitutional duty "to keep and bear Arms" (or, in the case of a conscientious objector or an individual otherwise specially exempted, to serve in some manner without arms) in the Militia; and the Constitution presumes that what should be done will be done. So, if a "civilian" is someone who is not protected by "the right of the people to keep and bear Arms", then no American can be categorized as a "civilian" from the time he becomes eligible for the Militia for as long as he remains so eligible.

(2) The highly confused—indeed, legally and morally psychotic—nature of contemporary "gun control" effected under the deceptive color of Congress's power "[t]o regulate Commerce" appears perhaps most clearly in two statutes, one unfortunately still in force and the other mercifully defunct (as of this writing), through which Congress bans or banned the possession of certain firearms by average Americans. On the one hand, Congress has declared it "unlawful for any person to transfer or possess a machinegun".[3196] This statute does not apply, however, to "a transfer to or by, or possession by or under the authority of, the United States * * * or a State, or a department, agency, or political subdivision

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[3195] *See, e.g.,* Craig v. Missouri, 29 U.S. (4 Peters) 410, 433 (1830); NAACP v. Button, 371 U.S. 415, 429 (1963); New York Times Company v. Sullivan, 376 U.S. 254, 268-269 & notes 7 through 12 (1964); Bigelow v. Virginia, 421 U.S. 809, 826 (1975); City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Commission, 429 U.S. 167, 173-174 & note 5 (1976).

[3196] An Act To amend chapter 44 (relating to firearms) of title 18, United States Code, and for other purposes ("Firearms Owners' Protection Act"), Act of 19 May 1986, Pub. L. 99-308, § 102(9) [§ 922(o)(1)], 100 Stat. 449, 452-453; *now codified at* 18 U.S.C. § 922(o)(1).

thereof"[3197]—because, of course, "the United States" and "a State" do not constitute, and therefore cannot be "regulate[d]" as, "Commerce". And, not so long ago, Congress declared illegal private individuals' acquisition of newly manufactured so-called "semiautomatic assault weapons", including both certain specifically designated semiautomatic rifles then on the market "or copies or duplicates of th[os]e firearms in any caliber", along with every other semiautomatic rifle that thereafter might be produced with certain characteristics, including "an ability to accept a detachable magazine" and at least two other attributes from among "a folding or telescoping stock", "a pistol grip that protrudes conspicuously beneath the action", "a bayonet mount", "a flash suppressor or threaded barrel designed to accommodate a flash suppressor", and "a grenade launcher".[3198] This statute as well did "not apply to * * * the manufacture for, transfer to, or possession by the United States or a department or agency of the United States or a State or a department, agency, or political subdivision of a State, or a transfer to or possession by a law enforcement officer employed by such an entity for purposes of law enforcement (whether on or off duty)"[3199]—because, once again, even the most roguish Members of Congress recognized that "the United States" and "a State" do not constitute, and therefore cannot be "regulate[d]" as, "Commerce".

On the other hand, Congress has also declared that:

> (a) The militia of the United States consists of all able-bodied males at least 17 years of age and * * * under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are members of the National Guard.
>
> (b) The classes of the militia are—
>
> (1) the organized militia, which consists of the National Guard and the Naval Militia; and
>
> (2) the unorganized militia, which consists of the members of the militia who are not members of the National Guard or the Naval Militia.[3200]

Thus, "all [of the] able-bodied males at least 17 years of age and * * * under 45 years of age" who are not members of the National Guard and the Naval Militia are

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[3197] Act of 19 May 1986, § 102(9) [§ 922(o)(2)(A)], 100 Stat. 449, 453; *now codified at* 18 U.S.C. § 922(o)(2)(A).

[3198] An Act To control and prevent crime ("Violent Crime Control and Law Enforcement Act of 1994"), Act of 13 September 1994, Pub. L. 103-322, TITLE XI—FIREARMS, Subtitle A—Assault Weapons ("Public Safety and Recreational Firearms Use Protection Act"), § 110102(a) and (b), 108 Stat. 1796, 1996-1998. This Subtitle expired of its own force in 2004. *See* § 110105(2), 108 Stat. at 2000.

[3199] Act of 13 September 1994, Pub. L. 103-322, § 110102(a), 108 Stat. 1796, 1997.

[3200] 10 U.S.C. § 311.

members of the so-called "unorganized militia". Inasmuch as the Constitution provides for *no* "militia *of the United States*", the so-called "organized militia" must be identified with the "Troops, or Ships of War" which *the States* may "keep * * * in time of Peace" "with[ ] the Consent of Congress".[3201] As such, "the organized militia" is no "militia" at all. By default, "the unorganized militia" must include everyone who is not somehow enrolled among the States' "Troops, or Ships of War", and therefore is eligible for membership in "the Militia *of the several States*". This "unorganized militia" is surely "unorganized" as a matter of statutory definition and present fact; but its constituents are nonetheless members of "the Militia of the several States" as a matter of constitutional law. For they are members of the Militia not simply by dint of some tortuous construction of this statute (assuming *arguendo* that some construction could lend the statute any constitutional validity at all),[3202] but also because the *constitutional* definition of "Militia" subsumes "all able-bodied males at least 17 years of age and * * * under 45 years of age", and quite a few others (including most adult women) as well.

So here especially, the Second Amendment exposes the unconstitutional incoherence of contemporary "gun control"—that these statutes taken together exhibit, not simply a gross "misconstruction" of the Constitution or even a palpable "abuse of its powers", but an outright absurdity masquerading as legislation. The Militia consist of "the body of the people"[3203]—that is, essentially every able-bodied adult American, male or female, who is capable of performing any type of Militia service. The Militia are *governmental* institutions of the several States primarily, and of the United States secondarily when "call[ed] forth" to "be employed in the Service" thereof, and are invested with the *governmental* authority and responsibility to enforce the laws both of the Union and of the States.[3204] The "Arms" that "the people [are] to keep and bear" in preparation for or performance of their Militia duties—whether "machineguns", "semiautomatic assault weapons", or any other firearms suitable for Militia service—necessary constitute "Arms" to be "possess[ed] by or under the authority of * * * the United States * * * or a State, or a department, agency, or political subdivision thereof", or "by the United States or a department or agency of the United States or a State or a department, agency, or political subdivision of a State, or * * * by a law enforcement officer employed by such an entity for purposes of law enforcement (whether on or off duty)". As even Congress recognizes, *all such "Arms" in the possession of individuals performing functions for such governmental institutions are constitutionally immune from being*

[3201] U.S. Const. art. I, § 10, cl. 3 (emphasis supplied). *See ante*, at 786-793.

[3202] *See, e.g.,* Crowell v. Benson, 285 U.S. 22, 62 (1932); National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U.S. 1, 30 (1937); Lynch v. Overholser, 369 U.S. 705, 710-711 (1962).

[3203] Virginia Declaration of Rights (1776) art. 13.

[3204] *See* U.S. Const. art. I, § 8, cls. 15 and 16, *and* amends. II and X.

"regulat[ed]" as articles of "Commerce". Yet, in what can be adequately described only as political psychosis, on the one hand Congress acknowledges its disability to apply "gun control" to governmental institutions or establishments of either the United States or the several States; while, on the other hand, Congress claims the power to impose sweeping "gun controls" on the very individuals who make up arguably the most important of these institutions or establishments—and certainly the institutions or establishments most closely associated with WE THE PEOPLE—"the Militia of the several States". Of course, just as nothing happens in politics by accident, so nothing that appears crazy in politics lacks some sinister, if recondite, logic. Thus, a methodical, if malign, purpose lurks behind this legislative madness: namely, to deny in principle WE THE PEOPLE'S constitutional position as the ultimate governing authority in America, and to prevent THE PEOPLE from asserting that authority in practice through their exercise of the "'[p]olitical power [that] grows out of the barrel of a gun'".

C. The effect of the Second Amendment on the States. The effect of the Second Amendment on the States has long been the subject of controversy which has generated far more heat than light. Actually, the matter is rather straightforward.

1. Limitations on the States under the original Constitution. When Alexander Hamilton wrote that the original "Constitution [wa]s itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS" as to the General Government,[3205] he understated the matter, because the Constitution embodied "A BILL OF RIGHTS" as to the States, too. This was self-evident with respect to those provisions that explicitly prohibited the States from exercising certain powers or engaging in certain activities,[3206] which the Supreme Court early on described as "a bill of rights for the people of each state".[3207] But it should also have been obvious with respect to the States' powers that concerned the Militia.

a. "[T]he Militia of the several States". On its face, the original Constitution set out at least four limitations on the States that effectively guaranteed "the right of the people to keep and bear Arms" and to participate in "well regulated Militia" even in the absence of the Second Amendment.

(1) By incorporating "the Militia of the several States" as permanent parts of its federal system,[3208] the original Constitution precluded the States from doing away with their Militia entirely or from rendering them so ineffective that they could not perform the tasks to be expected of them.

[3205] *The Federalist* No. 84.

[3206] *See* U.S. Const. art. I, § 10.

[3207] Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 138 (1810).

[3208] U.S. Const. art. II, § 2, cl. 1 *and* art. I, § 8, cls. 15 and 16.

(2) By assigning certain powers over the Militia to Congress,[3209] the original Constitution imposed several duties on the States: Because the Constitution is "the supreme Law of the Land * * * and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding",[3210] and because "the Members of the several State Legislatures, and all executive and judicial Officers * * * of the several States, shall be bound by Oath or Affirmation, to support th[e] Constitution",[3211] from the beginning the States were powerless to interfere with Congress's constitutional exercises of its powers and duties "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions",[3212] and "[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States".[3213] Moreover, because Congress was required to enact whatever "Laws * * * shall be necessary and proper" in order to ensure that all eligible Americans were personally possessed of firearms suitable for Militia service, Congress could not have enacted any supposed "Laws" that disabled common Americans from acquiring, possessing, and owning firearms suitable for Militia service. And, if confronted with any such purported "Law", all State officials would have had to refuse to lend their aid in enforcing it, because it was not enacted "in Pursuance" of the Constitution.[3214] So no State could have prevented "the people" within her own jurisdiction from being "arm[ed]" through some "provi[sion]" of Congress. And no State could have disarmed "the people" within her jurisdiction in compliance with some purported statute of Congress, let alone on her own initiative.

(3) Because the original Constitution created no "Militia *of the United States*", but instead incorporated into its federal system "the Militia *of the several States*" as they then existed, it necessarily reserved the penultimate authority over and responsibility for the Militia to the States. (The *ultimate* authority, of course, the Constitution and the Declaration of Independence reserved to WE THE PEOPLE.) The Militia were subject to be "call[ed] forth" to "be employed in the Service of the United States", and were regulated in particular ways for that purpose by Congress,[3215] but otherwise were governmental institutions of the several States. Indeed, even when "employed in the Service of the United States" they remained governmental institutions of the States, because, except for the President as their

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[3209] U.S. Const. art. I, § 8, cls. 15 and 16.

[3210] U.S. Const. art. VI, cl. 2.

[3211] U.S. Const. art. VI, cl. 3.

[3212] U.S. Const. art. I, § 8, cl. 15.

[3213] U.S. Const. art. I, § 8, cl. 16.

[3214] *See* U.S. Const. art. VI, cls. 2 and 3.

[3215] U.S. Const. art. I, § 8, cls. 15 and 16.

"Commander in Chief", all of their "Officers" were appointed by the States.[3216] For that reason, the Constitution reserved to the States certain powers and duties with respect to the Militia—powers and duties which amounted to limitations on what the States could do or could refuse to do.

The most obvious of these was the explicit "reserv[ation] to the States respectively" of "the Authority of training the Militia according to the discipline prescribed by Congress".[3217] This consisted of both a power and a *duty*, because if "discipline [was in fact] prescribed by Congress" then the States were required to "train[ ] the[ir] Militia according to" it. Self-evidently, the Constitution did not "reserv[e] * * * th[is] Authority" to the States so that the States could have refused to exercise it—particularly when the exercise of that "Authority" was necessary to prepare the Militia to be "call[ed[forth" to "be employed in the Service of the United States" for one or more of the three constitutional purposes.

"[T]raining the Militia" would have been useless, if not impossible, though, if the Militia had not already been properly "organiz[ed], arm[ed], and [otherwise] disciplin[ed]". In the first instance, this was Congress's responsibility. But what if Congress defaulted on it? Then other of the States' reserved powers and duties would have come into play. Had Congress not "organiz[ed], arm[ed], and disciplin[ed], the Militia" so as adequately to prepare them to be "call[ed] forth", then each of the States would have been required to "organiz[e], arm[ ], and disciplin[e]" her own Militia to that end in conformity with *pre-*constitutional principles. For the Militia could not have been left "[*un*]organiz[ed], [*un*]arm[ed], and [*un*]disciplin[ed]", and therefore unserviceable if not altogether useless for the Union's needs. In addition, each of the States would always have been required to "organiz[e], arm[ ], and disciplin[e]" her own Militia for all purposes of "homeland security" other than the three in service of which the Militia could have been "call[ed] forth"on behalf of the General Government—for, had the States failed, neglected, or refused to do so, the Militia would have ceased to be "the Militia *of the several States*", in derogation of their constitutional identities.

Finally, in order to have exercised those powers and fulfilled those duties in accordance with *pre-*constitutional standards, the States would have had to recognize, protect, and enforce the rights and duties of individuals in relation to their Militia—in particular, the right and duty of each individual eligible for the Militia to acquire in the free market (or be supplied by the public with) at least one firearm, ammunition, and accoutrements suitable for Militia service, and thereafter to maintain personal possession of that equipment in his own home at all times. And nowhere within any of these powers and duties could the States have

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[3216] *Compare* U.S. Const. art. II, § 2, cl. 1 *with* art. I, § 8, cl. 16.

[3217] U.S. Const. art. I, § 8, cl. 16.

discovered even the merest shred of a license to disarm "the people" within their jurisdictions.

(4) The original Constitution recognized a reserved right and duty of "the people" as against the States with respect to WE THE PEOPLE'S possession of arms and participation within the Militia. As the Supreme Court observed in *Presser* v. *Illinois*,

> [i]t is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States, and, in view of this prerogative of the general government, as well as of its general powers, the States cannot, even laying the [Second Amendment] out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government.[3218]

Of course, *Presser* was wrong to assert that "all citizens capable of bearing arms" constitute a "reserve militia of the United States". For *no* "militia *of the United States*" exists under the Constitution. Rather, "all citizens capable of bearing arms" comprise "the Militia *of the several States*"—and at all times and in all sorts of active capacities, not just as a "reserve". Nonetheless, the essential point remained true, that no State could constitutionally have "prohibit[ed] the people [within her own jurisdiction] from keeping and bearing [the] arms" that they might have needed for Militia service, or from participating in the Militia (at least "in the Service of the United States").

By logical extension, no State could have prevented "the people" within her own jurisdiction from arming themselves on their own recognizance with equipment suitable for Militia service should both Congress and that State's government have failed, neglected, or refused "[t]o provide for * * * arm[ing]" them. *A fortiori*, no State could affirmatively have disarmed "the people", particularly if Congress and that State's government had previously failed, neglected, or refused to arm them, and "the people" had thereby been compelled to arm themselves in order to fulfill their constitutional "duty to the general government".

By combining the constitutional principle adduced in *Presser* with the original Constitution's "reserv[ation] to the States respectively * * * [of] the Authority of training the Militia according to the discipline prescribed by Congress",[3219] the breadth of the protection the Constitution afforded to "the people" as against the States (and as against Congress, too) comes fully to the fore:

[3218] 116 U.S. 252, 265 (1886) (*dicta*).

[3219] U.S. Const. art. I, § 8, cl. 16.

(i) The States were required to "train[ ] the Militia". Therefore, (ii) "the people" were entitled to receive "training". (iii) *Effective* "training" required proper "organiz[ation], arm[s], and [other] disciplin[e]". Therefore, (iv) "the people" had a right to such "organiz[ation], arm[s], and [other] disciplin[e]". (v) If "the people" were not provided with the necessary "organiz[ation], arm[s], and [other] disciplin[e]", either by Congress in the first instance or by the States upon Congress's default, then "the people" had a duty, and a corresponding right and power, to "organiz[e], arm[ ], and [otherwise] disciplin[e]" themselves howsoever they could have arranged such matters, and even to supply their own "training" if neither Congress nor the States had done so.

Self-evidently, all of this added up to nothing less than the substance of "the right of the people to keep and bear Arms" in the Second Amendment. That is, through its Militia Clauses alone, the original Constitution applied to the States the substance of the Second Amendment even in the absence of the Second Amendment.

b. "[A] Republican Form of Government". The requirement in the original Constitution that "the United States shall guarantee to every State in this Union a Republican Form of Government"[3220] also secured for "the people" the rights "to keep and bear Arms" and to participate in "well regulated Militia" as against the States even in the absence of the Second Amendment.

Throughout America in 1788, "a well regulated militia, composed of the body of the people, trained to arms"[3221] was understood to be a necessary characteristic and component of "a Republican Form of Government". Every legally and politically literate American knew that the definition of a republican government was "one constructed on th[e] principle, that the Supreme Power resides in the body of the people"[3222]—that "the Supreme Power" was a synonym for sovereignty[3223]—that "the Sword and Soveraignty always march[ed] hand in hand"[3224]—and therefore that "the body of the people" had to hold "the Sword" firmly in "the people['s]" own hands, if they intended to secure a republican government for themselves.

"[T]he Sword" in WE THE PEOPLE'S hands was the Militia. This was implicit in the Declaration of Independence. The Declaration explicitly recognized that "it is th[e People's] right, it is their duty, to throw off [an abusive] Government". But

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[3220] U.S. Const. art. IV, § 4.

[3221] Virginia Declaration of Rights (1776) art. 13.

[3222] Chisholm v. Georgia, 2 U.S. (2 Dallas) 419, 457 (1793) (opinion of Wilson, J.).

[3223] S. Johnson, *Dictionary*, *ante* note 50, in both the First (1755) and the Fourth (1773) Editions.

[3224] AN ARGUMENT, Shewing, that a Standing Army Is inconsistent with A Free Government, *ante* note 27, at 7.

it implicitly understood, as well, that no "Government" which had engaged in "a long train of abuses and usurpations" aimed ultimately at "reduc[ing] the[People] under absolute Despotism" could be "throw[n] off" without the application of armed force. Moreover, for some period of time during an interregnum while "the People" struggled "to throw off such Government", they would have no regular army to put into the field. So *only* Militia could have served the purpose. And, "being composed of the body of the people", *only* Militia would have provided instruments that fit the Declaration's invocation of "the Right *of the People* to alter or to abolish" an abusive "Form of Government".

Not surprisingly, then, the inextricable connection between the Militia and republican government was writ large upon the legal-historical record. Since 1776 and when the original Constitution was ratified, *every* State had "a Republican Form of Government".[3225] *Every* Colony in America other than Pennsylvania prior to 1776, and *every* independent State thereafter, established and maintained Militia *of a certain type* as integral parts of their governmental structures. Relying on this, the Articles of Confederation had required that "every state shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutred"[3226]—a requirement which everyone expected would easily be fulfilled, because such Militia were already in the field. *These* Militia, "the Militia of the several States", the Constitution incorporated as permanent parts of its federal system. Therefore, a Militia *of that type and only that type*—"composed of the body of the people, trained to arms" according to *pre-*constitutional principles—constituted an essential characteristic of "a Republican Form of Government". For such an unbroken legislative cavalcade provided "unmistakable evidence of what was republican in form, within the meaning of that term as employed in the Constitution".[3227]

Now, under the original Constitution, the United States—that is, all of the States acting collectively through the General Government—were required to guarantee "a Republican Form of Government", and therefore "a well regulated and disciplined militia, sufficiently armed and accoutred", to each State. Thus, it was the implicit duty of each State to maintain such a "Government" and such a Militia within her own territory. No State could have claimed a right, privilege, or power to set aside her "Republican Form of Government", or to disestablish her Militia as part of that "Form of Government"—because if she had attempted to do so the United States would have been required to intervene. Indeed, if rogue officials in a State had attempted to set aside her "Republican Form of Government" or to disestablish her Militia, as one of the United States that State herself would have been required, through the efforts of her loyal officials and her citizens (presumably

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[3225] *See* Minor v. Happersett, 88 U.S. (21 Wallace) 162, 175-176 (1874) (*dictum*).

[3226] Arts. of Confed'n, art. VI, ¶ 4.

[3227] Minor v. Happersett, 88 U.S. (21 Wallace) 162, 176 (1875) (*dictum*).

deployed in her own Militia), to stop her own disloyal officials from so offending the Constitution! That is, the original Constitution implicitly authorized and even commanded the Militia in each State to prevent rogue officials from attempting to disestablish it.

Although it was never tested in the early days of the Union, this implicit authority and command would have been particularly applicable and insistent with respect to the most fundamental—indeed, the indispensable—principle of the Militia, that each and every eligible individual in the community should personally acquire and possess, and wherever possible own outright, at least one firearm, with sufficient ammunition and accoutrements, suitable for Militia service. So, even in the absence of the Second Amendment, "the right of the people to keep and bear Arms" could not have been "infringed" by the States; and "the people" themselves, through their Militia, would have seen to its protection in the most fitting and striking manner possible.

c. The States' reserved powers. Under the original Constitution, the States enjoyed *no* "reserved" powers to impose upon their citizens what Americans today call "gun control".

(1) The original Constitution explicitly reserved to the States only three powers: namely,

- "the Appointment of the Officers, and the authority of training the Militia according to the discipline prescribed by Congress";[3228]
- the authority to "make * * * gold and silver Coin a Tender in Payment of Debts";[3229] and
- the authority to "engage in War" when "actually invaded, or in such imminent Danger as will not admit of delay".[3230]

The first and the third of these were antithetical to "gun control", and the second was not relevant to it.

(2) The original Constitution implicitly reserved many powers to the States—as the Tenth Amendment later declared, all of "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, [we]re reserved to the States respectively, or to the people".

(a) A general power of "gun control" was not among these reserved powers. To the contrary: The original Constitution prohibited powers favorable to "gun

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[3228] U.S. Const. art. I, § 8, cl. 16.

[3229] U.S. Const. art. I, § 10, cl. 1.

[3230] U.S. Const. art. I, § 10, cl. 3.

control" to the States, and delegated powers antithetical to "gun control" to the United States. Because the Constitution permanently incorporated "the Militia of the several States" within its federal system, the States were disabled from disestablishing them, directly or indirectly. Because the original Constitution delegated to Congress the power "[t]o provide for organizing, arming, and disciplining, the Militia",[3231] the States were disabled from interfering with the exercise of that power by attempting to disarm "the people" within their jurisdictions.[3232] And because "the Militia of the several States" were permanent *State* establishments which would have provided the States with "homeland security" for every purpose other than the three for which the Militia could have been "call[ed] forth" to "be employed in the Service of the United States",[3233] the States were required to maintain them in readiness—fully organized, armed, trained, and otherwise disciplined for those other purposes—no matter what Congress did or did not do.[3234]

(b) Even the most dangerous of the States' reserved powers—the power to tax, which "involves the power to destroy"[3235]—did not allow for "gun control" under the original Constitution. As a general principle, the States could not have applied their powers to tax so as to hinder, let alone to frustrate or defeat, the exercise by Congress of any of its powers, let alone the fulfillment of any of its duties.[3236] So, specifically, where Congress had "provide[d] for organizing, arming, and disciplining, the Militia" so that they might be "call[ed] forth" to "be employed in the Service of the United States", the Constitution precluded any State tax on the Militia themselves, or on individuals as a consequence of or in relation to their eligibility for or actual enrollment in the Militia, or on the equipment those individuals could have used to perform their Militia service.[3237]

Moreover, inasmuch as the Militia were "the Militia *of the several States*" themselves, *not* "the Militia *of the United States*", any such State taxes would have undermined the very existence of the Militia as State institutions the permanence of which the original Constitution commanded, and therefore would have been *ultra vires* on that score alone, no matter what Congress had or had not done. Even a commonplace general State sales tax, specifically applied to firearms suitable for

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[3231] U.S. Const. art. I, § 8, cl. 16.

[3232] *See* U.S. Const. art. VI, cls. 2 and 3.

[3233] *See* U.S. Const. art. I, § 8, cls. 15 and 16.

[3234] *See* U.S. Const. art. VI, cls. 2 and 3.

[3235] McCulloch v. Maryland, 17 U.S. (4 Wheaton) 316, 431 (1819).

[3236] *See* U.S. Const. art. VI, cls. 2 and 3.

[3237] *See* McCulloch v. Maryland, 17 U.S. (4 Wheaton) 316, 425-436 (1819); Warren Trading Post Company v. Arizona Tax Commission, 380 U.S. 685, 690-692 (1965). As these cases involved merely *Congressional* instrumentalities as distinguished from *constitutional* establishments such as the Militia, they recognized and enforced the *minimum* bounds on the States' authority in such situations.

Militia service, should have been invalid, because "a tax on the sale of an article * * * is a tax on the article itself",[3238] and therefore a tax on firearms suitable for Militia service would have amounted to a tax on the operations, and thereby an attack on the effectiveness, of the Militia.

(c) Under the original Constitution, the States could not have invoked even their most general reserved power, "the Police Power", on behalf of "gun control". The Police Power "is a power originally and always belonging to the States, not surrendered by them to the general government nor directly restrained by the Constitution of the United States, and essentially exclusive"[3239] which "'extends * * * to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State'".[3240] It is often assumed that "[a]n attempt to define [the Police Power's] reach or trace its outer limits is fruitless".[3241] But where the Militia are concerned, this is nonsense—for the original Constitution sharply defined the "outer limits" of the Police Power by its incorporation of "the Militia of the several States" into its federal system, and by its delegation to Congress of particular powers with respect to the Militia.

Inasmuch as the Police Power is ultimately directed towards public safety and security, and the enforcement of the laws, it logically could never have formed the legalistic basis for "gun control". For the original Constitution infused the Militia with the explicit authority and responsibility "to execute the Laws of the Union";[3242] and, being "the Militia *of the several States*", they were under an implicit obligation to execute the laws of their States, too, when called forth for that purpose. So, because "gun control" would have undermined, and if carried to its logical conclusion would have destroyed, the Militia, "gun control" and the Police Power were mutually contradictory from the beginning.

In addition, because the original Constitution incorporated the Militia as permanent parts of its federal structure, their continued existence was mandated by "the supreme Law of the Land", which every public official in the States was "bound by Oath or Affirmation, to support", in particular the "Judges in every State * * * any Thing in the Constitution or Laws of any State to the Contrary notwithstanding".[3243] So any purported exercise of a State's Police Power in aid of "gun control" that jeopardized the existence or effectiveness of her Militia would have been unconstitutional on its face.

[3238] Brown v. Maryland, 25 U.S. (12 Wheaton) 419, 444 (1827).

[3239] *In re* Rahrer, 140 U.S. 545, 554 (1891).

[3240] Slaughter-House Cases, 83 U.S. (16 Wallace) 36, 62 (1873).

[3241] Berman v. Parker, 348 U.S. 26, 32 (1954).

[3242] U.S. Const. art. I, § 8, cl. 15.

[3243] U.S. Const. art. VI, cls. 2 and 3.

Furthermore, the powers "[t]o provide for calling forth the Militia" and "[t]o provide for organizing, arming, and disciplining, the Militia" being among "[t]he powers * * * delegated to the United States by the Constitution",[3244] every supposed power in the States to prevent or hinder any such "calling forth" or "organizing, arming, and disciplining"—such as by undermining the effectiveness of the Militia through disarmament of "the people" under comprehensive "gun control"—was implicitly "prohibited by [the Constitution] to the States".[3245]

(d) Finally, many exercises of the Police Power have been rationalized, and perhaps in some cases even justified, by general appeals to "public safety". Laws that *properly* provide for "public safety", however, must always recognize the authority of, and in the final analysis rely for their enforcement upon, the Militia. For the very purpose of the Militia is to secure "public safety" for the community by the community, especially when all else fails. The Militia arise out of WE THE PEOPLE'S *supra*-constitutional authority and responsibility with respect to "public safety", and constitute the ultimate means by which THE PEOPLE exercise that authority and fulfill that responsibility. So, having THE PEOPLE organized, trained, and otherwise disciplined—and, in particular, *fully armed*—in the Militia is the precondition for *constitutional* "public safety". Anything less is, to the degree of its deficit, "public insecurity".

Nonetheless, laws sharply focused on the misuse of firearms do not violate any constitutional principle of the Militia. For misuses of firearms—whether negligent, reckless, or criminal in nature—are contrary to the purpose for which "the people * * * keep and bear Arms", and therefore can be prohibited and their perpetrators punished without interfering with that right. Which is why, when during *pre*-constitutional times such laws were enacted, no one ever imagined that they interfered with the Militia or denied anyone a "right * * * to keep and bear Arms".[3246] And which is why they would not have violated the original Constitution, either.

On this legal-historical basis, though, "public safety" could never have been invoked as a credible ground under the original Constitution for indiscriminately disarming individuals eligible for the Militia, simply because a few individuals might have behaved in negligent, reckless, or even criminal manners. To use the contemporary judicial jargon, "less-restrictive means" were always available to deal with such problems. For negligent and potentially reckless individuals, training and related personal discipline were indicated—and were available through the Militia.

[3244] *Compare* U.S. Const. art. I, § 8, cls. 15 and 16 *with* amend. X.

[3245] *Compare* U.S. Const. art. VI, cls. 2 and 3 *with* amend. X.

[3246] *See generally*, e.g., Robert H. Churchill, "Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment", 25 *Law and History Review* 139 (2007), at 161-165 & notes 54 through 61.

For individuals with minor criminal proclivities, the knowledge that they would have been apprehended, if necessary by the Militia, would have provided sufficient deterrence. Hardened criminals who might not have been deterred from committing violent crimes by the mere likelihood of arrest, conviction, and condign punishments would not have been deterred from misusing firearms by ordinances providing for "gun control", either. If they were to be stopped, some legal authority—such as the Militia—would have had to employ force, doubtlessly in the form of firearms.

More importantly, the purpose of arming "the people" for participation in "the Militia of the several States" was to place the community's ultimate force firmly in the hands of ordinary citizens, so that "public safety" would be controlled by the public itself. Americans in 1788 were doubtlessly familiar with the gist of the facile argument jurists of the present day put forward in favor of "gun control", that the Constitution should be loosely construed so as to "provid[e] protection only against *unreasonable* regulations of guns".[3247] But they would have rejected it as an obvious example of the logical fallacy *petitio principii*.[3248] For what would the standard of "reasonableness" have been to them, other than the set of principles gleaned from the *pre-*constitutional Militia Acts, under which the universal "regulation[ ] of guns" was that every able-bodied adult male (not a conscientious objector or otherwise specially exempted) was required personally to possess at all times (and usually own) at least one firearm, ammunition, and accoutrements suitable for Militia service? Americans in 1788 knew perfectly well that such objective standards were far better suited to a free society than the subjective notions of "good public policy" emanating from possibly rogue officials. Their own recent experiences had taught them that what individuals purporting to act in the name of "governments" did was not necessarily "reasonable", and all too often proved quite "*un*reasonable", from the perspective of "the people"—and that if the "reasonableness" of public officials and the "reasonableness" of "the people" stood in mutual contradiction, then the latter had to prevail, no matter what "reasons" those officials might have advanced in opposition to it.

True enough, Americans of that era were aware that arms in private individuals' hands could prove to be instruments of all sorts of harm to all sorts of people in all sorts of situations. But they also recognized that some harms might have to be tolerated, and some to be done, in order to preserve their freedom. And that, with respect to a tyranny as comparatively mild as the one they attributed to King George III. So, particularly myopic is the contention of a contemporary judicial apologist for "gun control", that

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[3247] McDonald v. City of Chicago, 561 U.S. ___, ___ (2010) (Breyer, J., dissenting), Slip Opinion at 29.

[3248] Figuratively, "begging the question."

> [g]overnment regulation of the right to bear arms normally embodies a judgment that the regulation will help save lives. The determination whether a gun regulation is constitutional would thus almost always require the weighing of the constitutional right to bear arms against the "primary concern of every government—a concern for the safety and indeed the lives of its citizens."[3249]

Evidently, even the most superficial familiarity with modern history was no part of this Justice's supposed qualification for his seat on the Bench. For no one who merely lived through the second half of the Twentieth Century should not know that "the 'primary concern of every government'" has most assuredly *not* been "'a concern for the safety and indeed the lives of its citizens'". Quite the contrary: Self-styled "governments" in recent times have been the greatest purveyors of violent deaths to innocent people known to history.[3250] It may be that some lives would be spared initially if individuals—because they had been preëmptively disarmed—could not attempt to oppose with main force the accession to power of usurpers and tyrants. But eventually murders and associated horrors would be multiplied beyond all calculation, when millions from among the helpless, hopeless masses were arrested and deported to concentration camps, slave-labor camps, or outright death camps by the tyrants' *para*-military police. For which gory result the jurists who considered themselves entitled to "weigh[ ]" the constitutional right to bear arms against the "concern[s]" of "governments", and to rule in favor of the "governments" when they could have done otherwise, should bear a heavy load of guilt.

2. Limitations on the States perforce of the Second Amendment. Whether the Second Amendment applies to the States at all, and if so how, has been a matter of controversy which has required more than two centuries to arrive at a temporary respite—from the Amendment's ratification in 1791 to the decision of the Supreme Court in *McDonald* v. *City of Chicago* in 2010,[3251] which applied to the States the Court's earlier decision in *District of Columbia* v. *Heller*.[3252] *McDonald* represents only a respite rather that a resolution of the controversy, however, because *no* opinion from any number of Justices of the Supreme Court can definitively resolve any question about the Constitution. Even the Court itself

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[3249] McDonald, 561 U.S. at ___ (Breyer, J., dissenting), Slip Opinion at 12, *quoting from* United States v. Salerno, 481 U.S. 739, 755 (1987).

[3250] *See* Rudolph J. Rummel, *Death by Government: Genocide and Mass Murder in the Twentieth Century* (New Brunswick, New Jersey: Transaction Publishers, 1994). As to communist "governments" in particular, *see* Stéphane Courtois, Nicholas Werth, Jean-Louis Panné, Andrzej Paczkowski, Karel Bartošek, and Jean-Louis Margolin, *The Black Book of Communism: Crimes, Terror, Repression*, Jonathan Murphy and Mark Kramer, Translators (Cambridge, Massachusetts: Harvard University Press, 1999).

[3251] 561 U.S. ___ (2010) (Alito, J., for the Court).

[3252] 554 U.S. 570 (2008) (Scalia, J., for the Court).

admits as much.[3253] Also, the life-expectancies of both *McDonald* and *Heller* are likely to be short, for three reasons: *First*, the puppets who populate America's professional political class and the special-interest groups that pull their strings despise WE THE PEOPLE—but, as long as tens of millions of THE PEOPLE possess hundreds of millions of firearms, and Heaven alone knows how much ammunition, they also fear them. So they desperately want to strip THE PEOPLE of even the minuscule legal protections *McDonald* and *Heller* provide, as the prelude to confiscating as many of THE PEOPLE'S firearms as possible. *Second*, because both *McDonald* and *Heller* rest on paper-thin five-to-four majorities—with *McDonald* cobbled together from three separate opinions on the majority's side—they are politically vulnerable decisions, no matter how sound their legal reasoning might be. *Third*, resting upon the sandy foundation of an "individual right" "to keep and bear Arms" for the purpose of personal self-defense, which *Heller* wrongly claimed to be "the *central component* of the right itself",[3254] they are wide open to destructive criticism, condemnation, and demands for correction, repudiation, and formal reversal. Indeed, the legal *intelligentsia* who tout "gun control" have already begun to roll out the wrecking-balls.

For example, a dissenting Justice in *McDonald* pointed out that

> [s]ince *Heller*, historians, scholars, and judges have continued to express the view that the Court's historical account was flawed. * * *
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> Consider as an example of these critiques an *amici* brief filed in this case by historians who specialize in the study of the English Civil Wars. They tell us that *Heller* misunderstood a key historical point. * * * *Heller's* conclusion that "individual self-defense" was "the *central component*" of the Second Amendment's right "to keep and bear Arms" rested upon its view that the Amendment "codified a *pre-existing* right" that had "nothing whatever to do with service in a militia." * * * That view in turn rested in significant part upon Blackstone having described the right as "'the right of having and using arms for self-preservation and defence,'" which reflected the provision in the English Declaration of Right of 1689 that gave the King's Protestant "'subjects'" the right to "'have Arms for their defence suitable to their Conditions, and as allowed by law.'"[3255] * * * The Framers, said the majority, understood that right "as permitting a citizen to 'repe[l] force by force' when 'the intervention of society in his behalf, may be too late to present an injury.'" * * *
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> The historians now tell us, however, that the right to which Blackstone referred had, not *nothing*, but *everything*, to do with the militia.

[3253] *See, e.g.*, Payne v. Tennessee, 501 U.S. 808, 828-830 & note 1 (1991) (collecting cases in which prior constitutional decisions had been overruled).

[3254] 554 U.S. at 599 (opinion of Scalia, J., for the Court) (emphasis in the original). *See ante*, at 1340-1351.

[3255] *See Commentaries on the Laws of England, ante* note 142, Volume 1, at 143-144.

> As properly understood at the time of the English Civil Wars, the historians claim, the right to bear arms "ensured that *Parliament* had the power" to arm the citizenry: "to defend the realm" in the case of a foreign enemy, and to "secure the right of 'self-preservation,'" or "self-defense," should "*the sovereign* usurp the English Constitution." * * * Thus, the Declaration of Right says that private persons can possess guns only "as allowed by law." * * * Moreover, when Blackstone referred to "'the right of having and using arms for self-preservation and defence,'" he was referring to the right of the people "*to take part in the militia* to defend their political liberties," and *to the right of Parliament* (which represented the people) to *raise a militia* even when the King sought to deny it that power. * * * Nor can the historians find any convincing reason to believe that the Framers had something different in mind than what Blackstone himself meant.[3256]

Now, these "historians who specialize in the study of the English Civil Wars" may have been correct to point out that "'the right of having and using arms for self-preservation and defence'" under *British* law was no more than a right for the *British* people to defend themselves against an usurper or tyrant on the *British* Throne when so authorized by the *British* Parliament. But apparently they forgot that *America's* patriots fought their War of Independence *against Parliament*, as well as against King George III—that the patriots employed "the right of the people to keep and bear Arms" to "throw off" the *entire* abusive British government, together with all of the *corpus* of strictly British law, "and to institute *new* Government"[3257]—and that the patriots raised and deployed their Militia on the basis of the principles embodied in *American Colonial and State* laws, not any laws emanating from the British Parliament. So to claim, as did the "historians", that nonetheless America's patriots understood the Second Amendment as guaranteeing nothing more than the right Blackstone described is little less than Nonsense wearing a dunce cap.

Amazingly, though, after agreeing with the "historians" "that the right to which Blackstone referred had, not *nothing*, but *everything*, to do with the militia"—and, therefore, concluding that "the right of the people to keep and bear Arms" in the Second Amendment must "ha[ve], not *nothing*, but *everything*, to do with the militia", too—this Justice then failed to ask "What is the relationship between 'the right of the people to keep and bear Arms' and '[a] well regulated Militia'?", "What are the Militia?", "Where are the Militia today?", "Why have the Militia '"largely faded as a popular concern"'?",[3258] and "*Can* the Militia, in the manner of proverbial old soldiers, just

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[3256] McDonald, 561 U.S. at ___ (Breyer, J., dissenting), Slip Opinion at 3-5 (citing eight scholarly articles critical of *Heller*, in addition to the "historians'" *amici* brief).

[3257] Declaration of Independence (emphasis supplied).

[3258] The inner quotation is from *McDonald*, 561 U.S. at ___ (Breyer, J., dissenting), Slip Opinion at 8.

silently fade away, with no constitutional consequence?" So one is left with the distinct impression that perhaps the whole shebang amounts to nothing more than comic judicial theater, and of a decidedly slapstick variety.

The matter deserves better treatment than that, however.

a. Application of the Second Amendment to the States through the Fourteenth Amendment. No one doubts that the Second Amendment's command reaches the General Government. Confusion has arisen from the Supreme Court's decision in *Barron* ex rel. *Tiernan* v. *Mayor of Baltimore*,[3259] that the Bill of Rights does not apply to the States. Although *Barron* has been followed many times over the years in many different contexts, it was wrong when it was written, and is no less wrong today.[3260] Large numbers of Americans have sensed that this was the case since the *mid-*1800s. The question has always been what to do about it.

(1) The answer most widely accepted today is that, for any part of the Bill of Rights to apply to the States, it must be (as the lawyers' jargon has it) "selectively incorporated" by the Supreme Court within the Due Process Clause of the Fourteenth Amendment: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law". A minority of legal scholars still contends that the Bill of Rights in its entirety applies to the States through that Amendment's Privileges or Immunities Clause: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States". Nothing in particular would be gained by rehearsing in other then outline the convoluted chronicle of how these positions emerged.

By the *mid-*1860s, the political forces that soon coalesced behind the Fourteenth Amendment were intent on overruling the decisions of the Supreme Court in *Barron* and *Scott* v. *Sandford*.[3261] As noted above, *Barron* had held that the Bill of Rights did not apply to the States. *Scott* had held that persons of African ancestry, even though free men, could not be "citizens of the United States" and were not entitled to the "rights", "privileges", and "immunities" that the Constitution guaranteed to such "citizens".[3262] Basically, two parts of Section 1 of the Fourteenth Amendment accomplished the reformers' purpose of setting these decisions aside. The Citizenship Clause—to wit, "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside"—overruled *Scott*; and the

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[3259] 32 U.S. (7 Peters) 243 (1833).

[3260] *See generally* W. Crosskey, *Politics and the Constitution, ante* note 206, Volume 2, Chapter XXX. Of course, there should be nothing surprising about that. *See, e.g.,* Payne v. Tennessee, 501 U.S. 808, 828-830 & note 1 (1991).

[3261] 60 U.S. (19 Howard) 393 (1857).

[3262] *See id.* (19 Howard) at 403-427.

Privileges or Immunities Clause overruled *Barron*. Or so the proponents of the Amendment, and anyone who read it with a working knowledge of its legal language and the standing constitutional law of the time, believed. The Amendment also included a Due Process Clause as well as an Equal Protection Clause—to wit, "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"—in order to secure minimal constitutional guarantees of fairness and equal treatment to "any person", whether a "citizen[ ]" or not. The Supreme Court, however, almost immediately muddied these waters beyond easy clarification, by effectively nullifying the Privileges or Immunities Clause. Thereafter, apparently recognizing the magnitude of its error but unwilling to admit and repair the damage honestly, the Court began "selectively incorporating" into the Due Process Clause various rights or parts of genuine rights drawn from the Bill of Rights, as well as *faux* "rights" that the Justices themselves cobbled together from whatever sources fit their fancies. Through this so-called "gradual process of judicial inclusion and exclusion",[3263] the Due Process Clause eventually became the unstable foundation for an elaborate edifice of supposed "rights" that consisted of two separate tiers: one applicable to the General Government; the other, usually less comprehensive, to the States.[3264]

(2) Rightly understood, "the privileges or immunities of citizens of the United States" include all of the freedoms guaranteed by the Bill of Rights, and more besides. For example, the most obvious "privilege[ ]" the Fourteenth Amendment protects which was not included in the Bill of Rights is "[t]he Privilege of the Writ of Habeas Corpus", which "shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it".[3265] From its placement in the original Constitution, this disability might have been deemed to apply solely to Congress[3266]—leaving the States free to suspend *habeas corpus* whenever they wished. Although recognizing even a circumscribed power in Congress to suspend *habeas corpus* was bad enough,[3267] leaving untrammeled licenses

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[3263] Davidson v. City of New Orleans, 96 U.S. 97, 104 (1878).

[3264] See W. Crosskey, *Politics and the Constitution, ante* note 206, Volume 2, Chapters XXXI and XXXII.

[3265] U.S. Const. art. I, § 9, cl. 2.

[3266] *Compare and contrast* U.S. Const. art. I, § 9, cls. 2, 3, 5, and 8 *with* art. I, § 10, cls. 1 and 2.

[3267] *See* THE GENUINE INFORMATION, DELIVERED TO THE LEGISLATURE OF THE STATE OF MARYLAND, RELATIVE TO THE PROCEEDINGS OF THE GENERAL CONVENTION, HELD AT PHILADELPHIA, IN 1787, BY LUTHER MARTIN, ESQUIRE, ATTORNEY-GENERAL OF MARYLAND, AND ONE OF THE DELEGATES IN THE SAID CONVENTION (29 November 1787), *reproduced in The Records of the Federal Convention of 1787, ante* note 2, Volume 3, at 213: "[I]t was urged, that if we gave this power to the general government, it would be an engine of oppression in its hands; since, whenever a State should oppose its views, however arbitrary and unconstitutional, and refuse submission to them, the general government may declare it to be *an act of rebellion*, and, suspending the habeas corpus act, may *seize* upon the persons of those *advocates of freedom*, who have had *virtue* and *resolution* enough to excite the opposition, and may *imprison* them during its pleasure, in the *remotest* part of the Union".

to that effect in each of the States was arguably worse. For, even without a suspensory power in the General Government, rogue public officials there could have combined with rogue officials in the States to set aside "the Privilege of the Writ" in the States' courts *without any limitation*. The Fourteenth Amendment corrected this problem.

Much useful information on this matter is collected in one of the opinions in *McDonald*.[3268] That compendium need not be examined here, because the equivalence specifically between "the privileges or immunities of citizens of the United States" and the freedoms included within the Bill of Rights should be glaringly apparent in the case of "the right of the people to keep and bear Arms". For, as Chief Justice Taney opined in *Scott*, if Negroes were citizens of the United States and thereby "entitled to *the privileges and immunities of citizens* * * * it would give them the full liberty of speech * * * ; to hold public meetings upon political affairs, *and to keep and carry arms wherever they went*".[3269] If Taney knew of any sources for these "privileges and immunities of citizens" other than the First and especially the Second Amendments, he failed to identify them.

To be sure, applying the Bill of Rights to the States through reference to "the privileges or immunities of citizens of the United States"—in comparison, for example, with simply declaring that "Amendments I through IX shall apply to the States, as well as to the General Government"—appears today to have been a clumsy way of achieving that end. It was, however, in keeping with the common legal language and understanding of the times, particularly as that terminology had been used in *Scott*. In any event, once the equivalence between the Bill of Rights and "the privileges or immunities of citizens of the United States" is recognized, the constitutional command that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" is easy to understand and to apply—and offers the inestimable advantage of affording the American people the selfsame protections for their constitutional rights as against both the General Government and the States. This, of course, would be eminently consistent with the principle of uniformity in America's foundational law that "[t]his Constitution * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding".[3270] And this principle should apply most insistently to those "certain unalienable Rights" "to secure" which the Declaration of Independence attests that "Governments are instituted among Men, deriving

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[3268] *See* 561 U.S. at ___ (Thomas, J., concurring in part and concurring in the judgement). This opinion is sullied, however, by its embrace of the error that most of the Bill of Rights originally did not apply to the States. *Id.* at ___, Slip Opinion at 14-15.

[3269] 60 U.S. (19 Howard) at 416-417 (emphasis supplied).

[3270] U.S. Const. art. VI, cl. 2.

their just powers from the consent of the governed", and "[t]hat whenever any Form of Government becomes destructive these ends, it is the Right of the People to alter or to abolish it, and to institute new Government".

In addition, properly applied in this particular, the Fourteenth Amendment could be especially valuable, because it prohibits every State from "mak[ing] *or enforc*[*ing*] *any* law which shall abridge the privileges or immunities of citizens of the United States".[3271] Now, a State can "make" a "law" only within her own jurisdiction. But she can "enforce" not only her own "law[s]", but also all valid "law[s]" enacted by the General Government.[3272] So, properly construed, the Privileges or Immunities Clause would preclude the States, not simply from "mak[ing]" and trying to "enforce" their own invalid "law[s]", but also from participating in any manner in the "enforce[ment]" of each and every unconstitutional "law" of the United States that violated any part of the Bill of Rights (among other provisions, both constitutional and statutory, that constitute "privileges or immunities of citizens"). That clause would even require the States to oppose within their own territories the attempted "enforce[ment]" of all such invalid "law[s]" by rogue agents of the General Government. Correctly understood, then, although ironically the Fourteenth Amendment arose out of the suppression of Southern secession, its Privileges or Immunities Clause would provide a firm constitutional basis for the doctrine and practice of "interposition", through which the States would be required to protect their own citizens (who would be both "citizens of the United States and of the State wherein they reside") from usurpation and tyranny at the hands of rogue officials of the General Government, by invoking their own duty under that Clause! Not only that. Under the aegis of the Privileges or Immunities Clause, "citizens of the United States and of the State[s] wherein they reside" as individuals could demand through their State courts that their States engage in *constitutionally mandated* "interposition" whenever rogue agents of the General Government threatened to assail those "citizens". Thus, the Tenth Amendment—which the enemies of federalism have long derided as "stat[ing] but a truism"[3273] and as "not operat[ing] as a limitation upon the powers, expressed or implied, delegated to the national government"[3274]—would be fitted with legally argumentative teeth rather sharper than any "truism". Is this perhaps one recondite reason why the Supreme Court has been so careful to render the Privileges or Immunities Clause more or less a dead letter?

Those readers sufficiently masochistic to negotiate the legalistic labyrinth of "'selective incorporation' through the Due Process Clause" will find that doctrine

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[3271] Emphasis supplied.

[3272] See, e.g., Tafflin v. Levitt, 493 U.S. 455, 458-460 (1990); Testa v. Katt, 330 U.S. 386, 389-394 (1947).

[3273] United States v. Darby, 312 U.S. 100, 124 (1941).

[3274] Fernandez v. Wiener, 326 U.S. 340, 362 (1945).

as applied to "the right of the people to keep and bear Arms" verbally beaten to a well-deserved death in various opinions in *McDonald*.[3275] The specifics of this rather acrimonious discussion, however, need not be rehashed here, for numerous reasons:

> • As far as the Second Amendment is concerned, except for the requirement that the States not "enforce any law which shall abridge the privileges or immunities of citizens of the United States", the Fourteenth Amendment is superfluous. Section 5 of the Amendment does delegate to Congress the "power to enforce, by appropriate legislation, the provisions of this article" against the States. But, with respect to "the right * * * to keep and bear Arms", Congress already possessed (and still possesses) such authority under the original Constitution.[3276]
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> • In principle the doctrine of "selective incorporation" is ridiculous. No fair-minded individual would attribute to the statesmen who wrote and ratified the Fourteenth Amendment an intent to saddle this country with a constitutional rule of construction that required volume upon volume of convoluted judicial mumbo jumbo to apply—and then in what has proven to be manifestly unsatisfactory ways.
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> • In practice "selective incorporation" is so lacking in either verifiable or falsifiable standards as to be utterly amorphous, leaving "men of common intelligence" to "guess at its meaning and differ as to its application"—which "violates the first essential of due process of law".[3277] This deficiency could be cured if jurists relied upon the exact terminology of the Constitution, understood as Americans in the late 1700s understood it, as their exclusive guide to what "rights" should be "incorporated". That approach, though, would effectively replace "*selective* incorporation" with the direct application of the *entire* Bill of Rights, which "selective incorporation" was designed to avoid. And,
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> • "Selective incorporation" subverts the rule of *constitutional* law, because through it a tiny clique composed of political appointees of questionable qualifications and perhaps dubious motivations has licensed itself to sit as an *ersatz* permanent constitutional convention—deciding, not only which freedoms are to be "incorporated" at all, but also the extent to and the conditions under which those freedoms are to be protected. No *constitution* can long survive if a mere five individuals can dictate with supposed finality to WE THE PEOPLE what constitutes the "fundamental

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[3275] 561 U.S. at ___ (Alito, J., for the Court), ___ (Scalia, J., concurring), ___ (Stevens, J., dissenting), and ___ (Breyer, J., dissenting).

[3276] *See* U.S. Const. art. I, § 8, cls. 15, 16, and 18; art. IV, § 4; *and* art. VI, cl. 2.

[3277] *See* Connally v. General Construction Company, 269 U.S. 385, 391 (1926).

> principles of liberty and justice which lie at the base of all our civil and political institutions",[3278] "which inhere[ ] in the very idea of free government and [are] the inalienable right[s] of a citizen of such a government",[3279] and which are "implicit in the concept of ordered liberty"[3280]—but in the course of such dictation need not adhere to the texts of the Declaration of Independence and the Constitution, although these are the charters "of all our civil and political institutions" which embody "the very idea of free government" and explain how "the concept of ordered liberty" can be put into practice. And no "right" is secure when five individuals can arrogate to themselves the license to determine what "function [it] serve[s] * * * in contemporary society",[3281] or whether it "continues to receive strong support"[3282]—and can arbitrarily conclude that it serves a "function" too tenuous or receives "support" too feeble to be accorded the status of or preserved as a "right".

Suffice it to say that the slippery doctrine of "selective incorporation" should provide an object lesson to Americans in the extent to which unscrupulous public officials will abuse their authority: at its inception, at the urging of Pride, in order to save their intellectual and political face; in its continuation, at the goading of Ambition, in order to arrogate to themselves powers they would find intolerable in others.

(3) The many fallacies embedded in judicial misinterpretations of the Fourteenth Amendment aside, on its face the Amendment plainly does empower Congress to prohibit rogue officials in the States from "infring[ing]" "the right of people to keep and bear Arms". For example, one Congressional statute explicitly describes its provisions which disallow "confiscation of firearms" as recognizing enforceable "rights, privileges, or immunities".[3283] These are "privileges or immunities of citizens of the United States", because the statute applies, without exception, to any and every American who legally possesses a firearm. In principle, moreover, these "privileges" or "immunities" do not run solely against officials, agents, or assistants of the General Government, because they ultimately derive from: (i) the constitutional nature of "the Militia of the several States", which requires near-universal possession of firearms by all individuals eligible for service

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[3278] Hurtado v. California, 110 U.S. 516, 535 (1884).

[3279] Twining v. New Jersey, 211 U.S. 78, 106 (1908).

[3280] Palko v. Connecticut, 302 U.S. 319, 325 (1937).

[3281] Apodaca v. Oregon, 406 U.S. 404, 410 (1972).

[3282] Duncan v. Louisiana, 391 U.S. 145, 154 (1968).

[3283] An Act Making appropriations for the Department of Homeland Security for the fiscal year ending September 30, 2007, and for other purposes, Act of 4 October 2006, Pub. L. 109-295, TITLE V GENERAL PROVISIONS, § 557 [§ 706(c)(1)], 120 Stat. 1355, 1392; *now codified at* 42 U.S.C. § 5207(c)(1). This statute is discussed in detail *ante*, at 1443-1446.

in every State;[3284] (ii) the power and duty of Congress "[t]o provide for * * * arming * * * the Militia", to which the States are subject;[3285] and (iii) the Second Amendment—for the behavior the statute protects with respect to "the possession" and "carrying" of firearms falls within the ambit of "keep[ing] and bear[ing] Arms". Therefore, through a new statute enacted under its power in Section 5 of the Fourteenth Amendment "to enforce, by appropriate legislation, the provisions of [Section 1 of the Amendment]", Congress could declare that attempts by rogue officials of a State to engage in "confiscation of firearms" "abridge the privileges or immunities of citizens of the United States". Similarly, the present Congressional statute secures certain "rights" of "liberty" and "property" with respect to the "possession" and "carrying" of firearms. These types of "rights" Congress could enforce against rogue officials in the States perforce of the command in Section 1 of the Fourteenth Amendment that no State shall "deprive any person of * * * liberty, or property, without due process of law". Thus, a statute of this kind could be written so as to protect, not just citizens, but also resident aliens "who have made a declaration of intention to become[ ] citizens" and therefore are possibly eligible for the Militia.[3286] And, of course, general judicial remedies—with both civil and criminal penalties—would already be available for the statute's enforcement.[3287]

b. Application of the Second Amendment to the States directly. The Second Amendment need not be "incorporated" into anything, "selectively" or otherwise, in order to apply to the States, because it does so directly.

(1) The Bill of Rights was "added" to the original Constitution "in order to prevent misconstruction or abuse of its powers", by appending "further declaratory and restrictive clauses" intended to "extend[ ] the ground of public confidence in the Government" and "best ensure the beneficent ends of its institution".[3288] "[T]he Government" the Constitution created, did not consist of General Government alone, but was *a federal system which included the States as governmental institutions, too*. So, promoting "public confidence in *the Government*" and "ensur[ing] the beneficent ends of *its* institution" required "ensur[ing]" the proper behavior of the States. After all, Americans could hardly have expected to achieve the Preamble's goal of "form[ing] a more perfect Union" if the people in some of the States "secure[d] the Blessings of Liberty to [them]selves and [their] Posterity", while the people in other States suffered under tyrannies with no legal recourse.

[3284] *See ante,* Chapters 38 through 40.

[3285] *See* U.S. Const. art. I, § 8, cl. 16 *and* art. VI, cl. 2.

[3286] *See* 10 U.S.C. § 311(a).

[3287] *See* 42 U.S.C. § 1983 (civil) *and* 18 U.S.C. §§ 241 and 242 (criminal).

[3288] RESOLUTION OF THE FIRST CONGRESS SUBMITTING TWELVE AMENDMENTS TO THE CONSTITUTION (4 March 1789), *in Documents Illustrative of the Formation of the Union of the American States*, *ante* note 1, at 1063.

Now, in certain "restrictive clauses", the original Constitution explicitly denied the States particular powers.[3289] In other "restrictive clauses" the denials were more general and partially implicit.[3290] But, in both cases, "restrict[ions]" there were. On the other hand, the Constitution implicitly left the States free to exercise many other powers, even before the Tenth Amendment emphasized that fact. Because Americans appreciated that "*any* Form of Government" could conceivably "become[ ] destructive of the[ ] ends" for which "Governments are instituted among Men",[3291] they anticipated that one or more of the States might someday misconstrue or abuse *these* powers, too, contrary to "the beneficent ends of [the Government's] institution" as set out in the Constitution's Preamble. To prevent such a possibility or to rectify its sequelae, further "restrictive clauses" applicable to the States were in order. Many (albeit not all) of those "restrictive clauses" were couched in broad language intended to apply to both the States and the General Government—because, of course, the potential for "misconstruction or abuse" of governmental authority was unique neither to the latter nor to the former.

(2) The text of the Bill of Rights proves that, in a few particulars, it literally applies to *only* the General Government, whereas in most others it literally applies, and therefore was meant to apply, to *both* the General Government *and* the States.

(a) Conclusive evidence of this appears in the First and the Seventh Amendments. The whole of the First Amendment is subject to the command, "*Congress* shall make no law", and part of the Seventh Amendment to the declaration, "no fact tried by a jury, shall be otherwise reexamined in any Court *of the United States*, than according to the rules of the common law".[3292] Plainly, these provisions can apply only to the General Government, because they say so. But if the entire Bill of Rights applied only to the General Government, then the words "Congress" and "of the United States" would be superfluous. The First Amendment would commence, "No law shall be enacted"; and the Seventh would read simply, "no fact tried by a jury, shall be otherwise reexamined in any Court". *No* words in the Constitution are superfluous and without their own particular effect, however.[3293] So the words of limitation emphasized above must have been employed to distinguish the reach of these provisions from that of other parts of the Bill of Rights.

[3289] *See* U.S. Const. art. I, § 10, cls. 1 through 3.

[3290] *Compare* U.S. Const. art. VI, cl. 2 *with* art. I, § 8.

[3291] Declaration of Independence (emphasis supplied).

[3292] Emphases supplied.

[3293] *E.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1805); Holmes v. Jennison, 39 U.S. (14 Peters) 540, 570-571 (1840) (opinion of Taney, C.J.); Hurtado v. California, 110 U.S. 516, 534 (1884); Blake v. McClung, 172 U.S. 239, 260-261 (1898); Knowlton v. Moore, 178 U.S. 41, 87 (1900); Williams v. United States, 289 U.S. 553, 572-573 (1933).

(b) The remaining eight Amendments are phrased in broad language that contains not even an implicit limitation to "Congress" or "the United States", let alone anything that could be taken as an exclusion of the States. So they must be read to reach the States. After all, the general prohibitions contained within the Constitution must be applied in as comprehensive a manner as they are stated;[3294] and "where no exception is made in terms, none will be made by mere implication or construction".[3295] Thus—

• The Third Amendment provides that "[n]o Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law".[3296] Although this prohibition might seem of scant consequence today, it was considered a sufficiently serious "injur[y] and usurpation[ ]" in 1776 that the Declaration of Independence indicted King George III "[f]or quartering large bodies of armed troops among us". And rightly so. For "quartering * * * armed troops" in private houses offers a proficuous means for putting "martial law" into effect without openly declaring it, by insinuating "Soldier[s]" throughout the population under circumstances in which they can keep a watchful eye on dissidents and enforce order immediately.

The Amendment's reference to "Soldier[s]" must include both "soldiers" and "sailors" strictly so called, because it could not be less offensive to have the latter, rather than the former, forcibly "quartered in any house". A "Soldier", then, could be a member of "the Army or Navy of the United States"[3297]—that is, the "Armies" that Congress may "raise and support" or "the Navy" it may "provide and maintain", "the land and naval Forces" "for the Government and Regulation" of which it may "make Rules".[3298] But a "Soldier" could also be counted among the "Troops, or [men serving on] Ships of War" that the States may "keep * * * in time of Peace" "with[ ] the Consent of Congress", or may raise in order to "engage in War" when "actually invaded, or in such imminent Danger as will not admit of delay".[3299] A "Soldier" could also be a member of one of "the Militia of the several States", because Militiamen were often described as "soldiers" in *pre-*constitutional Militia Acts. In that case, he might be "call[ed] forth to "be employed in the Service

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[3294] *See, e.g.*, Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 137-139 (1810); Sturges v. Crowninshield, 17 U.S. (4 Wheaton) 122, 199-200, 204-206 (1819).

[3295] Rhode Island v. Massachusetts, 37 U.S. (12 Peters) 657, 722 (1838). *Accord*, Martin v. Hunter's Lessee, 14 U.S. (1 Wheaton) 304, 338-339 (1816).

[3296] *See generally*, William S. Fields and David T. Hardy, "The Third Amendment and the Issue of the Maintenance of Standing Armies: A Legal History", 35 *American Journal of Legal History (Temple)* 393 (1991); Tom W. Bell, "The Third Amendment: Forgotten but Not Gone", 2 *William & Mary Bill of Rights Journal* 117 (1993).

[3297] U.S. Const. art. II, § 2, cl. 1.

[3298] U.S. Const. art. I, § 8, cls. 12, 13, and 14.

[3299] U.S. Const. art. I, § 10, cl. 3.

of the United States";[3300] or he might be employed in the service of his own State. So, because someone could be a "Soldier" of or attached to either level of government, "in time of war" he could be "quartered in any house * * * in a manner to be prescribed by" either the "law" of the General Government or the "law" of some State, depending upon circumstances.

Yet, during the *pre-*constitutional era, no basis existed for concluding that "the Owner" of "any house" would find it more objectionable to be required to provide "quarter[s]" for some "Soldier" of the United States, as opposed to a "Soldier" from some State, including his own. For example, in 1777 Rhode Island's General Assembly complained that

> the Soldiers serving in this State, who have been quartered in the College Edifice and other public Buildings, have broke the Windows, Doors and Floors of the same, and have done other Mischief, to the great Hurt and Damage as well of the Public as of Individuals; and notwithstanding the frequent Orders which have been issued by the Honorable General *Spencer* to prevent the same, all the Buildings where they are quartered are marked with their Devastations:
>
> WHEREFORE, * * * Major-General *Spencer* * * * is hereby requested to take such effectual Methods to prevent, for the future, any Waste or Destruction of the Houses, Barracks or Buildings where the Soldiers are quartered, as to him shall appear best for the Preservation thereof.{EN-2055}

If "the Soldiers serving in this State", many if not most of whom were Rhode Island's own "Soldiers", behaved so destructively in *public* buildings, which presumably were, if not well protected, at least under some public officials' close observation—including "the College Edifice in the Town of *Providence*", which was "so greatly damaged as to render the same useless for the Purpose" of a "Barracks"{EN-2056}—what depredations might they have committed, or been expected to commit, in mere private homes?!

Neither, during the *pre-*constitutional era, did any basis exist for believing that the "manner" in which "Soldier[s] shall, in time of peace be quartered in any house" was "to be prescribed by law" other than by the States' own legislatures. For example, during the French and Indian War in the *mid-*1750s, Virginia's General Assembly observed that "there is and may be occasion for the marching and quartering of soldiers in several parts of this colony", and therefore

> *enacted* * * * That * * * it shall and may be lawful to and for any one justice of the peace in any county, city or borough within this colony, and

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[3300] U.S. Const. art. I, § 8, cls. 15 and 16.

> he is hereby required to billet the soldiers in his majesty's service in ordinaries and licensed taverns, and in no private houses whatsoever * * * . And in case any person shall find himself aggrieved in that such justice of the peace has billeted in his house a greater number of soldiers than he ought to bear in proportion to his neighbours, and shall complain thereof to any two other justices of the peace * * * , such justices are hereby impowered to relieve such person, by ordering such and so many soldiers to be removed and billeted upon such other person or persons, keeping public houses, * * * as they shall see cause; and such other person or persons shall be obliged to receive such soldiers accordingly.
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> * * * [T]he soldiers so billeted * * * shall be received by the persons on whom they are billeted, and furnished with vinegar, salt, and the use of fire to dress their victuals, without demanding any reward or satisfaction for the same.{EN-2057}

Although "soldiers in his majesty's service" were to be billeted, Virginia deferred for the applicable rule neither to the British Army, nor to Parliament, nor even to her own Governor as "commander in chief" of the Colony's military forces, but instead empowered her Justices of the Peace—Colonial civil officials—to oversee the matter. Moreover, the General Assembly prohibited the quartering of "soldiers" in any "private houses whatsoever", even though in some Locales the available "ordinaries", "licensed taverns", and other like "public houses" could have proven insufficient. In this, the General Assembly went beyond what became the strictures of the Third Amendment, asserting its authority to immunize "private houses" from the quartering of "soldiers" altogether, even if high-ranking officers in the British Army had demanded such billeting.

Then, in 1781 Rhode Island's General Assembly observed that

> it frequently happens that troops are quartered upon the inhabitants of the town of Providence in undue proportions, which is incident to all populous towns;—
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> It is therefore * * * resolved, that, upon any complaint being made thereof, the members of the General Assembly * * * living in the said town, * * * be * * * empowered and directed to inquire into the circumstances * * * ; and if it shall appear reasonable, to remove the persons quartered, and to provide quarters for them in such other families as can receive them with less inconvenience[.]{EN-2058}

Self-evidently, the General Assembly recognized that "the inhabitants" of the State's Towns had a justifiable "complaint" against the State for having "troops * * * quartered upon the[m] * * * in undue proportions", and therefore assumed the task of investigating and correcting the "inconvenience[s]" occasioned thereby—in

effect, imposing on its own members the personal duty of fulfilling what became the terms of the Third Amendment.

So, today, to suggest that applying that Amendment to the States would amount to an unheard-of and burdensome imposition flies in the face of history as well as common sense. Rather, the Amendment must protect "the Owner" of every "house" from *any* "inconvenience" associated with the quartering of "Soldier[s]" in *every* eventuality, by applying to *both* the General Government *and* the States.

•The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized".

> This provision of the Constitution was largely due to the great awakening caused by the resort of the colonial authorities of Massachusetts Bay to "writs of assistance," as certain general search-warrants were called. * * * James Otis * * * took up the popular side, making in that behalf the most memorable speech of the times. * * * "The child Independence was born on that occasion," said John Adams.[3301]

Plainly, Americans would never have acquiesced in future violations at the hands of obnoxious functionaries of either the General Government or the States of a "right" previous violations of which by British officials had been a root-cause of the Colonies' fighting a long and sanguinary war in order to "dissolve the political bands which ha[d] connection them with" the Mother Country.[3302] So, unless compelling evidence can be adduced that "the people" in 1791 were content to be less "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" by thugish State officials than by equally brutish minions of the General Government, the Fourth Amendment must apply to both.

Any honest evaluation of the legal principles involved must support that conclusion. If no one is "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures", then anyone can be deprived of the right to "liberty"—through "seizures" of "persons", of the right to "property"—through "searches and seizures" of "houses, papers, and effects", and even of the right to "life" itself—which may all too easily be threatened by trigger-happy SWAT teams in the course of "unreasonable searches and seizures". And, overall, no one can claim any right to "the pursuit of Happiness" if his rights to liberty, property, and even life itself can be abridged "unreasonabl[y]" at any time.

[3301] J. Story, *Commentaries on the Constitution, ante* note 576, Volume 2, § 1901, at 647-648 note (c).

[3302] Declaration of Independence.

Yet the Declaration of Independence attests that "to *secure* these rights, Governments are instituted among Men, deriving their *just* powers from the consent of the governed".[3303] So, under "the Laws of Nature and of Nature's God", *no* such "Government" can claim a power to conduct "*unreasonable* searches and seizures"—for any such purported power must be manifestly "[*un*]just", and therefore beyond the authority of "the governed" to delegate to their "Government".

• The Fifth Amendment provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation". Nowhere does this Amendment even suggest that it applies solely to the General Government. To the contrary: It refers broadly to "a capital, or otherwise infamous crime", not specifically to "a capital, or otherwise infamous crime, *under the Laws of the United States*"—to "the same offence", not to "the same offence *under the Laws of the United States*"—to "any criminal case", not to "any criminal case *prosecuted under the Laws of the United States*"—and to "private property * * * taken for public use", not to "private property * * * taken for public use *by the United States*".

Indeed, it is apparently impossible for the Fifth Amendment to refer, even implicitly, to "private property * * * taken for public use *by the United States*", because the authority of the United States to exercise a power of "eminent domain" is anything but patent on the face of the original Constitution. WE THE PEOPLE delegated no such power in those specific terms. The only way in which the Constitution indicates that the United States can acquire territory from within the States, over which Congress can then act as a proprietor by "exercis[ing] exclusive Legislation in all Cases whatsoever", is by "purchas[ing]" "all" such "Places" "by the Consent of the Legislature of the State in which the Same shall be".[3304] This provision radically circumscribes Congress's authority—for it is not limited by its terms to "Places" the States themselves own, but encompasses "*all* Places" whatsoever, including those owned by private parties. Obviously, the Constitution would not bother to spell out a specific procedure that limits Congress to "purchas[ing]" "*all* Places" *only with "the Consent of the Legislature of the State in which the Same shall be"*, if Congress could simply expropriate those "Places" directly from private parties under color of "eminent domain" without anyone's "Consent".

[3303] Emphasis supplied.

[3304] U.S. Const. art. I, § 8, cl. 17.

To be sure, as part of an arrangement for "purchas[ing]" such "Places", "*the States* in which the [Places] shall be" might employ *their own* powers of "eminent domain" to obtain public ownership of those "Places", and then sell them to the United States. In that case, though, the injunction that "private property [shall not] be taken for public use without just compensation" could apply only to the States which actually took the properties in the first instance, not to the United States which subsequently "purchased" them.

The manner in which the Fifth Amendment deals with "cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger" provides further proof that the Amendment must apply to both the General Government and the States. *First*, and most obviously, the phrase "the Militia, *when in actual service in time of War or public danger*" does not by its own terms apply solely to "such Part of th[e Militia] as may be employed in the Service of the United States" "when called into the actual Service of the United States".[3305] For the Militia (in "Part" or in whole) "may be employed in the Service of the United States" for three reasons only: "to execute the Laws of the Union, suppress Insurrections and repel Invasions".[3306] It very well may be that "Invasions" would occur "in time of War", and that "execut[ing] the Laws of the Union" and "suppress[ing] Insurrections" would occur "in time of * * * public danger". But a "time of War" could arise *before* the Militia were "call[ed] forth" for "the Service of the United States"—as when a State "engage[d] in War" if she were "actually invaded, or in such imminent Danger as w[ould] not admit of delay".[3307] And a "time of * * * public danger" could arise solely within a State from some cause wholly unrelated to any of the three purposes for which the Militia may be "call[ed] forth" to "be employed in the Service of the United States". When the Militia are "call[ed] forth" to "be employed in the Service of the United States", they are subject to such rules as Congress may "provide * * * for governing * * * them".[3308] No one doubts that the Fifth Amendment recognizes as much, but also guarantees that *in all other circumstances* the General Government will not hold any Militiaman (which amounts to every able-bodied adult) "to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury". When the Militia are not "call[ed] forth" "in the Service of the United States", they remain instrumentalities of the several States, where "in time of War or other public danger" their members may be subject to specific Militia discipline when on active duty. So, by a parity of reasoning, the Fifth Amendment must recognize that, too, and guarantee that *in all other circumstances for which the Militia might be activated* the

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[3305] U.S. Const. art. I, § 8, cl. 16 *and* art. II, § 2, cl. 1.

[3306] U.S. Const. art. I, § 8, cl. 15.

[3307] U.S. Const. art. I, § 10, cl. 3.

[3308] U.S. Const. art. I, § 8, cl. 16.

States will not hold any Militiaman (which amounts to every able-bodied adult) "to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury".

Second, the general terms "land or naval forces", without qualification, encompass both "the Army and Navy of the United States" ("the land and naval Forces" as to which Congress may "make Rules for the[ir] Government and Regulation") and the "Troops, or Ships of War" that the States may "keep * * * in time of Peace" "with[ ] the Consent of Congress" or may raise even without such "Consent" in time of "War" or when "actually invaded, or in such imminent Danger as will not admit of delay".[3309] The word "Militia" refers to "the Militia of the several States". A "person" in the "land or naval forces" *of the United States* at any time,[3310] or in the "Part of the[Militia] * * * *employed in the Service of the United States*" when "call[ed] forth" "in time of War or public danger" "to execute the Laws of the Union, suppress Insurrections or repel Invasions", is subject to the plenary "military" jurisdiction of the United States.[3311] So the Amendment's denial to him of a right to "a presentment or indictment of a Grand Jury" when he is "held to answer for a capital, or otherwise infamous crime * * * in cases arising in the land or naval forces, or in [that Part of] the Militia", simply confirms the exclusive nature of that jurisdiction with respect to such "cases". Otherwise, the Amendment emphasizes that *the General Government cannot invoke procedures of so-called "martial law" against the average "person" (whether an American citizen or not) "held to answer for a capital, or otherwise infamous crime"*. This, of course, means that *no one, citizen or alien,* whose "case[ ]" does not in fact "aris[e] *in* the land or naval forces, or *in* the Militia, *when in actual service in time of War or public danger*", may be tried before some "military commission" or other *junta* if he is "held to answer for [the] capital, or otherwise infamous crime" of "engag[ing] in" or "purposefully and materially support[ing] hostilities against the United States"—and, therefore, that one of the statutory cornerstones of the present-day "war on terrorism" being waged by rogue and deluded officials of the General Government is undeniably unconstitutional.[3312] And rightly so. For one of the charges the Declaration of Independence hurled at

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[3309] *See* U.S. Const. art. I, § 8, cls. 12, 13, and 14; *and* art. I, § 10, cl. 3.

[3310] *See* Johnson v. Sayre, 158 U.S. 109, 114 (1895). *Contrast* O'Callahan v. Parker, 395 U.S. 258, 268-273 (1969), *with* Relford v. Commandant, 401 U.S. 355, 362-369 (1971).

[3311] *Compare* U.S. Const. amend. V *with* art. I, § 8, cls. 14, 15, and 16.

[3312] *See* An Act To authorize the trial by military commissions for violations of the law of war, and for other purposes ("Military Commissions Act of 2006"), Act of 17 October 2006, Pub. L. 109-366, § 3 [§ 948a(1)(A)(i) and 948c], 120 Stat. 2600, 2601, 2602; *superseded by* An Act To authorize appropriations for fiscal year 2010 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe military personnel strengths for such fiscal year, and for other purposes ("National Defense Authorization Act for Fiscal Year 2010"), Act of 28 October 2009, Pub. L. 111-84, TITLE XVIII—MILITARY COMMISSIONS ("Military Commissions Act of 2009"), § 1802 [§§ 948a(7) and 948c], 123 Stat. 2190, 2575, 2576; *now codified at* 10 U.S.C. § 948a(7) and 948c.

King George III was that "[h]e has affected to render the Military independent of and superior to the Civil Power".

A "person" in the "land or naval forces" (that is, the "Troops, or Ships of War") *of a State*, or in that "Part of the[Militia]" *not* "call[ed] forth" to "be employed in the Service of the United States" but instead "in actual service [*for the State*] in time of War or public danger" is within *the State's* exclusive "military" jurisdiction. So, applied to the States, the Fifth Amendment simply confirms the exclusive nature of their jurisdiction with respect to "cases" involving "capital, or otherwise infamous crime[s]" that "aris[e] in the [States'] land or naval forces, or in the[ir] Militia" when deployed in their service. If, however, the Amendment does not apply to the States, then *all* "person[s]" in every State, under *all* circumstances, may "be held to answer for * * * infamous crime[s]"—which could be defined as *any* "crime" the punishment for which fickle "public opinion" happens to consider "infamous"[3313]—*by whatever procedures a State chooses to adopt, including "military commissions" or other like bodies that "render the Military independent of and superior to the Civil power"*.[3314] This follows apodictically according to the schema of the Tenth Amendment: Because the Fifth Amendment undoubtedly applies to the General Government, the power to "h[o]ld [any person] to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia" has "not [been] delegated to the United States by the Constitution". If (hypothetically) the Amendment does not apply to the States, then that power has not been "prohibited * * * to the States", because it is not arguably proscribed anywhere else in the original Constitution or its Amendments. Therefore, that power must be "reserved to the States respectively, or to the people". Being a power with respect to procedures for criminal prosecutions, however, it is not capable of being exercised by the people directly (at least not in the normal course of events). So it must be "reserved to the States" alone. Thus, if the Fifth Amendment does not apply to the States, they may engage in precisely the type of behavior that the Declaration of Independence singled out as one of the "injuries and usurpations * * * having in direct object the establishment of an absolute Tyranny over the[ ] States". The self-contradictory absurdity of this result compels the conclusion that the Amendment does apply to them.

Thus, because the clause "[n]o *person* shall be held to answer..." in the Fifth Amendment applies to both the General Government and the States, the subsequent clauses that protect "any *person*" and "*private* property" (which is necessarily owned by some "*person*") must also apply to both the General

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[3313] *Ex parte* Wilson, 114 U.S. 417, 427 (1885).

[3314] Declaration of Independence (emphasis supplied).

Government and the States, there being no differentiation within the Amendment among any of those clauses on that score.

• The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor; and to have the assistance of counsel for his defence". Here, once again, an Amendment is couched in general terms: "[i]n *all* criminal prosecutions", without exception, not "[i]n all criminal prosecutions *by the United States*" alone. Indeed, such a limitation would hardly make sense—for, where "the judicial Power of the United States" is concerned, the original Constitution provided that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury",[3315] and thus rendered the Sixth Amendment unnecessary for that purpose.

Although the guarantee of "a *speedy* and *public* trial, by an *impartial* jury" did not appear in the original Constitution, why that should have been of concern to Americans in 1791 only with respect to the General Government, but not the States, remains a mystery. Could any Americans of that time have considered it unexceptionable for the States to delay trials indefinitely, to conduct trials *in camera*, to seat biased juries—or, worst of all, to deny trial by jury entirely? As just explained for the Fifth Amendment, on the hypothesis that the Sixth Amendment does not apply to the States, the Tenth Amendment would compel the conclusion that the States could do all of that. Yet no one in 1791 would have accepted that result, knowing as all Americans did that the Declaration of Independence had castigated King George III specifically "[f]or depriving us in many cases, of the benefits of Trial by Jury". For if each of the States could have denied trial by jury, it would have affected *most*, not just "many" cases, as most criminal prosecutions in those days took place in the States' courts.

That the Sixth Amendment secures "an impartial jury of the State and district" does not imply its exclusive applicability to the General Government, either. Indeed, this part of the Amendment, too, is largely superfluous as far as that government is concerned, because the original Constitution provided, with respect to "[t]he Trial of all Crimes" under "[t]he judicial Power of the United States", that "such Trial shall be held in the State where the said Crimes shall have been committed".[3316] So if this part of the Amendment relating to "jur[ies] of the State[s]" is to have any independent effect, it must be with respect to "criminal

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[3315] U.S. Const. art. III, § 1 and § 2, cl. 3.

[3316] U.S. Const. art. III, § 1 and § 2, cl. 3.

prosecutions" *by the States*. The addition of the term "district" in the Amendment does not exclude its application to the States, because someone charged with the commission of a crime in a "district" of his home State—which could be a county, a city, a borough, a township, or a village—would normally not want to be tried in a different "district", let alone a different State, whether in a court of a State or of the General Government. Certainly in 1791 Americans did not need to be paranoid to foresee the possibility that rogue public officials in various States, with the "Consent" of a rogue Congress, might "enter into * * * Agreement[s] or Compact[s]"[3317] that would enable them to convict popular dissidents of supposed "crimes" by shunting their trials to distant venues in which sympathetic juries could not be had, or hostile ones always would be. After all, misbehavior of exactly that sort had been at the heart of the Declaration of Independence's indictment of the King "[f]or transporting us beyond the seas to be tried for pretended offences". For the most notorious example, the patriots' anger at the King's determination to "transport[ ]" suspects and witnesses in the *Gaspée* affair "beyond the seas" for trial in England had sparked the formation of the Committees of Correspondence, which perhaps more than anything else had served to unify the Colonists in their opposition to British oppression.[3318]

Finally, it is impossible to imagine that Americans who would have objected to even the possibility of a blanket denial of trial by jury throughout the States in 1791 would have acquiesced in the States' denial to any criminal defendant of the most familiar incidents of a fair trial before any trier of fact: namely, "be[ing] informed of the nature and cause of the accusation", being able to "confront[ ] * * * witnesses against him", "hav[ing] compulsory process for obtaining Witnesses in his favor", and "hav[ing] the assistance of counsel for his defence". Yet, if the Sixth Amendment secures these safeguards against the General Government alone, by the logic of the Tenth Amendment the States can deny any or all of them. The consequence of such a construction being intolerable, that construction must be inadmissible.

• The Seventh Amendment provides that, "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law". As with the Fifth Amendment, the Seventh speaks in the most general terms of "Suits at common law", without exception, not "Suits at common law *arising in the Courts of the United States*". In 1791, Americans knew that next to no "common law *of the United States*" (as opposed to "common law of the States") existed; and perhaps

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[3317] *See* U.S. Const. art. I, § 10, cl. 3.

[3318] *See ante*, at 88-93.

little would have developed for a long time[3319]—which meant that most "Suits at common law" were to be litigated in the States' courts. To be sure, Americans certainly expected that some "Suits at common law" would eventually be tried in "such inferior Courts [of the General Government] as the Congress may from time to time establish",[3320] because the original Constitution provided that "[t]he judicial Power [of the United States] shall extend * * * to Controversies * * * between Citizens of different States",[3321] which would have been expected often to arise under the States' "common law". But surely not all such suits, or even a large proportion of them, would have been anticipated to arise in the General Government's courts—and certainly not in the earliest days of the Republic, when Congress was just beginning to "establish" those "inferior Courts". So Americans must have understood that, if the Seventh Amendment were to have any significant practical utility, it would have to apply to the States. Thus, although it is possible to read the Amendment as providing that, "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury [*in Courts of the United States*] shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law", it is far more plausible to read it as providing that, "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury [*in the Courts both of the United States and of the several States*] shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law". The latter reading enjoys the added advantage of making the most of the qualification that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States"—because Americans in 1791 were surely more concerned that "Court[s] of the United States" might wantonly disturb the verdicts of juries from the State courts than that a State's own higher courts would improperly interfere with verdicts of juries rendered in that State's lower courts. The only other alternative reading—"[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury [*in the Courts of the United States*] shall be preserved, and no fact tried by a jury [*in the Courts of the United States or of the several States*], shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law"—is too disjointed to be credible. Why should "fact[s] tried by a jury" in *both* Courts not be "reexamined in any Court of the United States", but "the right of trial by jury" itself, upon which would depend the "fact[s]" that were found, be preserved only in the Courts of the United States?

[3319] *See* W. Crosskey, *Politics and the Constitution, ante* note 206, Volume 2, Chapter XXIV.

[3320] U.S. Const. art. III, § 1. *See* U.S. Const. art. I, § 8, cl. 9.

[3321] U.S. Const. art. III, § 2, cl. 1.

Finally, once again returning to the logic of the Tenth Amendment, if the Seventh Amendment applied exclusively to the General Government, then the States would have no duty under the Constitution to "preserve[ ]" "trial by jury" at all. In that case, though, there would be "*no* fact[s] tried by a jury" in State courts to be "reexamined in any Court of the United States" (or anywhere else, for that matter)—and therefore that part of the Amendment would be rendered nugatory. No American in 1791, however, would have believed that the Seventh and Tenth Amendments affirmatively endorsed the proposition that the States could simply dispense altogether with trial by jury "[i]n Suits at common law". True, the State's governments were lawful governments, all operating under some constitution or charter. But the British government had been the Colonists' lawful government in the 1770s, also operating under what both Britons and Americans had called a "constitution"—yet everyone in 1791 remembered how the Declaration of Independence had attacked King George III "[f]or depriving us in many cases, of the benefits of Trial by Jury". Was such oppression more tolerable coming from rogue officials in the States than it was from the King?

•The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted". Suffice it to point out that, applying the logic of the Tenth Amendment, if the Eighth Amendment constrains only the General Government, then the Constitution licenses the States to exercise some "reserved" power to inflict "cruel and unusual punishments" on their citizens. But even to suggest this verges on the cusp of madness, because in all of its denunciations the Declaration of Independence never once charged George III with such barbarism. The Declaration did calumniate the King for "transporting large Armies of foreign Mercenaries to compleat the works of death, desolation and tyranny, already begun with circumstances of Cruelty & perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation"; and for "excit[ing] domestic insurrections amongst us, and * * * endeavour[ing] to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions". But even he perpetrated those excesses only as expedients in the course of waging a brutal civil war, not as a regular policy during times of peace.

•The Ninth Amendment provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people". Now, logically, the Ninth Amendment *must* apply to the States as well as to the General Government—or else how could "the people" *fully* "retain[ ]" the "other[ ]" "rights" (whatever they may be) to which the Amendment refers? If "the people" "retained" those "other[ ]" "rights" merely as against the General Government but not as against the States, or merely as against the States but not as against the General Government, their retention in both cases would be

imperfect and impermanent, because either the General Government or the States could deprive them of those "rights" to any degree at any time.

More specifically, "[t]he enumeration, in the Constitution, of certain rights" is not limited by its terms only to "certain rights" that run exclusively against the General Government.[3322] So, because "[t]he enumeration * * * of [*those*] rights" *which plainly run against the States in the original Constitution* "shall not be construed to deny or disparage other[rights *of a like nature*] retained by the people", "the people" can assert the Ninth Amendment against the States, as well as against the General Government, in favor of whatever "[un]enumerat[ed]" rights American legal history supports.

• The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people". This Amendment explicitly limits the States, as well as the General Government—or else how could "the people" have *fully* "reserved" to themselves the "powers" (whatever they may be), to which the Amendment refers? The "powers" "reserved to the people" cannot be exercised by either the United States or the States. As to those powers, "the people" have corresponding rights as against both the General Government and the States.

• In the foregoing context, it should hardy be surprising that the Second Amendment applies to both the General Government and the States.

First, the necessary application of the Second Amendment to the States derives from the constitutional position of the Militia as permanent parts of the federal system, and the nature of the Militia as "the Militia *of the several States*", composed of "the people" themselves. If a Congress controlled by rogue politicians attempted to violate the Second Amendment, State officials loyal to the Constitution would not be compelled to aid and abet Congress or to acquiesce in its actions, because the Militia are *their own States'* Militia, not "the Militia of the United States". If one or more States controlled by rogue politicians attempted to violate the Amendment, Members of Congress loyal to the Constitution could intervene in order to secure Congress's ability "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions".[3323] In either of those cases, although they were the real parties in interest, "the people" themselves would not need to invoke the Second Amendment, because either their States or Congress would do so on their behalf. But what if rogue politicians, concerting their misdeeds in tandem in *both* Congress

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[3322] *Compare* U.S. Const. art. I, § 9, cls. 3 and 8 *with* art. I, § 10, cl. 1. "The enumeration, in the Constitution" must refer to both the original Constitution and the first eight Amendments in the Bill of Rights, because from the perspective of the Ninth Amendment those Amendments are part and parcel of the Constitution.

[3323] U.S. Const. art. I, § 8, cl. 15 *and* art. VI, cl. 2.

and the States, attempted to violate the Amendment? In that case, for the Amendment to provide "the people" with a claim against rogue officials in the General Government alone would not suffice; a parallel claim against rogue officials in the States would also be needed. Such a conjunction of misbehavior might not have existed in 1791. But Americans of that day surely did not deny the possibility that it might occur in the future—as it *has* occurred, in the flood of "gun controls" which has inundated this country at every level of the federal system. They knew that, just as "the legality of [any governmental] power must be estimated not by what it will do but by what it can do",[3324] so too must the reach of an Amendment limiting public officials' powers be gauged not solely by the forms of public officials' misbehavior familiar in the present but as well by the novel forms of usurpation and tyranny which might assault "the people" in the future.

Second, the Second Amendment itself explains why a right of "the people" as against the States is imperative. The Amendment declares that "[a] well regulated Militia" is "necessary to the security of a free State". But the Constitution provides for *no* "well regulated"—or even *any*—"Militia *of the United States*", only "the Militia *of the several States*". (Although the Constitution allows "the Militia of the several States" to "be employed in the Service of the United States" in certain circumstances,[3325] it does not deprive them of their status as State institutions through such temporary "Service".) So the set of "free State[s]" for which "well regulated Militia" are "necessary" must include each and every one of "the several States"—as well, of course, as the Union composed of them all. Now, inasmuch as "the right of the people to keep and bear Arms" is operationally essential to "[a] well regulated Militia", and inasmuch as "[a] well regulated Militia" is "necessary to the security of a free State", and inasmuch as every one of "the several States" is "a free State", therefore "the right of the people to keep and bear Arms" must be "necessary to the security of" each of the several States. And inasmuch as no "free State" may undermine her own "security"—especially by "infring[ing]" "the right of [her own] people" which her own "supreme Law" declares to be "necessary to th[at] "security"—that "right" must be enforceable against each of the States, as well as against the Union.

Third, every "free State" in the United States must have "a Republican Form of Government".[3326] The Second Amendment declares that "[a] well regulated Militia" is "necessary to the security of a free State"—which means that such a Militia is an inseparable, integral component of "a Republican Form of Government". "[T]he right of the people to keep and bear Arms, shall not be infringed", because the actual exercise of that right is the most important

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[3324] Block v. Hirsh, 256 U.S. 135, 162 (1921) (McKenna, J., dissenting).

[3325] U.S. Const. art. I, § 8, cls. 15 and 16.

[3326] U.S. Const. art. IV, § 4.

characteristic of "[a] well regulated Militia". Therefore, inasmuch as each State must maintain "a Republican Form of Government", or be compelled to comply with that requirement by the United States, each State must guarantee "the right of the people to keep and bear Arms" both within her own jurisdiction through her own laws, and within the jurisdiction of every other State through her participation in the General Government. That is, *the Second Amendment applies not just to each State individually but even to all of the States collectively*.

Of course, the Second Amendment does not preclude the enactment of laws that *protect and promote* "the right of the people to keep and bear Arms". For example, without offending the Amendment, Congress could prohibit the States from disarming "the people", or from denying them the opportunity to arm themselves. And the States could enact laws prohibiting the enforcement within their territories of any purported Congressional statute that attempted to disarm "the people", to prevent the States from arming "the people" for service in their Militia, or to prohibit "the people" from arming themselves.

If, however, the Militia of the several States were revitalized along proper constitutional lines, the issue of whether the Second Amendment applies to the States of its own force or through some clause in the Fourteenth Amendment, along with all of the attendant problems of "gun control" created by rogue officials in both the General Government and the States, would disappear. For in "[a] well regulated Militia", every eligible individual (other than conscientious objectors and those permissibly exempted for different reasons) must be fully armed and accoutred at all times—and therefore must enjoy an absolute "right * * * to keep and bear Arms" as against ***all*** public officials.

c. The effect of the Second Amendment on private parties. The nature of "the right of the people to keep and bear Arms" demands that the Second Amendment be applied to *private parties* as well as to public officials. This is not such an odd requirement as it might first appear. Section 1 of the Thirteenth Amendment prohibits "slavery [ ]or involuntary servitude, except as a punishment for crime whereof the party shall have been duty convicted"—yet throughout history, both "slavery" and "involuntary servitude" usually involved the purported ownership as private property of one man by another for life or for a term of years—and therefore the Thirteenth Amendment can still be applied to private individuals today, whenever some private arrangement imposes any of "the badges and incidents" of slavery.[3327] To be sure, in these situations there will always lurk *some* involvement of rogue public officials in the background; for in the final analysis any claim of "private property" in another human being will always depend for its efficacy upon governmental enforcement of the putative owner's rights, either by

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[3327] *See, e.g.,* Jones v. Alfred H. Mayer Company, 392 U.S. 409 (1968).

commission or omission. With this caveat, the only question in the case of the Second Amendment is whether a sound basis exists for applying it to private parties.

(1) Certain ostensibly legitimate claims should come immediately to mind. For example, executions of civil judgments should never be allowed to deprive judgment-debtors of firearms, ammunition, or related accoutrements.[3328] And lawsuits attempting to shut down or curtail the activities of firing ranges and gun clubs for reasons other than the actual physical endangerment of persons or things on neighboring properties should be required to be dismissed as "frivolous", and the parties and attorneys responsible for them required to pay the opposing parties' attorneys' fees and costs. In such cases, so-called "governmental action" through the courts effectuates the plaintiffs' attempts to deprive persons of "the right * * * to keep and bear Arms".[3329]

(2) Of more long-term consequence are actions that should be taken against aggressive proponents of "gun control". "A well regulated Militia" is "necessary to the security of a free State". "[T]he right of the people to keep and bear Arms" is the most important condition precedent for "[a] well regulated Militia". Therefore, "th[at] right" is "necessary to the security of a free State". "[T]he right of the people to keep and bear Arms" is also necessary to enable "the People" to exercise their "Right * * * to alter or to abolish" "any Form of Government that becomes destructive of th[eir unalienable Rights]", and especially "their right" and "their duty, to throw off [an abusive] Government, and to provide new Guards for their future security".[3330] "Gun control" is antithetical to "the right of the people to keep and bear Arms", and therefore to "[a] well regulated Militia", and therefore to "the security of a free State"—and therefore to "a free State" altogether. *Any* "Form of Government" that attempts to impose thoroughgoing "gun control" on Americans will have proven to be, by that malign endeavor alone, "destructive" of *all* of WE THE PEOPLE'S rights, because it will threaten to deny THE PEOPLE their ultimate remedy against oppression under "the Laws of Nature and of Nature's God". Thus, because "gun control" is inevitably the primary instrument of usurpation and tyranny, it is inherently antagonistic to both the Constitution and the Declaration of Independence. And those who even propose it, let alone work for its implementation, are WE THE PEOPLE'S implacable enemies.

The nature of "gun control" is so notorious that no one burdened with even the lowest level of literacy in the modern political history of Western civilization can credibly claim to be unaware of its evil consequences in one society after another. Certainly no one in public office in America can plead ignorance. For officials of

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[3328] *See ante*, at 295-296 (Rhode Island); 460-463 and 715-717 (Virginia).

[3329] *See* Shelley v. Kraemer, 334 U.S. 1 (1948).

[3330] Declaration of Independence.

both the General Government and the States "shall be bound by Oath or Affirmation, to support th[e] Constitution".[3331] If they are aware that they do not understand *in detail and in historical context* what they solemnly promise "to support" with respect to the Militia Clauses of the original Constitution and the Second Amendment, or if they take their "Oath[s] or Affirmation[s]" with willful blindness to or in reckless disregard of those matters, they are guilty of perjury or false swearing, no less than if they do understand but secretly intend not "to support" "the right of the people to keep and bear Arms" (and all it entails), or if, with such understanding, they fail, neglect, or refuse "to support" that "right" later on. In short, *everyone in public office who promotes "gun control" must be presumed to be no less than an aspiring usurper or tyrant*—the only defense in mitigation for such an individual (other than a claim of insanity) being the admission that he knew so little about the subject when he took his "Oath or Affirmation" that he perjured himself or swore falsely, and subsequently made no attempt to correct his ignorance.

Moreover, everyone in private life who promotes candidates for public office with the goal of enacting "gun control" into law through their efforts, or who lobbies for "gun control" among legislators, or who importunes judges to rule in favor of "gun control", or who propagandizes the populace on behalf of "gun control" is no less than an accessory to whatever usurpation and tyranny "gun control" might foster. Indeed, these individuals quite often are *decidedly more culpable* than rogue public officials, because they may be the actual directors of the plot, the officials being mere marionettes who dance on the strings of campaign-contributions, blackmail, or any other forms of political favors, corruption, or coercion.

The machinations of these factious cabals can be thwarted in numerous relatively simple ways. For example: *First*, patriots should demand "zero tolerance" within their communities for groups that advocate "zero tolerance" for firearms, especially among America's youth. *Second*, places of public accommodation should be prohibited from banning the legitimate possession of firearms by their patrons. *Third*, neither the General Government nor any State should grant tax exemptions or other special benefits to groups that promote "gun control" through propaganda, agitation, or lobbying. *Fourth,* public law-enforcement agencies should terminate all contacts with groups that are active in "gun control", and certainly never engage, consult, or acknowledge any of their personnel as "advisors" or "experts". *Fifth*, officers, members, agents, and especially financial supporters of groups that promote "gun control" should be publicly exposed and then shunned whenever they have the temerity to appear among honest citizens. Apologists for "gun control" should be condemned as no less pariahs than apologists for antebellum chattel slavery—because, in effect, the two are identical.

[3331] U.S. Const. art. VI, cl. 3.

Even more potent remedies are available for the most malignant manifestations of this kind of organized aggression against "the security of a free State". For instance, whether in public office or private station, "gun controllers" who conspire "under color of any law, statute, ordinance, regulation, or custom" "to injure, oppress, threaten, or intimidate any person * * * in the free exercise * * * of any right * * * secured to him by the Constitution"—including in particular "the right * * * to keep and bear Arms" secured by the Second Amendment—can be prosecuted by the General Government.[3332] This, however, is a problematic approach at the present time, because some of the worst offenders against the Second Amendment are to be found in or allied with the United States Department of Justice.

Going further, if they do their work circumspectly and carefully, Congress and the States' legislatures can constitutionally suppress subversive private organizations that agitate and propagandize on behalf of "gun control" and conspire with candidates for public office and rogue public officials to impose "gun control" on WE THE PEOPLE. Not so long ago, the Constitution was held to allow prosecution of certain activities of the Communist Party of the United States that were aimed at overthrowing the governments of the United States and of the several States by force and violence and installing in their places a centralized "dictatorship of the proletariat".[3333] Although no statute or judicial decision during that era dealt directly with propaganda and agitation, electioneering, lobbying, and other related political activism synchronized for the purpose of establishing a communist régime under color of law through what deceptively appeared to be "constitutional" and "democratic" electoral and legislative procedures, the same principle should have applied. For any statute that aimed at transmogrifying a State or the Union as whole into a communist dictatorship would have been illegal from the beginning, under both the Constitution and the Declaration of Independence, and once enacted could have commanded the obedience of common Americans only through the most savage forms of oppression, just as Lenin, Stalin, Mao, Pol Pot, and other Red despots have always imposed communism everywhere else.[3334] Therefore, no matter

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[3332] See 18 U.S.C. §§ 241 and 242, *and, e.g., In re* Quarles, 158 U.S. 532 (1895); Logan v. United States, 144 U.S. 263, 293-295 (1892); United States v. Waddell, 112 U.S. 76, 77-81 (1884); *and Ex parte* Yarborough, 110 U.S. 651 (1884).

[3333] *See, e.g.,* Dennis v. United States, 341 U.S. 494 (1951); Yates v. United States, 354 U.S. 298 (1957); Communist Party USA v. Subversive Activities Control Board, 367 U.S. 1 (1961); Scales v. United States, 367 U.S. 203 (1961); Noto v. United States, 367 U.S. 290 (1961). Subsequent disclosures established that the concern with the criminal character of the Communist Party and its hangers-on as agents of an aggressive foreign power was actually *minimized* during the period of the Cold War. *See, e.g.,* Harvey Klehr, John E. Haynes, and Fridrikh I. Firsov, *The Secret World of American Communism* (New Haven, Connecticut: Yale University Press, 1995).

[3334] *See, e.g.,* Stéphane Courtois, Nicholas Werth, Jean-Louis Panné, Andrzej Paczkowski, Karel Bartošek, and Jean-Louis Margolin, *The Black Book of Communism: Crimes, Terror, Repression*, Jonathan Murphy and Mark Kramer, Translators (Cambridge, Massachusetts: Harvard University Press, 1999).

how open and notorious it might have been, lobbying for, enacting, and attempting to enforce such a statute would have constituted a conspiracy the activists directed against every man, woman, and child outside the circle of their adherents throughout the United States.

The contemporary promotion of "gun control" is no better. Were the comprehensive program over which "gun controllers" salivate ever enacted into law, every State in the Union, and the Union as a whole, would lose the ability to function as "a free State". The General Government would become the center, the States the radii, and the Localities the circumference of a National *para*-military police state, in comparison to which General Gage's military governance of Massachusetts and occupation of Boston would appear as delightful examples of enlightened administration. This being its inexorable and inevitable effect, and therefore presumably the intention of its proponents, such a comprehensive program would be illegal from the beginning as a contradiction of everything for which the Constitution and the Declaration of Independence stand.

Once enacted, comprehensive "gun control" would initially meet with the passive resistance of simple mass noncompliance. For example, in 1933 when Franklin D. Roosevelt's "New Deal" Administration ordered common Americans to surrender their holdings of gold coin to the Treasury, the public turned in only some twenty-two percent of the coin believed to be in circulation.[3335] Although many Americans may have viewed personal retention of their gold as necessary to the maintenance of their long-term economic welfare, few would have assumed that their *lives* would have been immediately in jeopardy had they surrendered it. Yet most of the gold remained, "illegally", in private hands. Were firearms the subjects of confiscation, though, common Americans would be fully justified in presuming that the loss of their arms represented a distinct danger to their physical survival. So were an equivalent of "the gold seizure" decreed for firearms, the level of compliance could be expected to be *very* low. "Gun controllers" would then turn to typical police-state measures, such as cordoning off large areas and conducting house-to-house searches, probably with the maximum application of brutal force by psychopathic SWAT teams in full view of the public, so as to terrorize the population into submission. At that point, active resistance by the targets of oppression would begin. The level of aggressive violence employed by the "gun controllers" would escalate, in response to which the level, tempo, and extent of defensive violence would increase as well. *As the point of "gun control" would be to deny WE THE PEOPLE the instruments necessary to secure for themselves "a free State", and as the proponents of "gun control" would attempt to enforce it through the methods of a police state, this situation would differ only in insignificant details from what would*

[3335] *See* James Turk, "The Confiscation Threat", *Freemarket Gold & Money Report*, No. 335 (1 December 2003).

confront THE PEOPLE under the attempted imposition of a candidly communistic "dictatorship of the proletariat".

A statute proscribing subversive activities conducted on behalf of "gun control" would not "abridg[e] * * * the right of the people peaceably to assemble, and to petition the Government for a redress of grievances",[3336] because the promotion of "gun control" cannot qualify as a constitutional "redress of grievances". ***"Gun control" is itself perhaps the most serious of all possible "grievances".*** For its proponents are attempting to legislate the "grievance[ ]" of disarmament into permanent existence, so that future petitions seeking "redress of [that and other] grievances" can be suppressed by police-state tactics without fear of popular resistance.

To argue that lobbying for "gun control" should be tolerated because it would not succeed is naive. Particularly in light of the extensive list of "gun controls" that rogue officials have already enacted or imposed at every level of the federal system, who can insure that it would fail?

Furthermore, to contend that legislators enjoy some vested "right" to try to pass statutes providing for "gun control" is worse than mere nonsense. *No legislator in America has any "right" to vote for the enactment of a statute that will render constitutional government in "a free State" no longer possible*. After all, the Constitution provides that "[a]ll *legislative Powers* herein granted shall be vested in a Congress of the United States".[3337] The Constitution delegates to Congress (or to anyone else, for that matter) *no* "*anti*-legislative Powers"—that is, powers to enact purported "legislation" which is not and cannot be "legislation" at all, because it violates the Constitution. A supposed "statute" that violates the Constitution is no "law".[3338] It never was a "law". It never could have become a "law". It was a *nullity* at every stage of the legislative process. Even the very *attempt* to enact it must have been unconstitutional. And if one piece of *faux* "legislation" which violates one provision of the Constitution is a total nullity, and therefore beyond the power of Congress even to attempt to enact no matter how many rogue Members concert themselves for that purpose, how much more obnoxious is an attempt to enact, either at one fell swoop or incrementally, a comprehensive scheme of "gun control"—which is not just unconstitutional under the Militia Clauses and the Second Amendment, but attacks the continued existence of *all* constitutional government, by rendering the entire Constitution indefensible and denying the fundamental premiss of the Declaration of Independence?!

[3336] U.S. Const. amend. I.

[3337] U.S. Const. art. I, § 1 (emphasis supplied).

[3338] *See* Norton v. Shelby County, 118 U.S. 425, 442 (1886); Huntington v. Worthen, 120 U.S. 97, 101-102 (1887); *Ex parte* Siebold, 100 U.S. 371, 376-377 (1880); Fay v. Noia, 372 U.S. 391, 408 (1963).

To be sure, the Constitution provides that, "for any Speech or Debate in either House" of Congress, Senators and Representatives "shall not be questioned in any other Place".[3339] But, as is evidenced by its derivation from the Articles of Confederation—"[f]reedom of speech and debate in Congress shall not be impeached or questioned in any Court, or place out of Congress"[3340]—this immunity extends to "any *Speech or Debate*", *and nothing more*. Nonetheless, always eager to assist officials of the General Government to evade constitutional limitations on their actions, the Supreme Court has opined that "[i]t would be a narrow view of the constitutional provision to limit it to words spoken in debate", because "[t]he reason of the rule is as forcible in its application * * * to the act of voting" and to all other "things generally done in a session of [Congress] by one of its members in relation to the business before it".[3341] Here as elsewhere, the Justices employed their old trick of going outside of the Constitution's actual verbiage to the supposed "reason of the rule"—that is, *the Justices'* "reason" (usually cobbled together in their own words for the purposes of the case at hand), not the Constitution's, inasmuch as *the Constitution's* "reason" must be found *in its own words alone*. Surely, one must conclude from the words "Speech or Debate" that *their* "reason" is to allow Members of Congress to engage in untrammeled deliberation and discussion in which inaccurate, defamatory, criminal, and other unconstitutional *arguments* are licensed and tolerated—but not, after talk has finally cleared the air, to permit unconstitutional, let alone criminal, *actions* to be taken without fear of sanction. This is the distinction, familiar in modern First-Amendment jurisprudence, between mere abstract advocacy (which is always protected) and actual illegal action albeit predicated on speech or association (which is usually punishable).[3342]

As a perceptive Justice pointed out, "[i]t is one thing to give great leeway to the legislative right of speech, debate, and investigation. But when a committee perverts its power, brings down on an individual the whole weight of government

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[3339] U.S. Const. art. I, § 6, cl. 1.

[3340] Arts. of Confed'n art. V, ¶ 5.

[3341] Kilbourn v. Thompson, 103 U.S. 168, 204 (1881). In support of this conclusion, the Court cited no *pre*-constitutional authorities that involved "the act of voting", but instead relied on a *post*-ratification Massachusetts decision, which it described as "the most authoritative case in this country on the construction of the provision in regard to freedom of debate in legislative bodies". *Id.* at 203-204, *citing* Coffin v. Coffin, 4 Mass. 1 (1808). *Coffin*, however, involved nothing but speech: an alleged slander. Only in *dicta* did the Chief Justice of the Massachusetts court "not confine [the immunity] to delivering an opinion, uttering a speech, or haranguing in debate, but * * * extend[ed] it to the giving of a vote * * * and to every other act resulting from the nature, and in the execution, of the office". 4 Mass. at 27, *quoted in* 103 U.S. at 203. And this construction plainly expanded on the words of the Massachusetts constitution, that "[t]he freedom of deliberation, speech, and debate in either House of the legislature * * * cannot be the foundation of any accusation or prosecution, action, or complaint, in any other court or place whatsoever". *Quoted in* 103 U.S. at 203. *See also* Tenney v. Brandhove, 341 U.S. 367, 372-375 (1951), again relying on *Coffin*; *and* Eastland v. United States Servicemen's Fund, 421 U.S. 491, 501-506 (1975), also reading the Speech and Debate Clause "broadly".

[3342] *Compare, e.g.*, Noto v. United States, 367 U.S. 290 (1961), *with* Scales v. United States, 367 U.S. 203 (1961); *and see* Brandenburg v. Ohio, 395 U.S. 444, 447-449 (1969).

for an illegal or corrupt purpose, the reason for the immunity ends."[3343] Against this insight, the best the Court could offer was to worry that

> [i]n times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses.[3344]

When, however, legislators are called on the carpet, not just for talking about, but for casting their votes in favor of, some unconstitutional statute, they are being punished, not for their *motives*—which must be left to God to sort out—but for their *actions*, which they knew or should have known violated the supreme law of the land whatever their motives may have been. Throughout American history, legislators' "[s]elf-discipline" has proven to be an exceptionally weak reed on which to lean—as the Constitution presumes it always will be, in the limitations it imposes on the legislative authority of both the General Government and the States. And, as far as the General Government is concerned (and most of the States as well), "the voters" can intervene only every two, four, or six years, before which times the enforcement of an unconstitutional statute can wreak havoc throughout society. For example, a *faux* "statute" providing for comprehensive "gun control" which mandated the confiscation and destruction of all firearms and ammunition in private hands could be enacted at the beginning of a session of Congress, and then enforced for about two years with impunity from retaliation on the part of voters, until a new House of Representatives could be elected.[3345] The new House, of course, could not change the situation without the concurrence of the Senate and likely of the President, too. So two years would probably constitute a minimum period in which the "statute" were operative. Were the "statute's" enforcement successful, the foundation for "a free State" everywhere within the United States would be demolished—with what consequences it would be frightful to contemplate. For surely a rogue Congress that enacted comprehensive "gun control" would not shrink from employing other police-state measures to achieve its ends. And even if the "statute" were eventually repealed, the subsequent rearmament of America—which would necessitate producing and distributing tens if not hundreds of millions of new firearms—would be extremely expensive in terms of time, money, resources, and human effort.

The only *quasi*-legitimate avenue for bringing about "gun control" in America would be: (i) an Amendment "ratified by the Legislatures of three fourths

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[3343] Tenney v. Brandhove, 341 U.S. 367, 383 (1951) (Douglas, J., dissenting).

[3344] *Id.* at 378 (footnote omitted).

[3345] *See* U.S. Const. amend. XX, §§ 1 and 2.

of the several States, or by Conventions in three fourths thereof",[3346] expunging the Militia Clauses and the Second Amendment from the Constitution; together with (ii) the States' unanimous repeal or repudiation of at least the part of the Declaration of Independence which asserts WE THE PEOPLE'S "right" and "duty" to "throw off [an abusive] Government" by main force whenever necessary. In the course of the national debate on these combined proposals, the proponents of "gun control" could try to convince Americans that "[a] well regulated Militia" is *not* "necessary to the security of a free State". They could try to explain *how* "a free State" could be maintained in some other manner. Or *why* "a free State" were no longer desirable—and exactly *what* should replace it. Of course, this candid national conversation will never take place. For "gun controllers" know that an open attack on the Constitution and the Declaration along these lines would earn them nothing but ridicule and opprobrium.

On the other hand, at the present time WE THE PEOPLE need legislation that will enable them to bring private civil actions for declaratory and injunctive relief and for damages against every "gun controller", in public office or private station, who seeks to prevent common Americans eligible for the Militia from acquiring firearms suitable for Militia purposes, or to expropriate the firearms they already possess. Congress has the power, in aid of enforcing its authority under the Militia Clauses of the Constitution, to define such interference with "the right of the people to keep and bear Arms" as a "constitutional tort".[3347] And the States enjoy an equivalent power within their own jurisdictions, too. True enough, the Supreme Court has held that a State statute which proscribed knowing advocacy of the violent overthrow of the government of the United States was preëmpted by a similar law of the United States.[3348] *If* correctly invoked in that case (which is doubtful), the principle of preëmption nonetheless would not apply in the case of "gun control", because "the right of the people to keep and bear Arms" aims at their participation in "the Militia of the several States", which first and foremost are establishments the Constitution requires the States to maintain. If Congress did enact a law punishing subversion aimed at "gun control" specifically with respect to provisions that it may have made for "arming * * * the Militia" and for "calling forth" the Militia to "be employed in the Service of the United States", presumably an equivalent statute emanating from a State legislature might properly be preëmpted. But those provisions would not, because they could not, deal with the multifarious duties of "homeland security" the Militia might be required to fulfill in their own States and Localities when they were *not* "in the Service of the United States". With respect to *those* duties, the Constitution has delegated to Congress *no*

[3346] U.S. Const. art. V.

[3347] *See* U.S. Const. art. I, § 8, cls. 15, 16, and 18, *enforceable through, e.g.,* 42 U.S.C. § 1983.

[3348] Pennsylvania v. Nelson, 350 U.S. 497 (1956).

constitutional authority at all. So, because Congress could not enact a statute on that subject in the first place, no State law could be "to the Contrary"; and therefore no State law on that subject could possibly be preëmpted.[3349]

Of course, the whole problem of "gun control" would be solved were the Militia fully revitalized. For then most of the members of subversive private special-interest groups would be enrolled in the Militia, and subject to Militia scrutiny and discipline. Any attempt on their part to plump for "gun control" would soon be discovered, and would trigger fines within the Militia for undermining the Militia's readiness and morale, as well as such social sanctions as ostracism by other members of the community in all facets of life outside of the Militia. Strictly enforced, ostracism would likely be far more punishing to most individuals than the payment of fines.

[3349] *Compare* U.S. Const. art. I, § 8, cls. 15 and 16 *with* art. VI, cl. 2.

Part Four

FOREBODINGS

In the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex. The potential for the disastrous rise of misplaced power exists and will persist.

We must never let the weight of this combination endanger our liberties or democratic processes. We should take nothing for granted. Only an alert and knowledgeable citizenry can compel the proper meshing of the huge industrial and military machinery of defense with our peaceful methods and goals, so that security and liberty may prosper together.

Dwight D. Eisenhower

The quotation on the preceding page is taken from the Farewell Radio and Television Address to the American People, 17 January 1961, *in Public Papers of the Presidents of the United States, Dwight D. Eisenhower, 1960-61* (Washington, D.C.: U.S. Government Printing Office, 1961), at 1038.

CHAPTER FORTY-SEVEN

Unless "the Militia of the several States" are revitalized in the immediate future, America will devolve into a National *para*-military police state dominated by a "standing army" and a "military-industrial complex".

The Declaration of Independence provides both an admonition and a prescription which have proven valid throughout "the Course of human events": namely, that "any Form of Government" is capable of "becom[ing] destructive of the[ ] ends" for which all "Governments" should be "instituted among Men"; and that WE THE PEOPLE must rely upon themselves to expose, deter, and if necessary resist and overcome those "injuries and usurpations" which "hav[e] in direct object the establishment of an absolute Tyranny" over their country. Perhaps the most insidious of these "injuries and usurpations"—because it disguises itself under the flag of "national defense" and the yellow ribbons of "patriotism"—and surely among the most likely to prove fatal in the long run is the elaboration of a permanent professional "standing army" within a vast "military-industrial complex".

A. American history and common sense allied against a "standing army". There was a time when all Americans understood the danger of a "standing army".

1. The *pre*-constitutional view. During the *pre*-constitutional era, not only Americans looked upon a "standing army" with jaundiced eyes.

a. Panegyrist of the British monarchical system though he was, no less a figure of the Establishment than Blackstone himself recognized that

> [I]N a land of liberty it is extremely dangerous to make a different order of the profession of arms. In absolute monarchies this is necessary for the safety of the prince, and arises from the main principle of their constitutions, which is that of governing by fear: but in free states the profession of a soldier, taken singly and merely as a profession, is justly an object of jealousy. In these no man should take up arms, but with a view to defend his country and it's laws: he puts not off the citizen when he enters the camp; but it is because he is a citizen, and would wish to continue so, that he makes himself for a while a soldier. The laws therefore and constitution of these kingdoms [that is, England, Scotland, and Ireland] know no such state as that of a perpetual standing soldier, bred up to no other possession than that of war * * * .

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> WHEN the nation [that is, Great Britain] was engaged in war, more veteran troops and more regular discipline were esteemed to be necessary, than could be expected from a mere militia. And therefore at such times more rigorous methods were put in use for the raising of armies and the due regulation and discipline of the soldiery: which are to be looked upon only as temporary excrescences bred out of the distemper of the state, and not as any part of the permanent and perpetual laws of the kingdom. For martial law, which is built upon no settled principles, but is entirely arbitrary in it's decisions, is * * * in truth and reality no law, but something indulged, rather than allowed as a law: the necessity of order and discipline in an army is the only thing which can give it countenance; and therefore it ought not to be permitted in time of peace, when the king's courts are open for all persons to receive justice according to the laws of the land. * * *
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> BUT, as the fashion of keeping standard armies * * * has of late years universally prevailed over Europe * * * it has also for many years past been annually judged necessary by our legislature, for the safety of the kingdom, the defence of the possessions of the crown of Great Britain, and the preservation of the balance of power in Europe, to maintain even in time of peace a standing body of troops under the command of the crown; who are however *ipso facto* disbanded at the expiration of every year, unless continued by parliament. * * *
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> TO prevent the executive power from being able to oppress, * * * it is requisite that the armies with which it is entrusted should consist of the people, and have the same spirit with the people * * * . Nothing then, according to these principles, ought to be more guarded against in a free state, than making the military power, when such a one is necessary to be kept on foot, a body too distinct from the people.[3350]

Noteworthy is how Blackstone contrasted "a free state" with one that is "govern[ed] by fear", and therefore treated suspicion of, and effective "checks and balances" against, a "standing army" as natural and necessary in such a "state".

b. Americans of that era shared these concerns and concurred in these conclusions. Influential political philosophers of the time had taught them that "arms * * * are the only true badges of liberty; and ought never, but in times of utmost necessity be put into the hands of mercenaries or slaves"[3351]—which was hardly political or legal hyperbole, as even Blackstone likened a professional "standing army" to "the only state of servitude in the nation".[3352] Americans were

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[3350] *Commentaries on the Laws of England, ante* note 142, Volume 1, at 407, 412-414 (footnotes omitted).

[3351] A. Fletcher, A DISCOURSE OF GOVERNMENT, *ante* note 31, at 43.

[3352] *Commentaries on the Laws of England, ante* note 142, Volume 1, at 415-416.

also justifiably suspicious of the ever-ready pretense in favor of a "standing army", that their country was "in hazard of being invaded by a powerful enemy". So, with the philosophers of liberty, they were willing to ask whether "we [shall] therefore destroy our government? What is it then that we would defend? * * * Whether our enemies shall conquer us is uncertain; but whether standing armies will enslave us, neither reason nor experience will suffer us to doubt."[3353] Americans knew as well that a "standing army" need not actually wage war against the people, but can often "conquer by looking on * * * . For there is no debating or disputing against Legions."[3354] And in a few short years in the late 1700s Americans witnessed the British Army—which, as members of the Empire, they had long accepted as *their own* Army—transmogrify itself from a defender into an aggressor, to the extent that the Declaration of Independence assailed King George III because

> [h]e has kept among us, in times of peace, Standing Armies, without the Consent of our legislatures.—He has affected to render the Military independent of and superior to the Civil power.—He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation:—For quartering large bodies of armed troops among us * * * [and f]or protecting them, by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States: * * * —He has abdicated Government here, by declaring us out of his Protection and waging War against us. * * * —He is * * * transporting large Armies of foreign Mercenaries to compleat the works of death, desolation and tyranny, already begun with circumstances of Cruelty and perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation.

For all of these reasons, America's Founders were philosophically, politically, and legally committed to the proposition that "the Constitution must either break the Army, or the Army will destroy the Constitution: for it is universally true, that where-ever the [military power] is, there is or will be the Government in a short time".[3355]

Thus it was inevitable that, following hard upon their independence, Americans would embody these precepts and principles in their own fundamental laws. The constitutions of several of the independent States addressed the issue in precisely those terms, including:

[3353] A. Fletcher, A DISCOURSE OF GOVERNMENT, *ante* note 31, at 36.

[3354] THE SECOND PART OF AN ARGUMENT, Shewing, that a STANDING ARMY Is inconsistent with a Free Government, *ante* note 1519, at 13-14.

[3355] AN ARGUMENT, Shewing, that a STANDING ARMY Is inconsistent with a Free Government, *ante* note 27, at 4.

DELAWARE. "SEC[TION] 17. No standing army shall be kept up without the consent of the legislature; and the military shall, in all cases and at all times, be in strict subordination to the civil power."[3356]

MARYLAND. "[Article] XXVI. That standing armies are dangerous to liberty, and ought not to be raised or kept up, without consent of the Legislature.

"XXVII. That in all cases, and at all times, the military ought to be under strict subordination to and control of the civil power."[3357]

MASSACHUSETTS. "Art[icle] XVII. * * * [A]s, in time of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it."[3358]

NEW HAMPSHIRE. "[Article] XXV. Standing armies are dangerous to liberty, and ought not to be raised or kept up without the consent of the legislature.

"XXVI. In all cases, and at all times, the military ought to be under strict subordination to, and governed by the civil power."[3359]

NORTH CAROLINA. "[Article] XVII. * * * [A]s standing armies, in time of peace, are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to, and governed by, the civil power."[3360]

PENNSYLVANIA. "[Article] XIII. * * * [A]s standing armies in time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power."[3361]

SOUTH CAROLINA. "[Article] XLII. That the military be subordinate to the civil power of the State."[3362]

[3356] CONSTITUTION OF DELAWARE (1792), *in* THE FEDERAL AND STATE CONSTITUTIONS, *ante* note 1157, PART I, at 279.

[3357] A DECLARATION OF RIGHTS, *and the* CONSTITUTION *and* FORM *of* GOVERNMENT, *agreed to by the Delegates of Maryland, in free Convention Assembled* (1776), A DECLARATION OF RIGHTS, *in* THE FEDERAL AND STATE CONSTITUTIONS, *ante* note 1157, PART I, at 819.

[3358] CONSTITUTION OF MASSACHUSETTS (1780), PART THE FIRST, A DECLARATION OF THE RIGHTS OF THE INHABITANTS OF THE COMMONWEALTH OF MASSACHUSETTS, *in* THE FEDERAL AND STATE CONSTITUTIONS, *ante* note 1157, PART I, at 959.

[3359] CONSTITUTION OF NEW HAMPSHIRE (1784), PART I.—THE BILL OF RIGHTS, *in* THE FEDERAL AND STATE CONSTITUTIONS, *ante* note 1157, PART II, at 1282.

[3360] CONSTITUTION OF NORTH CAROLINA (1776), A DECLARATION OF RIGHTS, *in* THE FEDERAL AND STATE CONSTITUTIONS, *ante* note 1157, PART II, at 1410.

[3361] CONSTITUTION OF PENNSYLVANIA (1776), *A Declaration of the Rights of the Inhabitants of the State of Pennsylvania, in* THE FEDERAL AND STATE CONSTITUTIONS, *ante* note 1157, PART II, at 1542.

[3362] CONSTITUTION OF SOUTH CAROLINA (1778), *An act for establishing the constitution of the State of South Carolina, in* THE FEDERAL AND STATE CONSTITUTIONS, *ante* note 1157, PART II, at 1627.

> VIRGINIA. "Sec[tion] 13. * * * [T]hat standing armies, in time of peace, should be avoided, as dangerous to liberty; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power."[3363]

Other States made declarations to the same effect upon their ratifications of the Constitution of the United States:

> NEW YORK. "That standing Armies in time of Peace are dangerous to Liberty, and ought not to be kept up, except in Cases of necessity; and that at all times, the Military should be under strict Subordination to the civil Power."[3364]

> RHODE ISLAND. "[Article] 17th * * * [T]hat standing armies in time of peace, are dangerous to liberty, and ought not to be kept up, except in cases of necessity; and that at all times the military should be under strict subordination to the civil power[.]"[3365]

Indeed, in that era, no patriot dissented from the admonition that "standing armies in time of peace are dangerous to liberty". No less than George Washington himself, America's first "Commander in Chief", advised his countrymen to "avoid the necessity of those overgrown Military establishments, which under any form of Government are inauspicious to liberty, and which are to be regarded as particularly hostile to Republican Liberty".[3366] Thus it was only natural in later years for Justice Joseph Story to treat as an indubitable axiom of constitutional jurisprudence that "[i]t is against sound policy for a free people to keep up large military establishments and standing armies in time of peace, both from the enormous expenses with which they are attended and the facile means which they afford to ambitious and unprincipled rulers to subvert the government or trample upon the rights of the people".[3367]

2. Good reasons at any point in "the Course of human events" for suspicion of a "standing army". Washington and Story no doubt derived their admonitions from their familiarity with *pre-*constitutional history, rather than from any formal scientific study of the psychopathology of political power. Yet their

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[3363] VIRGINIA BILL OF RIGHTS (1776), *in* THE FEDERAL AND STATE CONSTITUTIONS, *ante* note 1157, PART II, at 1909.

[3364] Convention (1787), *in Documents Illustrative of the Formation of the Union of the American States*, *ante* note 1, at 1035.

[3365] Convention (1790), *in Documents Illustrative of the Formation of the Union of the American States*, *ante* note 1, at 1055.

[3366] Farewell Address (19 September 1796), *in* Victor H. Paltsits, *Washington's Farewell Address: In Facsimile, with Transliterations of all the Drafts of Washington, Madison, & Hamilton, Together with their Correspondence and Other Supporting Documents; Edited, with a History of its Origin, Reception by the Nation, Rise of the Controversy Respecting its Authorship, and a Bibliography* (New York, New York: The New York Public Library, 1935), at facsimile page 9.

[3367] *Commentaries on the Constitution*, *ante* note 576, Volume 2, § 1897, at 646.

admonitions rest on firm grounds there, too.[3368] "Standing armies"—whether of the traditional type, or composed of ostensibly "civilian" but *para*-militarized "police departments" and other "law-enforcement agencies"—cannot be trusted, because they tend to attract to, mold within, and advance through their ranks the very types of men and women who can be expected to side with and even egg on "ambitious and unprincipled rulers" against "the rights of the people"—to attempt to become such "rulers" themselves—and to exclude and weed out all other individuals who exhibit contrary inclinations. This, for a number of obvious reasons:

a. True "standing armies" are usually composed effectively of mercenaries, particularly within the corps of officers. During their careers, such professional soldiers are primarily concerned with continuing their employment and enhancing their ranks, medals and other awards, incomes, political influence, social standing, retirement-benefits, and other perquisites. As with operatives in any extensive bureaucracy largely unaccountable to the people, they are indifferent to whether they serve "a free State"[3369] or "a[n un]free State", or even to whether their supposed "service" transforms "a free State" into "a[n un]free State", as long as they can continually advance their institutional, professional, and personal self-interests. Unlike most bureaucracies, however, which although often pernicious are not necessarily inherently destructive and deadly, "standing armies" are mainly preoccupied in preparing for, and often actually engaging in, armed conflicts—and therefore concerned with convincing the ruling classes in the societies in which they exist that such activities are necessary and worth their exorbitant cost in blood and treasure. For the greater the danger and the extent of such conflicts, the greater the resources, power, and prestige "standing armies" can demand that public officials should turn over to them. So, because too long a period of tranquility draws into question the necessity for the very existence of "standing armies", peace is never their goal. Because the demands of modern warfare lay claim to next to everything society can produce, frugality is never their goal. And because, after truth, liberty is the first casualty in any society routinely engaged in warfare, "a free state" based upon individuals' unalienable rights and limited government is never their goal.

b. The archetypal complex of military command is inherently: (i) despotic, because it depends upon and therefore inculcates implicit and immediate obedience to orders "from the top down"; (ii) totalitarian, because it seeks to regiment not only the activities, but even the thoughts, of those subject to its control; and (iii) absolute, because it can demand that any member of the "standing army" lay down his very life, without asking precisely for what or specifically for whom that sacrifice must be made. Being antagonistic to the mental and moral faculties of free men, the

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[3368] *See, e.g.,* Andrew M. Łobaczewski, *Political Ponerology: A Science on the Nature of Evil Adjusted for Political Purposes* (Grande Prairie, Alberta, Canada: Red Pill Press, Second Edition, 2006).

[3369] *See* U.S. Const. amend. II.

military apparatus always attempts to attenuate, if it cannot eradicate, those faculties. If it cannot reduce the behavior of its rank and file to the purely physical level of "action and reaction", it will seek to degrade their behavior to the essentially mindless animalistic level of "stimulus and response", rather than rely to any significant degree upon a distinctly human appeal to intellectual, let alone moral, suasion of an elevated character. So, inevitably and ineluctably, most men who rise to positions of higher authority in that apparatus, as well necessarily as all those others who remain subject to them, will strongly tend to exhibit personalities that at least accommodate to, if not enthusiastically embrace, the principle of unquestioning obedience in a rigid "chain of command".[3370]

c. An hierarchical scheme imbued with an ethic of unquestioning obedience from inferiors to superiors tends to instill in its less psychologically balanced practitioners delusions—perverse, to be sure, but nonetheless intoxicating—of personal power and irresponsibility verging on the absolute. In light of Lord Acton's *dictum* that "absolute power corrupts absolutely", that "superior officers" and "higher authorities" will inevitably inculcate into soldiers of lesser rank the supposed duty mechanically and unquestioningly to "follow orders"—howsoever repugnant to law, morality, simple human decency, and common sense those orders may be—should hardly surprise anyone.[3371]

d. Institutionalized and highly organized military "peer pressure" will promote and excuse, and when necessary whitewash and cover up, the exercise of excessive, abusive, and even criminal power in "obedience to orders", as a requirement of "loyalty" to "the Service" as a whole, to a soldier's particular unit, to his commanders, or even to just his closest comrades. As immediate concerns of every soldier in the field, each of these will predictably exert more influence than an apparently abstract responsibility to obey his country's fundamental laws (as embodied in the Constitution), let alone the higher moral, philosophical, and religious principles on which all true "laws" must rest (as invoked by the Declaration of Independence). The idea that one can be loyal to "the Service" only by first and foremost being loyal to the Declaration of Independence and the Constitution "the Service" is intended to serve—*and without which "the Service" would have neither*

[3370] The few exceptions are the "Napoléonic" figures who, relying upon the robotic responses of their subordinates in the "chain of command", break free of the apparatus and impose themselves as dictators whose own wills become "military law". Individuals of this type, though, can become dangerous only where "standing armies" exist. Or, perhaps, where the political equivalents of "standing armies"—such as the Nazi Party under Hitler or the Communist Party under Stalin—have seized control of some country, including its actual "standing army".

[3371] In addition to endless anecdotal examples of "war crimes" and other military atrocities available in any library and throughout the Internet, *see* the controlled experiments by Stanley Milgram, *Obedience to Authority: An Experimental View* (New York, New York: Harper & Row, 1974). *See also* Philip Zimbardo, *The Lucifer Effect: Understanding How Good People Turn Evil* (New York, New York: Random House Trade Paperbacks, 2008).

legitimacy, nor authority, nor purpose, nor even existence—will cross the minds of all too few, and direct the conduct of even fewer.

e. Soldiers' baser self-interests will always rationalize rote "obedience to orders". After all, personal success in the typical military system depends upon step-by-step promotion through the ranks and grades, which demands steadfast adherence to the principle "don't rock the boat", and above all avoidance of any appearance of a penchant for challenging (or even being insufficiently deferential to) "superior authority". This process unavoidably engenders in its participants a studied careerism that focuses on awards for robotic behavior, serial advancements in rank, and through them arrival at a comfortable retirement—and therefore that tends to exclude or at least minimize and even discredit every critical thought that might endanger achievement of those goals.

f. Whenever political wordsmiths affix the label "war" to some deployment of soldiers—even in self-evidently inapplicable cases, such as "the war on terrorism", "the war on crime", or "the war on drugs"—mindless "obedience to orders" can and will be rationalized in such menticidal slogans as "standing tall", "staying the course", and "achieving victory". This, naturally, *without* defining exactly *what* "the course" is, *why* it should be "stayed", or exactly *how* "victory" is to be defined and won, and at *what* cost—because all too often what passes for "victory" advantages common soldiers precious little (except through the termination of hostilities), whereas it always serves the vastly disproportionate, if not exclusive, gain of "ambitious and unprincipled rulers" and their controllers and clients among selfish special-interest groups, the *only* ones who can be assured of being left "standing tall" after the smoke over the battlefields clears away. In such situations, "victory" is the elusive artificial rabbit after which the greyhounds futilely run, so that astute betters in the grandstands can collect exorbitant winnings.[3372]

g. Applying the stratagem that "to kill a dog you must first call him mad", propagandists serving "ambitious and unprincipled rulers" will encourage robotic "obedience to orders" that leads soldiers to commit "war crimes" and other illegal or immoral acts, by thoroughly dehumanizing and demonizing their ostensible "enemies"—whether these unfortunate victims be labeled "gooks", "wogs", "fuzzy wuzzies", or "towel-heads" overseas (who are denounced on the basis of their race, culture, or religion); "extremists" at home (who are often patriots, traduced on the basis of their political ideals); or "terrorists" anywhere (who may actually be freedom-fighters, defamed on the basis of the desperate tactics they are compelled to employ in order to resist their oppressors).

h. The inevitable result of the inculcation of such mindless obedience will be that a "standing army" can be employed for essentially *any* purpose, no matter

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[3372] *See, e.g.,* Smedley D. Butler, *War Is a Racket* (Costa Mesa, California: The Noontide Press, 1988).

how barbaric and vile, which those in control of it deem expedient—that is, military menticide is designed to promote mass homicide, which all too easily can lead to genocide, almost always of wholly innocent victims. Perhaps the starkest example of this occurred in the old Soviet Union. While Stalin reigned, the extensive *para*-military police-state apparatus set into motion by Lenin and the Old Bolsheviks—from the Cheka, through the OGPU, to the NKVD, MVD, and KGB—with the relentlessness of a machine arrested, imprisoned, tortured, worked or starved to death, assassinated, or otherwise wantonly murdered *tens of millions* of people in a genocidal reign of terror.[3373] Upon Stalin's death, although the apparatus subsisted, the very worst excesses of Stalinist mass repression abruptly attenuated. The members of the surviving cabal at the top—including Vyacheslav Molotov, Nikita Krushchev, and Lazar Kaganovich—were as guilty of past criminal acts as Stalin, whose enthusiastic henchmen they all had been; and, to a man, they doubtlessly had proven themselves fully capable of committing equally horrendous atrocities in the future. But it was in their collective and personal interests to eschew Stalin's most brutal methods, especially in dealing with each other. To that end, they turned off the killing machine: *And the same apparatus which had been arresting, torturing, and murdering mostly innocent people suddenly stopped arresting, torturing, and murdering (at least to the same degree) when and simply because it was ordered to do so.*[3374] Proving that the police-state operatives, although indispensable to the implementation of Stalin's reign of terror, were never the moving and controlling parties in its adoption, its employment, its continuation, or its termination. Rather, they were no more than gears in an essentially automatic transmission that imposed the leader's will—to whatever degree of malignancy—on the masses. And proving as well that, if the apparatus could have been turned off at the flick of a political switch, it could also have been turned on again with no less ease. Which should lead anyone of other than a Stalinist bent of mind to conclude that such an apparatus should never be suffered to come into existence in the first place, for any reason.

i. Illusory is the hope that "large military establishments and standing armies" can be debarred, deterred, or detoured from wrongdoing simply by nominally subordinating them to civilian authority—as embodied in the catch-phrase "civilian control of the military". For not just titular "*civilian* control" according to some organizational chart, but *constitutional* control *in fact as well as in law*, is requisite. For example, what good can come of nominal "civilian control" in America when, as a practical matter, "the military-industrial complex" has grown

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[3373] *See, e.g.,* Norman M. Naimark, *Stalin's Genocides* (Princeton, New Jersey: Princeton University Press, 2010).

[3374] For decades thereafter, though, the apparatus and its apologists resisted the rehabilitation of Stalin's victims, even while they sought to rehabilitate Stalin. *See* Anton Antonov-Ovseyenko, *The Time of Stalin: Portrait of a Tyranny* (New York, New York: Harper & Row, Publishers, Inc., 1981), at 313-346.

so large and absorbed so much economic and political power that it can simply overawe Congress and the President—so that a proposal from the Pentagon all too often will be intended, treated, and acquiesced in as a command? As this country's Founders well appreciated, "standing armies" can "conquer [simply] by looking on * * * . For there is no debating or disputing against Legions."[3375]

Much worse, what good is nominal "civilian control of the military" when America's leaders no longer adhere, not only to the directives of the Constitution, but also to the precepts of the Declaration of Independence which animate it? When this country is nothing better than a plutocracy—wherein public officials purposefully misconstrue the Constitution and misuse the governmental apparatus in order to advance the fortunes of high finance, big business, or some other parochial domestic or foreign special interests? Or a kleptocracy—wherein the governmental apparatus has degenerated into a den of insatiable political plunderers? Or even a kakistocracy—wherein the very worst elements within society have seized control of all the important levers of political and economic leadership? And especially when such a plutocracy, kleptocracy, or kakistocracy is administered according to *das Führerprinzip* ("the Leader Principle") by some latter-day *Duce*, *Vozhd'*, "Decider", or other false political Messiah whose grotesque misunderstanding of his constitutional powers as "Commander in Chief"[3376] fuels dangerous pretensions to, if not hallucinations of, personal *grandeur* on an *hyper*-Napoléonic scale, but who is unable to draw upon Bonaparte's talents?

B. A civilian *para*-military police-state apparatus no different in principle from, and perhaps more dangerous in practice than, a "standing army". America's Founding Fathers, who opposed even the relatively limited "standing armies" of their own day, would surely recoil in horror and disgust from the sight of this country's contemporary "military-industrial complex". The Founders had no opportunity, however, to become familiar with the type of modern *para*-military police state that employs heavily armed but ostensibly "civilian" law-enforcement, intelligence, and allied "security" agencies—at the apex of the system a secret-police apparatus headquartered in a "ministry of the interior"—to oppress a disarmed, disorganized, disoriented, and demoralized population. Their experience was limited to the lukewarm oppression of the British Army, particularly General Thomas Gage's rather circumspect military rule in Boston—although that proved quite sufficient to arouse their ire, leading as it did to the confrontation at Lexington and Concord in 1775.[3377] Yet, had the Founders suffered under a thoroughgoing *para*-military police state of the modern ilk, they would certainly have recognized and

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[3375] THE SECOND PART OF AN ARGUMENT, Shewing, that a STANDING ARMY Is inconsistent with a Free Government, *ante* note 1519, at 13-14.

[3376] U.S. Const. art. II, § 2, cl. 1.

[3377] *See, e.g.*, E. Forbes, *Paul Revere, ante* note 127, Chapters VI and VII.

denounced such an engine of repression as no less, perhaps far more, dangerous to liberty and self-government than any "standing army". They would have realized as well that such a police state would be more likely to arise out of or in conjunction with a "standing army" than to come into existence independently—and once in operation it would outstrip a "standing army" in the ability and willingness to oppress society.

1. In modern times, usurpers and tyrants have almost always begun their criminal activities through a carefully measured employment of a network of informers, *agents provocateurs*, civilian intelligence and investigatory agencies, and *para*-militarized police departments against selected victims, rather than through massive deployments of regular armed forces against citizens in general. Long before indiscriminate sweeps by storm troopers through entire cities, come arrests of particular rebels and dissenters by the secret police at three or four o'clock in the morning. Indeed, if carried out thoroughly and ruthlessly enough, such targeted repression can render promiscuous attacks by regular armed forces unnecessary, by imprisoning or even entirely "disappearing" vocal dissidents, tearing apart resistance-networks, and cowing the general populace first into passivity and then into collaboration.

2. Yet one need not posit some conspiracy among aspiring usurpers and tyrants as the exclusive, or even most likely, means by which an extensive internal-security apparatus, organized along centralized bureaucratic lines, can devolve into a nominally "civilian" but *para*-militarized police state little different in its potential for oppression from a blatant military dictatorship that "govern[s] by fear".[3378] Even in the absence of actual criminal personalities haunting the upper echelons of its leadership, any establishment of that type can be expected so to degenerate over time.

After all, perfect "bureaucratic security" inevitably aims at foreseeing, forestalling, frustrating, and at last fending off every imaginable danger to the régime. This requires "intelligence" and "counterintelligence" as extensive and comprehensive as possible. As far as human beings are concerned, therefore, perfect "bureaucratic security" needs to subject all manifestations of individual freedom to surveillance, interdiction, control, and wherever expedient suppression. In such a society, no one may do anything of any social, economic, or political significance without the "security forces'" knowledge. In principle, every aspect of personal privacy is prohibited, except what might be permitted—and even that residuum is always exposed to new restrictions from day to day.

Not surprisingly, then, the very model of perfect "bureaucratic security" is a maximum-security prison:

[3378] *See* W. Blackstone, *Commentaries on the Laws of England, ante* note 142, Volume 1, at 407.

- centrally controlled "from the top down";
- completely "planned", in that both the guards and the inmates always know what they are supposed to do, and almost never do—or at least are never allowed to do—anything else;
- easy and efficient to administer, because most of the participants have no say whatsoever in the process;
- effective at eliminating all privacy for both individuals and groups, thereby precluding conspiracies that can lead to serious threats posed by refractory inmates;
- ready, willing, and able to apply the maximum coercion required, to the level of outright homicidal sadism, to maintain order, subordination, and especially chronic fear among the inmates, with no legal recourse on their part; and thus
- capable of providing maximum "protection" to, in the sense of predictable control over, inmates, guards, and the outside world alike.

Of course, because an entire society cannot be incarcerated in actual prisons or labor camps at a reasonable cost, even the most fanatic proponents of "bureaucratic security" must settle for a form of effective "community house arrest" characterized by:

- the requirement that everyone must carry official identification always available for scrutiny by "the authorities" on demand;
- pervasive surveillance that sets neighbor to informing against neighbor, and pits technology (from cameras and wiretaps to microchips and GPS locators) against everyone;
- "zero tolerance" of any suspected, let alone actual, deviant behavior, along with arbitrary expansions of the definition of "deviance", so that everyone is always afraid of being charged with actions outside the boundaries of "political correctness", and therefore is always anxious to avoid attracting "the authorities'" least attention;
- the demand that individuals obey the commands of the police and other "law-enforcement authorities" instantly and completely, with the slightest resistance, remonstrance, or request for reasons being ranked as a serious offense, whether the original commands were legal or not; and
- punishments the severity of which wildly exceed the seriousness of the infractions, in order to maximize deterrence, and thereby make what Blackstone denounced as "governing by fear"—or, even more bluntly put, systematically institutionalized official terrorism—that much easier.

Because the "internal-security forces" in such a system will inevitably imagine that the most dangerous of all potential threats arise from somewhere amongst the people, they will oppose as counterproductive and even subversive whatever might give the people direct participation in providing or overseeing "security". Then, as an unavoidable consequence of not "consist[ing] of the people", these forces will not share "the same spirit with the people".[3379] Soon enough, they will accredit themselves as not only separate from but also superior to the people, and therefore will affix their loyalties not to the people but instead to the governmental apparatus, the executive administration in power, their own agency, or even simply their agency's leaders for the time being. Then only a short step remains for them to become outright antagonists of the people.

3. Inasmuch as in the final analysis "'[p]olitical power grows out of the barrel of a gun'",[3380] no originally "civilian" *para-*military police state could ever come into existence, let alone achieve dominance over society, in the face of determined opposition from a strong "standing army". Yet a "standing army" might not complain while a powerful civilian "internal-security apparatus" were methodically built up alongside it—it might look the other way even as that apparatus increasingly engaged in illegal activities aimed at repressing the populace—and it might even lend its support to those activities[3381]—because the army's leaders might imagine that they could coöpt "the internal-security apparatus" and thereby themselves exercise indirect control over society through the front of an ostensibly "civilian" police state. Should the leaders of "the standing army" prove correct, "the internal-security apparatus" would effectively become an adjunct of the army. Should events prove them wrong, however, and should the army itself somehow come under the supervision or control of "the internal-security apparatus"—as

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[3379] W. Blackstone, *Commentaries on the Laws of England, ante* note 142, Volume 1, at 413.

[3380] *Quotations From Chairman Mao, ante* note 28, at 61.

[3381] For example, by means of some arrangement such as An Act To authorize appropriations for fiscal year 1982 for the Armed Forces for procurement, for research, development, test, and evaluation, and for operation and maintenance, to prescribe personnel strengths for such fiscal year for the Armed Forces and for civilian employees of the Department of Defense, to authorize appropriations for such fiscal year for civil defense, and for other purposes, Act of 1 December 1981, Pub. L. 97-86, TITLE IX—GENERAL PROVISIONS, AUTHORIZATION OF MILITARY COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS, § 905(a)(1), 95 Stat. 1099, 1114; *now codified as amended at* 10 U.S.C. §§ 371 through 382.

See, e.g., An Act To provide for Fiscal Year 2008, with certain modifications to address the foreign sovereign immunities provisions of title 28, United States Code, with respect to the attachment of property in certain judgments against Iraq, the lapse of statutory authorities for the payment of bonuses, special pays, and similar benefits to members of the uniformed services, and for other purposes ("National Defense Authorization Act for Fiscal Year 2008"), Act of 28 January 2008, Pub. L. 110-181, TITLE XVIII—NATIONAL GUARD BUREAU MATTERS AND RELATED MATTERS ("National Guard Empowerment Act of 2007"), Subtitle A—National Guard Bureau, §§ 1814 and 1815, 122 Stat. 3, 495, 498-500; *and see* 10 U.S.C. § 113(g)(2). *See also, e.g.,* United States Northern Command, Joint Task Force Civil Support Command Brief (14 March 2008); Air Land Sea Application Center, CIVIL SUPPORT, MULTI-SERVICE TACTICS, TECHNIQUES, AND PROCEDURES FOR CIVIL SUPPORT (CS) OPERATIONS, FM 3-28.1, NTTP 3-57.2, AFTTP 3-2.67 (December 2007); Department of Defense DIRECTIVE, NUMBER 3025.12 (4 February 1994), "Military Assistance for Civil Disturbances (MACDIS)".

occurred in both Stalin's Russia and Hitler's Germany[3382]—then the army would effectively become an adjunct of the apparatus, perhaps thereafter incapable of reasserting its independence;[3383] and the apparatus would become, for all intents and purposes, the effective "standing army". In either event, though, the people would be subjected to systematic oppression. So the worst of all possible situations for any society is to be beset by *both* a "standing army" *and* an ostensibly "civilian" but *para*-militarized police establishment.

C. America slipping into thralldom to both a "standing army" and a nascent *para*-military police-state apparatus. Instead of "civilian control of the military" through the Militia (or in any other effective fashion), America now suffers from arrant, rampant, and accelerating "civilian collusion with the military" in an highly articulated, economically and politically entrenched, "military-industrial complex". America's "standing army" is no longer simply an adjunct and agency of the General Government, but is emerging as the power behind and even above that government, a veritable *imperium in imperio*. Worse yet, it is aligning itself with and assisting an ever-expanding ostensibly civilian *para*-military police-state apparatus centered in the Department of Homeland Security, which in turn is extending its tentacles into law-enforcement, emergency-services, and related agencies in every State and Local government—so that the entire federal system is being systematically deconstructed "from the top down".

1. "The military-industrial complex" far more extensive and entrenched today than in President Eisenhower's time. If President Eisenhower was accurate in describing this structure as only a "*military-industrial* complex" in 1960, use of that term today conceals the complex's real scope, strength, influence, and danger in American life.

a. As could have been predicted from analysis of the situation during Eisenhower's tenure,[3384] the complex now includes as active participants, not simply the regular Armed Forces of the United States (the "military" component) and manufacturers of armaments and related products (the "industrial" component), but also

> • a *political* component, consisting of elected and appointed public officeholders, candidates for public office, and the upper

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[3382] *See, e.g.,* Robert Conquest, *The Great Terror: Stalin's Purge of the Thirties* (Ontario, Canada: The Macmillan Company, 1968), Chapter 7 (the Soviet Union); John W. Wheeler-Bennett, *The Nemesis of Power: The German Army in Politics 1918-1945* (London, England: Macmillan and Company Limited, 1964), Part III, Chapter 2 (Nazi Germany).

[3383] *See, e.g.,* Ulrich von Hassell, *The von Hassell Diaries, 1938-1944* (London, England: Hamish Hamilton, 1948); Hans Bernd Gisevius, *Valkyrie: An Insider's Account of the Plot To Kill Hitler* (Cambridge, Massachusetts: Da Capo Press, 2009).

[3384] *See, e.g.,* C. Wright Mills, *The Power Elite* (New York, New York: Oxford University Press, 1956).

echelons of the "two" major political parties the platforms, programs, and policies of which promote ever-more-extensive military adventurism abroad and ever-more-intensive militarization of society at home;

• a *scientific and technological* component, consisting of experts engaged in research and development in public and private universities, institutes, and laboratories;

• an *economic* component, consisting of oligopolistic factions and other special interests—particularly in the interconnected fields of *haute finance*, natural resources, and managed global trade—the exclusive territories and profits of which the Armed Forces are expected to protect, and where possible enlarge and enhance;

• an *ideological* component, consisting of the big domestic media and other outlets, particularly on the Internet, that churn out blatantly chauvinistic and jingoistic propaganda, agitation, and disinformation; and even

• an *alien* component, consisting of agents of influence, *agents provocateurs*, specialists in "black operations", and other subversives deployed on behalf of the complex by certain foreign states to intervene in American electoral campaigns, lobby Congress, amplify the party line put out by the big domestic media, and defame opponents of American militaristic imperialism. (Some of these foreign powers are highly questionable fellow-travelers at best, because they are not above widespread espionage and the trading of stolen secrets to America's enemies.)

Moreover, "the military-industrial complex" is anything but narrowly "military" in the traditional sense of that term. Rather, with the emergence of the global "war on drugs" and "war on terrorism" and the paranoiac emphasis on domestic "homeland security", its proponents rationalize its existence and the ever-multiplying burdens it imposes upon America through pretensions to omnicompetence: the supposed ability to provide *every* type of "security", "military" or "civilian", that might be required in relation to *every* kind of "crisis" that could possibly beset this country—including aggression from foreign states, "terrorism" of all sorts, traffic in illegal drugs and other forms of organized crime, emergency responses to natural disasters and industrial accidents, and even protection of the environment.

Furthermore, "the military-industrial complex" is not "industrial" in the traditional American sense of that term as denoting production in the free market for consumption largely by private consumers. Indeed, it exhibits characteristics

quite the opposite of a free-market economy: *First,* the consumers of its wares are primarily the General Government and to a lesser degree the States. *Second*, because the "military-industrial complex" deals in armaments the possession of which is prohibited for almost all private citizens, the producers are effectively the General Government's and the States' *alter egos*. *Third*, the complex derives its income from moneys extracted by force from taxpayers. *And fourth,* domestically at least, the products and the people who use them are increasingly being employed by police-state operatives to cow or actually coerce common Americans into ideological conformity with, or at least acquiescence in, the complex's world view. Essentially, the complex is *fascistic* in structure: ostensibly private corporations at the economic level, Congress and the President at the highest political level, all interlocked and interacting through the central agency of the Pentagon.[3385] However this establishment came to be erected—whether the General Government originally captured the industries or the industries originally captured the Government, and in what manner the Armed Forces willingly participated in or were dragooned into these developments—the situation now is one of mutual co-dependence: The manufacturers of armaments depend upon the continuation and if possible extension and intensification of an aggressively militaristic foreign policy; and public officials (both civilian and military) depend upon those manufacturers to supply the up-to-date equipment with which to implement such a policy.

b. Ironically, "the military-industrial complex" *is* a true "complex" in the specifically psychopathological sense, because it is designed or at least operates to instil, and certainly has the effect of instilling, in average Americans paranoia, despondency coupled with dependency, identification with the aggressor, chauvinism and jingoism, historical amnesia, and political stupor. To be sure, some threats against which "the military-industrial complex" claims to be preparing or deploying may be real and even serious. But experience, as well as common sense and an healthy level of political skepticism, counsel that most are exaggerated, hypothetical, conjectural, imaginary—or even utterly fictitious, because they derive from "false-flag" and other "black operations" of various domestic and foreign intelligence and law-enforcement agencies. Unfortunately for most contemporary Americans, fear (howsoever artificially induced) all too readily supplants reason. Exposed to never-ending warnings about impending threats, and even to revelations of supposed plots, against which they are told they are unequipped and unable to protect themselves, all too many Americans have swallowed and become addicted to the official snake oil that they must surrender more and more of their freedoms to a very real, immediate, massive, intrusive, and abusive military-*cum*-police

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[3385] What should be a familiar parallel is the Federal Reserve System: ostensibly private banks at the economic level, Congress and the Treasury at the highest political level, all interlocked and interacting through the central agency of the Board of Governors. *See, e.g.,* E. Vieira, Jr., *Pieces of Eight, ante* note 39, Volume 1, at 799-866.

apparatus as the unavoidable price of waging foreign "wars" (none of them properly declared[3386]) and of providing domestic "homeland security" against retaliation by "terrorists" who threaten to attack the United States for waging those "wars". Overall, average Americans are so shell-shocked by the speed and the brutality with which, in the name of the global "war on terrorism" especially, "the military-industrial complex" has compromised and even suppressed their fundamental liberties at home—and are so riddled with guilt and loss of self-respect for not having stood up against these developments when standing up would have cost relatively little—that they are temporarily incapable of bringing to mind their country's birth in WE THE PEOPLE'S *self*-government through *self*-defense, let alone of actually acting in their own self-defense through self-government.

2. A *para*-military police state the permanent domestic capstone to "the military-industrial complex". In this politically catatonic state of induced imbecility and inactivity, all too many Americans are demonstrating a lap-dog willingness to roll over for a top-heavy, ever-expanding *para*-military police-state apparatus being erected at the apex of the "the military-industrial complex".

a. The police-state apparatus already in operation. The danger from a National *para*-military police-state apparatus is not simply a matter of conjecture or prediction. For just such an apparatus, becoming more extensive every day, is now operating throughout America.

(1) The apparatus consists of myriads of "intelligence" and "internal-security" bureaucrats, law-enforcement personnel, and professional soldiers—all basically mercenaries—most of whom demonstrate little personal or institutional interest in maintaining "a free State" (as the Second Amendment understands that term) anywhere in America.[3387]

(2) The apparatus is becoming truly ubiquitous—casting a net of "top-down" control or influence from its headquarters in the Department of Homeland Security in the District of Columbia into every State and Locality, through such outposts as "fusion centers".[3388]

[3386] *See* U.S. Const. art. I, § 8, cl. 11.

[3387] For example, as of this writing, "[f]unds are * * * authorized to be appropriated * * * for the conduct of the intelligence and intelligence-related activities" of some *eighteen different* "elements of the United States Government", from the Central Intelligence Agency to the Departments of the Treasury, Justice, and Energy. An Act To authorize appropriations for fiscal year 2012 for intelligence and intelligence-related activities of the United States Government, the Community Management Account, and the Central Intelligence Agency Retirement and Disability System, and for other purposes, Act of 3 January 2012, Pub. L. 112-87, TITLE I—INTELLIGENCE ACTIVITIES, § 101, 125 Stat. 1876, 1877-1878.

[3388] *Compare and contrast, e.g.,* U.S. Department of Homeland Security, State and Major Urban Area Fusion Centers, at <www.dhs.gov/files/programs/gc_1156877184684.shtm> *with* Federal Support for Involvement in State and Local Fusion Centers, Majority and Minority Staff Report, United States Senate Permanent Subcommittee on Investigations (3 October 2012), *and with* Michael German and Jay Stanley, *What's Wrong with Fusion Centers?* (New York, New York: American Civil Liberties Union, 2007).

(3) Drawing upon enormous financial and material resources, the apparatus is attempting to raise law-enforcement and allied agencies at every level of the federal system to the highest technological state of readiness—so as to be able to overcome the quantity of Americans the apparatus foresees it may have to repress, through the quality of the equipment and tactics its relatively few myrmidons employ. That this process has been going on since well before 11 September 2001 indicates that it is not the product of the initiation of "the war on terrorism", but instead that both it and "the war on terrorism" are products of an overarching plan conceived much earlier.[3389] These arrangements could be called "the *para*-militarization of the police throughout America", or "the absorption of the police into the regular Armed Forces as *para*-military auxiliaries", or "the deployment throughout America of a standing army of occupation with ancillary police functions"—but, howsoever described, they have raised serious constitutional concerns even in "mainstream" legal publications.[3390]

(4) Its touts advertise the police-state apparatus as indispensable in order to fight "the war on terrorism". Any thinking observer, however, can recognize that, rather than a "war *on* terrorism" directed at *foreign* foes, the apparatus is actually preparing for, and even starting to wage, a "war *of* terrorism", step by step, *against the American people at home*. This is what anyone should expect, inasmuch as the first dictionary definition of "terrorism" is "a mode of government by terror or intimidation".[3391] And *anti*-"terrorism" legislation defines "domestic terrorism" as "activities that * * * involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State" and "appear to be intended * * * to intimidate or coerce a civilian population"[3392]—which definition would clearly

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[3389] *See, e.g.,* An Act To authorize appropriations for fiscal year 1982 for the Armed Forces for procurement, for research, development, test, and evaluation, and for operation and maintenance, to prescribe personnel strengths for such fiscal year for the Armed Forces and for civilian employees of the Department of Defense, to authorize appropriations for such fiscal year for civil defense, and for other purposes, Act of 1 December 1981, Pub. L. 97-86, TITLE IX—GENERAL PROVISIONS, AUTHORIZATION OF MILITARY COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS, § 905(a)(1), 95 Stat. 1099, 1114; *now codified as amended at* 10 U.S.C. §§ 371 through 382.

[3390] *See generally, e.g.,* Karen R. Singh, "Treading the Thin Blue Line: Military Special-Operations Trained Police SWAT Teams and the Constitution", 9 *William & Mary Bill of Rights Journal* 673 (2001).

[3391] *Webster's Revised Unabridged Dictionary, ante* note 11, at 1489. *Accord, The Compact Edition of the Oxford English Dictionary, ante* note 11, Volume 2, at 3268; *Webster's New International Dictionary, ante* note 330, at 2608, definition b.

[3392] An Act To deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes ("Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001"), Act of 26 October 2001, Pub. L. 107-56, TITLE VIII—STRENGTHENING THE CRIMINAL LAWS AGAINST TERRORISM, § 802(a)(5)(A) and (B)(i), 115 Stat. 272, 376; *now codified at* 18 U.S.C. § 2331(5)(A) and (B)(i). This Act was subsequently reauthorized in An Act To extend and modify authorities needed to combat terrorism, and for other purposes, Act of 9 March 2006, Pub. L. 109-177, 120 Stat. 192; *and* An Act To provide for an additional temporary extension of programs under the Small Business Act and the Small Business Investment Act of 1958, and for other purposes ("PATRIOT Sunset Extension Act of 2011"), Act of 26 May 2011, Pub. L. 112-14, § 2(a), 125 Stat. 216, 216.

embrace many acts of rogue public officials aimed at depriving Americans of constitutional and other civil rights.[3393] Moreover, today's "war *of* terrorism" is not the first one rogue officials and the special interests behind them have relentlessly waged against whole peoples within America.[3394]

b. Specious "exceptions" to WE THE PEOPLE'S constitutional rights the initial source of expansive powers for the police-state apparatus. Cleverly, the contractors constructing the apparatus did not set out through an open frontal attack on the Constitution to amass all at once a set of totalitarian powers rivaling those of the old communist East German *Ministerium für Staatssicherheit* (the notorious "*Stasi*"). Instead, well versed in the political tactic of "salami slicing", rogue officials of the General Government have employed the tried-and-true subterfuge of "the living Constitution" to jury rig *ersatz* "exceptions" to the Bill of Rights that step by step have expanded their apparent authority, without arousing opposition from the great mass of Americans unable to understand or unwilling to admit to themselves what was going on before their very eyes. For a particularly egregious example, as of this writing the United States Border Patrol—with the approbation of the Supreme Court—claims the authority to conduct random searches of *all* vehicles at "check-points" up to *one hundred miles inside* this country's borders, without "Warrants * * * issue[d] * * * upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized".[3395] This judicially created "exception" to what by its literal terms is a prohibition in the Fourth Amendment of *all* "unreasonable searches and seizures" *without exception*, rests upon the preposterous notion that "maintenance of a traffic-checking program in the interior is necessary because the flow of illegal aliens cannot be controlled effectively at the border".[3396] That is, *because some public officials have proven themselves incompetent to perform their constitutional functions where those functions should be performed, they may violate the Constitution in order to attempt to perform, presumably with equal incompetence, the very same functions in places where they have no authority to perform them!* On this ridiculous reasoning, the worse these officials' failures to fulfill their duties become, the greater their discretion expands to establish "check-points" farther and farther within "the interior"—until finally the *entire* "interior" will be excised from the Fourth Amendment. Yet, some thirty-six years (as of this writing) after the Supreme

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[3393] *See, e.g.,* 18 U.S.C. §§ 241 and 242.

[3394] *Compare* Thomas Powers, *The Killing of Crazy Horse* (New York, New York: Alfred A. Knopf, 2010) *with* Peter Matthiessen, *In the Spirit of Crazy Horse* (New York, New York: Viking, 1991).

[3395] U.S. Const. amend. IV. Actually, such searches would be unconstitutional even with "Warrants", because they would amount to the type of dragnets licensed during *pre*-constitutional times by the infamous "writs of assistance". *Contrast* Boyd v. United States, 116 U.S. 616 (1886), *and* Gouled v. United States, 255 U.S. 298 (1921), *with* Warden v. Hayden, 387 U.S. 294 (1967), *especially* 387 U.S. at 312 (Fortas, J., concurring). *See, e.g.,* Maurice H. Smith, *The Writs of Assistance Case* (Berkeley, California: University of California Press, 1978).

[3396] United States v. Martinez-Fuerte, 428 U.S. 543, 556 (1976) (Powell, J., for the Court).

Court first enunciated that puerile absurdity, the unconstitutional activity still continues unabated.

One need not suffer from even incipient paranoia to suspect, though, that something other than childish illogic was at work in this matter—that, instead, a plan was being put into operation to use securing this Nation's borders as an excuse to extend throughout the country police-state controls that would be arguably legitimate only at the borders (and, in some instances, not even there). So, one can anticipate that the United States Transportation Safety Administration will soon endeavor to enforce this type of "exception" to the Fourth Amendment on all American citizens throughout the country. After all, if the TSA can subject every passenger in the process of boarding an airplane to a degrading and possibly dangerous search without a shred of probable cause of any conceivable violation of any law, why can it not accost people boarding or riding trains, busses, automobiles, or bicycles—or merely walking from place to place? All of these are modes of "transportation"; any traveler might turn out to be an illegal alien; any illegal alien, or for that matter any legal alien or even citizen, might be a domestic "terrorist"; and the TSA would be the first to claim that *"the flow of* [*domestic 'terrorists' along the terrestrial arteries of commerce*] *cannot be controlled effectively" unless everyone using any and every means of transportation is subject to search at all times*.

Actually, this would be but one small step farther along the dark path down which the Supreme Court has dragged the Fourth Amendment towards effective extermination. For if the Court's recent decision licensing police to strip-search anyone arrested for any reason whatsoever, no matter how conjectural or contrived, which eviscerates the Amendment's guarantee of "[t]he right of the people to be secure in their persons",[3397] is combined with the Court's earlier ruling that an arrest without a warrant but on the basis of alleged probable cause of the violation of *any* law, no matter how minor, does not constitute an "unreasonable * * * seizure[ ]" under the Fourth Amendment,[3398] rogue police may henceforth detain, intimidate, and even personally humiliate essentially *any* American against whom they can dummy up *any* trivial charge. Because the first definition of "terrorism" in the English lexicon is "government by * * * intimidation",[3399] *cumulatively these decisions already license the police* ***literally*** *to* ***terrorize*** *every individual they accost for any supposed infraction of any law whatsoever*. If TSA agents or other police invested with authority to supervise "travel" may confront individuals who are "traveling" and demand that they submit to interrogation and invasive searches, and any alleged

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[3397] Florence v. Board of Chosen Freeholders of County of Burlington, No. 10-945, ___ U.S. ___ (2012) (Kennedy, J., for the Court).

[3398] Atwater v. City of Lago Vista, 532 U.S. 318 (2001) (Souter, J., for the Court).

[3399] *Webster's Revised Unabridged Dictionary, ante* note 11, at 1489. *Accord, The Compact Edition of the Oxford English Dictionary, ante* note 11, Volume 2, at 3268.

resistance on the part of those individuals—whether physical, verbal, or merely attitudinal—can be made out to constitute probable cause to suspect the violation of any law, then every "traveler" who does not cringe in abject submission to the demands of any TSA thug can be subjected to detention and strip-searches.[3400]

c. Fully *anti*-constitutional powers now being claimed. Not satisfied with powers adventitiously cobbled together one by one through ludicrous *ad hoc* "exceptions" to the Bill of Rights over the years, the "internal-security" bureaucrats in the District of Columbia have embarked upon a systematic program to arm themselves with a complete set of integrated and comprehensive police-state powers, the breadth and depth of which they rationalize as supposedly necessary to wage "the war on terrorism". These are not merely *extra*-constitutional powers, in the sense of limited "exceptions" that perhaps amount only to annoying yet not terminally debilitating cracks in the Constitution's walls, but instead are truly *anti*-constitutional powers, because they will—and are intended to—undermine its very foundations and in short order bring down the entire edifice in a controlled demolition. These powers include—

(1) The purported power to disseminate "official lies". The issue here is not so much the formal *legal* power of public officials, as it is their *practical* power in terms of their ability and willingness knowingly to broadcast falsehoods under some governmental imprimatur, to withhold facts, or to deceptively discolor the presentation of information under the invocation of "national security", "state secrets", "executive privilege", or some other question-begging rubric, whenever they choose to do so. For in a constitutional republic no such general *legal* authority can possibly exist. WE THE PEOPLE cannot supervise the conduct of their "representatives" if the "representatives" can deceive them at will through self-serving acts of commission or omission. If the "representatives" can lie to or withhold information from THE PEOPLE at discretion, then THE PEOPLE cannot determine whether they are being properly "represented". And if THE PEOPLE cannot know whether they are being "represented" properly, then for all meaningful intents and purposes they are *not* being "represented" at all. No politically sane

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[3400] Out of an excess of charity, one may assume that the Justices who decided the cases cited in the text did not foresee and intend this unconscionable result, but that instead it arose mechanically out of the so-called "gradual process of judicial inclusion and exclusion" which has come to be adopted in constitutional cases. *See* Davidson v. City of New Orleans, 96 U.S. 97, 104 (1878). According to the Court, this process requires the Justices to decide each case on as narrow a basis as possible, without consideration of the possible consequences the aggregation of prior holdings may have in different situations in the future. As the common aphorisms have it, they will "take only one step at a time" and will "cross that bridge only when they come to it". While the Justices wait for some appropriate case trudging the long road of litigation to arrive at that distant bridge, however, rogue "law-enforcement agencies", always eager to expand their powers, will inevitably extrapolate those decisions to their limits (and even beyond), to common Americans' gravest disadvantage. Indeed, a thoroughgoing police-state apparatus aggressively pushing the threat of detention and strip-searches in every possible venue could be expected to cow all too many Americans into sheepish obedience to every policeman's every command, no matter how unlawful it might be found to be at the end of a tedious course of litigation which almost none of the victims would be able to pursue.

people would ever accept supposed "representation" on such deceitful terms. Thus, no "Government[ ] instituted among Men" could ever "deriv[e] * * * [such an un]just power[ ] from the consent of the governed".[3401]

The seriousness of the present-day problem in this country inheres not merely in the emission of falsehoods and the suppression of truth by officialdom in the conduct of public business, but in the peculiarly pervasive and persistent character of this malfeasance. It is not a matter of adventitious, even though widespread, lies, half-truths, and withholding and destruction of evidence by rogue officials intent only upon covering up, whitewashing, or bathing in a false light their own incompetence, negligence, willful misbehavior, or even criminal wrongdoing. Under such circumstances, Americans would suffer simply from a passing climate or culture of political dishonesty and corruption which they could correct, case by case, through exposure, impeachment, defeat at the next election, or prosecution of particular rogue officials—the standard "checks and balances" of representative, republican government. Unfortunately and ominously, the present situation involves not just a few episodes of dishonesty and corruption disconnected with one another, but instead the conscious, systematic, and institutionalized use of falsehoods as components of or means of promoting, implementing, and defending unpopular and even blatantly illegal policies—that is, "*official* lies"—for the promulgation and consequences of which their purveyors expect *never* to be called to account in any way, because they control and therefore can fend off or subvert all of those "checks and balances".[3402]

To be sure, the enforcement of secrecy on the one hand and the dissemination of disinformation on the other may be necessary and fully justified in order to deceive real enemies in times of actual war.[3403] But in recent decades "official lies" have increasingly become the debased currency of public discourse in order to hide or misrepresent rogue officials' involvement in such horrendous wrongdoing as goading a foreign nation into launching a "surprise" attack in order to enrage reluctant Americans into waging a war which neither nation ever needed to fight in the first place;[3404] stirring up hysterical racial prejudice and malicious

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[3401] *See* Declaration of Independence.

[3402] For example, by using threats of prosecution to deter "whistleblowers" from releasing embarrassing information to the public. In aid of rendering this code of *omertá* effective, the Supreme Court has ruled that the First Amendment—notwithstanding its guarantees for the freedoms of speech and of the press, and the right to petition the government—does *not* prohibit rogue officials from retaliating against a public employee who volubly objects to official misconduct in the course of his employment. *See* Garcetti v. Ceballos, 547 U.S. 410 (2006). Of course, in some situations a few weak statutory protections for "whistleblowers" may be available. *See, e.g.,* 5 U.S.C. § 2302(b)(8).

[3403] *See, e.g.,* Anthony C. Brown, *Bodyguard of Lies* (New York, New York: Harper & Row, Publishers, 1975).

[3404] *Compare and contrast, e.g.,* Robert B. Stinnett, *Day of Deceit: The Truth About FDR and Pearl Harbor* (New York, New York: Touchstone, 2000) (exposes but approves of Roosevelt's deceptions); *and* Mark E. Willey, *Pearl Harbor: Mother of All Conspiracies* (Bloomington, Indiana: Xlibris Corporation, 2000) (strongly

charges of disloyalty against American citizens and resident aliens of a particular ethnic origin, while suppressing information that established their loyalty, so that they could be rounded up and detained in concentration camps;[3405] generating false "intelligence" ("an old grey mare" in the profession's jargon) in order to rationalize aggression against a foreign nation which posed no threat to the United States;[3406] and even framing and then liquidating a "lone gunman" as the assassin of the President of the United States, when in fact, even if the designated patsy was somehow implicated in the crime, a complex conspiracy was the true collective culprit.[3407]

Perhaps the worst of this genre—because they could trigger international confrontations leading to major wars—are the "false-flag" and other "black operations" which in recent years have been and continue to be mounted in order to foment various military adventures and other acts of aggression in the Balkans, Africa, and the Middle East. These are nothing new. As early as 1962, a study prepared for the Joint Chiefs of Staff outlined how such an operation, code-named "Northwoods", could be conducted.[3408] The proponents described "pretexts which [the Joint Chiefs of Staff] consider would provide justification for US military intervention in Cuba".[3409] The "premise" was

> that US military intervention will result from a period of heightened US-Cuban tensions which place the United States in the position of suffering justifiable grievances, World opinion, and the United Nations forum should be favorably affected by developing the international image of the

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disapproves of Roosevelt's actions).

[3405] *See* Michi Weglyn, *Years of Infamy: The Untold Story of America's Concentration Camps* (New York, New York: William Morrow and Company, Inc., 1976), Chapter 1.

[3406] *See, e.g.,* Sheldon Rampton and John Stauber, *Weapons of Mass Destruction: The Uses of Propaganda in Bush's War on Iraq* (New York, New York: Jeremy P. Tarcher / Penguin, 2003). Revealingly, the propaganda and agitation put out to manufacture mass hysteria over Iraq fit the standard rhetorical pattern of "gun control": namely, that disarming Iraq of "weapons of mass destruction" would make the American people safe. Generalized internationally, the notion is that disarming *all* nations of "weapons of mass destruction" will make the population of the entire world safe—*except, of course, from the nation or* supra-*national institution which proves powerful enough (presumably, through its own permanent possession of "weapons of mass destruction") to impose such disarmament on every other nation or institution.*

[3407] *See, e.g.,* James W. Douglass, *JFK and the Unspeakable: Why He Died and Why It Matters* (New York, New York: Touchstone, 2008); Stewart Galanor, *Cover-Up* (New York, New York: Kestrel Books, 1998); Harrison E. Livingstone and Robert J. Groden, *High Treason: The Assassination of JFK & the Case for Conspiracy* (New York, New York: Carroll & Graf Publishers, Inc., 1998); *Assassination Science: Experts Speak Out on the Death of JFK*, James H. Fetzer, Editor (Peru, Illinois: Catfeet Press, 1997); Noel Twyman, *Bloody Treason. On Solving History's Greatest Murder Mystery: The Assassination of John F. Kennedy* (Rancho Santa Fe, California: Laurel Publishing, 1997).

[3408] *See* <http://www.gmu.edu/~nsarchiv/news/20010430/doc1.pdf>.

[3409] REPORT BY THE DEPARTMENT OF DEFENSE AND JOINT CHIEFS OF STAFF REPRESENTATIVE ON THE CARIBBEAN SURVEY GROUP to the JOINT CHIEFS OF STAFF on CUBA PROJECT (13 March 1962), at 2.

> Cuban government as rash and irresponsible, and as an alarming and unpredictable threat to the peace of the Western Hemisphere.[3410]

"Such a plan would enable a logical build-up of incidents to be combined with other seemingly unrelated events to camouflage the ultimate objective".[3411] Among the steps calculated to rationalize military intervention were: (i) "legitimate provocation" by "[h]arassment plus deceptive actions to convince the Cubans of imminent invasion"; (ii) "[s]tart rumors (many)"; (iii) "[a] 'Remember the Maine' incident could be arranged" by "blow[ing] up a drone (unmanned) vessel anywhere in the Cuban waters", with faked "[c]asualty lists in US newspapers" to "cause a helpful wave of national indignation"; (iv) "develop a Communist Cuban terror campaign in the Miami area, in other Florida cities and even in Washington", by "[e]xploding a few plastic bombs in carefully chosen spots, the arrest of Cuban agents and the release of prepared documents substantiating Cuban involvement"; (v) "[h]ijacking attempts against civil air and surface craft"; (vi) "[a] 'Cuban-based, Castro-supported' filibuster could be simulated against a neighboring Caribbean nation"; and (vii) "create an incident which will demonstrate convincingly that a Cuban aircraft has * * * shot down a chartered civil airliner".[3412] The last of these is particularly revealing, in that it adumbrated how someone at a high level in "the military-industrial complex" could have imagined using drone aircraft to stage the incident that triggered "the war on terrorism".

Although the "Northwoods" conspiracy was apparently never carried to its ultimate conclusion, the tactics it proposed have been employed so repetitively since 1962, and in so many different venues, that they have become, as the wag remarked, "just *déjà vue* all over again". One need only substitute for "Cuba" some other foreign country—such as Iraq, Libya, Syria, or Iran—in the foregoing passages to recognize that most of the modern imperialistic foreign policy concocted in the District of Columbia has closely adhered to this formula. (With, of course, some additions to the litany of excuses for intervention, such as that the régime in the targeted country has, or is developing, "weapons of mass destruction"; is terrorizing its own citizens; or is engaged in a civil war with synthetic "freedom fighters" who somehow deserve massive armed support from "the international community".)

In all of this, the exquisitely Orwellian nature of "pretexts which * * * would provide justification" appears not to have bothered the Joint Chiefs of Staff, or anyone else in a high-level position in the General Government, either then or thereafter. Yet, by their own choice of words, they condemned the very principle of the "Northwoods" operation and its many progeny and imitators as illogical, unjust,

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[3410] *Id.*

[3411] *Id.* at 5.

[3412] *Id.* at 7-10.

illegal, and amoral. For a "justification" is "a showing or proving to be just or conformable to law, justice, right, or duty"—whereas a "pretext" is an "[o]stensible reason or motive assigned as a color or cover for the real reason or motive; pretense; disguise".[3413] So, if an action's conformity "to law, justice, right, or duty" is intentionally nothing more than a "disguise", then "the real reason or motive" for that action, and the action itself, must *not* exhibit such conformity at all, but the very opposite. Doubtlessly, had Cuba then, or any other country thereafter, employed the same tactics against the United States as the rogue operatives of the United States plotted to employ against Cuba (and have used against other countries thereafter), the then-Joint Chiefs of Staff and other officials of the General Government would have excoriated the perpetrators in no uncertain terms as international criminals. To be sure, this would have constituted crass hypocrisy—but, far worse, it would have exhibited what the German historian Friedrich Meinecke denounced as the gross chauvinistic antinomianism that characterized Adolf Hitler as a person and National Socialism as an ideology.[3414]

The eventual revelation of some of the details of the "Northwoods" conspiracy is, of course, not unique. Indeed, so many other grotesque "official lies" have finally been exposed (albeit usually too late to do much of anything about them),[3415] and as a result so many Americans now expect that rogue public officials will attempt to gull them as a matter of course, that *no* pronouncement from governmental sources at any level of the federal system can or should be taken at face value. From these experiences, Americans can finally appreciate the cynical wisdom in the wry sayings in the old Soviet Union with respect to *Pravda* (*Truth*, the official "organ" of the Communist Party) and *Izvestia* (*News*, the official "organ" of the Soviet government), that "in *Pravda* there is no truth and in *Izvestia* there is no news" and "in *Pravda* there is no news and in *Izvestia* there is no truth". Yet Americans should hardly be surprised to find those adages just as applicable, deplorable, and disgraceful under the Stars and Stripes as they were under the Hammer and Sickle. For, when complainants sought "to secure * * * a ruling * * * that there exists a[n] * * * individual constitutional right under the Ninth Amendment 'to trust the federal government and to rely on the integrity of its pronouncements'", judges at the very highest levels supposedly could "find no basis in constitutional history, judicial interpretation, political history, legal scholarship, or persuasive argument to conclude that such a right exists under the Ninth

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[3413] *Webster's Revised Unabridged Dictionary, ante* note 11, at 807, 1135.

[3414] *The German Catastrophe: Reflections and Recollections* (Boston, Massachusetts: Beacon Press, 1963), at 23-24. Of course, the selfsame antinomianism pervaded Leninism, Stalinism, Maoism, and other totalitarian systems of modern times.

[3415] *See, e.g.*, David Hoffman, *The Oklahoma City Bombing and the Politics of Terror* (Port Townsend, Washington: Feral House, 1998).

Amendment, or any other provision of the Constitution of the United States".[3416] Inasmuch as the Ninth Amendment provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people", these decisions afford rogue public officials a truly limitless "license to lie". For if no American may claim any *right* "'to trust the federal government and to rely on the integrity of its pronouncements'", then officials must labor under no *duty* whatsoever to be trustworthy and truthful; and, as a consequence, they must enjoy a perfect *privilege* to be *un*trustworthy and *un*truthful, and a perfect *immunity* from any punishment for such misconduct.[3417]

To be sure, as Americans increasingly realize that they cannot "'trust the federal government and * * * rely on the integrity of its pronouncements'", they will become decreasingly willing to believe *anything* official spokesmen tell them—which will be all to the good. Nonetheless, disbelieving public officials is not equivalent to knowing the truth of the matter, particularly when most of the relevant facts about which those officials are lying, or the existence of which they are simply denying, remain sequestered within the rabbit-warrens of governmental bureaucracies to which common citizens cannot gain access. Americans' mounting disbelief—and the political disgust it fosters—can, however, encourage them to search out the truth on their own, leaving rogue officials talking to themselves. This possibility has not been lost on those officials, either. They know that "the truth will make [the people] free".[3418] Therefore they must suppress the truth. But that becomes increasingly difficult with each passing day of technological innovation in the collection, dissemination, analysis, and retention of information. So they must employ *un*truths to render the people *un*free, before too much of the truth becomes apparent to too many Americans, and enough of them begin to act upon it. Thus, the main purpose of the present régime of "official lies"under the aegis of "the war on terrorism" is to flood the channels of mass communications with propaganda, agitation, and disinformation designed to achieve three interlocking goals:

> (i) *Mass paranoia fueled by the bogey of international "terrorism"*—to inculcate the belief that erection of a National *para*-military police-state apparatus is desperately necessary to provide for Americans' safety.[3419] This will camouflage the intrusions of the

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[3416] Mapco Inc. v. Jimmy Carter, President, 573 F.2d 1268, 1277-1278 (Temporary Emergency Court of Appeals 1978) (Becker, J., for the Court), *certiorari denied*, 437 U.S. 904 (1978); *discussed in detail in* E. Vieira, Jr., *Pieces of Eight, ante* note 39, Volume 2, at 1644-1650.

[3417] *See* A. Corbin, "Legal Analysis and Terminology", *ante* note 23, at 167-168, 170.

[3418] *See* John 8:32.

[3419] Amazingly, this campaign aimed at exaggerating the danger from international "terrorists" proceeds apace even while the Armed Forces falsely tout the success of their military incursions against the "terrorists'" supposed bases in such places as Afghanistan. *See, e.g.,* the exposé by Lt. Colonel Daniel L. Davis, *Dereliction of Duty II: Senior Military Leaders' Loss of Integrity Wounds Afghan War Effort* (27 January 2012). Apparently,

apparatus into Americans' daily lives and facilitate their acceptance of its impositions. Then, with the apparatus firmly in place,

(ii) *Mass acquiescence in the ever-present reality of domestic repression*—to instill a sense of futility and resignation, by convincing Americans that just about anyone can and will be browbeaten, physically assaulted, tasered, and arrested for the least manifestation of defiance, disobedience, or even disrespect to a "law-enforcement officer", and that no meaningful (and certainly no timely) judicial remedy will be afforded to the victims of such police brutality. Justifiable fear of the apparatus will cause the average citizen to conform his behavior to the slogan, *"Know your place! Do what you are told! Keep your mouth shut!"* This will deter those who might dare to engage in public criticism, opposition, and resistance. And to maintain this state of affairs,

(iii) *Mass confusion, controversy, and ultimately intellectual chaos*—to infuse and intensify within society every possible form of political, economic, cultural, racial, and religious suspicion, division, animosity, and antagonism, so as to prevent individuals and groups from coalescing as WE THE PEOPLE in effective opposition to the highly organized professional politicians, bureaucrats, factions, and other special interests who and which exploit and oppress them. Misunderstanding and confusion lead to suspicion—which foments distrust and division—which prevent people from organizing for their collective self-defense—which results in a discontinuity in popular solidarity, and at length the disappearance of the social conditions necessary for popular sovereignty.

In such wise, "official lies" prove the perverse political truth that in any competent tyranny conformity and obedience on the part of the masses are best rooted in fear and fertilized with ignorance: Today in America, the common people's irrational fear of "terrorists"; tomorrow, their all-too-justifiable fear of the domestic police-state apparatus set up ostensibly to deal with "terrorists"; overall, their fear of their own inability or unwillingness to rein in the tyranny which oppresses them, born of their own ignorance of both their constitutional authority and their capabilities for concerted action.

(2) The purported power to conduct permanent and pervasive surveillance of Americans. This power appears in statutes aimed at squeezing the last drop of information out of Americans' communications and financial

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the molders of public opinion presume that no significant number of Americans will ever compare one side of the coin of official propaganda with the other.

transactions.[3420] Such comprehensive surveillance constitutes "unreasonable searches" which should be disallowed altogether—especially when their targets are denied the protection of "Warrants * * * issue[d] * * * upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the * * * things to be seized".[3421]

That is hardly the worst of the burgeoning "surveillance state", though, because intelligence agencies admit that they are aggressively monitoring Americans' "publicly available online forums, blogs, public websites, and message boards to collect information".[3422] Such eavesdropping may not extract inculpatory information surreptitiously—*if* one believes the official line that only "*publicly available*" sources are being scrutinized. Nonetheless, inevitably it will tend to suppress the dissemination of even innocent information and opinion that falls outside of the political and economic "mainstream". For when individuals and groups know or suspect that they are under constant surveillance, their expressions of even legitimate points of view which challenge the prevailing official orthodoxies will be (as lawyers say) "chilled", if not wholly stifled. This, of course, is only the tip of the iceberg that rogue officialdom allows the public to see. If, as seems apparent, various agencies have the technical capabilities to eavesdrop on *all* electronic communications of *every* American—and must be presumed to be exercising those capabilities to some significant degree already, under the cloak of "state secrets"—then "official espionage" against this country's own population has reached a point orders of magnitude worse than anything every experienced (or even imagined) by ordinary citizens under the Tsarist Okhrana, Stalin's NKVD, or Hitler's Gestapo.

In addition to rummaging through Americans' personal records and monitoring their interpersonal correspondence, police-state investigators are now seeking the authority to deploy thousands of drone aircraft across this country's skies in order to observe potentially every activity in which any American engages

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[3420] *See, e.g.*, An Act To deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes ("Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001"), Act of 26 October 2001, Pub. L. 107-56, TITLE II—ENHANCED SURVEILLANCE PROCEDURES, §§ 201-225, *and* TITLE III—INTERNATIONAL MONEY LAUNDERING ABATEMENT AND ANTI-TERRORISM FINANCING ACT OF 2001, §§ 301-372, 115 Stat. 272, 278-296, 296-342. *Continued by* An Act To extend and modify authorities needed to combat terrorism, and for other purposes, Act of 9 March 2006, Pub. L. 109-177, 120 Stat. 192; *and* An Act To provide for an additional temporary extension of programs under the Small Business Act and the Small Business Investment Act of 1958, and for other purposes ("PATRIOT Sunset Extension Act of 2011"), Act of 26 May 2011, Pub. L. 112-14, § 2(a), 125 Stat. 216, 216.

[3421] *See ante*, note 3395.

[3422] *See* U.S. Department of Homeland Security, *Privacy Compliance Review of the NOC Media Monitoring Initiative* (15 November 2011), at 1. The fineness of the mesh in this philological net can be gauged from Department of Homeland Security, National Operations Center, Media Monitoring Capability, Desktop Reference Binder, *Analyst's Desktop Binder* (2011), § 2.13 Key Words & Search Terms, at 20-23.

in the open, as well as under the various types of concealment the latest sensors can penetrate.[3423] These spies in the skies have the advantages that, unlike stationary cameras (which already infest at least every urban area in the United States) and GPS-tracking devices (the employment of which without warrants the Supreme Court has declared unconstitutional, for whatever that may be worth[3424]), they are highly mobile, can survey extensive areas from distances and heights at which they themselves cannot be easily detected, can scrutinize and transmit information about their targets in exacting detail, can be configured to employ a variety of sensors to perform different missions, and do not require actual attachment to anyone's private property in order to perform their functions. Whether the Judiciary will find the use of drones compatible with the Fourth Amendment remains to be seen, though. On the one hand, certain judicial decisions might appear favorable to that outcome.[3425] On the other hand, these cases involved surveillance of things which were visible to and actually observed and identified by the naked eye, not what could be discerned only by technologically advanced optical and electronic sensors and scanners. Once the deployment of drones becomes commonplace across America, however, the courts may well determine that, because everyone knows that they are crisscrossing the skies, and has at least a rough idea as to their capabilities for observation, no one can claim "a reasonable expectation of privacy" against any such surveillance.[3426]

Moreover, inasmuch as drone aircraft are capable, not only of surveillance, but also of directing or even delivering a wide variety of weaponry to the targets they identify and track, their deployment will expose to destruction, on a twenty-four-hour basis and wherever they may be located, potentially every American whom police-state operatives consider for whatever reason to be "enemy combatants" or "terrorists" (along with whatever other unfortunate individuals happen to be in the vicinity, and end up being tallied as "collateral damage"). In

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[3423] *See* An Act To amend title 49, United States Code, to authorize appropriations for the Federal Aviation Administration for fiscal years 2011 through 2014, to streamline programs, create efficiencies, reduce waste, and improve aviation safety and capacity, to provide stable funding for the national aviation system, and for other purposes ("FAA Modernization and Reform Act of 2012"), Act of 14 February 2012, Pub. L. 112-95, TITLE III—SAFETY, Subtitle B—Unmanned Aircraft Systems, §§ 331 through 336, 126 Stat. 11, 72-78, *and* TITLE IX—FEDERAL AVIATION RESEARCH AND DEVELOPMENT, § 903, 126 Stat. at 138-139.

[3424] United States v. Jones, No. 10-1259, ___ U.S.___ (2012).

[3425] *See* Florida v. Riley, 488 U.S. 445 (1989) (surveillance from a helicopter); California v. Ciraolo, 476 U.S. 207 (1986) (surveillance from a fixed-wing aircraft).

[3426] For example, a stationary camera surveying the length of a city street might be able to deploy a wide-angle and a telescopic lens, in addition to a normal lens. The authorities in that city might have publicized this fact, so that everyone was at least on legal notice of it. If the camera did not violate the "reasonable expectation of privacy" of an individual near by on whom it focused through its normal lens, it would arguably not violate the "reasonable expectation of privacy" of someone in the periphery of its vision on whom it focused through its wide-angle lens, or of someone at a great remove on whom it focused through its telescopic lens—because in the face of such technology, notoriously deployed, for those individuals to have any "expectations of privacy" would be "unreasonable" (and surely imprudent).

light of the ever-increasing employment of drones for such purposes and with such effects in overseas venues, against Americans as well as foreigners, once their domestic deployment has become routine they may emerge as the agents of choice to effect "official assassinations" of those Americans considered most dangerous to the régime.[3427] The threat of constant surveillance, let alone "official assassination", will dissuade all but the hardiest dissenters from publicly criticizing the régime, so that the spies in the skies will function as effective aerial political muzzles "from sea to shining sea". Even were these developments not in aid of an expanding police state, they would be deplorable. For, besides making the decisions to assassinate targets easier because no "boots on the ground" need be put at risk, the use of drones will desensitize their operators to the horrific consequences, the illegality, and the moral squalor of such operations. Death and destruction wrought at long distances will be depersonalized and even dehumanized altogether by being reduced to fleeting images flickering on a computer screen, not unlike the highly realistic and obscenely violent video games with which so many Americans are already obsessed. And the cheaper the psychic cost of such aberrant behavior, the more likely it will persist, be promoted, and thus proliferate.

With respect to all of these activities, it should be enough to point out that, in a review of the Nazis' "PURGE OF POLITICAL OPPONENTS AND TERRORIZATION", the prosecutors at Nuremberg charged (and proved) that "[*t*]*he Nazi conspirators created a vast system of espionage into the daily lives of all parts of the population*"; "[*t*]*hey destroyed the privacy of postal, telegraphic, and telephonic communications*"; and "[*t*]*hey used the Secret State Police * * * and the Security Service * * * for the purpose of maintaining close surveillance over the daily activities of all people in Germany*".[3428] Those who refuse to learn from this episode will be condemned to live through (or perhaps die as the result of) its repetition.

(3) The purported power to mislabel some activity as "war". This power was concocted in order to rationalize application of the so-called "law of war" to American citizens, and thereby deny them a wide range of constitutional protections. Today, "the war on terrorism" is the primary semantic dodge which serves this devious purpose. At some point in the future, though, the authors of "the war on terrorism" may realize that they can exponentially expand the ambit of their deceit by linking that "war" with "the war on drugs" in particular and even "the war on crime" in general. For, as everyone knows, "terrorists" are often involved with the worldwide traffic in illicit drugs and with the syndicates of "organized crime" which control it. So, with the application of only a dollop of verbal grease, every

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[3427] *See post,* at 1605-1624.

[3428] *Office of United States Chief of Counsel For Prosecution of Axis Criminality,* NAZI CONSPIRACY AND AGGRESSION (Washington, D.C.: United States Government Printing Office, 1946), Volume I, at 244-245 (emphasis in the original).

domestic as well as international criminal enterprise, along with every individual allegedly connected therewith, could be shoe-horned into "the war on terrorism" as targets. In light of the breadth of the concept of "racketeering" under American law,[3429] if anyone alleged to be engaged in crimes that fell within that statutory rubric could be denounced as some species of "terrorist", and thereby automatically stripped of all constitutional protections, the possibilities for a *para*-military police state to run roughshod over this entire country could become truly breathtaking. This is far more than a far-fetched possibility. For all "racketeering" could just as easily be defined as a species of "terrorism" as "acts of terrorism" have already been defined as "racketeering".[3430] Indeed, inasmuch as common political parlance treats as legitimate discourse the terms "the war on poverty", "the war on overpopulation", "the war on illiteracy", and even "the war on obesity", the so-called "law of war" could invade the entire domain of economic, social, and other "welfare" legislation, rationalizing the erection of a *para*-military socialistic or communistic police state.

The obvious problem with its proponents' reliance on the fashionable catch-phrase "the war on terrorism" (let alone other *ersatz* "wars"), however, is that constitutional questions cannot be settled by the invocation of simplistic labels, any more than a sow's ear can become a silk purse simply because some jackass of a public official says it is.[3431] No thinking person is deceived by attachment of the label "war" to "terrorism". Every astute observer recognizes that the very concept of a "war on terrorism" is basically nonsensical. *First*, "terrorism" is a set of typically *para*-military *tactics*, not a foreign country or even a particular political ideology; and "terrorists" do not constitute one or more independent nations, but are at most mere bands of private criminals (seen from the perspective of their opponents) or perhaps actual freedom-fighters (seen from their own perspective) who are animated by all sorts of motives. *Second*, the strategies and tactics familiar in true warfare cannot be employed against "terrorists". For "terrorists" supposedly comprise a loosely linked international network, rather than a regular army or other military establishment of some foreign state that can be identified and targeted as such. They are committed to defend no permanently fixed territorial base. And they can strike whenever and wherever they choose, because they recognize and are tied

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[3429] *See* 18 U.S.C. §§ 1961 and 1962.

[3430] *See* An Act To deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes ("Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001"), Act of 26 October 2001, Pub. L. 107-56, TITLE VIII—STRENGTHENING THE CRIMINAL LAWS AGAINST TERRORISM, § 813, 115 Stat. 272, 382, *incorporating acts listed in* 18 U.S.C. § 2332b(g)(5)(B) (defining "Federal crime of terrorism") *into* 18 U.S.C. § 1961(1) (defining "predicate acts" that constitute "racketeering").

[3431] *See, e.g.,* Craig v. Missouri, 29 U.S. (4 Peters) 410, 433 (1830); NAACP v. Button, 371 U.S. 415, 429 (1963); New York Times Company v. Sullivan, 376 U.S. 254, 268-269 & notes 7 through 12 (1964); Bigelow v. Virginia, 421 U.S. 809, 826 (1975); City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Commission, 429 U.S. 167, 173-174 & note 5 (1976).

to or excluded from no front lines, rear areas, or neutral territory. *Third,* the formal conditions of victory usual in a war—whether through an armistice, a surrender, or a treaty of peace—cannot be obtained in "the war on terrorism". For global "terrorism" is not an array of men and machines subject to some central, controlling structure of command, with legal authority, that can negotiate a cessation of hostilities and then impose upon its own fighters the terms of any such arrangement, or that can yield its dominion over specific territory in such a manner as to enable the United States to enforce such an agreement. *Fourth*, the actual conditions for a final victory against "terrorism" can never be achieved. Nothing can compel the simultaneous surrender of all "terrorists" now at large and the termination of all acts of "terrorism" now directed against the United States, or prevent all future recruitment and deployment of new "terrorists" and their commission of new acts of "terrorism". But the existential impossibility of waging, let alone ever finally winning, "the war on terrorism" is no demerit to its proponents. Quite the contrary: *The political value of "the war on terrorism" is precisely that, in the nature of things,* ***it will never end****. And as long as it drags on, a rationalization will subsist for rogue public officials to ignore the Constitution with respect to any and every American to whom they can attach some label which links him, howsoever tenuously, to "terrorism".*

In the Constitution, "War" is a term of art which is employed in more than one way. Most familiarly, "War" connotes a specific set of relations between two or more nations that comes into existence under particular conditions. It may arise with legal formality—as when Congress exercises its power "[t]o declare War".[3432] The self-evident reasons for this requirement are: (i) so that the matter will be debated openly and completely, in the highest legislative forum of the land, before irretrievable actions are taken; and (ii) so that the legislators who choose to embroil their constituents in "War" can be identified and held personally responsible, if only at the next election. The necessity for a formal "declar[ation]", of course, makes it difficult for the United States to go to "War" as a matter of mere "foreign policy" (often simply an euphemism for the benefits to be derived by some domestic special-interest groups, or specially favored foreign countries), rather than only when America's actual self-preservation is at stake. Which is why rogue public officials, carrying water for special interests, have promoted the lunatic notion that the power "[t]o declare War" is "no longer relevant to a modern society" and has become "[i]nappropriate and anachronistic" as a prerequisite to an actual armed invasion of a foreign nation.[3433] The consequence of this kind of aberrant thinking is that the United States are now embroiled throughout the world in all sorts of military imperialism, adventurism, and in many cases naked aggression that have

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[3432] U.S. Const. art. I, § 8, cl. 11.

[3433] Authorization for Use of Military Force Against Iraq, Markup Before the Committee on International Relations, House of Representatives, 107th Congress, 2d Session, on H.J. Resolution 114, October 2 and 3, 2002, Serial No. 107-116, at 127, 128 (Representative Henry Hyde, Illinois).

never received—and could never possibly receive—the constitutional imprimatur of a "declare[d] War". The purely legal aspects of this problem are adequately outlined elsewhere.[3434] The practical moral and political consequence—not just in formal international relations but with respect to the relations of the American people simply as human beings to all other peoples everywhere else—is that (in the condemnatory yet prophetic words of one of America's inveterate enemies) "[r]iding roughshod everywhere, U.S. imperialism has made itself the enemy of the people of the world and has increasingly isolated itself"—such that, "[i]f the U.S. monopoly capitalist groups persist in pushing their policies of aggression and war, the day is bound to come when they will be hanged by the people of the whole world. The same fate awaits the accomplices of the United States."[3435] Under present global political and especially economic conditions, Americans neglect at their peril the warning that

> [t]he United States has set up hundreds of military bases in many countries all over the world. * * * [A]ll military bases of the United States on foreign soil are so many nooses round the necks of U.S. imperialism. The nooses have been fashioned by the Americans themselves and by nobody else, and it is they themselves who have put these nooses round their own necks, handing the ends of the ropes to the Chinese people, the peoples of the Arab countries and all the peoples of the world who love peace and oppose aggression. The longer the U.S. aggressors remain in those places, the tighter the nooses round their necks will become.[3436]

This is a telling commentary on the wages of political sin being death: That, the more rogue public officials have embroiled the United States in *ersatz* foreign "wars" of aggression without formally "declar[ing] War"—because it was impossible to do so, legally and politically—the more the United States have become internationally isolated, hated, and endangered, caught up not in "a war to end all wars" but in "wars without end" unto their final destruction.

This said, nevertheless a constitutional "War" may sometimes arise with legal informality—as when a State "engage[s] in War" as a matter of fact, but "without the Consent of Congress" as a matter of law, if she is "actually invaded, or in such imminent Danger as will not admit of delay".[3437] Presumably, in such a dire situation a State may act prior to and ultimately without any "declar[ation of] War" by Congress; and the United States, too, may in fact "engage in War" under such circumstances, just as each of the several States which compose the Union may.

[3434] *See* E. Vieira, Jr., *Constitutional "Homeland Security"*, *ante* note 3, at 25-33.

[3435] *Quotations From Chairman Mao*, *ante* note 28, at 78, 79.

[3436] *Id.* at 76-77.

[3437] U.S. Const. art. I, § 10, cl. 3.

Events of this nature, though, plainly involve the exigency of community self-defense, which needs no explicit constitutional sanction—for Americans retain "among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them";[3438] and "[s]elf-defence * * * is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society".[3439]

Whether attended with the trappings of legal formality or not, all of these manifestations of "War" involve at least *one other nation* as an antagonist. "War" cannot be waged, or even "declare[d]", against private parties (a "war on crime"), against things (a "war on drugs"), against tactics (a "war on terrorism"), against personal habits (a "war on smoking"), against personal characteristics (a "war on obesity"), or even against private parties committing serial crimes by means of "terrorism". Such was the understanding of the term "War" during the *pre*-constitutional era—and "[w]e are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted".[3440] As Blackstone explained,

> it is held by all the writers on the law of nature and nations, that the right of making war, which by nature subsisted in every individual, is given up by all private persons who enter into society, and is vested in the sovereign power: and this right is given up, not only by individuals, but even by the intire body of people, that are under the dominion of a sovereign. It would indeed be extremely improper, that any number of subjects should have the power of binding the supreme magistrate, and putting him against his will in a state of war. Whatever hostilities therefore may be committed by private citizens, the state ought not to be affected thereby: unless that should justify their proceedings, and thereby become partner in the guilt. *Such unauthorized voluntiers in violence are not ranked among enemies, but are treated like pirates and robbers*[.][3441]

> [And] the crime of *piracy*, or robbery and depredation upon the high seas, is an offence against the universal law of society * * * [being] among the principal cases, in which the statute law of England interposes, to aid and enforce the law of nations, as a part of the common law; by inflicting an adequate punishment upon offenses against that universal law, *committed by private persons*.[3442]

[3438] Declaration of Independence.

[3439] W. Blackstone, *Commentaries on the Laws of England, ante* note 142, Volume 3, at 4.

[3440] Mattox v. United States, 156 U.S. 237, 243 (1895).

[3441] *Commentaries on the Laws of England, ante* note 142, Volume 1, at 257 (footnote omitted) (emphasis supplied).

[3442] *Id.,* Volume 4, at 71, 73 (emphasis supplied in part).

Rather than just an idiosyncratic notion of English legalists alone, Blackstone's understanding of the *international* character of "war" had long been a commonplace among expositors of the Law of Nations.[3443]

To be sure, a clandestine or irregular armed force of some rogue nation could employ the tactics of "terrorists" on that nation's behalf against the United States or some State. Under those circumstances, however, any defensive "War" by the United States or a State, although waged in law against the aggressor nation as a whole, could perhaps be waged in fact only against the "terrorists" as individuals. Nothing in the Constitution would preclude Congress, for example, from formally "declar[ing] War" against that nation, but specifying that the "War" would be conducted only in some geographically or operationally limited fashion. But then any of that nation's soldiers, whether regular or irregular, who committed acts of "terrorism" would be, not simply private "pirates and robbers", but "war criminals" subject to the punishments prescribed by Congress for "Offences against the Law of Nations".[3444]

So, not surprisingly, Congress has never attempted actually "[t]o declare War" on either "terrorism" or any alleged perpetrators of "terrorism"—because even contemporary Members of Congress instinctively sense that such a putative "declar[ation]" would be ridiculous in fact as well as impossible in law. To be sure, if Congress could satisfactorily describe with sufficient particularity the characteristics of international "terrorism", it could outlaw such crimes pursuant to its power "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations",[3445] or perhaps even its power "[t]o regulate Commerce with foreign Nations".[3446] But those powers are constitutionally separate and distinct from, and independent of, Congress's power "[t]o declare War". So, because "each [provision of the Constitution] must be considered in light of the other[s]",[3447] by its very structure the Constitution makes clear that a "declar[ation of] War" with whatever it might entail in terms of deployment of the Armed Forces is an improper means to deal with private individuals and groups (so-called "non-state actors" and "non-governmental organizations", as the fashionable

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[3443] *See, e.g.*, Hugo Grotius, *The Law of War and Peace* [*De Jure Belli ac Pacis Libri Tres* (1646)] (Indianapolis, Indiana: The Bobbs-Merrill Company; Reprint from *The Classics of International Law*, by The Carnegie Endowment for International Peace, 1925), Book III, Chapter III, §§ I and II, at 630-632. The Founding Fathers were well aware of Grotius's work. *See, e.g*, *The Federalist* No. 84 note [4].

[3444] *See* U.S. Const. art. I, § 8, cl. 10, *applied through* 18 U.S.C. § 2441. *See generally, e.g.,* The Charter of the International Military Tribunal (Nuremberg, Germany, 1945); *Office of United States Chief of Counsel for Prosecution of Axis Criminality,* NAZI CONSPIRACY AND AGGRESSION, *Opinion and Judgement* (Washington, D.C.: United States Government Printing Office, 1947); Joseph E. Persico, *Nuremberg: Infamy on Trial* (New York, New York: Penguin Books, 1994).

[3445] U.S. Const. art. I, § 8, cl. 10.

[3446] *See* U.S. Const. art. I, § 8, cl. 3, *coupled with* cl. 18.

[3447] Hostetter v. Idlewild Bon Voyage Liquor Corporation, 377 U.S. 324, 332 (1964).

contemporary jargon has it) who or which commit "Piracies and Felonies * * * on the high Seas" or "Offences against the Law of Nations".

Noteworthy in this regard is that Blackstone described

> the crime of *piracy*, or robbery and depredation upon the high seas, [a]s an offence against the universal law of society; a pirate being * * * *hostis humani generis*.[3448] As therefore he has renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him: so that every community hath a right, by the rule of self-defence, to inflict that punishment upon him, which every individual would in a state of nature have been otherwise entitled to, for any invasion of his person or personal property.[3449]

Nonetheless, as familiar with Blackstone as they were, WE THE PEOPLE did not leave authority for the punishment of "*piracy*, or robbery and depredation upon the high seas" to be somehow interpolated by mere implication into Congress's power "[t]o declare War". Instead, they explicitly delegated to Congress a separate, independent, precise, and sufficient power on that score. This is particularly remarkable, in that Blackstone condemned pirates as having "*declar*[*ed*] *war* against all mankind", so that "all mankind must *declare war* against [them]".

In addition to a formally "declare[d] War", or "War" brought on suddenly by an invasion or imminent threat thereof, the Constitution envisions that the United States may have "War" "lev[ied]" in fact "against them" by individuals who, because they owe the United States allegiance as their citizens,[3450] through such actions become guilty of "Treason".[3451] Yet Congress cannot "declare War" against such individuals and perforce of such a declaration subject them to military jurisdiction and "the law of war", because the Constitution explicitly requires that "[n]o Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court".[3452] If its specifications with respect to "Treason" are to be meaningful, the Constitution must require that anyone who has committed acts of "levying War" arguably amounting to "Treason" must be tried according to the particular procedure ("in open Court") and strict standards of evidence ("the Testimony of two Witnesses to the same overt Act, or * * * Confession") applicable to "Treason".

[3448] "Enemy of the human race."

[3449] *Commentaries on the Laws of England, ante* note 142, Volume 4, at 71.

[3450] *See* United States v. Wiltberger, 18 U.S. (5 Wheaton) 76, 97 (1820).

[3451] *See* U.S. Const. art. III, § 3, cl. 1.

[3452] U.S. Const. art. III, § 3, cl. 1. On the strictness of this rule, *see* Cramer v. United States, 325 U.S. 1, 34-35 (1945).

If an act of "levying War" involved "adhering to the[ ] Enemies of the United States, giving them Aid and Comfort",[3453] and occurred "on the high Seas", an argument might be made that the perpetrator could be tried according to the standards applicable to "Piracies".[3454] For, during *pre-*constitutional times, had "any natural born subject commit[ted] any act of hostility upon the high seas, against others of his majesty's subjects, *under colour of a commission from any foreign power*; this, though it would only [have] be[en] an act of war in an alien, * * * [would have] be[en] construed piracy in a subject".[3455] Nonetheless, as "offence[s] against the universal law of society",[3456] all "Piracies" are "Crimes", "[t]he Trial of [which] * * * shall be by Jury",[3457] with "the accused * * * [to] enjoy the right to a *speedy and public* trial, by an *impartial* jury".[3458] Yet, if not subsumed within "Treason", such "Piracies" would not necessarily be subject to the evidentiary requirement of "two Witnesses to the same over Act, or * * * Confession".[3459] (Indeed, it was a similar requirement's "proving very inconvenient" when "th[e] Offence [of Piracy and Depredation at Sea] was punished at Common Law as Petit Treason, if committed by a Subject", which caused a change in the *pre-*constitutional English law, "ordaining that * * * it shall have the like Trial and Punishment, as are used for Felony at Common Law".[3460]) Under the Constitution, though, protection of an individual accused of crime must take precedence over the ease of his conviction. So, if a particular act of "Pirac[y]" can fairly be categorized as "Treason", it must be treated as such.

In any event, whether the charge is "Treason" or "Pirac[y]" or an act of "Pirac[y]" that constitutes "Treason", the perpetrator must receive at least the full protections the Constitution guarantees to all individuals who are to be tried "in open Court". This surely entails at least: (i) that such an individual's "right * * * to be secure in [his] person[ ] * * * against [an] unreasonable * * * seizure[ ], shall not be violated, and no Warrant[ ] shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing * * * the person[ ] * * * to be seized";[3461] (ii) that he may not "be held to answer for [such] a capital, or otherwise

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[3453] U.S. Const. art. III, § 3, cl. 1.

[3454] *See* U.S. Const. art. I, § 8, cl. 10. Presumably, today "the high Seas" would include international air routes, most of which traverse "the high Seas". *See* 49 U.S.C. § 46504.

[3455] W. Blackstone, *Commentaries on the Laws of England, ante* note 142, Volume 4, at 72 (emphasis supplied).

[3456] *Id.,* Volume 4, at 71.

[3457] U.S. Const. art. III, § 2, cl. 3.

[3458] U.S. Const. amend. VI.

[3459] Congress could, of course, make them so, pursuant to its power "[t]o define and punish Piracies and Felonies committed on the high Seas". U.S. Const. art. I, § 8, cl. 10. *See* 18 U.S.C. § 1652.

[3460] W. Hawkins, *A Treatise of The Pleas of the Crown, ante* note 434, Book I, Chapter XXXVII, §§ 1, 2, and 6, at 98, 99.

[3461] U.S. Const. amend. IV.

infamous crime, unless on a presentment or indictment of a Grand Jury"[3462]—thereby excluding charges drawn up under any form of military law; (iii) that he may not "be compelled in [such a] criminal case to be a witness against himself"[3463]—for instance, by torture; and (iv) that he "shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed * * * , and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor; and to have the assistance of counsel for his defence"[3464]—which self-evidently excludes indefinite detention, as well as a trial before a court-martial, a "military commission", "military tribunal", or other such *junta,* but instead requires a "Trial * * * by Jury" in one of the civilian "inferior Courts", exercising part of "[t]he judicial Power of the United States", "as the Congress may from time to time ordain and establish",[3465] pursuant to its power "[t]o constitute Tribunals inferior to the supreme Court".[3466]

Of course, were the United States officially at "War" with some foreign nation, a rogue American citizen might, even while retaining his citizenship, "adher[e] to their Enemies, giving them Aid and Comfort".[3467] In that situation too, however, such an American would be guilty of "Treason", and therefore not subject to "the law of war".

In short, *if an American citizen is "levying War against the*[*United States*]*, or * * * adhering to their Enemies", "the law of war"* ***cannot possibly*** *be applied to him, because the Constitution requires that the law of "Treason" shall control. Or, in such a case, the only applicable "law of war" is the law of "Treason".*

Congress cannot evade these constitutional limitations by creating other crimes of a nature substantially equivalent to "Treason", but to which it attaches different names, different procedures for trial, or different standards of proof. For "[i]f it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution. * * * But constitutional provisions cannot be thus evaded. It is the substance and not the form which controls[.]"[3468] For example, Congress may not purport to "define" acts of "levying War against the[United States]" as "Piracies and Felonies committed

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[3462] U.S. Const. amend. V.

[3463] U.S. Const. amend. V.

[3464] U.S. Const. amend. VI. As to the venues for trial of "Crimes * * * not committed within any State", *see* U.S. Const. art. III, § 2, cl. 3.

[3465] U.S. Const. art. III, § 2, cl. 3 and § 1.

[3466] U.S. Const. art. I, § 8, cl. 9.

[3467] U.S. Const. art. III, § 3, cl. 1. On the strictness of the proof required for such a finding, *see* Cramer v. United States, 325 U.S. 1, 29-35 (1945).

[3468] Pollock v. Farmers' Loan & Trust Company, 157 U.S. 429, 581 (1895).

on the high Seas, and Offences against the Law of Nations" in order to "punish" the commission of those acts in a way different from how it should be punished as "Treason".[3469] Similarly, when under the facts in the case a statute directed towards a crime denominated as other than "Treason" punishes arguably the selfsame behavior that constitutes "Treason", the constitutional requirements for dealing with "Treason" should be interpolated into that statute.[3470] So, in all cases in which American citizens as mere private individuals or groups engage in hostile acts against the United States, they cannot even arguably be subjected to "the law of war", because either: (i) they are not waging "War" in the capacity or on behalf of a foreign nation; or (ii) they are in fact "levying War" themselves against the United States, or "adhering to their Enemies, giving them Aid and Comfort", and therefore the Constitution requires that they must be treated specifically as traitors.

Of course, because "[t]reason is a breach of allegiance, and can be committed by him only who owes allegiance either perpetual or temporary",[3471] if an American citizen "los[t] his nationality by *voluntarily* * * * *with the intention of relinquishing United States nationality* * * * entering, or serving in, the armed forces of a foreign state if * * * such armed forces are engaged in hostilities against the United States",[3472] then such an individual, no longer owing allegiance to the United States, could and would not commit "Treason", and therefore possibly could be subjected to "the law of war" for his actions on behalf of that "foreign state". Nonetheless, an American cannot automatically lose his citizenship and be stripped of his duty of allegiance to the United States simply because he "lev[ies] War against them, or * * * adher[es] to their Enemies, giving them Aid and Comfort". For the crime of "Treason" presupposes that an American *can* "levy[ ] War against the[United States]" *and* "adher[e] to their Enemies" *even while retaining his citizenship and duty of allegiance*—otherwise, every such act of "levying" and "adhering" would exclude the perpetrator from the Treason Clause, thus effectively nullifying it. Indeed, because no one can commit "Treason" unless he both owes allegiance to the United States and nonetheless "lev[ies] War against them, or * * * adher[es] to their Enemies", if "levying War" or "adhering to their Enemies" automatically deprives the perpetrator of his citizenship, and with it his duty of allegiance, then the very fact that an American is "levying War" or "adhering to

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[3469] *Contrast* U.S. Const. art. I, § 8, cl. 10 *with* art. III, § 3, cl. 1.

[3470] *Compare and contrast, e.g.,* 18 U.S.C. §§ 2381 (treason) and 2382 (misprision of treason), *with* 2383 (rebellion or insurrection), 2384 (seditious conspiracy), 2385 (advocating violent overthrow of the government), 2390 (enlistment to serve in armed hostility against the United States), 2332 (use of weapons of mass destruction), 2332b (acts of terrorism across national boundaries), 2339A (provision of material support to terrorists), and 2339B (provision of material support to terrorist organizations). *See*, *e.g.*, National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U.S. 1, 30 (1937); Lynch v. Overholser, 369 U.S. 705, 710-711 (1962); United States v. Thirty-seven (37) Photographs, 402 U.S. 363, 369 (1971).

[3471] United States v. Wiltberger, 18 U.S. (5 Wheaton) 76, 97 (1820).

[3472] 8 U.S.C. § 1481(a)(3)(A) (emphasis supplied).

their Enemies" must constitute a *defense* to a charge of "Treason". That is, fulfilling the constitutional conditions for "Treason" would negate the crime!

The peculiar manner in which Congress is waging "the war on terrorism" raises yet another fatal constitutional objection. The Congressional Joint Resolution generally taken to legitimize that operation provides that

> the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[3473]

Notwithstanding its garbled syntax—which confines the reach of this mandate to *those particular* "nations, organizations, or persons" which or who perpetrated *certain specific* crimes *in the past*, thus arming the President with no authority to interdict "future acts of international terrorism" by *any other* "nations, organizations, or persons"—as of this writing this Joint Resolution is widely assumed to delegate to the President the power effectively "[t]o declare War" by deploying "all necessary and appropriate force" against *any* foreign nation in order "to prevent any future acts of international terrorism" that he imagines, on whatever evidence or even personal whim, might occur. Inasmuch as prior to September of 2001 the Constitution already empowered the President, as "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States",[3474] to employ such of those forces as Congress made available to him to defend this country from an imminent attack, the Joint Resolution's license "to prevent any future acts of international terrorism" must have been intended to go beyond National self-defense to what is called "preëmptive" or "preventive war"—or, more accurately put, *aggression*.

One would expect that, after the verdicts in the Nuremberg Trials as later codified in the Charter of United Nations,[3475] the black art of "preëmptive" or "preventive war" would find no apologists, let alone practitioners, among high officials of the United States. Surely, the evidence is far more persuasive that Adolf Hitler had sound military and political reasons (though certainly not legal or moral justifications) for launching a "preëmptive" or "preventive war" against Josef Stalin

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[3473] Joint Resolution To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States ("Authorization for Use of Military Force"), S.J. Resolution 23, 18 September 2001, Pub. L. 107-40, § 2(a), 115 Stat. 224, 224.

[3474] U.S. Const. art. II, § 2, cl. 1.

[3475] *See* Charter of the United Nations, Chapter I, art. 1, § 1, *and* art. 2, §§ 3 and 4; Chapter VI, art. 33, § 1; Chapter VII, arts. 39 and 42; *and* Chapter VIII, art. 53.

in 1941 than that any such reason existed or now exists for any *ersatz* "war" which rogue officials of the General Government have launched since the end of this country's military misadventures in Vietnam in 1973.[3476] Yet Nazi Germany's attack on the Soviet Union was charged at Nuremberg, and is still almost universally catalogued today, as one more example of the Third Reich's unbridled aggression.[3477]

Even more consequential, long before the Nuremberg Trials or the Charter of the United Nations, the Constitution plainly proscribed "preëmptive" or "preventive war". The Preamble—the purposes stated in which must be construed as limitations on, or at least standards for interpretation of, all that follows in the rest of the document[3478]—lists as the goal relevant here, "to * * * provide for the common *defence*".[3479] Then, in its very first delegation of specific substantive authority to Congress, the Constitution grants the "Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common *Defence* and general Welfare of the United States".[3480] How in the exercise of legal logic Congress could "provide for the common *Defence*" by "declar[ing a] War" of *aggression*—or how, in the face of the practical rule that "in warfare everything depends upon logistics", it could even hope to conduct such a "War" when it lacks the authority to "lay and collect Taxes, Duties, Imposts and Excises" for such a purpose—passes understanding. Rather, the obvious conclusion must be that "the genius and character of our institutions are peaceful, and the power to declare war was not conferred upon Congress for the purposes of aggression and aggrandizement".[3481] Similarly for Congress's power "[t]o provide for calling forth the Militia", which may be "employed in the Service of the United States", only "to execute the Laws of the Union, suppress Insurrections and repel Invasions"[3482], but never to attack foreign nations at all, let alone in violation of the Constitution or

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[3476] *See, e.g.,* John Mosier, *Deathride—Hitler vs. Stalin: The Eastern Front, 1941-1945* (New York, New York: Simon & Schuster, 2010), at 80-81 & the authorities cited in note 49, and at 99-100. Basically, Hitler's attack on Stalin amounted to "a falling out among thieves", as the two dictators were equally guilty for the initial aggression against Poland which precipitated World War II, and for almost two years thereafter coöperated economically while Hitler waged war against France, England, and numerous other countries in Western Europe and the Balkans, and Stalin absorbed Latvia, Lithuania, and Estonia into the Soviet Union and seized territory from Finland and Romania. *See, e.g.,* John Kolasky, *Partners in Tyranny: The Nazi-Soviet Nonaggression Pact, August 23, 1939* (Toronto, Canada: The Mackenzie Institute for the Study of Terrorism, Revolution and Propaganda, 1990).

[3477] *See, e.g.,* NAZI CONSPIRACY AND AGGRESSION, *ante* note 3428, Volume I, JUDGMENT, Part III, THE COMMON PLAN OF CONSPIRACY AND AGGRESSIVE WAR, Section (J), THE AGGRESSIVE WAR AGAINST THE UNION OF SOVIET SOCIALIST REPUBLICS, at 43-45.

[3478] *See, e.g.,* W. Crosskey, *Politics and the Constitution, ante* note 206, Volume 1, at 374-379.

[3479] Emphasis supplied.

[3480] U.S. Const. art. I, § 8, cl. 1 (emphasis supplied).

[3481] Fleming v. Page, 50 U.S. (9 Howard) 603, 614 (1850).

[3482] U.S. Const. art. I, § 8, cls. 15 and 16.

other "Laws of the Union", including "the Law of Nations".[3483] Just so for the States, too, which the Constitution prohibits from "engag[ing] in War, unless actually invaded, or in such imminent Danger as will not admit of delay".[3484]

To be sure, the Constitution does delegate to Congress the more general powers "[t]o raise and support Armies" and "[t]o provide and maintain a Navy".[3485] But these must be construed consistently with the Preamble, which excludes aggression as a purpose for deploying these forces. Moreover, Congress's power "[t]o raise and support Armies" is subject to the specific constraint that "no Appropriation of Money to that use shall be for a longer Term than two Years".[3486] This requirement enables each newly elected House of Representatives, the House of Congress most closely identified with WE THE PEOPLE, to act as a fiscal "check and balance" on a "standing army".[3487] Now, "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law".[3488] But no "Money" is to be found in the Treasury, save in consequence of some legislation which provides for raising revenue. "All Bills for raising Revenue", however, "shall originate in the House of Representatives".[3489] And the House of Representatives is limited in its ability to "rais[e] Revenue" through exercise of the "Power To lay and collect Taxes, Duties, Imposts and Excises" by the restriction that such revenue can be raised, and once raised expended, only "to pay the Debts and provide for the common *Defence* and general Welfare of the United States".[3490] So "Money" already deposited in the Treasury may not be paid out for an "Appropriation to th[e] Use" of "rais[ing] and support[ing] Armies" for a "War [of aggression]"; and no new "Taxes, Duties, Imposts and Excises" may be imposed or collected for that purpose, either.

Congress, of course, lacks the discretion to delegate to the President even the authority "[t]o declare [a] War [for the common Defence]". Under *pre*-constitutional Anglo-American imperial law, the King (Britain's chief executive)—not Parliament (Britain's supreme legislature)—enjoyed "the sole prerogative of making war and peace".[3491] By explicitly lodging among the legislative powers of Congress what had long been the exclusive executive power "[t]o declare

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[3483] The Constitution would not empower Congress "[t]o define and punish * * * Offences against the Law of Nations" if "the Law of Nations" were not part of "the Laws of the Union". *See* U.S. Const. art. I, § 8, cl. 10.

[3484] U.S. Const. art. I, § 10, cl. 3.

[3485] U.S. Const. art. I, § 8, cls. 12 and 13.

[3486] U.S. Const. art. I, § 8, cl. 12.

[3487] *See* U.S. Const. art. I, § 2, cl. 1.

[3488] U.S. Const. art. I, § 9, cl. 7.

[3489] U.S. Const. art. I, § 7, cl. 1.

[3490] U.S. Const. art. I § 8, cl. 1 (emphasis supplied).

[3491] W. Blackstone, *Commentaries on the Laws of England*, *ante* note 142, Volume 1, at 257.

War", WE THE PEOPLE not only denied that power to the President outright, but also withheld from Congress any privilege to delegate it back to him in any way, shape, or form. ***Congress can claim no authority whatsoever to resurrect and impose on Americans the* pre*-constitutional British allocation of authority between the legislative and executive branches of government which WE THE PEOPLE have explicitly rejected in their own fundamental law.*** *A fortiori*, because Congress lacks the power "[t]o declare [a] War [of aggression]", it is doubly disabled from purporting to delegate such a nonexistent authority to the President.

(4) The purported power to label Americans "enemy combatants". Folk wisdom has it that "in order to kill a dog you must first call it mad". Similarly, the purpose of labeling American citizens "enemy combatants" is to rationalize exposing them to "the law of war". Again, though, attaching the mere label "enemy combatants" to Americans does not determine the constitutional propriety of subjecting them to some "law of war" that strips them of the Constitution's protections. Moreover, a dog can in fact be mad, and therefore liable to being killed on sight. An America who remains a citizen, however,[3492] cannot be subjected to "the law of war", even if he does engage in "hostilities against the United States".[3493] For if rogue American citizens are in fact "levying War against the[United States" (such as in the course of a domestic insurrection or rebellion), or even are "adhering to the[ ] Enemies [of the United States], giving them Aid and Comfort" (such as during a sudden invasion or a declared international "War")—and even if such Americans are employing the tactics of "terrorists"—although they may colloquially be dubbed "enemy combatants" (or even "mad dogs"), constitutionally they are "traitors", and as such are subject, and exclusively so, to the specific constitutional requirements that appertain to "Treason".[3494] If, on the other hand, these rogue citizens perpetrate acts of "terrorism" unconnected with domestic insurrections, invasions, or a declared "War", they are simply common criminals—perhaps guilty of "Piracies" or "Felonies committed on the high Seas" or of other "Offences against the Law of Nations" where their depredations fit those categories,[3495] or otherwise guilty of some mundane violation of law, but in no case subject to "the law of war".

(5) The purported power to subject Americans to "extraordinary rendition". The Founders were familiar with such abuses. The Declaration of Independence, after all, excoriated King George III "[f]or transporting us beyond Seas to be tried for pretended offences"—the most notorious example at the time

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[3492] *See* 8 U.S.C. § 1481(a)(3)(A).

[3493] *See generally* E. Stewart Rhodes, *Solving the Puzzle of "Enemy Combatant" Status,* Supervised Analytic Writing Paper (Professor Owen Fiss, Advisor), Yale Law School (24 May 2004). If a law student could figure this out, it passes understanding that the highest officials in the General Government are unable to do so.

[3494] U.S. Const. art. III, § 3.

[3495] *See* U.S. Const. art. I, § 8, cl. 10.

being the *Gaspée* affair.[3496] Thus, not surprisingly, although the specific statutory authority that today purportedly licenses so-called "extraordinary rendition"—more honestly put, kidnapping—of American citizens to remove them to foreign venues "beyond Seas" is conjectural,[3497] the procedure plainly offends the constitutional requirements that: (i) "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury";[3498] (ii) "[t]he Trial of all Crimes, except in Cases of Impeachment, * * * shall be held in the State where the said Crimes shall have been committed; but where not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed";[3499] and (iii) "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law".[3500] For every imaginable case relating to "terrorism" that might supposedly warrant an "extraordinary rendition" will involve a "person * * * held to answer for a capital, or otherwise infamous crime". Every "extraordinary rendition" will likely translate a suspect to some location far removed from the place in which an alleged crime was committed—in any event a *secret* location, which even if specifically "by Law * * * directed" or "previously ascertained by law" nonetheless will remain *unknown* to WE THE PEOPLE, in order to exclude the victim from contacts with relatives and friends so that he cannot stand upon his right "to have the assistance of counsel for his defense".[3501] And, in this undisclosed location, neither "bail", nor "a presentment or indictment of a Grand Jury", nor "a speedy and public trial" will even be available, let alone ever be had—doubtlessly so that the victim can be exposed to indefinite "enhanced interrogation" (that is, torture), in violation of his rights not to be "required" to post even "[e]xcessive bail",[3502] not to "be compelled in any criminal case to be a witness against himself",[3503] and not to have "inflicted" upon him any "cruel and unusual punishments".[3504]

[3496] *See ante*, at 88-93.

[3497] Presumably it, too, derives implicitly from the Joint Resolution To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States ("Authorization for Use of Military Force"), S.J. Resolution 23, 18 September 2001, Pub. L. 107-40, § 2(a), 115 Stat. 224, 224. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 516-519 (2004) (O'Connor, J., announcing the judgment of the Court).

[3498] U.S. Const. amend. V.

[3499] U.S. Const. art. III, § 2, cl. 3.

[3500] U.S. Const. amend. VI.

[3501] U.S. Const. amend. VI.

[3502] U.S. Const. amend. VIII.

[3503] U.S. Const. amend. V.

[3504] U.S. Const. amend. VIII.

(6) The purported power to detain Americans indefinitely in military custody. Notwithstanding the Supreme Court's callous approbation of this practice[3505]—which parallels its cowardly complicity in the even more blatantly offensive indefinite preventive detention of Japanese-Americans during World War II[3506]—indefinite detention "violate[s]" "the right" of the detainee "to be secure * * * against [an] unreasonable * * * seizure" of his "person".[3507] In cases involving alleged "terrorism" and equally serious offenses, it dispenses with the requirement that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury".[3508] It "deprive[s]" each "person" subject to it of his "liberty * * * without due process of law",[3509] unless the constitutional facts justifying detention are determined *de novo* and in a timely fashion by a judicial tribunal.[3510] It abridges "the right" of every "accused" "[i]n all criminal prosecutions * * * to a speedy and public trial, by an impartial jury" in a civilian court.[3511] And, precisely because it is *indefinite but depends upon no actual judicial determination of guilt*, such detention flies in the face of the prohibitions that "[e]xcessive bail shall not be required, * * * nor cruel and unusual punishments inflicted".[3512]

Were all of this not enough, in their review of the Nazis' "PURGE OF POLITICAL OPPONENTS AND TERRORIZATION", the prosecutors at Nuremberg charged (and proved) that "[*w*]*ithout judicial process, the Nazi conspirators imprisoned, held in protective custody and sent to concentration camps opponents and suspected opponents*" and "*authorized the Gestapo to arrest and detain*

[3505] *See* Hamdi v. Rumsfeld, 542 U.S. 507, 516-524 (2004) (O'Connor, J., announcing the judgment of the Court), *relying on* Joint Resolution To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States ("Authorization for Use of Military Force"), S.J. Resolution 23, 18 September 2001, Pub. L. 107-40, § 2(a), 115 Stat. 224, 224.

[3506] *Compare* Korematsu v. United States, 323 U.S. 214 (1944) *with Ex parte* Endo, 323 U.S. 283 (1944). *See* Jacobus tenBroek, Edward N. Barnhart, and Floyd Matson, *Prejudice, War and the Constitution* (Berkeley, California: University of California Press, 1954). To the extent that degrees of putrescence can be assigned to the Court's grotesque violations of the Constitution, *Korematsu* was more of a stinker than *Hamdi*, because in *Hamdi* detention was imposed as a consequence of alleged prior behavior as to which some supposed evidence was available, whereas in *Korematsu* it was imposed as the result of nothing more than speculation about future behavior as to which, in the nature of things, no evidence could possibly have been assembled.

[3507] U.S. Const. amend. IV.

[3508] U.S. Const. amend. V.

[3509] U.S. Const. amend. V.

[3510] *But contrast, e.g.,* Crowell v. Benson, 295 U.S. 22, 60 (1932), *with* Hamdi v. Rumsfeld, 554 U.S. 507, 524-535(2004) (O'Connor, J., announcing the judgment of the Court). Surely it passes understanding that, in a case involving a taking of private property (*Crowell*) "the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law", but in a case involving an individual's indefinite incarceration (*Hamdi*) "[h]earsay * * * may need to be accepted", and "a presumption [indulged] in favor of the Government's evidence", so as not to "impose [burdens] on the military".

[3511] U.S. Const. amend. VI *and* art. III, § 2, cl. 3.

[3512] U.S. Const. amend. VIII.

without recourse to any legal proceeding".[3513] "'[T]he fear of such camps was a very effective brake on any possible opposition.'"[3514] Those who will not learn from this history where the contemporary reintroduction of indefinite detention is leading America will be condemned to relive the lesson to its bitter end.

To be sure, the Constitution does provide that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, *unless when in Cases of Rebellion or Invasion the public Safety may require it*",[3515] and to that limited extent tolerates possibly indefinite detention. During the already prolonged course of the "war on terrorism", however, Congress has yet to put forward the preposterous claim that any location within the United States is even exposed to, let alone suffering from, an actual "Rebellion or Invasion" that might justify "suspend[ing]" that "Privilege".[3516]

Notwithstanding the absence of the constitutional facts necessary for a suspension of "[t]he Privilege of the Writ of Habeas Corpus"—which, of course, neither Congress, nor the President, nor any of their agents can claim conclusively to find in any event[3517]—Congress *has* made it clear that it approves of the President's use of indefinite detention for American citizens. One section of its most recent statute (as of this writing) provides as follows:

> (a) IN GENERAL.—Congress affirms that the authority of the President to use all necessary and appropriate force pursuant to the Authorization for Use of Military Force * * * includes the authority for the Armed Forces of the United States to detain covered persons * * * pending disposition under the law of war.
>
> (b) COVERED PERSONS.—A covered person under this section is any person as follows:
>
> > (1) A person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks.

[3513] NAZI CONSPIRACY AND AGGRESSION, *ante* note 3428, Volume I, at 245 (emphasis in the original).

[3514] *Id.*, Volume I, at 246, *quoting from* Affidavit of Raymond H. Geist *in id.,* Volume IV, at 288 (Document 1759-PS).

[3515] U.S. Const. art. I, § 9, cl. 2 (emphasis supplied).

[3516] Even during the period of orchestrated mass hysteria, paranoia, xenophobia, and racism in late 1941 and early 1942, following the Japanese attack on Pearl Harbor, Congress never pretended that the Japanese-Americans the Roosevelt Administration interned in military custody were themselves engaged in "Rebellion" or were plotting to support an utterly impossible Japanese "Invasion" of the West Coast.

[3517] *See, e.g.,* Reagan v. Farmers' Loan & Trust Company, 154 U.S. 362, 397, 399 (1894); Missouri Pacific Railway Company v. Tucker, 230 U.S. 340, 349 (1913); Wadley Southern Railway Company v. Georgia, 235 U.S. 651, 660-661 (1915); Ohio Valley Water Company v. Ben Avon Borough, 253 U.S. 287, 289 (1920); Crowell v. Benson, 285 U.S. 22, 60 (1932); Saint Joseph Stock Yards Company v. United States, 298 U.S. 38, 51-51 (1936).

> (2) A person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.
>
> (c) DISPOSITION UNDER LAW OF WAR.—The disposition of a person under the law of war as described in subsection (a) may include the following
>
> (1) Detention under the law of war without trial until the end of hostilities authorized by the Authorization for Use of Military Force.[3518]

"[A]*ny* person" can include an American citizen—for nowhere are Americans excluded from that term. Therefore, *any* American whom someone in the Executive Branch believes (on whatever ground, be it serious, spurious, or the spawn of mere spite) to have "committed a belligerent act or * * * directly supported * * * hostilities in aid of enemy forces" against either "the United States or its coalition partners" can be detained "under the law of war without trial until the end of * * * hostilities"—and not simply in indefinite, but even in *indeterminable*, detention, because no one knows what conditions will signal "the end of * * * hostilities".

Revealingly, however, in its widest reach this statute extends only to "[a] person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces". So, in order to avoid it, new "terrorists" need simply eschew membership in or "substantial[ ]" support for "al-Qaeda, the Taliban, or associated forces". This means either that: (i) the draftsmen were incredibly naive or sloppy in defining "covered persons" in "the war on terrorism" in such narrow and therefore easily evaded terms—contrary to the party line from the District of Columbia that *any and every* disgruntled Muslim from Casablanca to the Celebes is a potential *jihadi* "terrorist"; or (ii) the wordsmiths were sufficiently astute to realize that a more comprehensive definition was unnecessary, because the whole "war on terrorism" is nothing but an intelligence-agency "black operation" in which "al-Qaeda, the Taliban, or associated forces" collectively play the same rôle for "the United States [and] its coalition partners" as did the individual arch-traitor Emmanuel Goldstein for Oceania in George Orwell's *1984*; and therefore *everyone* whom the "security agencies" decide to denounce as a "terrorist" they can simply *claim* to be involved with "al-Qaeda, the Taliban, or associated forces", in a process alongside of which

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[3518] An Act To authorize appropriations for fiscal year 2012 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe military personnel strengths for such fiscal year, and for other purposes ("National Defense Authorization Act for Fiscal Year 2012"), Act of 31 December 2011, Pub. L. 112-81, TITLE X—GENERAL PROVISIONS, Subtitle D—Counterterrorism, § 1021, 125 Stat. 1298, 1562.

"guilt by association" appears to be a hard science.[3519] In any event, inasmuch as it is impossible to gauge how "the war on terrorism" can ever end, when no central command capable of surrendering on behalf of all "terrorists" through the world could possibly exist, the statute effectively licenses the President and his minions to impose truly indefinite, even perpetual, detention. And inasmuch as the statute nowhere defines what may constitute "a belligerent act" or "support[ ]" for "hostility in aid of enemy forces"—or what the composition of "enemy forces" may be—or who or what might be deemed to constitute "associated forces" of "al-Qaeda" or "the Taliban"—or even what nations may be deemed to constitute the United States' "coalition partners"—therefore no one can know the precise contours of the behaviors for which such detention may be imposed. Even criticism of "the war on terrorism" which contends that some alleged "terrorists" may have legitimate grievances under "the Laws of Nature and of Nature's God" for which armed resistance offers them the only means of redress might be denounced as prohibited "support[ ]" for "hostility in aid of enemy forces"; or the critics might be traduced as themselves being "associated forces" of "al-Qaeda" or "the Taliban" on the evidence of their criticism.[3520] Of course, the intimidating ambiguity of this statute should surprise no one, as "detention under the law of war" falls within "martial law"—and

> martial law, which is built upon no settled principles, but is entirely arbitrary in it's decisions is * * * in truth and reality no law, but something indulged, rather than allowed as a law: the necessity of order and discipline in an army is the only thing which can give it countenance; and therefore it ought not to be permitted in time of peace, when the * * * courts are open for all persons to receive justice according to the laws of the land.[3521]

But on the count of its linguistic imprecision alone it should be treated as a nullity—because any statute couched "in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law".[3522]

[3519] The historical antecedents for this kind of malicious branding are well documented. For the prime example, Stalin relished linking every major domestic "traitor" and "conspirator" whom his secret police arrested to his erstwhile rival and exiled *bête noire*, Trotsky, even though most of those unfortunates had no more of an actual conspiratorial connection with Trotsky than they did with the Man in the Moon.

[3520] Those waging "the war on terrorism" would not shrink from refusing to recognize the First Amendment as a bar to prosecution of such critics. *See* Holder v. Humanitarian Law Project, 561 U.S. ___ (2010).

[3521] W. Blackstone, *Commentaries on the Laws of England, ante* note 142, Volume 1, at 412. *Accord*, *Ex parte* Milligan, 71 U.S. (4 Wallace) 2 (1866). *See post*, Chapter 48.

[3522] Connally v. General Construction Company, 269 U.S. 385, 391 (1926). At least one judge has recognized as much. *See* Hedges v. Obama, Case 1:12-cv-00331-KBF (S.D.N.Y.), Opinion and Order (filed 12 September 2012). Whether this decision will be upheld on appeal remains to be seen.

The next section of the statute does not alleviate any of these problems. It provides that:

> (a) CUSTODY PENDING DISPOSITION UNDER LAW OF WAR.—
>
> (1) IN GENERAL.— * * * the Armed Forces of the United States shall hold a person described in paragraph (2) who is captured in the course of hostilities authorized by the Authorization for Use of Military Force * * * in military custody pending disposition under the law of war.
>
> (2) COVERED PERSONS.—The requirement in paragraph (1) shall apply to any person whose detention is authorized under section 1021 who is determined—
>
> (A) to be a member of, or part of, al-Qaeda or an associated force that acts in coordination with or pursuant to the direction of al-Qaeda; and
>
> (b) to have participated in the course of planning or carrying out an attack or attempted attack against the United States or its coalition partners.
>
> * * * * *
>
> (b) APPLICABILITY TO UNITED STATES CITIZENS AND LAWFUL RESIDENT ALIENS.—
>
> (1) UNITED STATES CITIZENS.—The requirement to detain a person in military custody under this section does not extend to citizens of the United States.[3523]

Although "[t]he *requirement* to detain a person in military custody *under this section* does not extend to citizens of the United States", "this section" has no effect on the reach of the preceding section. If an individual can be characterized as a "covered person" under both the first section and the second section of the statute, he *must* be held "in military custody pending disposition under the law of war"—unless he happens to be an American citizen, in which case "[t]he *requirement* to detain" does not apply. Nonetheless, *such an American can still be indefinitely detained "under the law of war without trial" at the discretion of the President under the first section*.

The exact implications of the twists and turns in this statute's labyrinthine language aside, its fatal flaw is that the Constitution absolutely prohibits indefinite detention "under the law of war without trial" for "any person who has committed

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[3523] Act of 31 December 2011, § 1022, 125 Stat. at 1563.

a belligerent act or has directly supported * * * hostilities [against the United States] in aid of * * * enemy forces" *if that "person" is an American citizen or otherwise owes allegiance to the United States*. By definition, in committing the acts described in the statute, any such "person" would be "levying War against the[United States], or * * * adhering to their Enemies, giving them Aid and Comfort"—which the Constitution defines as "Treason".[3524] The Constitution explicitly requires, moreover, that "[n]o Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court"[3525]—thus mandating that *an actual trial* in a *civilian* court shall be held, and no conviction had (let alone punishment inflicted) except upon certain sufficient evidence.

The practical substance of these requirements can be gleaned from Hawkins' discussion of three English statutes that obviously were taken as models, and then appropriately modified, for the Constitution's provision:

> *That no Person or Persons * * * shall be indicted, arraigned, condemned, convicted or attainted, for any * * * Treasons * * * unless the same Offender or Offenders, be thereof accused by two lawful Accusers; which said Accusers * * * shall be brought in Person before the Party so accused, and avow and maintain what they have to say against the said Party, to prove him guilty of the Treasons * * * contained in the Bill of Indictment * * * , unless the said Party shall willingly, without violence, confess the same.*
>
> ** * * That all Trials * * * to be had, awarded, or made for any Treason, shall be had and used only according to the due Order and Course of the Common Law.*
>
> * * * * *
>
> ** * * That * * * no Person or Persons whatsoever shall be indicted, tried or attainted of High Treason, whereby any Corruption of Blood may, or shall be made to any such Offender, or Offenders, or to any Heir or Heirs of any such Offender or Offenders, * * * but by and upon the Oaths and Testimony of two lawful Witnesses, either both of them to the same Overt-Act, or one of them to one, and the other of them to another Overt-Act of the same Treason, unless the Party indicted and arraigned, or tried, shall willingly, without Violence, in open Court confess the same, or shall stand mute, or refuse to plead * * * .*[3526]

[3524] U.S. Const. art. III, § 3, cl. 1. *See also* 18 U.S.C. § 2381.

[3525] U.S. Const. art. III, § 3, cl. 1.

[3526] *A Treatise of The Pleas of the Crown, ante* note 434, Book II, Chapter XXV, §§ 131, 132, and 134, at 256-257. The Constitution substituted for the relatively lax English allowance of "*the Oaths and Testimony of two lawful Witnesses, either both of them to the same Overt-Act, or one of them to one, and the other of them to another Overt-Act*" the stricter requirement of "the Testimony of two Witnesses to the same overt Act". Similarly, it prohibited "*any Corruption of Blood * * * to any Heir or Heirs of any * * * Offender or Offenders*", by mandating that "[n]o Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted". U.S. Const. art. III, § 3, cl. 2.

The most important part of this historical derivation for the matter at issue is "*That all Trials * * * to be had, awarded, or made for any Treason, shall be had and used* ***only according to the due Order and Course of the Common Law***", in which *corpus juris* indefinite detention without trial is unknown (except during periods when "[t]he Privilege of the Writ of Habeas Corpus" has been lawfully "suspended"[3527]). More generally, "[A] CRIME * * * is an act committed * * * in violation of a public law".[3528] Being "an act committed * * * in violation of [the Constitution]" and subject to 'Punishment",[3529] "Treason"is a "CRIME"—indeed, in Anglo-American legal tradition it "is the highest civil crime, which (considered as a member of the community) any man can possibly commit".[3530] The Constitution requires that "[t]he Trial of *all* Crimes * * * shall be by Jury".[3531] And "[i]n *all* criminal prosecutions, the accused shall enjoy the right to a *speedy and public* trial",[3532] with the "Trial" and the "Jury" to "*be had and used only according to the due Order and Course of the Common Law*" (or some constitutional civil statute), not "military law". Thus, the only "law of war" applicable in a case in which any American citizen "has [allegedly] committed a belligerent act or has directly supported * * * hostilities [against the United States] in aid of * * * enemy forces" is the *constitutional* law of "Treason". And the *constitutional* law of "Treason" excludes indefinite detention without trial, but instead requires an actual, timely trial "in open Court".

If applying the purported power of indefinite detention to individuals against whom there exists some actual, articulable suspicion of "directly support[ing] * * * hostilities in aid of * * * enemy forces" in "the war on terrorism" were not bad enough, the distemper of these times supports the prediction that rogue public officials will soon claim a power of indefinite *preventive* detention (along the lines of the Japanese-American concentration camps of World War II) to be used against those unfortunate individuals whom some "homeland-security" bureaucrat trained as a "profiler" imagines *might* engage in "directly support[ing such] * * * hostilities". Then indefinite detention will be employed to cow into silence vocal dissenters from "the war on terrorism", and to remove from society those who refuse to shut up. Then it will be expanded to license military custodians to hold detainees as hostages against the good behavior of their relatives, friends, and associates—for even a first-class police state will find it far more efficient to seize a few individuals, and through threats of maltreatment aimed at them thereby terrorize many others into

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[3527] *See* U.S. Const. art. I, § 9, cl. 2.

[3528] W. Blackstone, *Commentaries on the Laws of England, ante* note 142, Volume 4, at 5.

[3529] *See* U.S. Const. art. III, § 3, cls. 1 and 2.

[3530] W. Blackstone, *Commentaries on the Laws of England, ante* note 142, Volume 4, at 75.

[3531] U.S. Const. art. III, § 2, cl. 3 (emphasis supplied).

[3532] U.S. Const. amend. VI (emphasis supplied).

compliance with the régime's dictates, than to round up and incarcerate the lot. Indefinite preventive detention may even be used to take into custody entirely innocent relatives and friends of supposed "terrorists" who cannot be apprehended, so as to hold them as hostages against the suspects' good behavior.[3533] Thus will be proven the prescience of Justice Robert Jackson's ominous warning when the Supreme Court upheld the internment of innocent Japanese-Americans, that

> once a judicial opinion rationalizes [a governmental act] to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an [act], the Court * * * has validated the principle. * * * The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds the principle more deeply in our law and thinking and expands it to new purposes. * * * There it has a generative power of its own, and all that it creates will be in its own image.[3534]

As to how extensively the perverse practice of indefinite detention might be applied in the future, the background of *Korematsu* provides a chilling possibility.[3535] On 19 February 1942, President Franklin D. Roosevelt purported to authorize the Secretary of War "to prescribe military areas":

> Whereas the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities * * * :
>
> NOW, THEREFORE, by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorize and direct the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restriction the Secretary of War or the appropriate Military Commander may impose in his discretion. The Secretary of War is hereby authorized to provide for residents of any such area who are excluded therefrom, such

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[3533] Once again, historical antecedents are well known. *See, e.g.,* R. Conquest, *The Great Terror, ante* note 3382, at 86, 142.

[3534] Korematsu v. United States, 323 U.S. 214, 246 (1944) (dissenting opinion).

[3535] *See generally* Michi Weglyn, *Years of Infamy: The Untold Story of America's Concentration Camps* (New York, New York: William Morrow and Company, Inc., 1976).

> transportation, food, shelter, and other accommodations as may be necessary, in the judgment of the Secretary of War or the said Military Commander, and until other arrangements are made, to accomplish the purpose of this order.[3536]

Then, on 18 March 1942, "in order to provide for the removal from designated areas of persons whose removal is necessary in the interests of national security," Roosevelt "established * * * the War Relocation Authority" and "directed"

> * * * [t]he Director of the War Relocation Authority * * * to formulate and effectuate a program for the removal * * * of the persons * * * designated * * * and for their relocation, maintenance, and supervision.
>
> * * * In effectuating such program the Director shall have authority to—
>
> (a) Accomplish all necessary evacuation * * * , provide for the relocation of such persons in appropriate places, provide for their needs in such manner as may be appropriate, and supervise their activities.
>
> (b) Provide, insofar as feasible and desirable, for the employment of such persons at useful work * * * .
>
> (c) Secure the cooperation, assistance, or services of any governmental agency.[3537]

Shortly thereafter, Congress provided

> [t]hat whoever shall enter, remain in, leave or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, * * * contrary to the restrictions applicable to any such area or zone * * * shall, if it appears that he knew or should have known of the existence and extent of the restrictions or other and that his act was in violation thereof, be guilty of a misdemeanor and * * * liable to a fine of not to exceed $5,000 or to imprisonment for not more than one year, or both, for each offense.[3538]

The effect of these dictates was that anyone who found himself within a "military area[ ] * * * from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave" was: (i)

[3536] Executive Order No. 9066 (19 February 1942), 7 *Federal Register* 1407, 1407 (25 February 1942).

[3537] Executive Order No. 9102 (18 March 1942), 7 *Federal Register* 2165, 2165 (20 March 1942).

[3538] AN ACT To provide a penalty for violation of restrictions or orders with respect to persons entering, remaining in, leaving, or committing any act in military areas or zones, Act of 21 March 1942, CHAPTER 191, 56 Stat. 173, 173.

"subject to whatever restriction" some civilian bureaucrat or military officer "may impose in his discretion", and (ii) could neither "remain in[nor] leave" that area "contrary to the restrictions"—which included being transported to some other place where such "food, shelter, and other accommodations as may be necessary" would be provided, and where his "activities" would be "supervise[d]", "until other arrangements [we]re made" at some unspecified time in the future. Thus, the designation of a "military area" exposed the individuals within it to seizure, relocation, and indefinite detention.

In 1944, the Supreme Court in *Korematsu* upheld the order for exclusion, on the ground that "exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country", and the "judgment that exclusion of the whole group was * * * a military imperative".[3539] In a companion case, *Endo*, the Court observed that "[n]either the Act [of 21 March 1942] nor the [Executive O]rders [Numbers 9066 and 9102] use the language of detention" in so many words; but that, because

> the Act and the orders are silent on detention does not, of course, mean that any power to detain is lacking. Some such power might indeed be necessary to the successful operation of the evacuation program. * * * [A]ny such implied power must be narrowly confined to the precise purpose of the evacuation program.[3540]

As the particular Japanese-American before the Court was "concededly loyal" and "admittedly loyal", the Court held that "[t]he authority to detain a citizen * * * as protection against espionage or sabotage is exhausted * * * when his loyalty is conceded"—but it also made clear that "[d]etention which furthered the campaign against espionage and sabotage" would be another matter.[3541]

The result of all this was the insinuation into American law of a trio of bastard "principle[s]" that now "lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need": (i) "[M]ilitary imperative" alone supports an order for evacuation of an extensive geographical area, and deportation of its residents, even though a large number of "loyal" individuals may be swept up along with "an unascertained" but presumably far smaller number of "disloyal" ones. (ii) Detention of all those individuals is justified if it is "necessary to the successful operation of the evacuation program"—which, at the minimum, it always will be if only to insure that everyone

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[3539] Korematsu v. United States, 323 U.S. 214, 218-219 (1944) (Black, J., for the Court).

[3540] *Ex parte* Endo, 323 U.S. 283, 300, 301-302 (1944) (Douglas, J., for the Court).

[3541] *Id.* at 302.

within the area has been discovered, removed, and processed in order to determine whether he falls afoul of any applicable law or regulation. And (iii) only the individuals whom the government "concede[s]" and "admit[s]" to be "loyal" (or worthy of some other exculpatory label) are entitled to unconditional release.

No vivid imagination is necessary to foresee how some future rogue President and his lackeys in Congress, using this material as their model, could substitute for "the war [against Germany and Japan]", "the war on terrorism"—for "protection against espionage and * * * "sabotage", "protection against hostile acts of 'terrorists' and 'enemy combatants'"—and for "the Secretary of War", "the Secretary of Homeland Security". Because of the ubiquitous and unpredictable nature of "terrorism", "military areas in such places and of such extent" as the Secretary of Homeland Security and various "Military Commander[s]" "m[ight] determine" could extend throughout the country. "[A]ny or all persons" could include whoever might be suspected of being a "terrorist", an "enemy combatant", or an individual who "has directly supported * * * hostilities in aid of such enemy forces"—which denunciation, in light of the plasticity of those terms, could be stretched to cover almost any outspoken American dissident, such as someone who vocally opposed imperialism and aggression by rogue civilian and military officials of the General Government, or expressed solidarity with, or even just sympathy for, the foreign nations and peoples being attacked, killed, and otherwise oppressed. The "restrictions the Secretary of [Homeland Security] or the appropriate Military Commander m[ight] impose in his discretion" on "the right of any person to * * * remain in[ ] or leave" the newly designated "military areas" could encompass rounding up everyone for exclusion and deportation from those areas (that is, *mass* "extraordinary rendition"). Such "transportation, food, shelter, and other accommodations as m[ight] be necessary * * * until other arrangements [we]re made" for the persons excluded could involve removal to and indefinite detention in some remote concentration camp labeled a "relocation center". And only those Americans deemed "concededly loyal" to the régime according to some unspecified procedure would be released from custody.

To be sure, thirty-four years after Roosevelt's first Executive Order, President Gerald Ford announced that "all the authority conferred by [that] Executive Order * * * terminated upon * * * the cessation of the hostilities of World War II on December 31, 1946".[3542] Ford acknowledged that the "evacuation" of Americans of Japanese ancestry which "resulted in the uprooting of loyal Americans" was "wrong" and a "national mistake[ ]", "and resolved that this kind of action shall never again be repeated".[3543] But he did *not* declare

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[3542] Proclamation No. 4417 (19 February 1976) ("An American Promise"), 41 *Federal Register* 7741, 7741 (20 February 1976), 90 Stat. 3078, 3079.

[3543] 41 *Federal Register* at 7741, 90 Stat. at 3078-3079.

unconstitutional or of otherwise questionable legality the underlying order "to prescribe military areas * * * from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to * * * restriction". Moreover, he emphasized that the supposed "national mistake[ ]" consisted only "in the uprooting of *loyal* Americans". And ultimately the basis for his action was that Roosevelt's Executive Order had "terminated upon * * * the cessation of the hostilities of World War II". So, as far as the Executive Branch is concerned, with respect to allegedly "[*dis*]loyal Americans" during a time of supposed "war", "[t]he principle" of such "military areas" still "lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need".[3544]

Similarly, some forty-six years after Roosevelt's Executive Order, Congress finally

> recognize[d] that * * * a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II. * * * [T]hese actions were carried out without adequate security reasons and without any acts of espionage or sabotage documented * * * , and were motivated largely by racial prejudice, wartime hysteria, and a failure of public leadership.[3545]

Although all of this is true, it would hardly preclude the resurrection of the perverse "principle" of deportation and indefinite detention of masses of Americans tomorrow. For the General Government's civilian and military "internal-security" bureaucracies could be expected to put forward as "plausible claim[s] of an urgent need" all sorts of general "security reasons" as well as particular charges or predictions of various "acts" of "terrorism", the evidence for which predictably they would withhold as "state secrets" on the grounds of "national security" or "executive privilege". Moreover, precisely because this country would still be awash in induced "wartime hysteria" over "the war on terrorism"—which in its entirety constitutes a monumental "failure of public leadership"—all too many Americans would go along with these charges or predictions, rather than recognizing them as the "failure[s]" they were.

Moreover, those politically myopic American patriots who might naively imagine that, by becoming expatriates, they could escape "extraordinary rendition" and "indefinite detention" at the hands of a fully fascistic *para-*military police state

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[3544] Korematsu, 323 U.S. at 246 (Jackson, J., dissenting).

[3545] An Act To implement recommendations of the Commission on Wartime Relocation and Internment of Citizens, Act of 10 August 1988, Pub. L. 100-383, § 2(a), 102 Stat. 903, 903-904.

in this country should recall that, in coöperation with or under pressure from the United States, during World War II most of the Central and South American Republics (Argentina and Chile being the only notable exceptions) seized their own residents of Japanese ancestry, detained and interned some at home, and removed others to concentration camps in the United States.[3546]

One might hope that the present state of international law would deter rogue public officials from imagining that they could get away with something akin to the deportation and indefinite detention of Japanese-Americans in World War II. For the International Criminal Court defines "[d]eportation or forcible transfer of population" as "forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law",[3547] which surely includes any patent violation of the constitution of the state in which the "forced displacement" occurs. "[W]hen committed as part of a widespread or systematic attack directed against any civilian population", "[d]eportation or forcible transfer of population" constitutes a crime against humanity.[3548] Nonetheless, mounting evidence indicates that the selfsame agency which put Roosevelt's Executive Orders into effect—the United States Army—has learned nothing from that shameful episode, but instead is preparing to be ready to repeat, and even to expand upon, it whenever the orders to do so are cut.[3549]

[3546] *See* M. Weglyn, *Years of Infamy, ante* note 3405, at 56-66.

[3547] Rome Statute of the International Criminal Court, Part 2, Article 7, § 2(d).

[3548] Part 2, Article 7, § 1(d). An "'[a]ttack against any civilian population' means a course of conduct involving the multiple commission of acts * * * against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack". Part 2, Article 7, § 2(a).

[3549] *See, e.g.,* Headquarters, Department of the Army, Field Manual No. 3-39.40, "Internment and Resettlement Operations" (12 February 2010). A comparison of this Field Manual to Roosevelt's Executive Order No. 9066 exposes the former as potentially far more inclusive and dangerous in nature than the latter.

(1) Just as did the Executive Order, the Field Manual applies within the United States proper. Roosevelt "authorize[d] and direct[ed] all Executive Departments, independent establishments and other Federal Agencies * * * to assist * * * in carrying out th[e] Executive Order". 7 *Federal Register* at 1407. Similarly, the Field Manual identifies "[s]ome government * * * entities that may be involved in [internment and resettlement] missions" as including the Department of Homeland Security, which by definition does not provide "security" in foreign lands. Chapter 1, § 1-40.

(2) Just as did the Executive Order, the Field Manual asserts the authority of the President to employ the Army in domestic "resettlement operations". Roosevelt "authorize[d] and direct[ed] the Secretary of War and * * * Military Commanders to take such * * * steps as * * * may [be] deem[ed] advisable to enforce compliance with the restrictions applicable to each Military area * * * , including the use of Federal troops and other Federal Agencies, with authority to accept assistance from state or local agencies". 7 *Federal Register* at 1407. Similarly, the Field Manual describes "[r]esettlement operations [as] typically includ[ing] civilian movement and providing relief to human suffering. * * * The authority to approve resettlement * * * operations within U.S. territories is at the Secretary of Defense level and may require * * * a constitutional authorization (for example the President invoking his executive authority under Article 2 of the Constitution)." Chapter 10, § 10-40.

(3) Roosevelt's Executive Order concerned itself only, and specifically, with securing "every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities" by "prescrib[ing] military areas * * * from which any and all persons may be excluded". 7 *Federal Register* at 1407. In contrast, the Field Manual states in broad terms that "[*i*]*nternment and*

Finally, if (as a result of what could be styled "the logical evolution of the *Korematsu* effect") the purported powers to subject individuals to "extraordinary rendition" and "indefinite detention" are "expand[ed] to new purposes" by being exercised in tandem under the conditions of strict "state secrecy" typically imposed in cases of alleged "national security", the effect will be what is now internationally condemned as "enforced disappearances".

The International Criminal Court defines "[e]nforced disappearance of persons" as "the arrest, detention, or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time".[3550] "[W]hen committed as part of a widespread or systematic attack directed against any civilian population", "[e]nforced disappearance of persons" is a crime against humanity.[3551] The ambivalent attitude which officials of the General Government have taken with respect to the International Criminal Court over the years does not augur well for the prosecution of Americans for this particular crime at the present time—although, eventually, as the long-suffering subject of such outrages a thoroughly exasperated humanity is sure to take these matters into its own hands.

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resettlement operations are conducted by military police to shelter, sustain, guard, protect, and account for populations (detainees * * * or dislocated civilians) as a result of military or civil conflict, natural or man-made disaster, or to facilitate criminal prosecution. Internment involves the detainment of a population or group that pose some level of threat to military operations. Resettlement involves the quartering of a population or group for their protection. These operations inherently control the movement and activities of their specific populations for imperative reasons of security, safety, or intelligence gathering." Chapter 1, § 1-3. Thus the Field Manual foresees the Army's involvement in "internment and resettlement operations" arising out of "military or civil conflict", "natural or man-made disaster", and "criminal prosecution" of *all* varieties. not just "protection against espionage and against sabotage".

(4) Roosevelt's Executive Order blandly "authrorize[d] the Secretary of War to provide for residents of any * * * [military] area who are excluded * * * such transportation, food, shelter, and other accommodations as may be necessary". 7 *Federal Register* at 1407. Yet the upshot was the incarceration of Japanese-Americans in concentration camps. The Field Manual provides for a "[psychological operations] officer in charge of supporting [internment and relocation] operations". The "[psychological operations] team * * * [i]dentifies malcontents, trained agitators, and political leaders within the facility who may try to organize resistance or create disturbances", "[d]evelops and executes indoctrination programs to reduce or remove antagonistic attitudes", and "[i]dentifies political activists". In addition, "[t]he [psychological operations] officer often may work in close conjunction with the behavioral science consultation team", which "may develop behavioral management plans". Chapter 3, §§ 3-55 through 3-57. Presumably, the Army expects to find "trained agitators", "political leaders", and "political activists" locked up in the camps precisely because such people would top the lists of those to be rounded up in the type of "emergency" that would trigger a mass internment of Americans. Even more ominously, the Army announces its intention to employ "indoctrination programs" to change the internees' political views through the application of "behavioral science". When performed on Americans held as prisoners in North Korean and Red Chinese camps during the Korean "police action", "behavioral management plans" were colloquially known as "brainwashing".

[3550] Rome Statute of the International Criminal Court, Part 2, Article 7, § 2(i).

[3551] Part 2, Article 7, § 1(i). An "'[a]ttack against any civilian population' means a course of conduct involving the multiple commission of acts * * * against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack". Part 2, Article 7, § 2(a).

Even more specifically, according to the *International Convention for the Protection of All Persons from Enforced Disappearance,*[3552] "enforced disappearance" includes "the arrest, detention, abduction, or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law".[3553] The Convention provides that "[t]he widespread or systematic practice of enforced disappearance constitutes a crime against humanity"; that "[n]o one shall be subjected to enforced disappearance"; that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance"; and that "[n]o order or instruction from any public authority, civilian, military or other, may be invoked to justify an offense of enforced disappearance".[3554] As of this writing, however, officials of the General Government have refused to sign this Convention—no doubt for the sinister reason of self-protection.

So, in the present climate of orchestrated hysteria, paranoia, militant chauvinism, and other induced political lunacy that grips America, one can expect rumors about *los desaparecidos* soon to become rife.

(7) The purported power to torture Americans. A good official definition of "torture" is "any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, for any reason based on discrimination of any kind".[3555] The employment of "enhanced methods of interrogation"—that is, "official torture" by official definition—should hardly be unexpected in a régime which employs "official lies" as central components of its policy. For torture is often used to elicit information the torturers

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[3552] Published on 20 December 2006, adopted by United Nations General Assembly Resolution 61/177 on 12 January 2007, and entered into force on 23 December 2010.

[3553] Part I, Article 2.

[3554] Part I, Article 5; Article 1, § 1; Article 1, § 2; and Article 6, § 2.

[3555] An Act To carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing ("Torture Victim Protection Act of 1991"), Act of 12 March 1992, Pub. L. 102-256, § 3(b)(1), 106 Stat. 73, 73. *See also, e.g.,* 18 U.S.C. §§ 2340(1) and (2), *and* 2441(d)(1)(A).

know perfectly well, or at least suspect, is *false*—but is useful precisely because of its falsity.[3556]

Presumably, "official torture" would be inflicted upon Americans while in custody in order to elicit testimony, or as a punishment. In the first case, it would violate the prohibition against "any person['s] * * * be[ing] compelled in any criminal case to be a witness against himself", no matter who that "person" might be.[3557] In the second case, it would constitute "cruel and unusual punishment[ ]", whether the victim were an American citizen or an alien.[3558]

These are not merely theoretical legal considerations, either. Although "national-security" bureaucrats in such outfits as the Central Intelligence Agency have devised and employed so-called "enhanced methods of interrogation" for decades,[3559] and court lawyers have cobbled together legalistic rationalizations for these methods,[3560] no explicit statutory permission for "official torture" of any variety seems to exist. And for good reason: Those rogue public officials, civilian or military, who purport to authorize or apologize for, as well as those who actually commit, torture are playing with fire—because, unless its perpetrators can contrive to hide behind the cloak of "official immunity",[3561] torture is a crime, whether committed within or outside of the United States; and under some circumstances is punishable even by *death*.[3562] This severity cannot be condemned as excessive, either, because "[t]he willingness of the authorities to use * * * vicious and inhuman methods [of torture] against a substantial number of people, without hesitation, qualms, or regrets, indicates the kind of murderousness that prompts cases of genocide".[3563]

And, "when committed as part of a widespread or systematic attack directed against any civilian population", torture constitutes a crime against humanity.[3564]

The utter hypocrisy of rogue officials in the United States is evidenced by the statute which provides that "[a]ny individual who, under actual or apparent

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[3556] *See, e.g.,* Robert Conquest, *Stalin: Breaker of Nations* (New York, New York: Viking, 1991), at 318.

[3557] U.S. Const. amend. V.

[3558] U.S. Const. amend. VIII.

[3559] *See* KUBARK COUNTERINTELLIGENCE INTERROGATION (July 1963), *later sanitized in* Human Resources Exploitation Training Manual (1983), both declassified in 1997. These two handbooks have been reproduced in their entirety at <http://www.gmu.edu/~nsarchiv/NSAEBB/NSAEBB27/01.01.htm> and at <http://www.gmu.edu/~nsarchiv/NSAEBB/NSAEBB27/02.01.htm>, respectively.

[3560] *See generally* <http://www.gmu.edu/~nsarchiv/torturing democracy/documents/theme.html/#olc>.

[3561] *See post*, at 1624-1629.

[3562] *See* 18 U.S.C. §§ 241 and 242, *and* 2340 and 2340A.

[3563] N. Naimark, *Stalin's Genocides, ante* note 3373, at 114 (quotation reproduced here with the express permission of Princeton University Press).

[3564] Rome Statute of the International Criminal Court, Part 2, Article 7, §§ 1(f) and 2(a).

authority, or color of law, *of any foreign nation* * * * subjects an individual to torture shall, in a civil action, be liable for damages to that individual".[3565] Why Congress needed the Charter of the United Nations as the goad for this legislation, and then did not expand it to the limits of the problem by mandating a civil action against *any individual whosoever* inflicts torture "under actual or apparent authority, or color of law" *of any nation or government whatsoever, **including the United States and each of the several States,*** passes understanding—except that the Members of Congress who voted for such legislation may have realized that they themselves are accessories before the fact in the crimes of this sort that domestic rogue public officials commit.

(8) The purported power to try Americans by "military commissions". The most relevant statute in effect as of this writing "establishes procedures governing the use of military commissions to try alien enemy belligerents for violations of the law of war and other offenses triable by military commission".[3566] For that purpose, it sets out the following definitions:

> * * * ALIEN * * * means an individual who is not a citizen of the United States.
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> * * * * *
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> * * * COALITION PARTNER * * * , with respect to hostilities engaged in by the United States, means any State or armed force directly engaged along with the United States in such hostilities or providing direct operational support to the United States in connection with such hostilities.
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> * * * * *
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> * * * PRIVILEGED BELLIGERENT * * * means an individual belonging to one of the eight categories enumerated in Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War.
>
> * * * UNPRIVILEGED ENEMY BELLIGERENT * * * means an individual (other than a privileges belligerent) who—
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> (A) has engaged in hostilities against the United States or its coalition partners;

[3565] An Act To carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing ("Torture Victim Protection Act of 1991"), Act of 12 March 1992, Pub. L. 102-256, § 2(a)(1), 106 Stat. 73, 73 (emphasis supplied).

[3566] *Originally* An Act To authorize trial by military commission for violations of the law of war, and for other purposes ("Military Commissions Act of 2006"), Act of 17 October 2006, Pub. L. 109-366, § 3 [§ 948b(a)], 120 Stat. 2600, 2602; *superseded by* An Act To authorize appropriations for fiscal year 2010 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe military personnel strengths for such fiscal year, and for other purposes ("National Defense Authorization Act for Fiscal Year 2010"), Act of 28 October 2009, Pub. L. 111-84, TITLE XVIII—MILITARY COMMISSIONS ("Military Commissions Act of 2009"), § 1802 [§ 948b(a)], 123 Stat. 2190, 2575; *now codified at* 10 U.S.C. § 948b(a).

> (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or
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> (C) was a part of al Qaeda at the time of the alleged offense * * * .
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> * * *
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> * * * HOSTILITIES * * * means any conflict subject to the laws of war.[3567]

Based on these definitions, the statute directs that "[a]ny alien unprivileged enemy belligerent is subject to trial by military commission".[3568]

Even as applied solely to aliens in its present form, this statute raises serious constitutional questions. For many of the "offenses * * * triable by a military commission" are quite plainly "capital, or otherwise infamous crimes" for which "[n]o person"—whether citizen or alien—"shall be held to answer * * * , unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia when in actual service in time of War or public danger".[3569] In some extraordinary circumstances, an alien's "case[could] aris[e] in the land or naval forces [of the United States], or in the Militia [of the several States]". But any alien enlisted in "the land or naval forces" or enrolled in "the Militia" would surely upon his engagement have taken an oath or affirmation of allegiance to the United States, or some State, or both—so if thereafter he committed "hostilities" against the United States, he could and should be prosecuted for "Treason". And under those circumstances or otherwise, any prosecution that resulted from "a presentment or indictment of a Grand Jury" would necessarily be one in which "the accused shall enjoy the right to a speedy and public trial, by an impartial jury" in a *civilian* court, not by a "military commission".[3570]

Even more obviously, if this statute did apply to American citizens, it would be unconstitutional unless the term "HOSTILITIES" were construed to exclude those actions that fell within the definition of "Treason". For, (i) the term "HOSTILITIES * * * means any conflict subject to the laws of war"; (ii) "any conflict" that comes within the constitutional definition of "Treason" cannot be "subject to the laws of war", because the Constitution prescribes "Trial * * * by Jury" "in open Court" under "[t]he judicial Power of the United States", not trial by "military commission";[3571] therefore, (iii) "HOSTILITIES" should be narrowly construed to

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[3567] Act of 28 October 2009, § 1802 [§ 948a], 123 Stat. at 1274-1275; *now codified at* 10 U.S.C. § 948a.

[3568] Act of 28 October 2009, § 1802 [§ 948c], 123 Stat. at 2576; *now codified at* 10 U.S.C. § 948c.

[3569] *Compare* U.S. Const. amend. V *with* Act of 28 October 2009, § 1802 [§ 950t], 123 Stat. at 2607-2612; *now codified at* 10 U.S.C. § 950t.

[3570] U.S. Const. amend. VI. *Accord*, art. III, § 2, cl. 3.

[3571] *See ante*, at 1589-1591.

exclude all actions by an American citizen that could arguably be characterized as "Treason".[3572] This is not a merely theoretical concern, either, for two reasons.

First, the Supreme Court has given its general approval for "subject[ing American citizens] to the laws of war" in such situations—but has refused to apply in such situations the specific (indeed, unique) "law of war" the Constitution defines in relation to "Treason".[3573] To be sure, how any other case of this nature might be decided hereafter is open to conjecture, because: (i) the opinions supporting the Court's most recent judgment are intellectually indefensible; (ii) the composition of the Court has changed since 2004; and (iii) as every student of "judicial review" is aware, the twists and turns of "the living Constitution" depend, not upon the words of the Constitution, objectively defined, but instead upon the subjective attitudes of the jurists who happen to be living and serving on the Bench when the Court hands down its next oracular pronouncement. Nonetheless, the precedent now "lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need".[3574]

Second, as of this writing, hysterical "claim[s] of an urgent need" *are* being brought forth, with the introduction of bills that call for "a national of the United States whether by birth or naturalization" to "lose his nationality by voluntarily * * * with the intention of relinquishing United States nationality"

> (A) providing material support or resources to a foreign terrorist organization;
>
> (B) engaging in, or purposefully and materially supporting, hostilities against the United States; or
>
> (C) engaging in, or purposefully and materially supporting, hostilities against any country or armed force that is—
>
> (i) directly engaged along with the United States in hostilities engaged in by the United States; or
>
> (ii) providing direct operational support to the United States in hostilities engaged in by the United States[.][3575]

[3572] *Compare* U.S. Const. art. III, § 1; § 2, cls. 1 and 3; *and* § 3, cl. 1, *with*, *e.g.*, National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U.S. 1, 30 (1937); Lynch v. Overholser, 369 U.S. 705, 710-711 (1962); *and* United States v. Thirty-seven (37) Photographs, 402 U.S. 363, 369 (1971).

[3573] *See* Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (O'Connor, J., announcing the judgment of the Court).

[3574] Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

[3575] *Compare* 8 U.S.C. § 1481(a) *with* A BILL To add joining a foreign terrorist organization or engaging in or supporting hostilities against the United States or its allies to the list of acts for which United States nationals would lose their nationality ("Terrorist Expatriation Act"), Senate Bill No. 1698, 111th Congress, 2d Session (Mr. LIEBERMAN [Connecticut]). *See also* A BILL To add engaging in or supporting hostilities against the United States to the list of acts for which United States nationals would lose their nationality ("Enemy Expatriation Act"), House of Representatives Bill No. 3166, 112th Congress, 1st Session (Mr. DENT [Pennsylvania]).

The obvious purpose of such bills is to denounce American citizens as "terrorists" or "enemies", *so that they can be stripped of their nationality and then be subjected to "military commissions" under "the law of war"*. Apparently, rogue Members of Congress imagine that, although most sensible Americans would resist having their fellow citizens hauled before "military commissions", they might be sufficient callous not to object to such treatment of *artificially produced aliens*—as well as sufficiently stupid not to realize that bills of this type expose potentially *any and every* American citizen to a condition *worse than that of genuine aliens*, because an American stripped of his nationality could count on no guarantee that any other country would accept him as a citizen, and therefore could be reduced to a veritable "man without a country" *without* ***any*** *of the protections that* ***any*** *country's laws might otherwise afford him*.

Provisions such as these trip and fall, however, over the constitutional fact that the behavior they condemn amounts to "Treason", and over the constitutional requirements that "Treason" must be prosecuted in a *civilian* court under exacting standards of evidence. Those requirements cannot be evaded—as is apparently the intent of such bills' authors—by the simpleminded expedient of stripping of their citizenship the very individuals who are entitled to the Constitution's protection, on the ground that they have engaged in the very behavior the Constitution identifies as "Treason", and as a consequence of that loss of nationality may be subjected to "military commissions" that in effect try "Treason" according to procedures constitutionally inapplicable to "Treason". *That an individual has allegedly committed "Treason" cannot form the basis for a denial to him of the constitutional protections applicable to those who allegedly commit "Treason"*.

(9) The purported power to employ "weapons of mass destruction" against Americans. Over the last two decades or so, in various countries throughout the world America's Armed Forces have expended huge amounts of munitions composed of "depleted uranium" in combat operations. Presumably, in order to suppress any serious resistance by armed Americans against domestic oppression, rogue units of the Armed Forces in support of *para-*military police (and perhaps those police themselves) would employ such munitions—notwithstanding that such munitions have been internationally condemned as "weapons of mass destruction".[3576]

Being both radioactive and a toxic heavy metal, when dispersed in fine particles throughout the environment as the result of its use in pyrophoric ammunition "depleted uranium" poses long-lasting and serious biological hazards

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[3576] *See, e.g.,*European Parliament resolution on non-proliferation of weapons of mass destruction: A role for the European Parliament, No. 2005/2139(INI), Adopted 17 November 2005, § 84: "[The European Parliament r]eiterates its call for a moratorium—with a view to the introduction of a total ban—on the use of so-called 'depleted uranium munitions.'"

to human beings.[3577] That weapons containing this poisonous material have been employed against anyone anywhere is unconscionable. That rogue public officials might cause them to be fired by Americans at Americans in America—leaving the territory in which they are expended contaminated for no one can predict how long—shows that the domestic situation in this country is rapidly deteriorating from a mere "design to reduce the[People] under absolute Despotism" to a capability and willingness to destroy them utterly.

(10) The purported power to assassinate Americans. Of all of the indicia that rogue public officials are waging a "war *of* terrorism" against WE THE PEOPLE, "official assassinations" of American citizens are obviously the most blatant, because depriving an individual of his life moots *all* of his rights to liberty, property, and the pursuit of happiness in general. "Official assassinations" *of foreigners in foreign countries* have long been a thinly disguised—and more than merely arguably illegal—tool of rogue foreign policy.[3578] But "official assassinations" *of Americans*, anywhere and for any reason, have traditionally been held (at least for public consumption) to be off limits. Now the situation has changed. As of this writing, the basic assertion from the Executive Branch of the General Government is that the President, in his capacity as "Commander in Chief" during "the war on terrorism", enjoys the inherent authority, by himself or through his subordinates, to label certain Americans "terrorists" and "enemy combatants", and on that basis to order operatives of the General Government to assassinate them wherever they may be found (thus brutally negating the children's nursery rhyme, that "sticks and stones can break my bones, *but names can never hurt me*").

Supposedly, the exercise of this purported power to deploy "death squads" (to employ the term that became fashionable when the practice was confined, appropriately, to various banana republics): (i) does not depend upon any prior judicial determination that an individual targeted for execution is guilty, or even suspected, of having actually committed any crime punishable by death; (ii) is not confined solely to individuals who cannot be apprehended and made to stand trial in some court; and (iii) is not subject to any sort of judicial intervention or review before or after the execution takes place. Indeed, because many of the supposed facts which might rationalize characterizing an individual as a putative "terrorist" certainly would be claimed to be "state secrets", meaningful judicial review either *ex ante* or *ex post* would routinely be impossible as a matter of practice. Thus, "official assassinations" are forms of "extrajudicial killing": "a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court

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[3577] *See, e.g.,* Anne Gut & Bruno Vitale, *Depleted Uranium: Deadly, Dangerous and Indiscriminate* (Nottingham, England: Spokesman, 2003).

[3578] *Compare, e.g.,* J. Douglass, *JFK and the Unspeakable, ante* note 3407, at 34-35, 60, 143-145, 211-212, 251-252, 375-377 (and authorities there cited), *with* 18 U.S.C. § 1119.

affording all the judicial guarantees which are recognized as indispensable by civilized peoples".[3579]

As of this writing, the Executive Branch has admitted to plotting and perpetrating "official assassinations" of Americans only in foreign countries. But inasmuch as the Constitution does not limit the exercise of the powers of the "Commander in Chief" (whatever they may be) to foreign venues only, no reason can be found why the supposed authority to execute certain Americans outside of any judicial process, if it does exist at all, cannot be exercised within the United States proper—even on the lawn of the White House itself. After all, if an American "terrorist" who might be apprehended in (say) Afghanistan may nonetheless be assassinated there, simply because some bureaucrat in the Executive Branch considers the latter course of action more efficient than the former, then why should not an American "terrorist" operating within the United States also simply be executed out of hand, for the same eminently practical reason? So, in its fullest statement, the contention is that the President enjoys unbridled discretion—acting either by his own hand or by the hands of his minions—to assassinate, anywhere in the world and presumably by whatever means may prove effective, any American whom someone in the Executive Branch, whose identity may never be disclosed, has characterized as a "terrorist" or an "enemy combatant" by some procedure and on the basis of some purported evidence that in their most important particulars may forever remain secret. And according to the apologists for "official assassinations", howsoever the President proceeds constitutes "due process of law".

The unconstitutionality of any such license for official "death squads" should be patent, however. Where "due process of law" is concerned, the fundamental rule of construction is that "[w]e must examine the Constitution itself to see whether th[e] process [at issue] be in conflict with any of its provisions".[3580] Most obviously, the Fifth Amendment provides that "[*n*]*o person* shall * * * be deprived of life * * * without due process of law"—and with respect to "a capital, or otherwise infamous crime" directs that "[*n*]*o person* shall be held to answer * * * , unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger".[3581] Specifically in the case of "a capital * * * crime", the Amendment imposes these requirements for the best of reasons—namely, because by definition

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[3579] An Act To carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing ("Torture Victim Protection Act of 1991"), Act of 12 March 1992, Pub. L. 102-256, § 3(a), 106 Stat. 73, 73.

[3580] Murray's Lessee v. Hoboken Land and Improvement Company, 59 U.S. (18 Howard) 272, 277 (1856).

[3581] Emphases supplied.

the usual punishment for "a *capital* crime" is *death*.[3582] The theory of "official assassinations" is not limited, and as of this writing has not been publicly asserted applicable, however, to "cases arising in the land or naval forces, or in the Militia". In all other "cases"—and surely in "cases" arising in the course of "the war on terrorism", which presumably would almost always involve alleged "capital, or otherwise infamous crime[s]"—the requirement of "a presentment or indictment of a Grand Jury" would necessarily make the "person" targeted for an "official assassination", *whoever and whatever he was*, the subject of a normal "criminal prosecution[ ]" in which "the accused shall enjoy the right to a speedy trial, by an impartial jury"[3583]—not lose all of his rights as the consequence of his own homicide at the hands of an official "death squad" before a jury can even be impaneled. A "person" suspected of having committed "a capital, or otherwise infamous crime" related to "terrorism", and who as the result of such suspicion is subjected to an "official assassination", would self-evidently be "held to answer" in fact for his alleged "crime" in the strictest fashion possible. But he would not be given the benefit in law of a prior "presentment or indictment of a Grand Jury"—let alone a "Trial * * * by Jury".[3584] Therefore, under the terms of the Fifth Amendment alone, such a "person" would "be deprived of life * * * without due process of law".[3585]

Perhaps supererogatory in this regard, the Fourth Amendment provides that "[t]he right of the people"—that is, of all Americans—"to be secure in their persons * * * against unreasonable * * * seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing * * * the persons * * * to be seized". If no "persons" may even be "*seized*" without judicial "Warrants * * * upon probable cause, supported by Oath or affirmation", how may any "persons" be simply *killed* out of hand, with no prior judicial involvement at all? Is homicide not the most extreme form of "seizure[ ]" of a "person[ ]" imaginable? Similarly, one could also ask whether an "official homicide" of some individual, with no prior judicial determination of guilt, does not constitute "cruel and unusual punishment", in violation of the Eighth Amendment. For death is certainly a "punishment". And to impose it on the basis of mere suspicion should make that "punishment" both "cruel and unusual" as a matter of law, in light of the many times the Constitution mandates some sort of judicial process before any supposed "Crime" may be investigated, charged, or tried,

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[3582] *See Black's Law Dictionary*, *ante* note 368, at 263.

[3583] U.S. Const. amend. VI. *Accord*, U.S. Const. art. III, § 2, cl. 3.

[3584] *See* U.S. Const. art. III, § 2, cl. 3 *and* amend. VI.

[3585] One must marvel that anyone of sound mind could possibly contest this conclusion, when every student of introductory constitutional law knows that, before welfare benefits may be terminated, or wages garnished, or consumer goods replevied, *some* sufficient evidentiary showing, ultimately subject to meaningful judicial review, must be had. *See* Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Finance Corporation, 395 U.S. 337 (1969); *and* Fuentes v. Shevin, 407 U.S. 67 (1972). Are welfare benefits, wages, and consumer goods of greater consequence than life itself?

let alone actually punished.[3586] Or, one might ask, if "[n]either slavery nor involuntary servitude, except as a punishment for crime *whereof the party shall have been duly convicted*, shall exist within the United States", how can a régime of "official assassinations" without trials, let alone convictions, be allowed to "exist within the United States"?[3587] Those condemned to "slavery [ ]or involuntary servitude", after all, at least remain alive. But stressing these additional points would merely bring a surfeit of owls to Athens.

The exponents of "official assassinations" do, of course, contend that the President's constitutional status as "Commander in Chief" somehow immunizes him from or overrides these and apparently all other constitutional prohibitions, limitations, and other requirements. That, however, is exceptionally thin hogwash.

First, the question of whether the President, as "Commander in Chief" engaged in fighting a supposed "war on terrorism", may authorize "death squads" to execute alleged American "terrorists" and "enemy combatants" cannot be avoided on the ground that it raises what jurists call a "political question". As everyone knows, the doctrine of "political questions" derives from Chief Justice John Marshall's opinion in *Marbury* v. *Madison*, in which he explained that

> [t]he province of the [Supreme C]ourt is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive can never be made in this court.[3588]

Plainly, then, if the Constitution *withholds* some power from the President, he cannot possibly assert any claim under color of such a nonexistent power to "perform duties in which [he has] a discretion". The President enjoys *no* "discretion"—legal or political, let alone moral—to violate the Constitution. Therefore, his disputed actions cannot raise a "political question".

Second, "official assassinations" cannot be condoned on the basis of the doctrine of "separation of powers", unless an authority to deploy "death squads" exclusive to the President can be unearthed within "[t]he executive Power".[3589] True enough, the Constitution does designate the President as "Commander in Chief". Yet, as the delegation of this status makes pellucid, the President is *not* a "Commander in Chief" for any and all conceivable purposes, ruling over every one and every thing imaginable within the United States in the totalitarian manner of

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[3586] *See* U.S. Const. art. III, § 2, cl. 3; amends. IV, V, and VI.

[3587] *See* U.S. Const. amend XIII, § 1 (emphasis supplied).

[3588] 5 U.S. (1 Cranch) 137, 170 (1803).

[3589] U.S. Const. art. II, § 1, cl. 1.

a German *Führer* or an Italian *Duce*. Neither is he a "Commander in Chief" specifically with respect to "death squads", in the style of a *Caudillo* of some Central American banana republic. Nor as "Commander in Chief" is he invested with the unlimited powers of a "Decider" (as one past President grandiloquently styled himself); for he can decide to do only what the Constitution permits him to do. Rather, the powers of the President as "Commander in Chief" are narrowly defined, *and therefore limited*: to wit, "[t]he President shall be Commander in Chief *of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States*".[3590] The President is "Commander in Chief" of *nothing* else, and for *no* other purposes.

"[T]he Army and Navy of the United States" are entirely the constructs of Congress, which alone exercises the powers "[t]o raise and support Armies" and "[t]o provide and maintain a Navy".[3591] Absent Congressional legislation, no "Army and Navy of the United States" exist as to which the President can function as "Commander in Chief". And, most of time, the States on their own can create no armies or navies upon which the United States could draw, and which the President might become able to command, because "[n]o State shall, without the Consent of Congress, * * * keep Troops, or Ships of War in time of Peace".[3592] Furthermore, "the Army and Navy of the United States" that do exist are always subject to—indeed, are uniquely defined in their organization and operations by—the power of Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces".[3593] The President can claim to exercise no control over "the Army and Navy of the United States" that ventures even a solitary Ångstrom Unit beyond the bounds of these "Rules", because "the Army and Navy of the United States" do not exist on the far side of those boundaries. Similarly for "the Militia of the several States"—except that the President's authority is even narrower with respect to them, because he enjoys the status of "Commander in Chief" *only* when the Militia are "called into the *actual* Service of the United States".[3594] And that can be for three purposes alone: namely, "to execute the Laws of the Union, suppress Insurrections and repel Invasions".[3595] Furthermore, even then the President cannot exercise untrammeled command, but must abide by whatever rules Congress has "provide[d] * * * for governing such Part of the[Militia] as may be employed in the Service of the United States".[3596] When the Militia have not been "called into the

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[3590] Article II, Section 2, Clause 1 (emphasis supplied).

[3591] U.S. Const. art. I, § 8, cls. 12 and 13.

[3592] U.S. Const. art. I, § 10, cl. 3.

[3593] U.S. Const. art. I, § 8, cl. 14.

[3594] *See ante*, at 871-880.

[3595] U.S. Const. art. I, § 8, cl. 15.

[3596] U.S. Const. art. I, § 8, cl. 16.

actual Service of the United States", they remain *the States'* institutions, governed by *the States'* "Officers", and are not subject to the orders of the President at all.[3597] So, if as "Commander in Chief" the President dares to claim any license to despatch "death squads" to perform "official assassinations", he must demonstrate how that license derives from some prior exercise of, for the most likely examples, *Congress's* powers "[t]o declare War", to enact "the Laws of the Union", "[t]o make Rules for the Government and Regulation of the land and naval Forces", or "[t]o provide * * * for governing * * * Part of the[Militia]". Nowhere within the *Statutes at Large*, however, does any legislation purport explicitly to authorize anyone to order or to commit "official assassinations" of American citizens, even if some public official believes them to be "terrorists" or "enemy combatants".

And suppose such legislation did exist. Would it constitute "due process of law"? Hardly. For, once again, "[w]e must examine the Constitution itself to see whether th[e] process [at issue] be in conflict with any of its provisions".[3598] And *the particular "process of law" inevitably involved in the deployment of official "death squads" the Constitution explicitly prohibits*. A purported "law", "rule", or "regulation" of Congress, condemning to death a particular individual or the members of a particular group, would be a "Bill of Attainder". As Joseph Story explained,

> [b]ills of attainder, as they are technically called, are such special acts of the legislature as inflict capital punishments upon persons supposed to be guilty of high offenses, such as treason and felony, without any conviction in the ordinary course of judicial proceedings. * * * In such cases, the legislature assumes judicial magistracy, pronouncing upon the guilt of the party without any of the common forms and guards of trial, and satisfying itself with proofs, when such proofs are within its reach, whether they are conformable to the laws of evidence or not. In short, in all such cases, the legislature exercises * * * what may be properly deemed an irresponsible despotic discretion, being governed solely by what it deems political necessity or expediency, and too often under the influence of unreasonable fears or unfounded suspicions. * * * The punishment has often been inflicted without calling upon the party accused to answer, or without even the formality of proof; and sometimes, because the law, in its ordinary course of proceedings, would acquit the offender. The injustice and iniquity of such acts, in general, constitute an irresistible argument against the existence of the power. In a free government it would be intolerable; and in the hands of a reigning faction, it might be, and probably would be, abused to the ruin and death of the most virtuous citizens. Bills of this sort have been most usually passed in England in

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[3597] *See* U.S. Const. art. I, § 8, cl. 16.

[3598] Murray's Lessee v. Hoboken Land and Improvement Company, 59 U.S. (18 Howard) 272, 277 (1856).

> times of rebellion, or of gross subserviency to the crown, or of violent political excitements; periods, in which all nations are most liable (as well the free as the enslaved) to forget their duties, and to trample upon the rights and liberties of others.[3599]

For these reasons, the Constitution explicitly, unequivocally, and without exception outlaws *all* "Bills of Attainder", both for Congress—"[*n*]*o* Bill of Attainder * * * shall be passed"; and for the States—"[n]o State shall * * * pass *any* Bill of Attainder".[3600] "If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties."[3601]

These prohibitions condemn *all* statutes, rules, regulations, or directives, "no matter what their form, that apply either to named individuals or to easily ascertained members of a group in such a way as to inflict punishment on them without a judicial trial".[3602] So Congress constitutionally cannot, in the guise of "declar[ing] War", or enacting "Laws", or promulgating rules or regulations for the governance of the Army, the Navy, or the Militia, authorize an "official assassination" of anyone, whether directly by name or indirectly by reference to membership in some specific group. And if Congress cannot constitutionally promulgate either general declarations, particular laws, or specific rules or regulations for the governance of the Army, the Navy, or the Militia that amount to "Bill[s] of Attainder", then the President cannot constitutionally purport to act under color of or to enforce any such declarations, laws, rules, or regulations perforce of his status as "Commander in Chief".

Neither can Congress delegate a nonexistent power to put out "Bill[s] of Attainder" to the President, for him to employ at his own discretion as the rationalization for "official assassinations". For example, Congress has purported to authorize the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons".[3603] Presumably, a rogue President could claim that "all necessary and appropriate force against * * * persons" includes their assassinations. Now "[a] bill of attainder is a

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[3599] *Commentaries on the Constitution, ante* note 576, Volume 2, § 1344, at 216-217 (footnotes omitted).

[3600] U.S. Const. art. I, § 9, cl. 3 *and* § 10, cl. 1 (emphases supplied).

[3601] Cummings v. Missouri, 71 U.S. (4 Wallace) 277, 323 (1867).

[3602] United States v. Lovett, 328 U.S. 303, 315 (1946).

[3603] Joint Resolution To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States ("Authorization for Use of Military Force"), S.J. Resolution 23, 18 September 2001, Pub. L. 107-40, § 2(a), 115 Stat. 224, 224.

legislative act which inflicts punishment without a judicial trial."[3604] That a group described in general terms, rather than any specifically named individual, is the target is immaterial. "It was not uncommon for English acts of attainder to inflict their deprivations upon relatively large groups of people, sometimes by description, rather than name"—indeed, "members of a political group thought to present a threat to the national security * * * were the targets of the overwhelming majority of English and early American bills of attainder".[3605] In addition, a "Bill of Attainder" need not punish absolutely, but may impose death or some other penalty only conditionally.[3606] So, as possibly construed by a rogue President, this Joint Resolution amounts to "a legislative act which [licenses the President to] inflict[ ] punishment"—up to and including death, and "without a judicial trial"—on those "persons he determines", by whatever means he alone may determine to be determinative, to comprise a certain group. Thus, by this misreading, the Joint Resolution amounts to a "Bill of Attainder". By itself, this provides a necessary and sufficient reason to construe the Joint Resolution as *not* including "official assassinations" within the term "*appropriate* force".[3607] In America's present disordered political climate, however, little likelihood exists that rogue officials of the General Government will apply such a limiting construction.

It is possible to misread the Joint Resolution as licensing the killing of only those particular "persons" who have supposedly committed certain "terrorist attacks" *in the past*—in which case it would be a "Bill of Attainder" which aimed at *retribution* for those acts. It is also possible (actually, far easier) to misread the Joint Resolution as intended to license the President "to use all necessary and appropriate force", including homicide, against any and all "persons" who may attempt to commit "terrorist attacks" *in the future*—in which case it would be a "Bill of Attainder" which aimed squarely at *deterrence* of such attacks. Either purpose, though, would constitute "punishment without a judicial trial". For where "Bill[s] of Attainder" are concerned,

> [i]t would be archaic to limit the definition of "punishment" to "retribution." Punishment serves several purposes: retributive, rehabilitative, deterrent—and preventive. * * * A number of English bills of attainder were enacted for preventive purposes—that is, the legislature made a judgment, undoubtedly based largely on past acts and associations

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[3604] Cummings v. Missouri, 71 U.S. (4 Wallace) 277, 323 (1867).

[3605] United States v. Brown, 381 U.S. 437, 461, 453 (1965) (footnote omitted). *Accord*, Cummings v. Missouri, 71 U.S. (4 Wallace) 277, 323-324 (1867).

[3606] *See* Cummings v. Missouri, 71 U.S. (4 Wallace) 277, 324-325 (1867).

[3607] *See, e.g.,* National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U.S. 1, 30 (1937); Lynch v. Overholser, 369 U.S. 705, 710-711 (1962); *and* United States v. Thirty-seven (37) Photographs, 402 U.S. 363, 369 (1971).

> * * * , that a given person or group was likely to cause trouble (usually, overthrow the government), and therefore inflicted deprivations upon that person or group in order to keep it from bringing about the feared event.[3608]

Neither may the States license their Militia to enforce "Bill[s] of Attainder", or through their "Officers" command their Militia to obey a rogue President's illegal order to do so. And inasmuch as the substance of the President's authority as "Commander in Chief" depends in the first instance upon Congressional legislation, and ultimately upon the existence of the Militia as permanent State institutions, he cannot possibly even claim, let alone put into practice, such an imaginary power by himself alone.

Moreover, the President cannot invoke any supposed authority as "Commander in Chief" to require or to license various *civilian* agencies of the General Government—such as the Department of Homeland Security and the Central Intelligence Agency—to perform "official assassinations", because, by constitutional definition, the President is in no conceivable way a "Commander in Chief" with respect to those agencies. Congress alone determines what the civilian agencies it creates are permitted to do—except that even Congress cannot constitutionally subordinate them to the President as "Commander in Chief", because the Constitution itself infuses that status into the Presidency *only* with respect to the Army, the Navy, and the Militia. And Congress cannot constitutionally enact laws, rules, or regulations for its civilian agencies that amount to, or require or allow them to promulgate or execute, "Bill[s] of Attainder". So, inasmuch as agencies such as the DHS and the CIA constitutionally can have nothing whatsoever to do with "Bills of Attainder" in either origin or operation, neither can the President in the course of his administration of them.

Finally, the President labors under an explicit constitutional duty to "take Care that the Laws be faithfully executed".[3609] Other than the Declaration of Independence, the most important of "the[se] Laws" is the Constitution itself. The Constitution prohibits any and every "Bill of Attainder". Therefore, the President can neither take nor authorize any action that purports to create, enforce, or countenance in any way a "Bill of Attainder". Rather, he must bend every effort to stop anything akin to a "Bill of Attainder" from being considered, prepared, enacted, promulgated, or put into operation. In particular, he must prevent everyone in the Army, the Navy, and the Militia, and in civilian "homeland-security" agencies such as the DHS, intelligence agencies such as the CIA, law-enforcement agencies such as the FBI, and all other agencies in the Executive

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[3608] United States v. Brown, 381 U.S. 437, 458-459 (1965) (footnotes omitted).

[3609] U.S. Const. art. II, § 3.

Branch from even proposing, let alone actually effectuating, plans for "official assassinations". In addition, the President must prevent all of the States' civilian officials from involving themselves in "official assassinations", and must vigorously pursue their punishment if such involvement cannot be prevented. For the highest "Law[ ]" (after the Declaration of Independence) which he "shall take Care * * * be faithfully executed" is the Constitution; and the Constitution mandates both that "[n]o State shall * * * pass any Bill of Attainder" and that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life * * * , without due process of law".[3610] Plainly, in the face of the Constitution's prohibition, no State can "deprive any person of life * * * *with*[ ] due process of law" through a "Bill of Attainder". Every American's freedom from "Bill[s] of Attainder", whether they emanate from any one of States or from the United States, is among "the privileges or immunities of citizens of the United States". And if the President fails, neglects, or refuses to perform his constitutional duty to suppress every manifestation of "Bill[s] of Attainder" at every level of the federal system, he should be impeached, convicted, and removed from office for a "high Crime[ ]" *sine die*, and then prosecuted to the full extent of the law.[3611]

Finally, the President cannot claim any authority to issue the executive equivalent of "Bill[s] of Attainder"—such as "proscription lists"—under color of "[t]he executive Power",[3612] for two reasons: (i) Nowhere do any of the President's

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[3610] U.S. Const. art. I, § 10, cl. 1 *and* amend. XIV, § 1.

[3611] *See* U.S. Const. art. II, § 4 *and* art. I, § 3, cl. 7. The full extent of the law could be serious indeed. For example, a President dispatching "death squads" would be engaged in "act[s] or threat[s] involving murder", and therefore in "racketeering activity". *See* 18 U.S.C. § 1961(1). Doubtlessly, he would be engaged in "at least two acts of [such] racketeering activity", which would constitute a "pattern of racketeering activity". *See* 18 U.S.C. § 1961(5). "[T[he Office of President" is "a legal entity", and therefore an "enterprise". *Compare* U.S. Const. art. II, § 1, cls. 4 and 7 *with* 18 U.S.C. § 1961(4). The activities of "the Office of President" affect interstate and foreign commerce in numerous ways. It is "unlawful for any person employed by or associated with an enterprise * * * the activities of which affect[ ] interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity". 18 U.S.C. § 1962(c). And anyone adjudicated guilty of such participation "shall be * * * fined or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment)". 18 U.S.C. § 1963(a). For another example, a President who conspired with others in "death squads" "to injure, oppress, threaten, or intimidate any person in any State * * * in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States"—such as that person's right to life itself—"shall be fined * * * or imprisoned not more than ten years, or both; and if death results from the acts committed * * * or if such acts include * * * an attempt to kill, * * * shall be fined * * * or imprisoned for any term of years or for life, or both, or may be sentenced to death". 18 U.S.C. § 241. For yet another example, a President who, "under color of any law, statute, ordinance, regulation, or custom, willfully subject[ed] any person in any State * * * to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or law of the United States", "and if bodily injury results from the acts committed * * * or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined * * * or imprisoned not more than ten years, or both; and if death results from the acts committed * * * or if such acts include * * * an attempt to kill, shall be fined * * * or imprisoned for any term of years or for life, or both, or may be sentenced to death". 18 U.S.C. § 242.

[3612] U.S. Const. art. II, § 1, cl. 1.

powers mention attainders, proscriptions, or anything of like nature. And (ii) a "Bill of Attainder" in particular is a *legislative*, not an executive action, and therefore if the Constitution licensed it at all would be found among the powers of Congress, in which body "[a]ll legislative Powers herein granted shall be vested".[3613] This, of course, is the reason why a prohibition of "Bill[s] of Attainder" is found appended specifically to the powers of Congress.[3614]

No appeal to "the law of war"—the mantra chanted by rogue spokesmen for the Executive Branch as their ultimate excuse for every affront to the Constitution in the course of "the war on terrorism"—can overcome these objections where "official assassinations" of Americans are involved. *First*, even if "the law of war" these people invoke had something to do with the exercise of Congress's power "[t]o declare War",[3615] Congress has *not* "declare[d] War" on any country since World War II, and *could not* "declare War" on "terrorism" or "terrorists" in general. *Second,* even if Congress does "declare War" on some constitutionally permissible basis, "the war power does not remove constitutional limitations safeguarding essential liberties".[3616] So, for one general example, "the exercise of the war power is * * * subject to the Fifth Amendment"[3617]—which, as explained immediately above, bans *extra*-judicial "official assassinations". *Third*, also as explained above, any American who, owing allegiance to the United States, "lev[ies] War against them, or * * * adher[es] to their Enemies, giving them Aid and Comfort" is guilty of "Treason", by constitutional definition—but "[n]o Person shall be convicted of Treason *unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court*".[3618] Inasmuch as "Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted",[3619] that "Punishment" could be death.[3620] But any "Punishment" may be inflicted only after guilt has been established through a proceeding "in open Court", with one or both of the constitutional standards of evidence fully satisfied. Plainly, then, "[n]o Person" who is merely suspected of "levying War against the[United States], or * * * adhering to their Enemies" may simply be killed on the say-so of some official

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[3613] U.S. Const. art. I, § 1.

[3614] U.S. Const. art. I, § 9, cl. 3.

[3615] U.S. Const. art. I, § 8, cl. 11.

[3616] Home Building & Loan Association v. Blaisdell, 290 U.S. 398, 426 (1934).

[3617] Hamilton v. Kentucky Distilleries & Warehouse Company, 251 U.S. 146, 155 (1919).

[3618] U.S. Const. art. III, § 3, cl. 1 (emphasis supplied).

[3619] U.S. Const. art. III, § 3, cl. 2.

[3620] Which Congress has so provided. 18 U.S.C. § 2381: "Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined * * * not less than $10,000; and shall be incapable of holding any office under the United States."

of the Executive Branch, whether civilian or military. That is, *the **only** "law of war" which can apply to Americans in such situations is the law of "Treason" explicitly fixed in the Constitution; and that law absolutely excludes summary executions*.

So much the Constitution commands on its face, in explicit language unmistakable to anyone who reads it intelligently and in good faith. Apparently, though, next to no one in high office in the United States or the several States today is able or willing to do so—or "death squads" would not be in the works in the Executive Branch of the General Government, with no official outrage and demands for interposition arising from the States. What should give conscientious Americans particular pause, moreover, is how much worse the present situation is than the one which confronted the Founding Fathers at the time of the Declaration of Independence. For although the Declaration rightly indicted King George III as guilty of "usurpations" and intent upon "the establishment of an absolute Tyranny over these States", and mercilessly castigated him for "waging War against us", it never once accused him of employing "death squads" to assassinate Americans. An usurper and tyrant "unfit to be the ruler of a free people" he may have been—a murderous thug, no.

Perhaps an even starker lesson from more recent history is that, unlike rogue officials at the highest level of the General Government today, no less a mass murderer than Josef Stalin took care never to claim in public a legal "power", "right", or "privilege" to assassinate Soviet citizens out of hand simply because he considered them "enemies". Millions of innocent people *were* killed, one way or another, on his orders or with his tacit approval after secret-police *troikas* and other kangaroo tribunals had adjudged them guilty of some trumped-up charge, or in many cases without trials of any sort. But during his long reign of terror Stalin never took personal credit in public for, or even admitted his own complicity in, a single outright assassination—including the murder of Lev Trotsky, and notwithstanding that Trotsky had been repetitively and redundantly inculpated *in absentia* as a traitor in the course of numerous well-publicized "show trials" involving the most infamous of "the Old Bolsheviks".[3621] Indeed, the Stalinist party line always denied any participation even by the Soviet secret police in Trotsky's death.[3622]

In contrast, from 1934 onwards, Adolf Hitler openly asserted his supposed personal authority as *Führer* to order executions without trials, licensing himself to preëmpt and overrule the German courts. The day after personally participating in the seizure and ordering the execution of various allegedly disloyal members of the *Sturmabteilung* ("SA", colloquially known as "the Storm Troopers" or "Brownshirts")

[3621] On Trotsky as *la bête noire* of Stalin's "show trials", *see generally* R. Conquest, *The Great Terror, ante* note 3382, *passim*. On Stalin's relentless and ultimately successful pursuit of Trotsky, *see* Robert Payne, *The Life and Death of Trotsky* (New York, New York: McGraw-Hill Book Company, 1977), Part Eight.

[3622] *See, e.g.*, R. Conquest, *The Great Terror, ante* note 3382, at 449.

on 30 June through 2 July 1934 (the so-called "*Röhm-Putsch*" or "Blood Purge" of the Nazi SA),[3623] Hitler as *Reichskanzler* and two other Ministers signed a bill retroactively legalizing the killings in a single sentence.[3624] Shortly thereafter, Hitler addressed the *Reichstag* in Berlin, "to enlighten the German People with regard to events that should live on for all time in our history as a memory even as wretched as it is admonitory".[3625] To avert a calamity, he claimed, actions "quick as lightning" had to be taken ["*Wenn überhaupt das Unheil noch zu verhindern war, dann mußte blitzschnell gehandelt werden*"]. "I gave the order to shoot dead the chief offenders in this treason", he admitted—and "if someone reproaches me with why we did not call upon the ordinary courts for judgment in the matter, then I can say to him only: in that hour, I was responsible for the fate of the German Nation and therefore was the supreme judge of the German People" ["*In dieser Stunde war ich verantwortlich für das Schickstal der deutschen Nation und damit des deutschen Volkes oberster Gerichtsherr*"]![3626] "When confronted by the opinion that only a judicial proceeding could have produced an accurate weighing of guilt and expiation, against that conception I lodge a solemn protest."[3627] So, he warned, with conviction none of his listeners could have doubted, "everyone should know for the future that, if he raises his hand to strike against the State, certain death will be his fate".[3628] Finally, Hitler predicted, "if destiny were to call me away from my post * * * my successor[s] would not act differently, and * * * would be prepared to protect the security of the German People and Nation with no less determination".[3629]

Shortly thereafter, the German legal theorist, Dr. Carl Schmitt, interpreted these events with the explanation that, as *Führer*, Hitler exercised

> the right and the power to found a new state and a new order.

[3623] *See, e.g.,* John Toland, *Adolf Hitler* (Garden City, New York: Doubleday & Company, Inc., 1976), Volume I, Chapter 12.

[3624] "*Die zur Niederlegung hoch- und ladesverräterischer Angriffe am 30 Juni, 1 und 2 Juli 1934 vollzogenenen Maßnahmen sind als Staatsnotwehr rechtens.*" ("The measures taken on 30 June and 1 and 2 July 1934 in order to put down attacks of high treason shall be considered to be legitimate State self-defense.") *Gesetz über Maßnahmen zur Staatsnotwehr* [Law Regarding Measures of State Self-defense] (3 July 1934), 1934 *Reichsgesetzblatt*, Part I, at 529 (the present author's translation). *See Office of United States Chief of Counsel For Prosecution of Axis Criminality,* NAZI CONSPIRACY AND AGGRESSION, *ante* note 3428, Volume I, at 240-242; Volume IV, at 699 (Document 2057-PS).

[3625] Address of 13 July 1934, *original audio available at* <www.archive.org/Hitler_Speeches>, No. 22, 1934-07-13, Adolf Hitler, *Reichstagsrede* (the present author's translation). The complete German text is reproduced in, *e.g.,* Max Domarus, *HITLER: Reden und Proklamationen 1932-1945, TEIL I, TRIUMPH 1932-1938, Ester Band 1932-1934* (Leonberg, Germany: Pamminger & Partner Verlagsgesellschaft mbH, 1973). The passage to which this footnote refers is quoted in Domarus, *ante*, at 410. The *Reichstag* ratified this assumption of power permanently in 1942. *See, e.g.,* J. Wheeler-Bennett, *The Nemesis of Power, ante* note 3382, at 538 & note 1.

[3626] *See* M. Domarus, *HITLER, ante* note 3625, at 420-421.

[3627] *See id.* at 422.

[3628] *See id.* at 421.

[3629] *See id.* at 422-423.

> The *Führer* protects the law against the most serious abuse when, at the moment of danger, as the supreme judge by virtue of his status as *Führer* he creates law directly: "In that hour I [that is, Hitler] was responsible for the fate of the German nation and therefore [I was] the supreme judge of the German People." The true *Führer* is also always a judge. From leadership flows judgeship. * * *
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> In truth, the *Führer's* action was authentic jurisdiction. It was not subordinate to the judiciary, but to the contrary was itself the supreme judiciary.[3630]

The German Army's General Staff imprudently supported Hitler in these grandiose and murderous pretensions, because his first "official assassinations" eliminated the dangerously radical and personally corrupt leadership of the *Sturmabteilung*, which threatened the Army's martial supremacy.[3631]

In line with his prognostication to the *Reichstag*, and with Schmitt's analysis, Hitler's malign confidence has been vindicated. For his successors in spirit have neither acted differently, nor exhibited any less determination, nor been thwarted by the legitimate Armed Forces or any other center of authority. In parallel with Hitler's régime, the rogue cabal in control (as of this writing) of the Executive Branch of the General Government has contended that the President's license to kill in his capacity as "Commander in Chief" does not depend upon a prior judicial determination of a victim's guilt, presumably can even override a prior judicial determination of a victim's innocence, and *per propria vigore* must be immune from any subsequent judicial inquiry. For, according to the cabal's slogan, "[t]he Constitution guarantees due process, not judicial process".[3632] That is, "executive due process" is separate from, independent of, and (in light of the absolute finality of an "official assassination") even superior to "judicial due process". Where "official assassinations" are concerned, the President is "the supreme judge of the American People"—and the supreme jury and executioner as well—because he is "responsible for the fate of the * * * Nation". Or, in the classic and more candid formulation of this doctrine, *Der Führer befiehlt; wir folgen!*[3633] On *that* basis, of course, the Fifth Amendment's injunction—"nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb"—is simply irrelevant, if not impertinent. Because "official assassinations" operate *extra*-judicially by "executive due

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[3630] *"Der Führer schützt das Recht: Zur Reichstagsrede Adolf Hitlers vom 13. Juli 1934", Deutsche Juristen-Zeitung, Heft 15, 39 Jahrgang*, 1 August 1934, at 946-947 (the present author's translation). A reproduction of the original document appears at <www.flechsig.biz/DJZ34_CS.pdf>.

[3631] *See, e.g.,* J. Wheeler-Bennett, *The Nemesis of Power, ante* note 3382, at 304-332.

[3632] United States Department of Justice, Justice News, "Attorney General Eric Holder Speaks at Northwestern University School of Law", Chicago[, Illinois] ~ Monday, March 5, 2012 (remarks reported "[*a*]*s prepared for delivery*").

[3633] "The Leader commands; we follow!"

process"—and therefore are not constrained by such principles as *res judicata* and collateral estoppel recognized in "judicial due process"—any prior determination in court of a targeted individual's innocence would be beside the point as to whether, for some reason known only to the inner circle of the "homeland-security" bureaucracy, he should be killed anyway. And any attempts at subsequent "judicial due process" would surely be thwarted by the defenses of "official immunity" (so that no charge, whether civil or criminal, could be prosecuted), or "executive privilege" and "state secrets" (so that no evidence could be obtained by which to incriminate anyone).

The excuse the cabal has proffered as to why "executive due process" must displace "judicial due process" is the very same rationalization Hitler put forward: the need for actions "quick as lightning" in National self-defense: "The evaluation of whether an individual presents an 'imminent threat' incorporates considerations of the relevant window of opportunity to act, [and]the possible harm that missing the window would cause to civilians"; "the Constitution does not require the President to delay action until some theoretical end-stage of planning—when the precise time, place, and manner of an attack become clear".[3634] Self-defense, however, is justified only "when the precise time, place, and manner of an attack [*have*] become clear" to the party being assailed. Before then—that is, when one or more of those variables remains unknown—self-defense is premature, because any evidence, let alone proof, of its necessity is absent.

Moreover, the theory of "official assassinations" is not limited to homicidal attacks on Americans only on account of acts they have actually committed in the past, but instead approves of the liquidation, at whatever time and in whatever circumstances the killers may deem most propitious, of any American who *might* commit supposedly "hostile" acts in the future. As the cabal has asserted, "[t]he evaluation of whether an individual presents an 'imminent threat' incorporates considerations of * * * the likelihood of heading off future disastrous attacks against the United States".[3635] Self-defense, however, *never* involves a determination of "the likelihood of heading off *future* disastrous attacks". Self-defense always arises in the *present*, being aimed at "heading off [a] disastrous attack[ ]" taking place *at that very moment*. If "*future* disastrous attacks" are at issue, the matter is one of "*preëmptive* homicide" or "*preventive* homicide", not self-defense. And once the victim of an "official assassination" supposedly carried out in National self-defense is dead, whether those "future * * * attacks" were "likel[y]" or not, or whether if likely they seriously threatened National security, become moot points, as does the victim's actual guilt or innocence. That the victim was assassinated through "executive due process" suffices to establish his presumptive—and, from a practical perspective,

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[3634] Justice News, *ante* note 3632.

[3635] *Id.*

conclusive—guilt. Ironically, then, an "official assassination" actually conforms in a perverse way to the Fifth Amendment. For having once been "put in jeopardy" through "executive due process" by being physically eliminated, a victim cannot possibly be "put in jeopardy" a second time through "judicial due process". As Stalin was reputedly wont to say, "No man. No problem."[3636]

To be sure, the cabal has denied that

> the Executive Branch has—or should ever have—the ability to target any such individuals without robust oversight. Which is why, in keeping with the law and our constitutional system of checks and balances, the Executive Branch regularly informs the appropriate members of Congress about our counterterrorism activities, including the legal framework, and would of course follow the same procedure where lethal force is used against United States citizens.[3637]

The self-evident fallacy in this assurance, though, is that no "checks and balances" could prove to be of any value to the target of an "official assassination" *after* his death. To be meaningful, a "check"—in the sense of a mechanism capable of "arrest[ing]" a course of action in a timely manner[3638]—would need to *prevent* the killing, until some further constitutional process might determine whether it were justified or not. Although Hitler acknowledged it as "the most qualified tribunal of the Nation", what "checks and balances" was the German *Reichstag* capable of interposing *after* he had informed it about the "events that should live on for all time in our history as a memory even as wretched as it is admonitory"?[3639] For the victims of the purge, of course, it could do nothing. Worse yet, not a single prospective "check and balance" was ever proposed, let alone imposed on Hitler and his murderous myrmidons. To the contrary: On the very same day that Hitler informed the *Reichstag* of his status as "supreme judge of the German People", *Reichspräsident* Hermann Göring congratulated him on the "confidence" that made it "possible for him [that is, Hitler] to do what is necessary for the reconstruction of Germany. This confidence * * * is the platform on which Germany stands today."[3640] Thus, in both principle and practice, the present open and unabashed apology for the employment of "death squads" by rogue officials in the Executive

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[3636] *See* the cover of *Time* (8 February 1933). Sometimes this epigram is quoted (albeit without being attributed to a particular verifiable source) as: "Death is the solution to all problems—no man, no problem." *Ma se non è vero è ben trovato.*

[3637] Justice News, *ante* note 3632.

[3638] *Webster's Revised Unabridged Dictionary, ante* note 11, at 244, definition 1. *See also Webster's Third New International Dictionary, ante* note 330, at 381, definition 2a.

[3639] *See* M. Domarus, *HITLER: Reden und Proklamationen, ante* note 3625, at 410.

[3640] *See id.* at 424.

Branch of the General Government situates the exponents and practitioners of "official assassinations" not far behind, if not directly alongside, Hitler at the vicious end of the spectrum of modern totalitarian dictatorships. Disturbingly, in one respect these worthies may actually have forged ahead of Hitler on the scale of moral turpitude. For Hitler was possessed of the sincerity and self-assurance *personally* to defend his actions in a formal address to the *Reichstag,* and to receive its sheepish approval; whereas no President has ever dared to appear before Congress even to inform its Members about the policy of "official assassinations", let alone to seek its concurrence.[3641]

To describe the Presidential policy of "official assassinations" as a defining characteristic of a totalitarian dictatorship is hardly hyperbole, either. In particular, the acquiescence of Germany's political leadership, *Wehrmacht*, and society in Hitler's homicidal pretensions in 1934 was correctly recognized at the time as the critical moment in that country's modern history, after which the thoroughgoing illegality of a demented dictatorship reigned supreme.[3642] More generally, if "[t]he scientific term 'dictatorship' means nothing more nor less than authority untrammeled by any laws, absolutely unrestricted by any rules whatever, and based directly on force",[3643] then a régime which claims for its chief magistrate the power *to kill without trial* any citizen to whom his minions merely affix some opprobrious label is a "dictatorship", because as to those citizens (and, indeed, *as to any and all citizens who might fall into sufficient political disfavor to be described with whatever scurrilous epithet might serve to condemn them*) the chief magistrate is "untrammeled by any laws" and his rule is "based directly on force". Furthermore, by definition a "*totalitarian* state" claims for itself every conceivable power, and denies any obligation to recognize, let alone to guarantee and protect, any rights, privileges, or immunities of individual citizens that it does not create (and therefore can withdraw at will). Self-evidently, then, a "state" which asserts the power of its chief magistrate to kill without trial any of its citizens on some official's own mere unsubstantiated claim that they are somehow "enemies" is quintessentially a "totalitarian state",

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[3641] In addition, no recent occupant of the White House implicated in "official assassinations" has marshaled the personal grit actually to participate in any way in these incidents in the field. In contrast, personally leading no more than ten followers, Hitler drove to the resort of Bad Wiessee where an SA conference was to be held, burst into SA Chief Ernst Röhm's room in the Pension Handselbauer, and pistol in hand declared him under arrest. When a truck filled with some forty armed members of Röhm's personal guard arrived, Hitler himself ordered them to return to their barracks and surrender—which they did. Then, on its return trip, Hitler's little entourage, although encumbered with prisoners, accosted and arrested various other SA men along the route. *See, e.g.,* J. Toland, *Adolf Hitler, ante* note 3623, Volume I, at 355-357. One must, of course, recall that, distinguishably from the occupants of the White House during the past several Administrations, Hitler served with exceptional courage in the German Army on the Western Front during World War I, receiving numerous awards for valor. *See id.*, Volume I, at 62-75.

[3642] *See id.*, Volume I, at 369-370.

[3643] Vladimir I. Lenin, "A Contribution to the History of the Question of the Dictatorship, A Note" [1920], *in Collected Works* (Moscow, Union of Soviet Socialist Republics: Progress Publishers, 4th English Edition, 1966), Volume 31, at 353.

because the state's homicidal power entails the negation of *all* of its victims' rights by physically eliminating the victims themselves. Not without reason does the Declaration of Independence list "certain unalienable Rights" in the order "Life, Liberty and the pursuit of Happiness"—for, without the "Right[ ]" to "Life", all other "Rights" are at best ephemeral, if not illusory. After all, most individuals threatened with extermination will surrender the rest of their rights in exchange for even the gossamer-thin hope of remaining alive. So, should they acquiesce in "official assassinations"—of which it can be truly said, *ne plus ultra*—Americans would in principle necessarily bend beneath the yoke of totalitarianism *in toto*.

No matter how large a majority of deluded or cowardly Americans did so, however, the minority could not be bound to follow their lead—morally, politically, or legally. For, as the Declaration of Independence makes clear: (i) Americans are entitled to a "separate and equal station" "among the powers of the earth" only in conformity with "the Laws of Nature and of Nature's God". (ii) A "totalitarian dictatorship" does not conform to those "Laws", because it refuses to "secure" the "certain unalienable Rights" with which "all men * * * are endowed by their Creator", but is instead wholly "destructive" of those "Rights". (iii) The most characteristic powers of a "totalitarian state" being irremediably "[*un*]just powers", such a "state" could never arise from "the consent of the governed". And (iv) a "totalitarian state" not merely "evinces a design to reduce the[People] under absolute Despotism", but constitutes such a "Despotism" in full force. Therefore, the employment of "death squads" by rogue officials in the General Government establishes a sufficient ground for patriotic Americans—whether they constitute the majority or only a minority of this country's population—to conclude that at least in its present composition the Executive Branch of the General Government has taken on or been forced to assume the character of a totalitarian dictatorship, and on the basis of that conclusion to set about "to alter or to abolish" that "Form of Government" to the degree necessary to correct the situation, or even "to throw off such Government" entirely, if the problem cannot be solved in any other way.

Against this background, the utter moral imbecility of rogue officials in the United States stands out in stark relief. Congress has enacted a statute which provides that "[a]ny individual who, under actual or apparent authority, or color of law, *of any foreign nation* * * * subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative for wrongful death".[3644] Why Congress needed a prod by the United Nations in order to establish a civil action for such an egregious crime, and then did not extend

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[3644] An Act To carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing ("Torture Victim Protection Act of 1991"), Act of 12 March 1992, Pub. L. 102-256, § 2(a)(2), 106 Stat. 73, 73 (emphasis supplied).

liability to *any and every individual* who participates in an "extrajudicial killing" "under actual or apparent authority, or color of law", *of any nation or government whatsoever, including the United States and each of the several States,* defies explanation. Except perhaps that rogue Members of Congress then intended, and continue to intend, to leave a very large gap through which such killers can escape even civil penalties. For although that statute defines "extrajudicial killing" as "a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized people", it also provides that "[s]uch term * * * does not include such killing that, *under international law, is lawfully carried out under the authority of a foreign nation*".[3645] One wonders, though, what sort of "law" of *any* nation could dispense with "*all* the judicial guarantees which are recognized as *indispensable* by *civilized* peoples", or what sort of "international law" could countenance such a dispensation, and still be entitled to the appellation "law". If these "judicial guarantees" are "recognized as indispensable by civilized peoples", then "laws" purportedly setting them aside cannot be "laws" of any sort, and the nations that promulgate and approve of them cannot be taken as "civilized"! Then why should their "laws" be given any credence or deference at all?

Moreover, Congress has no constitutional choice but to repudiate any such *un*civilized "laws" of foreign nations, taken either individually as the idiosyncracies of those particular nations or collectively as some international consensus. For WE THE PEOPLE have delegated, and could delegate, to Congress only "just powers" which comport with "the Laws of Nature and of Nature's God".[3646] And therefore Congress cannot exercise any of its powers so as in any manner to treat as valid the spurious "laws" of *un*civilized nations that, by definition, must undermine the very foundations of civilization. Congress may "define and punish * * * Offences against the Law of Nations"[3647] when "the Law of Nations" embodies agreement among civilized peoples which reflects "the Laws of Nature and of Nature's God", *but not otherwise.* As Blackstone explained, "the Laws of Nature" are

> such laws as were founded in those relations of justice, that existed in the nature of things, antecedent to any positive precept. These are the eternal, immutable laws of good and evil, to which the creator himself in all his dispensations conforms; and which he has enabled human reason to discover, so far as they are necessary for the conduct of human actions.
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> * * * * *
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> THIS law of nature * * * is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no

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[3645] Act of 12 March 1992, § 3(a), 106 Stat. at 73 (emphasis supplied).

[3646] *Compare* Declaration of Independence *with* U.S. Const. preamble ("to * * * establish Justice").

[3647] U.S. Const. art. I, § 8, cl. 10.

> human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately, or immediately, from this original.
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> * * * * *
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> IF man were to live in a state of nature, unconnected with other individuals, there would be no occasion for any other laws, than the law of nature, and the law of God. * * * But man was formed for society * * * . However, as it is impossible for the whole race of mankind to be united in one great society, they must necessarily be divided into many; and form separate states, commonwealths, and nations, entirely independent of each other, and yet liable to a mutual intercourse. Hence arises a third kind of law to regulate this mutual intercourse, called "the law of nations:" which, as none of these states will acknowledge a superiority in the other, cannot be dictated by either; but depends entirely upon the rules of natural law, or upon mutual compacts, treaties, leagues, and agreements between these several communities: in the construction of also of which compacts, we have no other rule to resort to, but the law of nature; being the only one to which both communities are equally subject: and therefore the civil law very justly observes, that *quod naturalis ratio interomnes homines constituit, vocatur jus gentium.*[3648]

Conversely, if the majority of nations should forsake "the Laws of Nature and of Nature's God", then the putative "law of [*those*] nations" would no longer qualify as "the law of nations" at all, any more than the "law" of thieves qualifies as the law of property, or the "law" of confidence-men qualifies as the law of contracts.

Nonetheless, here in the United States Americans now witness, on the one hand, the Legislative Branch of the General Government defining "extrajudicial killing" as "a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples"; and, on the other hand, the Executive Branch declaring that it may perpetrate "extrajudicial killing[s]" at discretion, thereby traducing as outside the community of "civilized peoples" every single American whom it purports to "represent".

(11) Claims of "official immunity" in the exercise of these purported powers. If, for purposes of argument, public officials are properly engaged in a "*war* on terrorism", those among them who turn out to be rogues should be liable to prosecution and punishment for any "*war* crimes" they commit in the course of that "war"—or, in light of their repeated, strident, and self-satisfied assertions that "the war on terrorism" is legitimate, they should at least be estopped from denying and

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[3648] *Commentaries on the Laws of England, ante* note 142, Volume 1, at 40, 41, 43 (footnote omitted). The Latin epigram translates to: "What natural reason establishes [to be true] among all men is called the law of nations."

evading their exposure in that regard even if "the war on terrorism" is bogus. Among recognized "war crimes" are torture and other cruel or inhuman treatment, murder, deportation, and the taking of hostages.[3649] So, because the purported powers to kidnap Americans through "extraordinary renditions", to detain Americans indefinitely in military custody, to torture Americans, and to assassinate Americans are not conceivably constitutional (but indeed are self-evidently *anti*-constitutional), each and every official who participates in such acts in the course of "the war on terrorism" should be condemned as a "war criminal".

One can be sure, however, that if ever called to account for their "war crimes" (or any other crimes, for that matter), rogue public officials would stridently assert a supposedly all-embracing "official immunity" that insulated them from every form of personal liability, no matter where and against whom they might have perpetrated their thuggery, or in what tribunal or under what laws they might be charged. Such a defense would at best be effrontery, because:

First and foremost, it is the classic means that tyrants employ to insulate their myrmidons from legal responsibility for their acts of political and other criminality. For example, describing the Nazis' "PURGE OF POLITICAL OPPONENTS AND TERRORIZATION", the prosecutors at Nuremberg pointed out that, "in direct contrast to the severity of the criminal law as it affected the general population of Germany, the Nazi conspirators adopted and endorsed a large body of unwritten laws exempting the police from criminal liability for illegal acts done under higher authority". The guiding principle was that "'[t]he police never act in a lawless or illegal manner as long as they act according to the rules laid down by their superiors * * * . As long as the police carry out the will of the Government, [they are] acting legally.'" And "[*w*]*here no definite law protected terroristic acts of Nazi conspirators and their accomplices, proceedings against them were in the first instance suppressed or thereafter their acts were pardoned*".[3650]

Second, "official immunity" flies in the face of a fundamental principle on which America was founded, that "in a republic * * * every magistrate ought to be personally responsible for his behavior in office".[3651]

Third, the Constitution itself excludes it. The *only* "official immunities" the Constitution recognizes are that "Senators and Representatives * * * shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to

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[3649] *See, e.g.,* 18 U.S.C. § 2441(d)(1)(A), (B), (D), and (I). *See also* Rome Statute of the International Criminal Court, Part 2, Article 8, § 2(a)(ii), (iii), (i), (vii), and (viii).

[3650] *Office of United States Chief of Counsel For Prosecution of Axis Criminality*, NAZI CONSPIRACY AND AGGRESSION, *ante* note 3428, Volume I, at 244, 247 (emphasis in the original).

[3651] *The Federalist* No. 70 (Alexander Hamilton).

and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place".[3652] Although perhaps no pure "Speech or Debate in either House" could constitute a "war crime" (in contrast to an actual *vote* in favor of some bill that purported to authorize an unconstitutional "war"), all "war crimes" should fairly fall within the category "Felony"; and some "war crimes" could be prosecuted specifically as "Treason", if they amounted to "levying War against the[United States]", as waging a "war *of* terrorism" against WE THE PEOPLE certainly would. So the constitutional immunity, by its explicit terms, would not "privilege[ ]" the perpetrators of such acts "from Arrest" even in the very course of their performing their official functions. And the Constitution would hardly bother to allow for the actual "Arrest" of "Senators and Representatives" at those times, unless it presumed that their "Arrest[s]" could be followed by further criminal investigations, presentments or indictments, trials, convictions, and punishments against which *no* "official immunity" could be interposed.

Moreover, no rogue public official could plausibly claim immunity from prosecution for "war crimes", because the commission of any and every "war crime"—being, in the very nature of such behavior, unconstitutional—necessarily entails a violation of the requirement that "[t]he Senators and Representatives [in Congress] * * * , and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support th[e] Constitution".[3653] No public official can be "*bound* by [his] Oath or Affirmation, to support th[e] Constitution", however, without *personal* exposure to some serious *punishment* for refusing "to support" it—particularly when that refusal in the case of a "war crime" has resulted in a simultaneous violation of "the Laws of Nature and of Nature's God", the Law of Nations, and "the supreme Law of the Land". But any "official immunity" somehow deriving from or appurtenant to public office precludes the imposition of *any* penalty for such a refusal, thereby rendering the "Oath or Affirmation" taken with respect to that office not simply nugatory but even self-contradictory and absurd. Therefore, no "official immunity" can possibly obtain in such a situation.

Nonetheless, rogue public officials known or suspected to have exercised, or to have ordered the exercise of, any of the abusive powers discussed above are implicitly being afforded such a defense right now. As of this writing—

• No bills of impeachment against such officials have been introduced, or even proposed, in Congress—for the obvious reason that a majority of the Members of Congress has participated in those crimes by purporting to license them in one statute or another.

[3652] U.S. Const. art. I, § 6, cl. 1.

[3653] U.S. Const. art. VI, cl. 3.

• No prosecutions of rogue officials are in train—because personnel at the highest levels in the Executive Branch, civilian and military, are promulgating the policies pursuant to which these acts are being committed.[3654]

• No reliance can be placed on the Judiciary. Quite the contrary: The judges themselves fathered the bastard doctrine of "official immunity"[3655]—thereby not simply violating *their own* "Oath[s] or Affirmation[s], to support th[e] Constitution", but also aiding and abetting all other rogue officials in similar violations. In any proper prosecution for "war crimes" committed in the course of "the war *of* terrorism", a rogue official's claim of "official immunity" should warrant a further count in his indictment; and any judge who purports to entertain such a claim should himself be indicted as at least an accessory after the fact. Arguably, any such judge should be indicted as a full co-conspirator, because the actual perpetrators of "war crimes" do so with the assurance that judges will exonerate them through a grant of "official immunity"; and judges grant "official immunity" with the full knowledge and expectation that its availability will encourage further acts of the type to which such "immunity" applies.[3656]

Were Congress truly representative of WE THE PEOPLE, and intent upon enforcing the Constitution, that the Supreme Court has handed down numerous decisions creating, applying, protecting, and expanding "official immunity" would pose no problem, but instead would provide a perfect context in which to demonstrate that WE THE PEOPLE, not "we the judges", exercise ultimate control over the Constitution. One need only recall that the Supreme Court *upheld* the supposed legality of the mass evacuation of Japanese-Americans during World War II on the grounds of the possibility of disloyalty among some of them, but refused to rule on the question of subsequent indefinite detention in concentration camps of

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[3654] Having received glaring exposure in the media, a few military personnel of low rank have been prosecuted for relatively minor wrongdoing in "the war on terrorism", doubtlessly for the purpose of generating a smokescreen of "plausible denial" with respect to higher-ups. But inasmuch as the President of the United States himself claims the power to order "official assassinations"—to which mere kidnapping or even torture can hardly compare—the unconstitutionality of all such practices should be established once and for all *at the very head of the military chain of command*, not just case by case at some distant links only when the crimes of disposable flunkies fortuitously finally come to light.

[3655] *See generally* E. Vieira, Jr., *Pieces of Eight, ante* note 39, Volume 2, at 1643-1662.

[3656] It might be objected to this line of argument that: (i) most of the "official immunities" cobbled together by the Judiciary have been applied almost always only in *civil* litigation, to exclude awards of monetary damages against rogue public officials who have violated individuals' civil rights or committed other infractions that did not sink to the level of criminal misbehavior; and (ii) criminal prosecution of such wayward officials, where warranted, might still be had in principle. In practice, however, criminal prosecutions of these miscreants are almost *never* had, even if plainly warranted, because of the multilayered "good old boy" network within officialdom at every level of the modern federal system. Under these circumstances, the only *real* "checks and balances" against usurpation and tyranny must be applied by the injured parties themselves, who if given their "day in court" can impose staggering financial penalties on the malefactors. No tyrannous régime can long survive if its enforcers are constantly exposed to the forfeiture of their personal wealth for carrying out the régime's illegal orders. Being fully aware of this danger, the judges do everything possible to derail such lawsuits entirely or at least to minimize awards of monetary damages.

the individuals so evacuated.[3657] Yet, later on, Congress "acknowledge[d] the fundamental injustice of the evacuation, relocation, and internment of United States citizens and permanent resident aliens of Japanese ancestry during World War II", and determined to "make restitution to those individuals of Japanese ancestry who were interned" and to "discourage the occurrence of similar injustices and violations of civil liberties in the future".[3658] When Congress did so, it necessarily recognized *and repudiated* the viciously erroneous nature of the Court's actual holding on the evacuation, as well as its evasion of the issue of detention, in *Korematsu*—which acknowledgment, recognition, and repudiation for all intents and purposes constituted *a legislative declaratory judgement reversing that holding and condemning that evasion*. Moreover, Congress agreed to "make restitution" to the aggrieved Japanese, in the form of monetary compensation.[3659] Thus, in effect, the victims of the evacuation and internment, having lost in the judicial system, took a *political* appeal of *Korematsu* to Congress *and at length prevailed with a judgment of law and an award of damages*—proving that the General Government actually operates, when public officials properly operate it, on the principle of *legislative*, not judicial, supremacy. In addition, having denounced "the fundamental injustice" of the behavior of the Justices in the majority in *Korematsu,* Congress established for the future that any judge who dares to assert the holding in that case with respect to evacuation, or to rely on its evasion of the issue of detention, against anyone else will be perpetrating a "fundamental injustice", too, and therefore will be guilty of "high Crimes and Misdemeanors", warranting "Impeachment", "Conviction", and "remov[al] from Office", and after that other appropriate punishment.[3660] The historical basis for such a conclusion is firm: Under *pre*-constitutional English law, "disobedience to any act of parliament" was one of several "positive" "MISPRISIONS" "generally denominated *contempts* or *high misdemeanors*".[3661] Obviously, this method could (and should) be applied to the judicial rigamarole of "official immunity"—with nothing more complicated than a Congressional determination that no such "immunity" does exist, or ever has existed; that the very notion of "official immunity" constitutes a "fundamental injustice" to every victim of officials' misconduct, as well as an intolerable encouragement to and reward for misbehavior; and that any public official seeking, along with any judge purporting to grant,

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[3657] Korematsu v. United States, 323 U.S. 214 (1944). The Court did rule, however, that a Japanese-American citizen, *whose loyalty the government conceded*, could *not* be so detained. *Ex parte* Endo, 323 U.S. 283 (1944). During the war, however, the government never conceded the loyalty of most detainees—but it never proved their disloyalty, either.

[3658] An Act To implement recommendations of the Commission on Wartime Relocation and Internment of Citizens, Act of 10 August 1988, Pub. L. 100-383, § 1(1), (4), and (6), 102 Stat. 903, 903.

[3659] *See* Act of 10 August 1988, § 105(a)(1), 102 Stat. at 906 ("to each eligible individual the sum of $20,000").

[3660] *See* U.S. Const. art. II, § 4; *and compare* U.S. Const. art. I, § 3, cl. 7 *with, e.g.,* 18 U.S.C. §§ 241 and 242.

[3661] W. Blackstone, *Commentaries on the Laws of England, ante* note 142, Volume 4, at 121-122.

"official immunity" in the years ahead will be severely sanctioned. Admittedly, however, this reform has little likelihood of being implemented in the foreseeable future.

•No sufficient recourse can be had by the voters' removing rogue officials from office at the next election, either. *First,* no *un*elected bureaucrat can readily be "bound by [his] Oath or Affirmation" in that manner, because he will never face the electorate. And even an elected official may not be concerned with being reëlected—for, having well served some faction or other special-interest group at WE THE PEOPLE'S expense during his term in office, he may expect to be amply rewarded with some variety of "golden parachute" by his clients when the voters throw him out. *Second*, electoral defeat is not a true "punishment" in any sense known to the law, inasmuch as it can happen to any official without any wrongdoing on his part. *Third*, removal of a rogue from office at the next election provides only prospective relief. It cannot undo the damage he has already done during his term. *Fourth*, the prospect of electoral defeat is largely a paper tiger. The level of public officials' misbehavior would not be as great as it is today if any significant number of them feared popular retaliation at the pools, and the election of true reformers to public office. Apparently most incumbents are convinced—with good reason—that the electoral system and the types of candidates it allows to vie for office are so tightly controlled by the "two" major political parties and their clients and partisans in special-interest groups and the big media that WE THE PEOPLE are powerless to change the situation for the better, even if they succeed in changing the identities of their elected officials. And,

•No faith can be placed in the presumption that a rogue public official tempted to violate his "Oath or Affirmation" will be sufficiently "bound" solely perforce of a religious conviction that he will suffer meet punishment in the next world for the crimes he commits and fails to expiate in this one. Some officials may believe that; but others may not. WE THE PEOPLE, however, cannot mandate a sincere personal belief in an afterlife of rewards and punishments as an universally applicable condition for office, because "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States", and "Congress shall make no law respecting an establishment of religion".[3662]

So, *nothing* will effectively deter and punish rogue officials for their assumption and exercise of these—and perhaps even more—*anti-*constitutional powers until WE THE PEOPLE themselves, through concerted political action of the most fundamental sort, take their sovereignty into their own hands for their own self-preservation.

[3662] U.S. Const. art. VI, cl. 3 *and* amend. I. Similarly for the States under U.S. Const. amend. XIV, § 1. *See, e.g.,* Torcaso v. Watkins, 367 U.S. 488 (1961).

Crucial here is to focus on *the practical assertions* of the foregoing *anti*-constitutional powers, not on the specific statutory mumbo jumbo in which they have been embodied, or the particular judicial double-talk through which some of them have been approved, to date. For old statutes can be amended and new ones enacted, and judicial opinions written and rewritten, to suit the occasion—and will be, as long as the District of Columbia houses rogue officials eager to exercise such abusive powers. The one certainty is that whatever comes will be rationalized as necessary for "national security". Yet the Constitution contains no "national-security power" that licenses anyone in the General Government to perform these actions, or to approve of their performance by others. And for good reason: *True* "national security" requires that *all* constitutional limitations be scrupulously enforced *at all times*. For "the Nation"—that is, the United States—has no legal existence outside of the Constitution. Therefore, "[i]t would indeed be ironic if, in the name of national defense, we would sanction the subversion of [any] of those liberties * * * which makes the defense of the Nation worthwhile".[3663]

In the final analysis, though, "ironic" is hardly the word for it. "Ridiculous", "appalling", and "frightening" would be more accurate. For, if the assertions of such *anti*-constitutional powers—linked tightly together both temporally and logically in "a long train of abuses and usurpations, pursuing invariably the same Object [that] evinces a design to reduce the[People] under absolute Despotism"[3664]—do not constitute authentic "state crimes against democracy", then nothing does.[3665] In the United States, of course, the term "*state* crimes against *democracy*" is something of a misnomer, because any crimes which rogue public officials commit against WE THE PEOPLE (the *demos*) are *not* attributable to "the state", to "the government", or even to the particular "offices" the rogues occupy, but always remain the *entirely personal* crimes those individuals perpetrate *against* "the state" and "the government" as well as THE PEOPLE. With that clarification, though, the term can be profitably employed. "State crimes against democracy"—or, more accurately put in the specific context of America's federal system, "state crimes against limited representative government" in general or "state crimes against the Constitution" in particular—involve rogue public officials, almost always closely leagued with private factions or special interests, who abuse legal, and arrogate to themselves illegal, political and economic powers for their own benefit at WE THE PEOPLE'S expense. That is, "state crimes" always involve, as means or ends, usurpation, tyranny, or both. Because of their purposes, such crimes are often covert in nature, planning, and execution; and those who attempt to expose—and even succeed in

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[3663] United States v. Robel, 389 U.S. 258, 264 (1967).

[3664] Declaration of Independence.

[3665] For a general introduction to the concept of "state crimes against democracy", *see* the articles collected in *American Behavioral Scientist*, Volume 53, Number 6 (February 2010).

exposing—them are typically derided as delusional and dangerous "conspiracy theorists".[3666] Yet the planning and commission of such crimes can also be quite overt, provided that their true effect or their perpetrators' ulterior intent remains well camouflaged.

As is the case here: Every one of the *anti*-constitutional powers catalogued above is supposedly the product of some statute openly enacted in the normal course of Congressional business, or of some notorious claim of authority from the President or other high-ranking official, in some instances rubber-stamped by some court. The true character and purpose of these powers, and especially the true beneficiaries of their exercise, are concealed, though, (i) by hysterical invocations of "national security", infusions of xenophobia and mass paranoia, and instigation of chauvinism and jingoism throughout society; and (ii) by the general public's inability to parse the complex, specialized, and often impenetrable legalistic jargon in which their authors couch the statutes, executive decrees, or judicial decisions that purportedly grant or approve these powers. Such techniques often succeed, because most people uncritically accept whatever they are told by "authority figures", amplified by the echo-chambers of the big media; and many of those who do investigate the matters independently, and come to contrary conclusions, are loathe to face the truth and especially its consequences: (i) That, by effectively "levying War" on WE THE PEOPLE, their own "representatives" have become traitors according to the Constitution's explicit definition.[3667] And (ii) that, their "Form of Government" having failed to such an extent, WE THE PEOPLE themselves must reassert their sovereignty through their own personal efforts, before they lose it entirely—along with their freedom, their prosperity, and perhaps even their very lives.

D. An anticipated nationwide economic collapse and WE THE PEOPLE'S awakening to and rejection of the criminality of America's oligarchical political and economic systems the specific reasons for the erection of a domestic *para*-military police state. Although the erection of a National *para*-military police state may appear to any constitutionalist to be madness, yet undoubtedly method lurks behind it. America is not stumbling blindly, as a somnambulist, down a political dark alley. No, indeed. She is being led to a very definite, if dangerous, destination by the syndicate of factions, domestic and foreign special-interest groups, and their puppets in ostensible "public service" which and who throw the economic switches in New York City and pull the political levers in the District of Columbia. This oligarchy has forged these *anti*-constitutional powers as weapons for the specific purpose of waging a permanent domestic "war *of* terrorism"—political, economic,

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[3666] *See, e.g.,* David Ray Griffin, *Cognitive Infiltration: An Obama Appointee's Plan To Undermine The 9/11 Conspiracy Theory* (Northhampton, Massachusetts: Olive Branch Press, 2011).

[3667] *See* U.S. Const. art. III, § 3, cl. 1.

social, cultural, and in the event of forcible resistance even military in nature—against WE THE PEOPLE.[3668]

"The global war on terrorism" is little more than a cover-story to disguise this aggression in gossamer-thin legalistic camouflage. No alleged "terrorists" headquartered in foreign venues have ever been proven to have posed a menace to the continental United States that could possibly have warranted even the money Congress has poured down the rat-hole of the Department of Homeland Security, let alone the on-going assaults on the Constitution at every level of the federal system that "the war on terrorism" has rationalized. Moreover, did a serious threat to the oligarchs' domestic interests really exist from the infiltration of dangerous foreign "terrorists" into this country, the present "homeland-security" bureaucracy would immediately seal the borders, especially the border with Mexico. Nonetheless, the oligarchs' actions *do* reveal their anticipation that a set of catastrophic events of *some* sort will soon occur within what they call "the homeland" (disingenuously, of course, because if any "homeland" commands their loyalty it is certainly not the United States). They *do* expect that this calamity will strike everywhere throughout America within a short span of time—that it will have historically unprecedented and extraordinarily serious economic, political, and social consequences—that it will engender an intense conflict between the oligarchy and at least a significant proportion of the people—that in the course of this conflict those people will seek out economic, ideological, and political alternatives to the oligarchs' continued rule—and that in order to preserve their commanding positions during this impending, and perhaps indefinite, period of confrontation and chaos the oligarchs must deploy a nationwide *para*-military police-state apparatus in order to clamp down on whoever steps too far out of line.

1. The oligarchy's problem of maintaining economic control. To a man, the bankers and financial speculators in New York City and their political Pinocchios in the District of Columbia may be knaves; but they are not all fools. Most of them are well aware that the chronic economic problems which have plagued this country since the second decade of the Twentieth Century have derived from the machinations of the Federal Reserve System—or, more generally, from the inherent and ineradicable instability of a corporative-state banking cartel which transmutes public and private debt into legal-tender paper currency irredeemable in silver, gold, or any other valuable commodity.[3669] The oligarchs realize that the Federal Reserve System will eventually self-destruct—indeed, it has

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[3668] In its use of the term "oligarchy", this study follows Aristotle's definitions: namely, that "an aristocracy" is so called "either because the government is in the hands of the most worthy citizens, or because it is the best form for the city and its inhabitants"; whereas, as the "corruption[ ]" of "aristocracy", "an oligarchy considers only the rich", "be they few or be they more". *Politics*, Book III, Chapters VII and VIII, *in* A TREATISE ON GOVERNMENT OR, THE POLITICS OF ARISTOTLE, *ante* note 73, at 79 and 80.

[3669] *See* E. Vieira, Jr., *Pieces of Eight, ante* note 39, Volume 1, at 746-866.

already collapsed once in an utterly catastrophic fashion in 1932 to 1934, when domestic redemption of Federal Reserve Notes in gold was terminated permanently; then it failed again in 1971, when an impending collapse forced an indefinite suspension of international redemption. And they sense that yet a third, and this time finally fatal, *débâcle* is not very far off.

Under these circumstances, the oligarchy's position is rapidly becoming untenable. The Federal Reserve System has always served as the engine which supplied the oligarchs' economic power, and perforce of their economic power supported their political power as well. Yet, without the Federal Reserve System, it would have been *impossible—not simply improbable, or difficult, but* ***impossible***—for reckless politicians in the public sector and greedy speculators in the private sector to have amassed the staggering level of unproductive, unpayable, unconstitutional, and unconscionable debt that now bears down inexorably upon this country. It is too late, however, for the oligarchs merely to bemoan the consequences from a century of their and their forebears' financial imprudence. Having erected this monstrous Ponzi pyramid, they cannot allow it to collapse, because its fall will crush America's (and likely the world's) economy in a full-scale depression—and nothing would be more politically destabilizing, inevitably to their detriment. To be sure, the Federal Reserve System's ability to generate an inexhaustible stream of "liquidity" will allow for the debt to be paid off, albeit in strictly nominal terms, through hyperinflation of the currency. Hyperinflation, though, will destroy the free market's structure of prices, render rational economic calculation on any large scale impossible, derange the division of labor, devastate productivity, and drive Americans' standard of living down perhaps to third-world levels. So, whether through depression, hyperinflation, or (the most likely eventuality) hyperinflation followed immediately by depression, a breakdown of America's monetary and banking systems will negatively impact upon *every* economic relationship and transaction *everywhere* throughout the United States. And such a nationwide economic collapse will generate social dislocations, civil unrest and disobedience, riots and other mass violence, and political upheavals of immensity and intensity never before seen. Indeed, not unlikely might be a veritable *renversement* which would entirely displace the oligarchy from its present cat-bird's seat as America's ruling class.

In the face of these imminent perils, the oligarchy cannot afford to abide events. Sudden and sharp as its arrival has been, the crisis may have caught the oligarchs largely off balance and unprepared—so that their main concern at this point must be simply to weather the economic storm by desperately hanging on to as much power as possible. Then again, although they may not have intentionally triggered the crisis, being opportunists they appreciate the possibility of using it as the perfect occasion and excuse to promote new "global" financial institutions

under their control[3670]—so that they will end up with *more* economic and political power than ever before. It is even conceivable that, applying their oft-favored strategy of "*ordo ab chao*",[3671] they themselves intentionally created the conditions for and triggered the crisis in the first place, in order to impose a new "global" financial régime on an otherwise unwilling world. When one observes how the oligarchs perfectly positioned and prepared themselves to take advantage of the crisis in advance of everyone else—how, after the crisis erupted, they bludgeoned Congress into granting them gargantuan "bail outs", and drew into their accounts staggering amounts of "quantitative easing" from the Federal Reserve System's well of currency and credit—and how otherwise they have shamelessly lined their pockets while protecting themselves from prosecution all along—it is difficult not to suspect that their hidden hands were behind the crisis from the start and have been guiding it ever since to their own favored destination.

No matter what may have been cause and what is effect, though, the oligarchs will now follow the selfsame strategy. To retain, and especially to gain, power they must project and expend power against whatever social forces might dare to challenge them. Sufficiently serious economic disruptions can be expected to goad many desperate Americans into potentially revolutionary political activity. So the oligarchs must be prepared to employ main force, to whatever degree may become necessary, in order to suppress dissent, opposition, social unrest, civil disobedience, and especially armed resistance amongst the masses.

No one can believe that most State and Local police forces will prove adequate—in terms of personnel, equipment, and tactical doctrine—to deal effectively with the degree of turmoil that will erupt within their own jurisdictions during a nationwide economic, political, and social breakdown. The only apparent source for a supply of highly trained cadres, as well as massive reinforcements of new *para-*military "boots on the ground", suitable for the task, will be the General Government—which explains the conception, birth, and growth of the Department of Homeland Security. Moreover, all of the initially disparate forces from different jurisdictions within the federal system will need to be coördinated in conformity with some overall plan, so that an unified effort can be made across the country to stem the crisis, before too many common Americans embrace radical political movements in an effort to return economic stability to their communities. Any such plan will require a central apparatus of command and control to administer it—therefore, the Department of Homeland Security. The Department of Homeland Security is and always has been primarily an anticipatory response, not to anything going on in or coming out of any foreign country, but instead to what

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[3670] Perhaps along the grandiose lines of the scheme described in Hans Heymann, *Plan for Permanent Peace* (New York, New York: Harper & Brothers Publishers, 1941).

[3671] "Order from chaos."

the oligarchy expects will occur throughout America as a consequence of its own misguided and malicious policies. The Department of Homeland Security's real, if recondite, mission is and always has been to wage a "war *of* terrorism" *at home*.

The oligarchy's ability—because there can be no question of its willingness—to crack down with *para*-military force on the populace everywhere throughout the United States, more or less at once, will be crucial if it is to maintain its hold over this Nation's monetary and banking systems. For people anywhere within the United States at any time could adopt an alternative currency of silver and gold, thereby separating themselves from financial control by the Federal Reserve System. Were this to occur to any significant degree—for instance, if a single State officially adopted such an alternative currency for all of her monetary transactions—the new currency would soon come into open competition with Federal Reserve Notes throughout the country, with the full force of the free market pushing the one up and pulling the other down. No one needs to be told what the outcome of such a competition would be in the midst of an economic crisis the origin of which lay in the inherent instability, exacerbated by decades of gross mismanagement, of the Federal Reserve System. Needless to emphasize, the oligarchy would never tolerate, because it could never survive, such a development—and therefore it would move to stamp out the use of an alternative currency whenever and wherever it occurred. An alternative currency could be employed, however, by any two individuals, as well as by *ad hoc* groups, business organizations of all types, and myriad Local as well as State governments. So, because potentially tens of millions of economic relationships and transactions would have to be monitored and controlled each and every day—many on "black markets" where even discovering them would pose a significant problem—the oligarchy would have to deploy huge numbers of informers, investigators, analysts, police, prosecutors, and other operatives. The so-called "war on drugs" has failed, even though only a relatively small proportion of America's population uses illicit drugs and a large proportion deems such use pernicious. How could a "war on alternative currency" succeed, when most of the population would take up such a currency as a necessary means of economic survival?

2. The oligarchy's problem of maintaining political control. The oligarchical régime which now misrules this country is a "confidence game", in both senses of that term. Its continuation absolutely demands maintaining a large majority of the people's confidence, albeit confidence firmly rooted in untruths. After all, the successful commission of any crimes—especially "state crimes against limited representative government"—depends upon the suppression of incriminating evidence. This requires cultivating a state of ignorance and credulity in the victims. Yet, precisely because the maintenance of unwarranted confidence in the oligarchy depends upon the persistence of incorrect beliefs among the general population, that confidence is always in jeopardy. For incorrect beliefs can be

discarded and correct ones adopted by exposure to facts. Although "you can fool some of the people all of the time, and all of the people some of the time", that is *not* good enough if some of the people some of the time somehow come into possession of some of the truth, and that "some" proves to be *just enough*.

The problem confronting the oligarchy today is two-fold: (i) its inability to shore up the Nation's collapsing monetary and banking systems, with attendant economic disruptions which are causing more and more people to lose confidence in the régime's competence; and (ii) its inability to deny common Americans access to reliable information which contradicts "the party line" coming out of the District of Columbia and New York City, and which increasingly exposes this country's political and economic leadership as not simply incompetent, but malevolent (and in some respects even demented) as well. As ever-increasing numbers of Americans obtain access and pay attention to unfiltered information from the Internet, the oligarchs' position progressively worsens—because their position has always depended upon centralized control over information through the oligopoly of the corporate mass media, by dint of which political and economic misinformation, disinformation, defamation, distortions, myths, and outright lies could be broadcast without fear of exposure and effective contradiction. So now, even if this country's faulty economic system does not collapse in the near term, the foundation of falsehoods on which it rests will certainly crumble. Exposure of what has really been going on, and especially for whose benefit and at whose cost, will likely incite extensive political unrest and civil disobedience, even if the economy continues to muddle along as it has in the recent past. But the economy will not just muddle along. The difficulty of imposing central control over an unstable economy will expand exponentially when the people largely disbelieve what officialdom tells them. Traditional "monetary policy" worked through a central bank emitting irredeemable legal-tender paper currency will become increasingly ineffective as more and more people, and perhaps many of the States as well, adopt alternative currencies of silver and gold. New knowledge will encourage people to seek alternatives with respect to matters other than currency, too. "Black markets" will proliferate. The oligarchy's hold on the country will atrophy. And not just with respect to the economy, either. For, as common Americans finally realize exactly who is responsible for the economic mess, and why—and that nothing in the way of real and lasting reform can be accomplished through petitions, elections, or litigation in the kangaroo courts—they will adopt other forms of political activism as the means to correct the situation. The serendipitous combination of an economic implosion with an infusion of reliable information will form an incendiary mixture of truly *revolutionary* volatility.

The oligarchy is well aware of these dangers. The extent of officialdom's concern can be gauged, for example, by the mission recently assigned to the Federal Bureau of Investigation which, in coöperation with law-enforcement agencies at

every level of the federal system, is developing a National Domestic Communications Assistance Center to engage in research and development, and to provide technical assistance and practical advice, in the area of electronic surveillance, aimed at intercepting traffic coursing through the ether.[3672] And, putting theory into practice, the Department of Homeland Security's Office of Operations Coordination and Planning has been assigned the task, "through [Social Networking/Media Capability] analysts, [to] monitor publicly available online forums, blogs, public websites, and message boards [in order] to collect information used in providing situational awareness * * * including in limited instances personally identifiable information".[3673]

Merely monitoring the Internet and other electronic media, and intercepting private communications and other transfers of data, however, will not suffice. To manipulate, discredit, and even shut down the sources of information that might goad a distressed population to massive civil disobedience will be more desirable than merely to predict the geneses, likelihoods, and locations of particular outbreaks of unrest. This is why the oligarchy is feverishly striving to develop within its *para*-military police-state apparatus a capability for reversing history and forcing the genii of information-technology into a new bottle which will enable rogue officialdom to exercise centralized surveillance, intervention, and ultimately control over the entire electronic "marketplace of ideas". One sinister initiative is the Defense Advanced Research Project Agency's "Social Media in Strategic Communication" program, which intends to use social media to "[d]etect, classify, measure and track the * * * formation, development and spread of ideas and concepts (memes), and * * * purposeful or deceptive messaging and misinformation"; to "[r]ecognize persuasion campaign structures and influence operations across social media sites and communities"; to "[i]dentify participants and intent, and measure effects of persuasion campaigns"; and to engage in "[c]ounter messaging of detected adversary influence operations".[3674] Whether the category "detected adversary influence operations" includes communications among American patriots, the contents of which rogue officials consider politically dangerous and therefore prime targets for detection and suppression, this document does not admit. Once such technology is in place, however, the likelihood is high that it will be unleashed against perceived *ideological* "domestic terrorists"—that is, any and all Americans who might try to mobilize mass public support on behalf of real political reform.

[3672] H.R. Report No. 112-169, 112th Congress, 1st Session, Commerce, Justice, Science, and Related Appropriations Bill (20 July 2011), at 53.

[3673] U.S. Department of Homeland Security, *Privacy Compliance Review of the NOC Media Monitoring Initiative* (15 November 2011), at 1.

[3674] Broad Agency Announcement, Social Media in Strategic Communication (SMISC), DARPA-BAA-11-64, Amendment 2 (15 August 2011), at 4.

No strenuous mental effort is necessary to predict the chain of perverse reasoning by which rogue public officials would traduce as "domestic terrorists" Americans who protested *en masse* through exercises of "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances"[3675] in or around the governmental buildings that housed the officials the demonstrators were trying to influence. For

- political protestors or demonstrators might "knowingly, and with intent to impede or disrupt the orderly conduct of Government business or official functions, engage in disorderly or disruptive conduct in, or within such proximity to, any restricted building or grounds * * * so that such conduct, in fact, impedes or disrupts the orderly conduct of Government business or official functions";[3676] or
- political protestors or demonstrators might "knowingly, and with the intent to impede or disrupt the orderly conduct of Government business or official functions, obstruct[ ] or impede[ ] ingress or egress to or from any restricted building or grounds";[3677] and
- inasmuch as any such "imped[ing] or disrupting" constitutes a crime;[3678] and
- inasmuch as a truly massive demonstration—its size and vehemence proportionate to the depth of, and the demonstrators' disgust with, rogue public officials' wrongdoing—could be claimed to threaten "acts dangerous to human life that [we]re violation[s] of the criminal laws of the United States";[3679] and
- inasmuch as any such demonstration would always, in the nature of things, be aimed at "influenc[ing] the policy of a government by intimidation or coercion"[3680]—because widespread civil unrest is ultimately intended to remind public officials "[t]hat whenever any Form of Government becomes destructive of the[true] ends [of Government], it is the Right of the People to alter or to abolish it";[3681] therefore,
- mass protests could be labeled "domestic terrorism".

[3675] U.S. Const. amend. I.

[3676] 18 U.S.C. § 1752(a)(2).

[3677] 18 U.S.C. § 1752(a)(3).

[3678] 18 U.S.C. § 1752(b).

[3679] *See* 18 U.S.C. § 2331(5)(A).

[3680] *See* 18 U.S.C. § 2331(5)(B)(ii).

[3681] Declaration of Independence.

So it is hardly accidental that the statute which effectively outlaws "sit ins" and other disruptive demonstrations at governmental facilities was recently reënacted.[3682] Obviously, the oligarchy anticipates massive civil unrest and even disobedience, aimed, if not in general at "the Form of Government [which has] become[ ] destructive of the[true] ends [of Government]", then in particular at the rogue officials who have perpetrated "a long train of abuses and usurpations" which "evinces a design to reduce the[People] under absolute Despotism".[3683] To be sure, any prudent government prepares for suppressing civil unrest—the Constitution itself delegates to Congress the power "[t]o provide for calling forth the Militia to * * * suppress Insurrections",[3684] and imposes upon the United States the duty to "protect each of the[States] * * * against domestic Violence".[3685] In this case, however, the oligarchy can distinguish between immediate effect and underlying cause. In the long run, the people who will pose the greatest danger will not necessarily be the demonstrators alone. Protest demonstrations and other forms of organized civil disobedience are not spontaneous natural events. They are the products of political ideas. Such ideas are more dangerous even than guns. For a man with a gun, but with no idea of why and how he should use it, will end up doing nothing constructive, because he does not know what he should do. Conversely, a man with the idea that he needs a gun in order to secure his freedom—for example, the idea that "[a] well regulated Militia" is "necessary to the security of a free State"[3686]—will inevitably find a way to acquire a gun and will work out a plan for using it effectively. The oligarchy has expended extensive efforts over several generations in pushing "gun control". It is now coming to realize that "gun control" will prove futile without an equally aggressive campaign of "idea control": namely, that individuals who promulgate ideas subversive of the political and economic *status quo*—in particular, ideas derived from the Declaration of Independence and the Constitution—must be identified, isolated, discredited, demonized, harassed, and ultimately silenced.

On may well wonder, however, whether the oligarchy's schemes will perform as well as their creators expect. In times of crisis, after all, "black markets" can and will supply whatever economic goods consumers desire, through effective surreptitious channels. Particularly during a period of economic crisis, political information that exposes rogue public officials' wrongdoing is an economic good which many people want. Therefore, no matter what the oligarchy does, "black

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[3682] An Act To correct and simplify the drafting of section 1752 (relating to restricted buildings or grounds) of title 18, United States Code ("Federal Restricted Buildings and Grounds Improvement Act of 2011"), Act of 8 May 2012, Pub. L. 112-98, 126 Stat. 263; *now codified at* 18 U.S.C. § 1752.

[3683] Declaration of Independence.

[3684] U.S. Const. art. I, § 8, cl. 15.

[3685] U.S. Const. art. IV, § 4.

[3686] U.S. Const. amend. II.

markets" for that information—from such clandestine sources as "whistleblowers" and "hackers", and through means of communication that largely avoid monitoring and intervention by civilian and military "intelligence agencies"—will spring up, employing whatever technology is available. The might of the Soviet secret police could not eliminate *samizdat* when dissident literature was written out in cursive or at best typewritten, and then passed from hand to hand. How powerful would a police apparatus have to be to suppress technologically adept Americans from developing an electronic *samizdat*, or from employing what appear to be relatively primitive means of communication in new and sophisticated manners which can evade or defeat rogue officials' techniques of electronic surveillance and intervention?

3. The oligarchy's problem of maintaining popular loyalty and legal subordination to the régime. Even if the oligarchy can manage by some show of force to maintain a semblance of economic and political control over this country during the initial stages of the crisis, its doom will nonetheless be sealed in the long run. In order to govern justly—so that WE THE PEOPLE have no reason to exercise their "Right * * * to alter or to abolish" their "Form of Government"[3687]—their leaders must endeavor "to win the people's hearts and minds". "To win the people's minds", one must appeal to their intellects: that it makes practical sense to retain their present leaders (in person or in type) in positions of authority. No such appeal can succeed, however, in the face of the people's understanding that the on-going economic collapse is the inexorable result, and the irrefutable proof, of their leaders' incompetence. Of course, even in some very serious circumstances, the people might forgive mere incompetence. But here, mere incompetence is not the half of it. "To win the people's hearts", one must appeal to their moral sense: that some obligation of loyalty requires that their leaders ought to be retained in positions of authority, notwithstanding their shortcomings. *No people owes loyalty, however, to leaders who have been systematically disloyal to them.* Once common Americans realize this, the oligarchy's fate will be irretrievably sealed.

And every American should be aware of this principle of reciprocity between the people and their leaders, if not simply by dint of political instinct then through consulting his own country's history. From Blackstone, for one source, the Founders knew that

> allegiance is usually, and therefore most easily, considered as the duty of the people, and protection as the duty of the magistrate; and yet they are, reciprocally, the rights as well as the duties of each other. Allegiance is the right of the magistrate, and protection the right of the people.[3688]

[3687] *See* Declaration of Independence.

[3688] *Commentaries on the Laws of England*, *ante* note 142, Volume 1, at 123.

The Declaration of Independence excoriated King George III because "[h]e has abdicated Government here, by declaring us out of his Protection and waging War against us"—one of the reasons, by itself doubtlessly fully sufficient, why "these United Colonies * * * are Absolved from all Allegiance to the British Crown". Later, this principle was reaffirmed as a foundational precept of constitutional law:

> The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection. Allegiance and protected are, in this connection, reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance.[3689]

So, when adequate protection is not forthcoming—especially when their leaders are actually waging a "war *of* terrorism" against the people—the ties of allegiance between the people and their leaders unravel, and the legal order of which allegiance is the foundation collapses.

The crisis now besetting America proves that her self-styled, self-promoted, self-appointed, self-perpetuating, and always self-serving political and economic leaders have failed, and will continue to fail, to provide her people with protection. Their chronic reliance on "official lies", in the form of the suppression of truth as well as the promulgation of falsehoods, proves that they have no intention of protecting the people. To the contrary: Their relentless preparations to wage a "war *of* terrorism" against the people proves their intent to destroy those "certain unalienable Rights" which "Governments are instituted among Men" "to secure"—to take from the people their "Liberty", and with their "Liberty" their ability to engage in "the pursuit of Happiness", and from those who resist even "Life" as well.[3690]

Under such circumstances, one can expect that masses of economically deprived, socially dislocated, and politically disenfranchised, disgruntled, and disgusted Americans—who in the midst of an economic crisis have next to nothing left and therefore almost nothing more to lose—and many of whom have been reduced to a state of moral depravity by the constant assaults of crude cultural bolshevism emanating from the big media and the *demi-monde* of mass "entertainment"—will feel themselves no longer obliged to the political system under which they happen to live, or to the public officials, political parties, politicians, and bosses of special-interest groups who run that system for their own

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[3689] Minor v. Happersett, 88 U.S. (21 Wallace) 162, 165-166 (1875).

[3690] *See* Declaration of Independence.

parochial, selfish benefit. So, when this country tumbles into the free-fall of hyperinflation or depression, these materially and morally impoverished citizens will rebel: Initially, against ever-worsening economic conditions, by demanding that public officials correct the situation. Then, when their petitions, marches, sit-ins, and other public protests accomplish little or nothing, they will retaliate against incumbents at the next elections. Finally, when they discover that the "two" major political parties are really a single criminal enterprise with a pair of duplicitous faces leering at them from opposite sides of an empty cranium, and that changing the political personalities in office does not ameliorate the insufferable conditions which arise out of the hare-brained policies implemented by whichever individuals are elected, they will strike at the façade of "government" the "two" parties have foisted upon this country. At that point, a general disdain and disregard for legality will become the order of the day. After all, ***if public officials refuse to obey the Constitution, which is the sole source of their authority and which each of them is "bound by Oath or Affirmation[ ] to support",***[3691] ***what obligation has anyone else to obey any purported "law" those officials enact or attempt to enforce?***

Now, as many as two hundred to three hundred million firearms, and inestimable supplies of ammunition, are held in private store throughout this country. In the midst of what threatens to become the most severe economic crisis of modern times, if not of all time, will not this profusion of armaments—in the hands of people who have been rudely stripped of their financial security, disabused of their political illusions, and driven to the edge of desperation by unemployment, homelessness, hunger, and loss of hope—be brought into play in the most direct manner possible? Will not these people's natural and fully justified antagonisms against public officials, politicians, and special-interest groups mature into rancor—rancor into hatred—hatred into an urge for revenge—and an urge for revenge into actual violent retaliation in more than a few isolated instances and in less than a short period of time? But these are merely rhetorical questions. For anyone who consults the Internet will be overwhelmed with evidence of the antagonism, rancor, hatred, and demands for vengeance already arising at a fever pitch among common Americans against the political and economic oligarchs whom they quite correctly believe to have intentionally sold them and their country down the river Styx. To what levels of intensity and irreconcilability this anger will mount—and in what eruptions of mass violence it will emerge—in the course of a final, catastrophic collapse of the economy throughout the United States can only be imagined (there being no precedent for today's conditions). But comparisons with the circumstances which provoked previous episodes of widespread civil unrest in contemporary America augur that those events will pale in comparison to what

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[3691] U.S. Const. art. VI, cl. 3.

full-blown hyperinflation or depression should be expected to bring about in the near future.

During the six days of the so-called "Watts Riots" of 1965 in Los Angeles, California, over thirty thousand adults took to the streets, thirty-four individuals lost their lives, eleven hundred more were injured, and upwards of one hundred million dollars' worth of property, including some one thousand buildings, was destroyed, looted, vandalized, or otherwise damaged. An altercation incident to a routine arrest for alleged drunken driving triggered the disturbances—but their suppression required more National Guardsmen and police than the total of American Armed Forces' personnel whom President Lyndon Johnson deployed to seize control of the entire Dominican Republic in that same year. And suppression of the rioters did not address, let alone alleviate, the riots' chronic underlying causes in the community—including such socio-economic problems as high unemployment, substandard living conditions, and a lack of adequate public education, together with political grievances linked to the racial discrimination which had become institutionalized in the city. Then, in the explosion of the so-called "Los Angeles Riots" of 1992, once again the detonator was a relatively minor event—the questionable acquittals of several Local policemen charged with using excessive force to make an arrest. Within hours of the verdicts of "not guilty", violence broke out, and then continued for three days, with arson, assaults, looting, and vandalism by rioters, and suppression of the disturbances by National Guardsmen and police, the subjects of live television coverage broadcast nationwide. Overall, fifty individuals were killed; more than four thousand were injured; and some one billion dollars' worth of property was destroyed or damaged. These outbursts teach lessons which Americans would be imprudent to the height of folly to imagine do not apply to themselves today:

First, both of the riots in Los Angeles erupted over comparatively minor events—*but ones which the people on the spot linked to long-standing, widespread, and serious animosities derived from social, economic, and political grievances that public officials had failed, neglected, or refused to address*. Being representative of entire hosts of injustices, these two isolated events became the proverbial "straws that broke the camels' backs". In the course of a major nationwide economic collapse today, such occurrences—and many much more serious—would be quotidian and legion.

Second, the Los Angeles rioters obviously believed that *mass violence could and should be employed as a justifiable form of political activism, when and because nothing else worked.* In this, they were in rough agreement with the men who wrote the Declaration of Independence. And the timeless wisdom of the Declaration—that "mankind are more disposed to suffer, when evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed", but that "when a long train of abuses and usurpations * * * evinces a design to reduce the[People] under absolute despotism, it is their right, it is their duty, to throw off

such Government"—will surely galvanize many more adherents into action as an insufferable economic catastrophe caused by nincompoops, charlatans, and outright criminals in public office and their controllers in greedy special-interest groups sweeps across America.

Third, probably very few of the participants in the Los Angeles riots (other than adventitious *semi*-professional looters and other criminals) gained, or even expected to gain, any significant personal profit or meaningful social betterment as a consequence of the upheavals themselves. Most of them could never have imagined that the riots would actually bring about any specific political reforms. Instead, they engaged in the mayhem simply as actors in anguished, despairing, and especially defiant political street-theater, with the dialogue communicated to a national audience through unmitigated violence across the footlights of burning buildings. People who find themselves in dire economic straits throughout America tomorrow can also be expected to turn to the red-curtained drama of mass insurgency in order "to send a message". *This message, however, will not be sent from a very small part of the country to the rest of it,* ***but from almost the entire country to the very small part that constitutes the corrupt economic and political oligarchy****. So the breadth and the intensity of the violence will be far greater, and its focus far narrower and much sharper.*

Fourth, although the territory in which the Los Angeles riots broke out was limited in area and fairly compact, the disturbances proved so severe that they could not be put down by only the State and Local police forces available, but instead required deployment of the regular Armed Forces, in the form of the National Guard. *Tomorrow, major civil unrest throughout the entire length and breadth of the United States will render this country ungovernable in short order, even if the entire National Guard could be mobilized and none of it defected to the popular side.*

Fifth, although those in positions of political power in Los Angeles eventually suppressed the rioters with armed force, the cost far exceeded what might have been the bill for nonviolently correcting the worst of the underlying conditions that had spawned the people's grievances, before those grievances finally took shape in destructive rebellion. Today, even worse shortsightedness is evident. For *next to nothing* is being done by the oligarchy to lift the crushing burden of debt—much of it unconstitutionally incurred in the first place—from Americans' shoulders. Instead, more and more debt is being shoveled into the Nation's wildly overdrawn account—eventually to be collected from common people through taxation, inflation, and "austerity" in their living standards—precisely in order to "bail out" the very institutions and individuals responsible for the present financial mess. The banks, financial houses, and dens of speculators which are supposedly "too big to fail" *will* have failed; but they will be relieved of the weight of their failures by having that load of moan shifted onto the backs of ordinary Americans.

Sixth, the rioters in Los Angeles in 1965 and 1992 were neither organized nor disciplined; and although some were armed, no *concerted and systematic* use of firearms and other weapons throughout the disaffected communities occurred. Neither did the insurgents attempt to export their violence into outlying areas, so as to attack the people they considered their oppressors in those people's own persons and homes. This evidenced the absence of any overall strategy guiding the uprising.[3692] Under similar circumstances in the near future, however, such shortsightedness almost certainly will not be repeated. And,

Seventh, in general, the more extensive and severe the underlying socio-economic problems, and the more callous the disregard for their solution exhibited by the political Establishment, the more likely will be the eruption of mass violence, which the perpetrators will rationalize as their only effective means to protest, broadcast, and redress their grievances with petitions written in the readily legible handwriting of blood and destruction. Which augurs ill for the present time, inasmuch as the socio-economic difficulties which underlay the riots in 1965 and 1992 in Los Angeles were essentially local phenomena which an impact almost trivial in comparison to the economic and social dislocations, and ensuing mass civil disobedience, which full-blown hyperinflation, depression, or some combination of the two—or even the approaches to those conditions—will bring about *everywhere* within America tomorrow.

If, however, this is the worst that one can expect—when people bereft of hope and devoid of comprehension strike out blindly at their oppressors—what is the best? That would be the response of American patriots who *do* understand the Constitution, and therefore do not hope in vain. They know that, under the federal system, even the grossest betrayal of their trust by rogue public officials does not leave the people deprived of a government and denuded of protection. For, in the final analysis, *WE THE PEOPLE are the government*; and through "well regulated Militia * * * necessary to the security of a free State" in each of the several States *WE THE PEOPLE protect themselves*.[3693] So, in the ultimate crisis, when a "Form of Government becomes destructive of the[true] ends [of Government]",[3694] THE PEOPLE'S political allegiance and legal obligations do not disappear in the billowing main of anarchy. Rather, they are transferred without hiatus from faithless officials to THE PEOPLE themselves; to THE PEOPLE'S most important constitutional establishments, "the Militia of the several States"; and to whatever new political and economic institutions THE PEOPLE, having secured for themselves the "'[p]olitical power [that] grows out of the barrel of a gun'", may then create in order to correct the problems confronting them.

[3692] *Contrast, e.g.,* T. Barry, *Guerilla Days in Ireland*, *ante* note 2599, Chapters XVI and XVII.

[3693] *Compare* U.S. Const. preamble *with* amend. II.

[3694] *See* Declaration of Independence.

To achieve this result under the press of the present crisis, through, THE PEOPLE must act in good time, by revitalizing the Militia immediately if not sooner. But what if they do not?

E. The National stage being set for an open takeover of government by "the military-industrial complex". The oligarchs know that a nationwide, even a worldwide, economic crisis is inescapable. They understand that when they can no longer depend upon the people's good will they must be able to suppress both individual and especially collective manifestations of the people's ill will. To crush dissent and civil unrest as extensive and intensive as can be expected to break out in the course of hyperinflation, depression, or one following immediately upon the other will require vast numbers of "boots on the ground". So the oligarchs will bend every effort to put a first-class *para-*military police-state apparatus into operation in this country as soon as possible. And they may advance far beyond what they have already accomplished before enough Americans awaken and start to resist.

The oligarchs apparently do not appreciate or even seem to be concerned, however, that the *para-*military police-state apparatus they are elaborating will not extricate them from, but will only exacerbate, the situation. It can not, and will not even attempt to, provide the basic economic reforms necessary to mitigate the crisis. Indeed, quite the opposite: The timely adoption by the States of an alternative currency in anticipation of a collapse of the Federal Reserve System is probably the only way under present conditions that America's free markets and State and Local governments can be protected against the worst ravages from hyperinflation of the Federal Reserve's currency. But, as common Americans become increasingly aware of this, and petition their States' legislators to take such action, police-state operatives can be expected to crack down on monetary reformers by labeling them "domestic economic terrorists".[3695] Obviously, though, the application of mere

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[3695] As of this writing, the oligarchy is still fixated on its traditional tactic of attempting to dissuade the majority of Americans from paying any attention to advocates of monetary reform in general and the adoption of gold and silver as alternative currencies in particular. In this effort, the police-state apparatus has adopted two approaches, which may be called "the soft-sell" and "the hard sell".

"The soft sell" is "soft" only in the misleading sense that a "soft-boiled egg" is "soft", but has nonetheless been cooked. Its goal is to boil Americans' brains in propaganda and agitation that extol the Federal Reserve System—and soon, perhaps, some new *supra-*national central bank set up to emit a new *supra-*national currency—while denigrating the usefulness of gold and silver as currency, as investments, or even as hedges against inflation. For decades, throughout the big print and electronic media the oligarchy has sown myriad little echo chambers that have reverberated with a centrally coördinated, carefully concocted, and to the untutored mind even seemingly credible "party line" always antagonistic towards everything even remotely favorable to real monetary reform. The oligarchy is well aware, however, that its standard defamation of critics of the Federal Reserve System as kooky "conspiracy theorists" is starting to fall on deaf ears. For, as the revelation of one grotesque banking and financial scandal follows another, even the veriest dolt can conclude that *no* "conspiracy theory" involving the Federal Reserve System, the big-time money-manipulators and speculators in New York City, and rogue officials in the General Government is too outlandish to believe. Rather, each of these groups by itself, and all of them together, constitute an on-going conspiracy against the public interest the likes of which has never before been witnessed in this country's history.

So, to maintain its position in the face of this pubic awakening, the oligarchy will increasingly have

defamatory labels in the course of an economic collapse will fail to turn Americans on the brink of financial desperation away from alternative currencies. Therefore, if it hopes to salvage its foundering ship of state, the oligarchy will increasingly be compelled systematically to commit "state crimes against limited representative government"—perpetrated, as its spokesmen promise, "through infiltration, disruption, and dismantling of organizations which seek to challenge" the Federal Reserve System.[3696] This will require more and more intervention in the free market by *para*-military police and other operatives—and therefore more and more recruits for the police-state apparatus. Yet the oligarchs themselves sense that the apparatus cannot be expanded quickly enough to overtake, let alone outpace, the collapse of the economy and consequent alienation of the people from the régime. They are

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to rely upon "the hard sell". "The hard sell" is predicated on the adage, "Strike the shepherd and the sheep shall be scattered!" A glaring example of this tactic in operation is the recent conviction of one Bernard von NotHaus in the so-called "Liberty Dollar" case in the United States District Court in North Carolina. United States v. von NotHaus, Docket No. 5:09CR27-V (W.D.N.C. 2011). Von NotHaus may not have been an intellectual or political leader in the very first rank of the movement for sound money; but he did represent a distinct threat to the oligarchy's monetary and banking régime. For his "Liberty Dollar" pointed out the essential problem with the present monetary system, and indicated one basic direction in which at least part of the solution could be found—by providing average Americans with a means to avoid the Federal Reserve System's paper currency, in favor of silver and gold, not simply as investments or hedges against inflation, but for use as actual currency in day-to-day transactions. Celebrating its victory in this case, the Department of Justice issued a press release which stated in part:

> "Attempts to undermine the legitimate currency of this country are simply a unique form of domestic terrorism," [the] U.S. Attorney * * * said, in announcing the verdict [against Bernard von NotHaus]. "While these forms of anti-government activities do not involve violence, they are every bit as insidious and represent a clear and present danger to the economic stability of this country," she added. "We are determined to meet these threats through infiltration, disruption, and dismantling of organizations which seek to challenge the legitimacy of our democratic form of government."

Press Release of 18 March 2011, originally published on the website of the Federal Bureau of Investigation of Charlotte, North Carolina, at <http://charlotte.fbi.gov/dojpressrel/pressrel11/ce031811.htm>.

These assertions constitute more than idle threats. Rather, they must be taken as calculated acts of "official terrorism" directed at every American who intends not to allow himself to be looted by the Federal Reserve System, its financial controllers and clients in New York City, and its political puppets in the District of Columbia. But exactly what will the Department of Justice attempt to do to those Americans who use gold and silver, in whatever forms, as media of payment for the contracts that Congress has explicitly authorized? *See* 31 U.S.C. § 5118(b) and (d). What pressure will the Department attempt to apply to those States which adopt alternative media of exchange, consisting of gold and silver in the form of coin or bullion, in reliance, not only on the Constitution, but also on the Supreme Court's favorable ruling on that very point? *See* U.S. Const. art. I, § 10, cl. 1 *and* Lane County v. Oregon, 74 U.S. (7 Wallace) 71, 76-78 (1869). And how, in the face of the First Amendment, will it contrive to gag all of the organizations, groups, and individuals which and who simply *advocate* the use of gold and silver as alternative media of exchange? For, even if the actual use of gold and silver for monetary purposes were illegal, simple advocacy of such use would nevertheless be constitutionally protected. *See, e.g.,* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 253 (2002) ("[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it"); *and* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (advocacy of illegal activity can be punished only when it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

[3696] The contemporary version of this scheme sports the *pseudo*-scientific name "cognitive infiltration". *See* David Ray Griffin, *Cognitive Infiltration: An Obama Appointee's Plan To Undermine The 9/11 Conspiracy Theory* (Northhampton, Massachusetts: Olive Branch Press, 2011). But the techniques are as old as the *modus operandi* of the East German *Stasi,* Hitler's Gestapo, Stalin's NKVD, and the Tsarist Okhrana.

caught in a vicious circle: A *para*-military police state is necessary to contain popular rebellion in the course of the economic crisis—but the employment of police-state tactics will exacerbate America's political as well as economic troubles, which will necessitate further expansion of the police state, which will make the situation even worse—so, although reliance on the police state cannot be avoided in the short run, in the long run it will prove self-defeating. What, then, can the oligarchy do?

1. Revitalization of the Militia unacceptable to the oligarchy. Were the oligarchs patriots, rather than usurpers, tyrants, and even traitors, they would admit that America's only route of escape from the labyrinth of woe into which she has been lured is to revitalize "the Militia of the several States". Even they can recognize that the Constitution mandates "[a] well regulated Militia" as "necessary to the security of a free State", and that "a free State" by its very nature will have a sound economy based upon constitutional money. And they might be willing to make some reasonable concessions on free markets and sound currency, if thereby they could retain a modicum of their political, economic, and social status, powers, and privileges. They justifiably fear, however, that even if the Militia were revitalized circumspectly "from the top down" initially through some Congressional statute, a mass movement could be set in motion among Americans who would demand, develop, and perforce of the Militia usher in "régime change" throughout this country "from the bottom up"—necessarily to the oligarchy's detriment. On the other hand, the oligarchs also recognize that the people could reason backwards from economics to constitutional law: namely, that a sound economy is impossible in any but "a free State", that "a free State" is impossible without "[a] well regulated Militia", and that *they* are the Militia and therefore the only judges of what should be done to guarantee a sound economy. In that event, mass movements would revitalize the Militia "from the bottom up" in one State after another, without the assistance and quite beyond the control of Congress. This would pose a much greater danger to the oligarchs, because: in principle, the assertion of popular sovereignty "from the bottom up" would absolutely reject the oligarchy's claim to exercise authority "from the top down"; and, in practice, the people would not undertake the effort to revitalize the Militia themselves unless they were utterly fed up with the oligarchy and intent upon, not just deposing, but even demolishing, it.

For these reasons, the oligarchs must set into place their *anti*-Militia scheme—a centralized *para*-military police-state apparatus—before events move beyond their control. This requires that: (i) The very concept of "Militia" must be derided, denounced, and demonized in the big media in every possible way, so that next to no one will ever think of "Militia" as an acceptable solution to any problem besetting America—a scheme which has met with no little success in "the marketplace of ideas" over the last several decades. And (ii) "the right of the people to keep and bear Arms" must be truncated to the maximum extent, even to

extinction, so that those who do think about "Militia" in a favorable way will find themselves stripped of the implements necessary to turn their thoughts into actions—a scheme which has recently come to fruition in the Supreme Court of the United States.[3697]

Such apparent good fortune does not, however, solve the oligarchs' most pressing problem of being unable to deploy "boots on the ground" in their police-state apparatus sufficient in numbers to secure their own position in the face of mass revulsion and rebellion. So, having cut themselves off from the Militia, and therefore from WE THE PEOPLE, the oligarchs have turned to the Armed Forces for assistance.

2. The oligarchy's reliance on the Armed Forces even more dangerous than it is necessary. The ever-mounting emphasis by officials in the Department of Homeland Security on involvement of the Armed Forces in domestic police operations under color of "the war on terrorism" is certainly necessary—for the oligarchy. For no *para*-military forces the DHS could hope to deploy—even drawing upon all State and Local police as well as the armed civilian agencies of the General Government—could possibly deal with the chaos that would rampage throughout the United States upon an hyperinflationary explosion of the Federal Reserve System. The bright bulbs in the "homeland-security" bureaucracy's lamps have been unable to illuminate, however, the danger that reliance on the Armed Forces poses to the oligarchy itself—ironically, a danger arguably greater than it poses to WE THE PEOPLE.

a. America's Armed Forces are definitely paying ever-closer attention to the possibilities that: (i) a major economic crisis could seriously undermine "the military-industrial complex"; (ii) in such circumstances rogue officials in the General Government would surely attempt to take control of the entire National economy on the ground that "[t]he domestic industrial and technological base is the foundation for national defense preparedness";[3698] and (iii) resistance from common Americans to the imposition of a fully fascistic system of production throughout this country, particularly with respect to its adverse effects on their basic civil liberties and standards of living, could render unavoidable the widespread deployment of the Armed Forces for domestic "peacekeeping". One recent study, for instance, explained that

> [w]idespread civil violence inside the United States would force the defense establishment to reorient priorities in extremis to defend basic domestic order and security. * * * [U]nforeseen economic collapse, loss

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[3697] *See ante*, at 1095-1103.

[3698] *See* Executive Order No. 13603, National Defense Resources Preparedness (16 March 2012), § 102, 77 *Federal Register* 16651, 16651 (22 March 2012).

> of functioning political and legal order, purposeful domestic resistance or insurgency * * * are all paths to disruptive domestic shock.
>
> * * * [The Department of Defense] might be forced by circumstances to put its broad resources at the disposal of civil authorities to contain and reverse violent threats to domestic tranquility. Under the most extreme circumstances, this might include the use of military force against hostile groups inside the United States. Further, [the Department of Defense] would be, by necessity, an essential enabling hub for the continuity of political authority in a multi-state or nationwide civil conflict or disturbance.
>
> A whole host of long-standing defense conventions would be severely tested. Under these conditions and at their most violent extreme, civilian authorities, on advice of the defense establishment, would need to rapidly determine the parameters defining the legitimate use of military force inside the United States. Further still, the whole concept of conflict termination and/or transition to the primacy of civilian security institutions would be uncharted ground.[3699]

On a small canvas, this passage paints a remarkably comprehensive picture of a truly *catastrophic* situation, unprecedented in the history of the United States. In light of the extensive record of preparations by the Armed Forces for intervention in domestic civil disturbances and disorders, one senses that it is not intended as a sketch for a mere "thought experiment", either.[3700] Plainly, with the benefit of all of their sources of intelligence, the Armed Forces do not envision "unforeseen economic collapse, loss of functioning political and legal order, [and] purposeful domestic resistance or insurgency" as simply theoretical "paths to disruptive domestic shock", but rather as sequential, fully integrated steps in a

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[3699] Nathan Freier, Strategic Studies Institute of the United States Army War College, *Known Unknowns: Unconventional "Strategic Shocks" in Defense Strategy Development* (November, 2008), at 32-33.

[3700] For example—**1968:** Department of the Army Civil Disturbance Plan (10 September 1968) [colloquially known as "Garden Plot"] ("This plan provides guidelines for development of plans to support civil disturbance operations by the Military Services, unified commands, and other DOD [*i.e.,* Department of Defense] components."); **1973:** Department of the Army Civil Disturbance Plan (17 May 1973); **1978:** Department of the Army Civil Disturbance Plan (3 August 1978); **1991:** Department of Defense Civil Disturbance Plan (15 February 1991); **2006:** United States Northern Command Concept Plan 2501-05, Defense Support of Civil Authorities (8 May 2006); **2007:** Joint Chiefs of Staff, Joint Publication No. 3-28, Civil Support (14 September 2007) ("This publication * * * sets forth joint doctrine to govern the activities and performance of the Armed Forces of the United States in civil support operations and provides the doctrinal basis for interagency coordination during domestic civil support operations."); **2009:** United States Northern Command Concept of Operations Plan (CON PLAN) 3591-09, Response to Pandemic Influenza (13 August 2009); **2011:** Defense Support of Civil Authorities, *Tactical Level Commander and Staff Tool Kit*, GTA 90-01-020 (Washington, D.C.: U.S. Government Printing Office, [no date of publication given, but to expire on 30 January 2012]).

See generally, e.g., the overviews presented in Statement of General Victor E. Renuart, Jr., USAF, Commander, United States Northern Command and North American Aerospace Defense Command, before the Senate Armed Services Committee (6 March 2008); *and* U.S. Northern Command Overview, National DSCA [Defense Support of Civil Authorities] Workshop, Henderson, Nevada (3 March 2009).

process of societal destruction that is no longer in any sense "[u]nforeseen", but instead is actually being observed in its initial stages.

After this, however, the picture blurs. The most revealing aspect of the rest of this material is its intriguingly equivocal character:

• The high commands in the Armed Forces undoubtedly have a good idea as to who is responsible for the present "economic collapse". Surely they are aware that the fault lies with the oligarchy, not the American people. The contrary contention that the people are equally or more to blame because they elected various rogues to public office is inadmissible. *First*, even if true majorities of the voters, in honest elections, chose those individuals, they did not do so with the understanding that, once elected, the candidates would turn rogue and destroy America's economy. *Second*, even if true majorities chose those individuals for the very purpose of adopting destructive economic policies, WE THE PEOPLE would not be estopped to complain. For, in that case, those rogue officials would be serving the interests, not of society as a whole, but of a mere *faction*—that is, "a number of citizens, whether amounting to *a majority * * * of the whole*, who are united and actuated by some common impulse of passion, or of interest, *adverse * * * to the permanent and aggregate interests of the community*".[3701]

• Moreover, the Armed Forces surely realize that any "loss of functioning political and legal order" *as it now exists* threatens the oligarchs with serious diminution of the political and economic power, personal wealth, and social status which they (the oligarchs) now enjoy, *but of which they would be deprived under a strictly* ***constitutional*** *"political and legal order"*. With all of that at stake, "state crimes against limited representative government" cannot be excluded from the oligarchs' strategy and tactics for survival. Indeed, the commission of such crimes has to be taken as a certainty, because: (i) The oligarchs have already committed numerous "state crimes against limited representative government" in order to arrive at this point in their careers, and therefore have nothing to lose by committing more. And (ii) the oligarchs are at this very moment claiming the authority to commit even more serious crimes under color of the purported powers catalogued above.[3702] Predictably, when the time comes, the oligarchs will order the Armed Forces to participate in, to facilitate, or at a minimum to acquiesce in these crimes. But will the Armed Forces comply?

• "[I]n a multi-state or nationwide civil conflict or disturbance", exactly *what* "continuity of political authority" would the Armed Forces seek to preserve? No doubt, that would depend upon the substance and the legitimacy of the particular "authority" being claimed, and by whom. By itself, though, the mere description of

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[3701] *The Federalist* No. 10 (James Madison) (emphasis supplied).

[3702] *See ante*, at 1561-1631.

the situation as a "civil conflict or disturbance" could not compel the conclusion that *the oligarchs*' claims should necessarily prevail. That a "civil conflict or disturbance" is raging does not indicate which side is in the right. Labels can never substitute for analysis. One must investigate and contrast the ends the contending parties are seeking and the means they are employing. "Hostile groups within the United States" might be arrayed in opposition to homicidal usurpers and tyrants, so that those groups' hostility—even if it found expression in a widespread resort to arms—would be perfectly justified. A "purposeful domestic resistance or insurgency" could have as its goal the restoration of constitutional government, and therefore be perfectly lawful. Specifically, the oligarchs might be seen as mounting a treasonous "domestic * * * insurgency" themselves from within and through the governmental apparatus they have usurped and perverted to criminal purposes;[3703] whereas WE THE PEOPLE would be conducting legitimate "resistance" from outside the apparatus, but with their feet firmly planted on the more secure foundation of popular sovereignty under "the Laws of Nature and of Nature's God". The circumstances might even establish that "a long train of abuses and usurpations, pursuing invariably the same Object [had finally] evince[d] a design to reduce the[People] under absolute Despotism", such that "it is the[People's] right, it is their duty, to throw off such Government, and to provide new Guards for their future security".[3704]

• Finally, who would be authorized definitively to decide who was right and who was wrong? The oligarchs? The Armed Forces? Or WE THE PEOPLE? Constitutionally, the answer must come from THE PEOPLE, because it can come from no one else. For, as THE PEOPLE'S mere agents, the Armed Forces could never provide an answer that would bind their principals. And as THE PEOPLE'S antagonists, the oligarchs should never be suffered to suggest any answer whatsoever.

b. Howsoever these matters might be resolved in the hurly-burly of the legal and political confusion that would arise in the course of a National economic crisis, beyond question is that, once the Armed Forces did "put [their] broad resources at the disposal of civil authorities to contain and reverse violent threats to domestic tranquility", "civilian authorities, *on advice of the defense establishment*, would need to rapidly determine the parameters defining the legitimate use of military force inside the United States", and "*the whole concept of conflict termination and/or transition to the primacy of civilian security institutions would be uncharted ground*". So, where "violent threats to domestic tranquility" were so severe that the Armed

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[3703] *See, e.g.,* Texas v. White, 74 U.S. (7 Wallace) 700, 718-726 (1868); Thorington v. Smith, 75 U.S. (8 Wallace) 1, 7-11 (1869); Hanauer v. Doane, 79 U.S. (12 Wallace) 342, 347 (1871); Sprott v. United States, 87 U.S. (20 Wallace) 459, 464-465 (1875).

[3704] Declaration of Independence.

Forces had to be deployed to quell them, civilian authorities would be effectively under the Armed Forces' tutelage and at their mercy. In the final analysis, *the Armed Forces* would "determin[e] the parameters defining the legitimate use of military force inside the United States"; and *the Armed Forces* would decide when it was appropriate to "transition to the primacy of civilian security institutions". As a practical matter, then, "the standing army" would control the civilian authorities, turning upside-down the fundamental constitutional principle that "the military power shall always be held in an exact subordination to the civil authority, and be governed by it".[3705]

(1) This should hardly surprise anyone, because the lesson History teaches, but which the deep thinkers in the District of Columbia's "homeland-security" bureaucracy have not absorbed, is that once politicians (in any country) have turned to their Armed Forces to put a lid on domestic turmoil erupting out of failed economic and social policies, the Armed Forces quickly conclude that they are able and even entitled to become political powers *in their own right, on their own initiative, on their own terms, and in their own interests*. After all, why should the Armed Forces not propose, control, or even dictate the policies and other decisions civilian officials make concerning their deployment, particularly when those officials' incompetence or corruption has brought about the domestic disturbances the Armed Forces' members are expected to risk their lives to quell? Then, why should the Armed Forces themselves not promulgate, or at least oversee, policies on *all* economic and social matters in the first place? Could they fail any more miserably than have civilian officials? And finally, why should the Armed Forces not select, or at least exercise a veto over the selection of, the civilian leadership, so as to forefend future blunders by imbeciles who have somehow insinuated themselves into top positions in the government?

Once they had been called in as "domestic peacekeepers", the Armed Forces would be uniquely positioned to take over politically, because they could correctly point to the civilian leadership as the cause of the chaos, thereby delegitimizing and even demonizing that leadership—both in its present embodiment in certain individuals, and in principle altogether. Indeed, essentially all of the top officials in the General Government, and the major personalities in the "two" political parties and other leadership groups, institutions, and structures, whether in the sphere of National politics or in the upper echelons of the economy, could easily be convicted in the court of public opinion, because once the country had come under some variety of "martial law" the only "official" position permitted to be aired would be the one that had passed the Armed Forces' censorship. And with that mass of

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[3705] CONSTITUTION OF MASSACHUSETTS (1780), PART THE FIRST, A DECLARATION OF THE RIGHTS OF THE INHABITANTS OF THE COMMONWEALTH OF MASSACHUSETTS, Article XVII, *in* THE FEDERAL AND STATE CONSTITUTIONS, *ante* note 1157, PART I, at 959.

propaganda as a base, *real* convictions by "military commissions" of the most despised among the old leadership could easily follow. Real convictions might even *need* to follow, in order to convince an enraged populace that the Armed Forces seriously intended to stamp out and punish civilian political incompetence, corruption, and criminality once and for all. Those who imagine that this could never transpire in the United States should recall that the Ceauşescus never foresaw their own demise at Târgovişte, either, and that two of the five charges leveled against them at their drumhead trial before a military tribunal were sabotage of Romania's national economy and the incitement of armed attacks against the Romanian people by the armed forces and the secret police.[3706]

(2) Whatever the level of their true support among the people, were the Armed Forces deployed to suppress widespread civil unrest emanating from a major breakdown of the economy, they would have a compelling institutional incentive of their own to maintain themselves in the foremost positions of political and economic leadership thereafter: namely, securing the continued viability of this country's gargantuan "military-industrial complex". For the effectiveness of the Armed Forces, and therefore the credibility of their newly assumed rôle as guardians of the public weal, would depend upon the smooth functioning of that complex.

In this, of course, the Armed Forces would inevitably command the support of the two other sides of the complex's "iron triangle": namely, the industrialists and the workers who, directly or indirectly, would constitute and derive incomes and other benefits from the complex. And as the complex expanded—which it doubtlessly would, if only in response to the increasingly diverse tasks the Armed Forces would have to perform as "domestic peacekeepers"—more and more industrialists and workers in other areas of production and services would become to significant degrees economically dependent upon, and therefore politically supportive of, the complex's smooth functioning, and for that reason would favor continued tight control by the Armed Forces over the domestic governmental apparatus.[3707] So that, at length, most of the domestic economy would be at least *quasi*-militarized in what would be the ultimate "warfare-welfare state"—with the overwhelming emphasis on "warfare", because the supposed "welfare" of everyone involved in the political and economic systems would be tied inextricably to the power of the Armed Forces. Of course, as has proven true everywhere else, having no particular training in economics or statecraft, politicized Armed Forces in this country would be unable to solve the underlying economic and social problems that

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[3706] *See* Victor Sebestyen, *Revolution 1989: The Fall of the Soviet Empire* (New York, New York: Pantheon Books, 2009), at 1-6, 380-400.

[3707] Under these circumstances, one could expect the Armed Forces to rely on organized labor as their main political prop amongst the citizenry, in a North American version of the authoritarian populism installed in Argentina under Juan Perón. *See, e.g.,* Joseph A. Page, *Perón: A Biography* (New York, New York: Random House, Inc., 1983), Chapters 20 and 25.

rationalized their politicization in the first place. Their incompetence would not discourage them from trying, however. And their power would dissuade most everyone else from suggesting that it should.

(3) Although initially deployed to protect the oligarchy from a "purposeful domestic resistance or insurgency" emanating from the people themselves, the Armed Forces might end up sympathizing with the people in a paternalistic way, and might change sides. If the Armed Forces' high commands were constitutionally minded, they would realize that the oligarchs were aggressively mounting the "purposeful domestic * * * insurgency", and that the people were engaged in justifiable defensive "resistance". Even if not composed of self-conscious constitutionalists, and even if ignorant of the precept that national armies should always "Serve the People" by being "wholly dedicated to the liberation of the people and work[ing] entirely in the people's interest",[3708] the Armed Forces' high commands could be expected to concern themselves first and foremost with the interests of the United States that advance "the military-industrial complex" and thereby provide the people with significant protection—rather than the narrow "globalist" interests with which for entirely self-serving reasons the oligarchy has historically concerned itself, protection of the people be damned. In either event, the oligarchy's involvement of the Armed Forces would prove far more dangerous to the oligarchs than to the people. The people would be denied many of the benefits of "a free State"; but the oligarchs would stand to lose everything.

c. So, if in the course of an "economic collapse" and the "loss of functioning political and legal order" the only practical choice for common Americans were between their own repression by the oligarchy through the Armed Forces, and suppression of the oligarchy and control of the country by the Armed Forces under some variety of "martial law", many Americans could be expected to acquiesce, and perhaps even welcome, the latter. For: (i) The Armed Forces' ascension to power would appear to provide the only way that a modicum of economic order and social peace could be restored. (ii) The Armed Forces would still generally be seen as truly "American" in composition, attitudes, goals, and methods—as opposed to the oligarchs, who would be recognized as unpatriotic "globalists". (iii) The Armed Forces would present themselves as embodying popular aspirations and serving popular needs—governing on behalf of the great mass of working- and middle-class people, rather than for the benefit of parasitic special interests. And (iv) the Armed Forces' intervention would be excused as fundamentally "democratic", because most people would at least tacitly support it, in preference to the chaos it had replaced. On the other side, only a few die-hard constitutionalists would complain—until they were silenced—that: (v) The Armed Forces' overthrow of the oligarchs' police-

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[3708] *Quotations From Chairman Mao, ante* note 28, at 172.

state apparatus did not eliminate oppression of Americans, but merely changed its source and character from ostensibly "civilian" to frankly military. (vi) The Armed Forces' imposition of "martial law" was patently illegal.[3709] (vii) The Armed Forces and the rest of "the military-industrial complex" were themselves special interests of the most dangerous sort. And, (viii) even apparent popular approval of the Armed Forces' takeover reflected no more than that many Americans were willing to embrace what appeared to be "the lesser of two evils" in order to rid themselves of the oligarchy.

Admittedly, no one can predict with apodictic certainty whether, as the result of an "economic collapse, loss of functioning political and legal order, [and] purposeful domestic resistance or insurgency", the oligarchs' burgeoning ostensibly civilian but *para*-military police state will coöpt the Armed Forces as its "enforcers"; or whether the Armed Forces will coöpt the police state as a front-group and transmission-belt in order to manipulate the governmental apparatus from behind a "civilian" mask; or whether the Armed Forces will simply push aside the police state altogether, and rule this country openly under color of what they imagine to be their own authority. The outcome will depend upon the particular figures in positions of political and military leadership at the time. What cannot be doubted, however, is that the *dénouement* will conform to Justice Jackson's prediction that "[e]very repetition [of a bad principle] imbeds the principle more deeply in our law and thinking and expands it to new purposes"[3710]—none of them salutary. The only way to forfend the problem would be for the Armed Forces unequivocally to reject all of these bad principles *now*, by putting their collective foot down against any participation in domestic police-state operations, and by putting their full influence behind immediate revitalization of the Militia.

[3709] *See post,* Chapter 48.

[3710] Korematsu v. United States, 323 U.S. 214, 246 (1944) (dissenting opinion).

CHAPTER FORTY-EIGHT

Outside of a zone of actual military combat operations, the only form of "martial law" applicable to civilians which is constitutionally allowable within America arises when "the Militia of the several States" are "call[ed] forth * * * to execute the Laws of the Union" or the laws of their States.

A National *para*-military police state which claims extraordinary powers under color of "the law of war" to strip Americans of the basic protections guaranteed by the Constitution (and especially the Bill of Rights) is, in fact, asserting a license to impose potentially unlimited "martial law" on this country, effectively setting aside, superseding, or simply disregarding the Constitution in part or as a whole for as long as the police state's chief operatives unilaterally assert that some *ersatz* "war" or other "national emergency" persists—or, worse yet, whenever those operatives themselves threaten to launch some "preëmptive" or "preventive war" of outright aggression, or to create or conjure up some other dire "emergency" that they can somehow characterize, metaphorically or even mystically, as "war". Unfortunately, all too many Americans assume that public officials, in both the General Government and the States, *can* invoke "martial law" in this sense (and, indeed, can embroil this country in *ersatz* "wars" of all sorts) at any time they see fit to declare that circumstances constitute a "national emergency"—and even if they themselves have intentionally brought those circumstances into being specifically for that purpose. Nothing provides a foundation for and furthers the expansion of a *para*-military police state more than this belief. And no belief about the Constitution is more obviously false.

In legal analysis, definitions of terms make all the difference. And "martial law" can be defined in at least four ways:

A. "Martial law" to govern "the land and naval Forces" of the United States and "the Militia of the several States". "Martial law" fairly describes the laws which Congress may enact specifically for the day-to-day governance of the Armed Forces and "the Militia of the several States". This kind of "martial law" is plainly legitimate, because the Constitution delegates to Congress the powers "[t]o make Rules for the Government and Regulation of the land and naval Forces [of the United States]" and "[t]o provide * * * for governing such Part of the[Militia of the several States] as may be employed in the Service of the United States, reserving to the States, respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by

Congress".[3711] With respect to "the land and naval Forces", such "martial law" applies at all times. With respect to the Militia, it applies only when they have been "call[ed] forth * * * to execute the Laws of the Union, suppress Insurrections and repel Invasions".[3712] The term "martial law" could also fairly apply to the laws enacted by the several States for the governance of their Militia when the latter are not "employed in the Service of the United States" but are on active duty on behalf of their States, and for such "Troops, or Ships of War" as the States may "keep" "with[ ] the Consent of Congress" "in time of Peace" or may bring into the field in time of "War" or in order to "engage in War" when they are "actually invaded, or in such imminent Danger as will not admit of delay".[3713] *With respect to everyone else in all other pursuits of life, though, including Militiamen not in actual service at the time, the original Constitution itself makes pellucid that such "martial law" applies not at all.*

This absolute separation the Fifth Amendment confirms: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger". The "martial law" which may (but need not necessarily) dispense with "Grand Jur[ies]", applies only to "the land and naval forces" of both the United States and of the several States at all times,[3714] and to the Militia in time of "War" (for instance, "repel[ling] Invasions") or "public danger" (for instance, "execut[ing] the Laws of the Union" and of the States, and "suppress[ing] Insurrections" and other "domestic Violence")[3715]*—and otherwise to no one else.*

As clear-cut as this dichotomy is, not to describe these situations as exemplifying or involving "martial law" at all would be preferable. Instead, they should be described with particularity as, say, "rules for the government and regulation of the land and naval forces" of the United States, "rules for governing part of the Militia of the several States when in the service of the United States", "rules for governing the Militia of the several States when not in the service of the United States", and "rules for the government of State 'Troops' and 'Ships of War'". Then their applications only to individuals in the Armed Forces of the United States and of the several States (at all times and everywhere) and in the Militia (when "call[ed] forth" either in extraordinary situations "in the Service of the United States" or in the normal course of events on behalf of their particular

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[3711] U.S. Const. art. I, § 8, cls. 14 and 16. "[T]he land and naval Forces [of the United States]", of course, are synonymous with "the Army and Navy of the United States". U.S. Const. art. II, § 2, cl. 1. *See also* U.S. Const. amend. V.

[3712] U.S. Const. art. I, § 8, cl. 15.

[3713] *See* U.S. Const. art. I, § 10, cl. 3.

[3714] *Compare* U.S. Const. art. I, § 8, cl. 14 *and* § 10, cl. 3 *with* amend. V.

[3715] *Compare* U.S. Const. art. I, § 8, cl. 16; art. I, § 10, cl. 3; *and* art. IV, § 4 *with* amend. V.

States)—*and their inapplicability to anyone else at any time, anywhere, for any reason*—would immediately and always be beyond cavil.

B. "Martial law" in the zone of actual military combat operations. The term "martial law" may also denote the direct control of civilians by the regular Armed Forces of the United States or the "Troops, of Ships of War" of the States operating in those territories where civilians are present, but no effective civilian government exists, and therefore friendly military personnel are the only "peacekeepers" available.

1. According to the most common definition, "[m]artial law is the law of necessity *in the actual presence of war*".[3716] For example, during a true "War" (as opposed to some bastard political contrivance such as "the war on terrorism"), in the front lines and near-by rear echelons where combat is taking or may recently have taken place, as well as in locations in the immediate vicinity where no actual fighting with an enemy may be going on but the civilian authorities have been killed, incapacitated, driven out, or otherwise rendered impotent as a consequence of previous fighting, as a practical matter military personnel may be the only ones capable in fact of enforcing any sort of "law" at all. The legal justification for them to impose "martial law" then becomes the question.

Plainly, one cannot defend the definition that "[m]artial law is the law of necessity in the actual presence of war" simply by recourse to such maxims as "*quod cogit necessitas defendit*",[3717] "*necessitas legem vincit*",[3718] "*necessitas sub lege non continetur quia quod alias non licitum licitum facit*",[3719] and ultimately "*necessitas non habet legem*".[3720] For these supply only rhetorical avenues for evasion of the question. For example, under the strictures of "martial law", *death* may be the penalty for certain transgressions. Under *pre-*constitutional English law, homicide was justifiable if it was

> [S]UCH as is owning to some unavoidable *necessity* * * * . As, for instance, by virtue of such an office as obliges one, in the execution of public justice, to put a malefactor to death, who hath forfeited his life by the laws and verdict of his country. This is an act of necessity, and even of civil duty; and therefore not only justifiable, but commendable where the law requires it. But the law must *require* it, otherwise it is not justifiable * * * .

[3716] United States v. Diekelman, 92 U.S. 520, 526 (1875) (emphasis supplied).

[3717] "Necessity defends that which it compels". *See Black's Law Dictionary, ante* note 368, at 1182.

[3718] "Necessity masters the law". *See id.*

[3719] "Necessity is not restrained under the rule of law because it makes lawful that which otherwise is not lawful." *See id.*

[3720] "Necessity has no law"; or, figuratively, "necessity needs no law". *See id.*

> AGAIN: in some cases homicide is justifiable, rather by the *permission*, than by the absolute *command* of the law: either for the *advancement* of public *justice* * * * ; or, in such instances where it is committed for the *prevention* of some atrocious *crime*, which cannot otherwise be avoided. * * *
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> * * * * *
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> * * * [S]uch homicide, as is committed for the *prevention* of any forcible and atrocious *crime*, is justifiable by the law of nature; and also by the Law of England[.][3721]

Neither "the law of nature" nor "the Law of England", however, established the Armed Forces of the United States or the States, or required that they be established. To be sure, the Armed Forces may not act in any manner that contradicts "the Laws of Nature and of Nature's God" which underlie the Declaration of Independence and the Constitution. But, on the other hand, nothing compels, and common sense rejects, the conclusion that the Armed Forces are necessarily authorized to act in every possible way that happens to be consistent with those "Laws". So, to find a justification for "martial law" administered by the Armed Forces, one must search this country's positive laws for some specific permission. That Congress or a State's legislature might have enacted a statute licensing "the land and naval Forces" of the United States or the State's "Troops, or Ships of War" to impose "martial law" in some circumstances does not conclude the matter, though, because the *constitutional* basis for such a statute always remains at issue. But consideration of some basic constitutional principles can settle the matter.

If the Armed Forces are, in fact, the *only* institutions capable of enforcing "law" in some Locality, then not only must the civilian authorities have been effectively eradicated, *but the Local Militia must have been destroyed or dispersed as well*. Now, presumably, the personnel in the Armed Forces on the scene would be members of some "well regulated Militia" if they were not enlisted in the Armed Forces. Their faithful performance of duty in the Armed Forces justifies their exemptions from enrollment in the Militia—in effect, service in the Armed Forces being for them the equivalent of service in the Militia. Therefore, in the absence of any Militia in the affected Locality, the personnel in the Armed Forces could fairly be deemed to be performing the functions of the Militia, in the place of the Militia, and (if they are to be effective) with powers equivalent to those the Militia normally exercise. The very first constitutional responsibility of the Militia is "to execute the Laws of the Union".[3722] So, standing in the shoes of the Militia in such a situation,

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[3721] W. Blackstone, *Commentaries on the Laws of England, ante* note 142, Volume 4, at 178-180 (footnote omitted).

[3722] U.S. Const. art. I, § 8, cl. 15.

the personnel of the Armed Forces would be implicitly invested with that power. A proper Congressional statute providing for "martial law"—that is, the "law" to be executed by the Armed Forces in such an extremity—would be one of "the Laws of the Union" that the Constitution mandates *should be* "execute[d]". Similarly for a State's statute providing for "martial law" to be executed by her "Troops, or Ships of War". For that reason, the personnel of the Armed Forces of the United States or of that State would be justified in "execut[ing]" such "martial law" in the affected Locality—until the Militiamen in that Locality were sufficiently reformed to take over, or Militiamen from other jurisdictions reinforced them, or the Local civilian authorities were restored to office; at which point the Armed Forces could no longer claim to be acting in the place of either the Militia or those authorities, and the application of "martial law" to civilians would have to terminate.

This analysis provides a justification for "martial law", in the very specific sense of "the law administered by the Armed Forces in zones of actual military operations because of the exclusion by exigent circumstances of any other form of law", *without concluding that such "martial law" as applied to civilians should exclude, or substitute for, or even be significantly different in substance from normal civilian law*. Because, of course, there need be little or no divergence between such "martial law" and civilian law in that situation. For instance, it may easily transpire that, within or contiguous to a zone of actual combat, notwithstanding interference by or the constant threat of hostilities, courageous civilian officials can still exercise authority sufficient to negate any necessity for the imposition of "martial law" to the exclusion of civilian law. Even while the battle of Leyte opened the liberation of the Philippines in 1944, General MacArthur restored constitutional civil government to Filipinos by Filipinos on the part of the island the Americans had just cleared of Japanese; then, after the invasion at Inchon and the liberation of Seoul in 1950, while intense fighting still raged against the North Koreans, he restored civil government to South Korea.[3723] Indeed, when Germany faced invasion at the height of World War II, even Adolf Hitler recognized that, where civilian and political officials continued to function in zones of actual military operations, "martial law" should be subordinated to or exercised in coöperation with those officials.[3724] That

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[3723] *See* General of the Army Douglas MacArthur, *Reminiscenses* (New York, New York: McGraw-Hill Book Company, 1964), at 234-235, 354-356; William Manchester, *American Caesar: Douglas MacArthur, 1880-1964* (New York, New York: Dell Publishing, 1978), at 694. In occupied Japan, MacArthur went further than that, lifting all restrictions on civil rights, and then assisting the Japanese in the adoption of a new constitution. *Reminiscenses, ante,* at 288-289, 298-304.

[3724] *Decree of the Führer on the exercise of command in an area of operations within the Reich* (13 July 1944), *in Blitzkreig to Defeat: Hitler's War Directives, 1939-1945*, H.R. Trevor-Roper, Editor (New York, New York: Holt, Rinehart and Winston, Inc., 1964), at 167-168; *Decree of the Führer on co-operation between the Party and the Armed Forces in an area of operations within the Reich* (13 July 1944), *in id.* at 169; *Second decree of the Führer on co-operation between the Party and the Armed Forces in an area of operations within the Reich, dated 19th September 1944, in id.* at 198; *Second Decree of the Führer on powers of command in an area of operations within the Reich, dated 20th September 1944, in id.* at 199-200.

such polar opposites as MacArthur and Hitler both arrived at the conclusion that conditions which might justify "martial law" do not always therefore provide grounds for excluding civilian law, or even subordinating it to "martial law", establishes the general validity of that judgment.

Should hostilities result in the enforced absence of Local officials, though, the blame cannot rest upon the civilian community; and therefore the members of that community should not suffer the loss of their legal rights on that account. To be sure, no one would doubt that crimes such as espionage, sabotage, banditry, arson, looting, and otherwise terrorizing civilians would need to be detected and suppressed as quickly as possible—which might justify summary proceedings by Armed Forces' personnel in some instances. (For instance, in extreme cases of civil unrest and domestic violence, the shooting of arsonists or looters on sight might be the only effective procedure under the circumstances.) But in most cases of such crimes, let alone all others, the military police could perform the functions of detection, apprehension, and detention of suspects in keeping with the procedures and safeguards of civilian law. Even were the courts in the immediate vicinity temporarily closed perforce of hostilities from time to time, the Armed Forces could simply hold for trial, until the courts reopened, any persons whom the military police arrested, or transfer those detainees to civilian authorities in other areas in which regular judicial proceedings could seasonably be had. That is, "martial law" would closely approximate civilian law, with the exception that when necessary it would be put into effect in the first instance by military police or other soldiers, because they would be the only personnel then available to enforce any laws. This would be in keeping with the fundamental political axiom of "a free state" that, whenever possible, "the military should be under strict subordination to, and governed by, the civil power"[3725]—not in the sense that civilian officials actually govern military personnel at all times (because in the situation posited no civilian officials would be at hand to do so), but in the sense that *civilian law* should always set the standards for military conduct.

A fortiori, when a true "War" is being waged, "martial law" (even in the limited sense of largely civilian law administered by the Armed Forces) cannot automatically be extended over territory not actually part of the Armed Forces' legitimate theater of military operations. For example, the Armed Forces may not attempt to impose "martial law" on civilians as the consequence of the Armed Forces' mere presence on the scene—say, with combat units passing through some peaceful Locale on the way to the front, or with rear-echelon units temporarily operating bases for replacements, depots for storing supplies and repairing equipment, or field hospitals and other medical facilities there.

[3725] Virginia Declaration of Rights (1776) art. 13.

2. More problematic yet is the rôle, if any, of "martial law" (in the sense being discussed here) after some huge natural disaster, mammoth industrial accident, or devastating attack by "terrorists" across a wide area in which every important arm of the civilian administration has been rendered inoperative. The usual apology offered for "martial law" in these cases is not the presence of "War[fare]" (although these days any attack by anyone who can be labeled a "terrorist" is immediately catalogued as an action in "the war on terrorism"), but instead that, the enforcement of civilian law being temporarily impossible, some other form of "law and order" must immediately be established and enforced for the benefit of otherwise helpless civilians who cannot be evacuated from the zone of danger. This, however, begs certain important preliminary questions, such as: If Armed Forces' personnel are already on the scene, how did they survive the event which created the emergency? And if they survived in a condition which allowed them to take over enforcement of the law, did not Local Militiamen in numbers sufficient for that purpose also survive? Or, if the Armed Forces' personnel are to be brought in from some other Locale only after the event, why cannot Militiamen, or even temporary civilian officials, be brought in, too, thereby obviating any need for involvement of the Armed Forces at all, or in the capacity of the exclusive or even primary enforcers of "law and order"? Or, if so many civilians are present in the area that a major relief effort is necessary, why are they not prepared to function as Militiamen in "execut[ing] the Laws of the Union" as well as State and Local laws? And, if they are, why would it not be better simply to provide them with whatever equipment and supplies they need to do so?

In any event, even if involvement of the Armed Forces were, for whatever reason, deemed unavoidable in some such situations, nothing would preclude Congress from exercising its power "[t]o make Rules for the Government and Regulation of the land and naval Forces"[3726] in compliance with the principle that "the military should be under strict subordination to, and governed by, the civil power",[3727] so as to require that, when operating in any "police" capacity within any part of the United States not in fact within an active zone of military combat during an actual "War", the Armed Forces must adhere to State and Local law to the selfsame degree that State and Local police do, for at least as long as the Local courts remain open,[3728] and must always submit to supervision by, and coördinate their actions with, whatever other civil authorities remain on the scene. Neither would anything preclude Congress from requiring Armed Forces' personnel who commit offenses that are punishable by civilian law from being tried by civilian

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[3726] U.S. Const. art. I, § 8, cl. 14.

[3727] Virginia Declaration of Rights (1776) art. 13.

[3728] *See Ex parte* Milligan, 71 U.S. (4 Wallace) 2, 127 (1866). *See also* O'Callahan v. Parker, 395 U.S. 258, 273-274 (1969).

courts or made subject to civilian punishments.[3729] Similarly, for the States' legislatures with respect to the States' own "Troops, or Ships of War".

3. In no case should the Armed Forces of either the United States or of the several States ever be suffered to evade restrictions on their employment of "martial law" in domestic venues by peremptorily shutting down the Local courts and refusing to turn nonmilitary prisoners over to civilian custodians.[3730] And Congress labors under a constitutional duty to provide as much, because: (i) If any species of "martial law" is valid at all, it must be among "the Laws of the Union". (ii) Only "the Militia of the several States"—of which State and Local police forces should be integral parts, upon proper revitalization of the Militia[3731]—enjoy the explicit constitutional authority and responsibility "to execute the Laws of the Union" when "call[ed] forth" for that purpose by Congress.[3732] Therefore, (iii) the Armed Forces may exercise no authority equivalent to the Militia's in any Locality unless circumstances have precluded the Militia from being "call[ed] forth". But such circumstances would not obtain unless almost all of the civilian population in that Locality had been wiped out, incapacitated, or driven away, and sufficient numbers of Militiamen could not be summoned from other Localities; or unless and until the Militia had been "call[ed] forth" from whatever Locality and had actually failed for whatever reason "to execute the Laws". Again, the same considerations apply to each State's legislature with respect to restricting the employment of the State's own "Troops, or Ships of War".

C. "Martial law" imposed as the result of a takeover of the government by rogue Armed Forces. The term "martial law" can also denote the set of dictates under color of which rogue personnel in the Armed Forces might purport to exercise outright control over some area in which they have simply suppressed the Local authorities and supplanted the apparatus of civilian government under the threat of main force. If a State or the whole of the United States were involved in such usurpation, the event might be styled a *coup d'état,* a *Putsch*, or a *golpe*. If Americans had a proper understanding of, and were to determined to enforce, constitutional limits on the power to draft individuals into military service, they

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[3729] *See, e.g., An Act for enrolling and calling out the national Forces, and for other Purposes*, Act of 3 March 1863, CHAP. LXXV, § 30, 12 Stat. 731, 736 (emphasis supplied): "That in time of war, insurrection, or rebellion, murder, assault and battery with an intent to kill, manslaughter, mayhem, wounding by shooting or stabbing with an intent to commit murder, robbery, arson, burglary, rape, assault and battery with an intent to commit rape, and larceny, shall be punishable by the sentence of a general court-martial or military commission, when committed by persons who are in the military service of the United States, and subject to the articles of war; *and the punishments for such offences shall never be less than those inflicted by the laws of the state, territory, or district in which they may have been committed.*"

[3730] *See* Duncan v. Kahanamoku, 327 U.S. 304, 313-324 (1946); Sterling v. Constantin, 287 U.S. 378, 400-401 (1932).

[3731] *See ante*, at 327-328, 1135-1138, 1194-1202, 1276-1277, 1292-1293, and 1482-1488.

[3732] U.S. Const. art. I, § 8, cl. 15.

would not need to fear "martial law" in the sense of "military dictatorship", because neither "the military-industrial complex" as it now exists nor any reasonably conceivable National *para*-military police-state apparatus could impress enough cannon fodder into the ranks of the Armed Forces or "law-enforcement agencies" to overawe "the Militia of the several States" and set up such a régime.[3733] In the absence of revitalized Militia, however, the danger needs to be carefully assessed.

1. Whether or not personnel of the Armed Forces affect to follow some specific "code of military justice", "martial law" (in the sense under consideration here) purports to override, set aside, or suspend the Constitution and all of the other "Laws of the Union", as well as of "the several States" and their Localities, and to substitute therefor the orders of military officers and tribunals. And any civilian who dares to violate these orders—even if he is acting pursuant to the Constitution and other "Laws of the Union" or of a particular State or Locality—may be punished, perhaps unto death itself. Although many Americans might acquiesce in "martial law" of this variety if they imagined that it were the only available response to an actual natural disaster, economic crisis, or other political or social upheaval of severe magnitude, many others justifiably fear that rogue public officials bent on usurpation and tyranny, on the pretext of some phony "emergency" they themselves have created, allowed to happen, or exacerbated, will deploy the Armed Forces along with *para*-militarized State and Local police throughout the United States for the purpose, not of protecting, but rather of oppressing, common Americans. Obviously, neither public officials nor officers of the Armed Forces can rationalize their imposition of "martial law" in some geographical area by themselves destroying, driving out, or otherwise suppressing civilian authorities on the claim of some supposed "emergency" that does not really exist at all, that has been ginned up especially for the purpose, that has been blown wildly out of proportion, or that in any event does not prevent the civilian authorities from functioning. Once the straitjacket of "martial law" has been fastened on a community, however, a *real* "emergency" *will* exist—not least of all in the inability of civilian authorities and residents to resist the oppressors occupying their territory. So "martial law" in this sense can amount to a self-fulfilling prophecy: Aspiring usurpers and tyrants in public office claim that some imaginary or exaggerated "emergency" exists. They declare "martial law" and deploy troops and *para*-militarized police forces. The imposition of "martial law" creates a set of circumstances with which average Americans have had no experience and for which they are totally unprepared. The resulting destruction of popular self-government—with attendant economic, political, and social chaos—then rationalizes the maintenance of "martial law" into the indefinite future.

[3733] *See post*, Chapter 49.

2. The question, though, remains: "Is 'martial law' of this variety legal in America?" In light of the delusions that hold sway among a large segment of this country's population, the answer demands painstaking analysis of the Constitution.

a. The first step is to place one's self in the position of Americans in the late 1700s so as to understand what they understood. In that era, those at all literate in the law were aware that no less an authority than Blackstone was highly critical and deeply suspicious of "martial law":

> WHEN the nation [that is, England] was engaged in war, more veteran troops and more regular discipline were esteemed to be necessary, than could be expected from a mere militia. And therefore at such times more rigorous methods were put in use for the raising of armies and the due regulation and discipline of the soldiery: which are to be looked upon only as temporary excrescences bred out of the distemper of the state, and not as any part of the permanent and perpetual laws of the kingdom. For martial law, which is based upon no settled principles, but is entirely arbitrary in it's decisions, is * * * in truth and reality no law, but something indulged, rather than allowed as a law: the necessity of order and discipline in an army is the only thing which can give it countenance; and therefore it ought not to be permitted in time of peace, when the king's courts are open for all persons to receive justice according to the laws of the land. * * * And it is laid down, that if a lieutenant * * * doth in time of peace hang or otherwise execute any man by colour of martial law, this is murder; for it is against *magna carta*. And the petition of right enacts * * * that no commission shall issue to proceed within this land, according to martial law.[3734]

The Declaration of Independence provides conclusive evidence that patriotic Americans of that time thought even less of "martial law" than did Blackstone. As it recounted:

> The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.—
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> * * * * *
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> He has affected to render the Military independent of and superior to the Civil power.—He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation:—For quartering large bodies of armed troops among us:—For protecting them, by a mock Trial,

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[3734] *Commentaries on the Laws of England, ante* note 142, Volume 1, at 412 (footnotes omitted).

> from punishment for any Murders which they should commit on the Inhabitants of these States[.]

In this litany of the most egregious aspects of "martial law", the worst is that "[h]e has affected to render the Military independent of and superior to the Civil power"—for, if that can be done, then all the rest (and even more) will inevitably follow, inasmuch as no one will have any legal recourse against whatever the executors of "martial law" may choose to do.

b. No American alive today can believe that the men who wrote the Declaration of Independence, who acted upon it to separate the Colonies from and to conduct a long and sanguinary war against Great Britain, and who upon the strength of the Declaration then enacted constitutions for their States and the United States ever imagined that the powers to behave in the fashion of King George III—powers that he had used to bring about "a long train of abuses and usurpations, pursuing invariably the same Object [that] evince[d] a design to reduce [Americans] under absolute Despotism"; and powers the very use of which justified the invocation and exercise of "the[people's] right, * * * their duty, to throw off such Government, and to provide new Guards for their future security"—were among the "just powers" that "Governments * * * instituted among Men, deriv[e] * * * from the consent of the governed". And no American alive today can believe that WE THE PEOPLE in that era authorized the States and then the United States in their constitutions to do what the Declaration of Independence had just condemned as "abuses", "injuries[,] and usurpations" aiming at nothing less than "absolute Despotism" and "absolute Tyranny". Moreover, what Americans believed and incorporated into their fundamental laws at that time retains operative force today. For if the Declaration of Independence did not state the necessary and sufficient legal principles upon which the Colonies became independent States, then everything the States and their people did thereafter is devoid of legal basis.[3735]

(1) Now, when the Union was founded, many of the States explicitly demanded in their constitutions and declarations of rights "that standing armies, in time of peace, should be avoided, as dangerous to liberty; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power".[3736] Self-evidently, a "military * * * *under strict subordination to, and governed by, the civil power*" cannot impose "martial law" on civilians.

(2) The Constitution of the United States is not so explicit. Yet perusal of the Constitution easily proves the illegitimacy of the type of "martial law" which purports to override, set aside, or suspend the Constitution itself and potentially all

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[3735] *See ante*, at 22-27.

[3736] Virginia Declaration of Rights (1776) art. 13. *See ante*, at 1542-1545.

other "Laws of the Union", upon the mere say-so of military officers or tribunals (or of rogue civilian public officials colluding with them). This variety of "martial law" proceeds on the premiss that *it* is, or can become, *the* "supreme law" in this country. It is, in effect, *military dictatorship*, pure and simple—"military", because it is administered by the Armed Forces; and "dictatorship", because "[t]he scientific term 'dictatorship' means nothing more nor less than authority untrammeled by any laws, absolutely unrestricted by any rules whatever, and based directly on force".[3737] Revealingly, the essential point in Blackstone's description, emphasized by Lenin's definition—namely, that "martial law * * * is based upon no settled principles, but is entirely arbitrary in it's decisions"—has never been denied, even by the Supreme Court of the United States: "Martial law * * * is administered by the general of the army, and is in fact his will. It is arbitrary; but it must be obeyed."[3738] How a Court purporting to exercise "[t]he judicial Power"of a government invested with "just powers" alone could accept as valid and as rightfully commanding obedience any body of supposed "law" that, being *arbitrary*, is inherently *un*just has never been explained.[3739]

This lacuna exists for good reason. The Constitution declares that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land".[3740] And all public officials, including officers of the Armed Forces, "shall be bound by Oath or Affirmation, to support this Constitution".[3741] So, unless "martial law" in the sense Blackstone used that term is authorized by the Constitution itself in so many words, or by some constitutional "Laws of the United States" or constitutional "Treaties" enacted or entered into pursuant to some constitutional power of Congress or of the President and the Senate, then no public official, and no officer of the Armed Forces, can invoke, enforce, or act under color of it without thereby violating his "Oath or Affirmation". Unless within the Constitution itself lurks some power to set aside or suspend the Constitution, perhaps with no guarantee of its ever being reëstablished, "martial law" is utterly impossible, as a direct contradiction of the Constitution's legal supremacy. And no such power exists. For example—

(a) Congress cannot authorize "martial law" by dint of any of its express powers, because no such express power can be found in the Constitution —with, of course, the exception of Congress's power "[t]o provide for calling forth the

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[3737] V. Lenin, "A Contribution to the History of the Question of the Dictatorship, A Note", *ante* note 3643, at 353.

[3738] United States v. Diekelman, 92 U.S. 520, 526 (1875).

[3739] *Compare* U.S. Const. art. III, § 1 *with* Declaration of Independence.

[3740] U.S. Const. art. VI, cl. 2.

[3741] U.S, Const. art. VI, cl. 3.

Militia to execute the Laws of the Union", which allows for an entirely different, and benign, form of "martial law".[3742] Congress cannot authorize "martial law" by dint of any implied power, either. For, although Congress does enjoy the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its enumerated "Powers",[3743] none of those "Powers" relates to "martial law" (except with respect to the Militia)—and therefore no implied power can be exercised in relation to that subject. In any event, Congress can enact only "Laws * * * which shall be made in Pursuance of" its express or its implied powers;[3744] and no mere "Law[ ]" can override, set aside, or suspend anything in the original Constitution or the Bill of Rights (or any other Amendments).[3745]

To be sure, Congress does have the power "[t]o make Rules for the Government and Regulation of the land and naval Forces",[3746] and thereby to enact a "code of military justice" or equivalent body of "military law" for those "Forces".[3747] By constitutional definition, however, Congress can extend any such "code of military justice" *only* to "the land and naval Forces", not at all to the civilian population at large. And "the land and naval Forces"—having no independent existences or powers of their own, because they are no more than the creatures of Congress, invested with only such authority as it has to grant—cannot on their own initiative impose that or any like "code" on anyone not within their ranks. In addition, even Congress cannot promulgate a "code of military justice" that purports to license "the land and naval Forces" to disregard such limitations in the original Constitution as the prohibitions on "Bill[s] of Attainder" and "ex post facto Law[s]",[3748] or that purports to deny civilians the benefits of the numerous restraints on Congress's powers that the Bill of Rights catalogues.[3749]

(b) Neither can the President authorize "martial law". Although the President is "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States",[3750] in that capacity (or in any other, for that matter) he lacks authority to make any "Laws of the United States" in the first place,[3751] or to overrule, set aside,

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[3742] U.S. Const. art. I, § 8, cl. 15, *discussed post*, at 1674-1678.

[3743] U.S. Const. art. I, § 8, cl. 18.

[3744] U.S. Const. art. VI, cl. 2.

[3745] *See, e.g.,* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 173-180 (1803); Miranda v. Arizona, 384 U.S. 436, 491 (1966); United States v. Brignoni-Ponce, 422 U.S. 873, 877-878 (1975).

[3746] U.S. Const. art. I, § 8, cl. 14.

[3747] *See, e.g.,* 10 U.S.C. §§ 801 through 946.

[3748] U.S. Const. art. I, § 9, cl. 3.

[3749] Especially U.S. Const. amends. II, III, IV, V, VI, and VIII.

[3750] U.S. Const. art. II, § 2, cl. 1.

[3751] *Contrast* U.S. Const. art. I, § 1 *with* art. II, § 1, cl. 1.

or suspend any of the "Laws" then in existence—unless perhaps those "Laws" themselves so provide, or are not really "Laws" at all because they are unconstitutional.[3752] Indeed, how could any rational President ever consider himself justified in acting above or outside, let alone against, the Constitution, when what the Constitution calls "the Office of President"[3753] is entirely a construct of the Constitution, and when "[b]efore he enter on the Execution of his Office, [the President] shall take the following Oath or Affirmation:—'I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States'"?[3754] Self-evidently, he could not, because his constitutional duty is always to "take Care that the Laws be faithfully executed".[3755] So, if no "Law[ ]" allowing "martial law" exists, the duty to "take Care" requires the President to refrain from any involvement whatsoever with "martial law", except to prevent anyone else from attempting to invoke, let alone to impose, it.

(c) The President enjoys no greater license to play at or with "martial law" by combining with rogue Senators "to make Treaties".[3756] For, as noted above, because all "Treaties" must "be made[ ] under the Authority of the United States", and because "the Authority of the United States" extends no farther than the boundaries the Constitution sets, no "Treat[y]"—or "international peacekeepers" imported under the aegis of some foreign alliance or *supra*-national institution—can overrule, set aside, or suspend the Constitution.[3757]

(d) The Constitution does allow for "[t]he Privilege of the Writ of Habeas Corpus * * * [to] be suspended, * * * when in Cases of Rebellion or Invasion the public Safety may require it".[3758] This, however, does not amount to a power to invoke or execute "martial law", because suspension of "the Privilege of the Writ" has no necessary connection with "martial law", howsoever defined. Suspension of "the Privilege" addresses merely one part of the civilian law, licensing civilian authorities to hold a suspect without bail, presumably pending trial—and therefore falls within Congress's civilian powers "[t]o constitute Tribunals inferior to the

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[3752] *See, e.g.*, Huntington v. Worthen, 120 U.S. 97, 101-102 (1887); Norton v. Shelby County, 118 U.S. 425, 442 (1886); Poindexter v. Greenhow, 114 U.S. 270, 288 (1885).

[3753] U.S. Const. art. II, § 1, cls. 4 and 7.

[3754] U.S. Const. art. II, § 1, cl. 7. Significantly, this "Oath of Affirmation" employs the oracular prophetic and imperative phrase "I *will*" rather than the simple idiomatic phrase "I shall".

[3755] U.S. Const. art. II, § 3.

[3756] U.S. Const. art. II, § 2, cl. 2.

[3757] *See, e.g.,* United States v. Wong Kim Ark, 169 U.S. 649, 701 (1898); Doe v. Braden, 57 U.S. (16 Howard) 635, 657 (1863); The Cherokee Tobacco, 78 U.S. (11 Wallace) 616, 620-621 (1871); Holden v. Joy, 84 U.S. (17 Wallace) 211, 243 (1872); Geofroy v. Riggs, 133 U.S. 258, 267 (1890); Asakura v. City of Seattle, 265 U.S. 332, 341 (1924); United States v. Minnesota, 270 U.S. 181, 208 (1926); Reid v. Covert, 354 U.S. 1, 16-18 (1957) (Black, J., announcing the judgment of the Court).

[3758] U.S. Const. art. I, § 9, cl. 2.

Supreme Court",[3759] to "make" "Exceptions" to the "appellate Jurisdiction [of the Supreme Court], both as to Law and Fact",[3760] and "[t]o make all Laws which shall be necessary and proper for carrying into Execution" those "Powers".[3761] Although, in the situations the Constitution specifies, that part of the civilian law may be temporarily suspended, no form of military law is, or need be, thereby created or substituted for it. Indeed, the Armed Forces need play no part in the process at all. Revealingly, the conditions precedent for suspension of "[t]he Privilege"—that is, "Rebellion or Invasion" sufficient to endanger "the public Safety"—involve circumstances which the advocates of "martial law" invariably cite as reasons for invoking "martial law". Yet, even in those situations, the Constitution does not suggest the propriety of, let alone call for, "martial law", suspension of "[t]he Privilege of the Writ" alone being deemed sufficient to protect "the public Safety".

(e) The Constitution mandates that "[t]he United States shall guarantee to every State in th[e] Union a Republican Form of Government".[3762] Self-evidently, a community ruled dictatorially by "martial law" is not functioning as "a Republican Form of Government". For the American "definition of * * * a [republican] Government is * * * one constructed on th[e] principle, that the Supreme Power resides in the body of the people".[3763] And "martial law" in the sense under consideration here derives its powers purely and simply from military force—at base, from nothing more than the arbitrary will of some "general of the army"[3764] or other puffed-up uniformed popinjay—not from WE THE PEOPLE. For that very reason, "martial law" is not *any* "Form" of "Government[ ]" that "deriv[es its] just powers from the consent of the governed"—the *one and only* "Form" of "Government[ ]" which the Declaration of Independence allows in America. Thus, perforce of this constitutional provision alone, "martial law" cannot be imposed by the United States on any State. And if any State attempts to set up a régime of "martial law" on her own, the United States must put it down forthwith.

(f) Inasmuch as the United States cannot impose "martial law" in any State, and inasmuch as no State can impose "martial law" within her own territory, *where* in America could "martial law" in the sense at issue here ever exist? Not even in the District of Columbia and in "all Places purchased by the Consent of the Legislature of the State in which the Same shall be", over which "Places" the Constitution empowers Congress "[t]o exercise exclusive Legislation in all Cases whatsoever".[3765]

[3759] U.S. Const. art. I, § 8, cl. 9. *See* U.S. Const. art. III, § 1.

[3760] U.S. Const. art. III, § 2, cl. 2.

[3761] U.S. Const. art. I, § 8, cl. 18.

[3762] U.S. Const. art. IV, § 4.

[3763] Chisholm v. Georgia, 2 U.S. (2 Dallas) 419, 457 (1793) (Wilson, J.).

[3764] United States v. Diekelman, 92 U.S. 520, 526 (1875).

[3765] U.S. Const. art. I, § 8, cl. 17.

For, even in those "Places", although Congress may exercise "*exclusive* Legislation" it may not enact *arbitrary* legislation. As Blackstone pointed out, "martial law, *which is based upon no settled principles, but is entirely* ***arbitrary*** *in it's decisions*, is * * * in truth and reality no law, but something indulged, rather than allowed as a law".[3766] Thus, the very essence of "martial law" is *vagueness*, because no one can predict what arbitrary orders military officers may pronounce on the spur of the moment, or how they may interpret or enforce them. Indeed, this very "flexibility" of "martial law" its advocates typically commend most highly. "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application", however, "violates the first essential of due process of law".[3767] So, even if "martial law" were explicitly enacted in some supposed statute applicable to the "Places" in which Congress may "exercise exclusive Legislation", it would "violate[ ] the first essential of due process of law", and therefore be unconstitutional—hardly a surprising result, though, given that "martial law * * * is * * * in truth and reality no law" at all.

(g) The essence of "martial law" in the sense under consideration here may be vague, but its constitutional effect is pellucid: Any attempt to impose "martial law" by force is nothing less than "Treason". The Constitution declares that "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort".[3768] And "if ['War'] be actually levied, that is, if a body of men be actually assembled, for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors".[3769] In operation, "martial law" always proceeds by arraying men under arms in order to override, set aside, suspend, or defy the Constitution of the United States, in whole or in part, and to employ those arms against anyone who resists—*without any constitutional or other lawful authority for doing so.* Therefore, inasmuch as "the United States" exists only perforce and through application of the Constitution, "martial law" amounts to "levying War against the[United States]". And inasmuch as WE THE PEOPLE are the authors and beneficiaries of the Constitution—and the real parties in interest behind the rubric "the United States"—"martial law" must amount as well to "levying War against" THE PEOPLE themselves. It would be immaterial that those who attempted to impose "martial law" wore uniforms (even with United States or State flags as shoulder patches), or held commissions in "the land and naval Forces" of the United States or the "Troops, or Ships of War" of some State, or acted

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[3766] *Commentaries on the Laws of England, ante* note 142, Volume 1, at 412 (emphasis supplied).

[3767] Connally v. General Construction Company, 269 U.S. 385, 391 (1926).

[3768] U.S. Const. III, § 3, cl. 1.

[3769] *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 126 (1807).

pursuant to orders from supposed superiors. Even someone who commits "Treason" under color of law and a claim of "good faith" is entitled to no immunity. This principle is part of the modern Law of Nations: "[T]hat the [officer] acted pursuant to order of his Government or of a superior shall not free him from responsibility".[3770] And it subsists in American law of a far longer heritage.[3771]

In sum, "martial law" in the sense being considered here cannot lawfully exist in this country. Participation in it would constitute the most serious of all crimes. And it would supply just grounds for mass resistance among the citizenry aimed at overthrowing whatever purported governmental apparatus attempted to impose it. For, as the Declaration of Independence proclaims, under such circumstances "it is the[people's] right, it is their duty, to throw off such Government, and to provide new Guards for their future security". And the Declaration of Independence is still very good law in America.

All that being so, who in his right mind would ever attempt to impose such a form of "martial law" on America? *Perhaps* no one. Prudent Americans must nevertheless prepare for the possibility that individuals *not* in their right minds may somehow insinuate themselves into high public offices and the upper echelons of the officer corps of "the land and naval Forces" of the United States and the "Troops, or Ships of War" of the several States, and from those *points d'appui* seek to transmogrify this country from a constitutional republic into a national-security state, a garrison state, or a *para*-military police state[3772]—*a process which any individual with his eyes half open can see taking place at an accelerating pace even as he reads these words*. Because *no* national-security state, garrison state, or *para*-military police state can operate according to the Constitution (let alone the Declaration of Independence), its leaders must invoke some alien mumbo jumbo to rationalize their rule. Being entirely arbitrary in its substance, yet able to masquerade in the patriotic garb of "national security", "martial law" fits their purposes perfectly. So perfectly, that "martial law" should be recognized as the legalistic springboard and support which psychopathic personalities inevitably employ in order to seize total political power—and therefore should be outlawed, and its proponents treated as pariahs. Certainly it is myopic to contend that, insofar as responsible people with well-balanced minds presumably outnumber psychopaths in society by many orders of magnitude, America has nothing to fear. For that would be true only if such right-thinking Americans were properly organized to meet the danger of "martial law" in the "well regulated Militia" which the Second Amendment itself tells them are "necessary to the security of a free State".

[3770] The Charter of the International Military Tribunal (Nuremberg, Germany, 1945), art. 8.

[3771] *E.g.,* Mitchell v. Harmony, 54 U.S. (13 Howard) 115, 137 (1851).

[3772] *See, e.g.,* Andrew M. Łobaczewski, *Political Ponerology: A Science on the Nature of Evil Adjusted for Political Purposes* (Grande Prairie, Alberta, Canada: Red Pill Press, Second Edition, 2006).

D. "Martial law" arising out of applying "the law of war" to situations that do not involve actual "War". Through their apparent willingness uncritically to accept the definition of "martial law" as "the law of military necessity *in the actual presence of war*",[3773] most Americans have set themselves up for aspiring usurpers' and tyrants' latest political scam: to wit, imposing various aspects of "martial law" throughout this country under the pretense of fighting some *ersatz* "war", such as "the war on terrorism". To be sure, today America finds herself forced by rogue public officials "in[to] the actual presence of ['the war on terrorism']". But "the actual presence of ['the war on terrorism']" does not amount to "the actual presence of war"—and therefore could not even arguably rationalize the imposition of "martial law" anywhere within the United States to any degree—unless "the war on terrorism" were an actual "War" in the constitutional sense. Congress, of course, has never "declare[d] War" on "terrorism", and rationally could not do so;[3774] and none of the States is "engag[ing] in [a] War" against "terrorism" in fact, because none of them has been "actually invaded [by any 'terrorists'], or [is] in such imminent Danger as will not admit of delay".[3775] So "martial law" cannot come into play in that manner. On the other hand, if certain disloyal Americans, allegedly employing the tactics of "terrorists", were "levying War against the[United States]", then the constitutional law of "Treason", *not* "martial law", would apply to them.[3776] So, even if the United States could be described figuratively as fighting a "war on terrorism" against those rogue Americans, the metaphor could not change the constitutional result.

E. "Martial law" arising out of the authority of the Militia to "execute the Laws of the Union, suppress Insurrections and repel Invasions". A plainly legitimate form of "martial law" which could be imposed on civilians within the United States would arise whenever "the Militia of the several States" were "call[ed] forth * * * to execute the Laws of the Union, suppress Insurrections * * * [or] "repel Invasions" "in the Service of the United States",[3777] or were called forth to perform like tasks (or to perform other services in the realm of "homeland security") on behalf of their own States.

1. For the Militia to "repel [an] Invasion[ ]" would involve military combat operations against *foreign* forces or possibly erstwhile Americans who had forfeited their citizenship by allying with such forces. Therefore, to those enemy forces the Militia could apply "martial law" in the sense of "the law of military necessity in the

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[3773] United States v. Diekelman, 92 U.S. 520, 526 (1875) (emphasis supplied).

[3774] U.S. Const. art. I, § 8, cl. 11. *See ante*, at 1570-1576.

[3775] *See* U.S. Const. art. I, § 10, cl. 1.

[3776] U.S. Const. art. III, § 3, cl. 1. *See ante*, at 1576-1580, 1583, and 1589-1591.

[3777] U.S. Const. art. I, § 8, cls. 15 and 16.

actual presence of war"[3778]—to wit, "the law of war" recognized by "the Law of Nations" and embodied in such statutes as Congress had enacted to authorize the Militia to "punish * * * Offenses against the Law of Nations" (which presumably an "Invasion[ ]" by an aggressor nation would entail).[3779] Inasmuch, however, as the Constitution plainly empowers Congress to enact such "Laws" and the Militia "to execute" them, in and through such execution the Militia would be *enforcing* the Constitution, not overriding it, setting it aside, suspending it, or disregarding it.

For the Militia to "suppress [an] Insurrection[ ]" could involve military combat operations if the insurrectionists were "levying War" on the United States; nonetheless, outside of the zone of actual combat, the law of "Treason", not "the law of war" would apply. So, following—and, to the extent practical, perhaps even during—actual combat operations, the Militia would have a duty to proceed according to and substantively enforce the civil laws applicable to prisoners and suspects, such as by simply holding them in custody pending normal civilian judicial proceedings. "[S]uppress[ion of an] Insurrection[ ]" on some lesser scale would involve no more than enforcement of the normal civilian law. Other than actual combat, these activities could be loosely described as the enforcement of "martial law" only because *the Militia* were the enforcers, not because of the character of the laws being enforced.

Finally, for the Militia to "execute the Laws of the Union" in all other respects would involve none but civilian laws. All of these situations could implicate "martial law" only in the loose, purely descriptive sense that *the Militia* would be enforcing "the Laws", perhaps in the fashion of *para*-military police. Of course, nothing would require the Militia, when "execut[ing] the Laws of the Union", always to employ overtly *para*-military tactics. To the contrary, the members of "*well regulated* Militia" who performed such police functions would doubtlessly be trained and equipped to operate, wherever possible, in a properly civilian fashion, so as to maintain social solidarity in their communities. In which case, to describe the involvement of the Militia as somehow a true manifestation of "martial law" would be inaccurate, except to the extent that *every* involvement of *the Militia* in *any* activity partaking of their enforcement of *any* "law" could be deemed "martial law" simply because the Militia are inherently "martial" institutions.

In any event, as the Constitution plainly mandates in the generality of its language, whenever "call[ed] forth * * * to execute [*any* of] the Laws of the Union", the Militia would be required, to the fullest extent possible, *simultaneously* to execute *all* of "the Laws of the Union" relevant to the situation, *including both the original Constitution and the Bill of Rights (and other Amendments)*, both substantively

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[3778] United States v. Diekelman, 92 U.S. 520, 526 (1875).

[3779] U.S. Const. art. I, § 8, cl. 10.

and procedurally. So in no such situation could any claim ever arise that the Militia might impose upon Americans any form of "martial law" which would purport to override, set aside, suspend, or simply disregard the Constitution in any particular.

Finally, what the Militia could not do or claim with respect to "martial law" the President as their "Commander in Chief"could not himself do or claim, or order them to do or claim, "when [they were] called into the actual Service of the United States".[3780] For the President—in his rôle as "Commander in Chief * * * of the Militia" and otherwise—must always "take Care that the Laws be faithfully executed".[3781] And "the Laws"—in particular, the Constitution itself—provide that the President is "Commander in Chief * * * of the Militia" *only* when the Militia are, in fact and law, "call[ed] forth" "to be employed in the Service of the United States"—by which is meant "the *actual* Service of the United States" not some merely suppositious or fictitious "Service"—and *only* for one or more of the three explicit constitutional purposes.[3782] As just explained, only two of those purposes allow for the invocation of "martial law" in the sense of "the law of military necessity in the actual presence of war", and then exclusively in zones of actual military combat operations.

2. In all of these situations, the Militia's enforcement of "martial law" (such as it might be) would always be fully consistent with "a Republican Form of Government". For the American "definition of * * * a [republican] Government is * * * one constructed on th[e] principle, that the Supreme Power resides *in the body of the people*".[3783] And "a well regulated militia" is "composed *of the body of the people*, trained to arms"[3784]—which training enables "the people" to exercise "the Supreme Power". So *the* basic principle of "a Republican Form of Government" is made manifest whenever and in whatever fashion the Militia legitimately enforce "martial law" in the various senses under consideration here.

3. Besides being undoubtedly valid, because the Constitution provides for them in so many words, the types of "martial law" enforceable by the Militia would never become politically dangerous.

a. In contrast to the variety of "martial law" under color of which members of the regular Armed Forces would be deployed to control—and possibly to oppress—Americans they did not know in Localities in which they had never lived or worked, "martial law" enforceable by the Militia would almost always involve in the forefront of operations Local Militiamen who could hardly be expected to

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[3780] U.S. Const. art. II, § 2, cl. 1.

[3781] U.S. Const. art. II, § 3.

[3782] *See* U.S. Const. art. II, § 2, cl. 1 *and* art. I, § 8, cls. 15 and 16. *See ante*, at 871-880.

[3783] Chisholm v. Georgia, 2 U.S. (2 Dallas) 419, 457 (1793) (Wilson, J.) (emphasis supplied).

[3784] Virginia Declaration of Rights (1776) art. 13 (emphasis supplied).

oppress their own families, friends, neighbors, and co-workers. Indeed, if the territory being policed contained large numbers of civilians, probably most of them would be members of the Militia—and therefore to a large extent the Militiamen would be policing themselves.

b. Even the Militia would not be "call[ed] forth" to enforce some variety of "martial law" within their ken unless the ordinary course of civilian justice were hopelessly obstructed. As Congress's very first statute on the subject provided,

> whenever the laws of the United States shall be opposed, or the execution thereof obstructed, in any state, *by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in* [*United States*] *marshals* * * * , the same being notified to the President of the United States, by an associate justice or the district judge, it shall be lawful for the President of the United States to call forth the militia of such state to suppress such combinations, and to cause the laws to be duly executed.[3785]

Obviously, the understanding was that "calling forth" the Militia "to execute the Laws of the Union" would not be constitutionally appropriate *unless and until* "the laws of the United States" *were* "opposed, or the execution thereof obstructed * * * *by combinations too powerful to be suppressed by the ordinary course of judicial proceedings*". This language reflected Congress's belief in the existence of an implicit restriction on its constitutional power to "call[ ] forth the Militia", which took into account the character of the Militia as *para*-military establishments. Although only implicit, such a restriction plainly accorded with the Founders' concern to keep enforcement of the law in *purely civilian* hands as much as possible, as well as to maintain both the strictest practical separation of powers and division of responsibilities between the Judicial Branch of the General Government (the courts)[3786] and the Executive Branch (the President and the Militia),[3787] as well as a proper balance of federalism between the General Government and the States (insofar as "the Militia *of the several States*" would be "called into the actual Service *of the United States*").[3788] All of these matters considered, this practical construction of the power "[t]o provide for calling forth the Militia to execute the Laws of the Union", having been "adopted at a time when the founders of our government and

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[3785] *An Act to provide for calling forth the Militia to execute the laws of the Union, suppress insurrections and repel invasions*, Act of 2 May 1792, CHAP. XXVIII, § 2, 1 Stat. 264, 264 (emphasis supplied). *See* 10 U.S.C. § 332. Inasmuch as the Act of 2 May 1792 *preceded* the Act of 8 May 1792 in which Congress first provided for organizing, arming, and disciplining the Militia, it evidenced Congress's understanding that the Militia were then *already* at least minimally prepared by the States to carry out the purposes of the Act of 2 May.

[3786] *See* U.S. Const. art. III, § 1 *and* art. I, § 8, cl. 9.

[3787] *See* U.S. Const. art. II, § 2, cl. 1 and § 3; *and* art. I, § 8, cls. 15 and 16.

[3788] *See* U.S. Const. art. II, § 2, cl. 1 (emphasis supplied).

framers of our Constitution were actively participating in public affairs" is entitled to no little deference.[3789]

Unfortunately, "martial law" enforceable by the Militia—protective as it would be of Americans' rights—cannot be invoked today, because "well regulated militia" of the constitutional pattern, "composed of the body of the people, trained to arms",[3790] do not exist in a single State. And none will exist until enough Americans who want this country to avoid having to relive the perilous circumstances that justified the Declaration of Independence come forward to correct this deficiency.

F. "Martial law" enforced directly by WE THE PEOPLE. In light of all of contemporary America's serious economic, political, and social problems, avoidance of such a dire situation "in the Course of human events" may no longer be possible.

1. The day may soon dawn when the Constitution can no longer be enforced because of combinations too powerful to be suppressed by normal legal processes. Rogue public officials may control so much of the General Government that no effective "checks and balances" remain within that level of the federal system. Such officials will claim sweeping powers under the Constitution, but refuse to recognize most if not all of its disabilities. "[T]he right of the people * * * to petition the Government for a redress of grievances"[3791] will prove feckless. Elections will prove futile, except perhaps to change the particular identities of the rogues in office. And the rogues will claim the authority to employ their version of the powers of the General Government to prevent anyone else from trying to enforce the Constitution against them in any other way, by deploying squads of *para*-military goons against dissenters. So the situation will parallel the dire straits in which patriots found themselves at the time of the Declaration of Independence, that King George III "has abdicated Government here, by declaring us out of his Protection and waging War against us". In addition, this country will probably be in the throes of an economic crisis, with attendant civil unrest, which rogue officials will present as an excuse to crack down on common Americans. In such circumstances, could any type of "martial law" justifiably be invoked by anyone—under color of the Constitution or otherwise— as the basis for action designed to preserve, protect, and defend the Constitution against such rogue officials?

2. The Constitution provides numerous "checks and balances" that would involve what could be called "martial law".

[3789] Knowlton v. Moore, 178 U.S. 41, 56 (1900). *Accord, e.g.,* McCulloch v. Maryland, 17 U.S. (4 Wheaton) 316, 401-402 (1819); Cooley v. Board of Wardens, 53 U.S. (12 Howard) 299, 315 (1851); The Laura, 114 U.S. 411, 414-415 (1885); Myers v. United States, 272 U.S. 52, 174-175 (1926); United States v. Curtiss-Wright Export Corporation, 299 U.S. 304, 322-329 (1936).

[3790] Virginia Declaration of Rights (1776) art. 13.

[3791] U.S. Const. amend. I.

a. The only parties whom the Constitution expressly empowers "to execute the Laws of the Union" are the Militia and the President of the United States as their "Commander in Chief".[3792] The Constitution also imposes on the President the duty to "take Care that the Laws be faithfully executed".[3793] But the only way for him to perform that duty when the rest of the General Government—including, presumably, a significant part of the regular Armed Forces—were composed of or in thrall to rogue officials would be to "call[ ] forth the Militia". So, in the extraordinary situation posited here, the President and the Militia could jointly "execute the Laws", including the Constitution. As this effort would center on enforcement of "the Laws" *by the Militia*, which are *quasi*-military institutions, under the direction of their "*Commander in Chief*", which is a *quasi*-military status, it could properly be described as "martial law" under the aegis of the Constitution.

b. Of course, it might happen that the President himself turned rogue, along with the rest of the highest officials in the General Government. That, however, would not prevent the Militia from "execut[ing] the Laws", even against the wayward individual masquerading as President, because all of the Militia's other "Officers" are appointed by the States, and faced with a rogue President would take direction from the States' political leaders. If a rogue President attempted to countermand orders to the Militia from the States' leaders, the Militia would be under no obligation to obey, because whatever actions a *rogue* President directed would not constitute "the *actual* Service of the United States".[3794]

Presumably, with the entire governmental apparatus in the District of Columbia in the hands of rogues, public officials in States loyal to the Constitution would be subjected to threats and even attacks from various armed agents of the General Government. The Constitution provides that "[n]o State shall, without the Consent of Congress, * * * keep Troops, or Ships of War in time of Peace, * * * *or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay*".[3795] On its face, the Constitution does not confine the right and power of the States to act on their own when "actually invaded, or in * * * imminent Danger" only to situations involving invasions launched by foreign nations. Self-evidently, an actual attack or credible threat of an attack on a State by regular or *para*-military armed forces commanded by rogue officials in the General Government, being unconstitutional, would satisfy the condition of that State's being "actually invaded, or in * * * imminent Danger". Indeed, even a credible threat from rogues in the General Government that did not rise of the level of "*imminent* Danger" should suffice to negate the disability that "[n]o State shall * * * keep Troops" "without

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[3792] U.S. Const. art. I, § 8, cl. 15 *and* art. II, § 2, cl. 1.

[3793] U.S. Const. art. II, § 3.

[3794] *See* U.S. Const. art. II, § 2, cl. 1, *discussed ante*, at 871-880.

[3795] U.S. Const. art. I, § 10, cl. 3 (emphasis supplied).

the Consent of Congress"—for, being composed of rogues itself, Congress would never give its "Consent"; and no State could be compelled to forsake preparation for her own self-defense because her adversary refused to agree to it. Nonetheless, although the raising of "Troops" would be constitutionally permissible, scant time would be available in which to do so. Therefore, the States would have to depend primarily upon their Militia. Again, as this effort would center on enforcement of "the Laws" by the Militia, perhaps with the assistance of State "Troops", it could properly be described as "martial law", but squarely within the ambit and under the aegis of the Constitution.

c. It might also transpire, though, that most of the States' highest public officials were themselves rogues, too, acting in collusion with the rogues in the General Government. In that eventuality, patriotic Americans would be compelled to depend upon themselves alone for succor. So the Militia would be bound by their primary constitutional duty "to execute the Laws of the Union" to police the rogue officials in *both* the General Government *and* their own State governments.

But what if a rogue Congress had enacted no statutes that "provide[d] for calling forth the Militia to execute the Laws of the Union", or that "provide[d] for organizing, arming, and disciplining, the Militia" for that purpose?[3796] And, to make matters worse, what if rogue officials in the States had done nothing to provide for "well regulated Militia" either? Plainly, average Americans could not take upon themselves the authority of Congress or any of their States' legislatures in order to enact the necessary statutes on their own recognizance. Would they therefore be compelled to proceed only *extra*-constitutionally in order to act effectively? Not at all.

(1) The Second Amendment guarantees "the right of the people to keep and bear Arms" so that "the people" always possess the implements necessary for their participation in "well regulated Militia". Implicit in "the right * * * to keep and bear Arms", therefore, is "the right of the people" to serve in "well regulated Militia"—a right which is *absolute*, because "the security of a free State" depends upon it.[3797] No right, however, can prove effective unless a remedy exists for its infringement.[3798] If rogue legislators refuse to assist "the people" in effectuating their right to serve in "well regulated Militia", then "the people" can and must act in their own self-defense—especially when that course of action is the only way to guarantee "the security of a free State" in the face of usurpation and tyranny. What, after all, is the alternative?

[3796] *See* U.S. Const. art. I, § 8, cls. 15 and 16.

[3797] *See ante*, at 1401-1423.

[3798] *See, e.g.,* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803); United States *ex rel.* Von Hoffman v. City of Quincy, 71 U.S. (4 Wallace) 535, 554 (1867); Poindexter v. Greenhow, 114 U.S. 270, 303 (1885).

To be sure, although "[h]e that has virtue and power to save a people, can never want a right of doing it",[3799] even in this dire situation "the people" would not be authorized to enact actual statutes. But why could they not adopt temporary "ordinances"—so called in order to differentiate them from the products of regular legislatures[3800]—through which they could organize their Militia provisionally according to the tried and true constitutional principles to which all statutes on that subject must conform? Organizing their Militia in this manner would constitute simply the fulfillment of "the *right* of the people to keep and bear Arms".

The *power* "the people" would employ for the purpose of enforcing their "right" could be derived from the Tenth Amendment, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people". No "powers" are "delegated to the United States" or "reserved to the States respectively" to deprive "the people" of "well regulated Militia". Rather, such "powers" are clearly "prohibited" to both the States and the United States.[3801] So, if the government of the United States and the governments of the States, in the grips of rogue officials, refuse to assist "the people" in forming "well regulated Militia" which are "*necessary* to the security of a free State", *some* "powers" suitable for that purpose *must* be "reserved * * * to the people" if such Militia, and therefore "free State[s]", are to exist at all anywhere within America.

(2) If a "right" for "the people" to enact "ordinances" of this kind cannot be found in the Second Amendment, it can nonetheless be derived from elsewhere. For example, both the Ninth and Tenth Amendments presume that "the people" are entitled to "certain rights" and "powers" that appear nowhere in the Constitution in so many words, but are incorporated into it by reference from other sources through those Amendments.

The obvious well from which some of these "rights" and "powers" can easily be drawn is the Declaration of Independence, which constitutes the legal as well as the political spring from which has issued every one of the governments in America since 1776.[3802] The Declaration states that all "Governments are instituted among Men, deriving their just powers from the consent of the governed", in order "to secure" "certain unalienable Rights"; and that, "whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their

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[3799] A. Sidney, *Discourses Concerning Government*, *ante* note 54, at 227.

[3800] *See ante*, at 592 & note 895.

[3801] *See* U.S. Const. art. I, § 8, cls. 15 and 16; art. II, § 2, cl. 1; *and* amend. II.

[3802] *See ante*, at 22-27.

Safety and Happiness". So, perforce of the Declaration, "the People" enjoy and can exercise on their own initiative, not only certain "rights", but also certain "powers" (or "the People" could not delegate "just powers" to any "Form of Government" or "organiz[e] its powers"). These must be in the forefront of the unenumerated "rights" and undefined "powers" to which the Ninth and Tenth Amendments refer. Therefore, through those Amendments (if not in other ways, too), the Declaration of Independence finds its place at the very head of "the Laws of the Union" that the Militia enjoy the authority and labor under the responsibility to "execute".

Now, because "Governments are instituted among Men, deriving their *just* powers *from the consent of the governed*", when rogue public officials take it upon themselves to assert "[*un*]just powers" "the People" can and should withdraw their "consent" to whatever degree may be necessary. So, "whenever any Form of Government becomes destructive of the[ ] ends" for which it was "instituted", "it is the Right of the People to alter or to abolish it, and to institute new Government", pursuant to the principle *cuius est instituere eius est abrogare*.[3803] The paradigmatically worst case is "when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce the[People] under absolute Despotism". Then, "it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security". In any less egregious situation, though, "the People" need not "throw off [the] Government" entirely. For theirs is the "Right", and therefore the power, "*to alter or* to abolish" "any Form of Government"—*a power which, under the counsel of "Prudence", "the People" can and should exercise in such time, place, and manner as circumstances may dictate "most likely to effect their Safety and Happiness".*[3804] Inasmuch as WE THE PEOPLE have a right to participate in "well regulated Militia" which can "execute the Laws of the Union" in aid of "the security of a free State"; and inasmuch as, to be "well regulated", the Militia must be organized pursuant to some act with legislative character; and inasmuch as THE PEOPLE today are entitled to execute the selfsame right and power their forebears invoked in the Declaration of Independence, "to alter or to abolish" their "Form of Government" in order to prevent that "Form" from "becom[ing] destructive of the[ ] ends" for which it was "instituted"; and inasmuch as THE PEOPLE, under the aegis of that right and power, could "throw off" the entire Constitution, eliminating the legislative powers of Congress and of the States as well; therefore, THE PEOPLE can merely "alter" their "Form of Government" by enacting temporary "ordinances" under the authority of which they can organize themselves in "well regulated Militia" for the purpose of preserving the Constitution by "throw[ing] off" the misgovernment of usurpers and tyrants. In taking such action, THE PEOPLE would not set aside or suspend the

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[3803] "To whom it is to institute, to him it is to abrogate"; or, figuratively, "he who institutes may abrogate".

[3804] *See ante*, Chapter 32.

Constitution, but rather would enforce it, by exercising rights and powers incorporated within the Ninth and Tenth Amendments.

To be effective against usurpers and tyrants in practice, THE PEOPLE would likely have to form provisional Militia in order to protect themselves while such "ordinances" were being enacted and then put into operation. So this process, too, could properly be described as a form of "martial law" within the ambit of the Constitution, and of the Declaration of Independence as well.

3. If the Declaration of Independence is *not* one of "the Laws of the Union" perforce of or under the Constitution, but is an *extra*-constitutional law, then neither "the Militia of the several States" nor the President of the United States can "execute" it *under color of the Constitution*. Which would mean that, in the circumstances posited above, the Constitution could not protect WE THE PEOPLE against usurpation and tyranny being worked against them by rogue public officials under color of the Constitution. As the Declaration described such a situation, the "Form of Government" embodied in the Constitution would have "become[ ] destructive of the[ ] ends" for which it had been "instituted", and irretrievably so. Common Americans would then find themselves in the position their forebears occupied following publication of the Declaration of Independence but before adoption of the Articles of Confederation or ratification of the Constitution.

At that time, however, the Declaration of Independence was not merely some hortatory pronouncement, but was the first and foremost organic law of each of the States, because it was through the Declaration that each of them became "Free and Independent States" with "full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do". The authority of the Declaration and the means for its enforcement did not depend upon the Constitution, which was not even imagined, let alone in existence. Indeed, the Declaration was not only a *pre*-constitutional and an *extra*-constitutional law, but also a *supra*-constitutional law, because it was the foundation in fact and justification in law for the Constitution. So if, in the present era, the Constitution were to fail, in the sense of "becom[ing] destructive of the[ ] ends" for which it was "instituted", WE THE PEOPLE could still fall back on the Declaration of Independence.[3805] And the Declaration recognizes THE PEOPLE'S "right" and "duty" "to throw off [a bad] Government"—where necessary, by force of arms. In the temporary absence of any regular "Government" as a result of the failure of the Constitution, THE PEOPLE would have to organize themselves into Militia that were *extra*-constitutional, because the Constitution could not be enforced to authorize such formations, and were even *supra*-

[3805] This, of course, is one of the main reasons why those intent upon destroying the Constitution domestically are also attempting to negate the independence of the United States, individually and collectively, through their absorption into some form of *supra*-national "global government".

constitutional, because through their efforts either the old Constitution would be restored or some new organic law adopted. This process, too, could be described as a form of "martial law", because it would be executed by the Militia, albeit under the aegis of the Declaration of Independence alone.

4. What if the Declaration of Independence were deemed to be without *any* authority of its own in the premises, purportedly because it applied only to an unique situation in the past, when one part of a country separated from the rest and become independent, whereas the situation under scrutiny here involves an attempt to hold the entire country together in the face of usurpation and tyranny by its disloyal leaders?

a. Even on that supposition, the controlling first principle remains that "sovereignty is never in abeyance". WE THE PEOPLE—ultimately, those "citizens, whether amounting to a majority or a minority of the whole, who are united and actuated" by a desire to protect "the rights of other citizens" and to advance "the permanent and aggregate interests of the community"[3806]—always retain their sovereignty. WE THE PEOPLE—through "Representatives" speaking "in the Name, and by the Authority of the good People of the[ ] Colonies"—put forth the Declaration of Independence. WE THE PEOPLE—through "delegates" acting "in the name and in behalf of [their] respective constituents"—adopted the Articles of Confederation.[3807] WE THE PEOPLE then "ordain[ed] and establish[ed] th[e] Constitution" through "Conventions" in the several States.[3808] And, whenever necessary, WE THE PEOPLE can take up such tasks again, in order to create a whole new body of supreme law for themselves. They can do this in the future in the same way they did it in the past, through organizing themselves in "well regulated Militia". For "a [republican] Government is * * * one constructed on this principle, that the Supreme Power resides in the body of the people"[3809]—"the Sword and Soveraignty always march hand in hand"[3810]—all "'[p]olitical power grows out of the barrel of a gun"[3811]—and "a well regulated militia" is "composed of the body of the people, trained to arms".[3812]

Thus the genius of the Second Amendment's declaration that "[a] well regulated Militia" is "necessary to the security of a free State": The independence of "a free State" precedes its constitution. But "the security of a free State" must be

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[3806] *See The Federalist* No. 10 (James Madison).

[3807] Arts. of Confed'n, closing paragraph.

[3808] U.S. Const. preamble *and* art. VII.

[3809] Chisholm v. Georgia, 2 U.S. (2 Dallas) 419, 457 (1793) (Wilson, J.).

[3810] AN ARGUMENT, Shewing, that a Standing Army Is inconsistent with A Free Government, *ante* note 27, at 7.

[3811] *Quotations From Chairman Mao, ante* note 28, at 61.

[3812] Virginia Declaration of Rights (1776) art. 13.

guaranteed if that "State" is to enjoy enduring independence. "A well regulated Militia" is "necessary to the security of a free State". Therefore, the establishment of "[a] well regulated Militia" is the condition precedent to both independence and a constitution for "a free State", and the condition subsequent for their preservation. This, because "[s]elf-defence * * * is * * * the primary law of nature",[3813] upon the successful execution of which depend all other laws.

b. If, because of the unique historical circumstances in which it arose, the Declaration of Independence were deemed inapplicable to the situation posited here of egregious usurpation and tyranny within America, and therefore WE THE PEOPLE could not rely upon it as the controlling law, nonetheless they would not act without law, or as a law unto themselves. The Declaration may have addressed itself to a special situation; but the legal principles it invoked were never understood to be so confined in their pertinence. Rather, as the Declaration itself made clear, they are the basic principles of law that govern the entire "Course of human events" in political societies. For they derive from the permanent "Laws of Nature and of Nature's God" to which "all men" are subject and from which "all men" are entitled to benefit. These "Laws" set WE THE PEOPLE above all "Governments". But they do not set THE PEOPLE above all law. Rather, "Governments * * * instituted among Men * * * deriv[e] * * * *just* powers from the consent of the governed", because THE PEOPLE possess only "*just* powers" to delegate to them, with the standards of "justice" defined, not by mere "Men", but by "the Laws of Nature and of Nature's God". Thus, THE PEOPLE enjoy the absolute right to organize themselves in Militia for collective self-defense, because "[s]elf-defence * * * is * * * the primary law of nature"; but, on the other side, they labor under the absolute duty that their Militia never engage in aggression, because aggression attempts to negate others' rights of self-defense.

5. In the final analysis, the problem with any conception of "martial law" is formulating a guarantee that the executors of "martial law" will relax their control and allow society to return to civilian law when the legitimate occasion for "martial law" has passed. This becomes especially difficult if the type of "martial law" at issue "is based upon no settled principles, but is entirely arbitrary in it's decisions";[3814] "is administered by the general of the army, and is in fact his will";[3815] and therefore "means nothing more nor less than authority untrammeled by any laws, absolutely unrestricted by any rules whatever, and based directly on force".[3816] The precepts of American political science, however, provide bases for confidence that this fear

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[3813] *See* W. Blackstone, *Commentaries on the Laws of England, ante* note 142, Volume 3, at 4.

[3814] *Id.*, Volume 1, at 412.

[3815] United States v. Diekelman, 92 U.S. 520, 526 (1875).

[3816] V. Lenin, "A Contribution to the History of the Question of the Dictatorship, A Note", *ante* note 3643, at 353.

is groundless *when WE THE PEOPLE themselves, in and through "well regulated Militia", administer the variety of "martial law" suitable for the Militia to execute*.

Inasmuch as "the Laws of Nature and of Nature's God entitle the[People]" to "a separate and equal station" "among the powers of the earth", under the aegis of which they may "do all * * * Acts and Things which Independent States may of right do"[3817]—and inasmuch as "a well regulated militia, composed of the body of the people, trained to arms" is "necessary to the security of a free State"[3818]—those "Laws" therefore approve of WE THE PEOPLE'S participation in such Militia. For THE PEOPLE to maintain their entitlement to that "separate and equal station", however, they must adhere to those "Laws" at all times, by exercising only "*just* powers", which by definition are never arbitrary in their application. In particular, their Militia must remain "well regulated" in terms of those "Laws" especially when enforcing "martial law"—because, unless checked, military discipline tends to instil robotic responses to arbitrary commands. Fortunately, "martial law" is more likely to conform to "the Laws of Nature and of Nature's God" when THE PEOPLE themselves are enforcing it through their Militia, because then the political principals in society, not their mere representatives or agents who might mistake the principals' commands or even betray the trust the principals have reposed in them, are in control.

So if tomorrow WE THE PEOPLE were compelled by circumstances to revitalize the Militia and invoke "martial law" on their own initiative in order to enforce the Constitution (or the Declaration of Independence through the Constitution, or the Declaration of Independence in aid of restoring the Constitution) against usurpers and tyrants in the highest offices of the General Government and the States, the Militia could not be selective in what provisions of the Constitution to enforce. Because the Constitution is an unitary charter of government, each word and phrase of which supports and depends upon every other, the Militia would be bound in duty to enforce the Constitution in its entirety. And as soon as the situation no longer justified THE PEOPLE in enacting and enforcing "ordinances" for organization of the Militia—that is, as soon as the General Government and the governments of the States were thoroughly purged of usurpers and tyrants and their string-pullers in factions and other *anti*-social special-interest groups; as soon as the misconstructions and misapplications of the Constitution that enabled such miscreants to gain footholds in the governmental apparatus were overruled; and as soon as loyal, honest, and competent individuals were installed in public office—then THE PEOPLE would look to Congress and the States' legislatures to regularize the situation by enacting the necessary statutes,

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[3817] Declaration of Independence.

[3818] Virginia Declaration of Rights (1776) art. 13 *and* U.S. Const. amend. II.

formally revitalizing the Militia and ratifying the actions they took to execute the laws while under the aegis of THE PEOPLE'S provisional "ordinances".[3819]

[3819] *See, e.g.*, United States v. Heinszen & Company, 206 U.S. 370, 381-382, 385-386 (1907).

CHAPTER FORTY-NINE

In order to function as effective "checks and balances" against "standing armies", "the military-industrial complex", and a domestic National *para*-military police state, members of "the Militia of the several States" must be immune from wholesale impressment into the regular Armed Forces.

Although no one should minimize the danger posed by the progression—or, more accurately from the perspective of anyone concerned with legality and liberty, the *retrogression*—from "standing armies" to a massive "military-industrial complex" to a National *para*-military police state, and with it the ever-intensifying insinuation of "martial law" into common Americans' lives, all in the service of the most immoral, avaricious, and corrupt political and economic factions ever to have parasitized the United States, no one should treat the situation as hopeless, either. For the Constitution provides the necessary and sufficient "checks and balances":

> The militia is the natural defence of a free country against * * * domestic usurpations of power by rulers. It is against sound policy for a free people to keep up large military establishments and standing armies in time of peace, both from the enormous expenses with which they are attended and the facile means which they afford to ambitious and unprincipled rulers to subvert the government or trample upon the rights of the people.[3820]

Nonetheless, as with every other constitutional "check and balance", "the Militia of the several States" can function effectively in that capacity only if certain conditions are satisfied.

A. "[T]he Militia of the several States" not to be absorbed within or subordinated to the regular Armed Forces. Self-evidently, "the Militia of the several States" cannot serve as "checks and balances" against "standing armies", "the military-industrial complex", and a National *para*-military police state unless: (i) they actually exist in practice, not simply in words on the parchment of the Constitution; and (ii) they are recognized as independent of and superior to those establishments; which requires that (iii) they are maintained separate from those establishments, by being held immune from absorption within, as well as

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[3820] J. Story, *Commentaries on the Constitution, ante* note 576, Volume 2, § 1897, at 646.

subordination to, the regular Armed Forces. Fortunately, the Constitution insures that all of these requirements can be met.

1. Revitalization of the Militia the first priority. If "standing armies", a "military-industrial complex", and a National *para*-military police-state apparatus cannot be avoided in the first place, or eliminated after they have once been set up, society must face the difficult problem of how to assert sufficient "civilian control" to keep them on a tight leash until they can be reduced in size or disbanded entirely. In contemporary America, all of these establishments exist, are well entrenched (in the case of "standing armies" and "the military-industrial complex") or are becoming so (in the case of the police-state apparatus), and are largely out of WE THE PEOPLE'S practical control. Americans find themselves in these dire straits precisely because no "well regulated Militia" worthy of the name exists in even a single State. *True* "civilian control of the military"—that is, "civilian control" *according to constitutional principles*—must rest with the architects, arbiters, and beneficiaries of the Constitution: WE THE PEOPLE themselves, who, in their capacity as "the Militia of the several States", can (in Justice Story's estimation) "offer[ ] a strong moral check against the usurpation and arbitrary power of rulers, and will generally, even if these are successful in the first instance, * * * resist and triumph over them".[3821]

The danger is more acute today than during the Founding Era, because the contemporary "military-industrial complex" goes far beyond the mere "standing armies" of that time. Indeed, compared to "the military-industrial complex", those "standing armies" were little more than toothless paper tigers. Not because they were not sufficiently large, thoroughly armed, well trained, and usually led by competent officers, but because they were overmatched by both political and military "checks and balances" amongst the people they attempted to repress. In that age, Americans were well schooled in political philosophy of liberty, used to self-government, intent upon preserving it, and willing to make whatever personal and collective sacrifices "the Course of human events" might have required to that end. And, being organized, armed, and disciplined in their Militia, Americans were actually capable of defending their rights in the field. Moreover, during the entire period prior to 1776, the Militia—along with the British Army, Colonial "Troops", and the hodge-podge of manufacturers of armaments in both the Colonies and the Mother Country—had all been integral components of the Anglo-American "military-industrial complex". And during the whole of the *pre*-constitutional period following the Declaration of Independence, the Militia—along with the Continental Army, State "Troops", and such manufacturers of arms as existed—were all integral components of America's "military-industrial complex". So Americans never looked

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[3821] *Id.* (footnote omitted).

upon personal military preparedness and even actual participation in military campaigns as something alien to them, but instead accepted that service as the most important part of the duties, and the rights as well, inherent in citizenship in "a free State".

Not so for all too many Americans today, however. Now, "the Militia of the several States" are not parts of this country's "military-industrial complex" at all—having been effectively excluded for more than a century by Congress's purported assignment of most Americans to the oxymoronic "unorganized militia".[3822] As a result, WE THE PEOPLE—including those who through their personal possession of firearms naively imagine themselves to be exercising "the right * * * to keep and bear Arms" to the full—have no personal experience of the Militia. And although many Americans may entertain vague notions of what the Militia once *were*—with mental images of men in tricorn hats, knee britches, and buckled shoes, carrying flintlock muskets—vanishingly few have the foggiest notion of what the Militia *constitutionally still are and must be, and especially why it matters*. Devoid of both experience and knowledge, most Americans fall back on the assumption that "standing armies" are necessary for their country's defense—never noticing, let alone understanding, that WE THE PEOPLE could safely delegate to Congress the power "[t]o raise and support Armies, *but no Appropriation of Money to that Use shall be for a longer Term than two Years*",[3823] precisely because the original Constitution incorporated "the Militia of the several States" as *permanent* components of its federal system.

Through its mouthpieces among rogue public officials, the big media, and various subversive factions and special-interest groups, "the military-industrial complex" does its best to keep average Americans in this state of ignorance, too—ridiculing, defaming, and demonizing those few patriots whose advocacy of revitalization of the Militia cannot simply be ignored. Next to no one, however, draws the conclusion that, having made itself independent of and even hostile to "well regulated Militia", "the military-industrial complex" has emerged, as a matter of constitutional fact and law, as an antagonist of "the security of a free State", and therefore an antagonist of "a free State" everywhere throughout this country (although that conclusion should be glaringly obvious from the complex's promotion of the domestic *para*-military police-state apparatus). This antagonism proves not merely that America is confronted (in President Eisenhower's words) by "[t]he *potential* for the disastrous rise of misplaced power", but that "the military-industrial complex" has *already* acquired "unwarranted influence" which "endanger[s] our liberties [and] democratic processes"—*and that it will never be brought to heel under* ***constitutional*** *"civilian control" until the Militia are revitalized*.

[3822] *See* 10 U.S.C. § 311(b)(2). *See ante*, at 786-793.

[3823] U.S. Const. art. I, § 8, cl. 12 (emphasis supplied).

The Constitution requires the Militia to be fully organized at all times.[3824] Nonetheless, a merely formal revitalization of the Militia, no matter how complete on paper, will not suffice. The Militia must be restored *in actual practice* to the exact position the Constitution reserves and requires for them, in strict compliance with *all* of the *pre*-constitutional principles that define "well regulated Militia", so that they can exercise the *full* measure of authority necessary to control "the military-industrial complex" (as well as perform the other tasks the Constitution and the States' laws assign to them). Any deviation from those constitutional principles will provide aid and comfort to "the complex", and to all other enemies of the United States, foreign and especially domestic. The most insidious form of such deviation today exhibits the characteristics of camouflage and confusion. Namely, that Americans have long been gulled by the fantastic misconstruction of the Constitution under color of which Congress: (i) has labeled the National Guard and the Naval Militia "the organized militia"—when in reality they consist of the "Troops, or Ships of War" that the several States may "keep * * * in time of Peace" "with[ ] the Consent of Congress";[3825] and (ii) has consigned everyone not a member of the National Guard or the Naval Militia to the constitutionally impossible "unorganized militia"[3826]—so that now almost all Americans have been led to believe that they need not, or even cannot, actively participate in any "militia" at all. Obviously, if WE THE PEOPLE continue to swallow such bilge in the face of a crescent National *para*-military police state, they will soon choke to their political deaths on tyranny. So their first steps must be: (i) To assert in the strongest possible terms their ultimate legal supremacy as the parties "in [whose] Name, and by [whose] Authority" the Declaration of Independence was "solemnly publish[ed] and declare[d]", and who originally "ordain[ed] and establish[ed] th[e] Constitution"[3827]—and therefore who, having exercised "the power to enact" retain "the final authority to declare the meaning of the[ir very own] legislation".[3828] And then (ii) to direct their "representatives" in public office to revitalize the Militia immediately if not sooner, on pain of having THE PEOPLE revitalize the Militia themselves in the event of officialdom's default.

2. Revitalized "Militia of the several States" to be maintained separate from, independent of, and superior to the regular Armed Forces at all times. Revitalization of "the Militia of the several States" *will* provide effective "checks and balances" against "the military-industrial complex", because of the Militia's unique constitutional nature and status.

[3824] *See ante*, Chapter 34.

[3825] *See ante*, at 786-793.

[3826] *See* 10 U.S.C. § 311.

[3827] U.S. Const. preamble.

[3828] Propper v. Clark, 337 U.S. 472, 484 (1949).

a. The Militia are separate from and independent of the regular Armed Forces in two ways.

(1) By definition, the Militia must be "composed of the body of the people, trained to arms"[3829]—and not simply as the result of each individual's personal choice, but perforce of every able-bodied adult's *constitutional duty*.[3830] Conversely, the Armed Forces have never been defined in law as "composed of the body of the people"—and could not possibly ever be "composed of the body of the people" in fact unless either the individuals eligible for Militia service were entitled to dissolve the Militia themselves by voluntarily joining the Armed Forces pursuant to some specific statutory exemption from Militia duty for that purpose, or some legislative body were empowered to dissolve the Militia by impressing into the Armed Forces every individual eligible for the Militia. But *no one*, whether individual citizen or legislator, may dissolve the Militia, because the Constitution *permanently* incorporates the Militia within its federal system.[3831] So, although the States, or Congress, or both could enact exemptions from Militia service for individuals who voluntarily joined the regular Armed Forces of the United States or such "Troops, or Ships of War" as the States might "keep" "in time of Peace" "with[ ] the Consent of Congress" or might assemble on their own initiatives in time or war or when "engaged in War" because they were "actually invaded, or in such imminent Danger as will not admit of delay",[3832] such exemptions could not license draining the Militia of so many members that they could no longer function as "well regulated Militia".[3833]

The Militia's independence of the Armed Forces is a crucial attribute, because, being "composed of the body of the people", the Militia can never imagine themselves as somehow distinct, separate, or divorced from, let alone antagonistic to, "the people"; whereas regular Armed Forces or "Troops" composed of volunteers or draftees, being always less than "the body of the people", can easily (and, indeed, are conditioned through training to) envision themselves as "soldiers" and everyone else as mere "civilians". So, although it is impossible to speak of "'Militiamen' as opposed to 'civilians'" let alone "'Militiamen' who are opposed to 'civilians'", because all "Militiamen" *are* "civilians" and most "civilians" *are* "Militiamen", it is quite possible to speak of "'soldiers' as opposed to 'civilians'"; and in times of political turmoil and civil unrest this distinction can easily be twisted in the minds

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[3829] *See* Virginia Declaration of Rights (1776) art. 13.

[3830] *See ante*, Chapter 35.

[3831] *See ante*, Chapter 33. On the constitutional impossibility of general impressment from the Militia for the Armed Forces, *see post*, at 1714-1835.

[3832] *See* U.S. Const. art. I, § 8, cl. 16 and § 10, cl. 3; *and* art. VI, cl. 2.

[3833] *See ante*, Chapter 36. On the constitutional impossibility of generating unlimited *ersatz* exemptions by impressing Militiamen into the Armed Forces, *see post*, at 1714-1835.

of impressionable "soldiers" to the pernicious concept of "'soldiers' who are opposed to 'civilians'" in the sense of mutual antagonists.

(2) As well as by virtue of their composition, the Militia are separate from and independent of the Armed Forces by dint of their unique status and distinct position in the Constitution.

(a) The Militia are *permanent* components of the federal system *at every one of its three levels*:

> **(i)** The Militia consist of "the body *of the people*, trained to arms"[3834]—more or less identical with WE THE PEOPLE. WE THE PEOPLE existed before the foundations of the federal edifice were poured, and will continue to exist even were that edifice totally demolished. WE THE PEOPLE created the federal edifice—and it depends upon their consent for every moment of its continued existence. They do not depend upon it at all, but may determine at their own discretion that their continued welfare demands its alteration or abolition.[3835]
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> **(ii)** "[T[he Militia *of the several States*"[3836] are *State governmental* institutions. Indeed, they are the most important of all State governmental institutions, because the Constitution guarantees to each State "a Republican Form of Government";[3837] "a Republican Form of Government" is "one constructed on th[e] principle, that the Supreme Power resides in the body of the people";[3838] "'[p]olitical power grows out of the barrel of a gun";[3839] and the Militia are "composed of the body of the people, *trained to arms*". And
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> **(iii)** The Militia may be "employed in *the Service of the United States*" for three vital constitutional purposes.[3840] Self-evidently, as long as that "Service" is to be performed—which presumably is as long as the Constitution provides for it—the Militia must remain in existence.

In sharp contrast, "the Army and Navy of the United States" are merely contingent components *of the General Government alone*[3841]—with the Army explicitly exposed to complete dissolution every "two Years", unless Congress

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[3834] Virginia Declaration of Rights (1776) art. 13 (emphasis supplied).

[3835] *See* Declaration of Independence; U.S. Const. preamble *and* art. V.

[3836] U.S. Const. art. II, § 2, cl. 1 (emphasis supplied).

[3837] U.S. Const. art. IV, § 4.

[3838] *See* Chisholm v. Georgia, 2 U.S. (2 Dallas) 419, 457 (1793) (opinion of Wilson, J.).

[3839] *Quotations From Chairman Mao, ante* note 28, at 61.

[3840] U.S. Const. art. I, § 8, cls. 15 and 16 (emphasis supplied).

[3841] U.S. Const. art. I, § 8, cls. 12 through 14, *and* art. II, § 2, cl. 1.

provides a new "Appropriation of Money".[3842] The Constitution does empower Congress "[t]o provide *and maintain* a Navy",[3843] which suggests that the Senior Service should be permanent. Yet, if Congress determines in good faith that no "Navy" is needed after all, *no one else* can "provide and maintain a Navy" on anything akin to a permanent basis, because private parties cannot put to sea without being issued "Letters of Marque and Reprisal" from Congress,[3844] and the States cannot "keep * * * Ships of War in time of Peace" "without the Consent of Congress".[3845]

Similarly, the "Troops, or Ships of War" which the States may "keep" "in time of Peace" are merely contingent components *of the States' governments alone*—and are even less secure in their existences than are "the Army and Navy of the United States", because "[n]o State shall * * * keep" them at all "without the Consent of Congress". To be sure, as a condition of Congress's "Consent" to their existences (and the States' concurrence therewith), these "Troops, or Ships of War" may be integrated into "the Army and Navy of the United States" for certain National purposes. Yet such possible integration into forces which are themselves contingent renders such "Troops, or Ships of War" no less contingent than if Congress had not mandated such integration, or the States had not agreed to it.

(b) The Constitution explicitly recognizes that the Militia are separate from and independent of the regular Armed Forces,

- by denominating them differently—as "the Militia *of the several States*" in contrast to "the Army and Navy *of the United States*";[3846]
- by delegating different powers to Congress with respect to each of those establishments, and segregating those powers in different clauses;[3847]
- by directing that the Militia be "call[ed] forth" to "be employed in the Service of the United States" for but three purposes, while imposing no limitation on the use of the Armed Forces;[3848]
- by establishing different bodies of rules for governing "the land and naval Forces" and "such Part of the[Militia] as may be employed in the Service of the United States";[3849]

[3842] U.S. Const. art. I, § 8, cl. 12.

[3843] U.S. Const. art. I, § 8, cl. 13 (emphasis supplied).

[3844] U.S. Const. art. I, § 8, cl. 11.

[3845] U.S. Const. art. I, § 10, cl. 3.

[3846] U.S. Const. art. II, § 2, cl. 1 (emphasis supplied).

[3847] *Compare* U.S. Const. art. I, § 8, cls. 12 through 14 ("Armies", "Navy", "land and naval Forces") *with* cls. 15 and 16 ("the Militia").

[3848] *Contrast* U.S. Const. art. I, § 8, cls. 15 and 16 *with* cls. 12 and 13.

[3849] *Contrast* U.S. Const. art. I, § 8, cl. 14 *with* cl. 16.

• by differentiating the status of the President with respect to those establishments—that "[t]he President shall be Commander in Chief of the Army and Navy of the United States" at all times, but "of the Militia of the several States, [only] when [they are] called into the actual Service of the United States";[3850]

• by "reserving to the States respectively, the Appointment of the Officers [in the Militia], and the Authority of training the Militia according to the discipline prescribed by Congress",[3851] so that the Militia cannot be brought under the command of any officer of "the Army [or] Navy of the United States" other than the President, and then only in his separate capacity as "Commander in Chief * * * *of the Militia of the several States*"; and even

• by explicitly securing to "the people" "the right * * * to keep and bear Arms" for the purpose of serving in "well regulated Militia" that can provide effective "checks and balances" against "standing armies".[3852]

b. "[T]he Militia of the several States" are superior to the regular Armed Forces in three ways.

(1) They are *politically superior*.

(a) The Second Amendment's declaration—that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed"—is special. Unlike the terms of office for the Members of Congress or for the President, or many of the powers of Congress, which might have been set, or formulated, or distributed otherwise with no diminution of their utility, the Second Amendment presents an unqualified statement both of constitutional law, deriving from fixed principles of political philosophy, and of constitutional fact, arising out of actual American experience—and, by negative implication, also and especially a premonishment: namely, that without "well regulated Militia" Americans can never provide "the security of a free State" and therefore will inevitably prove unable to preserve "a free State" for themselves. Thus, the reason for everything in the Constitution that pertains to the Militia—for incorporating the Militia into the federal system at all three of its levels; for requiring Congress "[t]o provide for organizing, arming, and disciplining, the Militia"; for "reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia"; and for limiting the President's authority as "Commander in Chief * * * of the Militia" to when they are

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[3850] U.S. Const. art. II, § 2, cl. 1.

[3851] U.S. Const. art. I, § 8, cl. 16.

[3852] U.S. Const. amend. II.

"called into the actual Service of the United States"[3853]—is that *the Militia are the ultimate political establishments*: They provide THE PEOPLE with the means to preserve self-government through THE PEOPLE'S own efforts under THE PEOPLE'S own personal control.

The epigram "'[p]olitical power grows out of the barrel of a gun'"[3854] encapsulates the fact, undeniable throughout history, that in the final analysis no division can long exist between political and military power. Ultimately, those people who are to decide their society's political polices must be the bearers of arms, because the bearers of arms in any society will always come to decide its political policies. Morality and law, though, look beyond the mere fact of who happens to wield the gun at any particular time to ask, "Who is *entitled* to wield the gun?" When the gun is in the hands of the people entitled to hold it, then their use of the gun to obtain, preserve, and employ political power—but always in a *just* fashion—is legitimate.

In America, WE THE PEOPLE are the only sovereigns.[3855] WE THE PEOPLE are also the Militia. The Militia exist because THE PEOPLE do. Indeed, as the Second Amendment attests, it is impossible to imagine a self-governing society organized as "a free State" in America without "[a] well regulated Militia" composed of "the people". Thus, the Militia constitute the executive arm of the sovereigns themselves, composed of the sovereigns themselves, commanded by the sovereigns themselves *directly*. Conversely, "the Army and Navy of the United States" and the States' "Troops, or Ships of War" are the contingent creations of THE PEOPLE'S "representatives" in the General Government and the governments of the several States. Thus, they are three long political steps removed from THE PEOPLE: the first step, THE PEOPLE'S creation of those governments through the Declaration of Independence, the Constitution, and the States' constitutions; the second step, those governments' creation of regular Armed Forces by the enactment of various statutes; the third step, the recruitment of a relatively small set of individuals for the Armed Forces, which never embraces "the body of the people" as a whole.

(b) The three constitutional purposes for which the Militia may be "call[ed] forth" to "be employed in the Service of the United States"—that is, "to execute the Laws of the Union, suppress Insurrections and repel Invasions"[3856]—emphasize the supreme political character of the Militia. *None* of these responsibilities does the Constitution explicitly assign to the regular Armed Forces. And for at least three good reasons:

[3853] U.S. Const. art. I, § 8, cls. 15 and 16, *and* art. II, § 2, cl. 1.

[3854] *Quotations From Chairman Mao, ante* note 28, at 61.

[3855] *See* Chisholm v. Georgia, 2 U.S. (2 Dallas) 419, 454, 456 (opinion of Wilson, J.), 471-472 (opinion of Jay, C.J.) (1793).

[3856] U.S. Const. art. I, § 8, cls. 15 and 16.

(i) Two of the purposes for "calling forth" the Militia "in the Service of the United States" address threats arising within this country—"to execute the Laws of the Union" against those who violate "the Laws", and to "suppress Insurrections" (which could be seen as a special case of "execut[ing] the Laws"). When such internal threats have some specifically political genesis, they are always more dangerous than attacks from outside. For, aspiring usurpers and tyrants being perennial and hardy weeds in the Republic's garden, such threats are always ready to sprout and flourish; and in their initial stages of germination and growth they are not easily recognized for the noxious vegetation they are, if the ones who cultivate them adroitly employ their public offices to subvert the Constitution and even the Declaration of Independence under the color of law and the pretense of loyalty.

To deal with such eventualities, a "standing army" is far less reliable than the Militia. True enough, both a "standing army" and the Militia are military establishments; and both may be salted with individuals looking out for only their own personal interests, "the general Welfare" be damned. The danger from each is not equally great, though, because a rogue "standing army" may see its chance to usurp sovereignty and tyrannize society, either in collusion with disloyal civilian officials or on its own initiative; whereas the Militia can have no rational interest in usurping sovereignty which as WE THE PEOPLE they already exercise, or in tyrannizing over their own members. Certainly the Constitution conclusively presumes that "the Militia of the several States" are not as dangerous to freedom as any "standing army", or it would not assign the explicit authority and responsibility "to execute the Laws of the Union" and to "suppress Insurrections" exclusively to them. Moreover, the Second Amendment reflects the historical fact that the Militia mustered in the very forefront of Americans' original struggle for independence and liberty, and as a matter of law requires contemporary Americans to presume that the Militia will continue to prove "necessary to the security of a free State". This, after all, is the only plausible and prudent expectation: For are WE THE PEOPLE, with their own arms in their own hands, and their own officers chosen from amongst themselves, likely to set out to oppress themselves? And even if such an event cannot be excluded as impossible, one must weigh the highly conjectural risk that some significant portion of the Militia *might* turn rogue against the near-certainty that a "standing army" *will* prove disloyal to THE PEOPLE at some dark turning-point "in the Course of human events".

(ii) It may seem odd that the Constitution also explicitly assigns the exclusive authority and responsibility to "repel Invasions" to the Militia alone, rather than to the regular Armed Forces, either alone or in tandem with the Militia. As a practical matter, when foreign navies land foreign armies on America's shores, "the Army and Navy of the United States" and "Troops, or Ships of War" from the States might be expected to be better prepared than the Militia to defeat the aggressors. But within that natural expectation lurks a worrisome realty: If this

country's regular Armed Forces were large and strong enough to "repel Invasions" by those enemies sufficiently powerful to launch assaults from distant foreign bases, they would be large and strong enough to pose a distinct domestic threat themselves. An "Invasion[ ]", after all, need not always be entirely military in character, but may be military in its perpetrators while political in its purposes. And its perpetrators need not be foreign armies, but could be rogues in a domestic "standing army" who, by systematically usurping power for themselves through violations of "the Laws of the Union", surreptitiously "invade" the centers of governmental authority and become effectively an "army of occupation" through stealth rather than shooting.[3857] Politically it would be more prudent, then, to build up the Militia to the point at which they could "repel Invasions" by any conceivable foreign forces—either in concert with the Armed Forces, or even on their own—so that an excessive reliance would not have to be placed upon, and excessive power surrendered to, the Armed Forces.

(iii) On the other hand, "Invasions" that are *entirely political* in nature must also be considered. These occur when large numbers of American public officials in influential positions exhibit an attachment to some foreign nation so politically unnatural and inordinate as to be pathological, in that they transfer their primary loyalties to that nation and misuse their positions in government in order to advance its interests at the expense of the United States or their own States. The causative factors may be traceable to matters of race, religion, cultural affinity, ideology, bribery, blackmail, or other improper source, motive, or consideration. Some of these individuals may have had such a foreign loyalty inculcated into them while impressionable youths; others may have eagerly cultivated it only later on in order to advance their careers or swell their personal estates; and still others may have reluctantly acceded to it under pressure in order to evade exposure of embarrassing events earlier in their lives. Whatever the origin of this perverse phenomenon in individual cases, its danger to the country as a whole was cogently explained by George Washington:

> [N]othing is more essential than that * * * passionate attachments for other[Nations] should be excluded; and that in place of them just & amicable feelings towards all should be cultivated. * * * [A] passionate attachment of one Nation for another produces a variety of evils. Sympathy for the favourite nation, facilitating the illusion of an imaginary common interest, in cases where no real common interest exists, and infusing into one the enmities of the other, betrays the former into a participation in the quarrels & Wars of the latter, without adequate inducement or justification: It leads also to concessions to the favourite Nation of priviledges denied to others, which is apt doubly to injure the

[3857] This process is sometimes denominated a "cold *coup*".

> Nation making the concessions—by unnecessarily parting with what ought to have been retained—& by exciting jealousy, ill will, and a disposition to retaliate, in the parties from whom eq[ua]l priviledges are withheld: And it gives to ambitious, corrupted, or deluded citizens (who devote themselves to the favourite Nation) facility to betray, or sacrifice the interests of their own country, without odium, sometimes even with popularity; gilding with the appearances of a virtuous sense of obligation[,] a commendable deference for public opinion, or a laudable zeal for the public good, the base or foolish compliances of ambition[,] corruption[,] or infatuation.
>
> As avenues to foreign influence in innumerable ways, such attachments are particularly alarming to the truly enlightened and independent Patriot. How many opportunities do they afford to tamper with domestic factions, to practice the arts of seduction, to mislead public opinion, to influence or awe the public Councils! * * *
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> Against the insidious wiles of foreign influence, * * * the jealousy of a free people ought to be *constantly* awake; since history and experience prove that foreign influence is one of the most baneful foes of Republican Government. * * * Real Patriots, who may resist the intrigues of the favourite, are liable to become suspected and odious; while its tools and dupes usurp the applause & confidence of the people, to surrender their interests.
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> The Great rule of conduct for us, in regard to foreign Nations is * * * to have with them as little *political* connection as possible.[3858]

The legal consequence of "passionate attachments" to foreign nations (and, especially today, to international and *supra*-national organizations) on behalf of America's public officials, and of those officials' inevitable seduction and corruption by "the insidious wiles of foreign influence", should be pellucid. In the *pre*-constitutional era, Blackstone described in detail that

> species of offences, more immediately against the king and government, [which] are entitled misprisions and contempts.
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> MISPRISIONS (a term derived from the old French, *mespriss*, a neglect or contempt) are * * * generally understood to be all such high offences as are under the degree of capital, but nearly bordering thereon: and it is said, that a misprision is contained in every treason and felony whatsoever * * * . Misprisions are generally divided into two sorts; negative, which consist in the concealment of something which ought to be revealed; and positive, which consist in the commission of something which ought not to be done.
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[3858] Farewell Address, *ante note* 3366, at facsimile pages 23-25.

> * * * MISPRISIONS, which are * * * positive, are generally denominated *contempts* or *high misdemeanors*; of which
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> 1. THE first and principal is the *mal-administration* of such high officers, as are in public trust and employment. This is usually punished by the method of parliamentary impeachment: wherein such penalties, short of death, are inflicted as to the wisdom of the house of peers shall seem proper; consisting usually of banishment, imprisonment, fines, or perpetual disability. * * * Other misprisions are, in general, such contempts * * * as demonstrate themselves by some arrogant and undutiful behaviour towards the king and government. These are
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> 2. CONTEMPTS against the king's *prerogative*. As * * * by preferring the interests of a foreign potentate to those of our own, or doing or receiving any thing that may create an undue influence in favour of such extrinsic power[.][3859]

Today, of course, Americans recognize no "king's *prerogative*". For WE THE PEOPLE themselves are America's sovereigns.[3860] But public officials surely demonstrate "CONTEMPT[ ]" against THE PEOPLE'S sovereignty "by preferring the interests of a foreign potentate to those of our own [country], or doing or receiving any thing that may create an undue influence in favour of such extrinsic power". Therefore, any such "preferring" should constitute a "high * * * Misdemeanor[ ]", warranting "Impeachment", "Conviction", and "remov[al] from Office", and after that other appropriate punishment.[3861] Of course, the practical problem is that when too many rogue officials develop intensely "passionate attachments" for foreign nations and international organizations, and succumb to "the insidious wiles of foreign influence", normal procedures such as impeachment and prosecution cannot be had. Then, extraordinary measures must be undertaken.

In situations of this type that involve rogue civilian officials, the Armed Forces would be of little use, except perhaps for such specialized activities as the collection and analysis of foreign intelligence. Rather, the Militia would be best equipped to handle these matters, for two reasons:

First, because these situations would always implicate "the Laws of the Union", from violations of governmental codes of ethics and regulations of election-campaigns to subversion and outright espionage. At the very minimum, when disloyal public officials act as agents of influence on behalf of some foreign nation, they break their "Oath[s] or Affirmation[s], to support *this* Constitution", which

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[3859] *Commentaries on the Laws of England, ante* note 142, Volume 4, at 119, 121-122. In this, Blackstone closely followed W. Hawkins, *A Treatise of The Pleas of the Crown, ante* note 434, Book I, Chapter XX, § 1, *and* Chapter XXII, §§ 1 and 3, at 55-56, 59.

[3860] *See* Chisholm v. Georgia, 2 U.S. (2 Dallas) 419, 454, 456 (opinion of Wilson, J.), 471-472 (opinion of Jay, C.J.) (1793).

[3861] *See* U.S. Const. art. II, § 4; *and compare* U.S. Const. art. I, § 3, cl. 7 *with, e.g.,* 18 U.S.C. §§ 241 and 242.

misbehavior not only amounts to what Blackstone called "the *mal-administration* of such high officers * * * usually punished by the method of parliamentary impeachment", but also should be treated as a serious crime against every one of their constituents.[3862] And the very first constitutional responsibility of the Militia is "to execute the Laws of the Union".

Second, because of the insidious nature of the wrongdoing, the danger to "a free people" and "Republican Government" in situations of this kind would be particularly acute. In contrast to an open invasion by foreign troops at one or a few points around the periphery of the country, domestic agents of foreign influence who posture as loyal Americans work their wiles under cover as well as color of law and throughout the interior of this country, "tamper[ing] with domestic factions", "practic[ing] the arts of seduction", "mislead[ing] public opinion", and "influenc[ing] and aw[ing] the public Councils" in ways that become apparent only to those who are both authorized and able to apply the closest scrutiny to the actions and especially the motivations of suspicious public officials. Revitalized Militia would be perfectly positioned to deal quickly and decisively with these matters, however. For they could investigate public officials, expose alien influences, compile evidence, and compel the application of appropriate legal sanctions to wrongdoers.[3863]

(2) "[T]he Militia of the several States" are *legally superior* to "the Army and Navy of the United States" and to the States' "Troops, or Ships of War", for at least three reasons:

(a) The Militia are "the body of the people, trained to arms".[3864] "[T]he body of the people" consists of almost all of WE THE PEOPLE—for in the common parlance of *pre*-constitutional times, "the *body* of the people" meant "[a] collective mass; a joint power" and "[t]he main part; the bulk",[3865] just as later it meant and still means "the main, central, or principal part"[3866] and "[a] number of individuals spoken of collectively, usually as united by some common tie, or as organized for some purpose; a collective whole or totality".[3867] WE THE PEOPLE are America's sovereigns.[3868] Therefore, the Militia consist of "the body of the [sovereigns], trained

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[3862] *Compare* U.S. Const. art. VI, cl. 3 (emphasis supplied) *with* 18 U.S.C. §§ 241 and 242.

[3863] *See ante*, at 956-963.

[3864] Virginia Declaration of Rights (1776) art. 13.

[3865] S. Johnson, *Dictionary*, *ante* note 50, definition 5 in both the First (1755) and the Fourth (1773) Editions, and definitions 9 in the First Edition and 8 in the Fourth.

[3866] *Webster's Revised Unabridged Dictionary*, *ante* note 11, at 162, definition 2. *Accord, Webster's New International Dictionary, ante* note 330, at 301, definition 2.

[3867] *Webster's Revised Unabridged Dictionary*, *ante* note 11, at 162, definition 5. *Accord, Webster's New International Dictionary, ante* note 330, at 301, definition 13.

[3868] *See* Chisholm v. Georgia, 2 U.S. (2 Dallas) 419, 454, 456 (opinion of Wilson, J.), 471-472 (opinion of Jay, C.J.) (1793).

to arms"—that is, "the main part" and "the bulk", up to the "collective whole or totality", of the sovereigns organized for the assertion of their sovereignty through collective self-defense. In contrast, "the Army and Navy of the United States" and the States' "Troops, or Ships of War" do not now include, and never have included, within their ranks "the main part" or "the bulk" of the populace of the United States or of any State. At best, "the Army and Navy of the United States" and the States' "Troops, or Ships of War" are the mere "shadow[s]" of the people, whereas the Militia are "the substance, as opposed to the shadow".[3869] Therefore, the regular Armed Forces can lay no claim whatsoever to being themselves institutions somehow invested with sovereignty, as opposed to being the mere instruments of THE PEOPLE'S sovereignty.

(b) The Militia are permanent components of the Constitution's federal system, in that respect at least equal in constitutional status to the States, Congress, the President, and the Supreme Court. Indeed, inasmuch as the Militia were the only organized armed forces with which Americans began "to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle[d] them" even before and then under the aegis of the Declaration of Independence, and would be called upon again if "the People" were to exercise their "Right * * * to alter or to abolish" the present "Form of Government" by force should it become "destructive of the[ ] ends" for which it was "institute[d]", the Militia are undoubtedly of an *extra*-constitutional status superior to Congress, the President, and the Supreme Court, and arguably to the States as well. In contrast, the regular Armed Forces of both the General Government and the States are merely contingent establishments.

(c) Because the Constitution explicitly "reserv[es] to the States respectively, the Appointment of the Officers, and the Authority of training the Militia",[3870] no officers of "the Army and Navy of the United States" enjoy any authority to issue commands to any Militiaman—except for the President, and then only in his separate, specific capacity as "Commander in Chief * * * *of the Militia*", not as "Commander in Chief *of the Army and Navy of the United States*" or simply as the President.

Congress, however, could authorize "Officers" of the Militia to supervise personnel in the Armed Forces, by "provid[ing] for calling forth the Militia to execute th[os]e Laws of the Union" that constituted the "Rules for the Government and Regulation of the land and naval Forces".[3871] "[T]he Army and Navy" could not complain about such an arrangement, either, because the Constitution neither

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[3869] *See Webster's Revised Unabridged Dictionary, ante* note 11, at 162, definition 3.

[3870] U.S. Const. art. I, § 8, cl. 16.

[3871] *See* U.S. Const. art. I, § 8, cls. 15 and 14.

assigns to them any explicit authority or responsibility "to execute the Laws of the Union" in general, nor designates them as the sole or final executors of the "Rules for the Government and Regulation of the land and naval Forces" in particular. And Congress could surely determine that, in order to control this country's "standing armies", it would be "necessary and proper" "[t]o make [a] Law" for carrying into Execution the * * * Power[ ]" "[t]o make Rules for the Government and Regulation of the land and naval Forces" by "calling forth the Militia" in a supervisory capacity in order to insure that those "Rules" were being properly "execute[d]".[3872]

Moreover, in the absence of some controlling statute of Congress, as "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States" with a duty to "take Care that the Laws be faithfully executed", the President himself is authorized to deploy political liaison officers from the Militia within the Armed Forces, and to order the Armed Forces to accept such oversight.[3873] On the other hand, the Militia could arrest a rogue "Commander in Chief of the Army and Navy of the United States" were that necessary "to execute the Laws of the Union" such a President was violating, or to "suppress [an] Insurrection[ ]" he was leading or in which he was participating. The Militia would even be entitled to disregard any purported orders from him to the contrary, on the grounds that their compliance with such orders would not constitute "the *actual* Service of the United States", because: (i) in promulgating such orders the individual in "the Office of President" was not acting in his constitutional capacity of "Commander in Chief * * * of the Militia" at all, but instead was violating both his "Oath or Affirmation" of office and his duty to "take Care that the Laws be faithfully executed"; and (ii) establishments to which the Constitution delegates the authority and responsibility "to execute the Laws of the Union" can never be ordered to violate those "Laws".[3874]

In addition, no officers in such regular "Troops, or Ships of War" as the States may "keep * * * in time of Peace" may be licensed to command members of the States' Militia. For "[n]o State shall, without the Consent of Congress, * * * keep Troops, or Ships of War in time of Peace".[3875] And Congress cannot condition such "Consent" on a requirement that the States' "Troops" must or even may control the States' Militia, because in either event the Militia would then become parts of or subordinate to the States' "Troops" by the contrivance of Congress or (worse yet) by connivance between Congress and the States, in violation of the

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[3872] *See* U.S. Const. art. I, § 8, cl. 18.

[3873] *See* U.S. Const. art. II, § 2, cl. 1 and § 3.

[3874] *See* U.S. Const. art. I, § 8, cl. 15 *and* art. II, § 2, cl. 1 (emphasis supplied); art. II, § 1, cl. 7; *and* art. II, § 3. *See ante*, at 871-880.

[3875] U.S. Const. art. I, § 10, cl. 3.

Constitution's categorical separation of "the Militia of the several States" from the States' "Troops, or Ships of War".[3876]

On the other hand, Congress could condition its "Consent" for the States to "keep Troops, or Ships of War in time of Peace" on those forces' being subject to supervision in each State by her Militia (or perhaps by the Militia of some other State). In contradistinction to the improper subordination of the Militia to State "Troops", an arrangement of that kind would be perfectly constitutional, because it would involve "calling forth the Militia to execute the Laws of the Union" that related to Congress's "Consent" for those "Troops, or Ships of War" to exist in the first place. Congress certainly may determine that it is "necessary and proper for carrying into Execution" its authority to allow the States to "keep Troops, or Ships of War" to employ the very institutions the Constitution assigns "to execute the Laws of the Union" in order to ensure that the States comply with the implicit constitutional requirement that the "Troops, or Ships of War" for which Congress gives its "Consent" always behave in a lawful manner.[3877]

A State would not need "the Consent of Congress" to "keep Troops, or Ships of War" in time of "War", or if she were "engage[d] in War" because "actually invaded, or in such imminent Danger as will not admit of delay".[3878] Nonetheless, even under such circumstances Congress could decide that it was "necessary and proper" to "call forth[ ] the Militia" of that or some other State to supervise those "Troops" and "Ships", on the grounds that: (i) "the Law[ ] of the Union" which allows the States to "keep Troops" and "Ships" is the Constitution; (ii) the Constitution sets out the condition that such "Troops" and "Ships" may be "ke[pt]" only in time of "War" or for the particular purpose of repelling an "actual[ ]" or "imminent" invasion; and therefore (iii) in aid of "execut[ing]" the Constitution, the Militia may supervise the State's "Troops" and "Ships" so as to ensure that they are deployed at such a time and for such a purpose alone.

(3) The Constitution implicitly presumes that "the Militia of the several States" will always be *operationally superior* to "the Army and Navy of the United States" in whatever ways may be necessary and sufficient for the Militia to serve as effective "checks and balances" against rogue "standing armies". This is self-evident: For to remain politically and legally superior to the regular Armed Forces *in fact*, and well as in political and legal principle, the Militia must always retain operational superiority as to them *in fact* wherever and whenever such superiority is most important.

[3876] *See generally, e.g.,* Kathleen M. Sullivan, "Unconstitutional Conditions", 102 *Harvard Law Review* 1413 (1989). *See ante*, at 1304, notes 2642 and 2643 & accompanying text.

[3877] *See* U.S. Const. art. I, § 8, cl. 18.

[3878] U.S. Const. art. I, § 10, cl. 3.

The most obviously efficacious operational "checks and balances" against rogue "standing armies" fall into two categories: deterrence, and resistance if deterrence fails:

(a) The first line of operational superiority is *deterrence by timely exposure*. If rogues in the Armed Forces cannot plot in secret, their schemes will all die aborning, and may not even be set into motion in the first place. Living in a self-governing Republic, WE THE PEOPLE must acquire complete and accurate information as to everything subject to their governance. The Armed Forces must be subject to the closest possible governance. Therefore, THE PEOPLE must conduct day-to-day oversight of the Armed Forces. Being well advised, however, by the admonition *Quis custodes custodiet?*[3879] THE PEOPLE cannot safely leave such supervision to personnel in the Armed Forces or to THE PEOPLE'S civilian "representatives", either or both of whom might turn rogue. (If such *laissez-faire* has ever been possible, the mushrooming growth of "the military-industrial complex" since World War II proves that it is now neither practical nor prudent.) So THE PEOPLE must ask the further question, *Quis custodes custodire potest?*[3880] In the present situation, that question has but one answer: *THE PEOPLE themselves*. And, in their Militia, THE PEOPLE themselves comprise the perfect institutions to perform the task. The Constitution imposes on the Militia the responsibility to guarantee "the security of a free State" against "large military establishments and standing armies" which may afford "facile means * * * to ambitious and unprincipled rulers to subvert the government or trample upon the rights of the people".[3881] The Constitution endows the Militia with the authority and responsibility "to execute the Laws of the Union".[3882] As the ultimate beneficiaries of "the security of a *free* State", the members of the Militia are possessed of every personal incentive linked to liberty and the pursuit of happiness to engage in such supervision. And the Militia dispose of a plenitude of personnel capable of doing the job.

Thus, acting on the precept that "knowledge is power", revitalized Militia can best preserve their operational superiority to "the Army and Navy of the United States" by being "call[ed] forth to execute the Laws of the Union" that pertain to the "Rules for the Government and Regulation of the land and naval Forces" enacted by Congress;[3883] and their operational superiority to the States' "Troops, or Ships of War" by having Congress condition its "Consent" for the States to "keep Troops, or Ships of War in time of Peace" on those forces' being subject to

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[3879] "Who shall guard the guardians?"

[3880] "Who is able to guard the guardians?"

[3881] *See* J. Story, *Commentaries on the Constitution, ante* note 576, Volume 2, § 1897, at 646, *explaining* U.S. Const. amend. II.

[3882] *See* U.S. Const. art. I, § 8, cl. 15.

[3883] *See* U.S. Const. art. I, § 8, cls. 15 and 14.

supervision in each State by her Militia.[3884] Such oversight will deter the Armed Forces from going rogue, and in the event that deterrence fails will provide an early warning which will enable the Militia and loyal elements in the Armed Forces to intervene and prevent the rogues from doing too much damage.

(b) The second line of operational superiority is *deterrence by expectation of defeat*. If rogues in the Armed Forces recognize that any attempt to impose "martial law" on this country will arouse THE PEOPLE against them in a firestorm which regular troops and *para*-military police cannot possibly quench, even complots that have been successfully kept secret will wither on the vine.

(c) The second line of operational superiority depends, however, on the third and final line, which is *actual resistance by THE PEOPLE that cannot be overcome*. *How* revitalized Militia can preserve operational superiority over well organized, equipped, and trained rogue Armed Forces *in the field*, of course, poses the main problem.

In the nature of things, no matter how "well regulated" they might come to be, the Militia could probably never maintain a thoroughgoing technical superiority over the regular Armed Forces on every point of organization, arms and other equipment, discipline, training, and so forth relevant to modern military operations. So instead of attempting to compete in all of these areas, the Militia should take advantage of their unique, inherent, and permanent source of superiority over the Armed Forces: namely, their identity with WE THE PEOPLE. Being composed of THE PEOPLE, the Militia will always be imbued with the correct political attitude for any military establishment which truly intends to "Serve the People"—that is, to guarantee "the security of a free State" by remaining "wholly dedicated to the liberation of the people and work[ing] entirely in the people's interest".[3885] Because the Militia *are* THE PEOPLE, they will always have on their side not only THE PEOPLE'S "hearts and minds" to lend moral support, but also THE PEOPLE'S hands to labor at whatever work may be necessary. Being THE PEOPLE, the Militia will always vastly outnumber the Armed Forces. And being dispersed in every Local community throughout America where THE PEOPLE actually live and work, the Militia will always enjoy the benefits of specialized knowledge, experience, and skills acquired, put to use, practiced, and perfected over long periods of time in all sorts of circumstances—none of which the Armed Forces could possibly duplicate.

A PEOPLE as numerous as Americans, armed to the teeth, defending a land as extensive as the United States with the tried and true strategies and tactics of *guerrilleros* or "irregulars", and determined to remain free, cannot be conquered. Indeed, in light of the successes of popular resistance-movements against British

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[3884] *See* U.S. Const. art. I, § 10, cl. 3.

[3885] *Compare* U.S. Const. amend. II *with Quotations From Chairman Mao, ante* note 28, at 172.

repression on the relatively small islands of Ireland (during and after World War I) and Cyprus (after World War II)—even with the British in complete control of ingress and egress by both air and sea, with the forces of occupation able to draw upon secure bases overseas, and with the indigenous freedom fighters possessed of little more than small arms, scanty supplies of ammunition, and only a few explosive devices—the notion that "martial law" could suppress some three hundred million people in physical control of most of the territory within a massive swath across the continent of North America, a great many of them both well armed and incensed against their oppressors, is ludicrous.[3886]

So, to establish and maintain their operational superiority as "checks and balances" against "standing armies", revitalized "Militia of the several States" should develop the highest possible degree of proficiency in *guerrilla* and other "irregular" operations. This is the natural way for WE THE PEOPLE to conduct a "people's war" against both foreign aggressors and especially domestic usurpers and tyrants. For any "people's war" is at base a *political* struggle, a collective act of self-defense that aims to secure sovereignty for "the people" "'out of the barrel[s] of [the] gun[s]'" they hold in their very own hands.[3887]

Besides playing to the Militia's overwhelmingly strong suit of identity with THE PEOPLE, an emphasis on preparation for *guerrilla* resistance would prove both inexpensive and convenient, important considerations were the Militia to be revitalized during a period of economic stringency. *First*, a great deal of new and costly equipment would not be required—for most patriotic Americans who already possessed firearms suitable for Militia service would probably also possess enough other useful items to fit out a typical *résistant's* minimum kit. *Second*, manuals of instruction, and even actual instructors, for the full range of *guerrilla* operations would be readily available (just as they are today[3888])—although, of course, Militia across the country would need to tailor the basic principles of such operations to the peculiar resources, advantages, and problems their own Localities offered and

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[3886] *See, e.g.,* Commandant General Tom Barry, *Guerilla Days in Ireland* (Dublin, Ireland: Anvil Books, 1989); J.B.E. Hittle, *Michael Collins and the Anglo-Irish War: Britain's Counterinsurgency Failure* (Washington, D.C.: Potomac Books, Inc., 2011); *The Memoirs of General Grivas*, Charles Foley, Editor (New York, New York: Frederick A. Praeger, Inc., 1964). *See generally, e.g.,* Robert Taber, *War of the Flea: The Classic Study of Guerrilla Warfare* (Washington, D.C.: Potomac Books, Inc., 2002); Friedrich August Freiherr von der Heydte, *Modern Irregular Warfare in Defense Policy and as a Military Phenomenon*, George Gregory, Translator (New York, New York: New Benjamin Franklin House, 1986).

[3887] *Compare Quotations From Chairman Mao, ante* note 28, at 61 *with* R. Taber, *War of the Flea, ante* note 3882, at 10.

[3888] *See, e.g.,* Department of the Army, *U.S. Army Guerrilla Warfare Handbook* (New York, New York: Skyhorse Publishing, Inc., reprint of the original Field Manual, 2009); Department of the Army, *U.S. Army Improvised Munitions Handbook* (New York, New York: Skyhorse Publishing, Inc., reprint of the original Field Manual, 2012); *The Partisan's Companion: The Guerrilla Fighter's Handbook* (3rd Edition, 1942), *translated as The Red Army's Do-It-Yourself Nazi-Bashing Guerrilla Warfare Manual*, Lester Grau and Michael Gress, Editors (Havertown, Pennsylvania: Casemate Publishers, 2011).

presented. *Third*, training could be accomplished Locally, where the future *guerrilleros* lived, and on an efficient part-time basis. *Fourth*, as the training in each Locality would necessarily focus on the specific strategies and tactics future *résistants* and other partisans would employ in the event of some oppressors' declaration of "martial law" in that particular area, literally hundreds or even thousands of experiments could be performed, both on sand-tables and in the field, in order to devise and perfect the best possible methods for conducting campaigns of resistance in a wide range of different situations—thus insuring the defeat of any "standing army" or *para*-military constabulary which relied upon only a few largely theoretical "school solutions" of counterinsurgency.

Moreover, nothing precludes the Militia from developing other novel techniques to thwart a rogue "standing army". Pointing to contemporary "private militias" as their models, opponents sneeringly predict that revitalized Militia will turn out to be ill-regulated gaggles of poorly educated misfits from the margins of society which will provide little if any real security to their communities, in comparison to professional Armed Forces (such as the Army and the National Guard) and civilian *para*-military police departments. Such predictions fail to take into account, however, that, upon revitalization of the Militia, existing State and Local police forces, Sheriffs' departments, and other law-enforcement and emergency-services agencies will be absorbed into and deployed by the Militia as units of specialists akin to the "Rangers" and "Minutemen" of the *pre*-constitutional era.[3889] That will leave the Militia to be compared with the Armed Forces alone. And such a comparison will be anything but unfavorable to the Militia.

Nothing particularly distinguishes individuals in the Armed Forces as such from everyone else in society. So, man for man and woman for woman, the individuals who will serve in revitalized Militia can be expected to be just as capable as their counterparts in the Armed Forces. Indeed, they will probably prove to be more capable, because revitalized Militia in every State will draw upon tens and even hundreds of thousands of individuals from all walks and stages of life, with far more diverse backgrounds, educations, knowledge, skills, accomplishments, and experiences than the typical individuals serving in the Armed Forces. In addition, upon their return to civilian life, many soldiers demobilized from the Armed Forces will be required to enroll in or will volunteer for the Militia, bringing with them whatever specialized training, expertise, and experience they acquired during their previous service.

Of course, training is largely what separates a "civilian" from a "soldier" in practice. Once the Militia are revitalized, though, their members will be offered and often required to engage in training in many ways equal, and in some ways even

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[3889] *See ante*, at 327-328, 1135-1138, 1194-1202, 1276-1277, 1291-1292, and 1482-1488.

superior, to the training personnel in the Armed Forces will normally receive. The Constitution "reserv[es] to the States respectively * * * the Authority of training the Militia according to the discipline prescribed by Congress".[3890] That "discipline" must prepare the Militia to perform the three purposes for which they may be "call[ed] forth" to "be employed in the Service of the United States": namely, "to execute the Laws of the Union, suppress Insurrections and repel Invasions".[3891] Because the Militia may well need to work in close coöperation with the Armed Forces to "suppress Insurrections" and especially to "repel Invasions", Congress will need to "prescribe[ ]" military and *para*-military "discipline" for the Militia that at least approximates the Armed Forces' standards. On the other hand, Congress will also have to "prescribe[ ]" for the Militia "discipline" specifically tailored to "execut[ing] the Laws of the Union", necessitating types of training to which few in the Armed Forces, other than military police and lawyers, will ever be exposed. So, on that score, man for man the Militia's training will actually exceed the Armed Forces' standards. In addition, each of the several States will train her own Militia to perform "homeland-security" duties peculiar to that State. So, as to those matters, the Militia will be trained in numerous ways that next to no personnel of the Armed Forces will ever experience. In short, anything the Armed Forces will be able to do in certain of the areas of responsibility that the Constitution assigns to the Militia the Militia will be able to do equally well. And many things that the Militia will be able to do in other areas of their responsibility the Armed Forces will be unprepared to do.

c. All of the foregoing is well and good enough in principle. The question remains, nonetheless, how to insure that "the Militia of the several States" *are* always maintained separate from, independent of, and superior to the regular Armed Forces in actual practice. To answer this question, one needs to ask how designing men in public office might attempt to eliminate—and, indeed, have largely eliminated—the Militia as viable "checks and balances" against rogue Armed Forces. The ultimate goal of such miscreants must be to preclude the very possibility of organization of all eligible Americans in the Militia in each and every State, by convincing them that they need not be organized, and then depriving them of the firearms, ammunition, and accoutrements required in order to field effective Militia, so that even if by some miracle they disabuse themselves of the party line, realize that they have the right, power, and duty to be organized, and recognize the need to organize in order to defend themselves against usurpation and tyranny, they will neither possess nor be able to acquire the necessary equipment.

(1) The most obvious way for rogue public officials to proceed would be openly and formally to disestablish the Militia in their entireties. Then people

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[3890] U.S. Const. art. I, § 8, cl. 16.

[3891] U.S. Const. art. I, § 8, cls. 15 and 16.

promoting revitalization of the Militia would be merely whistling in the wind. Even for the most blatant of usurpers, however, this would be impossible without excising from the Constitution all of its references to the Militia.[3892] And such a formal disestablishment would require ratification of a new constitutional Amendment, during the national debate on which the true significance of the Militia might just come to the fore—leading not to disestablishment but to revitalization.

(2) Inasmuch as rogue officials do not dare—so far—to attempt to disestablish the Militia openly, they must try to destroy them through stealth. To a large extent this has already been accomplished, by inventing an imaginary "militia of the United States" unknown to the Constitution, denoting the National Guard and the Naval Militia as "the organized militia" when they are not any sort of "militia" at all, and consigning every individual not enrolled in those establishments to "the unorganized militia", which for all intents and purposes is nothing more than an empty and useless shell.[3893] Because these political ploys merely play deceptively on words, though, they could easily be thwarted by revitalization of the true Militia. Substantively, nothing would need to be changed with respect to the National Guard and the Naval Militia. It would be enough for officials of the General Government and the States simply to stop using the misnomers "militia of the United States" and "organized militia" in reference to those two establishments; and instead candidly to admit that they consist of the "Troops, or Ships of War" the States may "keep * * * in time of Peace" "with[ ] the Consent of Congress",[3894] with all of the legal and other consequences that admission entails.

(3) Another method by which the Militia have been and are being suppressed through stealth is "gun control". By convincing Americans that, at most, "the right of the people to keep and bear Arms" is a so-called "*individual* right" not necessarily connected to the Militia[3895]—and that therefore "the people" enjoy no constitutional right to participate collectively in "well regulated Militia" according to *pre*-constitutional principles—the enemies of "a free State" have deprived "the people" of the very institutions the Constitution itself declares to be "*necessary* to the security of a free State".[3896] In addition, "gun control" deprives "the people" of the specific types of firearms, ammunition, and accoutrements most suitable for Militia service under contemporary conditions[3897]—so that "the people" cannot

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[3892] U.S. Const. art. I, § 8, cls. 15 and 16; art. II, § 2, cl. 1; *and* amends. II and V.

[3893] *See* 10 U.S.C. § 311.

[3894] *See ante,* at 786-793.

[3895] *See* District of Columbia v. Heller, 554 U.S. 570, 576-578, 598-605 (2008) (Scalia, J., for the Court).

[3896] U.S. Const. amend. II (emphasis supplied).

[3897] *See, e.g.,* the egregious *dicta* in District of Columbia v. Heller, 554 U.S. 570, 592, 626 (2008) (Scalia, J., for the Court).

easily prepare themselves for revitalization of the Militia by their legislators in the normal course of events, let alone through their own efforts if they are compelled to assert "the right of restoration" against rogue public officials in extraordinary circumstances.[3898] Of course, when WE THE PEOPLE have once and for all disabused themselves of such false interpretations of the Second Amendment, revitalization of the Militia will entirely alleviate these problems.

(4) The most insidious tactic for effectively nullifying the Militia involves absorbing directly into the Armed Forces those individuals most useful to the Militia. This process is doubly destructive. On the one hand, it depletes the Militia, rendering ineffective the very institutions intended to serve as "checks and balances" against "the standing army", and otherwise "necessary to the security of a free State". On the other hand, it balloons "the standing army", the very domestic institution most dangerous to "the security of a free State". This tactic is employed in two ways:

(a) Many individuals interested in military service as "citizen-soldiers" voluntarily join the National Guard and the Naval Militia under the mistaken impression that these establishments are constitutional "militia", when in fact they consist of the "Troops, or Ships of War" the States may "keep * * * in time of Peace" "with[ ] the Consent of Congress" as adjuncts to "the Army and Navy of the United States".[3899] This removes probably the most highly motivated individuals from the pool of those eligible for the Militia in their communities. It also convinces almost everyone else who bothers to think about the subject at all that "militia" do exist in their States, but that (fortunately for them) they are not required to enroll. That, of course, fosters precisely the insouciance, self-centeredness, and sloth which concerned Joseph Story in the 1830s, when he warned that

> among the American people, there is a growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burdens, to be rid of all regulations. How it is practicable to keep the people duly armed without some organization it is difficult to see. There is certainly no small danger that indifference may lead to disgust, and disgust to contempt; and thus gradually undermine all the protections intended by [the Second Amendment.][3900]

"[U]ndermine" is not the half of it, though. For if the supposed "organized militia" actually consists of State "Troops, and Ships of War" committed to possible service with "the Army and Navy of the United States", and if the remainder of Americans

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[3898] *See ante*, Chapter 32.

[3899] U.S. Const. art. I, § 10, cl. 3. *See ante*, at 786-793.

[3900] *Commentaries on the Constitution, ante* note 576, Volume 2, § 1897, at 646 (footnote omitted).

eligible for the Militia are consigned to a supposed "unorganized militia", then *of course* it will prove "[*im*]practical to keep the people *duly* armed", and *of course* "all the protections intended by [the Second Amendment]" will ultimately be lost.

Yet, as observed above, this problem can be solved, not by significantly restructuring the National Guard and the Naval Militia, but simply by revitalizing "the Militia of the several States" in a political climate of opinion that demands the transformation of "homeland security" from a "top-down" to a "bottom-up" operation. Once the National Guard and the Naval Militia, on the one side, and "the Militia of the several States", on the other side, are in open competition—with the Militia enjoying the advantage of *preferential compulsory membership* by all eligible individuals from sixteen years of age up—the vast majority will likely prefer to remain in the Militia.[3901]

(b) As with the National Guard and the Naval Militia, today the regular Armed Forces of the United States are made up entirely of volunteers.[3902] Nonetheless, since the 1860s, rogue public officials in the General Government have claimed, and continue to claim, a power to draft any and all individuals into the Armed Forces, in time of peace as well as in time of war, and for any reason. The Constitution, however, delegates no explicit power "to draft", "to impress", or in any other language to require anyone to serve in the "Armies" or the "Navy" of the United States. So advocates of such compulsory service have implied a power "to draft" or "to impress" within Congress's powers "[t]o raise and support Armies", "[t]o provide and maintain a Navy", and "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers".[3903] A power without limitations, too—because its exponents refuse to admit that the phrases "[t]o raise", "[t]o provide", and especially "Laws which shall be necessary and proper" must be construed within the historical and legal contexts in which they first arose.

Such a power of universal impressment in favor of expanding the regular Armed Forces necessarily implies a corresponding power of universal contraction of the Militia, such that "the standing army" may employ the draft even to eliminate

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[3901] "Preferential compulsory membership" would recognize that membership in the Militia is each citizen's primary constitutional duty. Therefore, anyone enrolled in the Militia would need a specific exemption in order to volunteer for the National Guard or the Naval Militia. Such an exemption would not be automatic, either, but would require approval by a Militia exemption board (essentially the opposite of a traditional draft board), which would determine whether the Militia did or did not need that particular individual at that particular time. In light of the very large numbers of Americans eligible for revitalized Militia, sufficient exemptions would probably be allowed for the National Guard and the Naval Militia to maintain their present strengths in terms of numbers, although the Militia could be expected to retain within their ranks most of the enrollees of the highest quality.

[3902] *See, e.g.*, Bernard Rostker, *I Want You! The Evolution of the All-Volunteer Force* (Santa Monica, California: RAND Corporation, 2006).

[3903] U.S. Const. art. I, § 8, cls. 12, 13, and 18.

all "checks and balances" emanating from the Militia, by bleeding the Militia into impotence. *And such a transfusion of the Armed Forces with the lifeblood of the Militia could* ***not*** *be cut back, let alone cut off, simply by revitalizing the Militia.* The question then becomes, "How can too great an absorption into the regular Armed Forces of individuals eligible for the Militia be prevented?" As with so many political conundrums these days, the answer is that the reigning misconstruction of the Constitution on this score must first be exposed and corrected. Which actually is a solution simpler than it appears, because the notion that Congress possesses an unlimited power to draft individuals into the Armed Forces collapses rather readily in the face of history and sound legal analysis.

B. The practice of impressment in *pre-*constitutional law and history. As with the true meaning of the power of Congress "[t]o provide for organizing, arming, and disciplining, the Militia" and of "the right of the people to keep and bear Arms", one must turn first to *pre-*constitutional experience in order to determine how to construe, in relation to the Militia, the powers of Congress "[t]o raise and support Armies" and "[t]o provide and maintain a Navy", and the power of the States to "keep Troops, or Ships of War".[3904] For "[i]n construing * * * a constitution established by the people as the supreme law of the land, regard is to be had, not only to all parts of the act itself, and of any former act of the same law-making power, but also to the condition, and to the history, of the law as previously existing, and in the light of which the new act must be read and interpreted".[3905]

1. *Pre-*constitutional English practice. In his discussion "OF THE MILITARY AND MARITIME STATES" under English law, with respect to the British Army Blackstone observed that

> [T]HE military state includes the whole of the soldiery; or, such persons as are peculiarly appointed among the rest of the people, for the safeguard and defence of the realm.
>
> IN a land of liberty it is extremely dangerous to make a distinct order of the profession of arms. In absolute monarchies this is necessary for the safety of the prince, and arises from the main principle of their constitution, which is that of governing by fear: but in free states the profession of a soldier, taken singly and merely as a profession, is justly an object of jealousy. In these no man should take up arms, but with a view to defend his country and it's laws: he puts not off the citizen when he enters the camp; but it is because he is a citizen, and would wish to continue so, that he makes himself for a while a soldier. The laws therefore and the constitution of these kingdoms [that is, England,

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[3904] *See ante*, Chapter 1.

[3905] United States v. Wong Kim Ark, 169 U.S. 649, 653-654 (1898).

Scotland, and Ireland] know no such state as that of a perpetual standing soldier, bred up to no other profession than that of war * * * .

* * * * *

UPON the Norman conquest the foedal law was introduced here in all it's rigor, the whole of which is built on a military plan. * * * [I]n consequence thereof, all the lands in the kingdom were divided into what were called knight's fees * * * ; and for every knight's fee a knight or soldier, *miles*, was bound to attend the king in his wars for forty days in the year * * * . This personal service in process of time degenerated into pecuniary commutations or aids, and at last the military part of the foedal system was abolished at the restoration [of King Charles II] * * * .

IN the mean time we are not to imagine that the kingdom was left wholly without defence, in case of domestic insurrections, or the prospect of foreign invasion. Besides those, who by their military tenures were bound to perform forty days service in the field, the statute of Winchester [in 1285] obliged every man, according to his estate and degree, to provide a determinate quantity of such arms as were then in use, in order to keep the peace * * * .

* * * * *

SOON after the restoration of king Charles the second, * * * it was thought proper to ascertain the power of the militia, to recognize the sole right of the crown to govern and command them, and to put the whole into a more regular method of military subordination: and the order, in which the militia now stands by law, is principally built upon the statutes which were then enacted * * * the general scheme of which is to discipline a certain number of the inhabitants in every county * * * . They are not compelled to march out of their counties, unless in case of invasion or actual rebellion, nor in any case compellable to march out of the kingdom. They are to be exercised at stated times: and their discipline in general is liberal and easy; but, when drawn out into actual service, they are subject to the rigours or martial law, as necessary to keep them in order. This is the constitutional security, which our laws have provided for the public peace, and for protecting the realm against foreign or domestic violence; and which the statutes declare is essentially necessary to the safety and prosperity of the kingdom.

WHEN the nation [that is, Great Britain] was engaged in war, more veteran troops and more regular discipline were esteemed to be necessary, than could be expected from a mere militia. And therefore at such times more rigorous methods were put in use for the raising of armies and the due regulation and discipline of the soldiery: which are to be looked upon only as temporary excrescences bred out of the distemper of the state, and not as any part of the permanent and perpetual laws of the kingdom. * * *

BUT, as the fashion of keeping standing armies * * * has of late years universally prevailed over Europe * * * it has also for many years

> past been annually judged necessary by our legislature, for the safety of the kingdom, the defence of the possessions of the crown of Great Britain, and the preservation of the balance of power in Europe, to maintain even in time of peace a standing body of troops under the command of the crown; who are however *ipso facto* disbanded at the expiration of every year, unless continued by parliament. * * *
>
> TO prevent the executive power from being able to oppress, * * * it is requisite that the armies with which it is entrusted should consist of the people, and have the same spirit with the people * * * . Nothing then, according to these principles, ought to be more guarded against in a free state, than making the military power, when such a one is necessary to be kept on foot, a body too distinct from the people. Like ours therefore, it should wholly be composed of natural subjects; it ought only to be enlisted for a short and limited time; the soldiers also should live intermixed with the people; no separate camp, no barracks, no inland fortresses should be allowed. And perhaps it might be still better, if, by dismissing a stated number and enlisting others at every renewal of their term, a circulation could be kept up between the army and the people, and the citizen and the soldier be more intimately connected together.[3906]

Most revealing here is the exact parallel that can be drawn between "the main principle of the[ ] constitution[s]" of "absolute monarchies" in and before Blackstone's day and of totalitarian dictatorships in contemporary times: namely, the principle and practice of "governing by fear". In the parlance of both the late 1700s and today, "governing by fear" can be restated as "official terrorism". For the first definition of "terrorism" is "*a mode of government* by terror or intimidation".[3907] And, in the Founding Era, "to intimidate" meant (as it means today) "[t]o make fearful".[3908] Therefore, according to Blackstone (as well as the common sense of modern history), "official terrorism" usually depends upon some type of "standing army", either in the traditional form or quite often today in the deceptively *quasi*-"civilian" form of a *para*-military police-state apparatus (often denominated "the secret police", although its existence and purpose are never kept secret from the masses whom it aims to frighten into submission). For that reason, as Blackstone recommended and America's Founding Fathers embodied in the Militia Clauses of the original Constitution and in the Second Amendment, in a "free state" "the military power, when such a one is necessary to be kept on foot, [should not be] a body too distinct from the people".

[3906] *Commentaries on the Laws of England, ante* note 142, Volume 1, at 407, 409-414 (footnotes omitted).

[3907] *Webster's Revised Unabridged Dictionary, ante* note 11, at 1489 (emphasis supplied). *Accord, The Compact Edition of the Oxford English Dictionary, ante* note 11, Volume 2, at 3268.

[3908] S. Johnson, *Dictionary*, *ante* note 50, in both the First (1755) and the Fourth (1773) Editions. *Accord,* N. Webster, *An American Dictionary, ante* note 15; *Webster's Revised Unabridged Dictionary, ante* note 11, at 781; *Webster's New International Dictionary, ante* note 330, at 1301.

With respect to the *pre*-constitutional British Navy, although Blackstone opined that "[T]HE *maritime* state is * * * much more agreeable to the principles of our free constitution", he also pointed out that

> [t]he power of impressing men for the sea service by the king's commission, has been a matter of some dispute, and submitted to with great reluctance; though * * * the practice of impressing * * * is of very antient date, and hath been uniformly continued by a regular series of precedents to the present time * * * . The difficulty arises * * * that no statute has expressly declared this power to be in the crown, though many of them very strongly imply it. * * * All which do most evidently imply a power of impressing to reside somewhere; and, if any where, it must from the spirit of our constitution, as well as from the frequent mention of the king's commission [in the statutes] reside in the crown alone.
>
> BUT * * * this method of impressing * * * is only defensible from public necessity, to which all private considerations must give way[.][3909]

So, even as to her Navy, always England's first and foremost line of defense, impressment was "only defensible from public necessity", "and submitted to with great reluctance".

Not surprisingly, then, Britain never attempted to impose a draft for her Army in the Colonies. No draft existed in the Mother Country until almost two years after the Colonies declared their independence.[3910] And even these statutes provided only for highly selective drafts similar to those enacted in Virginia during the *pre*-constitutional era.[3911]

2. The practice in the Colonies and then the independent States. Impressment for military service was not foreign to the policy of the Colonies and the independent States.

a. As to the Militia. Impressment with respect to members of the Militia took several forms.

[3909] *Commentaries on the Laws of England, ante* note 142, Volume 1, at 417, 418-419.

[3910] *See* An Act for the more easy and better recruiting of his Majesty's Land Forces and Marines, 18 George III, CAP. LIII, *in* THE STATUTES at LARGE, From the Sixteenth Year of the Reign of KING *GEORGE* the THIRD, To the Twentieth Year of the Reign of KING *GEORGE* the THIRD, inclusive (London, England: Charles Eyre and William Strahan, 1780), Volume 13, at 273, *particularly* §§ IX and X, at 274-275; *superseded by* An Act for repealing an Act, made in the last Session of Parliament, intituled, *An Act for the more easy and better recruiting of his Majesty's Land Forces and Marines*; and for substituting other and more effectual Provisions in the Place thereof, 19 George III, CAP. X, *in* THE STATUTES at LARGE, *ante*, Volume 13, at 316, *particularly* §§ XVI through XIX and XXII, at 318-319; *repealed as to impressment and continued as to volunteers by* An Act to continue, for a limited Time, so much of an Act, made in the last Session of Parliament, *for the more easy and better recruiting his Majesty's Land Forces and Marines*, as relates to the Encouragement of Volunteers, 20 George III, CAP. VII, *in* THE STATUTES at LARGE, *ante,* Volume 13, at 557.

[3911] *See ante,* at 375-382.

(1) The Militia themselves were (and would be today) always and everywhere based upon compulsory service by every able-bodied adult free man from the time he reached the minimum age for enrollment.[3912] So, in both principle and practice, anyone impressed into the regular Armed Forces of a Colony or State was, in effect, transferred from the Militia.

(2) In many instances, drafts were made within the Militia for service with the Militia only.

(a) In Rhode Island, as their name implied, "Minutemen" were *always* subject to call at all times. For example:

> [1775] "That the * * * Minute-Men march for the Defence of the Colony, when and as often as they shall be called upon by the Colonel of the Regiment to which they respectively belong[.]"{EN-2059}

Their exposure to such arduous service, however, was the result of their initial voluntary enlistments in the Militia's Minute Companies.

Otherwise, all Militia service was entirely compulsory—but often mitigated by a process of "draughts" working through rotation:

> • [1776] "That all male Persons subject by Law to bear Arms, whether of the Militia, Alarm List or Independent Companies * * * be draughted in three Divisions * * * .
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> * * * * *
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> " * * * That the Division on actual Duty shall be relieved monthly, in the Order they shall be drawn out, by other Divisions * * * .
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> * * * * *
>
> " * * * [I]n case any Officer or Soldier * * * shall refuse or neglect to appear at Time and Place ordered * * * , either by himself or a good able-bodied and suitable Person in his Stead, to enter upon and perform such military Duty as shall be enjoined him, he shall be subjected to and pay * * * Fines, Forfeitures, and Penalties [.]"{EN-2060}
>
> • [1777] "[T]hat the first division of the second draft of the militia, and alarm and independent companies, heretofore drafted * * * march to such part of the shores within their respective counties, as shall be directed by the commanding officer * * * , properly equipped, to relieve those that are now upon duty, and there to remain and do duty for fifteen days * * * .
>
> * * * * *

[3912] *See ante*, Chapters 5, 16, 34, and 35.

"And * * * in case of sickness and inability to do duty (which alone shall excuse any person), it shall be in the power of * * * the field officers * * * to permit such a person to hire a man to do his tour of duty; and if such sick and unable person shall be so extremely poor * * * as to be unable to hire a person in his stead, that such field officer be empowered to remit such poor person's fine."{EN-2061}

• [1777] "That one of the Divisions, consisting of the One Sixth Part of the Independent and Alarm Companies and the Militia heretofore draughted, and One Half of a Division, be immediately called upon actual Duty * * * : That they continue in Service for the Space of Fifteen Days, and be relieved at the Expiration of said Time by the other half of said Division, and one other Division, in the Order in which said Divisions were drawn, to continue in Service during said Time; and that the Divisions on actual Duty from Time to Time be relieved and do Duty in Manner as is before directed.

* * * * *

" * * * [I]n case any Officer or Soldier * * * shall neglect to appear at Time and Place ordered * * * , either by himself or a good able-bodied and suitable Person in his Stead, compleatly equipped with Arms and Accoutrements, to enter upon and perform such military Duty as shall be enjoined him, he shall be liable to pay as a Fine for each Day's Neglect the Sum of *Five Shillings*[.]"{EN-2062}

• [1777] "That one Half of the Militia, Alarm, Independent, and Artillery Companies, be drafted * * * ; and that the Persons who shall be drafted * * * be duly equipped with Arms and Accoutrements according to Law."{EN-2063}

• [1777] "Whereas * * * one half of the militia, independent, artillery and alarm companies within this State were draughted, and have done duty for one month,—

"It is voted * * * that the remaining half-part of militia, independent, artillery and alarm companies, be draughted into two divisions * * * .

" * * * [O]ne of the said divisions * * * shall march to such place or places as shall be ordered * * * and do duty for the space of thirty days * * * .

* * * * *

" * * * [I]f any person who shall be draughted * * * shall neglect to do duty, or hire a man to do his tour of duty, the town council of the town in which such person shall reside, are empowered to hire a man in the room of such delinquent person, * * * if the delinquent person be adjudged by such town council of sufficient ability to bear the expense thereof[.]"{EN-2064}

• [1777] "[T]hat the militia and alarm company of the town of Little Compton be drafted into two divisions * * * .

"That one of the said divisions do duty within the said town, to guard the shores of the same, for the space of thirty days * * * .

"That after the expiration of the said thirty days, the first division be relieved by the second, who shall do duty within the said town, for the space of thirty days.

"That they continue to relieve each other, and do duty in manner as aforesaid, until the further orders of this Assembly."{EN-2065}

• [1777] "[T]he council of war of this state [may] call forth into actual duty, such part of the militia, independent and alarm companies, within this state, for the defence thereof, as they shall from time to time think necessary, in the order in which they have been draughted, to supply the delinquencies of the quotas to be furnished for the purpose aforesaid, by the states of the Massachusetts Bay, New Hampshire and Connecticut, and in the proportion they shall be deficient therein."{EN-2066}

• [1778] "[I]n case of an alarm, * * * the commander of the troops within this state * * * [shall] be empowered, with the advice and concurrence of * * * the Governor * * * , to call forth the militia, alarm and independent companies, or any part thereof, to do duty, which they shall be held to do, within this state only, unless in cases of imminent danger, when they shall be marched to any place within his command.

* * * * *

" * * * [E]very officer and soldier who shall neglect or refuse to do his duty when so called, and every person who shall be do draughted, and shall not appear, or procure an effective man in his room, shall be * * * punished for disobedience * * * in the same manner as officers and soldiers in actual service may be: excepting persons of tender consciences, for whom the town councils * * * shall provide effective men[.]"{EN-2067}

• [1781] "Twelve Hundred able-bodied effective Men of the Independent, Artillery, Senior and Junior Class Companies of Militia * * * be forthwith embodied; and that they rendezvous at such Places within this State * * * to do Duty therein for One Month * * * .

* * * * *

"*AND* * * * the * * * Commanders of each Regiment * * * shall forthwith issue their Warrants to the Captains of each Company * * * , setting forth the Number of the * * * able-bodied effective Men, which such Company is required to furnish, and commanding such Captain * * * , if the said Number of Men shall not voluntarily turn out to do Duty * * * , to detach the Men for the Service * * * and cause them to be marched to the Place of Rendezvous * * * .

* * * * *

"*AND* * * * the * * * Commanders * * * shall proportion the Men which each Company shall raise according to the Numbers of Men which the Company shall consist of, in Proportion to the whole Number

to be raised by the Town to which such Companies shall respectively belong.

"*AND* * * * the Commanders of each respective Company * * * shall forthwith call their * * * Companies together, and in case the Number of able-bodied effective Men which such Company is required to raise shall not voluntarily turn out to do Duty * * * , that then such Commander shall detach such a Number of Men as will make up their Quota * * * .

"*AND* * * * the [named individuals] appointed to class the Inhabitants of the Islands of *Rhode-Island* and *Jamestown* * * * be * * * empowered and directed, to detach from the Inhabitants of their respective Towns the Number of Men * * * assigned to the said Towns, unless they shall voluntarily engage in the said Service[.]"{EN-2068}

• [1781] "[T]hat the following independent companies, to wit: the Artillery of Providence, the Kentish Guards, the Kingstown Reds and the Pawtuxet Rangers, forthwith turn out one-half of the men belonging to their respective corps, to march to Newport, * * * there to do duty for one month; that the men so furnished by the said independent companies be accounted to the towns to which they respectively belong, and be reckoned as so many men furnished towards their quota of five hundred men * * * ; that the towns of Tiverton and Little Compton forthwith furnish one hundred and two men, to be at Newport * * * to do duty for ten days, which shall be in lieu of their furnishing their quota for one month's service; * * * and that the whole of the aforesaid men * * * shall be excused from doing further duty until the remaining part of the men in their respective towns shall have done an equal tour of duty."{EN-2069}

Actually, these might more accurately be styled as "deployments" or "assignments", rather than "drafts" or "impressments" in the strict sense, because everyone so selected had already been compelled to become a member of the Militia. Rather than being "impressed" in the first instance, these men were "detach[ed]", "turn[ed] out", or "furnish[ed]" for active service, or "called upon actual Duty". Moreover, in practice these drafts were largely voluntary, because in most cases anyone selected for duty could appear "either by himself or a good able-bodied and suitable Person in his Stead". Or "the town council" might be "empowered to hire a man in the room of [a] delinquent person" if he were "adjudged * * * of sufficient ability to bear the expense". And in situations in which "sickness and inability to do duty * * * alone * * * excuse[d] any person", "the field officers" could "permit such a person to hire a man to do his tour of duty; and if such sick and unable person" was "so extremely poor * * * as to be unable to hire a person in his stead", the field officers could "remit such poor person's fine".

(b) In Virginia, too, drafts were made within the Militia for service with the Militia only.

• [1727, 1732, 1734, 1738, 1740, 1744, 1748, and 1753] "[U]pon any invasion of an enemy by sea or land, or upon any insurrection, the governor * * * have full power and authority to levy, raise, arm, and muster, such a number of forces, out of the militia * * * as shall be thought needful for repelling the invasion, or suppressing the insurrection, or other danger[.]"{EN-2070}

• [1757, 1758, 1759, 1761, 1762, 1764, 1766, 1769, and 1772] "That upon any invasion of any enemy, by sea or land, or upon any insurrection, the governor * * * shall have full power and authority to levy, raise, arm and muster such a number of forces out of the militia of this colony as shall be thought needful for repelling the invasion, or suppressing the insurrection or other danger[.]

* * * * *

" * * *[T]o the end a sufficient number of men may be appointed for guarding the batteries erected in the several rivers of this dominion, and to assist in the better managing the great guns there mounted, when occasion shall be, *It is hereby further enacted*, That it shall * * * be lawful for the governor * * * to appoint and assign such a number of the militia as he shall think fit to attend the said batteries, * * * which number of the militia shall be drafted out of any of the militia of the county by the commanding officer of such county in which such battery is or shall be erected, and shall be exempted from all private musters, except at such battery only during their attendance at such battery[.]"{EN-2071}

• [1763] "The Council * * * were of Opinion that calling the [General] Assembly at this Juncture would be of no use, in as much as could they be prevail'd on to Levy Troops, they could not be rais'd in time to be of service this Year: They therefore advised [the Governor] to order Colo. Stephen to draught five hundred Men * * * out of [certain Counties], in proportion to the number of Militia in each County and to appoint Colo. Andrew Lewis County Lieutenant of Augusta, with directions to draught out of the Militia in that County as many Men as can well be spared, and then apply to [certain other Counties] for such a proportion of their Militia as he shall think will enable him to defend the Frontiers[.]"{EN-2072}

• [1775] "And for the more expeditious, convenient, and speedy draughting into service detachments of the militia * * * , as occasion may arise, *Be it farther ordained*, That, at the general muster * * * the commanding-officer of each county or corporation shall, by fair and equal lot, cause to be drawn out of each company so many men as will amount to one tenth part thereof, and cause the names of the persons so allotted to be enrolled * * * as the first division of militia for such county or corporation; and * * * shall in like manner proceed, by lot, to fix * * * nine other divisions * * * ; and thereafter, if the militia * * * shall be called into duty, the same shall be performed by the divisions, in the order

they shall so stand enrolled, one after another, so as to preserve the regular rotation of duty amongst them.

* * * * *

"*Provided always*, That if there shall * * * be a sufficient number of men, who will voluntarily enter into the service, to answer the demand made upon the militia * * * , such volunteers shall be accepted instead of calling on the divisions[.]"{EN-2073}

• [1776] "[W]here it shall be necessary to call on duty the militia of any colony [*sic*, 'county' was meant], upon an invasion or insurrection within the same, or any county adjoining, the commanding-officer shall have full power and authority to order into service such part of the militia of his said county as to him shall seem necessary, and shall also call in the divisions, or any part thereof, according to allotment; and the militia first called on duty shall be discharged as soon as the divisions called in shall be ready to perform the service required of such division. And where any soldier of the militia shall fail to appear at musters through sickness, the captain * * * of such company * * * may hear any evidence offered on behalf of such person * * * and admit the excuse, if to him it shall seem just[.]"{EN-2074}

• [1777] "FOR making provision against invasions and insurrections, and laying the burthen thereof equally on all: *Be it enacted* * * * , That the division of the militia of each county into ten parts * * * shall be completed and kept up * * * , each part to be distinguished by fair and equal lot * * * .

" * * * The several divisions of the militia * * * shall be called into duty by regular rotation * * * ; and every person failing to attend when called on, or to send an able bodied man in his room, shall, unless there be good excuse, be considered as a deserter, and suffer accordingly. Any able bodied volunteers who will enter into the service shall be accepted instead of so many divisions of the militia * * * , or of the particular person in whose room they may offer to serve; but if the invasion or insurrection be so near and pressing as not to allow the delay of calling the division * * * next in turn, the commanding officer may call on such part of the militia as shall be most convenient to continue in duty until such division * * * can come in to supply their places."{EN-2075}

• [1780] "WHEREAS there is reason to apprehend that an invasion is now meditating against the eastern frontiers of this state, * * * the governour, with the advice of the council, be empowered to direct the county lieutenants * * * of [certain named Counties] to order one sixth part of their respective militias to hold themselves in constant readiness to march at a moment's warning, taking care in such arrangement to fix upon those who will most probably answer the purposes of this act. And if the said sixth part shall at any time be called out into actual duty, the several county lieutenants * * * shall, in like manner,

> order one other sixth part of their respective militias to hold themselves in the same readiness. *Prov ided*, That nothing * * * shall preclude the governour and council, or commanding officer in any of the said counties from ordering out a greater part of the militia, if occasion shall require. * * * And every officer and soldier called upon to perform the duties required by this act, shall, for every day they are in the execution thereof, * * * be entitled to * * * pay[.]"{EN-2076}

As in Rhode Island, Virginia's drafts from her Militia were meant to be as economical as possible—"to levy, raise, arm, and muster * * * out of the militia * * * [only as many men] as shall be thought needful for repelling the invasion, or suppressing the insurrection, or other danger" (1727 through 1772), often "caus[ing] to be drawn out of each company" at any one time only "so many men as will amount to one tenth part" (1775) or "one sixth part" (1780), while "taking care in such arrangement to fix upon those who will most probably answer the purposes" (1780). In practice, Virginia's drafts were largely voluntary—because, "if there * * * [were] a sufficient number of men, who w[ould] voluntarily enter into the service, to answer the demand made upon the militia * * * , such volunteers [were] accepted instead of calling on the divisions" (1775); and any individual drafted could usually "send an able bodied man in his room" (1777). Virginia also aimed at an equitable process of selection—"laying the burthen [of each individual draft] equally on all" (1777), "by fair and equal lot" (1775). And Virginia spread the burden of service throughout the community by "regular rotation" (1777).

b. As to the regular Armed Forces. The Colonies and then the independent States raised regular "Troops" in various ways.

(1) Volunteers might be recruited specifically from the Militia. For example, in 1776 Rhode Island recruited men for a State regiment intended to serve with the Continental Army:

> [T]hat one regiment be * * * raised from the militia of this state, * * * to continue in the service of this state three months from the time of their enlistment, unless dismissed before that time by this Assembly.
>
> * * * * *
>
> That said regiment be composed of six men as soldiers, of every hundred of the male inhabitants of sixteen years of age, and upwards, as last estimated within this state.
>
> That the several towns within this state, raise such a number of men within their respective towns, as shall be their proportion, thereof, agreeably to the said estimate.
>
> * * * * *
>
> * * * [T]he form of enlistment * * * be as follows, to wit:
>
> *Form of Enlistment for the Soldiers.*

> "I * * * hereby solemnly engage and enlist myself, as a soldier, in the regiment ordered to be raise from the militia of the state of Rhode Island and Providence Plantations, in the service and pay of said state, from the day of my enlistment, for and during the term of three months, unless sooner discharged by the Assembly of said state; and I hereby promise to submit myself to all the orders and regulations of the army of the United States * * * ."{EN-2077}

Notably, this statute allowed only six percent of the Militia—"six men * * * of every hundred of the male inhabitants of sixteen years of age, and upwards"—to be recruited, indicating the General Assembly's concern, even during a time of war, with keeping under the State's control in her Militia the vast majority of Rhode Islanders eligible for service.

(2) Statutes recruiting volunteers for the Colonies' and then the States' regular Armed Forces often did not specify that the men were to be drawn from the Militia. In fact, though, if the volunteers were suitable for "soldiers" at all, they must already have been enrolled in the Militia. These statutes, then, always amounted to implicit exemptions from Militia duty during the periods in which the men served with the regular Armed Forces; and sometimes they extended such exemptions even after those periods ended, as part of the compensation paid for an individual's enlistment.

(a) During the Colonial period, Rhode Island regularly recruited men for service alongside the British Army. Usually, monetary compensation was the main inducement for enlistment:

> • [1740] "[F]or the encouragement of those who shall enlist in His Majesty's service, * * * that there be a commanding officer in each regiment in this colony appointed * * * to enlist so many men as shall be willing to serve * * * in the intended expedition against the Spaniards, which officer so appointed, shall be obliged to enlist himself.
>
> " * * * [E]ach soldier (so enlisted by said officer) being an able bodied effective man, shall have the sum of £3 allowed to him by the colony, at the time of his enlisting; and shall be exempted from all military service for the space of three years after his return, except in cases of great extremity * * * .
>
> "And in order to facilitate the raising and enlisting such soldiers, the field officers in each county be hereby empowered to call each captain's company together, in order for the * * * commanding officer to enlist the soldiers[.]"{EN-2078}
>
> Noteworthy in this statute is that: (i) the General Assembly used the Colony's Militia Companies as the most practical focal points for recruiting, but (except for "a commanding officer in each regiment * * *

appointed * * * to enlist [the] men") did not draft Militiamen directly; and (ii) each individual who enlisted was "exempted from all military service for the space of three years after his return, except in cases of great extremity". Presumably, "all military service" included actual service in the Militia; but presumably, too, "cases of great extremity" included "alarms", in which everyone eligible for Militia duty was always required to serve. So, for the average Militiamen, the apparent "exempt[ion] from all military service" may have been of limited value, in that it did not apply in the most dangerous situations.

•[1755] "[I]nasmuch as there is a scheme proposed for the governments of New England, to attempt, in conjunction with other neighboring governments, to remove the encroachments which the French have made upon the lands and country of our sovereign, at or near Crown Point * * *

" * * * there [shall] be * * * raised in this colony, at the government's expense, four hundred good and able-bodied men * * * ; which troops * * * shall join and act in conjunction with those of the other governments in New England, under the command of the general of the whole army; subject, nevertheless, to the control of the General Assembly of this colony.

* * * * *

" * * * [T]he following wages * * * shall be the pay and allowance per month, of the officers and troops to be raised:

* * * * *

"Every common soldier [is to receive] £16 per month, and £20 bounty, if furnished with a good firelock; but no more than £15, without; * * * [and] if the arms brought by any soldier into the army, shall be damnified afterwards, or lost, the same shall be made good by the colony, according to the value thereof.

* * * * *

"And for a further encouragement, * * * all such officers and soldiers shall be exempted from any and every arrest and execution, for the space or term of one whole year after the expedition is ended * * * ; and shall not, during said term of one year, be impressed for, or into any further military duty or service."{EN-2079}

Once again, exemption from impressment "into *any* further military duty or service" for Rhode Island during "one whole year"—presumably including service in her Militia, and even in the event of "alarms"—was offered as part of the enlistee's compensation. Revealingly, too, although these troops were to "join and act in conjunction with those of the other governments in New England, under the command of the general of the whole army", they remained "subject * * * to the control of the General Assembly". Apparently, notwithstanding that the governments of the New England Colonies had agreed upon this enterprise, Rhode Island refused to surrender command

of her troops to some "general of the whole army" from some other Colony.

• [1757] "Whereas, His Excellency the Earl of Loudoun, commander in chief of all His Majesty's forces in North America, hath demanded of this colony an aid of four hundred and fifty able bodied, effective men, to be employed in His Majesty's service, for, and during the ensuing campaign, in North America;—

" * * * [T]hat four hundred and fifty able bodied effective men * * * be * * * raised in this colony, to be employed in His Majesty's service, * * * for, and during a term of time, not exceeding one year * * * .

* * * * *

"And for the more easy and expeditious raising said men,—

" * * * [E]very able bodied effective man, who shall voluntarily enlist, shall receive a bounty of £30 * * * ; and be paid £25 * * * per month, during the time he continues in this service"

* * * * *

" * * * [I]n case it shall so happen that the * * * men demanded of this government, * * * and now ordered to be raised, should not be made up, * * * the deficiency shall be proportioned unto the several towns in this colony * * * ; and * * * an enlisting officer [shall] be appointed in every town[.]"{EN-2080}

• [1757] "[T]wo hundred and fifty able bodied, effective men, of the soldiers now in the pay of this colony, [shall] be enlisted anew, as they return from the service, they are now employed in, for, and during the pleasure of the General Assembly; that is to say, if so many will voluntarily enlist; and in case the said number will not, that then so many others be enlisted as shall be wanted, to make the whole number of two hundred and fifty * * * .

" * * * [A]ll the officers and soldiers so enlisted, shall have and receive the same pay as is now allowed them; * * * the bounty only excepted."{EN-2081}

• [1758] "Whereas, the King * * * is about to send a considerable reinforcement of land forces * * * to carry the war into the enemy's country; expecting that the six northern provinces will raise twenty thousand men, to be joined to, and co-operate with his regular forces * * *

" * * * one thousand able bodied, effective men * * * [shall] be forthwith raised in this colony, to be employed in His Majesty's service[.]

* * * * *

"And for the encouragement of men to enlist,—

" * * * [E]very able bodied man * * * shall receive a bounty of $18 * * * ; and shall have the monthly wages of $5[.]50 * * * ."{EN-2082}

• [1759] "[T]he troops now in the government's pay, [shall] be augmented to the number of one thousand able bodied, effective men[.]

* * * * *

"And for an encouragement to the soldiers now belonging to the regiment, to behave well, and to induce others to enlist into the same,—

" * * * [E]ach soldier shall * * * receive the same pay and billeting * * * that the soldiers had and enjoyed the last year; bounty only excepted."{EN-2083}

• [1759] "[T]o encourage good men to enlist and fill up the [regiment ordered by this government to be raised for the King's service] * * *

" * * * all such able bodied effective men as hereafter enlist * * * shall be allowed and paid down * * * wages and billeting for two months back from the time of enlisting; which amounts to £111 * * * ; and on or about the time of embarkation, each man shall have two months pay advanced to him."{EN-2084}

• [1759] "[O]ne hundred and fifteen able bodied, effective men [shall] be raised in this government * * * to complete the regiment ordered by the General Assembly, for the campaign of the current year; which men * * * shall be presented unto the committee of war, who are * * * to send them immediately unto Albany, to join the regiment there.

"And for the encouragement of such men to enlist as may be fit for the purpose,—

" * * * [A] bounty of £14 * * * shall be given each able bodied, effective man * * * ; he shall also be entitled to the same monthly wages * * * with the other soldiers now in the regiment, and receive a month's pay before the time of his embarkation."{EN-2085}

• [1760] "That *One Thousand able-bodied effective Men* * * * *be forthwith raised in this Colony*; to be employed in his Majesty's Service, until the *End of the ensuing Campaign*, and *no longer* * * * .

* * * * *

"AND for the Encouragement of Men to inlist, * * * That every able-bodied effective Man * * * shall receive a Bounty of Nine Pounds Lawful Money * * * and be provided with Billeting, from the Time of his Inlistment until he leaves the Colony, at the Rate of Eight Shillings * * * *per* Week, and * * * Two Pounds * * * *per* Month Wages[.]"{EN-2086}

(b) Official correspondence during this period establishes quite clearly that, in order to raise regular troops from the Colonies to serve alongside the British Army in North America, the British had to *request* assistance from Colonial authorities, rather than simply impress the Colonials into military service directly:

At the end of 1758, British Secretary William Pitt wrote to Governor Stephen Hopkins of Rhode Island that,

> His Majesty having nothing so much at heart as * * * by the most vigorous and extensive efforts, to avert * * * all dangers which may

> threaten North America from any future eruptions of the French; and the King not doubting that all his faithful and brave subjects there, will cheerfully co-operate with, and second to the utmost, the large expense and extraordinary succors supplied by this kingdom for their preservation and defence; and His Majesty considering that the several provinces in particular, from proximity and accessibility of situation, more immediately obnoxious to the main eruptions of the enemy from Canada, are, of themselves, well able to furnish at least twenty thousand men, to join a body of the King's forces, for invading Canada * * * —
>
> I am commanded to signify to you the King's pleasure, that you do forthwith use your utmost endeavors and influence with the Council and Assembly of your province, to induce them to raise with all possible despatch, within your government, at least as large a body of men as they did for the last campaign, and even as many more, as the number of its inhabitants may allow; * * * that you do direct them to hold themselves in readiness * * * to march to the rendezvous * * * as His Majesty's commander in chief in America shall appoint * * * .
>
> And the better to facilitate this important service, the King is pleased to leave it to you to issue commissions to such gentlemen of your province, as you shall judge, from their weight and credit with the people, and their zeal for the public service, may be best disposed and able to quicken and effectuate the speedy levying of the greatest number of men * * * .
>
> The King is further pleased to furnish all the men so raised * * * with arms, ammunition and tents, as well as to order provisions to be issued * * * in the same proportion and manner as is done to the rest of the King's forces. A sufficient train of artillery will also be provided at His Majesty's expense * * * .
>
> The whole, therefore, that His Majesty expects and requires from the several provinces, is, the levying, clothing and pay of the men; and on this head, also, that no encouragement may be wanting to this great and salutary attempt, the King * * * permit[s] me to acquaint you, that strong recommendations will be made to Parliament * * * to grant a proper compensation for such expenses * * * , according as the active vigor and strenuous efforts of the respective provinces shall justly appear to merit.
>
> It is His Majesty's pleasure, that you do, with particular diligence, immediately collect, and put into the best condition, all the arms issued last campaign, which can be any ways rendered serviceable, or that can be found within your government, in order that the same may be employed, as far as they will go, in this exigency. * * * [A] reasonable supply of arms will be sent from England, to re-place such as may have been lost, or that become unfit for future service.{EN-2087}

Then, in early 1760, General Jeffrey Amherst, Britain's commander in chief in America, wrote two letters to Governor Hopkins on the same subject:

> [A]lthough [Mr. Secretary Pitt] does not send me His Majesty's commands for the operations of the ensuing campaign, yet he directs me to make all the necessary preparations for pushing on the war with vigor * * * , and thereby complete the great work * * * of rendering His Majesty entire master of Canada.
>
> In order * * * to enable me to fill these instructions, I must renew to you my most earnest solicitations for your moving your Assembly to make immediate provision for the same, or a greater number if possible, of men, than they did for the last campaign; and to have them in such immediate readiness, that * * * I may be certain of the motion and junction of all the forces, at the time and places which I shall hereafter acquaint you with * * * .{EN-2088}
>
> * * * I have only to request that you would exert your utmost endeavors to incite and encourage your Assembly to the full and due execution of the King's commands, in a matter so essential to the future welfare and prosperity of the several provinces, and the success of the ensuing decisive, and (it is greatly hoped,) last campaign in North America * * * .
>
> * * * * *
>
> I have also * * * to recommend to you the collecting and putting into a proper condition, all the arms which can be in any way rendered serviceable, or that can be found within your government, in order that the same may be employed so far as they will go, in this exigency.
>
> As a further reason for which, I * * * now offer you the * * * encouragement * * * that for every one of such arms, as any of your men shall bring with them, and that may be spoiled or lost in actual service, I will pay at the rate of twenty-five shillings a firelock.
>
> Magazines of provisions shall also be established * * * , to provide for your forces on their march to the rendezvous; officers shall likewise be appointed at those respective places, to pay them the four pences in lieu of provisions, from the days of their several enlistments, to that of receiving the King's provisions; and the same allowance that was made last year, for the transportation of those troops that shall be hereafter directed to come by water, shall also be made this.
>
> From all these several encouragements, and your known fidelity and attachment to His Majesty, I have no doubt of your exerting yourself to the utmost on this great occasion, where the future safety and welfare of America are so nearly concerned.{EN-2089}

The salient characteristic of these letters is their utter lack of a peremptory tone of command—and of the least suggestion that either civilian or military authorities in Britain could unilaterally order Rhode Island to impress men or arms for a military campaign in Canada. Secretary Pitt, for instance, urged Governor Hopkins to "use your utmost endeavors and influence with the Council and

Assembly of your province, to induce them to raise * * * at least as large a body of men as they did for the last campaign"—thus recognizing *sotto voce* that without such efforts the desired "body of men" might not be forthcoming. To this, he added a touch of snobbish bribery, "leav[ing] it to [Hopkins] to issue commissions to * * * gentlemen of your province"—so as to align the personal interests and appetites for honors of a nascent Colonial aristocracy with the imperialistic policies of the Mother Country. For the common Rhode Islanders who were to slog out the campaign in the ranks, he promised "to furnish * * * arms, ammunition, and tents, as well as * * * provisions"—although he must have been aware that all Rhode Islanders capable of serving as Colonial troops were already enrolled in the Militia, with most of them under the personal duty to supply themselves with firearms and ammunition. To the General Assembly, which was initially responsible for "the levying, clothing and pay of the men", he offered the financial assurance that "strong recommendations will be made to Parliament * * * to grant a proper compensation for such expenses * * * , according as the active vigor and strenuous efforts of the * * * province[ ] shall justly appear to merit". Perhaps most revealing, he urged Hopkins, "with particular diligence, immediately [to] collect, and put into the best condition, all the arms * * * that can be found within your government, in order that the same may be employed, as far as they will go, in this exigency", but represented only that "a reasonable supply of arms will be sent from England, to replace such as may have been lost, or that become unfit for future service"—thus intimating that, as far as the Colonial forces were concerned, the success of the campaign could largely depend upon the Local availability of arms.

In a similar vein, in his first letter to Hopkins, General Amherst "renew[ed] * * * [his] most earnest solicitations for * * * moving [the General] Assembly to make immediate provision for the [ensuing campaign]"—illustrating that his continuing problem was to convince and cajole, not simply to command and coerce, Hopkins to act expeditiously. In his second letter, Amherst reiterated his "request that [Hopkins] exert [his] utmost endeavors to incite and encourage [the General] Assembly to the full and due executions of the King's commands"—apparently concerned that, in America, "the King's commands" were neither self-executing nor sure to be executed in full by the Colonial authorities. Then he "recommend[ed] to [Hopkins] the collecting and putting into a proper condition, all the arms which can be in any way rendered serviceable"—only "recommend[ed]", rather than "ordered", even though arms were essential for the success of the entire enterprise, and apparently were in short supply. In addition, he offered the "encouragement * * * that for every one of such arms, as any of [Rhode Island's] men shall bring with them, and that may be spoiled or lost in actual service," he would "pay at the rate of twenty-five shillings a firelock"—hardly an inducement which would have been necessary had the British been able to impress the arms directly, or to impress the men along with their arms; and surely a tacit admission that Britain could not

supply enough arms herself in time. All of this importuning and wheedling came forth, too, under circumstances in which, because "the future safety and welfare of America [we]re so nearly concerned", the British imperialists would likely have impressed the Colonies' men and equipment directly if they could have cobbled together any plausible legal theory licensing them to do so.

In short, Britain's political and military leaders did little more than coax, cajole, try to convince, and promise to assist Rhode Island. No one suggested, let alone threatened, that, should the Colony's coöperation be deemed insufficient, the Mother Country would impress either men or matériel.

(c) As the British Colonial period abruptly ended, giving way to independence and then civil war, Rhode Island raised regular troops on her own account:

> • [1775] "[T]he fifteen hundred men ordered to be raised by this colony, [shall] be formed into one brigade * * * .
>
> * * * * *
>
> " * * * [E]ach able bodied, effective man, who shall enlist into the service, and find himself a small arm, bayonet and other accoutrements, shall be allowed and paid forty shillings, as a bounty; and each able bodied, effective man, not finding himself a small arm, bayonet and other accoutrements, shall receive twenty-four shillings, as a bounty.
>
> "And * * * each officer and soldier shall receive * * * [various amounts of] monthly wages, while in the service * * *
>
> * * * * *
>
> "And * * * each officer and soldier [shall] be paid his wages * * * as soon as may be; and * * * one month's wages [shall] be paid in advance, before the troops march out of the colony."
>
> " * * * [E]ach soldier [shall] be enlisted, by signing the following statement, to wit:
>
> "*Form of the Oath of Enlistment.*
>
> "'I * * * hereby solemnly engage and enlist myself as a soldier in His Majesty's service, and in the pay of the colony of Rhode Island, for the preservation of the liberties of America, from the day of my enlistment, to the last day of December next, unless the service admit of a discharge sooner, which shall be at the discretion of the General Assembly * * * .'"{EN-2090}
>
> • [1775 and 1776] "[F]ive hundred men * * * [shall] be enlisted, raised and embodied, with all expedition and dispatch, and be formed into one regiment * * * .
>
> * * * * *

" * * * [E]ach able bodied man, who shall enlist into the service, and find himself a small arm, bayonet and other accoutrements, shall be allowed and paid sixteen shillings, therefor.[3913]

" * * * [E]ach officer and soldier shall receive * * * [various amounts of] monthly wages, while in the service, to wit:

* * * * *

"Each private man, forty shillings per month; and that his first month's wages be advanced at the time of his enlistment.[3914]

* * * * *

" * * * [E]ach soldier [shall] be enlisted by signing the following enlistment, to wit:

"Form of Enlistment.

*"I * * * hereby solemnly engage and enlist myself as a soldier, in the pay of the colony of Rhode Island, for the preservation of the liberties of America, and the defence of the United Colonies in general, and of this colony in particular, from the day of my enlistment for one year, unless the service admit of a discharge sooner, which shall be at the discretion of the General Assembly * * * ."*{EN-2091}

•[1776] "Whereas, our enemies have invaded this state, with a powerful armament, and are now in the possession of Rhode Island, whereby we are imminently exposed to still more hostile attacks, which renders it necessary that a considerable addition be made to the forces of this state,—

" * * * [T]hat two regiments of infantry, * * * also a regiment of artillery, * * * be immediately raised, for the defence of the United States, in general; and of this state, in particular.

* * * * *

" * * * [E]ach able bodied, effective man, who shall enlist himself * * * shall be furnished with * * * a gun, bayonet, cartouch-box and * * * be allowed £6 * * * as a bounty.

"And if any man * * * shall furnish himself with a gun, bayonet, cartouch-box * * * he shall be allowed * * *

"Eighteen shillings for a gun, bayonet, and cartouch-box * * * .

* * * * *

" * * * [E]very person who shall enlist as a soldier * * * shall be allowed and paid as wages, £3, per month.

" * * * [E]ach able-bodied man, who shall enlist himself * * * shall be allowed twelve shillings per week, after enlistment, and before

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[3913] The Act of 1776 increased this bounty by providing that such an enlistee "shall receive two months pay advance, at the time of enlisting".

[3914] The Act of 1776 increased a common soldier's monthly wage to £2.

the[regiments] shall be embodied; and * * * they [shall] be embodied within one week after they shall be enlisted.

" * * * [T]he officers and soldiers engaged * * * shall receive their pay monthly.

"That each soldier be paid one month's wages in advance, upon enlistment * * * .

" * * * [T]he officers and soldiers, when embodied, * * * shall be under the same rules, orders and regulations as those of the Continental army * * * .

" * * * [E]ach soldier be enlisted by signing the following enlistment, to wit:

"*Form of Enlistment for the Soldiers.*

"'I * * * hereby solemnly engage and enlist myself as a soldier, in the pay of the state of Rhode Island and Providence Plantations, for the preservation of the liberties of America, and the defence of the United States in general, and of this state, in particular, from the day of my enlistment during the term of fifteen months, unless sooner discharged by this General Assembly; and I hereby promise to submit myself to all the orders and regulations of the army * * * .'"{EN-2092}

•[1777] "[T]hat five hundred effective men be raised by the several towns within this state (excepting the towns of Newport, Portsmouth, New Shoreham and Middletown) for filling the Continental battalions raising by this state * * * ; that they be proportioned to the several towns, according to the number of polls * * * in the following manner, that is to say:

"The whole number already enlisted, who are proper inhabitants of, or that belong to, the respective towns to which said men are to be proportioned, be added to the number of five hundred; and the proportion be formed upon that total, giving credit to each town for those already enlisted from such town.

" * * * [T]hat each town be empowered to give such a sum, over and above the bounties already allowed, as they can agree for, with the men enlisting, not exceeding the sum of £22 * * * .

* * * * *

" * * * [I]f any town shall advance the said bounties to any person enlisted by them, who shall not pass muster, the loss, thereof, shall be borne by such town.

* * * * *

" * * * [E]ach town * * * which shall be deficient in raising its proportion of men * * * shall pay as a fine to, and for the use of, this state, £10, for every soldier they shall be deficient in[.]"{EN-2093}

• [1777] "Whereas, the calling forth the militia for defence of this state, greatly prevents the carrying on necessary husbandry, and is attended with many other inconveniences,—

"It is voted * * * , for the filling up the brigade ordered to be raised by this state for fifteen months, that a bounty of £6 * * * be * * * paid to each non-commissioned officer and private, who shall enlist into the same within fifteen days after the rising of this Assembly, in addition to the bounty heretofore allowed; after which time, this additional bounty shall cease.

* * * * *

" * * * [A]s soon as any town shall have raised its proportion assigned by this act, or any number of men as part of their quota, not less than five, and the same shall have joined the army, that then so many of the militia, alarm men, and independent companies, of such town upon duty, shall be dismissed by lot, and shall be discharged from doing duty upon the shores, except in case of such an alarm as shall occasion the whole force of the state to be called out[.]"{EN-2094}

• [1777] "Whereas, our enemies have invaded this state with a powerful armament, and are now in possession of the island of Rhode Island, whereby we are imminently exposed to still more hostile attacks,—

" * * * [T]wo battalions, each consisting of six hundred men, * * * also a regiment of artillery, consisting of three hundred men, * * * be immediately raised for the defence of the United States in general, and of this state in particular * * * .

* * * * *

" * * * [E]ach able-bodied man, who shall enlist himself * * * shall * * * be furnished with a * * * gun, bayonet, cartouch-box * * * , to be returned or accounted for, at the expiration of his service; and that he be allowed as a bounty, £20 * * * .

* * * * *

"And * * * the officers * * * and the non-commissioned officers and soldiers who shall enlist * * * [shall] be entitled to the same wages and rations as officers and soldiers in the Continental service.

" * * * [E]ach able-bodied man who shall enlist himself * * * [shall] be allowed twenty shillings per week, after enlistment, and before he is embodied * * * .

"And * * * the said officers and soldiers shall receive their pay monthly * * * .

"And * * * the officers and soldiers, when embodied * * * , shall be under the same rules, orders and regulations, as those of the Continental army * * * .

"And * * * each soldier be enlisted by the following enlistment, to wit:

"*Form of Enlistment of the Soldiers.*

> "'I * * * hereby solemnly engage and enlist myself as a soldier, in the pay of the state of Rhode Island and Providence Plantations, for the preservation of the liberties of America, and the defence of the United States in general, and this state in particular, from the day of my enlistment until the 16tth day of March, * * * 1779, unless sooner discharged by this Assembly; and I hereby promise to submit myself to all the orders and regulations of the army * * * .'"{EN-2095}

• [1778] "Resolved, that eight hundred and thirty-nine effective men be raised by the several towns within this state (excepting the towns of Newport, Portsmouth, New Shoreham, Middletown and Jamestown), for filling the battalions and regiment of artillery raising by this state * * * .

"That they be proportioned to the several towns * * * , to wit:

"The proportion of each town according to the last tax assessed upon it by the General Assembly * * * shall be computed, and then the proportion of each town, according to the number of fencible men,[3915] * * * shall be also computed.

* * * * *

" * * * [T]he men who may be raised * * * [shall] be allowed the same bounty and wages as have been allowed to the persons who have heretofore enlisted into said battalions and regiment * * * [.]

* * * * *

" * * * [E]ach town in this state, which shall be deficient in raising its proportion of men, * * * shall pay as a fine, to and for the use of this state, £30 * * * for every soldier they shall be deficient in[.]"{EN-2096}

• [1779] "WHEREAS our Enemies have invaded this State with a powerful Armament, and are now in Possession of the Island of *Rhode-Island*, whereby we are exposed to still more hostile Attacks:

"*BE it therefore Enacted* * * * , That Two Battalions of Infantry, each consisting of Five Hundred and Eighty-five Men * * * , and a Regiment of Artillery, consisting of Three Hundred and Thirty Men * * * , be immediately raised for the Defence of the United States in general, and of this State in particular * * * .

* * * * *

" * * * That each able-bodied Man who shall enlist * * * shall be furnished with a Gun, Bayonet, Cartouch-Box * * * the Three former to be returned or accounted for at the Expiration of the Service; and shall

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[3915] The adjective "fencible" means "[c]apable of defence". S. Johnson, *Dictionary, ante* note 50, in both the First (1755) and the Fourth (1773) Editions. *Accord*, N. Webster, *An American Dictionary, ante* note 15, definition 1. As a noun, "fencible" means "[a] soldier capable of bearing arms". *Webster's Revised Unabridged Dictionary, ante* note 11, at 552. *See also Webster's Third New International Dictionary, ante* note 330, at 837, definition 1a.

also receive as a Bounty Forty-five Pounds lawful Money: And that for their better Subsistence the following Sums to be allowed them Monthly, *to wit*: * * * each Private Six Pounds.

* * * * *

" * * * [T]he Officers * * * and the non-commissioned Officers and Privates inlisting * * * shall, in Addition to the Allowances herein before made, be entitled to the same Wages and Rations as Officers and Soldiers in the Continental Service; and shall receive their Pay and Allowance for Subsistence Monthly: That every able-bodied Man who shall inlist * * * shall be allowed Twenty-four Shillings *per* Week, for his Billet * * * .

"*AND* * * * That every Soldier entering into the said Service shall be enlisted by the following Inlistment, *to wit*.

"I * * * do hereby solemnly inlist myself as a Soldier in the Pay of the State of *Rhode-Island* and *Providence Plantations*, for the Preservation of the Independency and Liberties of *America,* and the Defence of the United States in general and this State in particular, from the Day of my Inlistment for one Year, unless sooner discharged by the General Assembly of this State. And I hereby promise to submit myself to all the Orders and Regulations of the Army * * * .

"*AND* * * * the Officers and Soldiers of the said Brigade, when embodied, shall be under the same Rules, Orders and Regulations, as the Continental Army[.]"{EN-2097}

• [1780] "That Two Hundred and Twenty able-bodied effective Men be inlisted to serve in the Battalion of this State, for the Defence of the United States: That each Man * * * receive a Bounty of *One Hundred Dollars* * * * , and *Forty Shillings* * * * per Month[.]"{EN-2098}

• [1780] "WHEREAS for the Support and Continuance of the present just and necessary War, on the part of the United States of *America*, * * * it is indispensably necessary that a regular, efficient and permanent Force be immediately engaged in the public Defence: And whereas the Number of Three Hundred and Eight Men, pursuant to a late Resolve of Congress, has been apportioned to this State, as their Quota of the new Army to be raised * * * :

" * * * Three Hundred and Eight able-bodied effective Men * * * [shall] be forthwith raised within this State, to serve during the War, or Three Years; and that the whole Number be apportioned to the several Towns in this State[.]

* * * * *

"*AND* * * * each and every Person inlisting into this State's Battalion, serving in the Army of the United States * * * shall receive each and every Year * * * [certain] Articles of Cloathing * * *

" * * * and shall also be allowed the Sum of *Forty Shillings* * * * Wages per Month, and all such other Refreshments and Emoluments

whatsoever, as those already engaged in the *Rhode-Island* Line of the Continental Army[.]"{EN-2099}

• [1781] "Whereas the Safety and internal Security of this State render it necessary that a military Force should be raised and maintained within this State, for the Defence thereof: And whereas it is found by Experience, that drafting or detaching from the Militia of this State, for that Purpose, is attended with a great Expence, and many Inconveniences:

" * * * That One Hundred able-bodied effective Men * * * be immediately raised for the Defence of this State, to do Duty therein (and not to march out of the same) from the Time of their Inlistment until the First Day of *April* next, unless sooner discharged by this Assembly * * * .

" * * * That each able-bodied Man who shall inlist * * * shall be furnished with a Gun, Bayonet, Cartouch-Box and Canteen, to be returned at the Expiration of his Service; and that in case any of the said Men shall furnish themselves with a Gun, Bayonet and Cartouch-Box, they shall be allowed a further Sum of *Twelve Shillings* Silver Money each.

" * * * That the Privates be allowed each *Forty-eight Shillings* Silver Money per Month * * * .

" * * * [A]nd that each Soldier sign the following Inlistment, *to wit:*

"'I * * * do solemnly engage and inlist myself as a Soldier in the Pay and Service of the State of *Rhode-Island, &c.* from the Day of my Inlistment until the First Day of *April*, A.D. 1782, unless sooner discharged by the General Assembly: And I hereby promise to submit myself to all the Orders and Regulations of the Army * * * .'"{EN-2100}

• [1782] "[T]hat two hundred effective men be recruited into the service of the United States, by voluntary enlistment, to serve for the term of three years, or during the war; that each effective man so enlisted, mustered and received * * * shall be entitled to a bounty of one hundred dollars in specie[.]"{EN-2101}

• [1782] "[T]hat two hundred able-bodied, effective men be raised and enlisted within this state, as recruits for this state's Continental battalion, * * * to serve in the army of the United States for the term of three years, or during the war, unless sooner discharged; that each able-bodied man who shall be * * * pass muster, shall be entitled to receive a bounty of one hundred Spanish milled dollars, from this state, over and above the rations, wages, clothing, and other allowances which are made by Congress to the Continental soldiers now in the field[.]"{EN-2102}

• [1782] "[T]hat forty able-bodied, effective men * * * be raised, to do duty in the town of Newport, for the space of four months from the time of their enlistment, unless sooner discharged by this Assembly * * * .

" * * * [T]hat the said men * * * receive the same pay and rations as are allowed the officers and soldiers in the Continental service.

* * * * *

" * * * [T]hat the wages of the * * * men be paid out of the next state tax[.]"{EN-2103}

•[1786] "[T]hat one hundred and twenty men * * * be immediately raised in this state for the service [of the United States]; * * * that they receive the pay, clothing, subsistence, forage, and other allowances provided by Congress; that they be rendezvoused at such place or places, and marched to such place or places within the United States, as the United States, in Congress assembled, or their secretary of war shall direct, or such officer as shall be commander-in-chief of the troops; that the following be the form of enlistment:

"I * * * do voluntarily enlist myself in the service of the United States, as a soldier, for the space of three years * * * , unless sooner discharged, and do engage to submit myself to the rules and regulations of the army already established, or that may be established by Congress * * * ."{EN-2104}

In light of the language the Constitution later used to define the relevant power of Congress—namely, "[t]o *raise* and support Armies"[3916]—it is revealing that: (i) Almost all of these statutes employed the verb "raise" to describe the process they mandated—such as, "be raised" (1775, 1777, 1778, and 1782), "be immediately raised" (1776, 1777, 1779, 1781, and 1786), "be forthwith raised" (1780), "be raised and enlisted" (1782), "be enlisted, raised and embodied" (1775 and 1776), "shall have raised" (1777), and "raising by this state" (1778). And (ii) all of these statutes provided for *voluntary* enlistments, never impressments, as plainly appeared from the oaths of enlistment some of the statutes incorporated (1775, 1776, 1777, 1779, 1781, and 1786) and the specific statutory statement that the men were to "be recruited by voluntary enlistment" (1782), as well as from the inducements of pay, bounties, and other allowances the statutes offered to recruits (1775, 1776, 1777, 1778, 1779, 1780, 1781, 1782, and 1786).

The statutes provided for voluntary enlistments even though the reasons adduced for raising troops were certainly serious—such as the British invasion and occupation Rhode Island (1776, 1777, and 1779); "the Safety and internal Security of this State" (1781); and "the Support and Continuance of the present just and necessary War, on the part of the United States of *America*" (1780).

Most importantly, the General Assembly retained control over every aspect of Rhode Islanders' service, including: the number of men to be raised (1775, 1776, 1777, 1778, 1779, 1780, 1781, 1782, and 1786); the men's periods of enlistment

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[3916] U.S. Const. art. I, § 8, cl. 12 (emphasis supplied).

(1775, 1776, 1777, 1779, 1780, 1781, 1782, and 1786), even when they were being raised specifically to serve with the Continental Army (1777, 1780, 1782, and 1786); when the men might be discharged before their statutory terms of service expired (1775, 1776, 1777, 1779, and 1781); and where the men would serve, whether "out of the colony" (1775), within Rhode Island "and not to march out of the same" (1781), "in the town of Newport" (1782), or only in "places within the United States" (1786). Indeed, in 1776 the General Assembly went so far as to mandate adoption by Rhode Island's troops of the rules and regulations of the Continental Army:

> [W]hereas, this Assembly * * * passed an act, establishing rules and regulations for the forces raised by this colony.
>
> And whereas, the Continental Congress soon after established rules and articles of war, for the Continental army, and have lately made divers additions and alterations thereto, necessary for the well governing of an army, which are better calculated for that purpose than those made by this colony, * * *
>
> * * * all the troops that shall be raised in the colony, shall be governed by the rules, regulations and orders established by the Continental Congress, for the governing of the Continental army[.]{EN-2105}

Which requirement the General Assembly regularly reasserted thereafter: namely, "under the same rules, orders and regulations as those of the Continental army" (1776 and 1777); "to submit * * * to all the orders and regulations of the [Continental] army" (1776, 1777, 1779, and 1781); and "to submit * * * to the rules and regulations of the army * * * established by Congress" (1786). And most indicative that the General Assembly considered itself the supreme authority in the premises was its assertion of a right to prevent Rhode Islanders from joining the Continental Army at all:

> [1777] "*Voted and Resolved,* That the non-commissioned Officers and Privates in the Train of Artillery, be not permitted in future to inlist into the Continental Battalions[.]"{EN-2106}

Interestingly enough, in one instance Rhode Islanders who volunteered for the State's regular troops were detailed to replace Militiamen who, in contrast, were all impressed into service: "[A]s soon as any town shall have raised its proportion * * * , or any number of men as part of their quota, not less than five, and the same shall have joined the army, * * * then so many of the militia, alarm men, and independent companies, of such town upon duty, shall be dismissed by lot, and shall be discharged from doing duty * * * except in case of such an alarm as shall occasion the whole force of the state to be called out" (1777). This exemplifies the weakness in the common contention that a draft is always necessary because

voluntary enlistments are usually insufficient. To be sure, a draft makes voluntary enlistments unnecessary; but, in some circumstances, voluntary enlistments can make a draft unnecessary.

(d) During the *pre*-constitutional period, Virginia, too, recruited volunteers for her regular Armed Forces:

> • [1746] "WHEREAS his * * * majesty * * * is engaged in a just, and necessary war against the French king; * * * and hath instructed his Lieutenant-governor of this colony, to inlist men with all possible speed * * * : And his majesty hath been pleased to declare, that both officers and men are to enter into his pay, * * * and moreover, that an allowance shall be made for arms and cloaths; this present General Assembly * * * have resolved to give such a sum of money as the circumstances of this colony will allow * * * :
>
> " * * * [T]he treasurer of this colony shall * * * borrow a sum of money * * * and * * * pay the same * * * to [certain named individuals] to be * * * applied towards defraying the expence and charge of inlisting, arming, cloathing, victualling, and transporting the soldiers * * * to be raised in this colony, for his majesty's service * * * .
>
> * * * * *
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> " * * * [N]o master of a ship * * * shall incur any penalty or forfeiture, for carrying or transporting any of the persons so inlisted * * * to any place his majesty shall think fit to order, direct and appoint[.]"{EN-2107}
>
> • [1755] The "treasurer shall out of the money raised * * * for the protection of his majesty's subjects, against the insults and encroachments of the French, pay to the * * * lieutenant governor, and commander in chief of this dominion, a sum of money * * * to be laid out for and in the raising and maintaining three companies of men, consisting of fifty men each, with their officers, to be employed as rangers, for the protection of the subjects in the frontiers of this colony, as the governor shall direct from time to time, and shall not be sent out of this colony, nor incorporated with the soldiers now in his majesty's service, or made subject to martial law."{EN-2108}
>
> • [1755] Certain named individuals "shall from time to time with the consent and approbation of the governor, or commander in chief for the time being, direct and appoint how * * * [certain] money shall be applied towards the raising, maintaining, arming and providing for so many men, to be employed for the protection of his majesty's subjects, in the frontiers of this colony, as they shall think necessary, so as that the whole number, so to be raised and employed * * * do not exceed twelve hundred men[.]"{EN-2109}
>
> • [1756] "[W]ithin twenty days after the passing of this act, the county lieutenant, or chief commanding officer of the militia in every

county, and of the city of Williamsburg, and borough of Norfolk, except of the county of Hampshire, is * * * required, to summon and hold a council of war * * * at which * * * the several captains of the militia * * * shall deliver in lists * * * of all the single men in their respective muster-rolls * * * ; which council of war shall enter the names of all the able-bodied single men upon a list, and shall * * * appoint a certain day * * * for the said able-bodied single men * * * to meet at the court-house of such county, city, or borough * * * : And the said county-lieutenant, and the field officers and captains of the militia * * * being there met, * * * shall then inlist all such able bodied men as will voluntarily enter into his majesty's service[.]

* * * * *

" * * * [T]he soldiers so * * * inlisted * * * shall be incorporated with, and become soldiers of the Virginia regiment, and shall receive the same pay and rewards, and be entitled to the same immunities and privileges, and be subject to the same government and discipline, as the soldiers of the said regiment, now in the pay of this colony, do receive, and are entitled, and subject to.

" * * * [I]f any such able-bodied single man shall fail to appear at the council of war * * * , without sending sufficient reasons * * * for his non-attendance, * * * such person, and persons, shall thereupon be deemed soldiers duly inlisted in his majesty's service[.]

* * * * *

" * * * [N]othing herein contained, shall extend or be construed to extend to impower the governor or commander in chief, or any other officer, to lead or march the soldiers hereby raised, or cause them to be led or marched out of this colony."{EN-2110}

•[1758] "[T]he forces now in the pay of this colony shall be augmented to two thousand men, exclusive of the rangers formerly directed to be raised. And for the more speedy raising the men * * * , it shall and may be lawful, to and for the officers appointed for that purpose, * * * to inlist so many men as shall be willing to enter into the said service; and every person so inlisting shall receive * * * the sum of ten pounds * * * .

" * * * [T]he men to be raised * * * as well as the soldiers formerly directed to be raised, and now in the pay of this colony, except the rangers, shall and may, by direction of the * * * commander in chief, be united to the forces that shall be sent to our assistance by his majesty or any of the neighbouring colonies, and may be marched to annoy or attack the enemy in such manner as may be thought proper by the commanding officer of his majesty's forces in North-America."{EN-2111}

As in *pre-*constitutional Rhode Island, these Virginia statutes almost always employed the verb "raise" to denote *voluntary* enlistments: "to be raised" (1746,

1755, and 1758), "raising" (1758), "the raising" (1755), "in the raising and maintaining" (1755), and "towards the raising, maintaining" (1755).[3917]

Also, as in Rhode Island, Virginia's General Assembly asserted a plenary discretion to determine where the troops the Colony raised would be deployed. They might be sent "to any place his majesty shall think fit to order, direct and appoint" (1746), or might "be marched to annoy or attack the enemy in such manner as may be thought proper by the commanding officer of his majesty's forces in North-America" (1758). But not because the General Assembly considered itself bound to acquiesce in the dictates of some ostensibly higher military authority. For sometimes it ordered quite the opposite: that Virginia's troops "shall not be sent out of this colony, nor incorporated with the soldiers now in his majesty's service, or made subject to martial law" (1755); and that no one should "lead or march the soldiers hereby raised, or cause them to be led or marched out of this colony" (1756).

(e) After the break with Britain, Virginia found herself under greater pressure than ever before to raise regular troops.

In 1775, Virginia's newly formed Convention (which had temporarily assumed the authority of the General Assembly under the unsettled political conditions of that time) provided

> [t]hat there shall be forthwith raised, and taken into the pay of this colony, from the time of their enlistment, two regiments complete, to consist of one thousand and twenty privates, rank and file [along with various officers and non-commissioned officers] * * * ; [and] to each of which regiments there shall be allowed a chaplain, a paymaster (who is also to act as muster-master) [,] an adjutant, quarter-master, one surgeon, two surgeons mates, and a serjeant-major.
>
> * * * * *
>
> * * * [T]he soldiers to be raised shall be enlisted on the terms following, to wit: That they shall continue in the service of the publick so long as may be judged necessary by the general convention, but not be compelled to continue more than one year, provided any soldier, or soldiers, do give the commanding-officer three months previous notice, in writing, of his or their desire to be discharged at the end of such period[.]
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> * * * * *
>
> And whereas it may be necessary, for the public security, that the forces to be raised by virtue of this ordinance should, as occasion may

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[3917] In one of the statutes, "the soldiers hereby raised" included both those voluntarily enlisted and those drafted (1756). As the passage in which the verb "raised" appeared did not differentiate between the two classes of "soldiers", it is likely that "raised" alone was employed merely for brevity. And the phrases "in the raising and maintaining" (1755) and "towards the raising, maintaining" (1755) are evidently close in meaning to the constitutional language, "[t]o raise and support".

> require, be marched to different parts of the colony, and that the officers should be subject to a proper controul, * * * the officers and soldiers under such command, shall in all things, not otherwise provided by this ordinance, and the articles established for their regulation, be under the controul, and subject to the order, of the general committee of safety.{EN-2112}

And

> * * * That the two regiments formerly raised be augmented; by the addition of three hundred and eighty two men * * * .
>
> * * * That there be likewise immediately raised, and taken into pay from the time of their endorsement, six other regiments complete, to be composed of ten companies of sixty eight men each rank and file
>
> * * * * *
>
> * * * [I]f any * * * officers * * * shall not recruit the whole number of men for a company * * * , the committee of the county or district * * * may either appoint others * * * or may continue the former officers, if * * * the company may be sooner completed by them than raised by appointing new officers[.]
>
> * * * * *
>
> * * * [T]he soldiers to be raised shall be enlisted on the terms following, to wit: That they shall continue in the service so long as may be judged necessary by the general congress, or by the general convention or general assembly of this colony, but not be compelled to continue more than two years * * * ;
>
> *Provided*, Any soldier or soldiers do give the commanding-officer three months previous notice, in writing, of his or their desire to be discharged at the end of such period[.]
>
> * * * * *
>
> And whereas it may be necessary, for the publick security, that the forces to be raised by virtue of this ordinance should, as occasion may require, be marched to different parts of the united colonies, and that the officers should be subject to a proper controul * * * , the officers and soldiers under their command shall, in all things, not otherwise particularly provided for by this ordinance, and the articles established for their regulation, be under the controul, and subject to the order, of the committee of safety.{EN-2113}

As did similar statutes in Rhode Island, these Virginia ordinances employed the verb "raised" with respect to soldiers to be recruited voluntarily, not impressed. And they distinguished among regular soldiers (who were all volunteers), Minutemen (who were all volunteers, too, although otherwise subject to draft as ordinary Militiamen), and ordinary Militiamen (who were all draftees).{EN-2114}

Also noteworthy is that in July of 1775, when fighting in the War of Independence was still localized, the first ordinance asserted Virginia's authority to control her forces that might be "marched to different parts of the colony"; whereas, in December of that year, when fighting was to be anticipated throughout America, the second ordinance asserted Virginia's authority to control her forces even if they might be "marched to different parts of the united colonies".

Thereafter, Virginia enacted further statutes to enlist volunteers into her regular Armed Forces:

> • [1776] "[F]or garrisoning the * * * fortifications, and for the further defence of this country, * * * three battalions of infantry be forthwith raised, to consist of ten companies each of sixty-eight able-bodied men rank and file[.]"{EN-2115}
>
> • [1777] "[A]s our numbers in continental service * * * may for some time be deficient: *Be it* * * * *enacted,* That the troops raised for the service of this commonwealth, by an act of assembly passed in [1776] * * * shall be forthwith regimented by the governor and council * * * ; and that a battalion of such troops * * * be marched to join the grand army, there to continue till a sufficient number of recruits may be raised to make good our just proportion, or until the terms of their enlistments shall expire.
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> * * * * *
>
> "But as an encouragement to persons to enter voluntarily into the said service, and thereby avoid the necessity of making * * * draughts, * * * any justice of peace or magistrate, or a commissioned officer of the militia * * * , as well as such recruiting officers as may be appointed by the governour or the continental commanding officer in this commonwealth, shall have power to enlist any able-bodied men willing to enter into the service, except apprentices and hired servants under written contracts at any iron works, or persons solely employed in the manufacture of fire arms, not having leave in writing from the owner or manager of such works, except also imported servants, and those who are by law obliged to serve to thirty one years of age, and to offer a bounty of ten dollars each from this commonwealth, over and above the continental bounty; to all such as will engage and serve * * * for three years, or during the present war, and to offer a bounty of twenty dollars * * * to such as will engage to serve therein for one year only * * * .
>
> * * * * *
>
> "And whereas it is of the greatest importance to the American cause to open the ensuing campaign as early as possible, and to render its operations more decisive and effectual, that the army under the command of his excellency general Washington should be reinforced by an additional number of troops to be raised for that purpose in this commonwealth: *Be it farther enacted,* That every man who shall voluntarily

engage to enter into such service, to continue therein for the space of six months * * * , unless sooner discharged, shall receive a bounty of ten dollars * * * . And that each volunteer so serving shall be exempted from any future draughts for the regular service for the space of six months after his discharge * * * .

"And for the greater expedition in raising and collecting the said volunteers, *It is farther enacted,* That the * * * commanding officer of the militia in each county or corporation shall immediately appoint a general muster * * * , and in the warmest terms represent to them the utility and necessity of strongly reinforcing the continental army, and receive the subscriptions of such as shall be willing to engage in this service[.]"{EN-2116}

•[1778] "That two thousand volunteers rank and file be raised, who are to join the commander in chief of the American army when ordered by * * * the governour * * * of this commonwealth.

" * * * That as an inducement to engage volunteers * * * , a bounty of thirty dollars, and a complete suit of regimentals * * * shall be given to every soldier who obliges himself to serve till of 1st day of January, [1779] * * * , unless sooner discharged by the commander in chief * * * . And that for the farther encouragement of such volunteers, they shall be exempt from all draughts and military duty, except in case of actual invasion of this commonwealth, or insurrection therein, and from payment of any tax on their persons for the space of twelve months, to commence from the day of their obtaining their discharge from the commanding officer * * * of the American army * * * .

"And for the more speedy carrying this act into execution, * * * the commanding officer in [certain named] counties * * * shall call together the militia of his * * * county, * * * and shall then * * * appoint the most proper man or men in the county as officer or officers for the volunteer service. * * *

"The officers being so appointed, shall immediately proceed to enlist volunteers to make up their respective quotas * * * ; and all volunteer officers * * * shall have full liberty to recruit any where within this commonwealth.

* * * * *

" * * * [T]he said volunteers shall be formed into four distinct battalions, * * * and the whole shall be under the command of a brigadier general, who shall be * * * commissioned by the governour. The governour and council shall appoint the field officers, who, with the captains and subalterns, shall be commissioned by the governour.

" * * * [E]very officer * * * shall, on the enlistments of the volunteers under him, obtain their subscription to the following terms, to wit: We do severally enlist to serve in the corps of volunteers now raising to reinforce the continental army, for the time and under the terms directed by [this] act * * * [;] and that the volunteers so raised, when they join the grand army, are to be governed by the like rules, regulations,

and articles of war, as govern continental officers and soldiers. The said volunteers when raised, shall, during the time they remain in the commonwealth, be subject to the orders of the governour and council[.]"{EN-2117}

• [1778] "FOR garrisoning the fortifications and batteries erected for the defence of the several ports and harbours within this commonwealth, * * * a battalion of infantry, to consist of eight companies, and each company of sixty eight rank and file, shall be raised within this commonwealth * * * . That the said battalion shall have the same bounty, pay, and rations, as are allowed in the continental service, * * * shall continue in service three years * * * , unless sooner discharged, and shall be subject to the continental rules and articles of discipline and government, save only, that the powers of confirming the sentences of courts martial in capital cases, or of pardon in the same cases, shall be in the governour and council.

* * * * *

"If any person enlisted for the said battalion shall be at any time ordered to march out of the commonwealth, such order shall amount to a discharge. * * *

"And for farther encouragement to those who shall enlist * * * , they shall be free from all draughts, except in case of an invasion of this commonwealth, or insurrection therein, from the time of their discharge, for so long a time as they shall have actually been in the said service."{EN-2118}

• [1778] "FOR preventing the inconveniency of draughting men to make up the deficiencies in the quota of continental troops to be furnished by this state, for giving encouragement to soldiers, and putting our army on a more permanent foundation, * * * the men * * * to be raised in this state for the continental army shall be engaged by voluntary enlistments to serve for three years, or during the war.

* * * * *

" * * * [A] bounty of one hundred and fifty dollars be given to each soldier * * * who shall enlist to serve during the war, and of one hundred dollars to each soldier * * * who shall enlist to serve for three years * * * . Every soldier enlisted shall be furnished, at the publick expense, with [certain articles of clothing] * * * . Provided, that the suit of clothes to be given annually to soldiers by this act shall not be additional to that annual suit which hath been allowed by congress. And if any soldier * * * shall be ordered to march out of this state, without having first received such clothes, such order shall amount to a discharge.

" * * * [A]s a farther encouragement, all soldiers who have enlisted * * * to serve in the army during the war, and shall actually serve that time, shall be exempted from the payment of all levies and taxes, for their own persons, during life * * * ."{EN-2119}

> • [1779] "WHEREAS it is necessary that the state be at all times provided with a force sufficient to repel any hostile invasion, and it being found that the militia, as it is presently constituted, is not sufficient for that purpose, * * * there be immediately raised for the publick service, four thousand five hundred and sixty volunteers, * * * to serve within this commonwealth for the defence thereof during the present invasion * * * ; that the pay, rations, and forage of the officers and soldiers be the same as in the continental army[.]
>
> * * * * *
>
> "And for the defence and protection of the western frontiers * * * , [t]hat two battalions of the said volunteers be raised in the counties lying on that side of the state * * * . The said battalions * * * shall not be compelled to march out of the commonwealth, unless in case of an expedition against the enemy Indians, or in pursuit of an enemy who shall have invaded the frontier."{EN-2120}
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> • [1781] "[T]he governor, with the advice of council, shall appoint some discreet officer or officers in the respective counties within this state, to recruit, by voluntary enlistments, any number of soldiers, not exceeding three thousand, for the term of two years, or during the war * * * .
>
> " * * * [E]very soldier who shall enlist to serve in the continental army for the term of two years or during the war, shall be allowed the sum of twenty dollars * * * .
>
> " * * * [W]here any person shall furnish one able-bodied man to serve in the continental army for two years or during the war, * * * such person * * * shall be exempted from militia and military duties for and during the term of service of such substitute."{EN-2121}

Once again, these statutes employed the verb "raise" to signify the *voluntary* recruitment of soldiers, both explicitly in those very terms—"raising * * * volunteers" (1777), "volunteers * * * be raised" (1778 and 1779), "volunteers so raised" (1778), "volunteers now raising" (1778), "volunteers when raised" (1778), and "raised for the publick service * * * volunteers" (1779); and implicitly in context—"be forthwith raised" (1776), "troops raised" (1777), and "troops to be raised" (1777). This, in contradistinction to drafts—"to enter voluntarily into the said service, and thereby avoid the necessity of making * * * draughts" (1777), "raised * * * by voluntary enlistments" in order to "prevent[ ] the inconveniency of draughting men" (1778). Not surprisingly, then, because of the statutes' reliance on volunteers, inducements to enlist for hazardous duty needed to be quite extensive,{EN-2122} even including "exempt[ion] from the payment of all levies and taxes, for the[recruits'] own persons, during life" (1778).

Volunteers raised in Virginia were *Virginia's* troops which, whenever they were enlisted, Virginia might detach for service strictly within her own borders (1775, 1776, 1778, and 1779), or for service with the Continental Army wherever

it might be deployed (1777, 1778, and 1781). Being Virginia's own troops, *Virginia* decided what rules and regulations were to govern their conduct. Thus, troops assigned to serve solely within Virginia were sometimes put under "the continental rules and articles of discipline and government" (doubtlessly so that they would be prepared for detachment to the Continental Army if necessary)—yet in the most important cases remained ultimately under Virginia's own "governour and council" (1778); whereas "volunteers * * * raised * * * [to] join the grand army, [we]re to be governed by the like rules, regulations, and articles of war, as govern continental officers and soldiers" (1778). Self-evidently, though, in the latter case Virginia could have mandated *different* "rules, regulations, and articles of war". For if troops despatched from Virginia to "join the grand army" would automatically have come under the "rules, regulations, and articles of war, as govern continental officers and soldiers", Virginia would not have needed to specify as much herself. Even more striking was the provision of one statute that "[e]very soldier enlisted shall be furnished, at the publick expense, with [certain articles of clothing] * * * . Provided, that the suit of clothes to be given annually to soldiers by this act shall not be additional to that annual suit which hath been allowed by congress. And if any soldier * * * shall be ordered to march out of this state, without having first received such clothes, such order shall amount to a discharge" (1778). Apparently, had Congress failed to provide the requisite clothing to Virginia's soldiers, and had Virginia herself been unable to do so, then her soldiers would have been entitled to a full release from service. Thus, Virginia made the continuance of her troops in the Continental service conditional on Congress's compliance with its promise to clothe them. That is, *Virginia asserted the authority to withhold her troops in the absence of satisfactory behavior by Congress*.

In these statutes, the relationship between Virginia's standing Militia and the volunteers specially "raised" for her regular troops was a subtle one. On the one hand, as a practical matter the volunteers had to come from among men eligible for the Militia—otherwise they would have been rejected as recruits. Several of the statutes made explicit what must have always been understood, that it was necessary "to prevent the enlistment of such men as are unfit for service",{EN-2123} and that "some proper person [should be appointed] to review and pass all soldiers enlisted in this state fit for service"{EN-2124}—and therefore stipulated that "no recruiting officer shall be allowed to enlist * * * any man unless he be five feet four inches high, healthy, strong made, and well limbed, not deaf, or subject to fits";{EN-2125} or that "each soldier [is] to be not less than five feet four inches high, not being a deserter nor subject to fits, of able-body and sound mind, fit for immediate service".{EN-2126} So, not surprisingly, because such men were to be found in the Militia, enlistments were sometimes explicitly sought from the Militia (1777); and the Militia was sometimes explicitly made the focal point for recruitment (1778). On the other hand, even though the reason given in one instance for

raising regular troops was that "it is necessary that the state be at all times provided with a force sufficient to repel any hostile invasion, and * * * the militia, as it is at present constituted, is not sufficient for that purpose",{EN-2127} Virginia *never* treated her Militia as mere pools of men from which volunteers for her regular troops could be drawn, but instead always recognized her Militia and regular troops as separate establishments.{EN-2128}

Virginia's regular Armed Forces were not limited to what the Constitution later called "Troops" (that is, infantry, cavalry, and artillery), but also included "Ships of War" (with sailors and marines).[3918] For example, in 1775 the Convention mandated that,

> for the greater security of the inhabitants of this colony from depredations of the enemy by water, * * * the committee of safety shall * * * provide from time to time such and so many armed vessels as they may judge necessary for the protection of the several rivers in this colony, in the best manner the circumstances of the country will admit; and, to that end, to raise and take into pay a sufficient number of * * * sailors and marines, whose pay shall be settled by the committee of safety[.]{EN-2129}

In 1776, another statute provided

> [t]hat the commissioners of the navy * * * provide necessary plank and timber for the building of two frigates, to carry thirty two guns each, and * * * the building of four large gallies, fit for river or sea service, to be mounted with proper cannon.
>
> And for manning the said gallies, as well as the others which are now building, * * * the commissioners * * * may * * * raise any number of men they shall think necessary for the same, not exceeding in the whole one thousand three hundred exclusive of officers, to serve on board the Virginia fleet, for the term of three years * * * . And if any * * * officer shall fail to enlist his quota of men, the governour, by and with the advice of the privy council, shall have power either to continue such officer or appoint another in his stead, as they shall judge best for the publick service.
>
> * * * And for the more speedy manning the said gallies, as well as completing the crews of the other vessels of war in the service of the commonwealth, every seaman and landsman enlisting * * * shall receive a bounty of twenty dollars[.]{EN-2130}

And in 1780, the General Assembly directed

[3918] *See* U.S. Const. art. I, § 10, cl. 3.

> that the governour, with the advice of council, * * * order the ships Thetis, Tempest, Dragon, together with the brig Jefferson, to be immediately repaired, manned, and made ready * * * ; and that the Henry galley be in like manner immediately repaired, manned, and made ready * * * . And as an encouragement for sailors to enter into the marine service, * * * there shall be paid to every person who shall enlist * * * for the term of three years or during the war, a bounty of one thousand dollars, and two dollars per day * * * . And whereas experience has evinced the great utility of marines, * * * a body of three hundred men be recruited for that purpose * * * . And to the end that recruits raised by virtue of this act may be conveniently received and passed, * * * the commanding officer or county lieutenant of the county * * * shall examine such recruit, and pass a certificate for such and so many as they may judge to be able bodied and sufficient for the purpose. And as an encouragement for marines to enter into said service, * * * there shall be paid to each marine so enlisting for the term of three years or during the war, a bounty of one thousand dollars, and one dollar per day[.]{EN-2131}

These statutes once again exemplify the use of the verb "raise" to indicate *voluntarily* recruitment, as in "raise any number of men" (1776) and "recruits raised" (1780). In addition, the idiomatic phraseology "provide * * * armed vessels" (1775) and "provide * * * for the building of two frigates" (1776) anticipated the later constitutional language in the power of Congress "[t]o provide and maintain a Navy".[3919]

(3) The Colonies and later the independent States also augmented their regular Armed Forces by means of drafts or impressments by, through, and from their Militia. This, of course, essentially amounted to drafting men from the general population, because all able-bodied adult free males were supposed to be enrolled in the Militia. Yet, no doubt in deference to the Militia, the statutes treated it as a different situation entirely.

(a) In Rhode Island, drafts from her Militia into her regular Armed Forces occurred only in time of war, or to enforce discipline.

During the Colonial period, for example—

> • [1744 and 1766] "[A]fter an Alarm is beaten in any Town in this Colony, no Man whatsoever shall leave or go out of said Town so alarmed, but by Leave or Order from the Commanding Officer there, upon the Penalty of paying to and for the Use of the Colony, the Sum of *One Hundred Pounds* * * * ;[3920] and in case any Person shall not have sufficient Estate to pay the same, then such Person shall be committed to

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[3919] *See* U.S. Const. art. I, § 8, cl. 13.

[3920] The Act of 1766 reduced the fine to "Twelve Pounds".

Goal * * * for the Space of Six Month, or else shall be sent to the Fort, there to serve the Colony as a Soldier for * * * Six Months[.]"{EN-2132}

• [1757] In order to ensure that four hundred and fifty men ordered to be enlisted "for the ensuing campaign against His Majesty's enemies in North America" would be raised, the General Assembly provided that "each respective colonel * * * shall immediately grant forth his warrant to the captain * * * of each of the troops of horse, and of the foot company or companies, in every town that shall be found deficient in enlisting its proper quota, immediately to impress and bring to him so many able bodied men, fit for soldiers, as shall make up each town's proportion * * * .

"And every man so impressed, shall be obliged to serve as a soldier, or find a good, able bodied, effective man to serve in his stead; unless he hath some reasonable or lawful excuse * * * .

"And when any man that hath been impressed, is excused or doth not pass muster, the captain * * * shall * * * impress another, forthwith, in his stead.

"And any man so impressed, upon his paying a fine of £100 * * * to one of the field officers * * * shall be excused; and such field officer shall order another to be impressed in his stead * * * ; and so on, from time to time, as often as any shall be excused, or pay a fine, until the required number of soldiers shall be completed and made up."{EN-2133}

• [1757] "Whereas, a number of men is demanded of this colony, by the commanders of His Majesty's forces, * * * for the relief of Fort William Henry, which is invested by a large body of French and Indians; in compliance with the said demands, and to the end that every thing in the power of this colony may be done for the preservation of the country,—

" * * * one sixth part of the whole militia of this colony, be forthwith raised and sent to Albany, with all possible despatch, to be under the command of the commander in chief of His Majesty's forces, * * * and to continue in the service as long as the immediate preservation of the country requires their stay there, and no longer * * * .

* * * * *

" * * * [T]hat His Honor the Governor, forthwith issue his warrants to the proper officers, to call together all the companies * * * in this colony * * * in each respective town * * * .

" * * * [T]hat the names of all persons in the list of each company, shall be written on a scroll of paper * * * then put into a hat or box; and one sixth part thereof, shall be drawn, (unless the company agree that the commissioned officers shall press said sixth part,) and the persons whose names shall be so drawn or pressed, shall go on this service.

"Provided, nevertheless, that any person drawn, who declines going, and shall immediately procure an able bodied, effective man to go in his room, shall be excused; but no person shall be excused without.

> "Provided * * * that no person's name be put into the hat or box, who, through sickness or lameness, cannot go, or who was out of the government before the meeting of this Assembly."{EN-2134}

The language employed in the latter two statutes emphasized the compulsory nature of the process: "to impress * * * so many able bodied men", "every man so impressed", and "the persons whose names shall be so drawn or pressed". Even the second statute, which loosely referred to "one sixth part of the whole militia" to "be forthwith raised", made clear that this would be accomplished by coercion. Of course, one of these statutes allowed for the payment of a fine as the price of an exemption; and both allowed men who were drafted to provide substitutes—so the draft was actually voluntary for anyone who could have paid the fine or found "an able bodied, effective man to go in his room".[3921]

Significantly, in neither of these instances were the men impressed directly by the British Army, or under color of some Act of Parliament. Rather, Rhode Island's General Assembly authorized the process, and directed that it be performed at the Local level, in each Town, by the Militia Companies themselves—in one case, to draft men only if a Town did not meet its quota of recruits through voluntary enlistments; in the other case, to draft only "one sixth part" of the Militia. Moreover, the men were not to be impressed into the British Army or Rhode Island's regular troops generally, but instead were drafted for very specific purposes only: "for the ensuing campaign against His Majesty's enemies in North America", or "for the relief of Fort William Henry" and "to continue in the service as long as the immediate preservation of the country requires their stay there, and no longer".

After the break with Britain, drafts from the Militia were more frequent, because driven by a more desperate situation—

> • [1778] "This Assembly, * * * having ordered Eight Hundred and Thirty-nine Men to be raised * * * for filling up the State's Brigade, * * * and apportioned the same to the several Towns, some of which have not raised the Quota assigned them, * * * *Resolved,* [t]hat such delinquent Towns shall keep up in the Field so many Men from the Militia, Alarm and Independent Companies, in such Town, as they are deficient in their Quota * * * , until the same shall be compleated: That the Militia so doing Duty shall be entitled to the Continental Wages and Rations only * * * : That the * * * Commanding Officer of the respective Regiments of Militia in this State * * * make Enquiry from Time to Time of the Numbers of Men raised by the several Towns in their respective Districts, * * * and * * * draught a sufficient Number out of the Militia, Alarm and Independent Companies, to make good such Deficiency, who shall do

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[3921] "[S]ome reasonable or lawful excuse", such as "sickness or lameness", was also accepted as a basis for a man's avoidance of impressment. But there was hardly anything extraordinary about this. *See ante*, at 249-252.

Duty for Fifteen Days each: That the Men which shall be so draughted do Duty * * * in the Twelve Months Brigade[.]"{EN-2135}

Interestingly, here, because the "delinquent Towns [were to] keep up in the Field so many Men from the Militia, Alarm and Independent Companies * * * as they [we]re deficient in their Quota[s] * * * until the same [were] compleated", Militiamen from those Towns who refused to volunteer for "the State's Brigade", and were not "draught[ed]* * * [to] do Duty for Fifteen Days each * * * in the Twelve Months Brigade", nonetheless might have served for some time in the field.

• [1778 and 1779] "Whereas, sundry persons in the several towns of this state, who were drafted, and required * * * to perform military duty in the late expedition against the enemy upon Rhode Island, were so destitute of public spirit, and regardless of the laws, honor and welfare of their country, as to neglect or refuse to serve in said expedition, in their own proper persons or by hiring others in their places * * * ; and whereas, for supporting just and equal government, it is necessary that every individual, liable to perform military duty, when required thereto, should be impartially obliged to perform his equal proportion thereof,—

" * * * [T]he * * * commanding officers of the several regiments of militia, alarm and independent companies in this state, who were required to serve in said expedition * * * make a true and exact list * * * of the names and places of abode of all persons in their respective regiments, who were delinquent in performing military duty in said expedition, and were not legally excused, or discharged therefrom; and also of all such as left the service without a proper discharge * * * .

" * * * [T]hereupon, all such delinquent persons * * * shall be liable to serve a tour of military duty, without any allowance of bounty or wages from this state, for two months, in one of the state's battalions, in lieu of the time they ought to have served in said expedition, unless such delinquent person shall pay as a fine to and for the use of this state * * * the sum of £45 * * * .

"Provided nevertheless, that any such delinquent persons may have the liberty of hiring other suitable persons to serve in their room, during the said term of two months.

" * * * [I]t is * * * recommended to the * * * commander-in-chief * * * to take effectual measures for bringing into the field, and holding in service, any such delinquent persons for the term of two months * * * who shall not pay said fine * * * or procure a suitable person to serve in their stead[.]"{EN-2136}

• [1780] "Whereas, * * * there appears * * * to be * * * Deficiencies in the Quotas of Men heretofore assigned to the Towns

* * * * *

" * * * wherever the said Deficiencies arise from the Delinquency of the Persons * * * classed, the Persons appointed to class and detach the Quotas of Militia apportioned to, and to be raised by the several Towns

within this State, are * * * to detach an able-bodied effective Man from such delinquent Class * * * ; And the Person so detached, shall, in case of Delinquency, be proceeded against * * * .

" * * * [W]herever the said Deficiency shall arise from the Delinquency of any of the said Towns, the Persons * * * appointed to make a Detachment from the Delinquent Classes * * * [shall] form the Inhabitants thereof into Classes * * * ; And that if any * * * of the said Classes shall not furnish an able-bodied Man * * * , the Persons appointed as aforesaid * * * [shall] detach an able-bodied Man from such Class; and, in case of Delinquency, cause him or his Estate to be proceeded against[.]"{EN-2137}

• [1780] "That Two Hundred and Twenty able-bodied effective Men be inlisted to serve in the Battalion of this State, for the Defence of the United States: That each Man * * * receive a Bounty of *One Hundred Dollars* * * * , and *Forty Shillings* * * * per Month * * * .

* * * * *

" * * * [T]he Delinquents in the last general Alarm, who were bound by Law to appear * * * , shall furnish Recruits for Three Years, or during the War, in the following Proportions, *to wit:* every Twelve Delinquents shall furnish One Recruit[.]"{EN-2138}

• [1780] "WHEREAS for the Support and Continuance of the present just and necessary War, on the part of the United States of *America*, * * * it is indispensably necessary that a regular, efficient and permanent Force be immediately engaged in the public Defence: And whereas the Number of Three Hundred and Eight Men, pursuant to a late Resolve of Congress, has been apportioned to this State, as their Quota of the new Army to be raised * * * :

* * * * *

"AND as a further Encouragement to Persons to enter into public Service, and to do the Duty assigned them by Law, * * * every Twelve of the Delinquents upon the last general Alarm, who were bound by Law to appear * * * , and every Twelve of those who deserted from the Service after having joined their respective Corps in said Alarm, shall furnish an able-bodied effective Man, to make up the Deficiency of the Town to which such Delinquents or Deserters respectively belong: * * * That the * * * Committee [in each Town] shall determine the Proportion of the Expence which each Delinquent or Deserter shall pay towards procuring an able-bodied Man * * * , as they the said Committee shall judge just and right[.]"{EN-2139}

• [1780] "[I]f any Person who shall be detached * * * shall absent himself * * * and shall not procure an able-bodied effective Man to do the Duty in his Stead, * * * such a Part of the Estate of the Person so detached shall be taken and disposed of * * * as shall be sufficient to procure an able-bodied Man to do the said Duty * * * : That if such

> Person * * * shall not be possessed of a sufficient Estate for that Purpose, the Commanding-Officer of the Regiment to which he belongs shall advertise, in all the public News-Papers of this State, the Person * * * as a Delinquent, and offer a Reward of *Three Hundred Pounds* * * * to the Person or Persons who shall apprehend such Delinquent: That upon such Delinquent being apprehended, the said Officer is directed to deliver him to some One of the Officers of the * * * Continental Battalions to do Duty as a Soldier therein, for the Space of One Year[.]"{EN-2140}
>
> • [1781] "[I]f any Person belonging to the military Force of this State [that is, the Militia] shall absent himself, in order to elude or evade this Act, or shall refuse to march forward, upon being detached, by himself or Substitute, he shall be sent forward to the Continental Army, to do Duty for Six Months, in the *Rhode-Island* Battalion, as a common Soldier[.]"{EN-2141}
>
> • [1781] "WHEREAS by [certain] Act[s] of this Assembly * * * the Men who were called forth * * * to do the * * * Month's Tour of Duty, and refused or neglected to do the same, in Person or by Substitute, were directed to be sent forward to the Continental Army, to do Duty as common Soldiers for the Space of Six Months: And whereas a Number of Persons in this State did neglect to do Duty * * * , Part of whom have not as yet been sent forward * * * : And this Assembly being willing to mitigate the Penalty by the said Acts inflicted,
>
> " * * * [*I*]*t is Enacted,* That * * * each and every such Delinquent, who hath not been sent forward, * * * shall pay as a Fine the Sum of *Nine Pounds* Lawful Silver Money * * * : And that in case any Delinquent * * * shall not have sufficient Estate to pay such Fine, he shall be sent forward to *Newport*, to do Duty as a common Soldier with the Militia of this State, for a Term of Two Months."{EN-2142}

In these statutes as elsewhere, Rhode Island's General Assembly distinguished between voluntary enlistments out of her Militia (or of men eligible for the Militia) and impressments from her Militia—such as between the "Men to be *raised*" by the Towns according to "the Quota assigned them" and the "Men which shall be * * * *draughted*" out of the Militia (1778). Here, in addition, the statutes employed the verb "detach" to signify "draft"—such as "to detach an able-bodied effective Man" (1780) and "to class and detach the Quotas of Militia" (1780).

Rhode Island resorted to drafts from her Militia for three purposes: (i) To complete the ranks of her own regular troops—such as "filling up the State's Brigade" by "apportion[ing] the [draft] to the several Towns * * * which have not raised the Quota assigned them" (1778). (ii) To provide the men the Continental Congress "apportioned to this State, as their Quota of the new Army to be raised" (1780). And (iii) to punish Militiamen who seriously defaulted in their duties—such

as those who were "required * * * to perform military duty in the late expedition against the enemy upon Rhode Island, [but] were so destitute of public spirit, and regardless of the laws, honor and welfare of their country, as to neglect or refuse to serve * * * in their own proper persons or by hiring others in their places" (1778 and 1779); or "the Delinquents in the last general Alarm" who were required to "furnish Recruits for Three Years, or during the War" at the rate of "One Recruit" for "every Twelve Delinquents" (1780). Yet, in practice, even these drafts were voluntary for those men who could afford to hire substitutes (1778, 1779, 1780, and 1781) or to pay fines (1778, 1779, and 1781).

(b) Virginia conducted drafts from her Militia for the benefit of her regular troops and the Continental Army on the same principles.

During the Colonial period, for example—

> • [1755] "That * * * a sum of money not exceeding two thousand pounds * * * be laid out for and in the raising and maintaining three compa[n]ies of men * * * to be employed as rangers, for the protection of the subjects in the frontiers of this colony, * * * and shall not be sent out of this colony, nor incorporated with the soldiers now in his majesty's service, or made subject to martial law. And in case the * * * men, cannot be raised, by such as will voluntarily enlist * * * chief officer[s] of the militia * * * [may] draft out of the militia * * * such and so many young men * * * who have not wives and children * * * to be employed in the said service."{EN-2143}
>
> • [1755] "[I]n case the * * * [required] number of men cannot be raised, by such as will voluntarily inlist * * * , it shall and may be lawful, for the field officers and captains of the militia * * * to draft out of the militia of their counties * * * such and so many of their militia, who have not wives or children, * * * to be employed in the * * * service[.]"{EN-2144}
>
> • [1756] "[T]he * * * chief commanding officer of the militia in every county, and of the city of Williamsburg, and borough of Norfolk, except the county of Hampshire, * * * [shall] hold a council of war * * * at which * * * the * * * captains of the militia * * * shall deliver in lists * * * of all the single men in their * * * muster-rolls * * * ; which council of war shall enter the names of all the able-bodied single men upon a list, and shall immediately appoint a certain day * * * for the said able-bodied single men * * * to meet at the court-house of such county, city, or borough * * * : And the * * * [various officers] of the militia * * * shall then inlist all such able bodied men as will voluntarily enter into his majesty's service, but in case so many of them will not voluntarily inlist as will make one of every twenty of the militia, then they shall cause so many distinct blank pieces of paper to be prepared, as the number of the able-bodied single men * * * , upon one of which pieces of paper for every twentieth man * * * shall be written the words * * * *"This obliges me*

immediately to enter his majesty's service," which distinct pieces of paper * * * shall be put into a box * * * , and then the said council of war shall cause all the said able bodied men single men * * * one after another * * * to draw forth one of the said pieces of paper * * * ; and the person * * * whose lot it shall be, to draw forth * * * any of the said papers, so written upon * * * , shall immediately * * * be deemed and taken to be an inlisted soldier[.]"{EN-2145}

• [1757] "[F]or the more speedy raising the men * * * the several justices [of the peace], and field-officers, and captains of their respective counties, city and borough, * * * shall * * * hold a court, and examine and enquire into the occupation and employment of the several inhabitants * * * between the age of eighteen and fifty years * * * : And the said courts are * * * required to prick down all such able-bodied persons * * * as shall be found loitering and neglecting to labor for reasonable wages; all who run from their habitations, leaving wives or children without suitable means for their subsistance, and all other idle, vagrant, or dissolute persons, wandering abroad without betaking themselves to some lawful employment * * * . And in a case a sufficient number of such persons * * * cannot be found * * * , then the said courts are hereby impowered to prick down such able-bodied men, not being freeholders or house-keepers qualified to vote at an election of burgesses, as they shall think proper to make up the same. * * * [A]nd such court shall then proceed to draft out * * * one man for every forty effective soldiers in the militia of each county, city and borough.

* * * * *

" * * * And for the encouragement of persons who may be inclined to inlist voluntarily into the said service, * * * every able-bodied person * * * that shall * * * inlist himself as a soldier * * * shall be entitled to five pounds * * * : And every person so inlisting shall be deemed and taken as one of the number * * * directed to be drafted[.]"{EN-2146}

After independence, Virginia continued to draft men into her regular troops, as well as for the Continental Army—

• [1777] "[F]or the more speedy and certain completion of the * * * new battalions [for the Continental Army], every county, city, and borough [with certain exceptions] * * * , in case the * * * officers by them appointed * * * shall not * * * enlist the quota * * * , shall make up such deficiency by draughts, to be taken from their respective militias in manner following * * * : The * * * [field officers and magistrates in the commission of the peace] * * * shall first ascertain the * * * deficiency * * * , and immediately * * * divide the whole militia of each county, city, and borough * * * into as many lots as there may be men wanting to supply their quota, * * * taking care to allot to each division * * * as many able bodied men as conveniency will admit, having regard to the property

of each individual composing such divisions, so as to make the number of able bodied men, and the property in each, as equal as may be; that each of the * * * divisions shall be required to furnish one man; and in case any such division refuse, or neglect to do so * * * then the field officers and magistrates * * * shall fix upon and draught one man, who, in their opinion, can be best spared, and will be the most serviceable, from the division so refusing or neglecting; and the * * * officers and magistrates * * * shall either procure an able bodied man to enlist, or, in default thereof, shall each of them pay the sum of fifty shillings, as an additional bounty to an able bodied man whom the officer appointed to recruit for the deficiency * * * may procure to enlist * * * ; and the person so furnished or draughted shall, to all intents and purposes, be considered as a regular soldier, * * * unless he shall secure an able bodied man to serve in his room."{EN-2147}

•[1777] "WHEREAS it is indispensably necessary that the regiments of infantry raised * * * , on continental establishment, be speedily recruited * * * : *Be it therefore enacted* * * * , That * * * the said regiments * * * be completed by recruits or draughts * * * .

* * * * *

"*It is farther enacted*, That * * * a number of men shall be draughted from the single men of the militia of the several counties, and the city of Williamsburg, * * * above eighteen years of age, who have no child * * * .

* * * * *

"And to the end that the draughts * * * may be fairly and equally made, *It is farther enacted*, That the * * * commanding officer of the militia in each county or corporation shall * * * collect from the muster rolls the names of all the * * * men * * * who have not a wife or child, or who are not exempted by this act, or from militia duty by having a substitute in the army, adding thereto the names of any other such single men as are * * * not enrolled, and who by the militia law ought to be enrolled, and shall direct all such single men to * * * meet * * * to determine, by fair and equal lot, which of them shall enter into the service[.]"{EN-2148}

•[1779] "FOR the better defence of the commonwealth and providing a force sufficient to repel any hostile invasion * * * , That four regiments of infantry be raised * * * . For completing those regiments, each county in this state, and the city of Williamsburg, except the county of Illinois, shall furnish one twenty fifth part of their militia. And for the more speedy and certain mode of raising the said men * * * the county lieutenant or commanding officer of each county * * * shall summon the four senior justices, not being field officers, and the field officers of his county, * * * which said justices and field officers * * * shall proceed to lay off the militia * * * into divisions * * * [and] each division so laid off is * * * required to produce * * * one able bodied man * * * . Every able bodied volunteer enlisting for any division, shall be entitled to a bounty

from the division of seven hundred and fifty dollars, to be paid by the individuals therein * * * . If any of the said divisions shall fail to furnish an able bodied man * * * , the said justices and field officers are * * * required, to appoint some reputable diligent man in each of the * * * divisions so failing, to enlist one able bodied volunteer to serve as a soldier * * * , and when any soldier shall have so enlisted, * * * the said county lieutenant or commanding officer shall * * * certify * * * the bounty he is entitled by law to receive, which sum * * * shall be forthwith levied upon every person make and female, within such district, in proportion to the rate of each persons last assessment[.]"{EN-2149}

Thus, the enlistment of troops under this statute was essentially voluntary, because if any "division" did not produce a fund with which to pay a bounty to a volunteer then the taxpayers in general—"every person male and female"—were dunned. No method was established for selecting a draftee.

• [1779] "WHEREAS * * * many counties hav[e] failed to furnish [by voluntary recruitment] one twenty fifth man [for the Continental Army] * * * ; and whereas it is just that the whole community should bear an equal part in publick defence: *Be it enacted* * * * That the county lieutenant or commanding officer of the militia shall * * * cause his county to be * * * laid off into divisions, * * * each of which divisions shall furnish a man * * * ; and in those counties where, although the militia hath been already laid off in divisions, have failed to furnish a soldier * * * ; every division having so failed, * * * the county lieutenant shall order the said division to assemble * * * and shall there * * * , by fair and impartial lot, draft one man out of such division, to serve as a regular soldier for * * * eighteen months[.]"{EN-2150}

• [1779] "If any non-commissioned officer or soldier [in the Militia] shall refuse to march when ordered into actual service according to his tour of duty, or find an able bodied man in his room, or shall while in service, mutiny, or desert, and thereof shall be convicted before a court-martial, such offender shall serve as a regular soldier in the troops of this state six months, and shall by order of such court-martial be delivered to a recruiting officer for that purpose."{EN-2151}

• [1780] "WHEREAS a dangerous invasion of South Carolina now threatens * * * that state, and the troops engaged in its defence may be overpowered by superiour numbers, if timely aid not be sent to them. And it is incumbent upon this state, on every principle of policy and good neighbourhood, to assist our friends and fellow citizens in distress, as speedily and effectually as possible; *Be it enacted* * * * That two thousand five hundred infantry be forthwith called into service, in legal rotation, from [certain] counties, and in [certain] proportions[.]

* * * * *

" * * * If any * * * soldier shall fail to attend when summoned, not having a just and reasonable excuse, or refuse to march when ordered into actual service according to his tour of duty, or find an able bodied man in his room, * * * such offender shall serve as a regular soldier in the troops of the state eight months[.]"{EN-2152}

• [1780] "[T]hree thousand men shall be forthwith raised for the purpose of completing this state's quota of continental forces * * * . The several counties and corporations within this commonwealth * * * shall * * * furnish * * * after their militia shall have been laid off into divisions * * * one fifteenth man of such of their militia as exceed the age of eighteen years, including all * * * officers under the age of fifty years * * * . The * * * commanding officer of each county or corporation * * * shall * * * divide the county and militia into as many separate districts and divisions as the number of men required [to be drafted] * * * , in which districts they shall include all the assessable property * * * , and so arrange it * * * as to have as equal a distribution thereof as the nature of the case will admit among the several divisions, which shall consist, as nearly as may be, of fifteen men each. The divisions * * * may collect among themselves any sum of money * * * and deposit it in the hands of some one of their body * * * , who shall * * * recruit a man to serve in the continental army * * * ; and if any division shall then fail to deliver a recruit * * * the * * * commanding officer * * * shall * * * draft an able bodied man by fair and impartial lot out of such division, to serve in the continental army * * * ; who may nevertheless be permitted to procure an able bodied man in his room; and any person who * * * shall enlist an able bodied soldier to serve in his stead during the war, shall * * * be exempted from all future drafts, except in case of actual invasion[.]"{EN-2153}

• [1780] "[W]hereas it has been a practice of many tradesmen to entice their apprentices to enlist as soldiers, and to sell them as substitutes for large sums of money; *Be it enacted*, That if any tradesman or other person to whom any infant is, or shall be bound as an apprentice, shall directly or indirectly take or receive, or agree to take or receive any money or other gratuity in consideration of such apprentice, his enlisting as a soldier or sailor in any corps whatsoever, every such tradesman or person so offending, * * * being an able bodied man under the age of fifty years, * * * shall be deemed a soldier to serve in this state's quota of continental troops during the war, and shall be by the commanding office of the militia of his county, delivered to some continental officer belonging to this state.

"And whereas a practice has prevailed of enlisting men for small bounties and afterwards selling them * * * for higher bounties * * * ; *Be it enacted*, That every person guilty of such offence, shall be subject to the same penalties as tradesmen and others enlisting or selling their apprentices[.]"{EN-2154}

• [1781] "Every militia-man ordered into actual service, who shall refuse and neglect to appear at the time and place of rendezvous appointed for the company, corps or detachment to which he belongs, without a reasonable excuse, or find an able bodied man in his room (but no person shall be admitted as a substitute except he belongs to the militia of the same county, and if it shall come to such substitute's tour of duty before he returns, then the person employing him shall be obliged to serve in his room or procure a second substitute) shall * * * be declared a regular soldier for six months, and shall * * * be delivered to a continental officer for that purpose[.]"{EN-2155}

• [1782] "FOR the more speedy recruiting this state's quota of troops in the continental service, *Be it enacted*, That three thousand men, of able bodies and sound minds, at least five feet four inches high, * * * and between the ages of eighteen and fifty years, shall be forthwith raised * * * : One able-bodied man * * * for every fifteen militia-men. And for effecting that purpose in the most equitable manner,

" * * * [Certain officers] of the militia * * * shall * * * divide each county into as many classes or districts as there are men required * * * , making such classes as equal as may be, having regard as well to an equal proportion of taxable property in the county, including the property of exempts, as the number of able-bodied men. * * *

" * * * [E]ach class or district * * * shall * * * enlist * * * one man * * * to serve as a soldier in the continental army for three years or during the war, * * * or pay a sum equal to one eighth part of the taxes payable by the several persons of which such class shall consist * * * to such person as they * * * shall appoint * * * . And in case of failure of the payment * * * or delivering such soldier * * * the class shall * * * choose a collector * * * to receive the sums payable from the individuals of such class, or to enlist such soldier; * * * and in case the same shall not be paid or such soldier enlisted * * * [the] commanding officer of the company to which [the] delinquents * * * belong * * * [shall] cause one of the * * * able-bodied militia-men to be drafted, by fair and equal ballot[.]"{EN-2156}

• [1782] "[T]he governor shall cause to be delivered to the * * * commanding officers of the militia of such counties as are most exposed to the incursions of the enemy, and to the officers of the militia of the city of Williamsburg, and borough of Norfolk, such a number of arms as he may think necessary, not less than sufficient to arm three tenths of their militia * * * ; who, on having served their tour of duty, shall return their arms, in good order, * * * to be delivered in like manner to such of the militia as stand next in rotation.

* * * * *

" * * * [E]very militia-man to whom arms shall be delivered * * * who shall neglect or refuse to return the same * * * shall forfeit and pay the sum of twelve pounds; and on failing so to do, or giving security to pay

> the same in two months, every such militia-man shall be obliged to serve in the continental army the term of three years or during the war."{EN-2157}

In these statutes, Virginia followed much the same pattern as Rhode Island, whether she assembled regular troops for her own forces (1755, 1756, 1757, 1779, and 1780) or for the Continental Army (1777, 1779, 1780, 1781, and 1782). *First*, when a statute that authorized a draft employed the verb "raise", it also allowed for voluntary enlistments, which only if insufficient were to be supplemented through impressment—"in case the * * * [required] number of men cannot be raised, by such as will voluntarily inlist" (1755); "in case so many of them will not voluntarily inlist" (1756); "in case the * * * officers by them appointed * * * shall not * * * enlist the quota" (1777); "regiments of infantry raised" to "be completed by recruits or draughts" (1777); "[i]f any of the * * * divisions shall fail to furnish an able bodied man" they shall "enlist one able bodied volunteer" (1779); where "the militia * * * have failed to furnish a soldier * * * the county lieutenant shall * * * , by fair and impartial lot, draft one man out of such division" (1779); "if any division shall * * * fail to deliver a recruit * * * the * * * commanding officer * * * shall * * * draft an able bodied man by fair and impartial lot" (1780); and if certain moneys were not paid or a "soldier enlisted", "[the] commanding officer of the company * * * [shall] cause one of the * * * able-bodied militia-men to be drafted, by fair and equal ballot" (1782). The one apparent exception used the phrase "the more speedy raising the men" in reference to a draft, but also provided for voluntary enlistments in lieu of drafts (1757).

Second, Virginia's drafts were usually highly selective—"young men * * * who have not wives and children" (1755); "so many of their militia, who have not wives or children" (1755); "all the able-bodied single men" (1756); "all such able-bodied persons * * * found loitering and neglecting to labor for reasonable wages (1757); all who run from their habitations, leaving wives or children without suitable means for their subsistance, and all other idle, vagrant, or dissolute persons, wandering abroad without betaking themselves to some lawful employment" (1757); "able-bodied men, not being freeholders or house-keepers qualified to vote at an election of burgesses" (1757); men "who * * * can be best spared, and will be the most serviceable" (1777); and "single men of the militia * * * above eighteen years of age, who have no child" (1777). At the height of the War of Independence, the class subject to the draft was broadened to include all "men, of able bodies and sound minds, at least five feet four inches high, * * * and between the ages of eighteen and fifty years"; but only "[o]ne able-bodied man * * * for every fifteen militia-men" was to be called up (1782).

Third, Virginia exposed to impressment in the regular Armed Forces no more than a small proportion of the men eligible for her Militia—"one of every twenty of the militia" (1756); "one man for every forty effective soldiers in the militia" (1757); "one twenty fifth man" (1779); "one fifteenth man * * * of the[ ]

militia as exceed the age of eighteen years" (1780); and "[o]ne able-bodied man * * * for every fifteen militia-men" (1782). Even then, selections were made more or less at random—by "draw[ing] forth * * * pieces of paper" (1756); "by fair and equal lot" (1777); "by fair and impartial lot" (1779 and 1780); and "by fair and equal ballot" (1782).

Fourth, impressment into the regular Armed Forces was employed to punish Militiamen who might "refuse to march when ordered into actual service * * * or * * * while in service, mutiny, or desert" (1779); "fail to attend when summoned * * * or refuse to march when ordered into actual service" (1780); "refuse and neglect to appear at the time and place of rendezvous" (1781); or "neglect or refuse to return" arms delivered to them (1782). Impressment was also used to punish "tradesmen" who might "entice their apprentices to enlist as soldiers, and * * * sell them as substitutes for large sums of money" (1780). (It must have been the sale of the apprentices "for large sums of money" that drew the General Assembly's attention at this time, because several of Virginia's earlier statutes explicitly allowed apprentices to be recruited with the written consent of their masters.{EN-2158})

Fifth, many of these statutes explicitly permitted men subject to impressment to hire substitutes—"procure an able bodied man to enlist" (1777), "find an able bodied man in his room" (1779, 1780, and 1781), and "procure an able bodied man in his room" (1780)—effectively rendering the draft voluntary as to them.

(4) Both Rhode Island and Virginia enacted statutes that, in terms, impressed men from their general populations. In effect, however, these amounted to drafts from their Militia, because all of the able-bodied adult free males who might have been suitable for regular "soldiers" were already subject to enrollment in the Militia.

(a) Not surprisingly, in Rhode Island these statutes arose only in times of great peril, which may explain their generality:

> • [1667] "Whereas, information is given to the Councill of eminent dangers approaching, whereby his Majesties Collony is like to be hazarded by the invasion of the common enemy, or by treachery from amongst the natives, whereby his Majesties subjects may be exposed to great extremities; the Councill * * * doe order, that * * * the magistrates of the townes and places within this Collony * * * are * * * empowered to press or cause to be impressed, any person or persons[.]"{EN-2159}
>
> • [1757] *"WHEREAS his Excellency the Earl of* Loudoun, *Commander in Chief of all His Majesty's Forces in* North-America, *hath demanded of this Colony, an Aid of Four Hundred and Fifty able-bodied effective Men, to be employed in His Majesty's Service, for and during the ensuing campaign in* North-America:

" * * * That Four Hundred and Fifty able-bodied effective Men * * * be forthwith raised in this Colony, to be employed in His Majesty's Service, * * * for and during a Term of Time not exceeding one Year[.]

* * * * *

" * * * [I]n Case it shall happen, that the Four Hundred and Fifty Men * * * now ordered to be raised, should not be made up and compleated * * * , the Deficiency shall be proportioned unto the several Towns in this Colony, so that the Number demanded, may be ready to march[.]"{EN-2160}

In practice, however, this statute was enforced through the Militia; so it, too, might be deemed to be another example of drafts from the Militia.{EN-2161}

• [1778] "[W]hen any draught shall be made, * * * every person who shall be so draughted, and shall not appear, or procure an effective man in his room, shall be liable to be called to account, and punished for disobedience * * * in the same manner as officers and soldiers in actual service may be; excepting persons of tender consciences, for whom the town councils * * * shall provide effective men[.]"{EN-2162}

• [1780] "WHEREAS * * * Six Hundred and Ten effective Men were ordered to be raised within this State * * * , and although the same were apportioned to the respective Towns * * * , some of the said Towns have not yet returned a Man, and others are greatly deficient * * * :

"*BE it therefore Enacted* * * * , That [certain named] Persons * * * are hereby empowered and directed, to form all male Persons whatsoever, of the Age of Sixteen Years and upwards, residing within their respective Towns (Deserters, *Indians*, Mulattos and Negroes excepted) into Classes, according to the Deficiencies of the said Towns, having Regard to the Number of Polls and Value of Estates of the Persons so to be classed * * * : And each of the said Classes is directed to furnish * * * One able-bodied effective Man * * * .

* * * * *

"*IT is further enacted* * * * , That if * * * the said Classes shall refuse or neglect to furnish an able-bodied Man * * * , the Persons appointed to class the said Men * * * are empowered and directed * * * to detach from the Class * * * an able-bodied effective Man, to recruit the said Battalions[.] * * *

* * * * *

" * * * [I]f any Person who shall be detached * * * shall absent himself, and not be to be found, and shall not procure an able-bodied effective Man to do the Duty in his Stead, * * * such Part of the Estate of the Person so detached shall be taken and disposed of * * * as shall be sufficient to procure an able-bodied Man * * * : That if such Person so detached shall not be possessed of a sufficient Estate for that Purpose, the Commanding-Officer of the Regiment to which he belongs shall advertise, in all the public News-Papers of this State, the Person * * * as a

Delinquent, and offer a Reward of *Three Hundred Pounds* * * * to be paid by the State, to the Person or Persons who shall apprehend such Delinquent: That upon such Delinquent being apprehended, the said Officer is directed to deliver him to some One of the Officers of the * * * Continental Battalions, to do Duty as a Soldier therein, for the Space of one Year[.]"{EN-2163}

• [1780 and 1781] "WHEREAS for the Support and Continuance of the present just and necessary War, on the part of the United States of *America*, * * * it is indispensably necessary that a regular, efficient and permanent Force be immediately engaged in the public Defence: And whereas the Number of Three Hundred and Eight Men, pursuant to a late Resolve of Congress, has been apportioned to this State, as their Quota of the new Army to be raised * * * :

" * * * *Be it Enacted* * * * , That Three Hundred and Eight able-bodied effective Men * * * be forthwith raised within this State, to serve during the War, or Three Years; and that the whole Number * * * be apportioned to the several Towns in this State, agreeable to a mean Proportion between the rateable Polls and the rateable Estates, compared with the whole number of Polls, and the whole rateable Property in the State * * * :

* * * * *

"*AND* * * * in case the aforesaid Number of Men * * * shall not be raised and inlisted by such Town * * * , the Persons * * * named, as Committees in the Towns * * * are hereby empowered and required, to form all male Persons whosoever, of the Age of Sixteen Years and upwards, residing in their respective Towns (Indians, Mulattoes and Negroes, excepted) into Classes, according to the Deficiency of each Town * * * , that is to say, into as many Classes as there are Men to be inlisted by such Town; * * * class[ing] the whole of the Inhabitants of their respective Towns * * * , as equitably as may be, according to the Number of Polls and the Value of the Estates of the Persons to be classed, mingling the Rich and Poor together, so as to make the Classes in Point of Estate as nearly equal as may be: * * * That each of the said Classes shall * * * procure a good, able-bodied effective Man, to serve during the War, or for Three Years: That in case * * * said Classes shall neglect or refuse to procure their Recruits, * * * such Town is hereby fully authorized and empowered to hire such Recruit for each of the said neglecting Classes, and may assess the said Class, or the several neglecting Individuals thereof, in the same Proportions as the Taxes * * * are assessed in said Town, against the Individuals of such Class; but if it shall happen that the same shall not be assessed, in that Case according to the Proportion of the last preceding State Tax assessed in said Town, double the Sum which such Town shall give to hire said Recruit: * * * And that each and every Town which shall neglect to raise their whole Quota of Men * * * shall forfeit and pay to the Treasurer of this State * * * double

the Sum it shall cost upon an Average to procure a Recruit, for each and every Deficiency; to be collected by adding the same to the next State Tax which shall be assessed on said Town. And moreover, that if * * * the said Classes shall neglect or refuse to furnish an able-bodied Man * * * the Persons appointed to class the said Men * * * are empowered and required thereupon to detach * * * from the Class which shall be deficient * * * an able-bodied effective Man, to serve in this State's Battalion in the Army of the United States, during the said Term of Three Years * * * . And in case any one or more Individuals in a Class shall procure a Recruit at his or their Expence, the Expence * * * shall be reimbursed and repaid to the Person or Persons advancing the same, by the said Class upon whom the same shall be assessed * * * and from whom the same shall be collected in the same Proportions as herein before directed[.]"{EN-2164}

• [1782] "That Two Hundred and Fifty-nine able-bodied effective Men * * * , being a Number sufficient to make up this State's Forces to their compleat Complement, in the Army of the United States * * * , be forthwith raised within this State, to serve Nine Months from the Day of their passing Muster; and that the whole Number aforesaid be apportioned to the several Towns in this State * * * [.]

" * * * [I]n case the aforesaid Number of Men * * * shall not be raised and inlisted * * * that * * * Committees in the Towns * * * are empowered and required to form all Persons and their Estates, whether belonging to Absentees or not, within their respective Towns (Indians, Mulattoes and Negroes excepted) * * * into as many Classes as there are Men to be inlisted by such Town * * * , as equitable as may be, according to the Number of Polls, and the Value of the Estates of the Persons to be classed, mingling the Rich and Poor together, so as to make the Classes in Point of Estate as equal as may be: * * * That each of the said Classes shall * * * procure a good, able-bodied, effective Man, to serve Nine Months * * * : That all Costs and Expences of hiring and procuring said Men shall be defrayed and paid by each Class respectively, to be assessed upon them in the same Proportions as the Individuals are taxed in the last preceding State or Continental Tax assessed in the said Town against the Individuals of such Class * * * .

" * * * [I]n case any one or more of the said Classes shall neglect or refuse to procure their Recruits, * * * the said Committee of the Town to which such delinquent Class belongs shall assess such delinquent Class the Sum of *Thirty Pounds*, Lawful Silver Money * * * .

* * * * *

" * * * [A]ny Person inlisting * * * shall receive the Sum of *Forty Shillings*, Lawful Money, in Silver or Gold, Wages per Month, in the same Manner as those already engaged in the *Rhode-Island* Line of the Continental Army * * * .

" * * * [T]he Committees * * * in the respective Towns * * * are empowered to assess and tax any or all Persons above the Age of Sixteen

> Years, and under the Age of Twenty One Years, as they shall think ought to contribute in Money towards raising a Recruit * * * ; and that the said Committees be further empowered to levy the same either on the Estates of the Infants (if they have any) or on the Estates of the Parents, Masters or Guardians, as the said Committees may judge proper."{EN-2165}
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> In effect, this statute raised troops solely by voluntary enlistments; for, if those were not forthcoming initially, the statute drew moneys from the general population in order to pay for "Recruit[s]", rather than draft the particular men themselves.

Here, too, Rhode Island followed the familiar pattern. *First,* except in one instance in which the law empowered the authorities only "to press or cause to be impressed" (1667), the statutes employed the verb "raise" to indicate voluntary enlistments—"Men * * * be forthwith raised" (1757), "Men * * * ordered to be raised" (1780), and "able-bodied effective Men * * * be forthwith raised" (1780 and 1781)—while using other phraseology to indicate impressment—"the Deficiency * * * proportioned unto the several Towns" (1757), "detach from the Class * * * an able-bodied effective Man" (1780), and "detach * * * from the Class which shall be deficient * * * an able-bodied effective Man" (1780 and 1781). *Second,* although the statutes exposed essentially every able-bodied free adult male to impressment—"to press or cause to be impressed, *any* person or persons" (1667), "*all male Persons whatsoever*, of the Age of Sixteen Years and upwards * * * (Deserters, *Indians*, Mulattos and Negroes excepted)" (1780 and 1781), or "*all* Persons * * * (Indians, Mulattoes and Negroes excepted)" (1782)—they required drafts only when voluntary enlistments fell short of established quotas: "in Case it shall happen, that the Four Hundred and Fifty Men * * * should not be made up and compleated" (1757), "if * * * the said Classes shall refuse or neglect to furnish an able-bodied Man" (1780 and 1781), or "in case the aforesaid Number of Men * * * shall not be raised and inlisted" (1782). *Third*, because substitutes were allowed—"an effective man in his room" (1778), or "an able-bodied effective Man to do the Duty in his Stead" (1780)—many men avoided actual impressment.

(b) Virginia, too, enacted statutes that, in terms, impressed men from her general population:

> • [1740] "WHEREAS, his majesty hath * * * sen[t] instruction * * * to raise and levy soldiers, for carrying on the present war, against the Spaniards, in America * * * ; and taking into * * * consideration, that there are in every county, within this colony, able-bodied persons, fit to serve * * * , who follow no lawful calling or employment:
>
> " * * * [T]he justices of the peace * * * [may] raise and levy such able-bodied men as do not follow or exercise any lawful calling or employment, or have not some other lawful and sufficient support and maintenance, to serve * * * as soldiers * * * .

> " * * * [N]othing * * * shall extend to the taking or levying any person to serve as a soldier, who hath any vote in the election of * * * burgesses, to serve in the general assembly of this colony; or who is * * * an indented or bought servant ."{EN-2166}
>
> • [1754] "WHEREAS his majesty has * * * sen[t] instructions * * * to raise and levy soldiers for carrying on the present expedition against the French on the Ohio * * * ; and * * * there are * * * able bodied persons, fit to serve his majesty, who follow no lawful calling or employment.
>
> " * * * [T]he justices of the peace of every county and corporation within this colony, * * * upon application made to them, by any officer * * * appointed or impowered to enlist men, * * * [may] raise and levy such able bodied men, as do not follow or exercise any lawful calling or employment, or have not some other lawful and sufficient support and maintenance, to serve his majesty, as soldiers in the present expedition * * * .
>
> " * * * [N]othing * * * shall extend to the taking or levying any person to serve as a soldier, who hath any vote in the election of a Burgess or Burgesses to serve in the General Assembly * * * , or who is, or shall be an indented or bought servant, or any person under the age of twenty one years, or above the age of fifty years."{EN-2167}

Revealingly, in referring to the impressments they mandated, these two statutes used the phrase "to raise *and levy* soldiers". Plainly, if the draftsmen had imagined that "raise" and "levy" were perfect synonyms, and that impressment could find legal expression and justification solely in the verb "raise", they would not have added the extra verb "levy".[3922] Moreover, the second statute added the phrase "the *taking or levying* any person", indicating that "to raise and levy soldiers" meant to assemble the men *by seizure of their persons through the imposition of authority*.[3923] In addition, these drafts were highly selective, embracing only "able-bodied men as do not follow or exercise any lawful calling or employment, or have not some other lawful and sufficient support and maintenance"—classes of men which could not have been very large in *pre*-constitutional Virginia.

(5) Finally, drafts for naval service were employed far less than for land forces. The maritime tradition in England was impressment (often enforced by the notorious "press gangs"). But, as Blackstone pointed out, although "the practice of impressing * * * is of very antient date", "[t]he [legal] power of impressing men for the sea service * * * has been a matter of some dispute, and submitted to with great

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[3922] In some circumstances, of course, the two verbs are roughly synonymous; for "levy" can mean "[t]o raise; to bring together men", and "raise" can mean "[t]o collect; to assemble; to levy". S. Johnson, *Dictionary*, *ante* note 50, definitions 1 ("levy") and 19 ("raise") in both the First (1755) and the Fourth (1773) Editions.

[3923] *Compare Black's Law Dictionary, ante* note 368, at 1051, *with Webster's New International Dictionary, ante* note 330, at 1423, definition 1.

reluctance"—for "this method of impressing * * * is only defensible from public necessity, to which all private considerations must give way".[3924] In the Colonies and then the independent States, "public necessity" for a maritime draft rarely arose, because sailors could usually be enlisted, as in 1759 in Rhode Island: "[A]ll able boded, effective men, that enlist in the service [to complete the manning of His Majesty's ships] * * * shall be allowed and paid as a bounty, out of the general treasury, over and above the King's, of forty shillings sterling[.]"{EN-2168} And when resort was had to impressment, stringent restrictions might be imposed, as in 1777 in Rhode Island: "Capt. John Hopkins * * * of the ship Warren, under the direction of any justice of the peace, in this state, [shall] be empowered to impress, within this state, a sufficient number of men for the present cruise, being seamen, transient, foreign persons, and not inhabitants of this or any of the United States, and not enlisted into the service of this state or the Continent."{EN-2169}

3. The practice under the Articles of Confederation. The statutes analyzed immediately above exemplify how, during the *pre-*constitutional era, the power to draft men into any armed force in America was lodged exclusively in the Colonies and States in three ways: (i) for their Militia, which always were institutions based on near-universal, compulsory service; (ii) for their own troops, which usually were composed of volunteers, but could be augmented by drafts from the Militia or the general population (which in practice amounted to the Militia); and (iii) for soldiers to serve in the Continental Army of the United States. This tripartite structure carried over into the Articles of Confederation. The Continental Congress agreed to the Articles on 15 November 1777.[3925] And they were gradually ratified by the States from 1778 to 1781.[3926]

a. With respect to the Militia, the Articles provided that "every state shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutred"[3927]—which, of course, every State was then doing, and had been doing, as a State or a Colony (with the peculiar exception of Pennsylvania) from the very beginning. The Articles did not define what constituted "a *well regulated* militia, *sufficiently armed and accoutred*". Neither did the Continental Congress claim a right, power, or privilege to dictate how the States should "regulate[ ] and discipline[ ]", or in what manner and to what degree the States should "arm[ ] and accoutre[ ]", their Militia. Rather, Congress presumed that the States knew perfectly well what "well regulated and disciplined militia, sufficiently armed and accoutred" were. Even before the Articles were drafted, a Resolution of Congress had suggested how the

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[3924] *Commentaries on the Laws of England, ante* note 142, Volume 1, at 418-419.

[3925] *Journals of the Continental Congress, ante* note 42, Volume IX (3 October to 31 December 1777), at 907-928.

[3926] *Id.*, Volume XIX (1 January to 23 April 1781), at 213-223.

[3927] Arts. of Confed'n art. VI, ¶ 4.

States should regulate their Militia.[3928] This, of course, was merely a recommendation. And hardly a novel one. For the principles it embodied were not the newfangled products of Congress, but instead conformed to the pattern and practice long-established in the Colonies and then the independent States. So, in essence, the Articles simply affirmed the situation as it then existed, in which all power over the Militia was concentrated in the States.

b. With respect to what the Constitution later denoted the States' "Troops, or Ships of War",[3929] the Articles provided that

> [n]o vessels of war shall be kept up in time of peace by any state, except such number only, as shall be deemed necessary by the united states in congress assembled, for the defence of such state, or its trade; nor shall any body of forces be kept up by any state, in time of peace, except such number only, as in the judgment of the united states, in congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such state[.][3930]

This was more restrictive than the analogous provision in the Constitution, because under the Constitution a State may "keep Troops, or Ships of War in time of Peace" "with[ ] the Consent of Congress" for *any* otherwise constitutional reason that a State (or Congress) might propose and with which Congress (or a State) might agree, not just (as under the Articles) "for the defence of such state, or its trade" ("Ships of War") or "to garrison the forts necessary for the defence of such state" ("Troops").[3931]

In other than a "time of peace", under the Articles the States could "ke[ep] up" such "vessels of war" and "body of forces" as they chose, with no precondition that Congress "deemed" such "vessels" or "forces" "necessary" or "requisite". So, under the Constitution, the power to "keep Troops, or Ships of War in [other than a] time of Peace" is "reserved to the States respectively" to the full extent that they enjoyed that power in *pre*-constitutional times.[3932]

Importantly, the Articles plainly differentiated such "vessels" and "forces" from the States' Militia: "No vessels of war shall be kept up in time of peace by any state, * * * nor shall any body of forces be kept up by any state, in time of peace *

[3928] *See ante*, Chapter 26.

[3929] U.S. Const. art. I, § 10, cl. 3.

[3930] Arts. of Confed'n art. VI, ¶ 4.

[3931] *See* U.S. Const. art. I, § 10, cl. 3. In one particular, however, the Articles were less strict than the Constitution, because, under the Articles, even in a "time of peace" if a State were "infested by pirates" then "vessels of war m[ight] be fitted out for that occasion, or until the united states in congress assembled, shall determine otherwise". Arts. of Confed'n art. VI, ¶ 5.

[3932] *See* U.S. Const. amend. X.

* * ; *but each state shall always keep up a well regulated and disciplined militia*".[3933] Thus, the Militia were to remain *permanent* establishments of the States, over the existence of which the Continental Congress exercised no authority.

c. Withe respect to the States' participation in "war", the Articles paralleled the analogous clause in the Constitution,[3934] albeit with more detailed requirements:

> No state shall engage in any war without the consent of the united states in congress assembled, unless such state be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such state, and the danger is so imminent as not to admit of a delay till the united states in congress assembled can be consulted: nor shall any state grant commissions to any ships or vessels of war * * * except it be after a declaration of war by the united states in congress assembled, and then only against the kingdom or state and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the united states in congress assembled[.][3935]

d. As to the Continental Army and Navy, the Articles provided that

> [t]he united states in congress assembled shall have authority * * * to build and equip a navy—to agree upon the number of land forces, and to make requisitions from each state for its quota, in proportion to the number of white inhabitants in such state; which requisition shall be binding, and thereupon the legislature of each state shall appoint the regimental officers, raise the men and cloath, arm and equip them in a soldier like manner, at the expence of the united states; and the officers and men so cloathed, armed and equipped shall march to the place appointed, and within the time agreed on by the united states in congress assembled: But if the united states in congress assembled shall, on consideration of circumstances judge proper that any state should not raise men, or should raise a smaller number of men than its quota, and that any other state should raise a greater number of men than the quota thereof, such extra number shall be raised, officered, cloathed, armed and equipped in the same manner as the quota of such state, unless the legislature of such state shall judge that such extra number cannot be

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[3933] Arts. of Confed'n art. VI, ¶ 4 (emphasis supplied).

[3934] U.S. Const. art. I, § 10, cl. 3.

[3935] Arts. of Confed'n art. VI, ¶ 5. This provision also allowed the States to "grant * * * letters of marque and reprisal * * * after a declaration of war by the united states". But the Constitution prohibited that practice. *Compare* U.S. Const. art. I, § 8, cl. 11 *with* § 10, cl. 1. Both the Articles and the Constitution lodged the exclusive power to declare war in Congress. *Compare* Arts. of Confed'n art. IX, ¶ 1 *with* U.S. Const. art. I, § 8, cl. 11.

> safely spared out of the same, in which case they shall raise, officer, cloath, arm and equip as many of such extra number as they judge can be safely spared.[3936]

Perforce of this authority, the Continental Congress could "agree upon the number of land forces" and "make requisitions from each state for its quota"—which "requisitions" were "binding" (although no procedure for enforcing them was ever created); but then how the States might choose to "raise the men" was left entirely to them. The Articles delegated to Congress no power to act directly on individuals, by-passing the States' authority over their own citizens. Moreover, although the Articles licensed Congress to decide that a State "should raise a greater number of men than [her] quota", they reserved to "the legislature of such state" the power to "judge that such extra number cannot be safely spared out of the same, in which case they shall raise * * * as many of such extra number as they judge can be safely spared". Presumably, too, any State could have refused to send even her original quota of "land forces", on the ground that the men could not "be safely spared". Importantly as well, the "land forces" the States supplied to Congress for the Continental Army would have retained a large measure of loyalty to the States from which they came, because the Articles allowed that, "[w]hen land forces are raised by any state for the common defence, all officers of and under the rank of colonel, shall be appointed by the legislature of each state respectively, by whom such forces shall be raised, or in such manner as such state shall direct, and all vacancies shall be filled up by the State which first made the appointment".[3937]

This was the practice the Continental Congress adopted even prior to ratification of the Articles. For example, in 1776 it resolved

> [t]hat eighty eight batallions be inlisted as soon as possible, to serve during the present war, and that each state furnish their respective quotas in * * * [certain specified] proportions * * * .
>
> That twenty dollars be given as a bounty to each non-commissioned officer and private soldier, who shall inlist to serve during the present war, unless sooner discharged by Congress:
>
> That Congress make provision for granting lands * * * to the officers and soldiers who shall so engage in the service, and continue therein to the close of the war, or until discharged by Congress, and to the representatives of such officers and soldiers as shall be slain by the enemy:
>
> * * * * *

[3936] Arts. of Confed'n art. IX, ¶ 5.

[3937] Arts. of Confed'n art. VII.

> That the appointment of all officers, and filling up vacancies (except general officers) be left to the government of the several states[.][3938]

Then, in 1780, it resolved that "in case the full quota of each state, respectively, shall not be enlisted and brought into the field * * * , that until such recruits for the war shall be obtained, the deficiencies be supplied by the states respectively, by men to serve for not less than one year, after they join the army, unless sooner relieved by the recruits inlisted for the war".[3939] Apparently, "the deficiencies [could] be supplied by the states" either through voluntary enlistments or through impressment.

One historian professed to find in the latter Resolution "[t]he key innovation * * * that the drafted men had to serve until replacements arrived. * * * Changing strategic needs, however, never allowed a thorough test of this system."[3940] This "key innovation", however, was really nothing new. For example, in 1777 Virginia's General Assembly had enacted the following statute:

> WHEREAS it is indispensably necessary that the regiments of infantry raised by the laws of this commonwealth, on continental establishment, be speedily recruited, * * * That fourteen of the said regiments * * * be completed by recruits or draughts * * * .
>
> * * * That the officers of the * * * regiments * * * shall use their best endeavours to re-enlist all the men therein whose times of service are near expiring, to serve for three years, or during the present war * * * .
>
> And as our numbers in continental service * * * may for some time be deficient * * * , That the troops raised for the service of this commonwealth * * * shall be forthwith regimented by the governour and council * * * ; and that a battalion of such troops * * * be marched to join the grand army, there to continue till a sufficient number of recruits may be raised to make good our just proportion, or until the terms of their enlistments shall expire. * * *
>
> * * * That, for securing the completion of the said regiments, a number of men shall be draughted from the single men of the militia of the several counties, and the city of Williamsburg, whether officers or privates, above eighteen years of age, who have no child * * * . And * * * each man so draughted shall be entitled to a bounty of fifteen dollars, to be paid by this commonwealth, and be compelled to serve one year, or find an able bodied man to serve in his room * * * . And as well such draughts, as those who enlist * * * , shall after such service be exempted

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[3938] *Journals of the Continental Congress, ante* note 42, Volume V (5 June to 8 October 1776), at 762-763.

[3939] *Id.*, Volume XVIII (7 September to 29 December 1780), at 844.

[3940] R. Wright, Jr., *The Continental Army, ante* note 396, at 158 (footnotes omitted).

> from all other draughts for the regular service, for so long a time after their discharge as they shall have actually served.{EN-2170}

Virginia also employed recruitment for the Continental Army by entirely voluntary enlistments, both before and after the Continental Congress's Resolution of 1780.{EN-2171}

Of most importance, throughout this period the Continental Congress never attempted to build up the Continental Army by imposing impressment on individual Americans directly under color of its own authority, and never purported to order the States to employ impressment for that purpose under their own laws to the exclusion of voluntary enlistments or of drafts that were in effect voluntary because the men initially selected could supply substitutes. Neither did the Continental Congress ever claim any authority to absorb any part of the States' Militia into the Continental "land forces", as if the Militia somehow constituted "reserves" for that purpose.

e. One historian has pointed out that,

> [f]or all practical purposes, the Continental Army reached its maximum size, in terms of units, in 1777. Hereafter the states' role was not organizing new units but rather procuring individual replacements for existing regiments. This change reduced the influence of state governments and increased the military's control over its own destiny.[3941]

Apparently, this author did not realize the incongruity of suggesting, with implicit approval, that the Continental Army should have desired, or been able, or been allowed to exert "control over its own destiny"—when the Army had been formed just a few years earlier; when it had no separate "destiny" even as a military force, because the Militia were organized in every State; when it was not a politically independent establishment entitled to exercise "control over its own destiny"; and especially when it could claim no "destiny" separate from WE THE PEOPLE who authorized their government to create it, and who through their government commanded it. Indeed, the very last thing Americans needed or desired at that time (any more than they need or desire such a state of affairs today) was for the Army to exert "control over its own destiny", or imagine that it had discretion to do so. And the Army's misbehavior proved no less, exemplifying the danger of a "standing army" even when its members were drawn originally from the ranks of patriots.

Notwithstanding that the Continental Army was a "standing army" in only an attenuated sense—because the "checks and balances" in the Articles of Confederation divided effective authority over it between the Continental Congress

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[3941] *Id.* at 119.

and the States, and left the Militia entirely under the control of the States—towards the close of the War of Independence the Army's Officer Corps came within a hair's breadth of attempting to threaten the Continental Congress with desertion or mutiny, or to set up some sort of strongman régime through a *coup* or *Putsch*. Admittedly, the Army had justifiable grievances of long standing. Congress had made many promises to the Army relating to pay, supplies, pensions, and the like, and had failed to keep many of them. To a large degree, this was because, although Congress was empowered "to ascertain the necessary sums of money to be raised for the service of the united states, and to appropriate the same and apply the same for defraying the public expenses" and "to borrow money, or emit bills on the credit of the united states",[3942] it was incapable of raising revenue itself by taxation, but instead had to depend upon the States. Languishing in a state of penury, the Army became infected with low morale, disillusionment, disappointment, and discontent, which soon festered into bitter frustration, disaffection, disgust, and anger with Congress. Eventually, leading officers began to foment combinations that soon exhibited the dark hues of conspiracies.[3943] Colonel Lewis Nicola, of Pennsylvania, was an outspoken opponent of republican government who held the Continental Congress in low repute and favored instead a constitutional monarchy, probably of a distinctly military cast. He wanted the new government to grant lands on the frontiers to the soldiery, thus creating a class or order of military colonists who owed their distinct place in society to the Army. Major General James M. Varnum, of Rhode Island, was highly critical of the Articles of Confederation, and even denied that Americans were capable of self-government. He advocated some sort of monarchical or military dictatorship. Colonel Theodore Bland, of Virginia, proposed the dissolution of the States' Armed Forces and the establishment of a huge National army, the loyalties of its officers and men to be secured through pensions and some sort of "knighthood". And Alexander Hamilton suggested that, while the war still continued and the Army remained in being, the Commander in Chief, George Washington, should advance the soldiers' claims with "firmness", and thereby intimidate Congress into coming to a financial settlement with the troops. Washington either rejected these suggestions outright or prudently kept silent.

Much of this dissension amounted more to talk than to action. But soon words that threatened action were addressed to Congress itself. General Henry Knox, long one of Washington's closest advisors, was the central figure behind the

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[3942] Arts. of Confed'n art. IX, ¶ 5.

[3943] These events are well described in their historical context by Charles Rappleye, *Robert Morris: Financier of the American Revolution* (New York, New York: Simon & Schuster, 2010), Chapter 14; *and by* William M. Fowler, Jr., *American Crisis: George Washington and the Dangerous Two Years After Yorktown, 1781-1783* (New York, New York: Walker Publishing Company, Inc., 2011), at 94-98 (the Nicola episode), 102-103 (the Varnum episode), 136-137 (the Bland episode), 146-158 (the Knox episode), 168-173 (the Hamilton episode), and 174-188 (the Gates episode), all touched on immediately below.

composition of "*The address and petition of the officers of the army of the United States*" "To the United States in Congress assembled".[3944] In this list of grievances, the Army obsequiously addressed Congress—not the American people—as "the supreme power of the United States", but then ominously observed that

> [o]ur distresses are now brought to a point. We have borne all that men can bear—our property is expended—our private resources are at an end * * * . We, therefore, most seriously and earnestly beg, that a supply of money may be forwarded to the army as soon as possible. *The uneasiness of the soldiers, for want of pay, is great and dangerous; any further experiments on their patience may have fatal effects*.[3945]

On the basis of this unsubtle threat, "*the officers of the army*"

> beg[ged] leave to urge an immediate adjustment of all dues; that so great a part as possible be paid, and the remainder put on such a footing as will restore cheerfulness to the army, revive confidence in the justice and generosity of its constituents, and contribute to the very desirable effect of establishing public credit.
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> * * * * *
>
> We regard the act of Congress respecting half-pay [for retired officers], as an honorable and just recompense for several years hard service, in which the health and fortunes of the officers have been worn down and exhausted. * * * [W]e *are willing to commute the half-pay pledged, for full pay for a certain number of years, or for a sum in gross, as shall be agreed to by the committee sent with this address.* * * *
>
> To the representation now made, the army have not a doubt that Congress will pay all that attention which the serious nature of it requires. It would be criminal in the officers to conceal the general dissatisfaction which prevails, and is gaining ground in the army, from the pressure of evils and injuries, which, in the course of seven long years, have made their condition in many instances wretched. They therefore entreat, that Congress, to convince the army and the world that the independence of America shall not be placed on the ruin of any particular class of her citizens, and will point out a mode for immediate redress.[3946]

In other words, the Continental Congress—which "*the officers of the army*" had flattered as "the supreme power of the United States"—was *not* in their eyes "supreme" after all, but instead was subject to being pressured into negotiating a

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[3944] PAPER No. VII, The memorial from the officers of the army (dated December 1782), *Journals of the Continental Congress, ante* note 42, Volume XXIV (1 January to 29 August 1783), at 290-293.

[3945] *Id.* at 291 (emphasis supplied).

[3946] *Id.* at 292-293 (emphasis supplied).

financial settlement with the Army, under pain of possibly "fatal effects" if the representatives of the States refused. That Congress was "entreat[ed] * * * *to convince the army* and the world that the independence of America shall not be placed on the ruin of any particular class of her citizens", and for this purpose to arrive at a binding understanding with the Army "as shall be agreed to by the committee sent with th[e] address", amounted to what would be recognized today as a demand for "compulsory public-sector collective bargaining". Inherent in that process is a sharing of WE THE PEOPLE'S sovereignty with the party which can require the government to negotiate.[3947] So, if the Army imagined that it could compel Congress to enter into negotiations, it envisioned itself as effectively at least a co-sovereign—and certainly an hostile one of a factional character, because it was the conceded antagonist of the very representative body which the States had established "for their common defence, the security of their Liberties, and their mutual and general welfare".[3948]

The Continental Congress, however, agreed only to pay in coin by installments a pittance of the arrears it owed to the enlisted men, with the officers to receive promissory notes drawn against the personal credit of Robert Morris, the so-called "financier of the revolution". As the primary concern of most soldiers was to avoid being discharged from the Army in a state of abject poverty, this was better than nothing. But many of the Army's officers, along with those civilians who supported the creation of a strong central government, believed that they did not have to settle for nothing better. Rather, Morris, Hamilton, and their political confederates recognized in the Army's plight an opportunity, not only to do some justice to the soldiers, but also and more importantly to establish a permanent centralized scheme of public finance. They intended to play the dangerous gambit of using the seething discontent and looming power of the Army to frighten Congress into asserting (or usurping, depending upon one's point of view) the power to tax; and if Congress refused to act, then to pressure the States into adopting an entirely new constitution which infused a central government with what they considered the necessary powers to tax and borrow. But they had to move quickly. They could not allow the unrest in the Army's ranks to dissipate, because with the coming of peace and the Army's demobilization that uniquely potent source of pressure would disappear.

Shrewdly, Morris advised Knox that the Army should form a political alliance "with the public Creditors of every kind both foreign and domestic" in order

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[3947] *See, e.g.,* Sylvester Petro, "Sovereignty and Compulsory Public-Sector Collective Bargaining", 10 *Wake Forest Law Review* 25 (1974); Edwin Vieira, Jr., *"To break and control the violence of faction": The challenge to representative government from compulsory public-sector collective bargaining* (Arlington, Virginia: Foundation for the Advancement of the Public Trust & Public Service Research Council, 1980).

[3948] Arts. of Confed'n art. III.

to convince Congress and the States' legislatures to establish "general permanent Funds" which could be used, among other purposes, to pay the soldiers.[3949] Thus, Morris sought to employ the temporary military crisis as the rationalization for permanently fastening around Congress's throat the talons of money-lenders, bankers, financiers, and speculators in public debt. His immediate purpose may have been to succor the soldiers and stabilize the public finances; but the inevitable long-term result was to empower and fatten the financiers. This was perhaps the most astute advice ever given for the formation of a "military-industrial complex": On the plea of "national security", "the standing army" would demand ever-increasing appropriations, with the money-lenders and their cronies ready, willing, and able to provide the necessary funds to Congress. Ultimately, the Army would depend upon the financiers for the money, which Congress would borrow from private sources—the money-lenders would depend upon the Army to provide a plausible, even patriotic excuse for a major part of the huge public indebtedness they would assist public officials in amassing—and venal careerists in the government could avoiding political retaliation from the voters in the near term by loading the burden of public debt onto the backs of taxpayers unrepresented in the present but forced to pay in the future. Apparently, an embryonic scheme of this sort had already been in the minds of the authors of "*The address and petition of the officers of the army of the United States*", as evidenced by the prediction in the memorial that "an immediate adjustment of all dues" would "contribute to the very desirable effect of re-establishing public credit". Of course, in the long run "the military-industrial complex" would not be the only special interest to benefit from the establishment of a financial partnership between politicians and speculators bottomed upon "public credit". Both Morris and Hamilton understood full well that such an arrangement could support essentially *any and every* special interest with sufficient political influence—with the very special interests of bankers and financiers always to be given top priority. This has certainly been proven true in spades today, with the multiple "bail outs" and "quantitative easings" that the present-day scheme of "public credit" has made available to public creditors and their clients, both domestic and foreign, through the Federal Reserve System and the General Government's Treasury.

The menaces in the petition from "*the officers of the army of the United States*" having failed sufficiently to overawe Congress, a coterie of officers close to General Horatio Gates proposed more forceful action. Often denoted "the Newburgh Conspiracy", after the location of the Continental Army's encampment in upstate New York, the scheme was openly embodied in the so-called "Newburgh Address", a supposedly anonymous letter "To the Officers of the Army" from "A fellow-

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[3949] *Quoted in* W. Fowler, Jr., *American Crisis, ante* note 3943, at 158.

soldier" (reputed to have been Major John Armstrong of Gates's staff) who chided them that,

> [a]fter a pursuit of seven long years, * * * peace again returns to bless—whom? A country willing to redress your wrongs, cherish your worth, and reward your services; a country * * * longing to divide with you * * * those riches which your wounds have preserved! Is this the case? Or is it rather a country that tramples upon your rights, disdains your cries, and insults your distresses? Have you not, more than once, suggested your wishes, and made known your wants to congress? * * * And have you not lately, in the meek language of entreating memorial, begged from their justice, what you would no longer expect from their favour? How have you been answered? * * *
>
> If this, then, be your treatment while the swords you wear are necessary for the defence of America, what have you to expect from peace, when your voice shall sink, and your strength dissipate by division?
>
> When these very swords, the instruments and companions of your glory, shall be taken from your sides, and no remaining mark of military distinction left, but your wants, infirmities, and scars! Can you then consent to be the only sufferers by this revolution, and, retiring from the field, grow old in poverty, wretchedness, and contempt? * * * But if your spirit should revolt at this; if you have sense enough to discover, and spirit enough to oppose tyranny, under whatever garb it may assume, whether it be the plain coat of republicanism, or the splendid robe of royalty; if you have yet learned to discriminate between a people and a cause, between men and principles,—awake,—attend to your situation, and redress yourselves. If the present moment be lost, every future effort is in vain; and your threats then, will be as empty as your entreaties now. * * * If your determination be in any proportion to your wrongs, carry your appeal from the justice to the fears of government; change the milk and water style of your last memorial,—assume a bolder tone—decent, but lively, spirited and determined; and suspect the man, who would advise to more moderation and longer forbearance. * * * Tell [Congress], that though you were the first, and would wish to be the last, to encounter danger; though despair itself can never drive you into dishonour, it may drive you from the field; * * * and that the slightest mark of indignity from congress now must operate like the grave, and part you for ever; that in any political event, the army has its alternative—if peace, that nothing shall separate you from your arms but death;—if war, * * * you will retire to some unsettled country * * * . But let it represent also, that, should they comply with the request of your late memorial, it would make you more happy, and them more respectable: that while the war should continue, you would follow their standard into the field, and when it came to an end, you would withdraw into the shade of private life, and give the world

> another subject of wonder and applause—an army victorious over its enemies—victorious over itself.[3950]

If perhaps not an open call to immediate desertion or rebellion, "the Newburgh Address" certainly threatened and encouraged such action in the near future.

As much as Washington sympathized with the soldiers, and foresaw fearful consequences if the Continental Congress demobilized them without largely making up their arrears in pay, he discountenanced the Army's meddling in politics even more. So when he became aware of the Address, he called for his officers to meet in order to discuss the matter. In their midst, he assured them that

> it can scarcely be supposed, at this last stage of the war, that I am indifferent to [the Army's] interests. But how are they to be promoted? The way is plain, says the anonymous addresser. If war continues, remove into the unsettled country * * * [.] "If peace takes place, never sheath your swords * * * until you have obtained full and ample justice." This dreadful alternative, of either deserting our country in the extremest hour of her distress, or turning our arms against it, which is the apparent object, unless congress can be compelled into instant compliance, has something so shocking in it, that humanity revolts at the idea.
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> * * * * *
>
> While I give you these assurances * * * to exert whatever ability I am possessed of in your favour let me entreat you * * * not to take any measures, which * * * will lessen the dignity and sully the glory you have hitherto maintained. Let me request you to rely on the plighted faith of your country, and place a full confidence in the purity of the intentions of congress * * * ; and that they will adopt the most effectual measures in their power to render ample justice to you, for your faithful and meritorious services. And let me conjure you * * * to express your utmost horror and detestation of the man who wishes, under any specious pretences, to overturn the liberty of our country, and who wickedly attempts to open the floodgates of civil discord, and deluge our rising empire in blood.[3951]

When he had finished (so the story goes), Washington began to read from a letter which confirmed his confidence that Congress would eventually do justice to the Army. Finding it difficult to focus on the words, he took out a new pair of spectacles, apologizing to his audience that "I have grown gray in your service and now find myself growing blind". At this, the incipient mutiny drowned in his

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[3950] *Quoted in* David Ramsay, *The Life of George Washington* (London, England: Luke Hanford & Sons, 1807), at 208-215 note.

[3951] *Id.*

officers' tears of self-reproach. Had it not been for that humble gesture from that remarkable man at that unique moment, Heaven alone knows by what centripetal or centrifugal political forces the nascent American Republic might have been overwhelmed—perhaps squeezed to death in the vice of a military dictatorship, or torn asunder by civil war, or dissolved altogether into a gaggle of mutually hostile independent States.

That this episode ended without a National calamity should not minimize the lessons it teaches. In this case, the men in "the standing army" were, as individuals, justified in their grievances, albeit not in the means many of their leaders employed in their attempts to redress them. In their impersonal corporate capacity as a "standing *army*", however, they imagined themselves capable of intimidating Congress—and, when threats failed, of plotting to punish the whole country through desertion, or to seize power through mutiny. Ambitious politicians who wanted to create a strong central government with themselves at the helm sought to capitalize on the disaffection among the soldiery as a reason for replacing the Articles of Confederation. And the money-lenders recognized the crisis as a context propitious for promoting a permanent system of "public credit" through which private bankers, financiers, and speculators could ally with public officials to the mutual benefit of both classes—proving the wisdom of Thomas Jefferson's belief that "banking establishments are more dangerous than standing armies",[3952] inasmuch as "standing armies" almost never create "banking establishments", but "banking establishments" almost universally support "standing armies". *And nothing has changed since then.*

C. Impressment under the Constitution. The powers of Congress "[t]o raise and support Armies", "[t]o provide and maintain a Navy", and "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers"[3953] supposedly provide the constitutional grounds for the General Government's impressment of individuals into the regular Armed Forces of the United States. If the verbs "raise" and "provide" are construed so broadly as to admit of no limitation, personnel for both "Armies" and "a Navy" could be supplied in three ways: (i) by direct interaction between the General Government and individuals, through voluntary recruitment; (ii) by direct interaction between the General Government and individuals, through a draft; and (iii) by interaction within the federal system between the General Government and the States, in the course of which the General Government sets quotas for or makes other arrangements with the States, leaving them to determine whether and how to

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[3952] Letter from Thomas Jefferson to John Taylor, 28 May 1816, *in The Works of Thomas Jefferson*, Paul L. Ford, Editor (New York, New York: G.P. Putnam's Sons, Federal Edition, Twelve Volumes, 1904-1905), Volume XI, at 533.

[3953] U.S. Const. art. I, § 8, cls. 12, 13, and 18.

assemble the necessary men by voluntary recruitment or impressment. The first of these requires no analysis. As will appear anon, the third should be the preferred method for manning the regular Armed Forces of the United States. The second, however, presents a multifaceted constitutional problem. This is because the apologists for the General Government's authority to impress individuals for service in the regular Armed Forces have given scant consideration to how seriously their misconstruction of Congress's three powers clashes with

> • the powers of Congress "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions", and "[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress";[3954]
>
> • the authority and responsibility of the President as the "Commander in Chief * * * of the Militia of the several States, when called into the actual Service of the United States", who "shall take Care that the Laws be faithfully executed";[3955]
>
> • the requirement that "[n]o State shall, without the Consent of Congress, * * * keep Troops, or Ships of War in time of Peace, * * * or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay";[3956]
>
> • the Second Amendment, which declares that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed"; and
>
> • the Tenth Amendment, which mandates that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people".

Apparently, Americans are expected to believe that hidden within the verbs "raise" and "provide" lurks a plenary power that Britain never claimed the authority to exercise in the Colonies throughout the *pre*-constitutional period—a power that the States did not delegate to the Continental Congress under the Articles of

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[3954] U.S. Const. art. I, § 8, cls. 15 and 16.

[3955] U.S. Const. art. II, § 2, cl. 1 and § 3.

[3956] U.S. Const. art. I, § 10, cl. 3.

Confederation—and a power which, when the independent States themselves exercised it prior to ratification of the Constitution, almost invariably involved recruiting men by voluntary enlistments, as opposed to the power the States also exercised to "draft" (or "draught"), "impress", and "levy" men, all of which verbs denoted compulsory service. Apparently, too, Americans are expected to believe that the Constitution delegated to Congress a supreme power to draft individuals directly, without any involvement whatsoever of the individual States in the process—notwithstanding that the Constitution only prohibited the States "without the Consent of Congress" from using their preëxisting power to draft for the purpose of "keep[ing] Troops, or Ships of War in time of Peace", and allowed them to draft without reference to any Congressional "Consent" in time of "War" or when "actually invaded, or in such imminent Danger as will not admit of delay". And, most implausible of all, apparently Americans are expected to believe that, in delegating to Congress a power to draft individuals into the Armed Forces, the Constitution thereby empowered Congress to reduce "the Militia of the several States" to impotence, if not nonexistence, even while building up a huge "standing army" within a vast "military-industrial complex".[3957]

1. In this as in every other question of constitutional interpretation, to advert to the relevant rules of construction must be the first order of business.

a. Whether the power "[t]o raise * * * Armies" encompasses the power to impress individuals directly into "Armies", and whether that power negates the power to draft which the States exercised before the original Constitution was ratified, cannot simply be assumed. Rather, "[t]he burden of establishing a delegation of power to the United States or the prohibition of power to the states is upon those making the claim".[3958] This burden, moreover, is not easily carried. For "when a legislative power is claimed for the national government the question is whether that power is one of those granted by the Constitution, either in terms or by necessary implication".[3959] And "*necessary* implication" requires more than just "conjecture, supposition, or mere reasoning on the meaning or intention of the writing".[3960]

b. In addition, the power "[t]o raise * * * Armies" (or any other power or disability, for that matter) cannot be analyzed in isolation. For "[t]he Constitution

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[3957] Hereinafter, for the sake of simplicity, analysis will focus solely on the meaning of the power "[t]o raise * * * Armies". The existence of a power to draft for the Navy might be a closer question, for two reasons: (i) Throughout the *pre*-constitutional era Britain had asserted a power to impress men for the Senior Service. And (ii) during that era no one considered that a "standing navy" (if such a term was ever used) could possibly pose the dangers a "standing army" always did.

[3958] Bute v. Illinois, 333 U.S. 640, 653 (1948).

[3959] Kansas v. Colorado, 206 U.S. 46, 83-84 (1907).

[3960] Rhode Island v. Massachusetts, 37 U.S. (12 Peters) 657, 723 (1838).

is an organic scheme of government to be dealt with as an entirety".[3961] "[I]n arriving at any conclusion" as to what a constitutional provision means, one should "refer to * * * the entire frame and scheme of the instrument, and the consequences naturally attendant upon the one construction or the other".[3962] "[E]ach [provision of the Constitution] must be considered in light of the other[s]".[3963] And no one provision of the Constitution may "be so enforced as to nullify or substantially impair [any] other".[3964] In sum,

> no one provision of the Constitution is to be segregated from all the others, and to be considered alone, but * * * all the provisions bearing upon a particular subject are to be so interpreted as to effectuate the great purposes of the instrument. If, in following this rule, it be found that an asserted construction of any one provision of the Constitution would, if adopted, neutralize a positive prohibition of another provision of that instrument, then * * * such asserted construction is erroneous, since its enforcement would mean, not to give effect to the Constitution, but to destroy a portion thereof.[3965]

c. Although interpretation of the power "[t]o raise * * * Armies" cannot proceed from the premiss that the other relevant powers and disabilities listed above can be disregarded, and although all of these powers and disabilities must be mutually harmonized within the framework the Constitution establishes, nonetheless "harmonization" does not mean that, in particular circumstances, some other power or disability should not be emphasized, its fulfillment recognized as having priority, and consistency with its requirements made the controlling factor in the construction of the power "[t]o raise * * * Armies". For in this area, after all, the Constitution does just that.

Repetitively, the Constitution asserts that the Militia, on the one hand, and the regular Armed Forces—whether the "Armies" and "Navy" of the United States, or the "Troops, or Ships of War" of the States, or all of them combined—on the other hand, are *not* of perfectly equal dignity. The Militia are the most important, because:

•The Militia preëxisted the Armed Forces of the Union by decades and even generations, not just before the Constitution but before the Articles of Confederation and the Declaration of Independence as well.

[3961] Reid v. Covert, 354 U.S. 1, 44 (1957) (opinion of Frankfurter, J.).

[3962] Pollock v. Farmers' Loan & Trust Company, 157 U.S. 429, 558 (1895).

[3963] Hostetter v. Idlewild Bon Voyage Liquor Corporation, 377 U.S. 324, 332 (1964).

[3964] Dick v. United States, 208 U.S. 340, 353 (1908).

[3965] South Dakota v. North Carolina, 192 U.S. 286, 328 (1904) (White, J., dissenting).

• The Militia are required to be composed of "the body of the people, trained to arms";[3966] whereas the Armed Forces are composed of only small segments of the population.

• "[T]he Militia of the several States" are establishments the Constitution incorporates as permanent components of its federal system; whereas the Armed Forces are merely contingent, and in the case of "Armies" *suspect*, organizations.[3967]

• The Constitution assigns explicit authority and responsibilities to the Militia; whereas it assigns no explicit authority or responsibilities to the Armed Forces.[3968]

• The Constitution allows the Militia to be "call[ed] forth" to "be employed in the Service of the United States" for three purposes only, none of which entails their absorption within the regular Armed Forces—rather, when "called forth" they are to serve *as Militia*.[3969]

• The Militia are "necessary to the security of a free State"; whereas "standing armies" are likely to pose a danger to "a free State".[3970]

• As the ultimate "checks and balances" against rogue "standing armies", the Militia obviously cannot be compelled to reinforce the latter to the point at which the whole system of "checks and balances" breaks down. And,

• Perhaps most directly relevant here, because the Militia are establishments based upon near-universal compulsory service, whereas the Armed Forces could be (as they are today) composed entirely of volunteers and mercenaries, the Militia have a claim on impressment prior and always superior to any that the Armed Forces might assert.

Thus, it is no exaggeration to conclude that *a construction of the power "[t]o raise * * * Armies" which licenses Congress to draft individuals without limit neutralizes or even negates the Militia powers and disabilities of the Constitution, and thereby disjoints, if it does not entirely dismantle, the federal system, the most important of the Constitution's "checks and balances", and the very possibility of maintaining "the security of a free State" anywhere within America.* This result alone should suffice to refute such a construction.

2. Nonetheless, even more systematic analysis would not be amiss in order to prove that point beyond cavil.

[3966] Virginia Declaration of Rights (1776) art. 13.

[3967] *See* U.S. Const. art. I, § 8, cl. 12.

[3968] *Contrast* U.S. Const. art. I, § 8, cls. 12 and 13 *with* cl. 15.

[3969] *See* U.S. Const. art. I, § 8, cls. 15 and 16.

[3970] *Compare* U.S. Const. amend. II *with* Virginia Declaration of Rights (1776) art. 13.

a. The first precept to be applied is that "[w]e are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted".[3971] At the end of the *pre-*constitutional period, the Articles of Confederation provided that:

> No vessels of war shall be kept up in time of peace by any state, except such number only, as shall be deemed necessary by the united states in congress assembled, for the defence of such state, or its trade; nor shall any body of forces be kept up by any state, in time of peace, except such number only, as in the judgment of the united states, in congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such state; but every state shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutred[.][3972]

> The united states in congress assembled shall have authority * * * to build and equip a navy—to agree upon the number of land forces, and to make requisitions from each state for its quota, in proportion to the number of white inhabitants in such state; which requisition shall be binding, and thereupon the legislature of each state shall * * * raise the men * * * : But if the united states in congress assembled shall * * * judge proper that any state should not raise men, or should raise a smaller number than its quota, and that any other state should raise a greater number of men than the quota thereof, such extra number shall be raised, * * * in the same manner as the quota of such state, unless the legislature of such state shall judge that such extra number cannot be safely spared out of the same, in which case they shall raise * * * as many such extra number as they judge can be safely spared.[3973]

So, when the Constitution was being drafted—

• The States were required to maintain their Militia, which of course they had always done on their own as independent States or as Colonies throughout the earlier part of the *pre-*constitutional period.

• "[I]n time of peace" the States were not allowed to "ke[ep] up" "vessels of war" or "any body of forces", except for certain specific limited purposes the Continental Congress approved.

• The Continental Congress could "make requisitions from each state for its quota" of "land forces". These were "binding", in that "the legislature of each state" was required somehow to "raise the men". In the nature of things, any men whom

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[3971] Mattox v. United States, 156 U.S. 237, 243 (1895).

[3972] Arts. of Confed'n art. VI, ¶ 4.

[3973] Arts. of Confed'n art. IX, ¶ 5.

a State "raise[d]" for the "land forces" of the United States had to come from the set of men eligible for her Militia. Yet, if the Continental Congress determined that a "state should raise a greater number of men than the quota thereof", the State could have refused to comply had her "legislature * * * judge[d] that such extra number c[ould]not be safely spared out of the [state]"—perhaps because such a detachment would have excessively weakened the State's Militia. Presumably, too, the selfsame grounds for refusing to comply must have been implicitly allowable with respect to a requisition even of a State's normal quota, because whether the men could "be safely spared" depended upon how many were subject to requisition, not whether that number happened to be the State's normal quota or some greater number.

• Each State possessed a general power to impress all able-bodied free males into her Militia, and through that power to draft men into her own "body of forces" or into the "land forces" of the Continental Army. A draft for the regular Armed Forces was always effectively a draft from the Militia, because everyone who was capable of being a soldier was already enrolled as a matter of law in the Militia. But the States never employed their power to draft so as to absorb their Militia into the regular Armed Forces, or even seriously to deplete their Militia for that purpose—instead, only small percentages of Militiamen were ever impressed into the regular forces; and even those percentages were minimized by the right of draftees to provide substitutes.

• The Continental Congress neither exercised nor even claimed a power to draft individuals directly from the general population into the Continental Army. And,

• Although the Militia were often held to be inferior to regular troops as a matter of fact, this was largely on the basis of anecdotal evidence, as opposed to a study of the big picture; for, from the latter perspective, "the militia played a very important role in the War of American Independence. Its political functions probably were indispensable, and as a military institution, supported by state troops, it continued to meet its traditional colonial responsibilities for local defense and for providing a general emergency reserve."[3974] In any event, the notion that the regular Armed Forces, whether of a State or of the United States, were somehow superior to the Militia as a matter of law had no currency.

The question then becomes: Did the Constitution change any of these principles of military federalism and organization so as to empower Congress to draft

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[3974] R. Wright, Jr., *The Continental Army, ante* note 396, at 183. Noteworthy is the confusion in this passage, typical of modern commentators who erroneously treat the Militia as an unitary organization ("it") rather than as a set of establishments as numerous as the several States themselves. *Contrast* U.S. Const. art. I, § 8, cl. 16 (emphasis supplied): "such Part of *them* [that is, the Militia] as may be employed in the Service of the United States".

an unlimited number of individuals directly into the General Government's "Armies"?

b. A power "[t]o raise * * * Armies" by impressment cannot be derived—as it were, by legal osmosis—from the undoubted power of the States to impress every able-bodied adult for their Militia, and the undoubted duty of every able-bodied adult to serve in some fashion in those Militia.

True, the power to draft individuals to serve in "[a] *well regulated* Militia"[3975] is inherent in the very concept of such a Militia, because that is how "[a] *well regulated* Militia" comes into being in the first place. But the Constitution delegates to Congress no power whatsoever *to create* a "Militia *of the United States*", "well regulated" or otherwise. The *only* Militia the Constitution recognizes are "the Militia *of the several States*",[3976] which during *pre*-constitutional times always were, and by this constitutional denotation today remain, *the States'* establishments. So, inasmuch as Congress lacks the power to create a "Militia of the United States", it must also lack the power to draft men for a "Militia of the United States", and (as a necessary consequence of that) must lack the further power "to draft upon a draft" by impressing persons out of an imaginary "Militia of the United States" for service in the General Government's regular Armed Forces. *A fortiori,* because the Militia are "the Militia of the several States", Congress lacks the power to impress anyone into those Militia in the first place; and therefore must lack the further power "to draft upon a draft" by impressing persons out of any of the States' Militia for service in the General Government's regular Armed Forces.

Also true, the Constitution authorizes Congress "[t]o provide for organizing, arming, and disciplining, the Militia".[3977] But a power "[t]o provide for *organizing*" is not a power to *draft*. The obligation of all eligible individuals to participate in the Militia justifies the draft that in fact creates the Militia, "composed of the body of the people, trained to arms".[3978] It is the basis upon which the Militia are "settled" in the first instance, as opposed to being "regulated" thereafter.[3979] This obligation exists independently of any action by Congress or the States. It is not the product, but the source, of the various powers that the States and Congress exercise with respect to the Militia. And it would exist—even if the States and Congress did not—wherever Americans sought to live in "a free State", because "[a] well regulated Militia" is "necessary to the security of a free State".[3980] But an individual

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[3975] U.S. Const. amend. II (emphasis supplied).

[3976] U.S. Const. art. II, § 2, cl. 1 (emphasis supplied).

[3977] U.S. Const. art. I, § 8, cl. 16.

[3978] Virginia Declaration of Rights (1776) art. 13.

[3979] *See ante,* Chapters 3 (Rhode Island) and 14 (Virginia). *See also ante,* at 100-102.

[3980] *See* U.S. Const. amend. II.

who is drafted into the Militia perforce of his own duty as a citizen is not thereby "organized" in any way. After the simple assembling of individuals for the Militia, another step is required: namely, for those individuals to be "trained to arms", which requires "organiz[ation]" according to certain constitutional principles that pertain to "arms", to "training", and to other aspects of "discipline". This, however, is "organiz[ation]" *within and for the purposes of the Militia*, not for Militiamen's compulsory service in the regular Armed Forces.

No less true, the Constitution does delegate to Congress the power "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions"[3981]—but this is not a general power to draft, only to "call[ ] forth the Militia" from the States in which they subsist, so that they may be "employed in the Service of the United States", and then only for one or more of those three specific purposes. For Militiamen to serve in the regular Armed Forces is not one of them. To the contrary: Every one of these purposes presumes that "the Militia" "call[ed] forth" will serve *as Militia only*—otherwise, the Constitution would not assign to Congress the power "[t]o provide * * * for governing such Part of the[Militia] as may be employed in the Service of the United States",[3982] *separate from* its power "[t]o make Rules for the Government and Regulation of the land and naval Forces".[3983]

c. The Constitution delegates to Congress no explicit power "[t]o draft" or "[t]o impress" individuals into the General Government's regular Armed Forces, only the power "[t]o raise * * * Armies". So proponents of a power "[t]o draft" or "impress" must establish that such a power is implied in "raise" in the special constitutional sense that "Laws" which "draft" or "impress" are "necessary and proper for carrying into Execution the * * * Power[ ]" "[t]o raise * * * Armies".[3984]

d. Self-evidently, however, not just anything that might be merely imagined to be "necessary and proper" for "rais[ing] * * * Armies" can legitimately be implied from that power. For example, the powers "[t]o lay and collect Taxes",[3985] "[t]o borrow Money on the credit of the United States",[3986] and "[t]o coin Money"[3987] would materially assist execution of the power "[t]o raise and support Armies". If the old saying be true that "gold is the sinews of war", such that the Power of the Sword depends upon the Power of the Purse, then without the former three powers

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[3981] U.S. Const. art. I, § 8, cl. 16.

[3982] U.S. Const. art. I, § 8, cl. 16.

[3983] U.S. Const. art. I, § 8, cl. 14.

[3984] *See* U.S. Const. art. I, § 8, cl. 18.

[3985] U.S. Const. art. I, § 8, cl. 1.

[3986] U.S. Const. art. I, § 8, cl. 2.

[3987] U.S. Const. art. I, § 8, cl. 5.

the latter one would be feckless.[3988] Indeed, without the three former powers, *all* other governmental powers the exercise of which required the expenditure of money would be of extremely limited usefulness. That being so, *apparently* the three former powers never needed enumeration in the Constitution, because they could be implied as always "necessary and proper for carrying into Execution [most or even all of] the [other] Powers". Yet enumerated they were and are. So these appearances are deceptive. Inasmuch as "'[i]n expounding the Constitution * * * every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added'",[3989] the unavoidable conclusion must be that the power "[t]o raise and support Armies" does *not* imply every other imaginable power that might *functionally* assist in its execution, if countervailing *constitutional* considerations—such as the existence of separate enumerated powers addressed specifically to those subjects—obtain.

And where an implied power "[t]o draft" or "[t]o impress" is concerned, other compelling countervailing considerations do exist.

e. Prudent construction of a Constitution intended to create a government of powers *limited by their very definitions* requires that practices which even Blackstone opined were "not * * * any part of the permanent and perpetual laws of [England]", and which were "only defensible from public necessity",[3990] should not be read into the Constitution as "necessary and proper" without the strongest linguistic and historical foundation, and even then should be employed only after all possible alternatives have been exhausted.

Both linguistically and historically, the verb "raise" does not necessarily imply "draft" or "impress". As detailed immediately above, in *pre-*constitutional usage "raise" usually connoted voluntary enlistment, as contrasted with "draught" ("draft"), "impress", or "levy", which denoted compulsion; and when "raise" was employed in a statute which also provided for "draughts", it referred to voluntary enlistments, which if insufficient were to be supplemented by "draughts".

Yet the Articles of Confederation used the verb "raise" to encompass all possible means by which the States could bring men into the field to meet their quotas for the Continental Army: "The united states * * * shall have authority * * * to make requisitions from each state * * * , and thereupon the legislature of

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[3988] Actually, of course, the reverse is true. For "gold alone will not procure good soldiers, but good soldiers will always procure gold". Niccolò Machiavelli, *Discourses on the First Ten Books of Titus Livius* (1531), Second Book, Chapter X, *in The Historical, Political, and Diplomatic Writings of Niccolo Machiavelli,* Christian E. Detmold, Translator (Boston, Massachusetts: James R. Osgood and Company, 1882), Volume 2, at 252. But analysis can profit from taking *arguendo* the common misconception as its premiss.

[3989] Williams v. United States, 289 U.S. 553, 572-573 (1933).

[3990] *Commentaries on the Laws of England, ante* note 142, Volume 1, at 412, 419.

each state shall * * * raise the men".[3991] And the Continental Congress doubtlessly presumed that the States would employ their full panoply of powers—including both voluntary enlistments and "draughts"—for that purpose. So some plasticity must be accorded to this use of "raise": for example, that "shall * * * raise" imposes a mandate on the States to do something, but allows them to choose what to do.

f. No ambiguity exists, however, as to the rule that "draft" or "impress" can be implied in "raise" only if "Laws" for drafting or impressing are both "necessary and proper for carrying into Execution the * * * Power[ ]" "[t]o raise * * * Armies". As all drafts for the regular Armed Forces must, in the final analysis, be taken from the Militia, such "Laws" would be "*necessary* and proper" only if the Armed Forces were *superior to* the Militia in terms of their relative constitutional "necess[ity]". That, however, is not the case.

First, the argument in favor of unlimited powers "[t]o raise * * * Armies" was expressed most facilely by the great exponent of centralized government, Alexander Hamilton:

> The authorities essential to the common defense are these: to raise armies; to build and equip fleets * * * . These powers ought to exist without limitation, *because it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them.* The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be coextensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defense.
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> Whether there ought to be a federal government intrusted with the care of the common defense is a question in the first instance open to discussion; but the moment it is decided in the affirmative, it will follow that that government ought to be clothed with all the powers requisite to complete execution of its trust. And unless it can be shown that the circumstances which may affect the public safety are reducible within certain determinate limits * * * , it must be admitted * * * that there can be no limitation of that authority which is to provide for the defense and protection of the community in any matter essential to its efficacy—that is, in any manner essential to the *formation, direction,* or *support* of the NATIONAL FORCES.[3992]

[3991] Arts. of Confed'n art. IX, ¶ 5.

[3992] *The Federalist* No. 23 (emphasis in the original).

Hamilton, however, did not take into consideration that, although it may be "impossible to foresee or to define" all "the circumstances which may affect the public safety", it is not difficult to predict the dangers posed *by "standing armies" in particular*. Indeed, the Constitution takes these dangers into account by authorizing more than one establishment to "provide for the common defence": "the Army and Navy of the United States" (together with such "Troops, or Ships of War" as the States receive "the Consent of Congress" to "keep"), on the one hand, and "the Militia of the several States", on the other. When the Militia are "called into the actual Service of the United States" alongside the regular Armed Forces, then *all of these forces together* constitute the totality of "the NATIONAL FORCES". With *all* of these forces available to it, "the [General G]overnment * * * [is] clothed with all the powers requisite to complete execution of its trust". As far as "Armies" and "Troops" are concerned, though, "available to it" does not mean always in actual existence. For the Constitution foresees the possibilities that the House of Representatives could determine that "Armies" were unnecessary or even dangerous, and therefore would refuse "Appropriations of Money to that Use", or that Congress could withhold its "Consent" for the States to "keep Troops".[3993] So the question is never which forces should be "unlimited" or "limited" in the abstract, but instead how to conform the composition of "the NATIONAL FORCES" to the actual pattern the Constitution prescribes.

Second, in contrast to the Militia, the Constitution attaches to the regular Armed Forces no imprimatur of "necessity"; whereas the Second Amendment declares "well regulated Militia" to be "necessary to the security of a free State".

Third, inasmuch as all eligible adults are always subject to compulsory membership in "the Militia of the several States", no sizeable portion of the population suitable for military service remains to be drafted into the Armed Forces. The absence of a significant number of subjects for such a draft indicates the unlikelihood of an implied Congressional power for that purpose. It would be useless to argue that Congress, in the exercise of its power "[t]o provide for organizing * * * the Militia"[3994] could simply exempt large numbers of individuals from "the Militia of the several States" for the very purpose of drafting them into the "Armies" of the United States. For, to be constitutional, any exemption from the Militia must first and foremost be consistent with maintenance of the Militia as viable forces, not aimed at stripping them of their necessary manpower.

Fourth, an implied power to drain the Militia of manpower through a general draft in favor of the regular Armed Forces would deprive Congress of the substance through which it could exercise its power "[t]o call forth the Militia to execute the

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[3993] U.S. Const. art. I, § 8, cl. 12 *and* art. I, § 10, cl. 3.

[3994] U.S. Const. art. I, § 8, cl. 16.

Laws of the Union, suppress Insurrections and repel Invasions",[3995] and would deny the President the explicit constitutional means by which he can "take Care that the Laws be faithfully executed".[3996] One power of Congress, however, cannot "be so enforced as to nullify or substantially impair [any] other",[3997] let alone so as to frustrate the performance of the President's foremost duty.[3998] Similarly, for such an implied power to exist would require either: (i) that "[a] well regulated Militia" is *not* "*necessary* to the security of a free State", in comparison to the "Armies" of the United States, and therefore may be subordinated thereto through a draft whenever Congress deems it expedient; or (ii) that even if "[a] well regulated Militia" remains "necessary to the security *of a free State*", Congress may deem the "Armies" of the United States "necessary" to something politically more important than maintaining "a free State"—such as launching aggressive foreign military adventures, establishing a domestic *para*-military domestic police state, and so on. Both of these alternatives, however, contradict the Second Amendment. But Congress's power "[t]o raise and support Armies"cannot contradict the Second Amendment.

Fifth, implication of a Congressional power to draft Americans into the Armed Forces *ad libitum* would license rogue Congressmen to extract from "the Militia of the several States" the cannon fodder sufficient for a massive "standing army", the very establishment against which the Militia are to serve as "checks and balances". Patriotic Americans of the constitutional era were agreed that "[i]t is against sound policy for a free people to keep up large military establishments and standing armies in time of peace", not least because of "the facile means which they afford to ambitious and unprincipled rulers to subvert the government or trample upon the rights of the people".[3999] And in keeping with this understanding, the Second Amendment declares "well regulated Militia", *not the regular Armed Forces*, "necessary to the security of a free State". Moreover, suspicion of a "standing army" appears even in the original Constitution, which enables any newly elected House of Representatives effectively to disestablish *all* "Armies", by providing that "no Appropriation of Money to that Use shall be for a longer Term than two Years".[4000] Nowhere does the Constitution contain an equivalent provision applicable to the Militia. In addition, the Constitution explicitly delegates to the Militia, *not to the regular Armed Forces*, the responsibility and authority "to execute the Laws of the Union"[4001]—which would be of critical importance if aspiring usurpers and tyrants

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[3995] U.S. Const. art. I, § 8, cl. 15.

[3996] U.S. Const. art. II, § 3.

[3997] Dick v. United States, 208 U.S. 340, 353 (1908).

[3998] *Compare* U.S. Const. art. II, § 1, cl. 7 *with* art. II, § 3.

[3999] J. Story, *Commentaries on the Constitution*, *ante* note 576, Volume 2, § 1897, at 646.

[4000] U.S. Const. art. I, § 8, cl. 12. *See also* U.S. Const. art. I, § 10, cl. 3.

[4001] U.S. Const. art. I, § 8, cl. 15.

attempted to recruit rogue elements of the Armed Forces to overthrow the Constitution. Conversely, nowhere does the Constitution delegate any authority to the Armed Forces to execute *any* law against the Militia—doubtlessly because the Militia, being composed of WE THE PEOPLE themselves, would never undertake "to throw off" the Constitution, unless under the principles of the Declaration of Independence that "Form of Government [had] become[ ] destructive of the[ ] ends" for which it had been instituted, in which event THE PEOPLE would be entitled under "the Laws of Nature and of Nature's God" "to alter or to abolish it" and "to provide new Guards for their future security", no matter what the Armed Forces thought about the matter.

To serve as an *effective* "check and balance" against rogue Armed Forces, however, the Militia must always command at least such strength as will suffice to deter aspiring usurpers and tyrants, or to resist them if deterrence fails. This was the premiss of the argument James Madison put forward against "the visionary supposition" that the General Government "may previously accumulate a military force for the projects of ambition", and with that force bring about "the downfall of the State governments":

> That the people and the States should, for a sufficient period of time, elect an uninterrupted succession of men ready to betray both; that the traitors should, throughout this period, uniformly and systematically pursue some fixed plan for the extension of the military establishment; that the governments and the people of the States should silently and patiently behold the gathering storm and continue to supply the materials until it should be prepared to burst on their own heads must appear to everyone more like the incoherent dreams of a delirious jealousy, or the misjudged exaggerations of a counterfeit zeal, than like the sober apprehensions of genuine patriotism. Extravagant as the supposition is, let it, however, be made. Let a regular army, fully equal to the resources of the country, be formed; and let it be entirely at the devotion of the * * * [General G]overnment: still it would not be going too far to say that the State governments with the people on their side would be able to repel the danger. The highest number to which, according to the best computation, a standing army can be carried in any country does not exceed * * * one twenty-fifth part of the number able to bear arms. This proportion would not yield, in the United States, an army of more than twenty-five or thirty thousand men. To these would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties and united and conducted by [State] governments possessing their affections and

> confidence. It may well be doubted whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops.[4002]

The defense which Madison presumed a properly proportioned Militia could mount, though, would not be possible if usurpers and tyrants under color of law could simply draft into the Armed Forces enough Militiamen to reduce the remainder of the Militia to impotence. It would be useless to contend that the General Government's Treasury could not afford such a draft. For why should usurpers and tyrants, intent on destroying the country's fundamental law, be deterred simply by the monetary price of obtaining absolute power, when they would expect to impose the costs of their oppression upon its victims? Of course, a draft would not necessarily be required to bring about this result. As of this writing, the stage for "the project of ambition" has been set in another way: by effectively disestablishing the Militia through the creation of the oxymoronic "unorganized militia", together with the maintenance of large regular Armed Forces and *para-*militarized police recruited on a voluntary basis. But a draft would surely provide significant assistance to usurpers and tyrants in the course of a political crisis in which a large proportion of the adults capable of Militia service opposed them.

g. Inasmuch as the power "[t]o raise * * * Armies" is not explicitly limited in any way, if "raise" implied "draft" or "impress" then *anyone and everyone from the pool of adults capable of performing some military service* could be drafted. This, of course, constitutes the very pool of individuals who make up the Militia. So the claim that "Laws" providing for a general draft would be "necessary and *proper* for carrying into Execution the * * * Power[ ]" "[t]o raise * * * Armies"[4003] cannot be entertained, because the power "[t]o make [such] Laws" would be capable of destroying, if not always intentionally employed to destroy, the Militia. It is, of course, irrelevant that such an extensive draft might not be imposed tomorrow, or even the day after. For "the legality of [any governmental] power must be estimated not by what it will do but by what it can do".[4004] As America's Founding generation knew, "*in government what may be done will be done*".[4005]

By way of analogy, a power to draft for the Armed Forces would amount to a "tax in manpower" on all other activities in which the individuals to be impressed might be employed. So, just as "the power to tax involves the power to destroy" the things or activities taxed, and thereby "the power to destroy may defeat and render

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[4002] *The Federalist* No. 46.

[4003] *See* U.S. Const. art. I, § 8, cl. 18.

[4004] Block v. Hirsh, 256 U.S. 135, 162 (1921) (McKenna, J., dissenting).

[4005] John Francis Mercer, Address to the Members of the Conventions of New York and Virginia (1788), *quoted in The Antifederalist Papers*, Morton Borden, Editor (East Lansing, Michigan: Michigan State University Press, 1965), at 176.

useless the power to create",[4006] a power to draft would "involve[ ] the power to destroy" the Militia in fact, and thereby "defeat and render useless" the safeguards the Constitution mandates in law through the Militia. "[T]he Militia of the several States" are State governmental establishments, however. And just as no State may tax the General Government or any of its instrumentalities,[4007] Congress may not tax a State or a State's instrumentalities.[4008] This must be especially true when the States' instrumentalities are themselves permanent components of the federal system which being "necessary to the security of a free State" "promote the general Welfare[ ] and secure the Blessings of Liberty",[4009] and upon which the Constitution explicitly depends to "establish Justice, insure domestic Tranquility, [and] provide for the common defence".[4010]

Therefore, Congress should be disabled from "rais[ing] * * * Armies" through an unlimited draft imposed directly on the population comprising the Militia. Indeed, any such unlimited "tax in manpower" levied upon the Militia in favor of the General Government's "Armies" should be *constitutionally inconceivable,* because: (i) the Militia are the primary "checks and balances" on a "standing army"; and (ii) a draft would build up "the standing army" necessarily at the expense of the Militia, thus transmogrifying the "checks and balances" into means for increasing the power of the very institution they were meant to constrain.

h. The foregoing analysis compels the conclusion that, if Congress may "raise * * * Armies" through any form of compulsory service, its power to do so must be stringently constrained in some effective manner, so that the numbers of Americans subject to any form of "draft" or "impressment" always remain small in relation to the numbers subject to service in the Militia—such as the "one twenty-fifth part of the number able to bear arms" which Madison believed was "[t]he highest number to which, according to the best computation, a standing army can be carried in any country" in his time.

(1) Whatever that number might be today, the best way to ensure a limitation on any draft would be to counterpose a countervailing power to the

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[4006] McCulloch v. Maryland, 17 U.S. (4 Wheaton) 316, 431 (1819).

[4007] *E.g.,* McCulloch v. Maryland, 17 U.S. (4 Wheaton) 316 (1819).

[4008] *See* Indian Motorcycle Co. v. United States, 283 U.S. 570 (1931). *Contrast* Veazie Bank v. Fenno, 75 U.S. (8 Wallace) 533 (1869). The circulating notes of State banks should have been declared unconstitutional "Bills of Credit" which "[n]o State shall * * * emit". U.S. Const. art. I, § 10, cl. 1. Congress had to employ its power to tax in order to drive those notes out of circulation only because the Supreme Court had erroneously refused on several occasions to condemn them as "Bills of Credit". *See* E. Vieira, Jr., *Pieces of Eight, ante* note 39, Volume 1, at 391-454. After the Civil War, Congress could also have banned State bank notes directly, on the grounds that their emission "abridge[d] the privileges or immunities of citizens of the United States". U.S. Const. amend. XIV, §§ 1 and 5.

[4009] *Compare the exact coincidence of ends between* U.S. Const. amend. II *and* preamble.

[4010] *Compare the exact coincidence of ends between* U.S. Const. preamble *and* art. I, § 8, cl. 15.

power of Congress—that is, some institution *with constitutional authority*, independent of Congress, which must exercise some *effective* say in how and to what extent a draft operates.

Within the General Government, this institution is unlikely to be the Supreme Court.[4011] Arguably, it could be the Presidency. As the dual "Commander in Chief of the Army and Navy of the United States and of the Militia of the several States",[4012] with a duty to "take Care that the Laws be faithfully executed",[4013] the President labors under a constitutional responsibility to insure that, whatever may be done for "the Army and Navy", the Militia always retain sufficient manpower to be so "well regulated" that they can provide "the security of a free State" against *all* enemies, both foreign *and domestic*.[4014] Therefore he cannot, on the one hand, accept excessive augmentation of "the Army and Navy" at the expense of the Militia, such that he becomes the titular "Commander in Chief" of a dangerous "standing army", while, on the other hand, he allows that expansion to occur, so that thereby he loses the ability as the Militia's "Commander in Chief" to interpose them as effective "checks and balances" against rogue elements in "the standing army". Of course, since 1903, no President has ever taken this responsibility seriously (or perhaps even realized that it exists). So it would be politically unrealistic to expect any change in the attitude of the Executive Branch on this score in the foreseeable future.

The States, too, have a palpable concern with any draft the General Government might direct at the members of their Militia, because the Militia are "the Militia of the several States", and "[a] well regulated Militia"—which means one with sufficient strength of numbers—is "necessary to the security of a free State". Moreover, if the Tenth Amendment is correct, and "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively", then to be sure that a power to draft which has *not* been "delegated to the United States" as a matter of law *is* actually "reserved to the States respectively" as a matter of fact, the States themselves must take appropriate action to "reserve[ ]" it. Certainly they cannot depend upon rogue officials in the General Government to admit that a power to draft has "not [been] delegated to the United States" to the excessive degree which those officials desire. The practical problem, though, is that the States' civilian governmental institutions would not find it easy to interpose themselves against a draft which Congress aimed at the general population and despatched agents of the General Government to enforce directly against individuals.

[4011] *See post*, at 1807-1835.

[4012] U.S. Const. art. II, § 2, cl. 1.

[4013] U.S. Const. art. II, § 3.

[4014] U.S. Const. amend. II.

At the sharp end of the stick where the point of any draft is felt, the Militia would be the logical and practical choices to exercise the necessary *effective* countervailing power. Not just their members as individuals, but as well the Militia as institutions would be the targets of any draft. Moreover, they would labor under a constitutional responsibility to oppose any draft that trenched too deeply upon their ability to perform their primary duty of providing each of their States with "the security of a free State". So they should refuse to release men to "the standing army" above some maximum percentage. And they could make their refusal effective: For, if properly revitalized, they would deploy the physical power necessary and sufficient to oppose the actual impressment of their members, individual by individual; from that physical power, they would derive the political power to interpose themselves against the draft, because "'[p]olitical power grows out of the barrel of a gun'";[4015] and at all times they would enjoy the legal power to act, perforce of the Constitution. After all, because the Constitution secures "the right of the people to keep and bear Arms" *so that they will be capable of serving in "well regulated Militia"*, that "right" is as well a "right of the people" to participate in such Militia. Indeed, the two are inextricably related. So, just as "the right * * * to keep and bear Arms, shall not be infringed", the right to participate in the Militia must "not be infringed" either.[4016] Any draft for the General Government's "Armies" beyond whatever proportion the Constitution allows necessarily infringes on each and every draftee's right to participate in the Militia. Therefore, any of "the people" eligible for the Militia, either as individuals or arrayed institutionally in the Militia, can lawfully oppose such a draft.

The point of departure for analysis, then, is to adopt as a working hypothesis that Congress may not draft individuals directly, but may "raise * * * Armies" by a process which involves the States and their Militia as active participants, capable of functioning as effective "checks and balances". This procedure is firmly grounded in legal history. As observed above, when the Articles of Confederation used the verb "raise"—"[t]he united states * * * shall have authority * * * to make requisitions from each state * * * , and thereupon the legislature of each state shall * * * raise the men"[4017]—they doubtlessly understood that the States would employ both voluntary enlistments and "draughts" for that purpose. And that is precisely what the States did. That being so, in construing Congress's power "[t]o raise * * * Armies" according to the rule that "[w]e are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted",[4018] the wisest course would be to follow as closely as possible what was *actually done* under the Articles,

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[4015] *Quotations From Chairman Mao, ante* note 28, at 61.

[4016] *See ante*, Chapter 45.

[4017] Arts. of Confed'n art. IX, ¶ 5.

[4018] Mattox v. United States, 156 U.S. 237, 243 (1895).

as a sure guide to what was *actually meant* both there and later on in the Constitution. For it is hard to imagine that WE THE PEOPLE intended to delegate to Congress under the Constitution significantly less authority "[t]o raise * * * Armies" than the Continental Congress enjoyed under the Articles of Confederation. Yet, inasmuch as whatever additional power the Constitution may have delegated to Congress had to be taken from the States, any such delegation and restriction need to be proven in unmistakable terms, not simply assumed.

(2) Under the foregoing hypothesis, Congress could "raise * * * Armies" in three ways.

(a) Congress could seek voluntary enlistments from the general population. The Articles did not provide for this; but the verb "raise" certainly encompasses it.

(b) Following the procedure adopted in the Articles, which the phrase "[t]o raise * * * Armies" certainly does not exclude, Congress could simply make requisitions from the States according to a system of fair quotas, leaving to legislators in each State the determination of how to enlist the requisite number of individuals. Even "in time of Peace" such action would not fall afoul of the prohibition that "[n]o State shall, without the Consent of Congress, * * * keep Troops * * * in time of Peace",[4019] because those whom the States enlisted would never become part of the States' own "Troops", but instead would be assigned and delivered directly to the General Government's "Armies". And because the requisitions would be worked through the States' governments, rather than through drafts of individuals directly by Congress, the States could function as effective "checks and balances", because the General Government could seek to enforce its requisitions only against the States themselves, which would resist its excessive demands.

(c) Another, more complicated, arrangement is also possible. The Constitution imposes the restriction that "[n]o State shall, without the Consent of Congress, * * * keep Troops * * * in time of Peace", whether the soldiers are volunteers or draftees. But Congress may grant its "Consent" for that purpose—*and may condition that "Consent" upon whatever otherwise constitutional requirements it deems expedient*.[4020] Congress may even permit the States to enact legislation of their own in order to implement the terms of its "Consent".[4021] This amounts to a significant relaxation of the similar limitation embodied in the Articles of Confederation, which permitted the Continental Congress to allow a State to "ke[ep] up" no "body of forces * * * except such number only, as in the judgment of the united states, * * * shall be deemed requisite to garrison the forts necessary

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[4019] U.S. Const. art. I, § 10, cl. 3.

[4020] *See* Arizona v. California, 292 U.S. 341, 345 (1934) (interstate compact).

[4021] *See* De Veau v. Braisted, 363 U.S. 144, 153-155 (1960).

for the defence of such state".[4022] So, for example, Congress may give "Consent" for the States to use any or all of their *pre-*constitutional powers—including the power to draft—to bring "Troops" into the field, upon the condition that those "Troops" be made available for duty with the General Government's "Armies" by direct incorporation, or as reserves or supplements, whenever Congress so orders. Thus, upon their enlistments, these forces would become, not simply the States' "Troops", but also effectively part of "the * * * land Forces" of the United States.[4023] This hermaphroditic character as State "Troops" at birth but with an ineradicable commitment to serve in or alongside the General Government's "Armies" is doubtlessly the constitutional basis (if any exists) upon which the modern National Guard rests (rather than the absurd notion put out for popular consumption that the National Guard is some form of "militia").[4024]

Thus, by coupling its power to give its "Consent" for the States to "keep Troops" with its power "[t]o raise * * * Armies", Congress would create a truly *federal* process for achieving both of those purposes simultaneously. Congress's employment of its power "[t]o raise * * * Armies" would be necessary, because its "Consent" for the States to "keep Troops" would not, by itself, necessarily cause those "Troops" to be recruited or made available for the General Government's service, inasmuch as, without such a condition on those "Troops'" enlistments, the States could retain them as exclusively their own, within their own territories, for their own defense.

Of course, the willingness of the States to coöperate with Congress in effectuating such a plan would be required. For "with[ ] *the Consent* of Congress" is not "by *the compulsion* of Congress". "Consent", after all, means "[c]oncord; agreement; accord; unity of opinion" and "joint operation".[4025] Congress may *allow* the States to enlist voluntarily, or even to draft, "Troops" for themselves, for the General Government, or for both, relying in every instance upon the States' agreement and coöperation; but it may not *command* the States to do so over their objection in any instance.

(d) All three of these alternatives for "rais[ing] * * * Armies" would have to be constrained in two ways:

First, from the purely legal perspective, neither Congress nor the States can prevent "the body of the people"—that is, "[t]he main part; the bulk"[4026]—from

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[4022] Arts. of Confed'n art. VI, ¶ 4.

[4023] *See* U.S. Const. art. I, § 8, cl. 14.

[4024] *See ante*, at 786-793.

[4025] S. Johnson, *Dictionary*, *ante* note 50, definitions 2 and 4, in both the First (1755) and the Fourth (1773) Editions.

[4026] *Id.*, definitions 9 in the First Edition (1755) and 8 in the Fourth Edition (1773).

exercising "the right of the people to keep and bear Arms" within "well regulated Militia".[4027] For the Militia must always remain effective establishments under WE THE PEOPLE'S control through THE PEOPLE'S direct participation *en masse*. So neither Congress nor the States can: (i) disestablish the Militia, directly or indirectly; or (ii) take any other action—such as by rendering the Militia incapable of performing their functions through depletion of their personnel or equipment—which prevents either Congress from being able to call forth the Militia for one or more of the three purposes the Constitution specifies or the States from deploying their Militia for those purposes (if Congress should default on its obligations) or for any other purposes related to each particular State's own "homeland security". Now, inasmuch as any voluntary enlistments by Congress, as well as enlistments or drafts by the States, in aid of building up the General Government's "Armies" would necessarily deprive the Militia of personnel, the Constitution must require: (i) that *some* proportion of the Militia can *never* be safely spared for that purpose; and therefore (ii) that Congress may *never* enlist, requisition, or agree with the States to recruit or levy so many individuals for the General Government's "Armies" as to trench upon that proportion, and the States may *never* agree to, facilitate, acquiesce in, or fail to oppose any such excessive drain of manpower from their Militia.

To be sure, the problem of an "excessive" draft in any particular instance reduces to one of relative numbers, which leaves some room for reasonable debate. Yet what might constitute an excessive proportion could never be left for empirical determination—because, if the proof of the proportion's being excessive were the effective destruction of the Militia, it might be established too late to rectify the situation. Beyond doubt, because "a well regulated militia" is "composed of the body of the people" and "a majority of the community hath an indubitable, unalienable, and indefeasible right, to reform, alter, or abolish [a bad government]",[4028] a draft for the General Government's "Armies" or a State's "Troops" that attempted to take a majority or more of Militiamen would be unconstitutional. Even a lesser number of draftees, though, might so weaken a State's Militia in a particular set of circumstances that it could not perform its function as "the proper, natural, and safe defence of a free state".[4029] As the Commonwealth's statutes of 1780 and 1782 evidence, Virginians of that era believed that a draft consisting of one-fifteenth of the enrollment of her Militia was sufficient during wartime and otherwise safe.[4030] Which suggests that a draft of any greater percentage would be presumptively invalid.

[4027] *See* Virginia Declaration of Rights (1776) art. 13 *and* U.S. Const. amend. II.

[4028] Virginia Declaration of Rights (1776) arts. 13 and 3.

[4029] Virginia Declaration of Rights (1776) art. 13.

[4030] *See ante*, at 1761-1762.

Second, from the political perspective, Congress cannot be allowed to enlist as volunteers or to requisition or otherwise draw from the States so many individuals for the General Government's "Armies" as to cause Americans to fear the erection of an excessively large and independent "military-industrial complex". So the States should refuse to meet quotas that Congress might set, or to agree to make their "Troops" available for the General Government's "Armies", or even to allow members of their Militia to enlist in those "Armies", if such arrangements trenched too deeply upon their Militia. After all, if sufficiently large percentages of Militiamen were absorbed directly into the "Armies" of the United States or into the "Troops" of the States that might be incorporated within those "Armies", the residue of able-bodied adults eligible for the Militia would no longer represent "the body of the people"—and therefore could constitute no true Militia at all. Obviously, a draft by the States *from* their Militia, ostensibly predicated on the States' original power to draft *for* their Militia, *but employed for the specific purpose of building up a "standing army" not simply at the expense but even tending towards the destruction of the Militia*, would be at least doubly deficient: On the one hand, it would be legally self-contradictory—for no power can be invoked in order to destroy that very power's primary object. On the other hand, it would be politically suicidal—for, unless prevented from coming into being, or deterred, or resisted by WE THE PEOPLE themselves through their Militia, "standing armies" afford "facile means * * * to ambitious and unprincipled rulers to subvert the government or trample upon the rights of the people".[4031] Inasmuch as maintaining "the security of a free State" is *the* purpose of the Militia, and impressing men in excessive numbers from the Militia into possibly rogue "standing armies" self-evidently subverts that security, any such draft could not conceivably be constitutional. And no putative Congressional requisition or "Consent" directed to apparently willing States could make it so.

What, though, if rogue public officials in the States, in league with equally villainous officeholders in the General Government, attempted to impress too many Militiamen into the States' "Troops", ultimately for service with the General Government's "Armies"? Then fulfillment of the duty of constitutional interposition would fall to WE THE PEOPLE themselves. At that point, Militiamen would need to refuse *en masse* to enter both the States' "Troops" initially and the General Government's service derivatively, on the grounds that: (i) such an excessive draft from the Militia for the States' "Troops" is unconstitutional in and of itself; and (ii) the Militia may be "call[ed] forth" into "the Service of the United States" for three constitutional purposes only, none of which involves performing any duty in the "Armies" of the United States.[4032]

[4031] J. Story, *Commentaries on the Constitution*, *ante* note 576, Volume 2, § 1897, at 646.

[4032] *See* U.S. Const. art. I, § 8, cls. 15 and 16.

Precisely *how large* the requisition or draft would have to be to pose trouble would entail the somewhat subjective judgment as to exactly when the growth of "the military-industrial complex" finally threatened "to reduce the[People] under absolute Despotism".[4033] That was undoubtedly not the case in the aftermath of the Civil War (except perhaps in some parts of the South during Reconstruction)—it became problematic in principle after World War I, because of the precedent of militaristic centralization the Wilson Administration imposed on this country during that conflict[4034]—it burgeoned in practice in World War II—in continued during what was legally peacetime, under color of "the Cold War" and the large-scale military operations in Korea and Vietnam[4035]—until today, rationalized by the *ersatz* but apparently eternal "war on terrorism", it has fastened an iron grip around this country's throat. So the proper judgment would not be too difficult to make today.

(3) In time of war, distinguishably, the States are constitutionally on their own with respect to putting regular Armed Forces into the field. They do not require "the Consent of Congress" to "keep Troops"—for inasmuch as "[t]he [only] power[ ] * * * prohibited by [the Constitution] to the States" is the power "to keep Troops * * * *in time of Peace*" "without the Consent of Congress", the power "to keep Troops" at any other time must be "reserved to the States respectively", *"without the Consent of Congress" and free from its interference*.[4036] And if a State were "actually invaded, or in such imminent Danger as w[ould] not admit of delay", she would be entitled even to "engage in War", certainly with her Militia and presumably with whatever "Troops" she managed to "keep".[4037] Plainly enough, then, the reserved authority to "keep Troops" other than "in time of Peace" must include the authority to enlist "Troops" in the first instance, *by whatever methods the States had been wont to employ during the* pre*-constitutional period—for nothing in the Constitution restricts them in that regard*—or else how would any "Troops" appear in the first instance in order to enable the States to "engage in War"?

[4033] Declaration of Independence.

[4034] *See, e.g., the synopsis in* ORDER OF BATTLE OF THE UNITED STATES LAND FORCES IN THE WORLD WAR (Washington, D.C.: U.S. Government Printing Office, 1931, Reprint of 1949), Volume 3, Zone of the Interior, Part 1, Organization and Activities of the War Department, at 2-12. A key piece of legislation which facilitated the erection of this structure—and set the tone for the Presidential Caesarism that was to become the dominant theme in every subsequent episode of America's international military involvement—was An Act Authorizing the President to coordinate or consolidate executive bureaus, agencies, and offices, and for other purposes, in the interest of economy and the more efficient concentration of the Government, Act of 20 May 1918, CHAP. 78, 40 Stat. 556.

[4035] The cessation of hostilities in World War II was proclaimed on 31 December 1946. *See* Proclamation No. 2714, 61 Stat. 1048. Since then, Congress has failed, neglected, or refused "[t]o declare War" as the predicate for *any* of the international operations the Armed Forces of the United States have conducted, no matter how extensive and prolonged. *See* U.S. Const. art. I, § 8, cl. 11.

[4036] *Compare* U.S. Const. art. I, § 10, cl. 3 (emphasis supplied) *with* amend. X.

[4037] U.S. Const. art. I, § 8, cl. 3.

Under these circumstances, the federal system of "checks and balances" might work somewhat differently. If a State attempted to assemble so many "Troops" in her own "standing army" that her Militia were in danger of becoming seriously debilitated, the General Government would be entitled to intervene, because: (i) each State must maintain a Militia sufficient in all respects to be "call[ed] forth" to "be employed in the Service of the United States" for the three purposes the Constitution specifies;[4038] and (ii) any State which assembled so many "Troops" at the expense of her Militia as to turn her territory into a "garrison state" would draw into question whether she had thus set aside her "Republican Form of Government".[4039] If the General Government did not intervene, however, then the people of that State, in and through whatever remained of their Militia, would have to take matters into their own hands.

(4) Nay-sayers, of course, will contend that such arrangements for "rais[ing] * * * Armies" are unrealistic and impractical, because they will not provide "enough" personnel for the "Armies" of the United States. The critical question, however, is: "Enough *for what?*" For chauvinistic National aggrandizement through aggressive military imperialism—in conflict with "the genius and character of our institutions"?[4040] To supply "cannon fodder" in subservience to the special interests of foreign nations or *supra*-national organizations—in violation of the Declaration of Independence? Or to "provide for the common defence" *as the Preamble to the Constitution understands that phrase*?

Whatever the answers to such questions, even nay-sayers cannot deny that, since America's misadventure in Vietnam ended, the General Government's Armed Forces have been composed *entirely of volunteers* who have proven to be "enough" for whatever military endeavors have been mounted throughout the world.[4041] Indeed, these forces may have been and may now be "too many" for what the Constitution understands to be the *true* "common defence",[4042] because they have enabled rogue officials in the General Government to maintain military bases and engage American forces in combat operations and other forms of intervention all over the world, usually under a cloak of "peacekeeping" that conceals highly dubious ends.

Were more individuals justifiably required for the regular Armed Forces than could be recruited from volunteers alone, requisitions from the States along the narrow lines outlined above would surely suffice. For example, if revitalized

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[4038] *See* U.S. Const. art. I, § 8, cls. 15 and 16.

[4039] *See* U.S. Const. art. IV, § 4.

[4040] *See* Fleming v. Page, 50 U.S. (9 Howard) 603, 614 (1850).

[4041] On the background to this, *see* Bernard Rostker, *I Want You! The Evolution of the All-Volunteer Force* (Santa Monica, California: The RAND Corporation, 2006).

[4042] *See* U.S. Const. preamble *and* art. I, § 8, cl. 1.

"Militia of the several States" enrolled simply every adult able-bodied male from sixteen to sixty years of age, a draft on even the modest scale of Virginia's in the 1780s, taking only one-fifteenth of the Militia's total complements (some 6.67%), would generate *millions* of soldiers in addition to all of the volunteers already enlisted or who would enlist in the Armed Forces.[4043] Moreover, should a massive "Invasion" of the United States ever occur, the General Government could always "call[ ] forth the Militia" in their entireties to supplement the regular Armed Forces. In preparation for such dire circumstances, a patriotic and prudent Congress should and would "provide for organizing, arming, and disciplining, the Militia" to the degree necessary to render them suitable for dealing with whatever reasonably predictable contingencies they might face. ***Why this has not already been done remains the question that the nay-sayers must answer.*** Public officials' ignorance of the constitutional requirements for "organizing, arming, and disciplining, the Militia", coupled with their sloth, may explain the situation in part. Another—perhaps the larger—part of the explanation, though, can be traced to the arrogance, avarice, ambition, and appetite for abusive powers that drive all too many officials, politicians, and their clients and controllers in factions and special-interest groups. For leaving the Militia *un*prepared to fulfill their constitutional responsibilities provides "facile means * * * to ambitious and unprincipled rulers to subvert the government or trample upon the rights of the people".[4044] That is, these individuals would rather jeopardize true National security than risk the loss of their offices, political power, accumulated wealth, inflated social status, and other perquisites were WE THE PEOPLE, reorganized in revitalized Militia, to reassert their control over this country. These individuals implicitly subscribe to the motto "rule or ruin", blind to the inevitable consequences that their "rule" will lead inexorably to this country's "ruin", and that with its "ruin" must come the end of their "rule", too.

(5) Finally, the construction of Congress's power "[t]o raise * * * Armies" which limits that power to voluntary enlistments, requisitions, and coöperation with the States—but excludes direct drafts from the general population—cannot be excluded as a matter of law. Read through the lens of the Articles of Confederation and all relevant *pre*-constitutional law and practice, the terms of the Constitution fully justify it. So it *could* have been what WE THE PEOPLE had in mind, had they wanted to improve incrementally on the Articles, rather than create a wholly new system that centralized in Congress more power to set up a "standing army" than

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[4043] *E.g.,* according to USA QuickFacts from the U.S. Census Bureau (reported as of 10 July 2009), the population of the United States in 2008 amounted to some 304,059,724. Of these, 49,746,248 were disabled, leaving 254,313,476. Of these, 24.5% were under 18 years of age, leaving 192,006,674. Of these, 12.6% were over 65 years of age, leaving 167,813,733. Of these, 50.7% were female, leaving 69,051,476 eligible males. And, of these, one-fifteenth (or 6.67%) totaled 4,603,565, certainly not an inconsiderable number.

[4044] J. Story, *Commentaries on the Constitution, ante* note 576, Volume 2, § 1897, at 646.

even Parliament had ever claimed. Certainly no application of the Constitution by Congress during the immediate *post-*constitutional period exists to gainsay this construction.[4045] And that Congress never actually "raise[d] * * * Armies" in the way posited here during the early years of the Republic provides no counterargument, either, because the United States had no occasion to assert any sort of power to draft until the Civil War and then World War I.[4046]

Admittedly, all of this rather starkly contradicts the misconstruction of the Constitution the Supreme Court has set forth on these matters (discussed immediately below). But this conflict merely illustrates once again that the doctrine of "judicial supremacy" through "judicial review" which now mesmerizes America's legal profession is a humbug.[4047]

D. The Supreme Court's disastrously erroneous decision in the *Selective Draft Law Cases*. During the first seventy-five or so years of the Constitution's existence, Congress never attempted to draft anyone into the "Armies" of the United States, directly or indirectly. The very first statute providing for a modern form of impressment was enacted only in 1863, at the height of the Civil War.[4048] But it never found its way to the Supreme Court for "judicial review".[4049] Rather, the Court first handed down an opinion on this subject only in 1917, almost one hundred and thirty years after ratification of the Constitution, when Congress purported to enact a National draft during World War I.

1. In pertinent part, the Act of 1917 provided

> [t]hat in view of the existing emergency, which demands the raising of troops in addition to those now available, the President be, and he is hereby, authorized—
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> First. Immediately to raise, organize, officer, and equip all or such number of increments of the Regular Army provided by the national defense Act [of] * * * nineteen hundred and sixteen,[4050] or such parts thereof as he may deem necessary * * * .

[4045] *See, e.g.,* Myers v. United States, 272 U.S. 52, 174-175 (1926) (and cases there cited); Marshall Field & Company v. Clark, 143 U.S. 649, 691 (1892).

[4046] *See, e.g.,* Lake County Commissioners v. Rollins, 130 U.S. 662, 671-672 (1889).

[4047] *See, e.g.,* Edwin Vieira, Jr., *How To Dethrone The Imperial Judiciary* (San Antonio, Texas: Vision Forum Ministries, 2004).

[4048] *An Act for enrolling and calling out the national Forces, and for other Purposes,* Act of 3 March 1863, CHAP. LXXV, 12 Stat. 731, *discussed in historical context post,* at 1823-1829.

[4049] Not unlikely, however, is that in the political atmosphere of the time, still redolent with gun smoke, the Court would have rationalized the draft as a unavoidable "emergency" measure, just as it upheld the Union Congress's emission of legal-tender United States Treasury Notes—and doubtlessly on no less flimsy reasoning. *See* Knox v. Lee, 79 U.S. (12 Wallace) 457 (1871), *discussed in* E. Vieira, Jr., *Pieces of Eight, ante* note 39, at 561-666.

[4050] An Act For making further and more effectual provision for the national defense, and for other purposes, Act of 3 June 1916, CHAP. 134, 39 Stat. 166.

Second. To draft into the military service of the United States, organize, and officer, in accordance with * * * section one hundred and eleven of said national defense Act * * * , any and all members of the National Guard and of the National Guard Reserves, and said members so drafted into the military service of the United States shall serve therein for the period of the existing emergency unless sooner discharged: *Provided,* That when so drafted the organizations or units of the National Guard shall, so far as practicable, retain the State designations of their respective organizations.

Third. To raise by draft * * * , organize and equip an additional force of five hundred thousand enlisted men, or such part or parts thereof as he may at any time deem necessary * * * : *Provided,* That the organization of such force shall be the same as that of the corresponding organizations of the Regular Army * * * .

Fourth. The President is further authorized * * * to raise and begin the training of an additional force of five hundred thousand men organized, officered, and equipped, as provided for the force * * * in the preceding paragraph of this section.

Fifth. To raise by draft, organize, equip, and officer, as provided in the third paragraph of this section, in addition to and for each of the above forces, such recruit training units as he may deem necessary for the maintenance of such forces at the maximum strength.

* * * * *

SEC. 2. That the enlisted men required to raise and maintain the organizations of the Regular Army and to complete and maintain the organizations embodying the members of the National Guard drafted into the service of the United States, at the maximum legal strength * * * , shall be raised by voluntary enlistment, or if and whenever the President decides that they can not effectually be so raised and maintained, then by selective draft; and all other forces hereby authorized, [with one exception] * * * , shall be raised and maintained by selective draft exclusively * * * . Such draft * * * shall be based upon liability to military service of all male citizens, or male persons not alien enemies who have declared their intention to become citizens, between the ages of twenty-one and thirty years * * * as the President may prescribe * * * . Quotas for the several States * * * shall be determined in proportion to the population thereof, and credit shall be given to any State * * * for the number of men who were in the military service of the United States as members of the National Guard * * * or who have * * * entered the military service of the United States from any such State * * * either as members of the Regular Army or the National Guard. All persons drafted into the service of the United States * * * shall * * * be subject to the laws and regulations governing the Regular Army * * * .

SEC. 3. * * * [N]o person liable to military service shall * * * be permitted or allowed to furnish a substitute for such service; nor shall any

> substitute be received, enlisted, or enrolled in the military service of the United States; and no such person shall be permitted to escape such service or to be discharged therefrom prior to the expiration of his term of service by the payment of money or any other valuable thing whatsoever as consideration for his release from military service or liability thereto.[4051]

a. Apparently, Congress was unsure of its constitutional authority to institute a direct draft of Americans into the regular Armed Forces of the United States, because it invoked "the existing *emergency*, which *demands* the raising of troops". This excuse, of course, was balderdash. For the Constitution contains *no* "emergency powers", or "emergency expansions" of the powers it does grant, or "emergency dispensations" from the disabilities it imposes, whether public officials honestly believe that conditions "demand" such action or are generating such a rhetorical smokescreen in order to usurp authority.[4052]

b. Congress's claim of power "[t]o draft into the military service of the United States * * * any or all members of the National Guard and of the National Guard Reserves * * * for the period of the existing emergency unless sooner discharged" exemplified the dangerous ambiguity in the statutes supposedly concerning the Militia which Congress had enacted in 1903, 1914, and 1916. In 1903, Congress had decreed "[t]hat the militia shall consist of every able-bodied male citizen of the respective States * * * , and every able-bodied male of foreign birth who has declared his intention to become a citizen, who is more than eighteen and less than forty-five years of age, and shall be divided into two classes—the organized militia, to be known as the National Guard of the State * * * , and the remainder to be known as the Reserve Militia".[4053] This was the first time since 1792 that Congress had purported to give any part of the Militia a name other than "Militia", or to divide the Militia into separate components, in this case an "organized militia" (the National Guard) and a "Reserve Militia" consisting of everyone else.[4054] Then, in 1914, Congress had declared "[t]hat the land forces of the United States shall consist of the Regular Army, the organized land militia while in the service of the United States, and such volunteer forces as Congress may

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[4051] An Act To authorize the President to increase temporarily the Military Establishment of the United States, Act of 18 March 1917, CHAP. 15, §§ 1, 2, and 3, 40 Stat. 76, 76-77, 77-78.

[4052] *See ante*, at 1420-1423.

[4053] An Act To promote the efficiency of the militia, and for other purposes, Act of 21 January 1903, CHAP. 196, § 1, 32 Stat. 775, 775. *Continued*, An Act To further amend the Act entitled "An Act to promote the efficiency of the militia, and for other purposes," approved January twenty-first, nineteen hundred and three, Act of 27 May 1908, CHAP. 204, § 1, 35 Stat. 399, 399.

[4054] *Contrast An Act more effectually to provide for the National Defence by establishing an Uniform Militia throughout the United States*, Act of 8 May 1792, CHAP. XXXIII, § 1, 1 Stat. 271, 271; Revised Statutes of the United States (1873-1874), TITLE XVI, THE MILITIA, § 1625, 18 Stat. 285, 285.

authorize".[4055] On the one hand, Congress's use of the terminology "the organized land militia *while in the service of the United States*" aped the constitutional language applicable to the Militia;[4056] yet, on the other hand, inclusion of "the organized land militia" within "the land forces of the United States" contradicted the meaning of that language, because being "employed in the Service of the United States" (as the Constitution describes the general situation) is decidedly different from being incorporated as an integral component within "the land forces of the United States" (as the statute described the particular situation). Finally, in 1916, Congress had provided

> [t]hat the Army of the United States shall consist of the Regular Army, the Volunteer Army, * * * the National Guard while in the service of the United States, and such other land forces as are now or may hereafter be authorized by law.
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> * * * The militia of the United States shall consist of all able-bodied male citizens of the United States and all other able-bodied males who have or shall have declared their intention to become citizens of the United States, who shall be more than eighteen years of age and * * * not more than forty-five years of age, and said militia shall be divided into three classes, the National Guard, the Naval Militia, and the Unorganized Militia.
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> * * * The National Guard shall consist of the regularly enlisted militia between the ages of eighteen and forty-five years * * * .
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> * * * * *
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> * * * [T]he organization of the National Guard, including the composition of all units thereof, shall be the same as that which is or may hereafter be prescribed for the Regular Army * * * .
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> * * * No State shall maintain troops in time of peace other than as authorized in accordance with the organization prescribed under this Act: *Provided,* That nothing contained in this Act shall be construed as limiting the rights of the States * * * in the use of the National Guard within their respective borders in time of peace * * * .
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> * * * When Congress shall have authorized the use of the armed land forces of the United States, for any purpose requiring the use of troops in excess of those in the Regular Army, the President may * * * draft into the military service of the United States, to serve therein for the period of the war unless sooner discharged, any or all members of the National Guard and of the National Guard Reserve. All persons so drafted

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[4055] An Act To provide for raising the volunteer forces of the United States in time of actual or threatened war, Act of 25 April 1914, CHAP. 71, § 1, 38 Stat. 347, 347.

[4056] *See* U.S. Const. art. I, § 8, cl. 16 *and* art. II, § 2, cl. 1.

> shall * * * stand discharged from the militia, and shall * * * be subject to such laws and regulations for the government of the Army of the United States as may be applicable to members of the Volunteer Army, and shall be embodied in organizations corresponding as far as practicable to those of the Regular Army * * * .[4057]

So, when drafted, the National Guard was to be completely absorbed into "the Army of the United States", thereby losing whatever character it might have had as a "militia". If, therefore, the National Guard in each State had constituted "Militia" in the true constitutional sense, the draft authorized in 1916 and put into effect in 1917 must have been unconstitutional, because (for one thing) it resulted in the extinction of the only "organized" component of the supposed "Militia" for the direct benefit of the "standing army". Whereas, if the National Guard was never in any sense a constitutional "Militia", but instead consisted of such "Troops" as the States may "keep in Time of Peace" "with[ ] the Consent of Congress"[4058]—which its hermaphroditic designation as part of the oxymoronic "militia of the United States", as well as Congress's allowance for the States to "maintain troops in time of peace *other than*" the National Guard both plainly implied—then Congress's mandates for drafts as to the National Guard in the Acts of 1916 and 1917 were apparently constitutional (all other things being equal), as conditions Congress had affixed to its "Consent" for the States to "keep [such] Troops" in the first place.[4059]

c. Those men enrolled in the National Guard were not the only Americans subject to being drafted into the General Government's "Armies" under color of the Act of 1917, however. Also authorized was a draft of a total of more than one million enlisted men. The "organization of [these] force[s]" was to "be the same as that of the corresponding organizations of the Regular Army"; and "[a]ll persons drafted into the service of the United States" were to "be subject to the laws and regulations governing the Regular Army". So, inasmuch as perforce of the Constitution all men not somehow enlisted in "the Regular Army" or the States' "Troops" must be members of the Militia; and inasmuch as the Acts of 1903, 1914, and 1916 themselves recognized that such men were members of the "Reserve Militia" or the "Unorganized Militia"; then this part of the Act of 1917 purported to draft men directly from "the Militia of the several States" into the Army, without their passing through the stage of being incorporated into the "Troops" of any State. Eventually, the draft was extended to all men from eighteen to forty-five years of

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[4057] An Act For making further and more effectual provision for the national defense, and for other purposes, Act of 3 June 1916, CHAP. 134, §§ 1, 57, 58, 60, 61, and 111, 39 Stat. 166, 166, 197, 198, 211. The Act defined the "Naval Militia" as "such part of the militia as may be prescribed by the President for each State". § 117, 39 Stat. at 212.

[4058] *See* U.S. Const. art. I, § 10, cl. 3.

[4059] *See ante,* at 786-793.

age.[4060] In all, some 24,234,021 Americans registered for the draft, of which 2,810,296 (some 11.6%) were drafted. Draftees supplied some sixty percent of the total enlistment in the Armed Forces of 4,683,826. On the presumption that all of the men drafted were eligible for enrollment in proper Militia, the draft took one hundred seventy three percent of the proportion believed safe by Virginia in 1780s (11.6% *versus* 6.7%), and two hundred ninety percent of the proportion believed safe by James Madison (11.6% *versus* 4.0%).[4061] And therein lay the primary constitutional objections to the statute.

Interestingly enough, although the Act of 1917 followed the pattern established in the Articles of Confederation by requisitioning quotas from the several States, it rather sharply deviated from all *pre-*constitutional tradition, with respect to both regular troops and Militia, by absolutely disallowing the use of substitutes, through either the provision of an individual or the payment of money. This doubtlessly formed the basis for a further constitutional objection.

2. The Supreme Court upheld the constitutionality of the Act of 1917 in the *Selective Draft Law Cases*.[4062] Unfortunately, in the light of its glaring weaknesses, the unanimous opinion of the Justices amounted, not to a sincere elucidation of applicable constitutional principles, but to a studied obfuscation penned for the political purpose of bolstering public support for the war.

a. The Court first cavalierly observed that, "[a]s the mind cannot conceive an army without the men to compose it, * * * the objection that [the Constitution] does not give power to provide for such men would seem to be too frivolous for further notice".[4063] But inasmuch as no one had ever contended that Congress's authority "[t]o raise * * * Armies" "does not give power to provide for * * * men" in *some* way, but only that *a direct and unlimited draft of Americans* is not proper, this snide comment amounted to nothing more than camouflaging the real issue and

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[4060] Joint Resolution Providing for the registration for military service of all male persons citizens of the United States and all male persons residing in the United States who have, since the fifth day of June, nineteen hundred and seventeen, and on or before the day set for registration by proclamation by the President, attained the age of twenty-one years, in accordance with such rules and regulations as the President may prescribe under the terms of the Act approved May eighteenth, nineteen hundred and seventeen, entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United States", S.J. Resolution 124, CHAP. 79, 40 Stat. 557; An Act Amending the Act entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United States," approved May eighteenth, nineteen hundred and seventeen, Act of 31 August 1918, CHAP. 166, 40 Stat. 955.

[4061] *See ante,* at 1761-1762 and 1795-1796. Not valid is the objection that the figures cited in the text are somewhat inflated to the detriment of the draft, because the draft reached men only from 18 to 45 years of age, whereas proper Militia would also have enrolled men from 16 to 18 and from 45 to 60 years of age. For the matter in issue is the drain on the Militia for the purpose of building up an *effective* "standing army" at the expense of Militia which otherwise would be *effective* in opposing *that* "standing army". Obviously, men from 18 to 45 years of age would be more far more likely to become *effective* soldiers (or Militiamen) than younger or especially older men.

[4062] 245 U.S. 366 (1918) (opinion of White, C.J., for the Court).

[4063] *Id.* at 377.

begging the question. It set the illogical and supercilious tone for all that followed, however.

The Court then disposed of the contention that "the right to provide [men for the Army] is not denied by calling for volunteer enlistments, but it does not and cannot include the power to exact enforced military duty by the citizen". "This", the Court objected, "but challenges the existence of all power, for a governmental power which has no sanction to it and which therefore can only be exercised provided the citizen consents to its exertion is in no substantial sense a power."[4064] On the very face of the Constitution, though, the Court's objection was exposed as nonsense. Many powers exist that do not "include the power to exact enforced * * * duty" (that is, compulsory compliance as opposed to voluntary coöperation); yet no one has ever imagined any of them to be "in no substantial sense a power". For example, the power of Congress "[t]o borrow Money on the credit of the United States"[4065] does not embrace a power to compel anyone to loan "Money" to the United States.[4066] The power "[t]o regulate Commerce"[4067] does not license Congress to force anyone to engage in "Commerce" in order that he might be "regulate[d]"—otherwise, the power "[t]o regulate Commerce" would be a power to engage in the most comprehensive "central economic planning" of the economy imaginable, and thus actually to destroy much of "Commerce" in the guise of "regulat[ing]" it.[4068] The power "[t]o promote the Progress of Science and useful Arts"[4069] does not entitle Congress to impress scientists and artists into some sort of Stakhanovite *intelligentsia*: The maxim is *ars artis gratia* not *ars respublicae gratia*. Congress also enjoys the power "[t]o constitute Tribunals inferior to the Supreme Court"[4070]—and one "cannot conceive" of such "Tribunals" "without the men to compose them"—but who would be so bold as to assert that therefore Congress may draft Americans learned in the law to serve as judges? Or is Congress's power "[t]o exercise * * * Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be"[4071] "in no substantial sense a power", because it depends upon "the Consent of the Legislature of the State" before it can be exercised in relation to those particular "Places"? And what, especially, of Congress's power to give its "Consent" for a State to "keep Troops * * * in Time of

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[4064] *Id.* at 377-378.

[4065] U.S. Const. art. I, § 8, cl. 2.

[4066] *See* E. Vieira, Jr., *Pieces of Eight, ante* note 39, Volume 1, at 155-164, 632-635.

[4067] U.S. Const. art. I, § 8, cl. 3.

[4068] *See* National Federation of Independent Business v. Sebelius, No. 11-393, ___ U.S. ___, ___ (2012) (Roberts, C.J., announcing the judgment of the Court) (arguably *dicta*), Slip Opinion at 16-30, *and id.* at ___ (Scalia, J., dissenting), Slip Opinion at 4-16.

[4069] U.S. Const. art, I, § 8, cl. 8.

[4070] U.S. Const. art. I, § 8, cl. 9. *See* U.S. Const. art. III, § 1.

[4071] U.S. Const. art. I, § 8, cl. 17.

Peace"[4072]—is this power empty because the State must also agree to "keep [those] Troops"? "[R]ais[ing] * * * Armies" through a draft which operated solely on the "Troops" a State may "keep * * * in Time of Peace" "with[ ] the [joint] Consent of Congress [and the States]" would be an exercise of that very power. And a power that can be exercised in the very manner the Constitution explicitly provides can hardly be dismissed as "in no substantial sense a power".

b. Not satisfied with proffering the childish sophistry that powers of these kinds are effectively not powers at all, the Court attacked the assumption

> that the authority to raise armies was intended to be limited to the right to call an army into existence counting alone upon the willingness of the citizen to do his duty in time of public need, that is, in time of war. But the premise of this proposition is so devoid of foundation that it leaves not a shadow of ground upon which to base the conclusion. Let us see if this is not at once demonstrable. It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it.[4073]

The first fallacy in this passage is that a draft for the purpose of "rais[ing] * * * Armies" which relied upon the States' power to "keep Troops" "with[ ] the Consent of Congress" would "count[ ] alone upon the willingness of the citizen". Because the States could draft the "Troops" and assign them to duty with the General Government's "Armies", "the willingness of the citizen[s]" to be selected for service would be irrelevant. The second fallacy is that, although the conclusion is true that each and every citizen labors under an "obligation * * * to render military service" which can be compelled, "the premise" that Congress cannot compel such service by a direct draft for the Regular Army is "devoid of foundation". For the question remains, *how* is the "obligation of the citizen to render military serve" *rightfully* to be compelled by "a *just* government" *within the constraints of the Constitution*? Service in the Militia, after all, has always been compulsory for *all* eligible able-bodied adults at all times. And Congress can compel the fulfillment of this obligation as to such "Part" of the Militia as it sees fit, by exercising its powers "[t]o provide for organizing, arming, and disciplining, the Militia" and "[t]o provide for calling forth the Militia" for one or more of the three constitutionally permitted purposes (albeit only for those purposes).[4074] Moreover, "with[ ] the Consent of Congress", the States may draft a safe proportion of individuals out of their Militia and into their "Troops", and then detach those

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[4072] U.S. Const. art. I, § 10, cl. 3.

[4073] 245 U.S. at 378.

[4074] U.S. Const. art. I, § 8, cls. 16 and 15.

"Troops" to the General Government for service in or with its "Armies". Thus, no inexorable legal logic demands that Congress's power "[t]o raise * * * Armies" be construed so as to license it to draft as many individuals as it desires directly out of the general population.

c. The Court than attempted to shore up its baseless conclusion that Congress must have the power to compel "the citizen to render military service" through a direct draft, by referring to "the almost universal legislation to that effect now in force" in England and numerous other foreign countries.[4075] Apparently, the Court's idea of "just government[s]" included Tsarist Russia, as well as monarchist Germany and Austria-Hungary, against which two the United States fought World War I ostensibly because "[t]he world must be made safe for democracy" (those two empires being the supposed enemies of "democracy" at that time).[4076] Then and now, the short answer to the Court's reliance on those foreign laws was and remains that "[t]he government of the United States was born of the Constitution";[4077] and "[i]ts power and authority have *no other* source".[4078] "In this respect we differ radically from nations where all * * * power, without restriction or limitation, is vested in a * * * body subject to * * * the discretion of its members."[4079] For this reason, constitutional analysis has neither need nor right to refer to "all the powers which usually belong to the sovereignty of a nation";[4080] to any "implied attribute of sovereignty possessed by all nations";[4081] to "the law of nations" in general,[4082] the "laws or usages of other nations" in particular,[4083] or "the law of any other country whatever";[4084] or to "decisions * * * by the Courts of any other country".[4085] For "no laws or usages of other nations * * * can enlarge the powers of the government or take from the citizens the rights they have reserved".[4086]

d. Turning at last to the only relevant body of law, the Articles of Confederation and the Constitution, the Court then observed that

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[4075] 245 U.S. at 378-379 & note 1 on each page.

[4076] Woodrow Wilson, War Message of 2 April 1917, Senate Document No. 5 (Serial No. 7264), 65th Congress, 1st Session.

[4077] Downes v. Bidwell, 182 U.S. 244, 288 (1901) (White, J., concurring).

[4078] Reid v. Covert, 354 U.S. 1, 5-6 (1957) (opinion of Black, J., announcing the judgment of the Court) (emphasis supplied).

[4079] United States v. Butler, 297 U.S. 1, 63 (1936).

[4080] Scott v. Sandford, 60 U.S. (19 Howard) 393, 401 (1857) (opinion of Taney, C.J.).

[4081] Afroyim v. Rusk, 387 U.S. 253, 257 (1967).

[4082] Fleming v. Page, 50 U.S. (9 Howard) 603, 617 (1850).

[4083] Scott v. Sandford, 60 U.S. (19 Howard) 393, 451 (1857) (opinion of Taney, C.J.).

[4084] Chisholm v. Georgia, 2 U.S. (2 Dallas) 419, 466 (1793) (opinion of Cushing, J.).

[4085] Osborn v. Bank of the United States, 22 U.S. (9 Wheaton) 738, 851 (1824).

[4086] Scott v. Sandford, 60 U.S. (19 Howard) 393, 451 (1857) (opinion of Taney, C.J.).

> [i]n the Colonies before the separation from England * * * the right to enforce military service was unquestioned. * * * And this exact situation existed also after the separation. Under the Articles of Confederation it is true Congress had no such power, as its authority was absolutely limited to making calls upon the States for the military forces needed to create and maintain the army, each State being bound for its quota as called. * * * While it is true that the States were sometimes slow in exerting the power in order to fill their quotas * * * that fact serves to demonstrate * * * the existence of the authority. * * *
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> * * * In supplying the power [to Congress to "raise * * * Armies"] it was manifestly intended to give it all and leave none to the States, since besides the delegation to Congress of the authority to raise armies the Constitution prohibited the States, without the consent of Congress, from keeping troops in time of peace or engaging in war.[4087]

The Court's conclusion that "it was manifestly intended to give [Congress] *all* [power over the Nation's Armed Forces] *and leave none to the States*" both begged the question and misstated what should have been obvious on the face of the Constitution. For, plainly, *not* "all" power was delegated to Congress and withheld from the States.

First, Congress received the power "[t]o raise * * * Armies" *simpliciter*, not a power "[]to raise * * * Armies *by all possible means to the exclusion of any power in the States*". Relying upon the common usage in the *pre*-constitutional era—which differentiated between "raise", on the one hand, and "draught" ("draft"), "impress", and "levy", on the other[4088]—it is perfectly plausible to read the verb "raise" as referring to voluntary enlistments by Congress itself, as well as to requisitions from the States. Yet, if so, the Constitution *did* delegate to Congress *more* power than did the Articles of Confederation, because the Articles did not allow the Continental Congress itself to enlist "land forces" directly from the general population, but empowered it only "to make requisitions from each state for its quota".[4089]

Second, the Constitution did *not* "leave *no*[power over the Armed Forces] to the States". To the contrary: The States *may* "keep Troops, and Ships of War in time of [War]" even "without the Consent of Congress", and *may* "keep Troops, and Ships of War in time of Peace" with such "Consent".[4090] That "Consent", moreover, may extend farther than did the parallel provision of the Articles, which allowed the Continental Congress to permit a State to "ke[ep] up" only such "body

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[4087] 245 U.S. at 379-381.

[4088] *See ante, e.g.*, at 1739, 1742-1743, 1744, 1748, 1751, 1756, 1768, and 1769.

[4089] Arts. of Confed'n art. IX, ¶ 5. Distinguishably, the same provision of the Articles did authorize the Continental Congress "to build and equip a navy" itself.

[4090] U.S. Const. art. I, § 10, cl. 3.

of forces" as "shall be deemed requisite to garrison the forts necessary for the defence of such state".[4091] In comparison to the Articles, in this particular the Constitution *expanded* the powers of *both* Congress *and* the States. Therefore, in this way the Constitution *did* supply to some degree what the Court called "the want of power in [the Continental] Congress to raise an army and the dependence upon the States for their quotas",[4092] but without necessarily delegating to Congress any further—and utterly novel—power to draft individuals directly from the general population into the regular Armed Forces of the Union.

e. The Court then adverted to the "argu[ment] that as the state authority over the militia * * * embrace[s] every citizen, the right of Congress to raise an army should not be considered as granting authority to compel the citizen's service in the army", yet "does not exclude the right of Congress to organize an army by voluntary enlistments". "[I]f th[is] proposition be true", the Court countered, "the right of the citizen to give consent would be controlled by the same prohibition which would deprive Congress of the right to compel unless it can be said that although Congress had not the right to call because of state authority, the citizen had a right to obey the call and set aside state authority if he pleased to do so."[4093] That is, supposedly no citizen eligible for the Militia could voluntarily enlist in the "Armies" of the General Government without thereby violating his duty to serve in the Militia.

On its face, the Court's position was nonsensical, both legally and historically. An individual eligible for service in "[a] well regulated Militia" may be entitled to an exemption on various grounds—most of which relate to some choice which the individual himself makes, such as serving in public office, following a particular trade or profession, or adhering to a religion that preaches pacifism.[4094] These choices do not "set aside state authority if [the individual] please[s] to do so"; instead, they implement the "state authority" which provides for exemptions. After ratification of the Constitution, one of the grounds for exemption became an individual's voluntary service in public office or employment *for the United States*—if Congress in the exercise of its power "[t]o provide for organizing * * * the Militia" so determined.[4095] So, with Congress's approbation, an individual who voluntarily enlists in the General Government's "Armies" may be entitled to an exemption from service in the Militia, no less than if (say) he successfully seeks election to Congress. "With Congress's approbation" is the key qualification, though. For example, in the first Militia Act under the Constitution, Congress provided that

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[4091] Arts. of Confed'n art. VI, ¶ 4.

[4092] 245 U.S. at 381.

[4093] *Id.*

[4094] *See ante*, Chapters 11, 22, and 36.

[4095] *See* U.S. Const. art. I, § 8, cl. 16 *and* art. VI, cl. 2.

> [t]he Vice President of the United States; the officers judicial and executive of the government of the United States; the members of both Houses of Congress, and their respective officers; all custom-house officers with their clerks; all post-officers, and stage drivers, who are employed in the care and conveyance of the mail of the post-office of the United States; all ferrymen employed at any ferry on the post road; all inspectors of exports; all pilots; all mariners actually employed in the sea service of any citizen or merchant within the United States; and all persons who now are or may hereafter be exempted by the laws of the respective states, shall be, and are hereby exempted from militia duty[.][4096]

Being the "Commander in Chief * * * of the Militia", the President obviously could not have been exempted in any case.[4097] But even if "the officers * * * executive of the government of the United States" included the other officers of the Army and Navy, this provision did not exempt the enlisted men, all of whom served voluntarily. Yet Congress must have presumed that the States *would* have recognized that those men were entitled to exemptions from all Militia duty as a consequence of their voluntary enlistments in the Army—or no Army the rank and file of which were independent of the Militia could have been "raise[d]" at all. Thus, Congress's very first action in this area refuted the Court's contention.

f. Worse yet, even as it condemned "[t]he fallacy of * * * confounding the constitutional provisions concerning the militia with that conferring upon Congress the power to raise armies", which "treats them as one, while they are different", the Court did no less:

> The right on the one hand of Congress under the Confederation to call on the States for forces and the duty on the other of the States to furnish when called, embraced the complete power of government over the subject. When the two were combined and were delegated to Congress, all government power on the subject was conferred, a result manifested not only by the grant made, but by the limitation expressly put upon the States on the subject. The army sphere therefore embraces such complete authority.[4098]

Self-evidently, however, the power of the Continental Congress "to call on the States for forces and the duty * * * of the States to furnish when called, [*did not*] embrace[ ] the complete power of government over the subject"—for there remained the plenary power of each State over her own Militia, which the Articles

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[4096] *An Act more effectually to provide for the National Defence by establishing an Uniform Militia throughout the United States*, Act of 8 May 1792, CHAP. XXXIII, § 2, 1 Stat. 271, 272.

[4097] *See* U.S. Const. art. II, § 2, cl. 1.

[4098] 245 U.S. at 382.

of Confederation themselves recognized as separate and independent from any power over "vessels of war", "a navy", "any body of forces", or "land forces".[4099] The powers of Congress and the States over the regular Armed Forces were rearranged in the Constitution;[4100] but, as well, "the Militia of the several States" were permanently incorporated as components of the Constitution's federal system, with some powers over the Militia delegated to Congress and the President, and the remainder reserved to the States.[4101] Therefore the Constitution itself howled down in ridicule the Court's notion that "the army sphere * * * embraces * * * complete authority".

Yet, almost incredibly, on the basis of that notion the Court stumbled into an even more serious error:

> [T]he duty of exerting the power [in "the army sphere"] thus conferred in all its plenitude was not made at once obligatory but was wisely left to the discretion of Congress as to the arising of the exigencies which would call it in part or in whole into play. There was left therefore under the sway of the States undelegated the control of the militia *to the extent that such control was not taken away by the exercise by Congress of its power to raise armies*. This did not diminish the military power or curb the full potentiality of the right to exert it but left an area of authority requiring to be provided for (the militia area) *unless and until by the exertion of the military power of Congress that area had been circumscribed* ***or totally disappeared***. This, therefore, is what was dealt with by the militia provision. It diminished the occasion for the exertion by Congress of its military power beyond the strict necessities for its exercise by giving the power to Congress to direct the organization and training of the militia (*evidently to prepare such militia in the event of the exercise of the army power*) * * * . It further conduced to the same result by delegating to Congress the right to call on occasions which were specified for the militia force, thus again obviating the necessity for exercising the army power to the extent of being ready for every conceivable contingency. * * * But because * * * the power was given to call for specified purposes without exerting the army power, it cannot follow that the latter power when exerted was not complete to the extent of its exertion *and dominant*.[4102]

Thus, even though the Court admitted that the Militia Powers and the Army Power are "different" and that to "confound[ ] th[os]e constitutional provisions" amounts to a "fallacy", the Court treated the two sets of powers as effectively one, by

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[4099] *Compare and contrast* Arts. of Confed'n art. VI, ¶ 4 *with* art. IX, ¶ 5.

[4100] U.S. Const. art. I, § 8, cl. 12 *and* § 10, cl. 3.

[4101] U.S. Const. art. I, § 8, cls. 15 and 16; art. II, § 2, cl. 1; *and* amends. II and X.

[4102] 245 U.S. at 382-383 (emphasis supplied).

contending that "the militia area" is supplementary to, subordinate to, and subject to being overridden by and submerged within the "army sphere" at any time Congress flaunts its "discretion" to do so. That is (according to the Court), exercises of Congress's power over the "army sphere" can cancel or at least render nugatory "the militia area", to the point at which "the militia area * * * ha[s] * * * totally disappeared"—in violation of the fundamental rule of constitutional construction that all "fundamental [constitutional] principles are of equal dignity, and n[o one] m[ay] be so enforced as to nullify or substantially impair [any] other".[4103] Yet, just a few lines further on in its opinion, the Court condemned itself with the observation that, "[b]ecause * * * the power granted to Congress to raise armies in its potentiality was susceptible of narrowing the area over which the militia clause operated, affords no ground for confounding the two areas which were distinct and separate to the end of confusing both the powers and thus weakening or destroying both"![4104] So on this point the Court's opinion was not only glaringly *anti*-constitutional, but also by its own implicit admission shamelessly illogical.

g. Not satisfied with expatiating on that egregiously erroneous constitutional theory, the Court proceeded to lay out a thoroughly duplicitous misrepresentation of American history.

First, the Court claimed, "[e]xcept for one act formulating a plan by which the entire body of citizens (the militia) subject to military duty was to be organized in every State * * * *which was never carried into effect*, Congress confined itself to providing for the organization of a specified number [of Militiamen] distributed among the States according to their quota to be trained as directed by Congress and to be called by the President as need might require".[4105] In fact, the so-called "one act formulating a plan"—the Militia Act of 1792[4106]—*was* "carried into effect". For example, in An ACT to organize the Militia of this State, passed in 1794, Rhode Island's General Assembly first recited the entire text of the Militia Act of 1792, and then both carried through the latter Act's mandates and dealt with that State's own particular requirements in detail.{EN-2172} Similarly, in Virginia in 1792.{EN-2173}

Moreover, *not one* of the seven Acts of Congress the Court cited provided for any specific "organization" or "train[ing]" of Militiamen. Six of them authorized the President "to require of the executives of the several states, to take effectual measures, as soon as may be, to organize, arm and equip, according to law, and hold in readiness to march at a moment's warning" certain numbers of "effective

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[4103] Dick v. United States, 208 U.S. 340, 353 (1908).

[4104] 245 U.S. at 384.

[4105] *Id.* at 384 & note 1 (citing various statutes) (emphasis supplied).

[4106] *An Act more effectually to provide for the National Defence by establishing an Uniform Militia throughout the United States*, Act of 8 May 1792, CHAP. XXXIII, 1 Stat. 271.

militia".[4107] But Congress did not specify what those "effectual measures" might have been—because, of course, it did not have to, the matter having already been spelled out "according to law" in the Militia Act of 1792 (and, presumably, the further statutes the States enacted for implementation and supplementation of the latter Act). The seventh Act of Congress simply authorized the President, "whenever the United States shall be invaded, or be in imminent danger of an invasion * * * to call forth such number of the militia of the state, or states, most convenient to the place of danger"; or, "in case of an insurrection in any state, against the government thereof, * * * to call forth such number of the militia of any state or states * * * sufficient to suppress such insurrection"; or, "whenever the laws of the United States shall be opposed * * * by combinations too powerful to be suppressed by the ordinary course of judicial proceedings * * * , to call forth the militia of such * * * state or states, as may be necessary to suppress such combinations".[4108] It said nothing whatsoever about organizing or training the Militiamen to be detached.

As the title of the statute last cited and the text of all of them made clear, every one of these Acts constituted an exercise, not of Congress's power "[t]o provide for organizing, arming, and disciplining, the Militia", but instead of its power "[t]o provide for calling forth the Militia", which (as the Constitution explicitly provides) allows Congress to "call[ ] forth", not necessarily all, but "such Part of the[Militia]" alone as Congress determines needs to "be employed in the Service of the United States".[4109] The Acts all presupposed that the Militia had theretofore been organized, armed, equipped, trained, and otherwise disciplined—or else six of them would not have included in their titles references to "a *detachment from* the Militia". A part cannot be "*detach*[*ed*] *from*" the whole unless the whole exists. Moreover, five of the statutes explicitly provided "[t]hat the detachments" or "detachment" "of militia * * * shall be officered out of the present militia

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[4107] *An Act directing a Detachment from the Militia of the United States"*, Act of 9 May 1794, CHAP. XXV, § 1, 1 Stat. 367, 367. *Identical or similar language in An Act authorizing a detachment from the Militia of the United States"*, Act of 24 June 1797, CHAP. IV, § 1, 1 Stat. 522, 522; *An Act directing a detachment from the Militia of the United States, and for erecting certain Arsenals,* Act of 3 March 1803, CHAP. XXXII, § 1, 2 Stat. 241, 241; *An Act authorizing a detachment from the Militia of the United States,* Act of 18 April 1806, CHAP. XXXII, § 1, 2 Stat. 383, 383; *An Act authorizing a detachment from the Militia of the United States,* Act of 30 March 1808, CHAP. XXXIX, § 1, 2 Stat. 478, 478-479; *An Act to authorize a detachment from the Militia of the United States,* Act of 10 April 1812, CHAP. LV, § 1, 2 Stat. 705, 705-706.

[4108] *An Act to provide for calling forth the Militia to execute the laws of the Union, suppress insurrections, and repel invasions; and to repeal the Act now in force for those purposes,* Act of 28 February 1795, CHAP. XXXVI, §§ 1 and 2, 1 Stat. 424, 424. *See also An Act to provide for calling forth the Militia to execute the laws of the Union, suppress insurrections and repel invasions,* Act of 2 May 1792, CHAP. XXVIII, §§ 1 and 2, 1 Stat. 264, 264.

[4109] *See* U.S. Const. art. I, § 8, cls. 15 and 16. One statute provided that "the militia employed in the service of the United States, shall be subject to the same rules and articles of war, as the troops of the United States". Act of 28 February 1795, § 4, 1 Stat. at 424. This, however, was not a matter of "organizing" the Militia, but rather an exercise of Congress's separate power "[t]o provide * * * for governing such Part of the[Militia] as may be employed in the Service of the United States". U.S. Const. art. I, § 8, cl. 16.

officers".[4110] How there could have been "*present* militia officers" in 1794 through 1812 if the Militia Act of 1792 had not been "carried into effect" during at least those years passes understanding.

Second, the Court then rehearsed how,

> [w]hen the War of 1812 came * * * [the Militia and the regular Army, consisting of volunteers,] composed the arm[ed forces] to be relied upon by Congress to carry on the war. Either because [these forces] proved to be weak in numbers or because of insubordination developed among the forces called and manifested by their refusal to cross the border [with Canada], the Government determined that the exercise of the power to organize an army by compulsory draft was necessary * * * . A bill was introduced [in Congress] giving effect to the plan. Opposition developed * * * . Peace came before the bill was enacted.
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> * * * In th[e Mexican War], however, no draft was suggested * * * .
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> So the course of legislation from that date to 1861 affords no ground for any other than the same conception of legislative power which we have already stated.[4111]

Therefore, the Court expected its readers to believe, although from 1788 to 1861 Congress actually enacted *no legislation whatsoever* which purported to impose a direct draft on Americans, nonetheless Congress surely possessed, and everyone somehow understood it to possess, such a power to draft all the while! One would have thought that the *total absence* of legislation predicated upon some supposed power of Congress could not possibly constitute evidence *on behalf of* that power,[4112] especially inasmuch as no legislature in America may arrogate to itself unconstitutional powers even through the *actual* enactment of purported statutes, *no matter how many times repeated*.[4113]

In the Wonderland of "judicial review", though, black is sometimes said (and perhaps even believed) to be white, and white black—in this case, in order to

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[4110] *An Act directing a Detachment from the Militia of the United States*, Act of 9 May 1794, CHAP. XXV, § 2, 1 Stat. 367, 367; *An Act directing a detachment from the Militia of the United States, and for erecting certain Arsenals,* Act of 3 March 1803, CHAP. XXXII, § 2, 2 Stat. 241, 241; *An Act authorizing a detachment from the Militia of the United States,* Act of 18 April 1806, CHAP. XXXII, § 3, 2 Stat. 383, 384; *An Act authorizing a detachment from the Militia of the United States,* Act of 30 March 1808, CHAP. XXXIX, § 3, 2 Stat. 478, 479; *An Act to authorize a detachment from the Militia of the United States,* Act of 10 April 1812, CHAP. LV, § 2, 2 Stat. 705, 706.

[4111] 245 U.S. at 384-385 (footnote omitted).

[4112] *See, e.g.,* Federal Power Commission v. Panhandle Eastern Pipe Line Company, 337 U.S. 498, 513 & note 20 (1949); Printz v. United States, 521 U.S. 898, 905, 907-910 (1997).

[4113] *See, e.g.,* Miranda v. Arizona, 384 U.S. 436, 491 (1966); Smyth v. Ames, 169 U.S. 466, 527 (1898); Fairbank v. United States, 181 U.S. 283, 311 (1901); Williams v. Illinois, 399 U.S. 235, 239 (1970).

convince careless readers of the Court's opinion that: (i) "[T]he Militia of the several States" were always establishments with at best *ad hoc* existences. (ii) The "Armies" of the United States were always considered superior to the Militia, not just militarily but also constitutionally. And (iii) impressments to fill the ranks of those "Armies", necessarily from the ranks of the Militia, were always recognized as constitutionally legitimate alternatives to "call[ing] forth" the Militia or enlisting volunteers, and were never actually employed only because circumstances never actually demanded it. Yet, for all of those propositions, no historical or legal evidence exists.

h. The Court then adverted to the draft which the Union Congress imposed during the Civil War[4114]—but in so sketchy a fashion that a more detailed recitation of the relevant history is warranted here.

From the perspective of the Union, the Southern rebellion was never a matter of "seceding States"; rather, from its inception and in its entirety "the Confederate States of America" was a completely illegal insurrectionary enterprise.[4115] The Constitution, of course, explicitly took into account the possibility of just such a situation, by empowering Congress "[t]o provide for calling forth the Militia to execute the Laws of the Union" and "suppress Insurrections".[4116] In reliance on that authority, in 1792 and 1795 Congress enacted legislation aimed at such an eventuality:

> [W]henever the laws of the United States shall be opposed, or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the [United States] marshals * * * , it shall be lawful for the President * * * to call forth the militia of such state, or of any other state or states, as may be necessary to suppress such combinations, and to cause the laws to be duly executed; and the use of the militia so to be called forth may be continued, if necessary, until the expiration of thirty days after the commencement of the next session of Congress.[4117]

Shortly after the Southern "secession" began, Union President Abraham Lincoln issued a Proclamation, declaring that,

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[4114] 245 U.S. at 385-387.

[4115] *See* Texas v. White, 74 U.S. (7 Wallace) 700, 718-726 (1866); Thorington v. Smith, 75 U.S. (8 Wallace) 1, 7-11 (1869); Hanauer v. Doane, 79 U.S. (12 Wallace) 342, 347 (1871); Sprott v. United States, 87 U.S. (20 Wallace) 459, 464-465 (1875).

[4116] U.S. Const. art. I, § 8, cl. 15.

[4117] *An Act to provide for calling forth the Militia to execute the laws of the Union, suppress insurrections, and repel invasions; and to repeal the Act now in force for those purposes,* Act of 28 February 1795, CHAP. XXXVI, § 2, 1 Stat. 424, 424, *superseding An Act to provide for calling forth the Militia to execute the laws of the Union, suppress insurrections and repel invasions*, Act of 2 May 1792, CHAP. XXVIII, § 2, 1 Stat. 264, 264.

> WHEREAS the laws of the United States have been for some time past, and now are opposed, and the execution thereof obstructed, in [certain Southern] States * * * by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by law:
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> Now, therefore, I * * * hereby do call forth[ ] the militia of the several States of the Union, to the aggregate number of seventy-five thousand, in order to suppress said combinations and to cause the laws to be duly executed.[4118]

This, of course, was a "draft", in the fullest sense of that term, because all of "the militia of the several States" were organizations founded upon compulsory service, and subject to being "call[ed] forth" at any time for the purposes stated in the Proclamation. This was true even in a State such as Massachusetts, which had earlier begun the process of political decomposition of her Militia by making day-to-day participation voluntary. In 1840, Massachusetts had provided that "[e]very able-bodied white male citizen, resident within this Commonwealth, who is or shall be of the age of eighteen years, and under the age of forty-five years, excepting [certain persons] * * * , shall be enrolled in the militia"—but that, "[t]he militia, thus enrolled, shall be subject to no active duty whatever, *except in case of war, invasion, or to prevent invasion*", and that "[t]he active militia * * * shall consist and be composed of volunteers".{EN-2174} So, even as to this largely "voluntary militia", compulsory service was mandated "in case of war". And rather than being ineffective overall, Lincoln's call brought somewhat more than 75,000 Militiamen into the field.[4119] Moreover, there could have been no question that *this* draft was perfectly constitutional in every particular.

Shortly thereafter, Congress enacted a statute which provided

> [t]hat whenever, by reasons of unlawful obstructions, combinations, or assemblages of persons, or rebellion against the authority of the Government of the United States, it shall become impractical, in the judgment of the President * * * , to enforce, by the ordinary course of judicial proceedings, the laws of the United States within any State or Territory * * * , it shall be lawful for the President * * * to call forth the militia of any or all of the States of the Union * * * to enforce the faithful execution of the laws of the United States, or to suppress such rebellion in whatever State or Territory thereof the laws of the United States may be forcibly opposed, or the execution thereof forcibly obstructed.
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> * * * * *

[4118] Proclamation of 15 April 1861, 12 Stat. 1258, 1258. *See The Collected Works of Abraham Lincoln, ante* note 30, Volume IV, at 331-332.

[4119] *See* Report of the Secretary of War (1 July 1861), Senate Executive Document No. 1, 37th Congress, 1st Session, at 21. *See also* Robert S. Chamberlain, "The Northern States Militia", 4 *Civil War History* 107 (1958).

> * * * [T]he militia so called into the service of the United States shall be subject to the same rules and articles of war as the troops of the United States, and be continued in the service of the United States until discharged by proclamation of the President: *Provided,* That such continuance in service shall not extend beyond sixty days after the commencement of the next regular session of Congress, unless Congress shall expressly provide by law therefor * * * .
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> * * * [E]very officer, non-commissioned officer, or private of the militia, who shall fail to obey the orders of the President * * * shall forfeit a sum not exceeding one year's pay, and not less than one month's pay, to be determined and adjudged by a court-martial; and such officer shall be liable to be cashiered * * * ; and such non-commissioned officer and private shall be liable to imprisonment * * * on failure of payment of the fines adjudged against him, for one calendar month for every twenty-five dollars of such fine.[4120]

This, too, was a true "draft", enforced by serious punishments for any Militiaman who disobeyed the President in his capacity as "Commander in Chief * * * of the Militia of the several States, when called into the actual Service of the United States".[4121] Here as well, there could have been no question that *this* draft was perfectly constitutional.

About a year later, Congress mandated

> [t]hat whenever the President * * * shall call forth the militia of the States, to be employed in the service of the United States, he may specify in his call the period for which such service will be required, not exceeding nine months; and the militia so called shall be mustered in and continue to serve for and during the term so specified, unless sooner discharged by command of the President. *If by reason of defects in existing laws, or in the execution of them, in the several States, or any of them, it shall be found necessary to provide for enrolling the militia and otherwise putting this act into execution, the President is authorized in such cases to make all necessary rules and regulations*; and the enrollment of the militia shall in all cases include all able-bodied male citizens between the ages of eighteen and forty-five, and shall be apportioned among the States, according to representative population.[4122]

[4120] *An Act to provide for the Suppression of Rebellion against and Resistance to the Laws of the United States, and to amend the Act entitled "An Act to provide for calling forth the Militia to execute the Laws of the Union," &c., passed February twenty-eight, seventeen hundred and ninety-five*, Act of 29 July 1861, CHAP. XXV, §§ 1, 3, and 4, 12 Stat. 281, 281-282.

[4121] U.S. Const. art. II, § 2, cl. 1.

[4122] *An Act to amend the act calling forth the Militia to execute the Laws of the Union, suppress Insurrections, and repel Invasions, approved February twenty-eight, seventeen hundred and ninety-five, and the Acts amendatory thereof, and for other Purposes,* Act of 17 July 1862, CHAP. CCI, § 1, 12 Stat. 597, 597 (emphasis supplied).

The President could certainly have fulfilled Congress's delegation of authority "to make all necessary rules and regulations" (presumably in conformity with Congress's own Militia Act of 1792) to correct "defects in existing [Militia] laws, or in the execution of them, in the several States". For those "laws" were easily accessible. And the President had the means to ferret out any serious "defects * * * in the execution of them", in that Congress had already provided for "an adjutant general appointed in each state" whose duty it was: (i) "to receive from the several officers of the militia * * * throughout the state, returns of the militia * * * , reporting the actual situation of their arms, accoutrements, and ammunition, their delinquencies, and every other thing which relates to the general advancement of good order and discipline"; and (ii) to "make a return of all the militia of the state to the commander-in-chief of the said state, and a duplicate of the same to the President of the United States".[4123] Thus, this statute provided for a draft more severe than what had preceded it, not only because it extended the period of compulsory service, but especially because the President was to enforce it directly against the States, as well as against individual Militiamen, through his exercise of the statutory mandate "to make all necessary rules and regulations". Although the President's authority in that particular could have extended only to the baneful effects of various States' laws on the employment of the Militia "in the actual Service of the United States", as the "Commander in Chief * * * of the Militia" he could have subjected to courts-martial any of the Governors or other officers who commanded the States' Militia for their failures, neglects, or refusals to correct such "defects" or to obey such "rules and regulations". Yet *this* draft, too, was constitutional.

Congress also authorized the President "to accept the services of volunteers" for the regular Army.[4124] So, even without a draft for the Union's "Armies", a huge force was quickly—*and constitutionally*—assembled. In the vernacular, Congress had thus provided, in principle at least, a satisfactory means "to raise armies", by both impressment through the Militia and voluntary enlistments. Inasmuch as there were some 3,167,936 men enrolled in "the Militia of the several States" in 1861,[4125] reliance on even the Militia alone could likely have proven satisfactory in practice had not Congress, the States, and the American people themselves suffered the Militia to fall into such disrepair and even disrepute during the several decades

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[4123] *An Act effectually to provide for the National Defence by establishing an Uniform Militia throughout the United States*, Act of 8 May 1792, CHAP. XXXIII, §§ 6 and 10, 1 Stat. 271, 273, 274.

[4124] *See, e.g., An Act to authorize the Employment of Volunteers to aid in enforcing the Laws and protecting Public Property*, Act of 22 July 1861, CHAP. IX, 12 Stat. 268; *An Act to amend the act calling forth the Militia to execute the Laws of the Union, suppress Insurrections, and repel Invasions, approved February twenty-eight, seventeen hundred and ninety-five, and the Acts amendatory thereof, and for other Purposes,* Act of 17 July 1862, CHAP. CCI, §§ 3 and 4, 12 Stat. 597, 598. "Volunteers" were temporary additions to the "Armies", who expected to be demobilized immediately the conditions that warranted their enlistments ceased.

[4125] *See* "Returns of Militia", House Executive Document No. 53 (Serial No. 1100), 36th Congress, 2d Session, at 5.

preceding the Civil War that they could not be restored to war-time competence as quickly as the Union's political and military leadership professed to believe necessary.[4126]

Whatever the motivation of its Members may have been, just a year later Congress essentially set all of its previous work aside, by enacting a general draft. The statute directed

> [t]hat all able-bodied male citizens of the United States, and persons of foreign birth who shall have declared their intention to become citizens * * * , between the ages of twenty and forty-five years, except as * * * excepted, are hereby declared to constitute the national forces, and shall be liable to perform military duty in the service of the United States when called out by the President of the United States.
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> * * * * *
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> * * * [T]he President * * * is hereby authorized and empowered, during the present rebellion, to call forth the national forces, by draft[.][4127]

Notwithstanding that this passage echoed the constitutional language pertaining to the Militia—"in the service of the United States when called out" "during the present rebellion", in similitude to "call[ed] forth" "in the Service of the United States" to "suppress Insurrections"—its substance differed radically from its appearance. The Constitution, after all, nowhere employs, let alone defines, the ambiguous term "the national forces". So, here, a Congress apparently well aware of the constitutional infirmities of its position chose to inject into the law a deceptive neologism doubtlessly intended to gull the unwary as to how the draft struck at the heart of the Militia—just as later on other Congresses imported the terms "National Guard", "Reserve Militia", and "Unorganized Militia" into other statutes in order to camouflage their reduction to impotence, if not nonexistence, of the true constitutional Militia.[4128] For the draft was intended, not "to call forth the national forces" in the form of "the Militia of the several States" in order for them to "suppress Insurrections" "in the service of the United States", but instead to flesh out the General Government's "Armies", because "all persons drafted * * * shall be assigned by the President to military duty in such corps, regiments, or other branches of the service as the exigencies of the service may require", rather than specifically to duty in units of the Militia.[4129]

[4126] *See generally* J. Mahon, *The History of the Militia and the National Guard, ante* note 1695, Chapters 4 through 6.

[4127] *An Act for enrolling and calling out the national Forces, and for other Purposes,* Act of 3 March 1863, CHAP. LXXV, §§ 1 and 33, 12 Stat. 731, 731, 736.

[4128] *See ante*, at 786-793 and 1809-1811.

[4129] *Contrast* U.S. Const. art. I, § 8, cls. 15 and 16 *with* Act of 3 March 1863, § 34, 12 Stat. at 736.

In keeping with the principles of military service followed in *pre*-constitutional times in both the Colonies' and then the independent States' Militia and regular "Troops", the statute did grant certain exemptions, however—and one exclusion which had no *pre*-constitutional antecedent: "[N]o person who has been convicted of any felony shall be enrolled or permitted to serve in said forces."[4130] More importantly, it allowed: (i) "[t]hat any person drafted * * * may * * * furnish an acceptable substitute to take his place in the draft; or he may pay * * * [a] sum, not exceeding three hundred dollars, * * * for the procuration of such substitute * * * ; and thereupon such person so furnishing the substitute, or paying the money, shall be discharged from further liability under the draft"; and (ii) "[t]hat any person enrolled and drafted * * * who shall furnish an acceptable substitute, shall thereupon receive * * * a certificate of discharge from such draft, which shall exempt him from military duty during the time for which he was drafted".[4131] So, distinguishably from the draft of 1917, actual service in the "Armies"pursuant to the draft of 1863 was, to a large extent, voluntary.

Revealingly, even as it created this scheme for building up a huge "standing army" at the expense of the Militia, the Union Congress professed what was undeniable: that "the duty of the government [is] to suppress insurrection and rebellion, to guarantee to each State a republican form of government, and to preserve the public tranquillity"; that "for these high purposes, a military force is indispensable, to raise and support which all persons ought willingly to contribute"; and that "no service can be more praiseworthy and honorable than that which is rendered for the maintenance of the Constitution and the Union, and the consequent preservation of free government".[4132] Apparently its Members had forgotten, though, that the *only* "military force[s]" *the Constitution* considers "indispensable" "for the preservation of *free* government" are those "well regulated Militia" which the Second Amendment declares to be "necessary to the security of a free State"—and that, without "the security of a free State" as its goal, "suppression of insurrection and rebellion" which involved nothing more than Southern "secession" was largely pointless, if not positively dangerous.

The only practical rationale ever advanced for the Act of 1863 was that drafts for the Union's "Armies" proved more efficient in assembling large, well-trained forces than drafts within and for the Militia would have proven. One must wonder, though, to what extent criticism of the Militia as effective forces could have been warranted. For it is hard to imagine that anyone might honestly have

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[4130] Act of 3 March 1863, § 2, 12 Stat. at 731.

[4131] Act of 3 March 1863, §§ 13 and 17, 12 Stat. at 733, 734. Such a "certificate of discharge *from such draft*", however, would not have exempted an individual from his preëxisting and otherwise permanent duty to serve *in his own State's Militia for that State's own purposes*.

[4132] Act of 3 March 1863, preamble, 12 Stat. at 731.

believed the Constitution needed to be set aside on the grounds that training individuals drafted promiscuously from the population into "Armies" was so much more efficient than training Militiamen who, already drafted within the Militia, needed only to be "call[ed] forth" to "the Service of the United States", in which they could be trained to the same standards as was the regular Army. It is equally difficult to comprehend how anyone might have believed that a serious problem lay in foot-dragging by the States—the old bugaboo under the Articles of Confederation—when Congress enjoyed the authority, and had recently demonstrated its willingness, to empower the President "to make all necessary rules and regulations" to correct "defects in existing [Militia] laws, or in the execution of them, in the several States". Besides, in order to administer the draft, the statute created a huge bureaucratic machine which could not possibly have been less cumbersome than "all necessary rules and regulations" which the President might have devised, or Congress might have enacted, to perfect the Militia.[4133]

In any event, the Supreme Court in 1917 considered the draft of the Civil War as some sort of conclusive evidence of Congress's power "[t]o raise * * * Armies" by means of direct impressment:

> It is undoubted that the men * * * raised by draft were treated as subject to direct national authority * * * . It would be childish to deny the value of the added strength which was thus afforded. * * * [I]t was the efficient aid resulting from the forces created by the draft at a very critical moment of the civil strife which obviated a disaster which seemed impending and carried that struggle to a complete and successful conclusion.[4134]

In form and intent, this was the very same argument—in each case, resting ultimately upon the logical fallacy *post hoc ergo propter hoc*[4135]—which the Supreme Court had earlier employed in order to rationalize the constitutionality of the legal-tender Treasury Notes (the so-called "Greenbacks") the Union Congress had emitted during the Civil War.[4136] By 1917, however, the Court had conveniently lost sight of the admission of its own former Chief Justice, Salmon P. Chase, who as Union Secretary of the Treasury under Lincoln had promoted the Greenbacks, only

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[4133] *See* Act of 3 March 1863, §§ 4 through 16, 12 Stat. at 732-734.

[4134] 245 U.S. at 387.

[4135] "After this therefore on account of this"—or, temporal sequence establishes causation.

[4136] *An Act to authorize the Issue of United States Notes, and for the Redemption of Funding thereof, and for Funding the Floating Debt of the United States,* Act of 25 February 1862, CHAP. XXXIII, § 1, 12 Stat. 345, 345. In *Knox* v. *Lee,* the Court contended that, "[i]f it be held * * * that Congress has no constitutional power, * * * in any emergency, to make treasury notes a legal tender for the payment of all debts (a power confessedly possessed by every independent sovereignty other than the United States), the government is without those means of self-preservation which, all must admit, may, in certain contingencies, become indispensable". 79 U.S. (12 Wallace) 457, 529 (1871). Were "draft" substituted for "treasury notes", this argument would be just as invalid. *See* E. Vieira, Jr., *Pieces of Eight, ante* note 39, Volume 1, at 602-605.

to apologize for his participation in their emission when the question of their unconstitutionality came before him on the Court:

> It is not surprising that amid the tumult of the late civil war, and under the influence of apprehensions for the safety of the Republic almost universal, different views, never before entertained by American statesmen or jurists, were adopted by many. *The time was not favorable to considerate reflection upon the constitutional limits of legislative or executive authority*. * * * Many who doubted yielded their doubts; many who did not doubt were silent.[4137]

Admittedly, "[i]t *would* be childish to deny" that the draft "added strength" to the Union's "Armies". Nonetheless, it would be even more "childish", because patently illogical, to conclude that a *constitutional* plan for "rais[ing] * * * Armies"—which was never fully tried, let alone perfected—could not possibly have sufficed to "carr[y] th[e] struggle to a complete and successful conclusion". After all, the draft created no *new* "forces" *ex nihilo*. Rather, the men who were drafted necessarily came originally from the ranks of those already eligible for Militia service. And *those* men did not need to be drafted by some new law to be held to perform that service.

As ludicrous as it is shocking, in a display of veritable intellectual desperation, the Court then relied upon the purported "laws" of the Southern Confederacy to bolster its opinion:

> [A]s further evidence that the conclusion we reach is but the inevitable consequence of the provisions of the Constitution as effect follows cause, we * * * recur to events in another environment. The seceding States wrote into the constitution which was adopted to regulate the government which they sought to establish, in identical words the provisions of the Constitution of the United States which we here have under consideration. And when the right to enforce under that instrument a selective draft law which was enacted, not differing in principle from the one here in question, was challenged, its validity was upheld, evidently after great consideration, by the [secessionist] courts of Virginia, of Georgia, of Texas, of Alabama, of Mississippi and of North Carolina[.][4138]

Apparently, by 1917 the Court had conveniently forgotten its earlier emphatic rulings that there had never been any "seceding *States*" as such, only illegal insurrections within various Southern States during the course of which those

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[4137] Hepburn v. Griswold, 75 U.S. (8 Wallace) 603, 625 (1870) (emphasis supplied). *See also* Chase's more-extensive treatment of the matter in *Knox*, 79 U.S. at 575-576 (dissenting opinion).

[4138] 245 U.S. at 388 (citing various judicial decisions).

States had nonetheless always retained their formal memberships in the Union,[4139] and that "the Confederate States of America * * * cannot * * * be regarded in this Court as having [had] any legal existence".[4140] And, of course, because "the Confederate States" as a whole had been without "legal existence", any decisions of their courts which had furthered the rebellion had been (and would always remain) devoid of any legal authority.[4141] Indeed, by supporting the Confederates' military effort, such decisions had themselves constituted acts of "Treason".[4142] For "if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, *all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors*"[4143]—judges included.

Beyond that, the Supreme Court sidestepped in silence the objection, as obvious as it was decisive, that, even if the Confederate constitution and the United States Constitution did often employ "identical words", the very fact that Southern "secessionists" had been so devoid of understanding that they had construed the United States Constitution as allowing for "secession", when "secession" had actually amounted to a criminal insurrection, had demonstrated that none of their courts' interpretations of the "identical words" in the Confederate constitution could possibly have been treated as a reliable reading of the United States Constitution.

Moreover, the interpretation of the Confederate constitution upon which the Supreme Court professed to rely had not gone unchallenged within the Confederacy. In words that the Court would have approved, the President of the Confederacy, Jefferson Davis, had recommended enactment of a draft on the grounds that "[t]he right of the State to demand, and the duty of the citizen to render, military service, need only to be stated to be admitted".[4144] And the statute enacted by the Confederate Congress had appealed to "the exigencies of the country, and the absolute necessity of keeping in the service our gallant Army, and of placing in the field a large additional force to meet the advancing columns of the enemy".[4145] Shortly thereafter, Davis had entered into correspondence with Joseph Brown, the secessionist Governor of Georgia, concerning the validity of the draft.

[4139] Texas v. White, 74 U.S. (7 Wallace) 700, 718-726 (1866).

[4140] Williams v. Bruffy, 96 U.S. 176, 182 (1877).

[4141] *See id.* at 191-192.

[4142] *See* U.S. Const. art. III, § 3, cl. 1.

[4143] *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 125-126 (1807) (emphasis supplied).

[4144] Message of 28 March 1862, *in* THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, Series IV, Volume I (Washington, D.C.: Government Printing Office, 1900), at 1031.

[4145] An ACT to further provide for the public defense, Act of 16 April 1862, *in* THE WAR OF THE REBELLION, *ante* note 4144, Series IV, Volume I, at 1095.

As did the Supreme Court in 1917, Davis had taken the position that "[t]he constitutionality of the act * * * is clearly not derivable from the power of the militia, but from that to raise armies".[4146] After a further exchange of letters,[4147] Brown had admonished Davis that the draft amounted to "a bold and dangerous usurpation by [the Confederate] Congress of the reserved rights of the [Southern] States and a rapid stride towards military despotism". "Suppose", Brown had maintained, that

> [the Confederate] Congress has the constitutional power to raise armies by conscription and without the consent of the States to compel every man * * * between eighteen and thirty-five years old, able to bear arms, to enter these armies, * * * Congress has the same power to extend the law and compel every man between sixteen and sixty to enter. * * * [T]he grant of power is as broad in times of peace as in times of war, as there is * * * no language to limit it to times of war. It follows that Congress has the absolute control of every man in the State whenever it chooses to execute to the full extent the power * * * to raise armies. * * * Your doctrine carried out not only makes Congress supreme over the States at any time when it chooses to exercise the full measure of its power to raise armies, but it places the very existence of the State governments subject to the will of Congress. * * * If the act is constitutional, * * * Congress has the power to compel the Governor or every State, every judge of every court in every State, every officer of the militia of every State and all other State officers to enter the military service as privates in the armies of the Confederacy under officers appointed by the President at any time when it so decides. * * * Congress may disband the State governments any day when it, as the judge, decides that by so doing it creates an instrumentality for executing the specific power to raise armies. * * * Congress has the power * * * to disband the State governments and leave the people of the States with no other government than such military despotism as Congress * * * may * * * judge to be best for the people. * * * I may be reminded, however, that Congress passed an exemption act * * * which exempts the Governors of the States, the members of the State Legislatures, the judges of the State courts, &c., from the obligation to enter the military service * * * . It must be borne in mind, however, that this very act of exemption * * * is an assertion of the right * * * to compel them to go when Congress shall so direct, as Congress has the same power to repeal which it had to pass the exemption act. All the State officers, therefore, are exempt from conscription by the grace and special favor of

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[4146] Letter of 28 April 1862 from Jefferson Davis to Joseph E. Brown, *in id.*, Series IV, Volume I, at 1100. In its Article I, Section 8, Clause 12, the Confederate constitution delegated to the Confederate Congress the selfsame power "[t]o raise * * * armies" as existed in the parallel clause of the United States Constitution.

[4147] Letter of 8 May 1862 from Joseph E. Brown to Jefferson Davis *and* Letter of 29 May 1862 from Jefferson Davis to Joseph E. Brown, *in id.,* Series IV, Volume I, at 1116, 1133.

> Congress and not by right, as the governments of the independent States whose agent and not master Congress has been * * * supposed to be. If this doctrine be correct, of what value are State rights and State sovereignty?[4148]

Brown, of course, had been entirely justified in principle to pose this unanswerable objection to the draft, because "the legality of [any governmental] power must be estimated not by what it will do but by what it can do".[4149] In practice, too, his fears of "military despotism" had been anything but paranoiac fantasies. For even before he had begun his correspondence with Davis, Davis had declared martial law in "the city of Richmond and surrounding country to the distance of ten miles".[4150] And by the last year of the Civil War the political-economic organization of the Confederacy could have best been described as a form of highly militarized state socialism.[4151] That the Justices in the *Selective Draft Law Cases* thought it necessary to employ *this* material as a putative legal-historical aid in construing the Constitution of the United States provides compelling evidence of how baseless they must have known their opinion to be.

One suspects, though, that none of the Justices ever imagined that, or bothered to consider whether, their opinion amounted to a satisfactory review of constitutional history, application of the rules of constitutional construction, or even employment of elementary logic. Rather, the opinion was handed down to serve a purely political purpose of a decidedly *anti*-constitutional cast: namely, to provide the final dab of legalistic coloration for the process at work in the statutes from 1903 by which the true Militia were effectively rendered nonexistent; to consolidate all military power in the General Government's "Armies"; to invest Congress in the event of some putative "emergency" with (in Joseph Brown's words) "the power * * * to disband the State governments and leave the people * * * with no other government than * * * military despotism"; and to create a consolidated state apparatus capable of aggressive militaristic imperialism throughout the world.

Even if to bring about such a litany of woe was not the conscious purpose of the Justices in the *Selective Draft Law Cases*, the effect of their opinion was truly

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[4148] *Id.* at 1156, 1162-1163.

[4149] Block v. Hirsh, 256 U.S. 135, 162 (1921) (McKenna, J., dissenting).

[4150] GENERAL ORDERS No. 9, War Department, Adjutant Inspector General's Office, 1 March 1862, *in* THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, Series I, Volume LI, Part II (Washington, D.C.: Government Printing Office, 1897), at 482. *See* Emory M. Thomas, *The Confederacy as a Revolutionary Experience* (Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1971), at 63. Of course, Lincoln, too, was subject to criticism in this regard. *See, e.g.,* James G. Randall, *Constitutional Problems Under Lincoln* (New York, New York: D. Appleton and Company, 1926), Chapters VI through VIII. But then Lincoln, too, was the proponent of a general draft.

[4151] *See* Louise B. Hill, "State Socialism in the Confederate States of America", *in* J.D. Eggleston, Editor, *Southern Sketches*, No. 9 (Charlottesville, Virginia: Historical Publishing Company, 1936).

horrendous for both America and the rest of Western civilization. The gist of that opinion had almost surely been foreseen, if not actually foreordained, by the powerful political and economic factions intent upon involving the United States as a belligerent in World War I. For they knew that, without unlimited "Armies" conscripted for overseas duty, America's effective participation in a timely fashion on the side of the Allies would have been extremely unlikely. And they never would have proceeded with the celerity and certainty they exhibited to push America into the conflict, without some behind-the-scenes assurance that a draft would be, not only enacted by Congress and the President, but also upheld by the Supreme Court in a decisive fashion. Which explains why an opinion so shoddy in intellectual substance and dangerous in political tendency received the Justices' *unanimous* approval in a case of such importance and notoriety.[4152]

And precisely *what* "in the Course of human events" did the Court facilitate? Instead of playing the prudent rôle of an honest broker in order to bring about a negotiated peace between the Allies and the Central Powers, America threw her full military and industrial weight onto the battlefields on behalf of the Allies, under Woodrow Wilson's fantastic slogan, "[t]he world must be made safe for democracy". The result was not the establishment of "democracy", but instead the destruction of the German Empire, the Austro-Hungarian Empire, and the Russian Empire (which with a negotiated peace in the West might have been saved from the worst effects of its revolution), and with them any hope of maintaining political stability and economic prosperity in Europe. The world then witnessed chaos in Italy, leading to Mussolini (the triumph of Fascism), chaos in Germany, leading to Hitler (the triumph of Naziism), and chaos in Russia, leading to Lenin and then Stalin (the triumph of Bolshevism)[4153]—all of which together soon drove Europe *and America* into World War II, in which untold millions of people perished, and as a consequence of which Stalin (with Hitler, the author of the war) devoured Eastern Europe and Mao Tse-tung fastened his maniacal grip on mainland China.

[4152] In contrast, a serious difference of opinion among other sets of Justices arose in the cases sustaining the constitutionality of the first legal-tender Treasury Notes—but, as those cases were heard only in 1871 and then 1884, after the Civil War had been brought to a successful conclusion, the dissenting opinions were not as politically charged as if the cases had come up for review while the fighting still raged. Therefore, the dissenters were able to set aside a *faux* unanimity cobbled together for political purposes, in favor of adherence to fundamental legal principles. *See* E. Vieira, Jr., *Pieces of Eight*, *ante* note 39, Volume 1, at 599-666. Distinguishably, Congress's repudiation and prohibition of "gold clauses" was in full effect even when the Court upheld that action in 1935—yet four Justices nonetheless dissented from the Court's opinion. They were able to get away with this politically, though, because they had protected their flanks by agreeing behind the scenes with the other Justices not to review the Roosevelt Administration's "gold seizure", even though the issues of "the gold clauses" and "the gold seizure" were inextricably linked, and the Court upheld the prohibition of "gold clauses" specifically on the *assumption*, *never litigated*, that "the gold seizure" was constitutional. *See id.*, Volume 2, at 1127-1211.

[4153] *Contrast* War Message of 2 April 1917, Senate Document No. 5 (Serial No. 7264), 65th Congress, 1st Session, *with, e.g.,* Stanley G. Payne, *A History of Fascism, 1914-1945* (Madison, Wisconsin: The University of Wisconsin Press, 1995), Chapter 3.

Specifically in America, the Court's opinion in the *Selective Draft Law Cases* then rationalized a peacetime draft in 1940,[4154] and drafts during World War II, during the "police action" in Korea, and during the conflict in Vietnam. Under its aegis and pernicious influence, "the army sphere" in the Constitution has expanded to "embrace[ ] * * * complete authority * * * conferred in all its plenitude", and therefore to become "dominant"; whereas "the militia area * * * ha[s] been circumscribed or totally disappeared".[4155] The idea of a permanent "standing army" in times of both peace and war has taken firm hold; whereas the true idea of the Militia has been lost in the mists of time, and even the word "militia" has been distorted into a scurrilous political epithet. Now, with "the war on terrorism" as its excuse, and under color of its supposedly unlimited power "[t]o raise * * * Armies" and build up a "military-industrial complex" in their support, Congress is erecting a National *para*-military police-state apparatus centered around the Department of Homeland Security and the Pentagon. Thus, Joseph Brown's characterization of a general draft as "a bold and dangerous usurpation by Congress of the reserved rights of the States and a rapid stride towards military despotism" has proven all too prophetic. Having failed to guarantee the Militia's immunity from wholesale impressment into the regular Armed Forces, Americans are now witnesses to the Orwellian demolition of "the security of a free State" in the name of "homeland security".

[4154] AN ACT To provide for the common defense by increasing the personnel of the armed forces of the United States and providing for its training, Act of 16 September 1940, CHAPTER 720, 54 Stat. 885. On the political background of this first peacetime draft, *see* Earl Rickard, "Marshall Builds the Defense Army", *WWII History*, Volume 11, Number 6 (September, 2012), at 48.

[4155] *See* 245 U.S. at 382-383.

CHAPTER FIFTY

Patriots cannot allow revitalization of the Militia to be thwarted by their enemies' invocation of the doctrines of preëmption or prescription.

As of this writing and for the foreseeable future, Americans cannot rely upon Congress to revitalize the Militia. For Congress is packed with rogue Members who dance to the discordant tunes of private factions and other special-interest groups, foreign nations, and *supra*-national organizations; who are intent upon bringing about the demolition of America's economy and the destruction of "the separate and equal station" "among the powers of the earth" "to which the Laws of Nature and of Nature's God entitle" her, contrary to the Declaration of Independence; and who, in service of those nefarious ends, are feverishly erecting a National *para*-military police-state apparatus in order to suppress WE THE PEOPLE'S resistance to submersion in the poverty and oppression of a fascistic "new world order". Apparently, this situation cannot be corrected through the present thoroughly corrupted electoral process, either. Therefore, THE PEOPLE must revitalize their Militia themselves, initially by working through whichever of their States' legislatures remain honestly "representative" of their constituents—and if those legislatures, too, prove impotent, incompetent, or inimical, then through their own efforts.

Of course, the enemies of the Declaration of Independence, the Constitution, and human freedom and dignity know precisely where this process, if allowed to follow its course, must inevitably lead: Once the Militia are revitalized, they will be finished—politically, economically, and in every other way. So they will throw up every possible legalistic impediment to revitalization. If they cannot prevent the enactment of statutes, they will bend every effort to ensure that those statutes are declared invalid in their kangaroo courts. Thus, no great foresight is required to predict that their first contention will be "preëmption", and their second will be "prescription".

A. Under present circumstances, preëmption of all State laws revitalizing the Militia not constitutionally possible. The doctrine of "preëmption" finds its legitimate basis in the Constitution's directives that: (i) "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary

notwithstanding";[4156] and (ii) "the Members of the several State Legislatures, and all executive and judicial Officers * * * of the several States, shall be bound by Oath or Affirmation, to support this Constitution".[4157] (The first of these provisions is usually denoted "the Supremacy Clause"; but the two together should be styled "the Supremacy Clauses", because both of them enforce the superiority of the General Government's to the States' laws.) If "the Constitution or Laws of any State" or the decisions of that State's courts, on the one hand, are "to the Contrary" of the "Constitution, or "the Laws", or any "Treaties" of the United States, on the other hand, then the former must yield to the latter, usually losing their legal validity and force to the extent of any inconsistency. To that extent, the laws of the States are (in legal jargon) "preëmpted". Opponents of revitalization of the Militia can be expected to claim that *any* State statute enacted for that purpose is necessarily preëmpted, because *all* effective power over the Militia supposedly resides in Congress, and through Congress in the President, with *nothing* left over for the States except what Congress affirmatively grants to them by statute.

1. On the face of the Constitution, this contention is nonsense. The Constitution does not imbue Congress with overall "supremacy" as against the States with respect to the Militia. Rather, it establishes two separate zones of authority, and differentiates between various functions to be performed in each. To be sure, these zones and functions overlap to a certain extent. And within that common area subject to dual authority, legitimate actions by Congress may exclude, supersede, or nullify conflicting actions by the States. But not *all* actions by Congress that pertain to the Militia, even within that common area, necessarily preclude or vitiate *all* independent actions by the States. For, self-evidently, *some* State laws revitalizing the Militia could not possibly be "to the Contrary" of "th[e] Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States"—because the Constitution plainly foresees and allows for such State legislation.

Here, the touchstone must be the Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Actually, with regard to the Militia the Tenth Amendment is something of a truism, because the original Constitution, by incorporating into its federal system "the Militia *of the several States*",[4158] necessarily as they existed at the time, made clear that all of the powers over the Militia which the States exercised prior to ratification of the Constitution, and which were not delegated to the United States, must remain with

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[4156] U.S. Const. art. VI, cl. 2.

[4157] U.S. Const. art. VI, cl. 3.

[4158] U.S. Const. art. II, § 2, cl. 1 (emphasis supplied).

the States. Nonetheless, the systematic manner in which the Amendment categorizes the Constitution's distribution of powers remains eminently useful as a tool of legal analysis.

a. With respect to the Militia there are *no* "powers * * * prohibited by [the Constitution] to the States"—in contrast, for the prime example, to the conditional prohibition that "[n]o State shall, without the Consent of Congress, * * * keep Troops, or Ships of War in time of Peace".[4159]

b. The extent of "[t]he powers not delegated to the United States" can be gauged by reference to: (i) the few and very specific powers the Constitution does delegate to Congress—namely, (i) the powers "[t]o provide for calling forth the Militia *to execute the Laws of the Union, suppress Insurrections and repel Invasions*",[4160] "[t]o provide for organizing, arming, and disciplining, the Militia",[4161] and "[t]o provide * * * for governing such Part of the[Militia] *as may be employed in the Service of the United States*";[4162] and (ii) the status the Constitution assigns to the President—namely, that he "shall be Commander in Chief * * * of the Militia of the several States, *when called into the actual Service of the United States*".[4163] All of this authority the Constitution confines to and in aid of three explicitly enumerated, and therefore limited, purposes *alone*. The further power of Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the[se] * * * Powers, and all other Powers vested by th[e] Constitution * * * in any * * * Officer thereof"[4164] adds nothing to "the[se]" and "all other Powers", because no "Law[ ]" can possibly be "necessary and proper for carrying [them] into Execution" which purports to go beyond their specific terms into activities which cannot, by constitutional definition, ever comprise "the Service of the United States".

c. Because all other conceivable powers addressed to all other purposes for which the Militia might be employed have "not [been] delegated to the United States", they must be "reserved to the States respectively, or to the people". Indeed, even if, as the result of some default by Congress and the President, some of the States were compelled by circumstances to call forth their own Militia for one or more of the three explicit constitutional purposes, those Militia would be employed in the service of those States, not in "the Service of the United States".

d. As a consequence of the foregoing, any purported "Law" enacted by Congress which attempts to interfere with the reserved powers of the States is not

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[4159] U.S. Const. art. I, § 10, cl. 3.

[4160] U.S. Const. art. I, § 8, cl. 15 (emphasis supplied).

[4161] U.S. Const. art. I, § 8, cl. 16.

[4162] U.S. Const. art. I, § 8, cl. 16 (emphasis supplied).

[4163] U.S. Const. art. II, § 2, cl. 1 (emphasis supplied).

[4164] U.S. Const. art. I, § 8, cl. 18.

in any way "the supreme Law of the Land", but is no "Law" at all, because it is not "in Pursuance [of the Constitution]".[4165] And any "Treaties" which attempt to interfere with those powers are to that extent not "made * * * under the Authority of the United States", because "the Authority of the United States" to enter into "Treaties" must be exercised consistently with "[t]he powers * * * delegated to the United States" in the Constitution.[4166]

2. The Supremacy Clauses can have no effect whatsoever on the Constitution's distribution of powers.

a. Those clauses can neither assign powers to the United States which the Constitution has not delegated, nor restore powers "prohibited by [the Constitution] to the States", nor withdraw or nullify powers which the Constitution has "reserved to the States respectively, or to the people".[4167] Theirs "is not a declaration of the supremacy of one provision of the Constitution or laws of the United States over another, but of the supremacy of the Constitution and laws of the United States over the constitutions and laws of the States".[4168]

For that reason, rogue Members of Congress cannot claim that some purported statute enacted under, for instance, the power "[t]o lay and collect Taxes"[4169] or the power "[t]o regulate Commerce"[4170] can override either: (i) the power of Congress—and the duty that power entails[4171]—"[t]o provide for organizing, arming, and disciplining, the Militia" for the purposes of "execut[ing] the Laws of the Union, suppress[ing] Insurrections and repel[ling] Invasions";[4172] or (ii) the power the Constitution has reserved to the States to organize, arm, and discipline "the Militia of the several States" for all other purposes (and for those three purposes, too, if Congress defaults on its obligations).

b. Even more obviously, the Supremacy Clauses cannot override any constitutional Amendment. In particular with respect to the Militia, if an hierarchy does exist, the Second Amendment must be superior to and to the extent of any mutual inconsistency must override the Supremacy Clauses, because the Second

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[4165] *See, e.g., Ex parte* Siebold, 100 U.S. 371, 376 (1880); Poindexter v. Greenhow, 114 U.S. 270, 288 (1885); Norton v. Shelby County, 118 U.S. 425, 442 (1886); Huntington v. Worthen, 120 U.S. 97, 101-102 (1887).

[4166] *See, e.g.*, Doe v. Braden, 57 U.S. (16 Howard) 635, 657 (1853); The Cherokee Tobacco, 78 U.S. (11 Wallace) 616, 620-621 (1871); Holden v. Joy, 84 U.S. (17 Wallace) 211, 242-243 (1872); Geofroy v. Riggs, 133 U.S. 258, 267 (1890); United States v. Wong Kim Ark, 169 U.S. 649, 701 (1898); Asakura v. City of Seattle, 265 U.S. 332, 341 (1924); United States v. Minnesota, 270 U.S. 181, 208 (1926); Reid v. Covert, 354 U.S. 1, 16-18 (1957) (opinion of Black, J., announcing the judgment of the Court)

[4167] *See* U.S. Const. amend. X.

[4168] National Prohibition Cases, 253 U.S. 350, 401 (1920) (McKenna, J., dissenting).

[4169] U.S. Const. art. I, § 8, cl. 1. *See ante*, at 1456-1462.

[4170] U.S. Const. art. I, § 8, cl. 3. *See ante*, at 1462-1470.

[4171] *See ante*, at 50-54.

[4172] U.S. Const. art. I, § 8, cls. 16 and 15.

Amendment followed the Supremacy Clauses in time. The Second Amendment was one of the ten "further declaratory and restrictive clauses" in the Bill of Rights which were "added" to the Constitution "in order to prevent misconstruction or abuse of its powers".[4173] The Amendment explains the limits of the Supremacy Clauses ("to prevent misconstruction") and excludes from legitimate political and legal discourse any excuses for exceeding those limits ("to prevent * * * abuse"). Thus, if "[t]his Constitution * * * shall be the supreme Law of the Land", "the right of the people to keep and bear Arms" in "well regulated Militia" must stand alone on the very top rung of the ladder of supremacy, because "[a] well regulated Militia"—and *only* "[a] well regulated Militia—is "necessary to the security of a free State".

3. The States' authority over some subjects may be limited by provisions of the Constitution that are effectively self-executing. In these cases, the Supremacy Clauses are basically redundant.

a. In some instances, the Constitution delegates powers to the United States which it simultaneously prohibits to the States, either absolutely or conditionally. Although "[t]he burden of establishing a delegation of power to the United States or the prohibition of power to the states is upon those making the claim",[4174] many of these delegations coupled with prohibitions are perfectly clear. For example—

- Congress may "lay and collect Duties[and] Imposts"; but "[n]o State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws".[4175]

- Congress may "establish uniform Laws on the subject of Bankruptcies throughout the United States"; but "[n]o State shall * * * pass any * * * Law impairing the Obligation of Contracts".[4176]

- Congress may "coin Money"; but "[n]o State shall * * * coin Money".[4177]

- Congress may "declare War"; but "[n]o State shall, without the Consent of Congress, * * * engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay".[4178]

[4173] RESOLUTION OF THE FIRST CONGRESS SUBMITTING TWELVE AMENDMENTS TO THE CONSTITUTION (4 March 1789), *in Documents Illustrative of the Formation of the Union of the American States*, *ante* note 1, at 1063.

[4174] Bute v. Illinois, 333 U.S. 640, 653 1948).

[4175] *Compare* U.S. Const. art. I, § 8, cl. 1 *with* § 10, cl. 2.

[4176] *Compare* art. I, § 8, cl. 4 *with* § 10, cl. 1.

[4177] *Compare* U.S. Const. art. I, § 8, cl. 5 *with* § 10, cl. 1.

[4178] *Compare* U.S. Const. art. I, § 8, cl. 11 *with* art. § 10, cl. 3.

• Congress may "grant Letters of Marque and Reprisal"; but "[n]o State shall * * * grant Letters of Marque and Reprisal".[4179]

• Congress may "raise and support Armies" and "provide and maintain a Navy"; but "[n]o State shall, without the Consent of Congress, * * * keep Troops, or Ships of War in time of Peace".[4180] And,

• The President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur"; but "[n]o State shall enter into any Treaty, Alliance, or Confederation", or "without the Consent of Congress * * * enter into any Agreement or Compact * * * with a foreign Power".[4181]

In the case of the Militia, distinguishably, the Constitution nowhere delegates to Congress exclusive control under all circumstances. Neither does the Constitution impose on the States any explicit prohibition of power over the Militia—which is hardly surprising, inasmuch as it recognizes the Militia as "the Militia *of the several States*". Nor does the Constitution contain any provision which expressly prevents the States from exercising any power over their Militia "without the Consent of Congress". The absence of express prohibitions on any of the powers of the States with respect to their Militia implies that the States' powers are fully concurrent in principle with those of the United States, and are subject to preëmption only when their exercise in practice interferes with the exercise of the powers of the United States.

b. In other instances, although the Constitution does not expressly prohibit a particular power to the States, a power which it delegates to the United States is so defined as to be inherently and inevitably exclusive in nature, and therefore incapable of being exercised by the States. Preëmption applies automatically "where an authority is granted to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant".[4182] For example, the powers of Congress—

• "[t]o lay and collect Taxes * * * *to pay the Debts and provide for the common Defence and general Welfare of the United States*";[4183]

• "[t]o borrow Money *on the credit of the United States*";[4184]

[4179] *Compare* U.S. Const. art. I, § 8, cl. 11 *with* art. § 10, cl. 1.

[4180] *Compare* U.S. Const. art. I, § 8, cls. 12 and 13 *with* § 10, cl. 3.

[4181] *Compare* U.S. Const. art. II, § 2, cl. 2 *with* art. I, § 10, cls. 1 and 3.

[4182] Holmes v. Jennison, 39 U.S. (14 Peters) 540, 574 (1840) (opinion of Taney, C.J.).

[4183] U.S. Const. art. I, § 8, cl. 1 (emphasis supplied). The States, of course, may still "lay and collect Taxes" to pay *their own* debts.

[4184] U.S. Const. art. I, § 8, cl. 2. The States, of course, may still "borrow Money" on *their own* credit.

•"[t]o establish an *uniform* Rule of Naturalization, and *uniform* Laws on the Subject of Bankruptcies *throughout the United States*";[4185]

•"[t]o provide for the Punishment of counterfeiting the Securities and current Coin *of the United States*";[4186]

•"[t]o promote the Progress of Science and useful Arts, by securing *for limited Times* to Authors and Inventors *the exclusive Right* to their respective Writings and Discoveries";[4187]

•"[t]o constitute Tribunals inferior to the supreme Court" which may exercise "[t]he judicial Power *of the United States*";[4188]

•"[t]o raise and support Armies" and "[t]o provide and maintain a Navy", which are to be "the Army and Navy *of the United States*";[4189] and

•"[t]o exercise *exclusive* Legislation in all Cases, whatsoever, over such District * * * as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings".[4190]

[4185] U.S. Const. art. I, § 8, cl. 4 (emphasis supplied). No State could have established "Rule[s]" or "Laws" on this (or any other) subject "throughout the United States". Nonetheless, in the absence of any Congressional statute the States may enact their own insolvency laws. Sturges v. Crowninshield, 17 U.S. (4 Wheaton) 122, 199 (1819). And even the enactment of a Congressional statute on the subject does not nullify inconsistent State laws, but merely suspends their operation, so that, upon repeal of the Congressional statute, the States' laws can be applied once more. Tua v. Carriere, 117 U.S. 201, 209-210 (1886); Butler v. Goreley, 146 U.S. 303, 314 (1892).

[4186] U.S. Const. art. I, § 8, cl. 6 (emphasis supplied). As "[n]o State shall * * * coin Money", no State can have any occasion to punish the counterfeiting of *her own* "Coin". *See* U.S. Const. art. I, § 10, cl. 1. *Contrast* the situation involved in Fox v. Ohio, 46 U.S. (5 Howard) 410 (1847), *discussed in* E. Vieira, Jr., *Pieces of Eight, ante* note 39, Volume 1, at 618-621.

[4187] U.S. Const. art. I, § 8, cl. 8 (emphasis supplied). If each of the States could enact separate laws on this subject, the "Times" would most likely not all be "limited" in the same manner, and the "Right[s]" would not be uniformly "exclusive" through the country. *See, e.g.,* Sears, Roebuck & Company v. Stiffel Company, 376 U.S. 225 (1964) (a State may not enforce as "unfair competition" a law that prohibits the copying of a product which cannot be patented).

[4188] U.S. Const. art. I, § 8, cl. 9 *and* art. III, § 1 (emphasis supplied). These are courts *of the United States*. The States may constitute *their own* courts.

[4189] U.S. Const. art. I, § 8, cls. 12 and 13, *and* art. II, § 2, cl. 1 (emphasis supplied). *See also* U.S. Const. art. I, § 10, cl. 3.

[4190] U.S. Const. art. I, § 8, cl. 17 (emphasis supplied).

Similarly for the authority of the President as "Commander in Chief of the Army and Navy *of the United States*".[4191]

Similarly, the powers of Congress "[t]o provide for organizing, arming, and disciplining, the Militia" so that they can be "call[ed] forth" to "be employed *in the Service of the United States*" "to execute the Laws of the Union, suppress Insurrections and repel Invasions",[4192] the power of Congress "[t]o provide * * * for governing such part of the[Militia] as may be employed *in the Service of the United States*",[4193] and the authority of the President as "Commander in Chief * * * of the Militia of the several States, *when called into the actual Service of the United States*"[4194] are in principle and practice exclusive to the United States, so long as Congress and the President properly fulfill their responsibilities, because the States enjoy no authority in the normal course of events to legislate for or otherwise attempt to prescribe or control "the Service *of the United States*". In both principle and practice, however, all of these powers could, should, and would have to be exercised by each State, with respect to her own Militia, if Congress and the President defaulted on their duties. For each State has a critical interest in the "execut[ion of] the Laws of the Union", the "suppress[ion of] Insurrections", and the "rep[ulsion of] Invasions", not only within her own territory but also within the territories of all of the other States that might find themselves in danger. It is inconceivable that the Constitution could prohibit the States from deploying *their own* Militia specifically in the defense of the Union, on the ground that such deployment was exclusively for Congress and the President to undertake, when defaults in their duties on the parts of Congress and the President jeopardized the Union's security. That is, the powers of Congress and the President over "the Militia of the several States" "in the Service of the United States" are exclusive *only insofar as Congress and the President can and do exercise them in a timely and proper fashion*—otherwise, they must be the concurrent powers of the States, too. And as a practical matter these powers would have to become the exclusive powers of the States in the case of a catastrophic default by the United States—for example, if the General Government were unable or refused to "call[ ] forth" the Militia in the Union's defense because its leading personnel had been taken prisoner in the course of an "Invasion[ ]" by some foreign power, or had been seized by rebels in the course of an "Insurrection[ ]", or themselves had turned out to be usurpers and tyrants who flouted the most important "Laws of the Union".

Moreover, the powers of Congress and the President with respect to the Militia "*in the service of the United States*" cannot possibly be exclusive, or even

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[4191] U.S. Const. art. II, § 2, cl. 1 (emphasis supplied).

[4192] U.S. Const. art. I, § 8, cls. 15 and 16 (emphasis supplied).

[4193] U.S. Const. art. I, § 8, cl. 16 (emphasis supplied).

[4194] U.S. Const. art. II, § 2, cl. 1 (emphasis supplied).

concurrent, because they are entirely irrelevant, in regard to the Militia *in the service of the several States*. ***When "the Militia of the several States" are deployed solely on behalf of the several States, then the several States alone exercise exclusive authority over them.***

4. If the Constitution does not expressly preclude the States from exerting some power over a subject to which Congress also may direct one of its powers, preëmption of State law requires that a State's law be inconsistent with an actual, valid law of Congress.

a. No State can be prohibited from exercising any of her concurrent constitutional authority on the basis of Congress's *in*action. For only "the Laws of the United States *which shall be made* in Pursuance [of the Constitution] * * * shall be the supreme Law of the Land"[4195]—not "Laws" which Congress has not actually "made" at all. "It is not the existence of the power [of Congress], but its exercise, which is incompatible with the exercise of the same power by the state."[4196] The notion that a power of Congress, concurrent with a power of the States, by its own unaided force always excludes State legislation on the subject to which it is addressed—that the States may not exercise their concurrent power unless it appears that Congress has somehow consented or acquiesced through an exercise of its own concurrent power, and that an absence of such exercise always entails disapproval of any exercise of the States' power—is "an unwarranted judicial invention".[4197] The correct inference must be that, if Congress has enacted no "Law[ ] of the United States", then Congress intends to allow the States to enact their own laws on the subject. This is the present situation with the Militia.

b. Even if Congress has enacted a purported "Law[ ]", that "Law[ ]" must have been "made *in Pursuance* [of the Constitution]"—both substantively, in that it does not exceed the powers of Congress;[4198] and procedurally, in that it has been passed and approved in the proper manner.[4199] For "[a]n unconstitutional act is not a law; it confers no rights; it imposes no duties * * * ; it is, in legal contemplation, as inoperative as though it had never been passed".[4200] So, if what Congress has

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[4195] U.S. Const. art. VI, cl. 2 (emphasis supplied).

[4196] Sturges v. Crowninshield, 17 U.S. (4 Wheaton) 122, 196 (1819).

[4197] Tyler Pipe Industries, Inc. v. Washington State Department of Revenue, 483 U.S. 232, 263 (1987) (Scalia, J., concurring in part and dissenting in part).

[4198] *See* U.S. Const. art. I, §§ 8 and 9.

[4199] *See* U.S. Const. art. I, § 7. This limitation has become increasingly important in an era in which an individuals possibly ineligible for "the Office of President" has nonetheless insinuated himself into that position. *Compare and contrast* U.S. Const. art. II, § 1, cl. 4 *with* art. I, § 7, cls. 2 and 3. No "Bill", "Order", "Resolution", or "Vote" can be "presented to the President" if the individual pretending to be "the President" is incurably ineligible for that "Office". In that case, so such "Bill" can "become a Law", and no such "Order, Resolution, or Vote" can "take Effect".

[4200] Norton v. Shelby County, 118 U.S. 425, 442 (1886).

done or has failed to do with respect to the Militia is *unconstitutional*—in violation of its own disabilities or duties, or in disregard of constitutional procedures—then it can impose no restraint whatsoever on the States. No State is bound to accept or acquiesce in any purported "Laws of the United States" *not* "in Pursuance [of the Constitution]", or in any failures, neglects, or refusals of Congress to enact "Laws" which truly are "necessary and proper"—particularly when those false "Laws" or refusals to enact true "Laws" threaten the one institution the Constitution identifies as "necessary to the security of a free State".[4201]

(1) There can be no "Laws of the United States * * * made in Pursuance [of the Constitution]" with respect to "the Militia of the several States" in the service of the several States respectively—that is, when the Militia are deployed purely for the purposes of the States' own "homeland security"—because Congress has no power whatsoever to enact any such "Laws".

The Constitution empowers Congress "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions"; and "[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress"[4202]—*and to do nothing more.* Similarly, it designates the President as the "Commander in Chief * * * of the Militia of the several States, *when in the actual Service of the United States*"[4203]—*and at no other time and for no other purposes than the three for which the Constitution permits the Militia to be "call*[*ed*] *forth" in that "Service"*. The Constitution delegates these powers to Congress and this authority to the President in order to provide *the United States* with the ability to draw upon Militia from the several States "organiz[ed], arm[ed], and disciplin[ed]" in such a reasonably uniform manner that they will be capable of performing *any of the three constitutionally designated tasks, but not necessarily any others*. The Constitution empowers Congress to prepare the Militia *only* by "organizing, arming, and disciplining" them, and *only* in order to perform the three specifically identified tasks. Congress is not authorized to prepare the Militia in any other way, or to "call[ ] forth" the Militia for any other purpose. This is because, as the Constitution itself recognizes, the "Militia" to be "organiz[ed], arm[ed], and disciplin[ed]" and "call[ed] forth" are none other than "the Militia *of the several States*", not "the Militia *of the United States*"—a distinction the Constitution makes exquisitely clear in defining the dual status of the President as "Commander in Chief of the Army and Navy *of the United States*, and of the Militia *of the several States, when called into*

[4201] *Compare* U.S. Const. art. I, § 8, cl. 18 *with* amend. II.

[4202] U.S. Const. art. I, § 8, cls. 15 and 16.

[4203] U.S. Const. art. II, § 2, cl. 1 (emphasis supplied).

the actual Service of the United States",[4204] and in delegating to Congress the power "[t]o provide * * * for governing" *only* "such *Part* of the[Militia] *as may be employed in the Service of the United States*".[4205]

Thus (using the analytical framework of the Tenth Amendment), because "the powers * * * delegated to the United States by the Constitution" pertain *only* to the Militia when they are "employed in the Service of the United States", and because *no* powers that pertain to the Militia when they are employed exclusively in the service of the States have been "prohibited by [the Constitution] to the States", therefore all powers that pertain to the Militia when they are employed exclusively in the service of the States have been "reserved to the States respectively, or to the people", and thereby prohibited from exercise by the United States. So, because Congress is constitutionally impotent to do anything with respect to the Militia when they are employed exclusively in the service of the States, nothing rogue Members of Congress might attempt to do can preëmpt the States. No "Laws of the United States" can "be made in Pursuance [of the Constitution]" when the Constitution delegates no power to "ma[k]e" such "Laws".

(2) Even with respect to the powers Congress does enjoy with respect to the Militia, the ambit in which it can prëempt the States is narrow, because of the limited and specific nature of those powers. Absent the power "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions",[4206] Congress would lack any semblance of authority to "call[ ] forth" the Militia at all and for any purpose, because the Militia are "the Militia *of the several States*", *not* "the Militia *of the United States*". That being so, Congress's authority in the premises is limited to the means which the Constitution specifies (that is, "calling forth"), and to the purposes the Constitution sets forth ("to execute the Laws of the Union, suppress Insurrections and repel Invasions"), *and to those means and purposes only*. Moreover, absent the power "[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States",[4207] Congress would have to rely totally upon the States to "organiz[e], arm[ ], * * * disciplin[e], * * * and * * * govern[ ]" the Militia. That being so, Congress's authority is limited to those elements of regulation, *and those alone*, *and only in relation to the three constitutional purposes for which the Militia may be "call*[*ed*] *forth" "in the Service of the United States"*. In addition, absent the Constitution's assignment to him of the status of "Commander in Chief * * * of the Militia of the several States, when called into

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[4204] *See* U.S. Const. art. II, § 2, cl. 1 (emphasis supplied).

[4205] U.S. Const. art. I, § 8, cl. 16 (emphasis supplied).

[4206] U.S. Const. art. I, § 8, cl. 15.

[4207] U.S. Const. art. I, § 8, cl. 16.

the actual Service of the United States",[4208] the President could not exercise any authority with respect to the Militia at all, because the Constitution explicitly "reserv[es] to the States respectively the Appointment of the Officers" in the Militia.[4209] And the authority the Constitution does allow the President to exercise it confines to "the *actual* Service of the United States", which by constitutional definition is limited to "organizing, arming, disciplining, * * * and * * * governing" the Militia with respect to the three purposes for which they may be "call[ed] forth".[4210]

Revealingly, that the power "[t]o provide for calling forth the Militia" comes before the power "[t]o provide for organizing, arming, and disciplining, the Militia" supports these conclusions.[4211] A naive draftsman might assume that the power to "[t]o provide for organizing, arming, and disciplining, the Militia" should precede the power "[t]o provide for calling forth the Militia", on the grounds that the first step should be to prepare those organizations in a general way for whatever their tasks might be, and only thereafter to specify those tasks. A sophisticated draftsman, however, would conclude—on the commonsensical basis that if the ends justify the means therefore the means must serve the ends—that the sequence of powers actually chosen amounts to a limitation on those powers: namely, because the Militia may be "call[ed] forth" *only* for three particular purposes (the ends), therefore all "organizing, arming, * * * disciplining, * * * and * * * governing" of the Militia (the means) must subserve *only* those three purposes. The Constitution states the ends before the means for other, very practical, reasons, too—namely, that: (i) in the earliest days of the Republic the Militia could have been "call[ed] forth" immediately, without any "organizing, arming, and disciplining" provided by Congress, because in 1788 they were existing State establishments already "organiz[ed], arm[ed], and disciplin[ed]" pursuant to State law;[4212] and (ii) even today Congress could "provide for organizing, arming, and disciplining, the Militia" by leaving those matters entirely to the States. If the order of the powers were reversed—that is, if the power "[t]o provide for organizing, arming, and disciplining, the Militia" preceded the power "[t]o provide for calling forth the Militia" for the three constitutional purposes—it might be argued that Congress could "organiz[e], "arm[ ], [and] disciplin[e]" the Militia for *any* purpose, but could "call[them] forth" only for the three purposes set forth. In the order in which those powers actually appear, though, the latter construction cannot be credited.

[4208] U.S. Const. art. II, § 2, cl. 1.

[4209] U.S. Const. art. I, § 8, cl. 16.

[4210] *See ante*, at 871-880.

[4211] U.S. Const. art. I, § 8, cls. 15 and 16.

[4212] *See* Arts. of Confed'n, art. VI, ¶ 4. Congress enacted the first National Militia Act only four years later. *An Act more effectually to provide for the National Defence by establishing an Uniform Militia throughout the United States*, Act of 8 May 1792, CHAP. XXXIII, 1 Stat. 271.

So, because Congress is constitutionally impotent to do anything with respect to the Militia that is not "necessary and proper" for "organizing, arming, * * * disciplining, * * * and * * * governing" them in relation to the three purposes for which they may be "call[ed] forth" to "be employed in the Service of the United States", nothing rogue Members of Congress might attempt to do outside of that area can preëmpt the States. No "Laws of the United States" can "be made in Pursuance [of the Constitution]" when the Constitution delegates no power to "ma[k]e" such "Laws".

(3) Stated another way, the Constitution has reserved a rather broad ambit of power for the States to exercise with respect to their Militia. "[T]he Militia of the several States" (or of the American Colonies before the latter declared their independence from Great Britain) preëxisted the Constitution. During the entire *pre-*constitutional era, all but one of the Colonies and then all of independent States exercised *exclusive* jurisdiction over their own Militia. Even the precursor to the Constitution, the Articles of Confederation, expressly mandated that "every state shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutred"[4213]—according, moreover, to *each State's own* laws, because the Articles granted no powers to Congress to enact laws for that purpose. The Constitution nowhere explicitly withdrew authority over their Militia from the States, as it did with respect to the States' "keep[ing] Troops, or Ships of War in time of Peace" "without the Consent of Congress".[4214] And the Constitution nowhere granted any authority to Congress to form a "Militia of the United States", as it did with respect to "rais[ing] and support[ing] Armies" and "provid[ing] and maintain[ing] a Navy" which were to be known as "the Army and Navy of the United States".[4215] So the States' reserved powers over "the Militia of the several States" must encompass *every* power capable of being addressed to the Militia, including in certain circumstances even those which the Constitution plainly delegates to the United States.

(a) The Constitution delegates to Congress the power "[t]o provide for organizing, arming, * * * disciplining, * * * and * * * governing" the Militia in relation to the three purposes for which they may be "call[ed] forth". To the extent that Congress exercises this power in a "necessary and proper" fashion, the States must yield. Conversely, each of the States retains the exclusive authority to "organiz[e]", arm[ ], * * * disciplin[e], * * * and * * * govern[ ]" her own Militia in order to provide "homeland security" in situations that do not involve any of the three reasons for which Congress may "provide for calling forth the Militia", should that State consider Congress's action insufficient for her own purposes.

[4213] Arts. of Confed'n art. VI, ¶ 4.

[4214] U.S. Const. art. I, § 10, cl. 3.

[4215] U.S. Const. art. I, § 8, cls. 12 and 13, *and* art. II, § 2, cl. 1.

After all, if the purpose of empowering Congress "[t]o provide for organizing, arming, * * * disciplining, * * * and * * * governing" the Militia in an uniform manner is solely that they may effectively "be employed in the Service of the United States" when called forth collectively, why should individual Militia not also be "organiz[ed], arm[ed], * * * disciplin[ed], * * * and * * * govern[ed]" in such complementary or supplementary fashion as each State might deem necessary for her own particular service? In principle, perhaps, Congress could "provide" different forms of "organizing, arming, * * * disciplining, * * * and * * * governing" the Militia, tailored to the specific needs of each State. In practice, though, such a program would be extraordinarily cumbersome and beset with every debility of bureaucratic "central planning". So why should the Constitution be tortuously misconstrued to deny the States the authority to perform for themselves a necessary task that must overtax, if it does lie entirely beyond, Congress's competence? Certainly no plausible construction of the Constitution could license Congress simultaneously (i) to disallow the States from "keep[ing] Troops, or Ships of War in time of Peace", *and* (ii) to preclude the States from "organizing, arming, * * * disciplining, * * * and * * * governing" their own Militia, *and* (iii) to fail, neglect, or refuse to take any of the latter three actions itself.

The unavoidability of this conclusion appears perhaps most patently in the portion of Congress's power that authorizes it "[t]o provide * * * for governing such Part of the[Militia] *as may be employed in the Service of the United States*". If Congress may provide for governing *only* that "Part" of the Militia "employed in the Service of the United States", *who is to govern the remainder of the Militia at that time, and all of the Militia when they are not so "employed"*? The Constitution itself decrees that it cannot be Congress. Therefore it must be the States, or in the event of the States' default "the people" themselves[4216]—unless the Constitution implicitly commands the absurd result that under those circumstances the Militia (in "Part" or in whole) are not to be "govern[ed]" at all. But such a result the Constitution obviously precludes, when it "reserv[es] to the States respectively, the Appointment of the Officers [of the Militia]",[4217] thereby retaining almost all actual authority of command in the States, because the only officer of the General Government who is simultaneously an "Officer[ ]" in any of "the Militia of the several States" is the President of the United States (and *only* when the Militia are "called into the actual Service of the United States").[4218] Moreover, if when not "employed in the Service of the United States" the Militia must be "govern[ed]" by the States or "the people", for what purposes are they be "govern[ed]"? Plainly, if the Militia are not "employed in the Service of the United States" they will probably not be

[4216] *See* U.S. Const. amends. II and X.

[4217] U.S. Const. art. I, § 8, cl. 16.

[4218] U.S. Const. art. II, § 2, cl. 1.

"execut[ing] the Laws of the Union, suppress[ing] Insurrections [or] repel[ling] Invasions" (although in some circumstances they might be engaged in those activities). Rather, in most cases, they will perform services for their own States in aid of their States' "homeland security"—purposes entirely outside of the powers of Congress which pertain to the Militia. For example,

• The authority each State enjoys "to call[ ] forth [her own] Militia to execute the Laws of [that State], and suppress Insurrections [in that State]", *without the assistance of or interference by the General Government*, is plainly a "power[ ] not * * * prohibited by [the Constitution] to the States", and therefore is "reserved to the States respectively, or to the people".[4219] "A well regulated Militia" in each State is not only an integral part of her own government, but also the organized assembly of her own people in arms—the means through which that State's people exercise their sovereignty directly, by wielding the Power of the Sword themselves. True enough, the Constitution does require that "[t]he United States * * * shall protect each of the[several States] * * * *on Application of the Legislature, or of the Executive (when the Legislature cannot be convened)* against domestic Violence".[4220] So, "domestic Violence" within one State which sought assistance from the United States could be the occasion for the General Government to "call[ ] forth the Militia" from other States in order to "suppress [the] Insurrection[ ]". But, absent an "Application" to the United States, the jurisdiction of each State with respect to "domestic Violence" within her own boundaries (and to the execution of her own laws for the purpose of putting down such "Violence") is exclusive, and the jurisdiction of the General Government in that regard nonexistent.

• The power of the States to "call[ ] forth the[ir own] Militia to "repel Invasions" is even more plainly reserved. The Constitution expressly provides that a State may "engage in War" when "actually invaded, or in such imminent Danger as will not admit of delay".[4221] Suddenly faced with an attack, however, a State may have no "Troops, of Ships of War" at hand, because she had not theretofore received "the Consent of Congress" to "keep [them] * * * in time of Peace".[4222] Therefore, if she is to defend herself, the State must deploy her Militia. To be able to deploy an effective Militia on a moment's notice, though, she must have "organiz[ed], arm[ed], disciplin[ed], * * * and * * * govern[ed]" the Militia beforehand, even without any direction or assistance, and perhaps in the face of resistance, from Congress. So, unless the Constitution is so psychotic a document that it permits the States to be stripped of the very ability to defend themselves when it explicitly allows such defense, Congress can have nothing whatsoever to say

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[4219] U.S. Const. amend. X.

[4220] U.S. Const. art. IV, § 4 (emphasis supplied).

[4221] U.S. Const. art. I, § 10, cl. 3.

[4222] *See* U.S. Const. art. I, § 10, cl. 3.

about any State's maintenance and deployment of her Militia for the purpose of "repel[ling an] Invasion[ ]"—and, by logical extension, for all other purposes relating to her own "homeland security".

In sum, as to all of the matters for which "the Militia of the several States" cannot constitutionally be "call[ed] forth" "in[to] the Service of the United States", and therefore as to which Congress is powerless "[t]o provide for organizing, arming, disciplining, * * * and * * * governing" them, the States may—indeed, must—adopt their own standards, with no fear that the United States might penalize their Militia as institutions or their citizens as individuals for complying with those requirements. Because Congress is constitutionally disabled from enacting any law for regulating any "Part of th[e Militia]" when that "Part" is not "in the Service of the United States", no "Laws of the United States which shall be made in Pursuance [of the Constitution]" can possibly be enacted in that regard—and no such "Laws" being capable of enactment by Congress, "the supreme Law of the Land" as to those matters in each of the several States must be the laws of the individual States themselves, if any laws on the subject are to exist.[4223]

(b) Under certain circumstances, the States are not without authority to "organiz[e], arm[ ], * * * disciplin[e], * * * and * * * govern[ ]" their Militia even for the three constitutional purposes for which Congress may "provide for calling [them] forth", either. The Constitution does not explicitly prohibit the States from "calling forth" their own Militia for those purposes. The Constitution does not explicitly prohibit the States from "organizing, arming, * * * disciplining, * * * and * * * governing" their own Militia so that they could be "call[ed] forth" for those purposes. Indeed, the Constitution imposes no disabilities whatsoever upon the States with respect to these matters, other than: (i) the explicit requirement that the States must "train[ ] the[ir] Militia according to the discipline prescribed by Congress"—which actually "reserv[es] * * * th[at] Authority" to the States in order to guarantee that the Militia *are* "train[ed]";[4224] and (ii) the implicit limitation always applicable to every concurrent power that the States' regulations in those particulars may not interfere with the performance of whatever constitutional regulations Congress may have enacted.[4225] Therefore, each of the States retains the authority to "organiz[e], arm[ ], * * * disciplin[e], * * * and * * * govern[ ]" her own Militia in order: (i) to fill any voids in her Militia's preparedness caused by Congress's failure, neglect, or refusal to "organiz[e], arm[ ], * * * disciplin[e], * * * and * * * govern[ ]" the Militia in complete readiness to be "call[ed] forth" "in the Service of the United States" for any of the three constitutionally designated

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[4223] *Compare* U.S. Const. art. VI, cl. 3 *with* amend. X.

[4224] U.S. Const. art. I, § 8, cl. 16. As is usually the case where the Militia are concerned, this reservation of authority amounts to both a right *and a duty*. *See ante*, at 50-54.

[4225] U.S. Const. art. VI, cls. 2 and 3.

purposes; and (ii) to prepare her Militia to be "call[ed] forth" by the State herself for any of those reasons in the event that Congress fails, neglects, or refuses to do so when such mobilization is necessary.

All of this should be self-evident. In America's legal lexicon, the noun "Militia" means the entirety of the able-bodied adult population, properly organized, armed, trained and otherwise disciplined, and governed—that is, "well regulated"—at all times. By incorporating "the Militia of the several States" into its federal structure, the Constitution presumes that such "Militia"—and, absent an Amendment to the contrary, *only* such "Militia"—will *always* exist under its aegis. The Constitution empowers Congress "[t]o provide for organizing, arming, * * * disciplining, * * * and * * * governing" the Militia, and "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its enumerated "Powers", including the former power. The Second Amendment declares that "[a] well regulated Militia" is "necessary to the security of a free State". Therefore, Congress must exercise its power with respect to the Militia at all times to the fullest extent possible. But what if it does not do so? Surely, maintenance of the federal structure, and especially of the Constitution as "the supreme Law" of "a free State",[4226] cannot for one moment be held hostage to some rogue Congressmen's failure, neglect, or refusal to exercise the powers that, if exercised, would prove sufficient to those ends. So, if such Congressmen, derelict in their constitutional duties, for whatever reason do not "organiz[e], arm[ ], * * * disciplin[e], * * * and * * * govern[ ]" "the Militia of the several States", the States must act individually. Because they must act, they must be constitutionally authorized to act. And if under such circumstances any State's government, derelict in its constitutional duties, for whatever reason does not "organiz[e], arm[ ], * * * disciplin[e], * * * and * * * govern[ ]" that State's Militia, then WE THE PEOPLE themselves in that State must act collectively to redress that deficiency—and because they must act, they too must be constitutionally authorized to act. The existence of which authority, reserved to the States or to THE PEOPLE, the Second and Tenth Amendments verify.

Moreover, the States need not wait to assert their authority in this respect until after a crisis has broken out. For the Constitution "reserv[es] to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress" at *all* times.[4227] Enforcing "th[is] discipline" necessarily includes overseeing matters that relate to "organizing", "arming", and even "governing" the Militia, because effective "training" depends upon having the twin foundations of "organizing" and "arming" properly prepared, and "discipline" maintained through appropriate "govern[ance]". So the States' rôle is not that of merely passive onlookers, but instead that of active administrators of

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[4226] *Compare* U.S. Const. art. VI, cl. 2 *with* amend. II.

[4227] U.S. Const. art. I, § 8, cl. 16.

the Militia, through "the Appointment of the Officers" who conduct the "training". To be fully effective in "training" the Militia, however, the States must enjoy a comprehensive authority to fill in any gaps if Congress fails, neglects, or refuses adequately "[t]o provide for organizing, arming, * * * disciplining, * * * and * * * governing" the Militia. As an integral part of the United States, each State must be critically concerned that "the Laws of the Union" are "execute[d]", "Insurrections" "suppress[ed]", and "Invasions" "repel[led]". Success in these endeavors will depend upon *properly* "organizing, arming, * * * disciplining, * * * and * * * governing" the Militia. If Congress does not exercise the powers the Constitution delegates to it when it ought to do so, or purports to exercise those powers in a slapdash or even an unconstitutional manner—and inasmuch as the Constitution does not flatly prohibit the States from exercising those powers—then upon Congress's default the States may, should, and must exercise them through "the Appointment of the Officers, and the Authority of training the Militia" which the Constitution has "reserv[ed] to the[m]". And precisely because the Constitution explicitly "reserv[es]" these powers to the States, no "Laws of the United States which shall be made in Pursuance [of the Constitution]" can possibly be enacted to preclude their exercise—and no such "Laws" being capable of enactment by Congress, "the supreme Law of the Land" as to those matters in each of the several States must be the laws of the individual States themselves, if any laws on the subject are to exist.[4228]

c. If both Congress and one or more States have each enacted otherwise valid laws with respect to the Militia, in most cases the laws of Congress can preëmpt the laws of the States only when the execution of the latter interferes to too great a degree with the execution of the former. For "[i]t is not the mere existence of the power [of Congress], but its *exercise*, which is incompatible with the *exercise* of the same power by the states".[4229] In those circumstances, the States' laws will be inoperative, but only to the extent of the conflict. As Justice Joseph Story summarized the situation,

> Congress have power to provide for organizing, arming, and disciplining the militia; but if Congress should make no such provision, there seems no reason why the States may not organize, arm, and discipline their own militia. No necessary incompatibility would exist in the nature of the power, though, when exercised by Congress, the authority of the States must necessarily yield. And here the argument from inconvenience would be very persuasive the other way. For the power to organize, arm, and discipline the militia, in the absence of congressional legislation, would seem indispensable for the defence and security of the State. Again,

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[4228] *Compare* U.S. Const. art. VI, cls. 2 and 3 *with* amend. X.

[4229] Sturges v. Crowninshield, 17 U.S. (4 Wheaton) 122, 196 (1819) (emphasis supplied).

> Congress have power to call forth the militia to execute the laws of the Union, to suppress insurrections, and repel invasions. But there does not seem any incompatibility in the States calling out their own militia as auxiliaries for the same purpose.[4230]

Thus—

• If Congress has adequately provided for "organizing, arming, and disciplining, the Militia" so that they may effectively "execute the Laws of the Union, suppress Insurrections and repel Invasions" when "call[ed] forth" for one or more of those purposes,[4231] the States may interpolate some useful additions, but not interject incompatible elements into or otherwise interfere with the Congressional scheme. *When Congress has done next to everything, the States may do next to nothing.*

• Whether or not Congress has adequately provided for "organizing, arming, and disciplining, the Militia" in order to perform any or all of the three constitutional functions, the States may enact whatever legislation they determine to be appropriate for regulating their own Militia for the purpose of providing "homeland security" (other than any of the three constitutional functions) exclusively within their own territories—so long as these preparations do not in fact interfere with "calling forth" the Militia to "be employed in the Service of the United States" for those functions. *When Congress can do nothing, the States may do everything.* And,

• If Congress has not adequately provided for "organizing, arming, and disciplining, the Militia" in order to perform any of the three constitutional functions, the States may do so, to whatever degree they are able. *When Congress has done nothing, the States may do everything.*

The third of these possibilities reflects the situation today. Congress has not enacted a proper Militia statute. As of this writing, the only statute purporting to deal with the Militia provides as follows:

> (a) The militia of the United States consists of all able-bodied males at least 17 years of age and * * * under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are members of the National Guard.
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> (b) The classes of the militia are—
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> (1) the organized militia, which consists of the National Guard and the Naval Militia; and

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[4230] *Commentaries on the Constitution of the United States, ante* note 576, Volume 1, § 445, at 340 (footnotes omitted).

[4231] *See* U.S. Const. art. I, § 8, cls. 15 and 16.

> (2) the unorganized militia, which consists of the members of the militia who are not members of the National Guard or the Naval Militia.[4232]

If this were treated as a "militia" statute, insoluble constitutional problems would arise.

First, constitutionally, no such thing as "the militia *of the United States*" exists. The only "Militia" the Constitution recognizes are "the Militia *of the several States*".

Second, "the organized militia, which consists of the National Guard",[4233] does not fit the constitutional pattern for a "Militia", "well regulated" or not. (i) A true "Militia" is based upon near-universal, essentially lifetime enrollment of a fully compulsory nature.[4234] The National Guard, conversely, is an establishment composed entirely of volunteers for limited periods of service:

> The National Guard of each State * * * shall consist of members of the militia voluntarily enlisted therein, who upon original enlistment shall be not less than eighteen nor more than forty-five years of age, * * * organized, armed, equipped, and federally recognized * * * .
>
> The National Guard of the United States * * * shall be a reserve component of the Army of the United States and shall consist of those federally recognized National Guard units * * * appointed, enlisted and appointed, or enlisted, as the case may be, in the National Guard of the United States * * * : *Provided,* That the members of the National Guard of the United States shall not be in the active service of the United States except when ordered thereto in accordance with law, and, in time of peace, they shall be administered, armed, uniformed, equipped, and trained in their status as the National Guard of the several States * * * .
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> * * * * *
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> * * * Original enlistments in the National Guard and in the National Guard of the United States shall be for a period of three years, and subsequent enlistments for periods of one or three years each * * * .
>
> * * * Men enlisting in the National Guard of the several States * * * , and in the National Guard of the United States, shall sign an enlistment contract and subscribe to the following oath or affirmation:
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> "I do hereby acknowledge to have voluntarily enlisted * * * as a soldier in the National Guard of the United States and the State of ------

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[4232] 10 U.S.C. § 311.

[4233] For simplicity of analysis, consideration of the Naval Militia will be put to one side. Anyone who cares to perform the task, however, will arrive at the same conclusion applicable to the National Guard.

[4234] *See ante*, Chapters 5, 10, 16, and 35.

> * * * for the period of three (or one) year--, under the conditions prescribed by law, unless sooner discharged by proper authority.["][4235]

(ii) "[T]he Militia of the several States" are separate from and independent of "the Army and Navy of the United States".[4236] The National Guard, conversely, is part of the Army: "[T]he Army of the United States shall consist of the Regular Army, the National Guard of the United States, [and] the National Guard while in the service of the United States".[4237] (iii) "[T]he Militia of the several States" may be "call[ed] forth" to be "employed the Service of the United States" for three constitutional purposes only,[4238] none of which exposes them to being impressed into the regular Armed Forces.[4239] The National Guard, conversely, may be called into service *within (not just alongside)* the Army, for duty both at home and overseas, at almost any time and for almost any reason:

> When Congress shall have declared a national emergency and shall have authorized the use of armed land forces of the United States for any purpose requiring the use of troops in excess of those of the Regular Army, the President may * * * order into the active military service of the United States, to serve therein for the period of the war or emergency, unless sooner relieved, any or all units and the members thereof of the National Guard of the United States. All persons so ordered into the active military service of the United States shall from the date of such order stand relieved from duty in the National Guard of their respective States * * * so long as they shall remain in the active military service of the United States, and during such time shall be subject to such laws and regulations for the government of the Army of the United States as may be applicable to members of the Army whose permanent retention in active military service is not contemplated by law.[4240]

Third, the Constitution recognizes no such thing as an "*unorganized* militia", for the very good reason that, by definition, no such thing as an "*un*organized militia" can exist. Throughout the *pre-*constitutional era, *complete* organization of those individuals eligible for Militia service was a fundamental principle of what the

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[4235] AN ACT To amend the National Defense Act of June 3, 1916, as amended, Act of 15 June 1933, CHAPTER 87, §§ 5, 7, and 8, 48 Stat. 153, 155-157. This statute (rather than later versions) is cited for the historical reason that it more or less completed the evolution of the basic structure of the National Guard. *See ante*, at 786-793 and 1809-1811.

[4236] *E.g.,* U.S. Const. art. II, § 2, cl. 1; *and contrast* U.S. Const. art. I, § 8, cls. 12, 13, and 14 *with* cls. 15 and 16.

[4237] Act of 15 June 1933, § 1, 48 Stat. at 153.

[4238] U.S. Const. art. I, § 8, cls. 15 and 16.

[4239] *See ante*, Chapter 49.

[4240] Act of 15 June 1933, § 18, 48 Stat. at 160.

Second Amendment came to denote as "[a] well regulated Militia".[4241] In keeping with this legal history, the Constitution delegates to Congress the power "[t]o provide for organizing * * * the Militia",[4242] *not* for requiring that they remain "[un]organiz[ed]". For "[t]he doing of one thing that is authorized cannot be made the source of an authority to do another thing which there is no power to do".[4243] In the terms of the Tenth Amendment, precisely because the power to organize the Militia *is* delegated to Congress, "[t]he power[to leave the Militia unorganized is] *not* delegated to the United States".

Therefore, if Congress's present "militia" statute is a "militia" statute it is unconstitutional. That, however, is an unacceptable conclusion, because every statute of Congress should be so construed as to be constitutional, if such a construction is fairly possible.[4244] In fact, such a constitutional construction *is* possible, if the National Guard and the Naval Militia are recognized, not as "militia" of any sort, but instead as the "Troops, or Ships of War" which the States may "keep * * * in time of Peace" "with[ ] the Consent of Congress".[4245] Under that construction, "the unorganized militia" becomes merely a clumsy and inaccurate designation for all of those individuals who, although eligible by dint of age for enlistment in the National Guard or the Naval Militia, have not enlisted—that is, those individuals who remain "unorganized" *with respect to the National Guard and the Naval Militia*. So read, the statute is silent as to whether those individuals might be "organized" or "unorganized" *with respect to "the Militia of the several States"*.

As this is the *only* statute on the subject of the Militia which Congress has enacted, on either construction of it *no* true Militia law of Congress now exists. Thus, there being *no actual exercise* of the powers of Congress that could preëmpt the States, and inasmuch as no laws they might enact could possibly interfere with a *nonexistent* Congressional statute, they are entirely free to revitalize their Militia according to constitutional principles just as they see fit—indeed, they are *required* to do *something*, so that "the Militia *of the several States*" will be in existence as "*well regulated* Militia". Plainly enough, any new State laws on this subject could not prevent Congress from subsequently enacting its own constitutional statute revitalizing the Militia specifically for "the Service of the United States". To the contrary: As more and more States enacted their own Militia laws, Congress would come under increasing pressure to promulgate an uniform National Militia code

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[4241] *See ante,* Chapters 5, 10, 16, 21, and 34.

[4242] U.S. Const. art. I, § 8, cl. 16.

[4243] Wilson v. New, 243 U.S. 332, 345 (1917).

[4244] *See, e.g.,* Crowell v. Benson, 285 U.S. 22, 62 (1932); National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U.S. 1, 30 (1937); Lynch v. Overholser, 369 U.S. 705, 710-711 (1962); United States v. Thirty-seven (37) Photographs, 402 U.S. 363, 369 (1971).

[4245] *See* U.S. Const. art. I, § 10, cl. 3. *See ante*, at 786-792 and 1809-1811.

that could harmonize the inconsistences likely to have arisen among the States' laws. And to the extent that any previously enacted State laws seriously conflicted with whatever statute Congress eventually passed, the States' laws would simply have to yield.

Interestingly enough, if Congress's statute providing for "the organized militia" (the National Guard and the Naval Militia) and "the unorganized militia" (every eligible individual not enlisted in either of those establishments) is construed in a constitutional fashion—and if "[c]onstitutional provisions should be interpreted with the expectation that Congress will discharge its duties",[4246] because "elected representatives, like other citizens, know the law"[4247] and therefore should be expected to enact legislation, or to refrain from enacting it, with their constitutional powers and disabilities in mind[4248]—the very fact that Congress has not "organiz[ed], arm[ed], [or] disciplin[ed], the Militia" at all should be taken as tacit encouragement to the States to regulate their own Militia on their own initiatives on their own terms. Presumably, after all, the Members of Congress know that *complete* "organiz[ation]" of the Militia *in their entireties* is the constitutional norm—and that if Congress does not "organiz[e]" the Militia, the States must.

Similarly, the Members of Congress ought to know that properly "arming" the Militia requires every eligible individual (other than conscientious objectors) to acquire and maintain personal possession of at least one firearm, with sufficient ammunition and accoutrements, suitable for Militia service.[4249] They also should know that their power "[t]o provide for * * * arming" the Militia cannot possibly include a power "[t]o provide for * * * [dis]arming" them,[4250] because "[t]he doing of one thing that is authorized cannot be made the source of an authority to do another thing which there is no power to do".[4251] In the terms of the Tenth Amendment, precisely because the power to "arm[ ]" the Militia *is* delegated to Congress, "[t]he power[to disarm the Militia is] *not* delegated to the United States". Yet, by not "arming" the Militia itself, Congress has not necessarily violated the Constitution. For, by doing nothing, Congress has in effect "provid[ed]" *sotto voce* for this task to be accomplished by the States, or by WE THE PEOPLE themselves through the free market, or by both in some coöperative fashion. The possible objection that the statutes mandating one or another form of "gun control" which Congress has promulgated over the years do not facilitate, or in some particulars even allow, THE PEOPLE to arm themselves in the manner most conducive to

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[4246] Myers v. United States, 272 U.S. 52, 183 (1926) (McReynolds, J., dissenting).

[4247] Cannon v. University of Chicago, 441 U.S. 677, 696-697 (1979).

[4248] *See* Albernaz v. United States, 450 U.S. 333, 341-342 (1981).

[4249] *See ante,* Chapters 6, 7, 8, 9, 17, 18, 19, 20, 38, 39, and 40.

[4250] *See* U.S. Const. art. I, § 8, cl. 16.

[4251] Wilson v. New, 243 U.S. 332, 345 (1917).

fielding "[a] well regulated Militia" (such as with fully automatic rifles) is not well taken. For, if the States actively participated in "arming" the Militia, most Congressional "gun control" would become irrelevant, because such statutes usually contain (as constitutionally they must) explicit exceptions for armed State establishments.[4252]

And, of course, each of the States could initiate the process of revitalizing their Militia by creating a separate corps of Militia "Officers", because the Constitution expressly "reserv[es] to the States respectively, the Appointment of the Officers".[4253] Inasmuch as Congress has been delegated no power whatsoever over "the Appointment of the Officers" (including even the President, whom the Constitution appoints as "Commander in Chief"), no purported statute it might enact on this subject would be "made in Pursuance [of the Constitution]" and could constitute "the supreme Law of the Land * * * , any Thing in the Constitution or Laws of any State to the Contrary notwithstanding".[4254] Such a statute would be no "law" at all—it would "confer[ ] no rights", would "impose[ ] no duties", and "in legal contemplation[would be] as inoperative as though it had never been passed".[4255] Thus, that the Constitution "reserv[es] to the States respectively, the Appointment of the Officers" in and of itself proves that Congress *must* "organiz[e]" and "arm[ ]" the Militia for the three constitutional purposes in fulfillment of which they may be "employed in the Service of the United States", and *must* allow each of the States to "organiz[e]" and "arm[ ]" her own Militia for all other possible purposes of "homeland security" (and for the three constitutional purposes as well, in the event that Congress defaults in that particular). For "Appointment of the

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[4252] *See* An Act To control crime ("Crime Control Act of 1990"), Act of 29 November 1990, Pub. L. 101-647, TITLE XVII—GENERAL PROVISIONS, § 1702(b)(1) [§ 922(q)(1)(B)(vi)], 104 Stat. 4789, 4844 (dealing with "gun-free schools"); An Act To amend chapter 44 (relating to firearms) of title 18, United States Code, and for other purposes ("Firearms Owners' Protection Act"), Act of 19 May 1986, Pub. L. 99-308, § 102(9) [§ 922(o)(2)(A)], 100 Stat. 449, 452-453 (dealing with transfers and possession of machine guns); AN ACT To amend title 18, United States Code, to provide for better control of the interstate traffic in firearms ("Gun Control Act of 1968"), Act of 21 October 1968, Pub. L. 90-618, TITLE I—STATE FIREARMS CONTROL ASSISTANCE, § 102 [§ 925(a)(1)], *and* TITLE II—MACHINE GUNS, DESTRUCTIVE DEVICES, AND CERTAIN OTHER FIREARMS, § 201 [§ 5833], 82 Stat. 1213, 1224, 1233-1234; AN ACT To assist State and local governments in reducing the incidence of crime, to increase the effectiveness, fairness, and coordination of law enforcement and criminal justice systems at all levels of government, and for other purposes ("Omnibus Crime Control and Safe Streets Act of 1968"), Act of 19 June 1968, Pub. L. 90-351, TITLE IV—STATE FIREARMS CONTROL ASSISTANCE, § 902 [§ 925(a)], 82 Stat. 197, 233; AN ACT To regulate commerce in firearms, Act of 30 June 1938 ("Federal Firearms Act"), CHAPTER 850, § 4(2) and (3), 52 Stat. 1250, 1252; AN ACT To provide for the taxation of manufacturers, importers, and dealers in certain firearms and machine guns, to tax the sale or other disposal of such weapons, and to restrict importation and regulate interstate transportation thereof ("National Firearms Act"), Act of 26 June 1934, CHAPTER 757, § 13(1), 48 Stat. 1236, 1240; An Act Declaring pistols, revolvers, and other firearms capable of being concealed on the person nonmailable and providing penalty, Act of 8 February 1927, CHAP. 75, 44 Stat. 1059, 1059.

[4253] U.S. Const. art. I, § 8, cl. 16.

[4254] U.S. Const. art. VI, cl. 2.

[4255] Norton v. Shelby County, 118 U.S. 425, 442 (1886). *Accord*, Poindexter v. Greenhow, 114 U.S. 270, 288 (1885); Huntington v. Worthen, 120 U.S. 97, 101-102 (1887).

Officers" would be useless if Militiamen were not to be enlisted to serve under them; enlistment of Militiamen would be pointless if they were not to be "organiz[ed]" in "well regulated Militia"; even "organiz[ed]" Militia would not be "well regulated" if they were not "arm[ed]"; and the declaration that "[a] well regulated Militia" is "necessary to the security of a free State"[4256] would be absurd if Congress could refuse to "organiz[e]" and "arm[ ]" the Militia itself and could prevent the States as well from "organizing" and "arming" them. The Constitution, however, does not authorize futility or countenance absurdity.

B. Prescription no basis for preventing revitalization of the Militia. Because, under the circumstances prevailing today, opponents of revitalization of the Militia will not be able to make out a credible case of preëmption, they will fall back on the even less plausible claim of "prescription". Although American constitutional law recognizes no doctrine explicitly denoted "prescription", that is the most descriptive term for what is involved here. In general, "prescription" denotes the theory that particular rights, although once recognized, may nonetheless be lost by serial failures, neglects, or refusals to enforce or claim them over some extensive period of time, or that rights never theretofore recognized may nevertheless be set up by a more or less continuous enforcement of them over some period of time through the exercise of powers that logically relate to them, notwithstanding that those powers may never have been considered legal either.[4257] The contention will be that the Constitution no longer permits revitalization of the Militia according to the principles of the *pre-*constitutional Militia Acts—that is, according to its "original intent"—because: (i) WE THE PEOPLE have left the Militia in a state of virtual nonexistence for so long (at least since 1903[4258]) that it is now "too late" for them to assert any right or power to revitalize the Militia. And (ii) through operation of "the living Constitution"—that is, through reinterpretations and reconstructions of the Constitution implicit in various statutes public officials have enacted over the years—Militia of the *pre-*constitutional type, "the Militia of the several States" which the Second Amendment recognizes as "well regulated Militia", have been permanently supplanted by a new, more relevant form of "militia" called "the militia of the United States" (the National Guard and the Naval Militia). Neither of these claims can withstand analysis, however.

1. WE THE PEOPLE'S failure to assert their rights no barrier to revitalization of the Militia. The theory that it is "too late" to revitalize the Militia is not based upon the supposition that revitalization would be impossible in practice,

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[4256] U.S. Const. amend. II.

[4257] *See, e.g., Webster's New International Dictionary, ante* note 330, at 1954, definition 4.b; *Webster's Third New International Dictionary, ante* note 330, at 1792, definition 2.b.

[4258] *See* An Act To promote the efficiency of the militia, and for other purposes, Act of 21 January 1903, CHAP. 196, 32 Stat. 775. *See ante,* at 786-793 and 1809-1811.

but instead upon an alleged legal impediment which renders revitalization impossible in principle: namely, that WE THE PEOPLE have permanently forfeited the constitutional right to "[a] well regulated Militia" by what lawyers' call "non-user".

Perhaps the simplest rejoinder to the charge of "non-user" is that it cannot be leveled exclusively at THE PEOPLE. *Who*, after all, *is* closely following the Constitution these days? Not Congress, which has invented "the militia of the United States", "the organized militia", "the unorganized militia", and all sorts of "gun controls" wholly incompatible with, if not utterly inimical to, "the right of the people to keep and bear Arms" in "well regulated Militia".[4259] Not any President in living memory—for, although each of them has been "the Commander in Chief * * * of the Militia of the several States, when called into the actual Service of the United States",[4260] apparently none of them has had any conception of what "the Militia of the several States" are (or acted on such a conception if he entertained it). Not the States, which not only have gone along with most everything Congress has done, but also in many instances have invented numerous abusive "gun controls" of their own. And not even the millions of private citizens who own firearms and belong to organizations that claim to defend and promote the Second Amendment. To be sure, by arming themselves these individuals are implementing the Constitution with respect to the Militia, albeit perhaps only unconsciously and in a primitive fashion. Yet even they have fallen for the party line that the National Guard is the present-day "militia"—otherwise, they would be demanding proper organization and training of "the body of the people" under governmental auspices in every State.[4261] If THE PEOPLE'S "non-user" of the Constitution through their inadvertence provides a reason to reject revitalization of "the Militia of the several States", then public officials' "non-user" of the Constitution through their malignant intent supplies an equally valid reason to repudiate "the militia of the United States" as the legitimate successor to "the Militia of the several States".

WE THE PEOPLE need not rely on the retort *tu quoque* leveled against public officials, however, because they have rights, powers, *and especially duties* unique to themselves that are not possibly subject to being emasculated or even enervated on a claim of "non-user". It is generally true that "[a] default in exercising a duty may not be resorted to as a reason for denying its existence".[4262] If, that is, such a duty actually exists; for the failure to exercise a duty over a long period of time can provide evidence that no such duty was ever thought to exist.[4263] As the

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[4259] *Contrast* 10 U.S.C. § 311 *with* U.S. Const. amend. II.

[4260] U.S. Const. art. II, § 2, cl. 1.

[4261] *See* Virginia Declaration of Rights (1776) art. 13.

[4262] Selective Draft Law Cases, 245 U.S. 366, 381 (1918).

[4263] *See, e.g.*, Federal Power Commission v. Panhandle Eastern Pipe Line Company, 337 U.S. 498, 513 & note 20 (1949); Printz v. United States, 521 U.S. 898, 905, 907-910 (1997).

Declaration of Independence makes clear, though, there can be no question that "*whenever* any Form of Government becomes destructive of the[ ] ends" of a proper "Government", "the People" *always* retain and may *always* exercise "the Right to alter or to abolish it, and to institute new Government"; and that *whenever* "a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government".[4264] And if "the People" *always* retain "the Right to alter or to abolish" and the "right" and "duty" to "throw off" "*any* Form of Government" *in toto*, then they must also *always* retain the lesser-included right and duty to resurrect their particular "Form of Government" from ruination and to restore it to rectitude.[4265] Now, the existence of "*a long train* of abuses and usurpations" implies that "the People" have done little or nothing to exercise their "right" and to fulfill their "duty" for a substantial length of time, but instead have followed the dictate of "Prudence * * * that Governments long established should not be changed for light and transient causes", and thus have provided more evidence "that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed".[4266] But they are not thereby estopped from taking remedial action when passivity becomes no longer prudent because evils have become no longer sufferable. They may (and perhaps should) wait even until that moment at which they finally recognize beyond any reasonable doubt "a design to reduce them under absolute Despotism", without thereby waiving their right and duty to take matters into their own hands at that juncture. ***And the very last individuals who should be suffered even to suggest the defense of "non-user" against "the People" are the very rogue public officials whose serial malfeasances have finally made it unavoidable that the "Form of Government" which they themselves have maladministered should be "alter[ed]", "abolish[ed]", or "throw[n] off".***

Moreover, even were it conceivable for THE PEOPLE to have waived their rights under "the Laws of Nature and of Nature's God" as to the Militia (or any other subject, for that matter) by "non-user" in principle, what evidence is available to prove that such has actually been the case in practice? In constitutional law—and certainly under "the Laws of Nature and of Nature's God"—"for a waiver to be effective, it must be clearly established that there was 'an intentional relinquishment or abandonment of a known right or privilege'" in fact.[4267] One can never blithely "presume acquiescence in the loss of fundamental rights".[4268] Rather,

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[4264] Declaration of Independence (emphasis supplied).

[4265] *See ante*, Chapter 32.

[4266] Declaration of Independence.

[4267] Brookhart v. Janis, 384 U.S. 1, 4 (1966), *quoting from* Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

[4268] Ohio Bell Telephone Company v. Public Utilities Commission, 301 U.S. 292, 307 (1937).

"every reasonable presumption should be indulged against [a] waiver".[4269] A "heavy burden rests on [public officials]" and "high standards of proof" are required "to demonstrate that [any individuals, let alone the entire PEOPLE, have] knowingly and intelligently waived" their constitutional rights.[4270] A finding of waiver requires conclusive evidence of both "warning" and "consent".[4271] "First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice, rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances * * * ' reveals both an uncoerced choice and the requisite level of comprehension" may one conclude that a constitutional right has been waived.[4272] Even that an individual is "an experienced attorney" who should know the consequence of not asserting his rights in a timely fashion is "by no means conclusive" on the issue of waiver.[4273]

So, what is "the totality of the circumstances" with respect to WE THE PEOPLE'S supposed acquiescence in rogue public officials' effective suppression of "the Militia of the several States"? On the face of it, no "intentional relinquishment or abandonment of a known right or privilege" can be found. If THE PEOPLE ever intended to eliminate their Militia in an unequivocally constitutional fashion, they would have amended the Constitution so as to license Congress to organize "the militia of the United States" and to consign everyone else to some sort of "unorganized militia", or to eliminate "the Militia of the several States" and "the right of the people to keep and bear Arms" entirely. No such Amendment, though, has ever been ratified. No such Amendment has ever been proposed. No National public debate or discussion has ever been conducted as to whether such an Amendment should even be offered. And, in any event, *no such Amendment, whatever its effect might be within and on the Constitution, could possibly foreclose THE PEOPLE in the future from revitalizing and deploying their Militia under the aegis of the Declaration of Independence*. For "all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety".[4274]

[4269] Hodges v. Easton, 106 U.S. 408, 412 (1882). *Accord*, Aetna Insurance Company v. Kennedy to Use of Bogash, 301 U.S. 389, 393 (1937); Johnson v. Zerbst, 304 U.S. 458, 464 (1938); Glasser v. United States, 315 U.S. 60, 71 (1942); Brookhart v. Janis, 384 U.S. 1, 4 (1966).

[4270] Miranda v. Arizona, 384 U.S. 436, 475 (1966).

[4271] Ohio Bell Telephone Company v. Public Utilities Commission, 301 U.S. 292, 307 (1937).

[4272] Moran v. Burbine, 475 U.S. 412, 421 (1986).

[4273] Glasser v. United States, 315 U.S. 60, 71 (1942).

[4274] Virginia Declaration of Rights (1776) art. 1.

It might be objected that no actual Amendment of the Constitution was ever necessary, because THE PEOPLE'S "representatives" were always empowered "[t]o provide for organizing * * * the Militia" by statute;[4275] and they did so, perhaps in some little excess of their authority in the beginning, but nonetheless openly and persistently, in statute after statute, for over more than a century from 1903 until today.[4276] In the tortuous course of events leading to the present state of affairs, though, did *any* of those public officials *ever* provide THE PEOPLE with *adequate* "warning" as to the gravity of the situation, and seek their *informed* "consent" as to *any* aspect of this matter? Was THE PEOPLE'S supposed "waiver * * * made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it"? As the legislation from 1903 onwards was being enacted, did public officials *ever* remind THE PEOPLE "[t]hat a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state; that standing armies, in time of peace, should be avoided, as dangerous to liberty; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power"?[4277] Did public officials *ever* explain to THE PEOPLE exactly what "the Militia of the several States" and "well regulated Militia" are—how they should be "organiz[ed], arm[ed], and disciplin[ed]"—why they should always be strictly differentiated from "the Army and Navy of the United States" and the "Troops, or Ships of War" that the States may "keep"—and that "the Militia of the several States" can never be incorporated within or subordinated to "the Army and Navy"? Did public officials *ever* make even a cursory attempt to show that "the militia of the United States", "the unorganized militia", and the incorporation of "the organized militia" into "the Army and Navy of the United States" were consistent with, or at least not antagonistic to, constitutional principles? On the other hand, have public officials *ever* warned THE PEOPLE that, as a result of the sequence of statutes from 1903, many of their most valuable rights, powers, privileges, and immunities *have* been "abandoned"—and what the nature and significance of that abandonment are? Namely, that these statutes have brought about, facilitated, and encouraged: (i) wholesale attacks and inroads on "the right of the people to keep and bear Arms", both as individuals and collectively in "the Militia of the several States"; (ii) the establishment of a permanent "standing army" within a vast "military-industrial complex"; (iii) the entanglement of the United States in foreign military alliances and so-called "special relationships", adventures, imperialism, and aggression; (iv) the step-by-step erection within this country of a National *para*-military police-state apparatus; and, overall, (v) the systematic elimination of the "checks and balances" that are

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[4275] *See* U.S. Const. art. I, § 8, cls. 16 and 18.

[4276] *See ante*, at 786-793 and 1809-1811.

[4277] Virginia Declaration of Rights (1776) art. 13.

"necessary to the security of a free State".[4278] *None* of this has ever been laid before the American people. And for the worst of reasons: Instead of promoting "well regulated militia, composed of the body of the people, trained to arms", officials have imposed "the unorganized militia" and pervasive "gun controls" on THE PEOPLE. Instead of "avoid[ing]" "standing armies, in time of peace, * * * as dangerous to liberty", officials have made such "armies" permanent, ensconced them within a huge "military-industrial complex", and subsumed "the organized militia" within them. And instead of maintaining "the military * * * under strict subordination to, and governed by, the civil power", officials are now preparing "the standing army", with the aid of "the organized militia" and *para*-military auxiliaries drawn from ostensibly "civilian" law-enforcement agencies at every level of the federal system, to impose "martial law" on the entire country in the event of a major economic and political crisis arising out of those very officials' wrongdoing.[4279]

Are contemporary Americans supposed to believe that their forebears affirmatively agreed to license politicians to excise from their country's laws every one of the principles of popular participation in the Militia and popular control of "standing armies" on which this country was founded, and to substitute those principles' very opposites without a nationwide political debate? And are contemporary Americans supposed to believe that the present situation derived from THE PEOPLE'S "free and deliberate choice", based upon "the requisite level of comprehension" of what public officials really proposed and what the likely (and now fully proven) consequences of adopting those proposals would be—that, in short, THE PEOPLE, fully aware of all of the relevant facts and other considerations, actually decided to substitute (or to take the chance of substituting) "a[n un]free state" for "a free state" throughout the United States? Or is it more plausible to conclude that these events were engineered through political "deception"? The gullery of "bait and switch"—enacting a series of statutes that, step by step, substituted "the militia of the United States" for "the Militia of the several States", so that the latter could be effectively eliminated, without arousing too much public suspicion, by transferring the color of its constitutional title to the former. The imposture that the National Guard and the Naval Militia constitute some sort of "organized militia", when in fact they are the "Troops, or Ships of War" which the States may "keep" "with[ ] the Consent of Congress" on the condition that they be made available for service within "the Army and Navy of the United States" at essentially any time. The pretense that everyone eligible for the Militia but not enlisted in the "organized militia" can be consigned to "the unorganized militia", in which no one does anything related to a "militia"—so that "the unorganized militia" is not conceivably a part of any "well regulated militia", because it is not "regulated"

[4278] *See* U.S. Const. amend. II.

[4279] *See ante*, Chapter 48.

at all; indeed, is nothing more than a standing self-contradiction. And all of this concocted to serve the ends of various special interests.[4280]

Are WE THE PEOPLE'S disloyal, duplicitous, or simply dopey "representatives" to be exonerated—and THE PEOPLE inculpated—on the grounds that THE PEOPLE did not sufficiently suspect their "representatives" of stupidity and double-dealing, did not supervise and even investigate them closely enough, did not expose and broadcast their errors immediately upon discovery, did not "assemble * * * and * * * petition the Government for a redress of grievances" *en masse*,[4281] and did not remove the worst offenders from office at the earliest possible opportunity? Admittedly, self-government implies a duty of oversight. But vanishingly few among WE THE PEOPLE, unfortunately, are (or ever will be) constitutional scholars. So, in the first instance, common Americans without such knowledge not only have to rely on public officials *but are fully entitled to do so.* For all public officials "shall be bound by Oath or Affirmation, to support th[e] Constitution",[4282] which "Oath or Affirmation" implicitly affirms that, to the fullest degree necessary "to *support* th[e] Constitution", they understand what the Constitution means and will do whatever it requires—without being constantly investigated, prodded, reproved, and reminded of their exposure to electoral defeat by their constituents. Yet, in the case of the effective replacement of "the Militia of the several States" by "the militia of the United States", WE THE PEOPLE'S "representatives" were all guilty, to one degree or another, of sloth, insouciance, incompetence, carelessness, charlatanism, reckless disregard of the truth, willful blindness, knowing falsehoods, suppression of evidence, duplicity, and above all the malignant ambition that overlooks or even accepts harm to the Nation as the price of personal advancement. So public officials' serial violations of their legal duty "to support th[e] Constitution" with respect to the Militia absolves THE PEOPLE of whatever dereliction of political duty may be laid at their doorstep for not intervening decisively before now.

2. Rogue public officials' long-time suppression of the Militia no barrier to their revitalization. The other side of the theory that it is "too late" to revitalize the Militia rests upon the supposition that revitalization is precluded, not so much because of any failure on the part of THE PEOPLE, as because of the success of "the adverse possessors" of the new legal dispensation—that is, the rogue public officials who have violated the Constitution for so long that they have somehow "gotten away with it", not only in the past but also in the present and for the future as well. For too long, Americans have been told—and all too many have come to believe—that "[i]t is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which

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[4280] *See* B. Stentiford, *The American Home Guard, ante* note 1058, Chapter 1.

[4281] U.S. Const. amend. I.

[4282] U.S. Const. art. VI, cl. 3.

life has written upon them"[4283]—the "gloss" being what rogue public officials have done quite *outside* "the words of the Constitution".

a. But "confin[ing] constitutional law * * * to the words of the Constitution" is "inadmissibly narrow" *to whom* and *for what purpose*? Why, to the very rogue officials who want: (i) to exercise powers "the words of the Constitution" do *not* delegate to the United States; (ii) to withhold from the States powers "the words of the Constitution" do not prohibit to them; and (iii) to deny to "the people" powers "the words of the Constitution" reserve to them.[4284] So the purveyors of this theory come into the court of public opinion with decidedly "unclean hands". For their ultimate goal is, not to determine what the Constitution actually means by dint of what it says, and to apply it according to that meaning and only to that meaning, but instead to impose upon it a *different* meaning altogether—a meaning derived from what they have actually done in defiance of the Constitution under the deceptive color of their offices. The meaning of the Constitution's words no longer determines public officials' actions; rather, their actions determine the meaning of the Constitution's words. In the legal equation, the constant (the Constitution) has been transmogrified into the dependent variable, and the original dependent variable (public officials' actions) has been turned into the independent variable which supplants any and every constant. Self-evidently, if usurpation can be rationalized *ex post facto* by changing the meaning of the Constitution to fit the facts of the usurpation, then no limit exists to what can be twisted within, inserted into, or excised from the Constitution. Anything from simpleminded error to the grossest calculated criminality can claim legitimacy as "the gloss which life * * * writ[es] upon the[words of the Constitution]" in supposedly indelible ink.

b. The notion that "[i]t is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them" is, in fact, not a principle of *American* constitutional law at all, but instead is the way the *British* "constitution" has always muddled along the tortuous path of "political might makes legal right"—that, for example, the King's successful assertion of some new claim of prerogative thereafter expanded his "constitutional" authority to the extent of that claim; or Parliament's successful assertion of some new discretion to constrain the King's prerogative (or even to depose the King from his throne altogether), thereafter expanded Parliament's "constitutional" power and diminished the King's "constitutional" prerogative to that degree (or even threatened his continued royalty). Thus, application of that notion effectively substitutes the British "constitution" for America's Constitution, thereby overthrowing not only the Constitution but also the Declaration of Independence.

[4283] Youngstown Sheet & Tube Company v. Sawyer, 343 U.S. 579, 610 ((1952) (Frankfurter, J., concurring).

[4284] *See* U.S. Const. amend. X.

"To prove" that "[t]he history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States", the Declaration "let Facts be submitted to a candid world". The "Facts" it then catalogued were marshaled to present a dark litany of "Oppressions"—which certainly was an accurate characterization of the situation, *if* the British "constitution" had been required to conform to some "higher law". Patriotic Americans believed that such a body of law existed: namely, "the Laws of Nature and of Nature's God". The British Establishment disputed the matter, or at least denied that "the Laws of Nature and of Nature's God" should be applied to their "Form of Government" in relation to its dealings with the Colonies in the manner the Colonists urged. This dispute was not amenable to compromise, at least not on the side of the patriots—for had they conceded that the British "constitution" was not subject to "the Laws of Nature and of Nature's God", or that the application of those "Laws" to that "constitution" depended upon something as politically protean as "the gloss which life has written", they would have been compelled by intellectual honesty to concede that the "Oppressions" they excoriated could all be explained away as perhaps impolitic but nonetheless legally proper interpretations and implementations of the British "constitution" by their rightful governors. So the patriots had no choice (as the Declaration concluded) other than to assert the "Right * * * to be Free and Independent States", to absolve themselves "from all Allegiance to the British Crown", and to dissolve "all political connection between them[selves] and the State of Great Britain". That complete political separation necessarily also totally freed Americans from the vicious principle of the British "constitution" which licensed the ruling Establishment to treat its successful "injuries and usurpations" as commendable evolutionary steps in political science.

c. The notion that "[i]t is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them" has been rejected so many times, in so many ways, that it would be burdensome to list them all. Suffice it to say that how public officials may have misread and misapplied the Constitution, whether negligently or intentionally, is of *no* consequence in comparison to how it should have been construed according to its language viewed through the lenses of correct rules of interpretation.[4285] Constitutional questions "must be resolved not by past uncertainties, assumptions or arguments, but by the application of the controlling principles of constitutional interpretation".[4286] "[T]hat * * * constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine

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[4285] *See, e.g.,* The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 Howard) 443, 458 (1851).

[4286] Wright v. United States, 302 U.S. 583, 597-598 (1938).

and if allowed to flourish would destroy the benefit of a written constitution".[4287] As a result, "no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and even predates it".[4288] "[N]either the antiquity of a practice nor * * * steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack".[4289] "Illegality cannot attain legitimacy through practice."[4290] And if "a bold and daring usurpation might be resisted, after [long and complete] acquiescence",[4291] surely a mindless "[g]eneral acquiescence cannot justify departure from the law".[4292] Therefore, "the gloss which life has written upon the[words of the Constitution]" is irrelevant, except insofar as it may be consistent with the true meaning of those words, and thereby constitutes evidence that the Constitution is perfectly capable of being understood.

d. Although the theory that the Constitution should be construed according to "the gloss which life has written" is as politically and legally porous as a sieve, as a practical matter it is precisely the rough tool which one would expect to be wielded against revitalization of the Militia. For the plastic rule of construction of the British "constitution" is the only one that can serve the purpose. There being no words in the Militia Clauses of the original Constitution or in the Second Amendment that can be plausibly twisted to that end, something has to be injected into the text that is not there, or something else has to be excised from what is there, or both. And that can be accomplished only by appeals to "past uncertainties, assumptions or arguments", "steadfast legislative and judicial adherence to" some earlier "practice", and "[g]eneral acquiescence" in what has transpired heretofore. Unfortunately, this subversive heresy has long had, and continues to have, numerous adherents in Congress—and in the present-day Supreme Court, where they are but one vote away from controlling the Court's decisions on these matters, and as vocal as they are unequivocal as to what they would do were they to command a majority of the Justices.

(1) The intellectual strongman of the present *anti*-constitutional judicial cabal set up what could be called an argument of "positive prescription"—namely, that "the right of the people to keep and bear Arms" in "well regulated Militia" should not be taken seriously, because it has already been largely negated by pervasive governmental controls at all levels of the federal system. The Judiciary should refrain from interfering with "gun control", he contended, because

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[4287] Reid v. Covert, 354 U.S. 1, 14 (1957) (opinion of Black, J., announcing the judgment of the Court).

[4288] Walz v. Tax Commission of the City of New York, 397 U.S. 664, 678 (1970).

[4289] Williams v. Illinois, 399 U.S. 235, 239 (1970).

[4290] Inland Waterways Corporation v. Young, 309 U.S. 517, 524 (1940).

[4291] McCulloch v. Maryland, 17 U.S. (4 Wheaton) 316, 401 (1819).

[4292] Smiley v. Holm, 285 U.S. 355, 369 (1932).

> by the end of the 20th century, in every State and many local communities, highly detailed and complicated regulatory schemes governed (and continue to govern) nearly every aspect of firearm ownership: Who may sell guns and how they must be sold; who may purchase guns and what type of guns may be purchased; how firearms must be stored and where they may be used; and so on.[4293]

The short and sufficient answer to this, of course, should be: *"So what?"* "[W]hen the meaning and scope of a constitutional provision are clear, it cannot be overthrown by legislative action, although several times repeated and never before challenged".[4294]

The longer and more intellectually satisfying answer is that, even if the existence of these "highly detailed and complicated regulatory schemes" were somehow relevant to the meaning and application of "the right of the people to keep and bear Arms" in "well regulated Militia", one would first need to determine which of those schemes were constitutional and which were not—not simply assume without investigation, let alone proof, that all of them were perfectly valid in all respects. Conceivably, *some* of these regulations *might* be constitutional, *if* they were consistent with "the right of the people to keep and bear Arms" for the purpose of participating in "well regulated Militia". But in any particular case, their consistency or inconsistency would need to be gauged against constitutional standards. In most instances, the principles of the *pre-*constitutional Militia would serve that purpose; and the analyses would be relatively simple and straightforward. In other instances, though, the operations of actual "well regulated Militia" under modern conditions might need to be consulted—which, unfortunately, would be next to impossible, inasmuch as no "well regulated Militia" exists in any State today. And even with the proper standards at hand, the crazy-quilt of "gun control" that blankets this country could not easily be stripped away by judicial action. For very few decisions from the Supreme Court have touched specifically on the substance of the Second Amendment[4295]—and none of these is satisfactory, either on its own terms or as extrapolated as a "precedent" to guide the decisions of lower courts in other situations. So every one of the "highly detailed and complicated regulatory schemes" of "gun control" now in existence would have to be addressed case by case. How long would *that* take? And, no matter how long that process continued, who could depend upon a judicial determination in any of those cases to be either correct or final? After all,

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[4293] McDonald v. City of Chicago, 561 U.S. ___, ___ (2010) (Breyer, J., dissenting), Slip Opinion at 28.

[4294] Fairbank v. United States, 181 U.S. 283, 311 (1901).

[4295] United States v. Miller, 307 U.S. 174 (1939); District of Columbia v. Heller, 554 U.S. 570 (2008); *and* McDonald v. City of Chicago, 561 U.S. ___ (2010).

> [i]n the ordinary use of language it will hardly be contended that the decisions of Courts constitute laws. They are, at most, only evidence of what the laws are; and are not of themselves laws. They are often re-examined, reversed, and qualified by the Courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect.[4296]

That is, the Court's decisions are no more than previous statements of the views of its then-members on particular legal issues raised by particular litigants in certain specifically defined factual contexts—statements which can be (and in many instances have later been admitted by the Court itself, or recognized by others, to be) *wrong*, and which are *not binding on the Court itself*, let alone on anyone other than the original litigants, *especially where constitutional issues are concerned*.[4297] So, although these decisions may be entitled to whatever respect the force of their reasoning commands, they merit no legal, logical, or factual deference except insofar as they bear on the rights of the actual litigants in a "Case[ ]" or "Controvers[y]".[4298] And when their reasoning commands no respect, these decisions must be dismissed as legal nullities, except as against the actual litigants themselves. For "no amount of repetition of * * * errors in judicial opinions can make the errors true".[4299]

The best, if not the only effective, way to address this problem would be to enact comprehensive legislation revitalizing the Militia and declaring every inconsistent statute invalid, with stiff civil sanctions and criminal penalties (including attorney's fees and costs) to be meted out against *anyone and everyone, without exception,* who thereafter attempted to enforce any such statute, *those penalties to be imposed in the course and as the consequence of each and every such attempted enforcement*.[4300] Militiamen would then see to it that any of these old statutes which some fanatic proponents of "gun control" tried to keep alive would be quickly despatched. With swift, sure, and severe punishment deterring attempted enforcement, these statutes would simply lie dormant, until legislators could identify and specifically repeal them all.

[4296] Swift v. Tyson, 41 U.S. (16 Peters) 1, 18 (1842). "I understand the doctrine to be in such cases [*i.e.*, cases in which a court overrules a previous decision], not that the law is changed, but that it was always the same as expounded by the later decision, and that the former decision was not, and never had been, the law, and is overruled for that very purpose." Gelpcke v. City of Dubuque, 68 U.S. (1 Wallace) 175, 211 (1864) (Miller, J., dissenting).

[4297] Numerous opinions of the Supreme Court have recognized this limitation on the binding nature of judicial precedents in constitutional adjudication. *See ante*, note 2566.

[4298] U.S. Const. art. III, § 2.

[4299] Wallace v. Jaffree, 472 U.S. 38, 107 (1985) (Rehnquist, C.J., dissenting).

[4300] For example, if a prosecutor attempted to bring a criminal charge against an individual under one of the superseded "gun-control" statutes, as part of the selfsame process the criminal charge against the individual would be dismissed, the criminal case would then be continued with the prosecutor as the new defendant, and a separate civil action would be initiated on behalf of the individual against the prosecutor.

(2) This same Justice also advanced what could be called an argument of "negative prescription"—namely, that "the right of the people to keep and bear Arms" in "well regulated Militia" should not be taken seriously, because today, and for a very long time heretofore, it has been rendered irrelevant by other supposed protections against tyranny. According to him,

> the Civil War Amendments,[4301] the electoral process, the courts, and numerous other institutions today help to safeguard the States and the people from any serious threat of federal tyranny. How are state militias additionally necessary? It is difficult to see how a right that * * * has "largely faded as a popular concern" could possibly be so fundamental that it would warrant incorporation through the Fourteenth Amendment.[4302]

The short answer to this, of course, is that "state militias [are] additionally necessary" *because the Constitution says so*. "[T]he electoral process, the courts, and numerous other institutions" existed in 1788, when "the Militia of the several States" were incorporated into the original Constitution, and in 1791, when the Second Amendment first declared that "[a] well regulated Militia" based on "the right of the people to keep and bear Arms" is "necessary to the security of a free State"—and were expected to continue to exist thereafter. Yet no one who read the original Constitution and the Bill of Rights imagined that WE THE PEOPLE expected those institutions to render the Militia irrelevant. And even after "the Civil War Amendments" were added in 1865, 1868, and 1869, Congress maintained the Militia in essentially the same form it had first provided in 1792.[4303]

The longer answer is that "the right of the people to keep and bear Arms" in "well regulated Militia" has not "'largely faded as a popular concern'" because of some peculiar inherent doctrinal flaw, or because the Militia are obsolete in principle, or because they could not be made to function in practice under modern conditions. Certainly the concept that "'[p]olitical power grows out of the barrel of a gun'"[4304] has not been disproven in the modern age—rather, the foremost lesson the Twentieth Century taught is the universal validity of that axiom, for both good and evil. Neither is it any less true today than in 1788 and 1791 that "a Republican Form of Government" is "one constructed on th[e] principle, that the Supreme Power resides in the body of the people".[4305] Nor can it be denied as a matter of fact,

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[4301] U.S. Const. amends. XIII, XIV, and XV.

[4302] McDonald, 561 U.S. at ___ (Breyer, J., dissenting), Slip Opinion at 8.

[4303] *Compare* Revised Statutes of the United States (1873-1874), TITLE XVI, THE MILITIA, §§ 1625 and 1628, 18 Stat. 285, 285 *with An Act more effectually to provide for the National Defence by establishing an Uniform Militia throughout the United States*, Act of 8 May 1792, CHAP. XXXIII, § 1, 1 Stat. 271, 271.

[4304] *Quotations From Chairman Mao, ante* note 28, at 61.

[4305] *See* Chisholm v. Georgia, 2 U.S. (2 Dallas) 419, 457 (1793) (opinion of Wilson, J.).

law, or logic that "the Supreme Power resides in the body of the people" *only* when "the body of the people" controls the "'[p]olitical power [that] grows out of the barrel of a gun'". Nor can anyone refute the definition of "a well regulated militia" as "the body of the people, trained to arms".[4306] Rather, "the right of the people to keep and bear Arms" in "well regulated Militia" has "'largely faded as a popular concern'"

> • because all too many Americans simply grew tired of bearing the personal burden of self-government which service in the Militia imposes;
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> • because their political leaders did not remind them that "[a] well regulated Militia" is "necessary to the security of a free State", not only on paper, but in the field as well;
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> • because their leaders invented "the militia of the United States", "the organized militia", and "the unorganized militia" for the purpose of subordinating "the Militia of the several States" to a "standing army";
>
> • because their leaders promoted pervasive "gun controls" in order to constrain as much as possible "the right of the people to keep and bear [the very] Arms [most useful for well regulated Militia]", and eventually to disarm "the people" entirely; and
>
> • because in recent years both the supposed friends of the Second Amendment and its worst enemies have agreed that, if it guarantees any "right" at all, the Amendment secures only a very narrow "[individual] right * * * to keep and bear Arms", unconnected to "[a] well regulated Militia".

But whether the Militia have "'largely faded as a popular concern'" because of a state of affairs shortsighted Americans mistakenly came to desire, or one they were deceived into accepting, is beside the ultimate point. For "[t]he very purpose of [the] Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as * * * fundamental rights [that] may not be submitted to vote".[4307]

And is it not abundantly clear why and how "state militias [are] additionally necessary" "to safeguard the States and the people from any serious threat of * * * tyranny"? How effectively have "the Civil War Amendments, the electoral process, the courts, and numerous other institutions today" protected Americans from rogue public officials' insouciance (doing nothing), incompetence (doing something they

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[4306] Virginia Declaration of Rights (1776) art. 13.

[4307] West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638 (1943).

should be doing, but doing it badly), and usurpation and tyranny (doing something they should not be doing at all, and doing it well)? Throughout the length and breadth of this country, average Americans are completely unprepared for such emergencies as natural disasters (hurricanes, tornadoes, and floods), industrial accidents (especially those chemical, biological, and nuclear in nature), a major failure in the national electrical grid, epidemics and pandemics, serious shortages in the production and distribution of food that could lead to famines, and economic crises and even collapse caused by breakdowns in the monetary and banking systems. Instead, they have been made utterly dependent upon small, élitist bureaucracies which more than once have proven themselves incapable of dealing with such problems. *Would any of this be true if "the Militia of the several States" were properly revitalized?*

Worse yet, rogue public officials at every level of the federal system are aggressively advancing an agenda antagonistic to any rational conception of "a free State", but perfectly consistent with—*because it is consciously aimed at*—a totalitarian police state. At the Local and State levels, police forces, Sheriffs' departments, and other law-enforcement and emergency-response agencies are becoming increasingly *para*-militarized while becoming decreasingly concerned with the rights of the citizens they are supposed (in their self-congratulatory idiom) "to protect and serve". Brutality by the police and their unabashed contempt for legal limits on their actions are now the rule, not the exception—proving that next to no "good cops" exist anymore, or else they would have weeded out the "bad cops" long ago. At the level of the General Government, the Executive Branch even claims the Hitlerian prerogative simply to kill any American whom it labels an "enemy combatant" or "terrorist".[4308] And everywhere throughout America, WE THE PEOPLE find themselves bereft of any sure means to control the rogue public officials, political parties, and factions and other special-interest groups who and which brazenly corrupt governments, rig elections, foment foreign military adventures, infest the country with the degeneracy of cultural bolshevism, and loot the economy. Rather, these miscreants have succeeded in demolishing social solidarity by fragmenting Americans into mutually hostile groups that can be easily manipulated through the tactic of "divide and rule". *Would any of this be possible, though, if "the Militia of the several States" were properly revitalized?*

3. "The living Constitution" no barrier to revitalization of the Militia. Ultimately, all theories of "political prescription" fall back for their justifications on the doctrine of "the living Constitution". "The living Constitution" can be taken in three different senses, one of which is legitimate, the other two of which are not—but none of which could preclude revitalization of the Militia.

[4308] *See ante*, at 1605-1624.

a. In its sole legitimate sense, "the living Constitution" imports that WE THE PEOPLE originally did intend some of the terms in their "supreme Law of the Land"[4309] to be understood in what would be those terms' contemporary meanings, *as those meanings might change from era to era*. For example, what constitutes "Commerce" today includes methods of transportation that were unknown, and perhaps unimaginable, in the Founding Era.[4310] What constitutes "cruel and unusual punishments" may depend upon what severe punishments society has chosen to forgo inflicting for such lengthy periods of time that their reintroduction should not be tolerated.[4311] And, most important here, the character, quality, and even quantity of "Arms" that come within "the right of the people to keep and bear" for the purpose of being able to serve in "well regulated Militia" self-evidently depend upon the technology of the period in question.

The particular "Arms" that WE THE PEOPLE had in mind in the late 1700s were the "Arms" of a then-contemporary member of the Militia familiar in their own personal experiences. Thus, in its first Militia Act, Congress required that "every citizen * * * enrolled [in the Militia] * * * shall * * * provide himself with a good musket or firelock, a sufficient bayonet * * * , two spare flints, and * * * a pouch with a box therein to contain not less than twenty-four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball; or with a good rifle, * * * shot-pouch and powder-horn, twenty balls suited to the bore of his rifle, and a quarter pound of powder".[4312] Almost a century later, Congress reaffirmed those requirements.[4313] Nonetheless, THE PEOPLE could never have originally intended that only the particular types of "Arms" with which individuals could provide themselves in the late 1700s and 1800s would always uniquely define and delimit "the right of the people to keep and bear Arms", no matter what improvements in firearms supervened over the years. Even Congress did not believe that, because in 1874 it appropriated moneys "to be paid out * * * for the purpose of providing arms * * * for the whole body of the militia, either by purchase or manufacture";[4314] and in 1887 and 1900 it provided that "the purchase or manufacture of arms * * * for the militia * * * shall be made * * * as such arms * * * are now manufactured or otherwise provided for the use of the Regular

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[4309] U.S. Const. art. VI, cl. 2.

[4310] *See* U.S. Const. art. I, § 8, cl. 3.

[4311] *See* U.S. Const. amend. VIII. Flexibility in this matter, however, would need to be tempered by the recognition that society may not have imposed such dire punishments only because no crimes sufficiently heinous to be worthy of them were commonplace—and that, when such crimes once again occurred, only the threat of such punishments could provide a sufficient deterrent.

[4312] *An Act more effectually to provide for the National Defence by establishing an Uniform Militia throughout the United States*, Act of 8 May 1792, CHAP. XXXIII, § 1, 1 Stat. 271, 271.

[4313] Revised Statutes of the United States (1873-1874), TITLE XVI, THE MILITIA, § 1628, 18 Stat. 285, 285.

[4314] Revised Statutes of the United States (1873-1874), TITLE XVI, THE MILITIA, § 1661, 18 Stat. 285, 290.

Army"[4315]—which enabled the Militia to be provided with up-to-date arms at public expense. So the noun "Arms" must be construed in a generic—and therefore expandable, or "living"—sense, in terms of what equipment, at a particular time and in a particular place, will enable a "Militia" to be sufficiently "well regulated" that it can effectively provide "the security of a free State".[4316] The "Arms" Congress specified in 1792 and then again in 1874, 1887, and 1900 were, first, the "Arms" typically carried by a light infantryman, irregular, *guerrillero*, partisan, or *franc-tireur* in those times (because the Militia employed the tactics of all such fighters, depending on circumstances); and, second, the "Arms" generally available to individuals in the free market that would serve those purposes—from which the deduction is inescapable that Congress understood such types and that source of "Arms" to be within "the right of the people to keep and bear Arms". So, today, "Arms" would not be limited to "musket[s]", "firelock[s]", or "good rifle[s]" with flintlock or percussion actions, or to the firearms "the Regular Army" carried in 1887 or 1900, but would embrace *any and every* type of long gun and hand gun private firearms manufacturers might produce that could *in any way* serve *any* of the purposes for which modern Militiamen might be deployed—including the ubiquitous semiautomatic (or even burst-fire) rifle in a typical military caliber, equipped with a detachable magazine, pistol grip, flash suppressor, and bayonet lug, which contemporary manufacturers supply in numerous varieties and in great numbers to the private market, and which in one form or another are "now manufactured or otherwise provided for the use of the Regular Army".

Perhaps it would be better, however, not to describe this method of construing the Constitution as involving a "living" document at all, because it is really the inevitable result of "original intent". Acceding to the legitimacy of the term "living Constitution" in any usage exposes constitutional law to all sorts of subtle confusions and abuses. For the prime recent example, Congress singled out precisely those features which define a modern firearm particularly suitable for Militia service because it is "now manufactured or otherwise provided for the use of the Regular Army", in order to create a class of so-called "assault weapons" the possession of which by private citizens it largely prohibited.[4317] This statute plainly

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[4315] An act to amend section sixteen hundred and sixty-one of the Revised Statutes, making an annual appropriation to provide arms and equipments for the militia, Act of 12 February 1887, CHAP. 129, § 3, 24 Stat. 401, 402; An Act To amend section one of the Act of Congress approved February twelfth, eighteen hundred and eighty-seven, entitled "An Act to amend section sixteen hundred and sixty-one of the Revised Statutes, making an annual appropriation to provide arms and equipments for the militia", Act of 6 June 1900, CHAP. 805, 31 Stat. 805.

[4316] *See* U.S. Const. amend. II. *See ante*, at 1353-1375.

[4317] *See* An Act To control and prevent crime ("Violent Crime Control and Law Enforcement Act of 1994"), Act of 13 September 1994, Pub. L. 103-322, TITLE XI—FIREARMS, Subtitle A—Assault Weapons ("Public Safety and Recreational Firearms Use Protection Act"), §§ 110102 and 110103, 108 Stat. 1796, 1996-2000. This statute expired of its own force in 2004. § 110105(2), 108 Stat. at 2000. But "gun controllers" aggressively agitate for its resurrection in one form or another.

violated Congress's trust and duty "[t]o provide for * * * *arming* * * * the Militia",[4318] and *not* "[t]o provide for [*dis*]arming" "the body of the people" who form the Militia.[4319] If Congress chose not "[t]o provide for * * * arming * * * the Militia" itself, at least it should have done nothing to prevent Americans eligible for the Militia from arming themselves through the free market. At the time of this "assault-weapons ban", Congress had declared "the unorganized militia" to be a component of "the militia of the United States", and to consist of "all able-bodied males of at least 17 years of age and * * * under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States" and "who are not members of the National Guard or the Naval Militia".[4320] The constitutional problems with these definitions aside, Congress should have been estopped from denying—indeed, it should have realized the utter absurdity in denying—that its "assault-weapons ban" prohibited the very people it declared to be part of "the militia of the United States" from obtaining the very weapons best suited to service in "the militia of the United States". Doubtlessly, though, rogue Members of Congress who intended to violate the Second Amendment through the semantic trick of demonizing the very firearms most suitable for Militia service as nasty "assault weapons" found support for their scheme from merely ignorant Members led astray by the "flexibility" in definitions of constitutional terms "the living Constitution" sanctions.

b. The first of the plainly illegitimate senses of "the living Constitution" posits that no one today can reliably determine what certain words or phrases in the original Constitution or the Bill of Rights actually meant to Americans in the late 1700s; and, therefore, to impart any legal effect to this obscure verbiage, contemporary public officials must impute to those words and phrases modern meanings—which, in practice, reduces to meanings congenial to those officials' particular legal, political, economic, social, cultural, or ideological points of view, presuppositions, or prejudices. Unfortunately for these special pleaders, no one can gainsay that any statute couched "in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law"[4321]—that is, *the ability to be understood*. Therefore, this version of "the living Constitution" is self-defeating. For, although the supposedly mysterious passages in the original Constitution and the Bill of Rights might have been "law" in the late 1700s, when WE THE PEOPLE knew what they meant, today they must be deemed unconstitutional (as the lawyers' jargon has it, "void for vagueness"), because no one any longer has any idea of what

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[4318] U.S. Const. art. I, § 8, cl. 16 (emphasis supplied). *See ante*, at 50-54.

[4319] *See* Virginia Declaration of Rights (1776) art. 13.

[4320] 10 U.S.C. § 311.

[4321] Connally v. General Construction Company, 269 U.S. 385, 391 (1926).

they import, or it would not be necessary for public officials to "guess at [their] meaning[s]" by imparting *new* meanings to them. And this is, of course, entirely a process of "guess[ing]", because the supposedly new meanings might coincidentally be the same as the old meanings that have been lost in the mists of lexicographical time; or they might be quite different; but, in either case, no one can possibly know. *Substitution* of new words for old—for the process cannot qualify as "interpretation" or "construction", inasmuch as the old words are supposedly unintelligible—cannot cure the problem of vagueness, because the difficulty does not lie in the definitions of the new words (which presumably can be confirmed) but in the choice of which new words should replace the old ones (which is necessarily arbitrary, the meanings of the old words being unavailable as referents). In any event, "the living Constitution" in this sense is not relevant to the question of revitalizing the Militia today, because there can be no question as to what the phrases "Militia of the several States",[4322] "organizing, arming, and disciplining, the Militia",[4323] and "[a] well regulated Militia" and "the right of the people to keep and bear Arms"[4324] meant in the late 1700s.

c. The second of the illegitimate senses of "the living Constitution" posits that, although certain words and phrases in the original Constitution and the Bill of Rights are as understandable today as they were in the late 1700s, nevertheless they now ought to be reinterpreted in order to comport with contemporary political, economic, social, and cultural theories, practices, and *mores*. This version of "the living Constitution" does not escape the problem of vagueness, but merely redirects its focus. Instead of contending that modern verbiage *must* be substituted for words and phrases of unknown meaning in the original Constitution and the Bill of Rights, proponents of this version assert that public officials *ought* to reinterpret words and phrases of always determinate and once accepted meanings in order to make them gibe with novel, often complex and controversial, concepts that not only lie entirely outside of the Constitution but also themselves require interpretation and thereby invite endless disagreements. These disputes open up the matter of misconstruction to such a degree that *everyone*—not only "men of common intelligence", but even the individuals of extraordinary intelligence who concoct and debate these matters of protean political, economic, and social policy—"must necessarily guess at [the Constitution's] meaning and differ as to its application". And that the vagueness in this version of "the living Constitution" is extrinsic, rather than intrinsic, to the Constitution (and even to the science of law) exacerbates the problem. Nonetheless, as will be explained anon, this version of "the living Constitution" could prove to be quite useful *for revitalization of the Militia*.

[4322] U.S. Const. art. II, § 2, cl. 1.

[4323] U.S. Const. art. I, § 8, cl. 16.

[4324] U.S. Const. amend. II.

d. In the latter two senses, "the living Constitution" amounts to a collection of legal fictions which rogue public officials concoct as they go along. Neither version is based upon the actual words and phrases of the original Constitution or the Bill of Rights, except to the extent that officials coöpt the bare verbiage as empty vessels into which they then pour theretofore unheard-of meanings. Neither version recognizes the crucial legal distinction between the British and the American ideas of a "constitution"—namely that the Constitution of the United States is not a shot glass which officials may fill with whatever rot-gut legal moonshine a credulous population will swallow, but instead is an already printed page the words on which say what they mean and mean what they say, and neither more nor less. Neither version finds support in the history of the Founding Era—for no Framer, Founder, or American patriot of consequence has ever been discovered who publicly asserted that no one knew what some words or phrases in the original Constitution or the Bill of Rights meant at that time or might mean at any subsequent time, or that either the original Constitution or the Bill of Rights should be construed as a "living" document the meaning of which would and should change in the future, perhaps as soon as the very day after ratification. And neither version comports with elementary human psychology—for who would be so devoid of prudence as to agree to adopt a "constitution" the meaning of which in various important particulars was unknown to him, or could change in an unpredictable fashion at the hands of unknown individuals for unspecified reasons at an uncertain time thereafter?! No one would enter into the simplest of short-term commercial contracts that dealt with only one commodity, let alone submit every aspect of his life to a permanent government with wide-ranging powers, on such absurd terms.

e. Nonetheless, as folk wisdom has it, "It takes a crooked stick to beat a mad dog!" And although it is always wise to "use enough gun" if possible, one may be reduced to using whatever gun is available from whatever source. So, if rogue public officials routinely rely upon "the living Constitution" for their own nefarious purposes, then they are estopped to deny that WE THE PEOPLE may also employ "the living Constitution" for THE PEOPLE'S laudable purposes. And for THE PEOPLE'S purposes, the second version of "the living Constitution" fills the bill quite well.

(1) Nothing about "the living Constitution" demands that it operate only at the behest and through the agency of public officials, but not under the control of THE PEOPLE themselves, independently of all public officials (except as the mere executors of THE PEOPLE'S will). After all, in America, WE THE PEOPLE are the sovereigns.[4325] So, as a matter of fundamental political principle, THE PEOPLE have a greater right to dictate the direction and substance of "political prescription" than do any public officials. WE THE PEOPLE originally "ordain[ed] and establish[ed]

[4325] *See* Chisholm v. Georgia, 2 U.S. (2 Dallas) 419, 454, 456 (opinion of Wilson, J.), 471-472 (opinion of Jay, C.J.) (1793).

th[e] Constitution",[4326] and by refraining from exercising their absolute "Right * * * to alter or to abolish" or "to throw off" the Constitution,[4327] they continue to "ordain and establish" it from day to day. As America's supreme legislators, THE PEOPLE are the supreme interpreters of their own law—for "[t]he power to enact carries with it final authority to declare the meaning of the legislation".[4328] THE PEOPLE can foresee the needs of "the living Constitution" far better and more quickly than any public officials, too, because officials are merely THE PEOPLE'S "representatives", at least once removed from THE PEOPLE themselves, and therefore inevitably less knowledgeable than THE PEOPLE about the actual day-to-day state of affairs throughout this country. And, according to the tenets of "the living Constitution", no one can dispute the conclusions to which THE PEOPLE eventually come, because their decisions will uniquely define the substance of "the living Constitution" at those particular points in time.

(2) Moreover, nothing precludes "the living Constitution" from arriving, through its normal "evolutionary" process but under the guidance of WE THE PEOPLE'S "intelligent design", at a construction with respect to the Militia which is equivalent to what an interpretation performed according to the principles of "original intent" prescribes. After all, "the living Constitution" is not static, but moves with the times, as circumstances change. Indeed, it is potentially in constant motion, because what may have been an acceptable construction yesterday may not necessarily be acceptable today, and probably will not be acceptable tomorrow. Neither is "evolution" of "the living Constitution" unidirectional, because society does not travel along only one permanently set pathway laid out on only one point of the legal compass. Nor is "the living Constitution" constrained by any fixed boundaries—rather, everything about it is flexible, malleable, plastic, even fluid, because it must conform its shape to whatever needs society perceives as pressing. And inasmuch as WE THE PEOPLE *are* society, they must determine what are society's needs as they change from day to day.

Because "the living Constitution" can adopt essentially *any* principles that seem useful, it enables THE PEOPLE figuratively to turn the clock forward *or backward* in order to set the right time in the present. No reason exists why a "new" construction of "the living Constitution" cannot revivify and incorporate some "old" construction of the original Constitution or Bill of Rights, the usefulness of which has recently become apparent. Indeed, if the operation of "the living Constitution" partakes of degrees of legitimacy at all, the reassertion of some construction which events have proven expedient and that accorded with and advanced "original intent" would be the most legitimate form of constitutional "evolution" possible.

[4326] U.S. Const. preamble.

[4327] *See* Declaration of Independence.

[4328] Propper v. Clark, 337 U.S. 472, 484 (1949).

All of this being so, WE THE PEOPLE can now determine that the construction of the Constitution which has departed from the *pre-*constitutional principles of the Militia, after a fair trial for over one hundred years, has been found decidedly wanting. The effective suppression of "the Militia of the several States"; the invention of "the militia of the United States", "the organized militia", and "the unorganized militia"; the creation of a huge "standing army", a vast "military-industrial complex", and a National *para-*military police-state apparatus against which effectively nonexistent Militia can exercise no "checks and balances"; the involvement of the United States in aggressive, imperialistic military adventures across the globe; the unpreparedness of the general populace to deal with any true emergency at any level of the federal system, and the consequent vulnerability of society to myriad domestic dangers—all of this has proven unworkable, politically destabilizing, economically unsustainable, and withal inimical to the freedom, prosperity, and general well-being, not only of Americans, but also of peoples throughout the world. The times demand a better construction of the Constitution with respect to the Militia. And WE THE PEOPLE can now determine that this better construction must conform to the Constitution's "original intent", which has never really been suggested, let alone actually put into practice, at any time since at least the dawn of the Twentieth Century, and therefore has never been proven to be insufficient for this country's present pressing needs. Thus, on the very principles of "the living Constitution" itself THE PEOPLE can now construe it anew and reinstate its "original intent"—*and no proponent of "the living Constitution" can complain*. ***So, within the terms of "the living Constitution", no argument against revitalization of "the Militia of the several States" is possible—including even preëmption, because the existence, extent, and effect of prëemption, too, are matters of constitutional construction, and therefore are just as subject to the mutability of "the living Constitution" as any other constitutional doctrine.***

CONCLUSION

Extreme economic, political, and social dislocations and conflicts throughout America will inevitably result if "the Militia of the several States" are not revitalized in the near future.

No one can deny that, as of this writing, an economic crisis of unprecedented proportions is looming on the horizon, threatening not only the United States but even the entire world. No one can predict exactly when or where this crisis will break out in its full fury; or how, in what directions, or at what velocity it will spread. Yet, although a calamity of such magnitude is unprecedented in economic history, its worst effects are largely foreseeable. No one with a scintilla of insight doubts that at some point in the near future hyperinflation, depression, or hyperinflation coupled with or followed immediately by depression will sweep across the United States. The dire effects of these events will not be exclusively economic in nature, either. Economic collapse will bring in train political and social dislocations on a massive scale. In the ultimate analysis, however, this is because the impending economic crisis is, first and foremost, the inevitable result of political and social crises that have long festered, but that average Americans, for one reason or another, have failed, neglected, or refused to recognize.

Those who carp that such descriptions and predictions represent the nadir of pessimism forget the folk wisdom that "a pessimist is an optimist who knows the facts". The facts being undeniable, the question becomes: "Now what?" To answer that query requires examining the sources of the crisis, where it may lead, and how its inevitable and unavoidable worst effects can be mitigated.

Sound analysis of most modern political problems should always apply the principle "follow the money". That counsel has never been more apt than it is today. The present economic crisis centers around *fiat* currency, fractional-reserve central banking, and the integration of bank and state in and through the Federal Reserve System. The Federal Reserve System is a *corporative-state* arrangement: namely, a governmentally sponsored cartel of private bankers and financial speculators that exercises authority delegated under color of law supposedly to serve both public and private interests in the area of currency and credit.[4329] What has become obvious, however, and should always have been self-evident from the

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[4329] *See* E. Vieira, Jr., *Pieces of Eight, ante* note 39, Volume 1, at 746-866.

nature of all such systems—particularly in the field of money and banking where the potential for redistribution of wealth through the operation of such a cartel reaches its apogee—is that the personal interests of the cartel's operators and their political allies inevitably take precedence over the public interest in the general welfare of common Americans.

When President Franklin D. Roosevelt put such a scheme of cartelization into effect throughout American private industry in the National Industrial Recovery Act of 1933,[4330] the Supreme Court, in an unanimous opinion, denounced it, saying: "Such a delegation of legislative power is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress."[4331] In the face of this decision, the only reasons the Federal Reserve System still exists are that: (i) it was not subsumed within the National Industrial Recovery Act in 1933, but was the product of a different statute enacted in 1913; and (ii) the Supreme Court has never heard a case challenging the banking cartel on those grounds (and probably never will). Yet, that the Federal Reserve System *has* usurped powers in the field of money and banking which are "unknown to our law and * * * utterly inconsistent with the constitutional prerogatives and duties of Congress" must have the most seriously deleterious consequences.

In general, through corporativism factions and other special-interest groups employ their political influence in order to obtain economic control over some segment of the economy. That control increases the economic power of those groups, enabling them to garner even more political influence, in a vicious spiral. The unavoidable problem, however, is that fractional-reserve banking, howsoever organized, is inherently unstable. This would be true even if the banks were required to maintain their currency on some sort of "gold standard", as were the Federal Reserve Banks initially.[4332] The instability becomes even more pronounced when the emission of the banks' currency lacks any fixed relationship whatsoever to gold, to silver, or to any other valuable commodity, but instead is bottomed on the incurrence of public and private debt.[4333] For, as Thomas Jefferson correctly

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[4330] AN ACT To encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes, Act of 16 June 1933, CHAPTER 90, 48 Stat. 195.

[4331] A.L.A. Schechter Poultry Corporation v. United States, 295 U.S. 495, 537 (1935). *See also* Carter v. Carter Coal Company, 298 U.S. 238, 311 (1936).

[4332] *See* An Act To provide for the establishment of Federal reserve banks, to furnish an elastic currency, to afford means of rediscounting commercial paper, to establish a more effective supervision of banking in the United States, and for other purposes ("Federal Reserve Act"), CHAP. 6, §§ 14(a) *and* 16, ¶¶ 1 and 3 through 6, 38 Stat. 251, 264-267 (each Federal Reserve regional bank "shall maintain reserves in gold or lawful money of not less than thirty-five per centum against its deposits and reserves in gold of not less than forty per centum against its Federal reserve notes in actual circulation"). This spurious "gold standard" collapsed catastrophically a mere twenty years after Congress concocted it. *See* E. Vieira, Jr., *Pieces of Eight, ante* note 39, Volume 2, at 867-1212.

[4333] *See* 12 U.S.C. §§ 411 through 416; *and* 31 U.S.C. § 5118(b) and (c).

observed, "paper is poverty, * * * it is only the ghost of money, & not money itself".[4334] Worst of all, stabilization of such an arrangement becomes a veritable impossibility when the banks are aggregated into a single nationwide pyramid, when their profits depend upon the expansion of debt throughout the national economy, and when the General Government fails to require them to maintain the purchasing-power of their paper currency (Federal Reserve Notes) on a par with all other forms of United States currency, including gold and silver coinage. The extent of this failure can be gauged from: (i) the duty of the Secretary of the Treasury to "redeem gold certificates owned by the Federal reserve banks at times and in amounts the Secretary decides are necessary to maintain the equal purchasing power of each kind of United States currency";[4335] (ii) "the [statutory] value * * * for the purpose of issuing those [gold] certificates, of 42 and two-ninth dollars a fine troy ounce";[4336] (iii) the face value of a one-ounce United States American Eagle gold coin of "fifty dollar[s]";[4337] (iv) the refusal of the General Government to redeem Federal Reserve Notes for either gold or silver;[4338] and (v) the market value of an American Eagle gold coin in Federal Reserve Notes, which as of this writing exceeds some *thirty-five times* its face value.[4339]

Being basically an arrangement with the vicious characteristics of a Ponzi-scheme, in order to keep its head above water the Federal Reserve System has been compelled constantly to expand the set of those individuals and institutions who or which use, *or are forced to use*, its currency, and to generate ever-increasing amounts of debt denominated and payable in that currency. Having established Federal Reserve Notes as National "legal tender" in 1933; having removed the restraints of required redemption of those notes in gold in 1933 (domestically) and 1971 (internationally); having shackled the Treasury of the United States to a policy of endless monetization of public debt; having obtained the ability to manipulate and loot domestic markets in the guise of making what is euphemistically called "monetary policy"; and even having assumed the imperialistic rôle of an *ersatz* "world central bank" emitting an *ersatz* "world reserve currency" which has enabled it and its clients to pillage markets across the globe—having done all this, nevertheless the Federal Reserve System now finds itself confronted with serial crises, for which only one solution appears workable: an even greater expansion

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[4334] Letter from Thomas Jefferson to Edward Carrington, 27 May 1788, *in The Works of Thomas Jefferson, ante* note 3952, Volume V, at 403.

[4335] 31 U.S.C. § 5119(a).

[4336] 31 U.S.C. § 5117(b).

[4337] 31 U.S.C. § 5112(a)(7).

[4338] *See* 31 U.S.C. § 5118(b) and (c).

[4339] *See, e.g.,* <www.kitco.com> for current prices of gold measured in Federal Reserve Notes. From time to time, of course, this disparity varies. Nonetheless, since 1971, when the official value of gold was 35 "dollars" *per* ounce, the disparity has exhibited a significant increase, which shows no sign of abating.

than ever before of *fiat* currency, bank "credit", and United States Treasury debt, to be dumped on a world increasingly less willing to accept them.

Such hyperbolic economic imperialism must fail, unless it is coupled with political imperialism. And political imperialism in service of what used to be described and denounced as "the Money Power" will not succeed unless it is backed up by outright *military* imperialism, "the iron fist in an iron glove"—because foreign nations will not sit still for long while their economies are manipulated from New York City and the District of Columbia; while their natural resources are extracted at bargain-basement prices; and while their populations are hired at coolie wage-rates and then paid in ever-depreciating Federal Reserve Notes, fictitious bank "credit", and United States Treasury debt beyond repayment by any amount of taxes the General Government could conceivably levy on the American people. Which international resistance, far more plausibly than the so-called "global war on terrorism", explains the metastasis of American military bases throughout the world over the last several decades, and especially the doctrine of "preëmptive war"—that is, naked aggression—first brazenly enunciated by George W. Bush's Administration. Actually, this "Bush Doctrine" itself was nothing new. It was, and remains, merely the logical expansion of the old "Brezhnev Doctrine" embossed with the Stars and Stripes rather than the Hammer and Sickle. Under "the Brezhnev Doctrine", the Soviet Union claimed the right to invade any country among its satellites that deviated too far from the Communist Party line as enunciated in Moscow. Under "the Bush Doctrine", the United States claims the right to impose crippling economic sanctions upon, to ring with military bases, and if those tactics do not work then to foment *ersatz* "wars of national liberation" against, to bomb, and even to invade (directly or through armed proxies) *any* country, without distinction, so bold as to refuse to subordinate its economy to the dictates of the Axis of Financial Fraud that runs from New York City to the District of Columbia.

Domestically, too, the Federal Reserve System finds itself increasingly on the defensive. The Federal Reserve's currency—both paper Federal Reserve Notes and electronic bank balances—is based entirely upon debt.[4340] Its value in exchange depends upon the free market's perception that these debts will, in fact, be paid. So, because the veriest dolt now realizes that the level of both public and private indebtedness has become unsustainable, and that much of this indebtedness as well as the system that made it possible is steeped in fraud and other wrongdoing, crises in banking and finance are proliferating and intensifying at all levels of America's federal system—setting the stage for an economic catastrophe, because apparently all too many Americans who could influence events in a positive direction are too

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[4340] *See* 12 U.S.C. §§ 411 through 416; *and* 31 U.S.C. § 5118(b) and (c).

stubborn to admit that, when an unsound currency stands on the brink of self-destruction, a sound alternative currency should be introduced into the economy as soon as possible.

As dangerous as it is, the Federal Reserve System is not the true core of the problem. After all, the banking cartel did not create itself. Neither has it been maintained in operation, and its powers steadily augmented, through the years solely by its own efforts. To be sure, the bankers and speculators for whom the Federal Reserve System fronts aggressively promoted it every step of the way. But, by themselves alone, they could have done nothing. Rogue public officials were the effective cause of the banking cartel's creation *by statute*, its accretion of ever-more-abusive powers and privileges *by statute*, and the serial calamities it has been allowed to bring about *under color of law*. So, when one "follows the money" to its ultimate destination, one inevitably arrives at rogue public officials' seats of power. If the Federal Reserve System is a monster, particular officials must be identified as playing the rôle of *Herr Doktor* Frankenstein.

The Constitution was designed around multiple "checks and balances" in order to prevent what the ancient Greeks denominated "ochlocracy"—that is, mob rule, the ultimate degeneration of democracy. The basic plan was to interpose "representatives" between WE THE PEOPLE themselves and the exercise of certain government powers.[4341] As Alexander Hamilton explained,

> [i]t is a just observation that the people commonly *intend* the PUBLIC GOOD. This often applies to their very errors. But their good sense would despise the adulator who should pretend that they always *reason right* about the *means* promoting it. They know from experience that they sometimes err; and the wonder is that they so seldom err as they do, beset as they continually are by the wiles of parasites and sycophants, by the snares of the ambitious, the avaricious, the desperate, by the artifices of men who possess their confidence more than they deserve it. ***When occasions present themselves in which the interests of the people are at variance with their inclinations, it is the duty of the persons whom they have appointed to be the guardians of those interests to withstand the temporary delusion in order to give them time and opportunity for more cool and sedate reflection.***[4342]

The "persons whom the[people] * * * appointed to be the guardians of th[eir true] interests" Hamilton and the other Founders presumed would be men of liberal

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[4341] *See, e.g., The Federalist* Nos. 10 and 51 (James Madison). Some governmental powers, such as the franchise, THE PEOPLE were to exercise directly, otherwise it could hardly have been claimed that their "representatives" in fact "represented" them. *See* U.S. Const. art. I, § 2, cl. 1.

[4342] *The Federalist* No. 71 (***bold-faced emphasis*** supplied).

education, secure wealth, and wide experience in the world who would remain uninfluenced by "the ambitious, the avaricious, [and] the desperate".

On the other side, the Founders also took care to establish "checks and balances" against "oligarchy"—the perversion of "aristocracy", when a few men rule with an eye towards augmenting their own wealth and social positions rather than advancing the best interests of the entire community.[4343] Here, besides prohibiting a formal oligarchy by outlawing all "Title[s] of Nobility",[4344] the Constitution established the fundamental requirement that, in the exercise of every one of its powers, the General Government should "establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty" for WE THE PEOPLE as a whole.[4345]

Under ordinary circumstances, these "checks and balances" might have sufficed to maintain political rectitude, economic prosperity, and social stability in America—*if* the electoral process had consistently brought forward politicians who had fairly represented the common interests of THE PEOPLE, rather than the selfish interests of various factions. The actual experience during the last century, however, has been that "the ambitious, the avaricious, [and] the desperate"—ever-intent upon working *against* THE PEOPLE'S interests, as such degenerates always are—have decade after decade finagled themselves into the positions of THE PEOPLE'S duplicitous and disloyal "guardians". Instead of assisting THE PEOPLE to "withstand * * * temporary delusions in order to give them time and opportunity for more cool and sedate reflection", rogue politicians and officials have systematically propagated permanent delusions, particularly in the field of money and banking. In this way, the Founders' "checks and balances" have been perverted into efficacious means to obstruct democracy in its best sense, and instead to promote oligarchy in its very worst manifestations. Today, those Americans with the eyes to see realize that voting is next to useless, because domination of the electoral machinery by the "two" major political parties, coupled with various forms of electoral fraud, guarantee that only politicians willing to prostitute public offices to factions and other special interests are likely to be nominated, let alone elected. "[T]he right of the people peaceably to assemble, and to petition the Government for a redress of grievances"[4346] is a largely bootless endeavor, too, because "the people" are petitioning, not their own, but their enemies' "representatives". THE PEOPLE'S appeals to the courts are no less feckless, because in almost all cases their enemies' "representatives" have appointed, or their enemies' political parties have

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[4343] *See ante,* note 3668.

[4344] U.S. Const. art. I, § 9, cl. 8 *and* § 10, cl. 1.

[4345] U.S. Const. preamble.

[4346] U.S. Const, amend. I.

arranged for the election of, the judges.[4347] And supposed "law-enforcement" agencies at every level of the federal system literally get away with murder, mayhem, and theft at common Americans' expense, because their personnel know that legislators, prosecutors, and judges will immunize them from punishment for any crimes they commit which further the agenda of this country's ruling factions.

To be sure, Americans long ago should have recognized and resisted the steady transmogrification of "checks and balances" in supports of constitutional government into "checks and balances" in opposition to it. *Principiis obstate.*[4348] Such degeneration should have been arrested at its very onset by WE THE PEOPLE'S searching inquiries into politicians' and public officials' true political beliefs, proclivities, and motives; into the credibility of their campaign-promises and the realities of their records in office; and especially into their personal backgrounds and activities, as well as those of their families and business associates, with respect to crooked deals they might have made, were making, or were likely to make with special interests in order to feather their own nests. With such information in hand, THE PEOPLE should have applied irresistible pressure against officials to do what as candidates they had promised to do, and in any event to do what needed to be done in the community's interest—and if they failed or refused, then THE PEOPLE should have forced them to choose between the stark alternatives of either resigning their offices *sine die*, so that some honest and competent individuals could assume those positions; or facing some kind of punishment, whether political (defeat at the next election), social and economic (shunning of their persons), or legal (civil litigation or criminal prosecution); and in any case publicly acknowledging their misbehavior, so that if they were not rendered contrite they would at least be thoroughly humiliated.

The severity of such a continuous process of permanent public inquisition—what could be called "the Eight I's Policy": namely, *illuminate, investigate, interrogate, implicate, indict, inculpate, incarcerate, and infame*—would have been, and today would still be, fully justifiable, because "[t]he republican principle demands that the deliberate sense of the community should govern the conduct of those to whom they intrust the management of their affairs".[4349] "[I]n a republic * * * every magistrate ought to be personally responsible for his behavior in office"—and "the two greatest securities the[people] can have for the faithful exercise of any delegated power [are], *first*, the restraints of public opinion * * * and, *second*, the opportunity of discovering with facility and clearness the

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[4347] With respect to the judicial subversion of America's constitutional monetary system in particular, one need look no farther for a gross example than the Supreme Court's transparently dishonest performance in the *Gold Clause Cases*. *See* E. Vieira, Jr., *Pieces of Eight, ante* note 39, Volume 2, at 1127-1211.

[4348] "Stand against the beginnings." Figuratively, "oppose evils at their inception".

[4349] *The Federalist* No. 71 (Alexander Hamilton).

misconduct of the persons they trust, in order either to their removal from office or to their actual punishment in cases which admit of it."[4350]

Unfortunately, even before the erection of the Federal Reserve System in 1913, WE THE PEOPLE'S jealous scrutiny of public officials, as well as the special-interest groups that manipulate them, had already diminished to a dangerous degree. Thereafter, sloth, narrow self-centeredness, complacency, wishful thinking, apathy, resignation, and at length even identification with the aggressor rapidly replaced as National characteristics that "'eternal vigilance'" which the Founders knew from personal experience to be "'the price of liberty'".[4351] And, step by step as common Americans' willingness to police their public servants gradually waned, the ability of factions and other greedy special interests to misdirect the course of public affairs waxed. So, today, "the price of liberty" has become very dear, indeed. Having by their own insouciance and inaction allowed their inveterate enemies to sow the wind with dragons' teeth, Americans are now constrained by circumstances to reap the whirlwind of their own irresponsibility.

What remains of a free market in this country has managed somehow to cope with the consequences of average Americans' failure to police rogue politicians, public officials, and special-interest groups. Until now. Now so heavy a burden and so great a strain have been put upon it that it is breaking down. *Indeed, it must collapse entirely if the unit of currency is destroyed, because then the entire structure of prices and the possibility of rational economic calculation will go into the discard, too*. Worse yet, as a consequence of political and economic failures on the bridge, America's ship of state is about to enter the historically uncharted waters of *social* failure. Unless this course is changed, the voyage will follow a route familiar in such disasters: namely, from economic crisis, to social chaos, to political repression, to National destruction.

As the individuals in temporary charge of the political system prove incompetent and impotent to cage the gigantic financial predators in the world of high finance, but instead set them loose to feed upon common Americans as upon so many tethered sheep, and even aid and abet them in doing so—as the Nation's economy melts down—and as middle- and lower-class standards of living give way to ever-deepening "austerity" (that is, politically induced poverty)—massive civil discontent, unrest, and disobedience will flare up.

[4350] *The Federalist* No. 70 (Alexander Hamilton).

[4351] Interestingly, the first actual printed version of the aphorism "eternal vigilance is the price of liberty" apparently appeared in Thomas U.P. Charlton, *The Life of Major General James Jackson* (Augusta, Georgia: George F. Randolph & Co., 1809), at 85. Charlton, however, placed it in quotation marks, evidently to acknowledge that the phrase was other than his own invention, but instead something of a commonplace in the political discourse of his day. In any event, he went on to recommend in his own words that, "whilst a just confidence is given to the[American people's] public servants, *they should be watched with eyes that never sleep*". *Id.* (emphasis supplied). Which is true, no matter who happened to say it first.

Being anything but students of economics, political philosophy, or even their own country's history, average Americans may not understand *why* all this is happening—but they do realize that it *is* happening, and that their own livelihoods, standards of living, and hopes for a sound education, long-term employment, and a comfortable retirement are in jeopardy. Expressed in today's popular jargon, "the 99%" are not blind to what "the 1%" are doing. They observe the bankers, speculators, and their cronies being "bailed out" financially, immunized from prosecution politically, and infused statutorily with even more abusive powers and privileges "unknown to our law and * * * utterly inconsistent with the constitutional prerogatives and duties of Congress"[4352] than they ever enjoyed heretofore—while the common man receives nothing in the near term, and in the long term will be forced to pay for all the "bail outs", "quantitative easings", and other financial chicanery through increased taxation, inflation, and austerity.

If not stopped and punished, this brazen pillaging of America's economy, with its massive redistribution of wealth from her middle and lower classes to *le gratin financier*, can only inflame the populace. Some individuals bereft of economic hope may simply shoot themselves in despair. But many others may descend to such a depth of hatred and a desire for vengeance on their oppressors that they will resolve, if pushed to the wall, to shoot someone else instead. Once widespread, such attitudes will fan the flames of social unrest, then civil disobedience, and finally violent resistence in the nature of open class warfare: namely, the bankers, their clients in high finance, and their puppets and stooges in public office ("the 1%") *versus* overwhelming numbers of common Americans ("the 99%").

The Money Power is well aware of these dire possibilities. Through its own incompetence, hubris, and greed it has rashly pried open Pandora's Box, and released a panoply of evils for which it knows but one remedy: repression. After all, protecting the perpetrators of financial fraud by repressing their victims is nothing new. In the 1930s, as a consequence of the first great collapse of the Federal Reserve System, average Americans were forced to accept irredeemable Federal Reserve Notes as "legal tender", were prohibited from enforcing contracts payable in gold, and were dispossessed of their gold—all for the benefit of the banks. But the likely extent and duration of the coming catastrophe are so great that mere monetary and banking repression along the lines of the 1930s will not suffice. Instead, the banking cartel and its allies will need to direct their Pinocchios in public offices at every level of the federal system to unleash hordes of *para*-militarized police-state thugs against every American who in any manner refuses to acquiesce in whatever economic stringencies officialdom deems necessary in order to preserve the cartel from the consequences of its own folly.

[4352] A.L.A. Schechter Poultry Corporation v. United States, 295 U.S. 495, 537 (1935).

In the final analysis, *all* of this—imperialism abroad, repression at home—arises, and had to arise, out of the corporative-state nature of America's central-banking system. More than that, imperialism in search of what could be called economic *Lebensraum*, coupled with the imposition of a domestic police state, is the essence of full-blown fascism. So, finally, the fruit of monetary and banking corporativism, in all its bitterness, falls from the tree: The big banks, financial houses, and dens of speculators which Americans are told are "too big to fail" *have* failed and *will continue* to fail. But rogue politicians and public officials will relieve them of the weight of their failures by shifting that load of moan onto the backs of ordinary citizens. That is, in the fascist lexicon, "too big to fail" really means "to big to pay". "Too big to fail" means that *someone else* will be compelled to pay the price through taxes, through inflation, and through enforced austerity in basic standards of living—someone else who cannot afford to pay, and is neither legally nor morally obligated to pay. The governmental apparatus can fail—as it has failed by becoming the mere marionette of the big banks, financiers, and speculators. The Nation's economy can fail—as it has failed with the Great Depression of the 1930s, with alternating recessions and "bubbles" thereafter, and now with the looming specter of depression, hyperinflation, or hyperinflation followed by depression. Even the people can fail—with untold economic suffering, political instability, and social dislocations, rather than peace and prosperity, their lot. But the big banks, financial houses, and their favored clients and political whores can never be suffered to fail, or even allowed to suffer. Thus America has arrived at the point of superordination of bank over state, and subordination of society to bank and state, the point at which the oligarchical complex of bankers, financial speculators, and crony politicians and public officials has become so entrenched, and so puissant both economically and politically, that it dares openly to operate according to the boast: "It is not the State which gives orders to us, it is we who give orders to the State!" This noxious assertion cannot be overemphasized, because perhaps its most infamous exponent in recent times was no less than Adolf Hitler, who made precisely that statement on behalf of the Nazi Party at the 1934 *Reichsparteitag*.[4353]

In a polity which conformed to the Declaration of Independence and the Constitution, every public official, at every level of the federal system, should align himself with WE THE PEOPLE in order to suppress the banking cartel, once and for all, in aid of "the general Welfare".[4354] For, as the Declaration attests, "Governments are instituted among Men, deriving their just powers from the consent of the governed," in order "to secure" men's "unalienable Rights"—*not* to guarantee under color of law and to collect by main force unjust profits for counterfeiters, usurers, and speculators at THE PEOPLE'S expense.

[4353] Recorded on film by Leni Riefenstahl in *Triumph des Willens*.

[4354] U.S. Const. preamble.

The present economic crisis stems from the generation of staggering quantities of debt, both public and private, which could never have been amassed except through the intermediation (and, if the truth be told, the prompting) of the banking cartel. *Catastrophhards* may wail that this debt is so gargantuan as to be "unpayable", and that therefore America is utterly doomed, financially and in other ways. Insofar as debt alone is the problem, though, prophecies of that sort are nonsensical. For *all debts are always paid*—either by the debtors, or by the creditors, or by some third-party sureties or guarantors. For example, because of the nature of the banking cartel's currency as unconstitutional "bills of credit", and the nature of the cartel itself as an unconstitutional corporative-state structure,[4355] much of the debt the Federal Reserve System has floated can be denounced outright as simply illegal *ab initio*, and therefore need not be repaid by the debtors or anyone else, but must be charged against the parties who emitted the *fiat* currency and bank "credit" which made incurrence of that debt possible in the first place.[4356] In addition, that portion of the General Government's debt which is actually licit can in fact be paid off entirely and in short order, if a little imagination is applied to the task.[4357]

At the present historical juncture, however, no one can expect the rogue officials who dominate the General Government to respect, let alone to assert, the rights of THE PEOPLE against the bankers and their clients, because those officials are the bankers' inseparable co-conspirators. Indeed, so committed are those officials to securing the bankers' interests at all costs, that they are preparing to commit actual "Treason" against THE PEOPLE of the United States, by setting up a *para*-military police-state apparatus for the purpose of "levying War" against them in every State of the Union when nationwide economic collapse results in widespread social dislocations which ignite massive civil disobedience.[4358]

Thus, America has arrived at a decisive parting of the ways. So far, Americans have exemplified in their restraint the cogency of the Declaration of Independence's observation that "Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed". But, as their situation becomes insufferable, WE THE PEOPLE will seriously reflect on the principles that: (i) in order "to secure" "unalienable Rights", "Governments are instituted among Men, deriving their just powers from

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[4355] *See* E. Vieira, Jr., *Pieces of Eight, ante* note 39, Volume 2, at 1401-1524.

[4356] *See, e.g.,* Craig v. Missouri, 29 U.S. (4 Peters) 410 (1830), *discussed in* E. Vieira, Jr., *Pieces of Eight, ante* note 39, Volume 1, at 391-410. Their losses would be vastly compounded, if any of the Federal Reserve Banks, commercial banks within the Federal Reserve System, or big financial houses allied with them were ultimately adjudicated to be "racketeering enterprises", as perhaps they should be. *See* 18 U.S.C. § 1963(a).

[4357] *See* APPENDIX B, *post*, at 1929.

[4358] *See* U.S. Const. art. III, § 3, cl. 1. *See ante,* at 814-821.

the consent of the governed"; (ii) "whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness"; and (iii) "when a long trains of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government". Little cogitation will be required for THE PEOPLE to conclude that:

> • They can—and should—withdraw their "consent" from any putative "Government", anywhere within the federal system, which purports intentionally and systematically to exercise any "[*un*]just powers" whatsoever.[4359]
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> • Inasmuch as most parts of the present "Form of Government" of the United States—including the Legislative, Executive, and Judicial Branches, for which the Constitution actually provides; as well as the elephantine bureaucracy of "the Administrative State", the present form and powers of which the Constitution nowhere approves—have been thoroughly colonized by individuals recruited, coöpted, and corrupted by the Money Power, and thereby have redundantly proven their behavior "destructive of the[ ] ends" for which the General Government was originally "instituted among Men", THE PEOPLE are fully justified in setting about "to alter or to abolish" that "Form of Government" to such degree as they may conceive necessary to bring such miscreants to heel. And,
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> • Confronted by the "absolute Despotism" under which the Money Power is working feverishly "to reduce them", THE PEOPLE may employ whatever means might be found to be efficacious "to throw off [such an abusive] Government", in the sense of removing from power the rogue officials who are the primary agents of that "Despotism".

Those among THE PEOPLE who are sufficiently astute, however, will surely observe that, although *much* of the General Government has failed in the sense of having been brought under the control of *anti*-constitutional forces, *not all* of it has. ***So far, "the Militia of the several States" have not been found wanting, because they have not even been tried.*** Moreover, WE THE PEOPLE need depend upon no one else to call forth the Militia, because they themselves are the Militia. So, in the final analysis, if the Militia are not called forth THE PEOPLE will have no one to blame but themselves.

[4359] Rogue public officials' intentional, albeit adventitious, exercises of "[*un*]just powers", in violation of the Constitution, is already a crime. *See, e.g.,* 18 U.S.C. §§ 241 and 242. Systematic exercises of such powers are also illegal. *See, e.g.,* 18 U.S.C. §§ 1961 *et seq.* Although on the surface the acts of public officials, misbehavior of these kinds should never be confused with acts of "government".

That blame, moreover, will be as well earned as it will be severe. For WE THE PEOPLE are America's sovereigns. The sovereigns bear the ultimate burden of accountability for the safety of the state. And, in the final analysis, sovereignty is not a merely titular status, but instead must entail the actual responsibility, the actual willingness, and the actual ability to say "No!" *with absolute finality* to all of those miscreants—whether in private station or public office—who endanger the *res publica*. In America today, the proper exercise of sovereignty requires the maintenance of National independence under the aegis of the Declaration of Independence; of popular self-government under the aegis of the Constitution; and of an economy controlled by and working for the people through the free market. To accomplish all of this, THE PEOPLE must hold the supreme political power in their own hands. And inasmuch as "'[p]olitical power grows out of the barrel of a gun'",[4360] THE PEOPLE must hold in their own well trained hands at all times guns sufficient in quantity and quality. Therefore, the absolute necessity for the Militia—the only organized military forces compatible with these principles.

Not only that. The Militia also comprise the only forces capable of dealing with the problem, chronic in any republic, of "unrepresentative representative government". Plainly, the will of THE PEOPLE expressed directly through their own votes provides the best evidence of what they believe "the common defence" and "the general Welfare" require.[4361] Yet, in the normal course of human events, for THE PEOPLE to assemble, identify issues, deliberate, and decide these matters themselves has often proven, or at least has been widely imagined to be, impractical. For that reason, THE PEOPLE'S participation in day-to-day governance has been limited to selecting "representatives" who supposedly can and will perform that task "in THE PEOPLE'S interest". To be sure, THE PEOPLE exercise their sovereignty when they "institute[ ]" "Governments * * * [which] deriv[e] their just powers from the consent of the governed",[4362] and select temporary "representatives" to administer those powers on their behalf. *But they remain sovereign only insofar as the "Governments" they "institute[ ]" act pursuant to and consistent with their consent, and not otherwise.*

For a system of "representation" to exist at all, THE PEOPLE must be confident that their "representatives" will do the right things for the right reasons, and not engage systematically in acts of usurpation and tyranny. Recent experience has taught, however, that supposed "representatives" all too often make policy on their own without consulting THE PEOPLE, frequently concealing their motivations, deliberations, and even actions from their constituents. Rather than "representing" THE PEOPLE, these disloyal "representatives" advance the agenda of factions and

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[4360] *Quotations From Chairman Mao, ante* note 28, at 61.

[4361] *See* U.S. Const. preamble.

[4362] *See* Declaration of Independence.

other special interests at THE PEOPLE'S expense. To that end, they do whatever is necessary to transmogrify the governmental apparatus—and, through the operations of that apparatus, the entirety of society's legal, political, and economic systems—into pliant instruments of their selfish clients' business plans. They supplant THE PEOPLE'S will with the dictates of self-appointed, self-aggrandizing élites, corrupt the economy, subvert the legal and constitutional order, and even betray the Nation's independence. The formal procedures of elections, of legislative action, and of judicial processes remain the same; but their substance is thoroughly perverted. The immense efforts that must be expended in these dark endeavors pale in comparison to the rewards that attend success, however—for once in control of the General Government in particular, these false "representatives" and their clients can subject the entire wealth of this country to systematic looting under the protective coloration of the false "laws" they promulgate for that very purpose.

The stakes being as high as they are, these disloyal "representatives" cannot allow their and their clients' positions to be challenged. So they must eliminate society's rights to resist their aggression and to restore the true legal and political order, and therefore must suppress every legal remedy which might vindicate those rights. At this point, they consider themselves bound by neither legitimacy, nor legality, nor even logic—rather, for them everything depends upon logistics: how much raw force they can bring to bear on dissenters. Thus is explicable the pressure being exerted by these treacherous "representatives" and the factions and special interests they serve for the establishment of an all-encompassing National *para*-militarized police-state apparatus to do their dirty work.

Under these circumstances, it is politically suicidal for Americans to imagine that they can protect their liberty, their property, or even their lives by petitioning legislators, executive officials, or judges "for a redress of grievances".[4363] What purpose can petitions possibly serve when the individuals who comprise this country's highest legislative, executive, and judicial institutions are themselves avowed and proven enemies of THE PEOPLE who misuse the law in order to violate the law under color of the law, thereby denying everyone else the protection of law?

Self-evidently, no rational people would ever consent to this state of affairs. And Americans have not consented—primarily because their false "representatives" have heretofore largely concealed the facts from them. Now this absence of informed consent must be made manifest through THE PEOPLE'S unmistakable withdrawal of consent. Mere "dissent" is not the equivalent of withdrawal of consent, though. Dissent must be rendered *effective*, in the sense that those acts of their disloyal "representatives" to which THE PEOPLE object must be made to cease, and those "representatives" must themselves be thoroughly chastized. Thus, "the

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[4363] *See* U.S. Const. amend. I.

consent of the governed" always boils down to their right to resist, their willingness to resist, their ability to resist, and *in extremis* their actual resistance. *A trustworthy system of political "representation" does not preclude THE PEOPLE'S resistance, but always assumes the possibility of it, and sometimes demands it.*

To be sure, the practical problems popular resistance to usurpation and tyranny poses today exceed in seriousness and complexity those which confronted Americans in the Founding Era. Yet WE THE PEOPLE enjoy a decided advantage over their forebears, because in calling forth the Militia today THE PEOPLE will be acting *under the aegis of the Declaration of Independence and the Constitution as settled law.* In contrast, in (for example) Virginia in 1774 and 1775 the Royal Governor's intransigeance stymied the General Assembly; the Colony's Militia Act had expired and could not be renewed; the Governor tried to strip the patriots of ammunition and then purported to declare "martial law" against them—so Virginians were compelled to proceed on their own, by forming Independent Companies of Militia.[4364] Under the British "constitution", this was arguably an *extra*-constitutional, if not a wholly illegal, course of action.[4365] Nonetheless, Virginia's patriots were justified, because "[h]e that has virtue and power to save a people, can never want a right of doing it".[4366] Fortunately, WE THE PEOPLE today need not go to such lengths, because their State legislatures can enact the statutes necessary to revitalize "the Militia of the several States" in perfect conformity with constitutional principles.

Perhaps even more importantly, in contrast to what might have been imaginable in *pre*-constitutional times when the Militia were creatures of statute, today neither Congress nor the States can suppress the Militia. The Second Amendment declares "[a] well regulated Militia" to be "necessary to the security of a free State"—and every provision of the Constitution must be construed and applied in consonance with this precept. The Constitution incorporates "the Militia of the several States" as permanent components of its federal system—of a status equal to that of Congress, the President, the Supreme Court, and the States themselves. And the Declaration of Independence presumes that, even in the absence of a new government "deriving [its] just powers from the consent of the governed", "the People" can avail themselves of the "'[p]olitical power [that] grows out of the barrel of a gun'" so as to exercise their "right" and fulfill their "duty" "to throw off [an abusive] Government, and to provide new Guards for their future security". Moreover, as the supreme human law-givers in America—exercising rights, powers, and privileges constrained only by "the Laws of Nature and of Nature's God"—WE THE PEOPLE are superior to the Second Amendment, to the

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[4364] *See ante*, at 567-597.

[4365] *But see* W. Blackstone, *Commentaries on the Laws of England, ante* note 142, Volume 1, at 143-144.

[4366] A. Sidney, *Discourses Concerning Government*, *ante* note 54, at 227.

Constitution, and even to the Declaration of Independence. And WE THE PEOPLE did not promulgate those laws, and through them establish and guarantee for themselves "a free State", while simultaneously licensing public officials to subvert and overthrow that "free State" by eliminating or eviscerating the Militia. After all, WE THE PEOPLE *are* the Militia. For this reason, not only no purported statute—but also no purported constitutional Amendment—which proposed to suppress the Militia could ever claim legitimacy.

Admittedly, even with the appropriate legislation in hand, if Americans want to preserve their liberty, their property, and perhaps even their very lives against the *para*-militarized SWAT teams and other *Pelotons* the Money Power's stooges in public office are preparing to deploy against them, they will have to pay a stiff price for not having done what they should have been doing for years heretofore. It is useless, however, to bemoan past failures. Water over the dam is lost downstream forever. All that matters is what THE PEOPLE steel themselves to do *now*. Plainly enough, they can accept no substitute for victory—for, if they do not prevail, America will be destroyed. And revitalization of "the Militia of the several States" is the only way to win.

Nonetheless, patriots must face the hard reality that American society is fractured, without even as much of a political consensus as existed in *pre*-constitutional times, when many Americans remained Tories to the bitter end. So one must expect that, initially, reformers may be able to muster only the votes of a minority of their State's legislators, because a myopic majority of the State's population will ignorantly, foolishly, or perversely oppose revitalization of the Militia. Even if at first such set-backs occur in every State, they will not signal the end of the matter. American government is not erected upon the shifting sands of "absolute democracy", such that "the majority rules" notwithstanding that its aberrant decisions will inexorably drive the country to ruin. Rather, American government stands upon the bedrock of "constitutional republicanism", perforce of which "[o]ne's right to life, liberty, and property * * * and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections".[4367] A majority, after all, can constitute a dangerous *anti*-social faction. For "a faction" is "a number of citizens, *whether amounting to a majority or minority of the whole*, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community".[4368] Under such circumstances, the moral and political concept "WE THE PEOPLE" does not inflexibly refer to the population as a whole, to a large majority of the population, or even to a bare majority. Rather, in the most unsettled and dangerous times, when a majority of the population is under the sway of "[m]en

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[4367] West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638 (1943).

[4368] *The Federalist* No. 10 (James Madison) (emphasis supplied).

of factious tempers" and "of sinister designs" who, "by intrigue, by corruption, or by other means, [have] first obtain[ed] the suffrages, and then betray[ed] the interests of the people",[4369] a minority of the population, acting in the true interests of everyone, is entitled to assume leadership, in whatever prudent manner that can be accomplished, and then to speak for and act on behalf of the whole: ***"He that has virtue and power to save a people, can never want a right of doing it."***[4370]

— *Finis* —

[4369] *Id.*

[4370] A. Sidney, *Discourses Concerning Government*, *ante* note 54, at 227 (emphasis supplied).

APPENDICES

1901

APPENDIX A

"A Cross of Gold"—A re-edited version of the full text of an address part of which was presented at the October, 2010, Meeting of the Committee for Monetary Research & Education, in New York City.

The present domestic and international monetary and banking systems have slipped into the initial stages of terminal dissolution. In their existing forms, they cannot long survive. No less than the United Nations Economic and Social Council takes this position. In July of this year it published a report entitled *United Nations World Economic Situation and Prospects 2010*, which stated that "[t]he risk of exchange-rate instability and a hard landing of the dollar could be reduced by having a global payments and reserve system which is less dependent on one single national currency", and that "[a] new global reserve system could be created, one that no longer relies on the United States dollar as the single major reserve currency".[4371] This is globalist *1984*-ish duckspeak for "our present funny-money scam is coming apart at the seams" and "we need to set up a new Ponzi pyramid before the old one collapses". But if not in its prescription, yet in its description the United Nations states the truth.

So the question is not, "Will the present domestic and international monetary and banking systems split apart at their seams?" but whether, in the course of their inevitable unraveling, they will drag this whole country—the *real* America, the America which was once worth the price of admission, the America which used to be a beacon of hope for the entire world—down with them. Or, more precisely, the question is whether those among the American people who are alert to this danger will sit idly by and allow the worst to happen. "They also serve who only stand and wait" cannot be the watchword in the coming battle. Remaining aloof will not be a viable option.

No hope is to be found in the notion that various clever ways exist for individuals to profit personally from the collapse of the reigning monetary and banking systems. Speculators conjure profits to be reaped from increases in the so-called "price of gold"—going up, up, and up.[4372] This, however, is a lamentable

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[4371] *To be found at* <http://www.un.org/esa/policy/wess/wesp2010files/wesp2010pdf>.

[4372] Gold *and silver* are the constitutional monetary metals, with the actual unit of money being silver (the "dollar" of 371.25 grains troy), and gold being valued in units of silver at the free-market exchange-rate between the two. But to simplify this discussion, gold alone will be treated as the unitary proxy for the more

econological fallacy, because it measures the value of gold in terms of another, *and a terminally unstable*, currency: Federal Reserve Notes. Increases in the so-called "price of gold" largely reflect the decreasing purchasing power of Federal Reserve Notes as against gold—inexorably going down, down, and down (whether because of actual increases in the supply of Federal Reserve Notes or because of an erosion in public confidence in the value of whatever supply exists). If economic history is any guide, the day will surely come when Federal Reserve Notes—as have so many other paper currencies of their ilk—become worthless, except as numismatic curiosities. Then "the price of gold" in Federal Reserve Notes will be exceedingly, perhaps astronomically, high. *But no one will care.* Once upon a time, "the price of gold" measured in Weimar "marks", or even in Confederate "dollars", was significant. What, though, is "the price of gold" in Weimar or Confederate currency today? Does anyone know? Why would anyone bother to find out? And why should things turn out differently for Federal Reserve Notes?

Astute Americans need to envision, and then to bring about, a *new* monetary system in which no one talks about "the price *of* gold", but only of "prices *in* gold". *No* "price of gold" exists when a fixed weight of gold is the actual unit of money. Under those circumstances, *all prices are stated in terms of gold*. When a fixed weight of gold is the unit of money, "the price of gold" is a meaningless concept, or at best a tautology: namely, "the price of a unit of gold" is precisely "a unit of gold". In that future time, asking "What is 'the price of a unit of gold'?" would be as sensible as asking "What is 'the price of a nominal one-dollar Federal Reserve Note'?" today.

So, other than waiting for disaster to supervene, exactly what is to be done? At least three basic plans for dealing with the present situation exist:

> *First*, the plan of the international political and financial crime families to maintain their empire of "funny money" with some new financial-racketeering enterprise.
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> *Second,* various plans for "reforming" and "regulating" the Federal Reserve System by somehow "returning" to something some people call a "gold standard", based on a "redeemable currency" that is somehow "backed" by gold. And,
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> *Third,* a plan for replacing the present unstable and unsustainable monetary system with an entirely new system of economically sound, honest, and constitutional money—by introducing into the free market and State governments an alternative currency consisting *solely of gold*, with no admixture of

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complicated duometallic system.

paper, and then letting competition between Federal Reserve Notes and specie settle the matter, once and for all.

The first two plans are similar, in that they are predicated upon imposing control "from the top down": namely, common people must use whatever currency "the authorities"—domestic or international—decree. Under the third plan, control derives "from the bottom up": namely, the people may use whatever currency they desire, and those who elect to employ the alternative currency can simply walk away from the Federal Reserve System. It may be imagined, however, that the second and third plans are at least similar, because they both rely on gold to some significant degree. Nothing could be further from the truth, however.

Here, careful analysis is in order—

1. A new *supra*-national monetary régime. The international political and financial crime families know full well that the Federal Reserve System—indeed, the whole complex, corrupt apparatus that couples private banks and public institutions through the Treasury of the United States—is inherently unstable and needs to be replaced, because it can no longer be propped up, let alone reformed in any fundamental sense. Aware that the Federal Reserve System's days are numbered, they intend to translate the paper-currency scam to the next level, just as they have done, step by step, in crisis after crisis, throughout American history. To understand the genesis of this plan, a review the past is necessary:

Prior to the Civil War, America suffered from two attempts by Congress to impose a so-called "national bank" (the first and second Banks of the United States), as well as from the States' creation of numerous State and local banks, both private and *quasi*-public in character. This loose arrangement failed, because of the inherent instability of fractional-reserve banking and the insoluble economic and political conflicts it inexorably and inevitably generated. In particular, although all of the banks operated on the same principle of "fractional reserves", no way was found to coördinate and control individual banks' cycles of expansion and contraction of currency and credit for the mutual benefit of the banks as a class. Instead, the banks' unregulated competitive looting of society through monetary manipulations led periodically to serious economic breakdowns called "bank runs", "suspensions of specie payments", "stringencies", "panics", "depressions", and so on. To overcome these problems, the locus of the bankers' economic power needed to be translated to an higher level, and their economic power needed to be brigaded with, or at least protected by, political power.

During the Civil War, to prop up and organize the fractional-reserve system, a new set of banks—called "National Banks"—was created and tied to the United States Treasury and the National debt through the National Currency Acts in 1863

and 1864.[4373] Yet, although these institutions were called "*National* Banks", this was a scheme of merely *regional and imperfect cartelization.*

The weaknesses of this system became apparent only forty-three years after the initiation of the scheme, when the great panic of 1907 proved that the National Banking System needed a major overhaul. The fundamental flaws pointed out at the time were that the system provided no single "lender of last resort" to pump up the pyramid of currency and credit in times of crisis, and set up no central regulator to supervise and discipline the bankers in order, if possible, to forefend crises altogether. To overcome these deficiencies, the locus of economic power needed to be translated to a still higher level.[4374]

To that end, *full national cartelization and central regulation* of the banks was set up in the Federal Reserve System through the Federal Reserve Act of 1913.[4375] Indeed, the Federal Reserve System went beyond mere national cartelization to *national Ponzification.* The twelve Federal Reserve Banks sowed throughout the country promised their depositors to redeem Federal Reserve Notes in gold or other "lawful money" on demand, which promise was "guaranteed" by the United States Treasury's ability to extract payments from taxpayers.[4376] To be sure, in the event of the Federal Reserve Banks' failure to redeem their notes, the Treasury could then assert a first lien on their assets.[4377] But what good would this statutory recourse prove to be if the Banks were without sufficient assets to meet their liabilities? So, just as in a classical Ponzi scheme present payments to the first tier of "investors" are "guaranteed" by revenues to be derived from subsequent tiers of duped "investors", under the Federal Reserve System promises of present redemption of Federal Reserve Notes were "guaranteed" by anticipated tax revenues—except that, far better than the classical Ponzi scheme, these revenues could be coerced from unwilling "investors".

Yet, once again, the inherent, inexorable instability of fractional-reserve banking proved too destructive for legislative draftsmen to contain. By 1932—a scant twenty years after its inception—the Federal Reserve System (as the saying

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[4373] *An Act to provide a national Currency, secured by a Pledge of United States Stocks, and to provide for the Circulation and Redemption thereof,* Act of 25 February 1863, CHAP. LVIII, 12 Stat. 665, *superseded by An Act to provide a National Currency, secured by a Pledge of United States Bonds, and to provide for the Circulation and Redemption thereof,* Act of 3 June 1864, CHAP. CVI, 13 Stat. 99.

[4374] *See generally* James Livingston, *Origins of the Federal Reserve System: Money, Class, and Corporate Capitalism, 1890-1913* (Ithaca, New York: Cornell University Press, 1986).

[4375] An Act To provide for the establishment of Federal reserve banks, to furnish an elastic currency, to afford means of rediscounting commercial paper, to establish a more effective supervision of banking in the United States, and for other purposes ("Federal Reserve Act"), Act of 23 December 1913, CHAP. 6, 38 Stat. 251.

[4376] *See* Act of 1913, § 16, ¶ 1; *now codified as amended, with deletion of the promise to redeem in gold, at* 12 U.S.C. § 411.

[4377] *See* Act of 1913, § 16, ¶ 4; *now codified as amended at* 12 U.S.C. § 414.

has it) "went off the gold standard" by suspending specie payments domestically in 1933 and 1934. And that suspension continues to this very day.[4378]

Nonetheless, because of the uniquely favorable situation of the United States in the aftermath of World War II, it was possible once again for the magicians of monetary manipulation to secure their own positions by translating the locus of economic power to a still higher level. Under the Bretton Woods Agreement and the International Monetary Fund in 1945,[4379] the Federal Reserve System effectively became the first "world central bank", and its currency (the Federal Reserve Note) effectively became "the world reserve currency". This went beyond national cartelizaton and Ponzification *to international Ponzification, but still nationally centered*. That is, the bankers' scheme moved to a higher level than under the original Federal Reserve Act of 1913, *but still only partially and imperfectly*.

A central pillar of this structure collapsed only twenty-six years later, though, when the Federal Reserve System and its surety, the United States Treasury, defaulted on "the international gold standard" in 1971, suspending specie payments on Federal Reserve Notes to everyone everywhere. And that suspension, too, continues unto this very day.

Now the disintegration of the entire edifice of central banking and fractional-reserve debt-currencies has begun—not just nationally, but globally as well—only thirty-nine years after the final repudiation of redemption of Federal Reserve Notes in gold in 1971.

Observe that, before it lurched into chaos, the first *ersatz* "world central bank" and "world reserve currency" held together for only thirteen years more than the original Federal Reserve System (from 1913 to 1933), and for four years less than the original National Banking System (from 1864 to 1907).

Today, similar to the situations that existed prior to the National Currency Act and the original Federal Reserve Act: (i) A multiplicity of national or regional central banks, all operating on the faulty principle of fractional reserves, exists. And (ii) all of these banks are attempting to accommodate irresponsible governmental fiscal policies and robber-baron pillaging of private economies in their home territories. The difference now is that an *ersatz* "world central bank" has been jury-rigged around the Federal Reserve System—but it is located in a single country, is tied to that country's laws, and is trying to sustain the reckless fiscal policies and unbridled financial brigandage of perhaps the most fiscally profligate and even

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[4378] *See* E. Vieira, Jr., *Pieces of Eight, ante* note 39, Volume 2, at 867-1240.

[4379] AN ACT To provide for the participation of the United States in the International Monetary Fund and the International Bank for Reconstruction and Development ("Bretton Woods Agreements Act"), Act of 31 July 1945, CHAPTER 339, 59 Stat. 512; T.I.A.S. 1501 (27 December 1945), 60 Stat. 1401, *especially* Art. IV, § 1(a), 60 Stat. at 1403.

corrupt of all nations in the history of the world. As with the National Currency Act, no adequate "lender of last resort" is available to bail out the Federal Reserve System as a whole, other than perhaps the United States Treasury, by printing irredeemable currency in the form of so-called "Lincoln Greenbacks".[4380] And no *supra*-national regulator exists to moderate the Federal Reserve's excesses. No *national* regulator exists, either, as Congress has proven impotent and incompetent in that capacity—or, perhaps more accurate a description, has functioned as a co-conspirator in the process of domestic and international looting. Thus, the world is confronted by a shaky state of affairs similar to that which plagued the United States during the era of the National Currency Act and that led to the creation of the Federal Reserve System—except that the present situation is orders of magnitude more serious.

So, one can confidently predict on the basis of both theory and experience that the international political and financial crime families will now attempt to create a true *supra*-national *world* "central bank of issue" empowered to emit a new *supra*-national *fiat* currency, *supra*-nationally "managed", and to exercise regulatory authority over all national central banks—in all things free from control by *any* national or regional government. Which, of course, will render this new *supra*-national bank itself a species of world government, or at least the nucleus of one.

As pointed out earlier, one such plan has already being floated among the international élitists through the United Nations Economic and Social Council. The United Nations *World Economic Situations and Prospects 2010* has called for the Federal Reserve Note to be replaced as the reserve currency for international trade with a new currency to be issued by the International Monetary Fund, and initially based on the IMF's so-called "Special Drawing Rights".[4381] More recently, on 4 October of 2010 the Institute of International Finance, a consortium in which are associated some four hundred twenty of the world's most important banks and financial institutions, issued a policy letter which also advocated the emission by the IMF of a new currency based on Special Drawing Rights.

Actually, this is not a new idea. In essence, it was John Maynard Keynes' original proposal leading up to Bretton Woods—namely, that a true *supra*-national bank would emit its own global currency, to be called "the bancor", which eventually would supplant all national and regional currencies, not only in international but also in domestic commerce (and, presumably, with respect to all political payments, such as taxes, too). So, one can expect that theoreticians of and other mouthpieces for paper currency and fractional-reserve central banking will

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[4380] *See* E. Vieira, Jr., *Pieces of Eight, ante* note 39, Volume 1, at 561-666.

[4381] "Special Drawing Rights" are an *ersatz* international reserve currency, the value of which derive from a "basket" of major currencies, and which are allocated to members of the IMF in proportion to the amounts of gold or (primarily) major foreign currencies that those members deposit with the IMF.

now contend that the present failure of the Federal Reserve System as an *ersatz* "world central bank" arose precisely because world leaders did not follow Keynes' recommendation. In any event, whatever the music's provenance, the globalist political oligarchs and the globalist economic oligarchs are now all playing the same discordant tune. And when one hears the overture, he knows that the opera cannot be far behind.

The *supra*-national character of this proposed new global currency, and of the institution that will emit it, is of crucial importance, because contemporary Americans still retain the power to deal with the Federal Reserve System directly, through Section 30 of the Federal Reserve Act of 1913, which provides that "[t]he right to amend, alter, or repeal this Act is hereby expressly reserved".[4382] But they will lose this power when a *supra*-national monetary scheme is imposed on them. And whatever other, similar power (if any) they might retain for themselves will depend upon the terms of the treaty or other international agreement by which the new currency gains legal-tender status in the United States.

To be sure, a treaty cannot override the Constitution of the United States. And a treaty can always be set aside, in part or in whole, by a subsequent statute of Congress. Nonetheless, because the American people never demanded that it be enforced, the Constitution has not stopped, or even retarded the profligacy of, the Federal Reserve System since 1913. Neither have the Members of Congress whom the people have elected generation after generation ever invoked Section 30 of the Federal Reserve Act, or any other provision of any other statute, to correct the banking cartel's excesses, except to make them worse (such as by removing redemption in gold, outlawing the private ownership of gold from 1933 until 1973, and outlawing "gold-clause contracts" from 1933 until 1978). So one can safely presume that any new *supra*-national global currency and central bank will be even harder for Americans to influence, let alone control, than the Federal Reserve System has proven to be.

The true perversity of the present situation lies in the indication—indeed, in some quarters the expectation—that this scheme for a new *supra*-national monetary order will be sold to a doubting world by attaching some sort of "gold standard" to it. This could be used as the bait to entice naive people tired of monetary instability caused by international bankers to bite on the hook of *supra*-national management of their economies by the selfsame international bankers. Beyond any doubt, however, whatever will be offered will not be even a traditional "gold standard", perforce of which the issuer of a unit of paper currency (or bank credit solvable in that currency) will be required by law to exchange each unit of its currency for a fixed weight of gold upon demand by the holder of that currency.

[4382] 38 Stat. at 275.

Neither will it be a true "gold standard", in which the only actual unit of money is a fixed weight of gold, and everything else is merely an instrument of debt without force as "legal tender". So, even with whatever thin gold veneer may be provided (if that is the ruse to be used), the new *supra*-national global currency will be a deception from its inception. In light of the precedents, though, notwithstanding its inherent instability the new swindle may be able to perdure for perhaps another forty years, during which time tremendous further looting, waste of resources, and other damage will be visited upon the peoples of the world.

Yet, one may doubt that any such *supra*-national monetary and banking structure will soon be created under present conditions:

> *First*, the European monetary union—which, in large measure, is the regional precedent for such a global arrangement—is now under increasing strain, and threatens to collapse, with its constituent countries perhaps returning to their national currencies.
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> *Second*, no reason exists to believe that Russia and China, in particular, will agree to submit their economies to some *supra*-national monetary and banking authority—and quite a few reasons to suspect that Germany might desire to become part of an new political and economic *bloc* consisting of Germany, Russia, and China, an expanded economic and political *Dreikaiserbund* the wisdom of which Bismarck would certainly have appreciated.

In any event, in the face of these possibilities, *what are Americans in particular to do* to protect their interests? Basically, they have two choices:

> • Americans can try to salvage, repair, restore, and then control the present Federal Reserve System. *Or,*
>
> • They can provide themselves with an *entirely new* currency, preferably before the present one completely self-destructs.

2. Salvaging the Federal Reserve System by returning Federal Reserve Notes to redeemability in gold. More than half a century ago, Professor Walter E. Spahr rather starkly summed up the situation:

> It should not be surprising * * * that apparently all who would socialize our economy are opposed to the restoration of a redeemable currency in the United States. Either because they understand the relationship between an irredeemable currency and the processes of socialization of the economy or because they simply note that Socialist, Communist, and Fascist governments employ irredeemable currencies as a means of controlling and managing the people, advocates of government dictatorship seem invariably to defend irredeemable currencies with the utmost vigor. * * * The evidence seems overwhelming that a defender of

> irredeemable currency is, wittingly or unwittingly, an advocate of Socialism or of government dictatorship in some form.
>
> So long as a government has the power over a people, that is provided by an irredeemable currency, all efforts to stop a government disposed to lead a people into Socialism tend to, and probably will, prove futile. The people of the United States have observed all sorts of efforts, organized and individual, to bring pressure upon Congress to end its spending orgy and processes of socialization. It should be amply clear by this time that none of these efforts has succeeded. Moreover, there is no reason for supposing that any of them, except the restoration of redeemability, can succeed in arresting our march into Socialism.[4383]

With all due respect to the memory of Professor Spahr, however, the fundamental problem is not *irredeemable* currency. It is, and always has been, *redeemable* currency—at base, the delusion that the thing being redeemed (a paper note) is the actual "money", not the thing in which redemption is made (a piece of actual gold).

Revealingly, not even the original Federal Reserve Act made that error. Rather, Section 16 of the Act provided that

> Federal reserve notes, to be issued at the discretion of the Federal Reserve Board for the purpose of making advances to Federal reserve banks * * * are hereby authorized. The said notes shall be obligations of the United States, and shall be receivable by all national and member banks and Federal reserve banks and for all taxes, customs, and other public dues. They shall be redeemed in gold on demand at the Treasury Department of the United States, * * * or in gold or lawful money at any Federal reserve bank.[4384]

Observe: From the very first, Federal Reserve Notes were denominated "advances" and "obligations"—that is, instruments and evidence of *debt*. True "money", however, is the most liquid of all *assets*, not a debt that might be repudiated, and certainly not a debt that has been serially repudiated. And if Federal Reserve Notes were from the start to be "redeemed * * * in gold or lawful money", they obviously were never conceived to be either "gold" or "lawful money". So, because by definition the only official "money" the law recognizes is "*lawful* money", by law Federal Reserve Notes were never (and are not now) actual "money" at all, but at best only some sort of *substitute for* "money".

The monetary conjurers' trick has been, slowly, steadily, and stealthily, to reverse this understanding in the public's mind. That is, to make the substitute pass

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[4383] At <www.fame.org/HTM/Spahr_Walter_Our_Irredeemable_Currency_System_WES-001.HTM#note1>.

[4384] ¶ 1, 38 Stat. at 265.

for the real thing, and then remove the real thing from the operation. This subterfuge was not overly difficult to put over. After all, in the term "redeemable currency", which is the noun and which the adjective? When people deal with a "paper currency redeemable in gold", the natural uninstructed inclination is to treat the paper currency as "money" and the gold as something else. The paper currency, as the saying goes, is merely "backed" by gold—but of course is not itself gold. And because the currency is not itself gold, the money-manipulators can remove the gold "backing" farther and farther into the background, *without affecting the nature of the paper as "currency" (at least nominally)*. Thus, a "redeemable currency" can be converted into a "contingently redeemable" or "conditionally redeemable" currency, through temporary suspension of specie payments (as happened repeatedly during the Nineteenth Century); and then into a full-fledged "irredeemable currency", through permanent suspension of specie payments, as with Federal Reserve Notes after 1933 domestically and 1971 internationally.[4385] Yet, to the average citizen (whose most serious liability is mental inertia), even though a paper currency's promise of redemption has been dishonored, it nonetheless remains "currency".

Thus one grasps that the so-called "right to redemption" attached to any paper currency is actually a *liability*, inasmuch as it exposes the holders of that currency to repudiation and expropriation, because they possess only the paper, *not the gold*. Even in the best of times, the holders of redeemable paper currency are not economically and politically independent. Rather, they depend upon the honesty and the competence of the money-managers. This is why America's Founding Fathers, realists all, denominated redeemable paper currency as "bills *of credit*". They knew that such bills' values in gold or silver are always contingent upon the issuers' credit—that is, ultimately, the issuers' honesty and ability to manage their financial affairs. The unavoidable trouble with "bills of credit", though, is that they can (and usually do) turn out to be "bills of *dis*credit", when the holders discover that the money-managers are *dis*honest and *in*competent—or worse, as is the situation today, highly competent at dishonesty. Then the holders of the paper currency (if they are sufficiently astute) realize how unwise it is to allow the gold to remain in the custody of the very institutions and individuals with the greatest incentives, and the uniquely favorable positions and opportunities, to steal it.

But when the money-managers refuse to redeem their currency, what can the holders of that currency do to protect themselves? Well, what were they able to do in 1933 and in 1971? *Nothing*. If the holders of Federal Reserve Notes had enjoyed an effective, enforceable "right" to the gold the Federal Reserve System and the Treasury of the United States promised to pay in redemption of those notes—that is, if the currency had been "redeemable" in the only meaningful sense

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[4385] *See* 31 U.S.C. § 5118(b) and (c).

that *redemption was absolutely assured as a matter of law* ***and especially fact***—the gold seizures of 1933 and 1971 would never have happened. The ostensibly "redeemable" character of paper currency of the *pre-*1933 and *pre-*1971 types did not protect the holders of that currency. Instead, *it turned out to be the very device used to deceive and defraud them, then divest and dispossess them of gold*—proving in perhaps the most palpable manner possible that a society's acceptance of "redeemable currency" is the product of confusion and the invitation to inevitable economic and political disaster.

Ludwig von Mises outlined a proposal for returning to a Federal Reserve Note redeemable in gold.[4386] No doubt, coming from that source, it might prove to be a workable approach. But, even assuming *arguendo* that it *could* be done, *why should* it be done?

A plan of this type offers no more than a cruelly delusive hope. Consider some of its demerits—

•First and foremost, the goal is not constitutional in any event, because every form of "redeemable currency" put out under color law through the Federal Reserve System is, by definition, a governmental "bill of credit", which Congress has no authority to emit, directly or indirectly.[4387] Moreover, the Federal Reserve System is a corporative-state banking cartel indistinguishable from the types of cartels set up under the National Industrial Recovery and Bituminous Coal Conservation Acts, which the Supreme Court declared unconstitutional, without dissenting voice, in the *Schechter* and *Carter* cases in the mid-1930s.[4388] Except that the Federal Reserve System is arguably worse, because the banking cartel influences every form of production and delivery of all goods and services throughout the country, so that the confusion and corruption it injects into the free market is pervasive in a manner in which even the National Industrial Recovery Act was not and could never have been. In the question of constitutionality lies the key to the whole problem, because, if the Constitution had been faithfully executed all along, America would not be treading water in a monetary septic tank today. And only by returning to the Constitution can Americans hope to extricate themselves completely in the long run. Yet vanishingly few people take much notice, or appear to be at all worried, that, as far as the constitutional aspects of money and banking in America are concerned, Mussolini won the political and economic war—that, in truth, this country now suffers under the Fascist Reserve System.

[4386] *The Theory of Money and Credit*, H.E. Batson, Translator (Irvington-on-Hudson, New York: The Foundation for Economic Education, Inc., 1971), at 448-452.

[4387] *See* E. Vieira, Jr., *Pieces of Eight, ante* note 39, Volume 1, at 141-155.

[4388] A.L.A. Schechter Poultry Corporation. v. United States, 295 U.S. 495 (1935); Carter v. Carter Coal Company, 298 U.S. 238 (1936). *See* E. Vieira, Jr., *Pieces of Eight, ante* note 39, Volume 2, at 746-866, 1423-1524.

• Leaving aside questions of constitutionality, and turning to matters of fact, the plan for returning the Federal Reserve System to redemption of its notes in gold retains the fascistic Federal Reserve System's banking cartel, which will perpetuate *factionalism* at the heart of America's economy. In *The Federalist* No. 10, James Madison pointed out that

> [a]mong the numerous advantages promised by a well constructed Union, none deserve to be more accurately developed than its tendency to break and control the violence of faction. The friend of popular governments never finds himself so much alarmed for their character and fate as when he contemplates their propensity to this dangerous vice. * * * The instability, injustice, and confusion introduced into the public councils have, in truth, been the mortal diseases under which popular governments have everywhere perished, as they continue to be the favorite and fruitful topics from which the adversaries to liberty derive their most specious declamations. * * *
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> By a faction, I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.

Madison then went on to point out what he considered egregious forms of factionalism, starting with "[a] rage for paper money". This passage seems to have been penned for the Federal Reserve System and "the financial community" of which it is the cornerstone. For no one can possibly deny that this edifice of financial chicanery serves one very narrow set of very special, very selfish interest groups, at the expense of everyone else in society. Neither is it deniable that, together with its satellites and clients, the Federal Reserve System holds the entire country hostage to "the financial community's" negligence, incompetence, venality, corruption, and even criminality. For, if the System is not exonerated and "bailed out" repetitively from the consequences of its managers' and clients' own blunders and sordid excesses—as it has been, serially and under conditions of increasing severity and cost, since 1933—its managers and clients threaten, either implicitly or even volubly as they did before the TARP "bail out", to take down the entire national economy, and with it this country as a whole, bringing about untold political and social dislocations, disturbances, distress, and destruction. *This is the essence of malignant factionalism.*

• The plan for returning the Federal Reserve System to redemption of its notes in gold is also economically psychotic. It does not propose to rein in fractional-reserve banking and the destructive Ponzi schemes fractional-reserve practices foster. Rather, it presumes that fractional-reserve banking will continue to operate indefinitely, just as it has in the past, supposedly to be "stabilized" by the Federal

Reserve System and a resurrected *pseudo-*"gold standard". But, as both theory and history attest, it is primarily fractional-reserve banking that has made a stable "gold standard" of the traditional type unworkable if not impossible.[4389] So the plan is bottomed on the self-contradictions that a system antithetical to a "gold standard" can be stabilized by a "gold standard", and that a "gold standard" will long remain an integral component of a system the most profitable (albeit economically and socially destablizing) operations of which a "gold standard" constrains!

• The plan for returning the Federal Reserve System to redemption of its notes in gold does not separate fractional-reserve banking from the government, but accepts and even hopes to cement their integration permanently. Because fractional-reserve banking is inherently unstable, this arrangement is triply unsatisfactory: (i) This unnatural coupling destabilizes the government's finances. (ii) By misusing the government's monopoly of force in what will inevitably prove a vain attempt to stabilize the banking cartel, it destabilizes this country's economic and political systems in their entireties. And (iii) it destabilizes even the banking cartel itself, because the protection the cartel receives from the consequences of its own excesses, perforce of its special relationship with the government, encourages and facilitates the bankers' and their clients' perpetration of further and even more egregious excesses.

• The plan for returning the Federal Reserve System to redemption of its notes in gold, and thereafter administering the national stock of currency and credit on that basis, is in the final analysis a scheme of central economic planning—employing bureaucratic managers to maintain a fixed rate of redemption of paper currency in gold in the face of both ever-changing conditions in the free market, and the tendency to Ponzification of fractional-reserve banks and the rapacious "financial community" allied therewith. But is not the salient economic lesson of the Twentieth Century that central economic planning does not work, no matter how many computers and information-technology *gurus* are put to the task? Would anyone in his right mind advocate the establishment of a "Federal Bread Board" to manage the production and distribution of bread throughout America? If every sensible person would reject this notion for one simple commodity such as bread (which anyone with a cookbook can learn how to bake in an afternoon), let alone for all other types of production in the most complex economy the world has ever known, then on what reasoning should it be accepted for the very special commodity—money—the soundness or unsoundness of which affects the production and distribution of *all* goods and services throughout the economy,

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[4389] In conjunction with fractional-reserve central banking, the suppression of common use of so-called "real bills" in commerce must be identified as another major cause of the problem, which would need to be addressed in any comprehensive plan for monetary and banking reform. On this point, the work of Professor Antal E. Fekete should be consulted, at <www.professorfekete.com/moneycredit.asp>.

because it is the commodity in which the mutual rates of exchange among all goods and services are measured? On the other hand, if the Federal Reserve System has proven to be such a good idea since 1913, or 1933, or 1971, or perhaps even the last several years, then why should its marvelous principles of organization, control, and concern for the welfare of average Americans not be extended to all other necessary commodities, such as food, clothing, shelter, personal transportation, and health care, to name just a few? Why should not America resurrect and reinstitute the National Industrial Recovery Act in a computerized version? Why not, indeed? For this is exactly what is going to happen—in fact, if not perforce of some statute—because the tail (the Federal Reserve System) will end up wagging the dog (the rest of the economy). And if the tail is fascistic, so will the dog eventually become fascistic. *Central fascistic control of the pricing system through manipulation of currency and credit must eventually lead to central fascistic control of the entire productive system*. Which will require *para*-military police-state repression to keep the bulk of the population in line, as common Americans' standards of living decline towards second- and even third-world levels.

• The plan for returning the Federal Reserve System to redemption of its notes in gold is politically impractical, if not wholly implausible, because any such reform has to be accomplished at the level of the Federal Reserve System through the General Government. Now, because of institutional incompetence, this plan cannot be put into effect through the Judiciary. The Judiciary may be able—although one must doubt that it would ever be willing—to declare some or all of the Federal Reserve System to be unconstitutional or otherwise unlawful; but it cannot prescribe to Congress the substance of new statutes necessary to correct the situation, and certainly cannot compel Congress to enact such legislation. Thus, the Judiciary can suddenly cause chaos within the monetary and banking systems, by throwing a legal monkey-wrench into their gears, but can do next to nothing to repair the damage its own actions would bring about. Knowing that limitation on their powers, judges would likely do everything possible to avoid deciding a case that raises such issues. Therefore, to be successful, the proponents of the plan for returning the Federal Reserve System to redemption of its notes in gold would need to gain control of or decisive influence over the Executive Branch, so as to be able to use (say) the authority granted in 12 U.S.C. § 95(a) and 31 U.S.C. § 5119(a),[4390]

[4390] 12 U.S.C. § 95(a) provides that "[i]n order to provide for the safer and more effective operation of the national Banking System and the Federal Reserve System, to preserve for the people the full benefits of the currency provided for by the Congress through the national banking system and the Federal reserve system, and to relieve interstate commerce of the burdens and obstructions resulting from the receipt on an unsound or unsafe basis of deposits subject to withdrawal by check, during such emergency period as the President of the United States by proclamation may prescribe, no member bank of the Federal reserve system shall transact any banking business except to such extent and subject to such regulations, limitations and restrictions as may be prescribed by the Secretary of the Treasury, with the approval of the President. Any individual, partnership, corporation, or association, or any director, officer or employee thereof, violating any of the provisions of this section shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than

as well as the ability to veto or otherwise hamstring any contrary legislation emanating from Congress. Or, of greatest value, the proponents of this plan would need to gain decisive control over Congress, in order to enact new laws that the Executive Branch and the Federal Reserve System would then follow—and, of course, along with this, the ability to override any veto of those new bills, as well as to punish any failure or foot-dragging by the Executive Branch in the execution of these laws. Furthermore, the proponents of this plan would also, perhaps especially, need to gain control of or to assert decisive influence over the Federal Reserve System itself and its allies in "the financial community"—which and who otherwise could effectively veto or paralyze the execution of any proposed reforms by threatening to create chaos in the markets, unless those threats were deterred with credible menaces that any such interference would immediately be met with severe punishments, such as are mandated in 12 U.S.C. § 95(a). So, all things considered, a true reform from *any* of these sources—although sufficient—is *extremely* unlikely. Instead, any supposed "monetary and banking reform" coming from these sources will almost surely be aimed at erecting a new *supra*-national currency and central bank. "The financial community's" mouthpieces are already telling America precisely that.

Even assuming *arguendo* that the political problem of control of or influence over the General Government and the Federal Reserve System could be solved, intractable practical problems would remain—

• The plan for returning the Federal Reserve System to redemption of its notes in gold depends upon using the gold in the so-called "National gold stock" for the initial round of redemption That, however, leaves open the questions:

> (i) How much gold is actually there?
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> (ii) How much of that gold is encumbered in some way—by loans, leases, "currency swaps", or other like devices—so that it cannot be used for redemption?
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> (iii) If sufficient gold is or could be made available for redemption tomorrow, then why is the Secretary of the Treasury not

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$10,000 or, if a natural person, may, in addition to such fine, be imprisoned for a term not exceeding ten years. Each day that any such violation continues shall be deemed a separate offense."

31 U.S.C. § 5119(a) provides that "[e]xcept to the extent authorized in regulations the Secretary of the Treasury prescribes with the approval of the President, the Secretary may not redeem United States currency (including Federal reserve notes and circulating notes of Federal reserve banks) in gold." Presumably, this would allow redemption in gold *bullion* only. *See* 31 U.S.C. § 5118(b): "The United States Government may not pay out any gold coin. A person lawfully holding United States coins and currency may present the coins and currency to the Secretary of the Treasury in exchange (dollar for dollar) for other United States coins and currency (other than gold and silver coins) that may be lawfully held." *And* 31 U.S.C. § 5119(a): "When redemption in gold is authorized, the redemption may be made only in gold bullion * * * in an amount equal at the time of redemption to the currency presented for redemption."

> *even now* fulfilling his statutory obligation, under 31 U.S.C. § 5119(a), to "redeem gold certificates owned by the Federal reserve banks at times and in amounts the Secretary decides are necessary to maintain the equal purchasing power of each kind of United States currency", at the statutory valuation of gold with relation to those gold certificates "of 42 and two-ninth dollars a fine troy ounce", set in 31 U.S.C. § 5117(b)? And,
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> (iv) Notwithstanding the limitations on executive action and judicial relief set out in 31 U.S.C. § 5118(b) and (c), will individuals be entitled to enforce their new claims to redemption of Federal Reserve Notes in actual gold, by obtaining from the courts judgements, mandatory injunctions, and other like orders that require the Federal Reserve Banks and the Treasury of the United States to pay out gold in exchange for those notes at some fixed rate? Or will the supposed "right" of redemption be (as it always has been) a toothless paper tiger?

Obviously, these questions must be *completely and unequivocally* answered before anyone can begin to plan intelligently for, or really even to advocate, a return to redemption of Federal Reserve Notes in gold—and before any potential holder of those notes takes seriously a reformed Federal Reserve System's assertion that he will enjoy a true *right*, in both law and fact, to redemption. But will these questions be answered? For example, precisely how can the Department of the Treasury and the Federal Reserve System be compelled to disgorge the necessary information? What will it require to compel the Secretary of the Treasury to fulfill his present statutory obligations in the premises, let alone any new ones that may be imposed upon him? And how can a permanent right of redemption be secured, unless it is somehow explicitly recognized and enforced as *constitutional* in nature?

•In any event, assuming *arguendo* that sufficient unencumbered gold exists in the "National gold stock" to start the process of redemption, and that the Secretary of the Treasury and other public officials can be compelled to fulfill their duties, the further question nonetheless remains: "At *what rate of exchange* should a Federal Reserve Note 'dollar'-bill be redeemed with gold?" Fortunately, 12 U.S.C. § 411 does *not* fix the rate of exchange at which Federal Reserve Notes "shall be redeemed in lawful money on demand at the Treasury Department * * * or at any Federal Reserve bank". And Section 30 of the Federal Reserve Act of 1913 licenses Congress to establish essentially *any* rate of exchange. Which is why the original repudiation of redemption of Federal Reserve Notes in gold domestically, and its modification internationally, in 1933 and 1934 was probably constitutional (to the extent the Federal Reserve Act itself is constitutional)—namely, because Congress had explicitly reserved in 1913 the right to make any changes it wanted in the Federal Reserve Act thereafter. So, when the rate of exchange was reduced from

$20.67 per ounce to zero domestically, and from $20.67 per ounce to $35.00 and then to zero internationally, and now to $42.22 per ounce as far as the Treasury's gold certificates are concerned, Congress was merely exercising a right it had retained from the very beginning.

Yet, even given that *any* rate of exchange is allowable, how would a particular, presumably economically correct, new rate of exchange once set be *maintained*? In light of the serial illegalities and duplicities of the past that brought America to this sorry pass, what new "checks and balances" would be necessary and sufficient to convince a doubting nation and world that the same swindle would not be allowed to be perpetrated again? The Federal Reserve Act of 1913 required redemption of Federal Reserve Notes in gold, and set reserve requirements of 40% for Federal Reserve Notes in actual circulation and 35% for the deposits held in the twelve Federal Reserve Banks—yet these limitations were set aside only twenty years later following the banking collapse of 1932. Franklin D. Roosevelt then set an international exchange rate of $35.00 *per* ounce of gold for Federal Reserve Notes—yet, in terms of actual payments, this rate became meaningless after August of 1971, only thirty-seven years after Roosevelt had conjured up the $35.00 *per* ounce figure. And the Secretary of the Treasury is even now required by statute to maintain the equal purchasing power of all form of United States currency according to the benchmark of $42-2/9 *per* ounce of gold—yet no such equivalence in purchasing power exists between Federal Reserve Notes and gold. So, critics are entitled to ask—

> Are effective economic "checks and balances" possible under present conditions? Assuming good faith and competence in the managers of the plan, can it be made to work at all, even to get back to the situation *pre*-1971, let alone *pre*-1933, given the present terrible burden of public and private debt throughout America, the gutting of this nation's real productive capacity, and her over-extension around the world in military imperialism and adventurism? Then, too,
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> Are effective political "checks and balances" possible under present conditions? What if the managers who happen to be chosen to oversee the Federal Reserve System and the Treasury in years to come prove incompetent or act in bad faith, or both? What if they simply continue to do the bidding of the racketeering enterprises and other criminal conspiracies that pass for "political parties" in the District of Columbia and "financial institutions" in New York City?

The plan for returning the Federal Reserve System to redemption of its notes in gold does not in and of itself limit such rogue public officials, bankers, and financial plungers from manipulating currency and credit as the means to grab power and

wealth, any more than did the old "gold standard" from 1913 to 1933 (or to 1971). And the precedents do not augur well. For *nothing* that has ever been done since 1913 with an eye towards controlling the Federal Reserve System in the interests of common Americans has ever worked, or perhaps was ever capable of working—or America would not find herself where she is today, being importuned to cede ever more and ever-more-abusive powers to the System's bosses, with no adequate provision for either reviewability or accountability.

Obviously, implementing a so-called "price rule" is not even a simplistic answer. Such was the basis of the original Federal Reserve Act—the "price rule" being $20.67 *per* ounce of gold—and everyone knows how well *that* worked.

Without an *absolutely enforceable constitutional* guarantee—and by that is meant ***a guarantee enforceable directly by the people themselves, because they either hold their gold in their own hands or themselves physically control the depositories in which their gold is secured***—rogue public officials and their clients in the banking cartel and "the financial community" can be expected to ferret out one means or another to change to their special advantage the rate of redemption (as it was serially altered after 1933) or even to eliminate it entirely (as it was in 1933 domestically and 1971 internationally).

Furthermore, even if all of the foregoing problems could be solved, what would be the point?

• The plan for returning the Federal Reserve System to redemption of its notes in gold would not provide a truly sound currency, any more than the original Federal Reserve System ever did. It would merely give America the currency of the *pre-*1933 era, or (worse) the *post-*1933 and *pre-*1971 period, both of which have been experimentally proven to be unsound.

• The plan for returning the Federal Reserve System to redemption of its notes in gold would perpetuate the fallacy of "redeemable currency"—namely, that the Federal Reserve Note is the "dollar", and some amount of gold is its "backing". But a "George Washington" Federal Reserve Note is not a "dollar". It is a mere promise to pay a "dollar", which has been utterly dishonored by both the banks and the Treasury since 1933 (as to gold domestically) and 1971 (as to gold internationally), even unto this very day.[4391] ***And sound, honest, and constitutional "Money" has NO "backing" consisting of or based on something else. It needs no "backing", because it has substance in and of itself. It is ACTUAL GOLD, not a mere promise to deliver gold. Sound, honest, and constitutional "Money" cannot be repudiated, because it does not need to and cannot be "redeemed". It is the ABSENCE of "redeemability"—the complete LACK OF NECESSITY OR***

[4391] *See* 31 U.S.C. § 5118(b) and (c).

DESIRABILITY for "redeemability"—that constitutes the essence and provides the strength of sound, honest, and constitutional "Money".

• As a further demerit, the plan for returning the Federal Reserve System to redemption of its notes in gold would retain the institutions, and attempt to validate the false ideas, that were the instrumental causes of all of America's problems. Under this plan, the merry-go-round of financial looting would not be permanently shut down, only temporarily slowed down—and not for a fundamental redesign, but only for repairs and repainting. Then it would be returned to operation under the same old management (at least in type), running in the same old direction, for the same old purposes. And inevitably with the same old results—because a merry-go-round cannot be straightened out.

• Most distressing to one's sense of justice, the plan for returning the Federal Reserve System to redemption of its notes in gold also would reward the very class of people who caused or allowed nearly a century of monetary and banking problems to beset this country. By bailing them out of the mess they have caused—without punishment, without even censure, but with protection and payoffs, present and future—it would perpetuate their system, their power, their wealth, their status, their prestige. It would maintain them in positions from which—if they operated in the future as they have in the past, as history and a knowledge of human nature premonish America that they would—they could despoil this country once again, just as they did with the original Federal Reserve System.

• The plan for returning the Federal Reserve System to redemption of its notes in gold would require not only perhaps more perspicacity than Americans probably could muster, but above all more *patience*. It would take a long time to implement. Therefore, it would demand the people's acceptance—really, the imposition—of political and economic discipline. Yet where would such patience and discipline be found, when this country is riven by contending factions for which *après moi le déluge* are the watchwords? In particular, *who* would impose that discipline against all of the economically and politically powerful factions that want "funny money" and the Ponzi pyramids it facilitates? And how could such discipline be maintained, in the face of the monumental, arguably unpayable debt of the General Government? Would it not require the intervention of the Armed Forces—"government by *junta*" in the sorry style of Argentina and other Latin-American republics? One must presume so. For the Department of Homeland Security and the Pentagon are even now preparing, in anticipation of massive civil unrest when the monetary and banking systems finally melt down, to involve the Armed Forces in domestic "peacekeeping".

• As if all of these shortcomings were not enough, the plan for returning the Federal Reserve System to redemption of its notes in gold would put all of this

country's monetary eggs in one political-*cum*-economic basket. If the plan did not work, all would likely be lost. This would be equivalent to playing Russian roulette with a *semi*-automatic pistol.

In sum, the return-to-redemption plan is an act of self-deception, if not desperation, which does not take advantage even of hindsight. For it proposes to reverse American monetary history on the basis of the very principles and practices which that history has already proven to be unworkable.

3. An alternative gold currency. Which brings this survey to the third plan for monetary reform—the adoption on a State-by-State basis of a new, sound, honest, and constitutional alternative currency consisting of actual gold as an—and ultimately the only—currency officially recognized by the State. In the plan which has been submitted—albeit, so far, unsuccessfully—to several State legislatures:

• The State adopts as its alternative currency so-called "electronic gold currency".

• Actual gold bullion is held for depositors in personal *bailment* accounts by an electronic gold currency provider (which could be a private organization or the State's own Treasury). So *no* fractional reserves are involved.

• Title to the gold on deposit can be transferred among depositors electronically or by more traditional means, such as checks.

• The process begins when the State collects some of her taxes in gold, and offers to pay her creditors with gold, on a first-come, first-served basis, from the gold tax fund.

• As more and more creditors request such payment, depleting the fund of gold secured by those taxes initially collected in gold, the State expands the taxes required to be paid in gold, until the State's finances are largely, if not completely, on a gold-currency basis.

In the initial plan I drafted,

• Those who were required to deal with the State in electronic gold currency in order to pay taxes, and those who chose to be paid in gold by the States were the only parties, in addition to the State herself, who were required to maintain electronic-gold-currency accounts.

• Parties who were required to pay their taxes in gold were expected to find it useful to seek payment from their own debtors in gold, and the State's creditors who sought payment in gold were expected to offer to pay gold to their creditors, too, so that the use of gold would percolate through the private economy in gradual, but inexorable, competition with Federal Reserve Notes.

• When the plan was first drafted many years ago, it was accepted that this infusion of gold into the State's finances and her private economy would take time,

and assumed that sufficient time would be available for the reform to move forward at a reasonable pace. Now, however, the urgency of the situation requires that the process be speeded up. The State will hold the gold in her own depository, controlled by a State Militia that will be revitalized in the same statute that provides for use of the alternative gold currency. Within thirty to forty-five or so days of the enactment of the enabling legislation, all members of the Militia—which will include every able-bodied adult from sixteen to sixty years of age—will be required to obtain an electronic-gold-currency account as part of his or her Militia duty. Also within those thirty to forty-five days, each and every businessman in the State—each of whom is a member of the Militia, too—will be required to set alternative prices and for his goods and services in both gold and Federal Reserve Notes as part of his Militia duty.

• Except with respect to the payment of particular taxes and payments by the State to her creditors, no one will be required actually to use gold, rather than Federal Reserve Notes, in their day-to-day financial transactions. Yet, the State will have enabled her citizens to do so, and will have established an alternative price-structure in gold for both her own financial affairs and for her entire private economy. *At that point, the State and her citizens could,* ***to whatever degree they wished****, voluntarily go off the Federal-Reserve-Note standard to a pure gold standard.* And, presumably, the State and increasingly large percentages of her citizens would do so, in pursuit of their own rational economic and political self-interests.

Why would implementation of this plan be advantageous?

• *First and foremost*, adoption of such an alternative gold currency would be an act of foresight. It would recognize that resuscitation of the Federal Reserve System is impossible, and that acceptance of a new global *fiat* currency and central bank to replace that System would be intolerable.

• *Second*, and no less important, adoption of an alternative gold currency would be an act of *scientific* insight, because it would introduce a currency the objective value of which could always be *verified or falsified* immediately upon inspection. That objective value would be a *fixed weight of gold*. It would be an *objective* value, because an ounce of gold is an ounce of gold is an ounce of gold—everywhere throughout the world, no matter what economic, political, or social conditions happen to prevail. Under this plan, *a specific weight of gold, and* ***only*** *that weight of gold, would become the State's official monetary unit*. Thus, *the holder of the currency himself would not only own but would actually possess the gold, because gold would be the currency*. Contrast this with a Federal Reserve Note. Even when such a note was "redeemable" in gold, some Federal Reserve Bank or the United States Government actually owned and possessed the gold that "backed" the note; and the holder of the note had no more than a claim to redemption. Only upon actual redemption did actual title to and possession of the gold change hands. And that

right of redemption was eventually cancelled, both domestically and internationally. As to gold, then, Federal Reserve Notes proved to be, as John Exter so well put it, "an I.O.U. *nothing* currency", made possible because the "currency" and the gold were *entirely separate* things, under the control of *entirely different* people. But with gold as actual money, *nothing is owed to anyone else and the holder of the currency himself holds the gold (the currency being gold, and nothing else)*, so no debt of redemption can ever be repudiated, because no debt of redemption ever arises.

• *Third*, also in the scientific spirit, an alternative gold currency would allow for more than one experiment to be conducted—indeed, as many as fifty separate trials in each of the several States would be possible. If any single experiment should fail, it would do so only locally, not nationally. If it succeeded, it could be expanded quickly and easily enough elsewhere. And by the process of judicious observations and adjustments, constant improvements on any initial success would be possible. Moreover, even if politically influential factions could succeed in stopping the adoption of an alternative currency in any one particular State, they would be unlikely to be capable of exercising the political clout necessary to suppress it in every other State as well. And if they could not stop it everywhere, the market would surely prove the theory somewhere, and then inevitably expand its application everywhere.

• *Fourth*, adoption of an alternative gold currency could be accomplished *incrementally and gradually*, allowing the market to set and equilibrate prices as more and more people employed the new currency in preference to Federal Reserve Notes. No sudden, economically disorienting jump from Federal Reserve Notes to gold would have to occur.

• *Fifth*, quite unlike the Federal Reserve System and its bills of credit, an alternative currency consisting of gold would be fully constitutional. The Supreme Court has already ruled that the States are *not* bound, and constitutionally *cannot* be bound, to use as their currency a currency emitted by Congress—in particular, that they may choose to employ gold and silver in preference to irredeemable paper currency, even when Congress has declared that paper currency to be "legal tender".[4392] Thus, the adoption of an alternative gold currency would return each State to the rule of constitutional law and federalism with respect to money.

• *Sixth*, introduction of an alternative gold currency would not depend upon a State's having *any* gold in her Treasury at the beginning of the process. Indeed, adoption of such an alternative currency would bring gold into the State's Treasury right away. Constitutionally, of course, the States cannot coin money.[4393] Only

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[4392] Lane County v. Oregon, 74 U.S. (7 Wallace) 71 (1869); Hagar v. Reclamation District No. 108, 111 U.S. 701 (1884).

[4393] U.S. Const. art. I, § 10, cl. 1.

Congress enjoys the governmental power "[t]o coin Money".[4394] But, inasmuch as an alternative gold currency could—and initially should—consist of bullion, not coin, no State would be dependent upon the assistance of Congress and the United States Treasury in the adoption of such a currency.

• *Seventh*, employment of an alternative gold currency would not involve a State in the rat's nest of central economic planning. A State would not be required to attempt to regulate the supply of money against a so-called "price level", to fix interest rates, or to engage in any of the other political-*cum*-economic manipulations characteristic of a central bank. Whatever amount of gold the people desired to use as their alternative currency would become currency; and the free market would then rationally establish and mutually adjust the prices *in gold* of all goods and services.

• *Eighth*, adoption of an alternative gold currency would not serve only one set of selfish special-interest groups at the expense of the rest of society. In particular, adoption of such a currency would facilitate the absolute separation of private banking from the government, on a State-by-State basis. No longer would bankers and their clients in "the financial community" enjoy the status of an economically and politically specially privileged class.

• *Ninth*, although it would bring about the politically radical end of separating private banks from the government—which "the financial community" would vehemently oppose—adoption of an alternative gold currency would not expose America to the economic equivalent of "mutual assured destruction". At present, any attempt to reform the monetary and banking systems "from the top down" can likely be thwarted by the bankers' threat to precipitate an economic collapse. "*Yes*", the bankers warn, "*you can destroy us. But, more importantly, we can destroy you. If we go down, we will take the whole economy with us. Without us, you will have no currency, no credit, and thereby no means of maintaining a high level of complex economic activity. So we have you by the throat. There is nothing you can do but to continue to allow us to loot society, and then to bail us out when our schemes threaten to implode or explode.*" With an alternative gold currency, however, monetary reform would not come "from the top down", by attempting to abolish the Federal Reserve System at one fell swoop and thereby throwing the economy into chaos. Rather, reform would come gradually and systematically "from the bottom up", by introducing a sound currency into the free market on a State-by-State basis, in free competition with the Federal Reserve System. If the banking cartel and its clients should respond aggressively, they would merely hoist themselves on their own

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[4394] U.S. Const. art. I, § 8, cl. 5; art. I, § 10, cl. 1; *and* art. VI, cl. 2. Of course, private parties may coin nonfraudulent moneys from gold or silver, and employ those coins as media of exchange in the free market. But as the concern of this study is how to bring *the government* under control in the monetary domain, details of this matter will not be considered here.

pétard, because in any State which had adopted an alternative currency the people would no longer be dependent upon the banks for currency. Whatever the bankers might then do in a destructive vein would only drive the market farther and faster in the direction of the alternative currency. Rather than mutually assured destruction, such actions would bring about *the bankers'* assured destruction.

• *Tenth*, on the other hand, if adoption of an alternative currency on a State-by-State basis showed promise, with more and more people using that currency to the exclusion of Federal Reserve Notes in more and more transactions, the banks would be forced to compete. At least some of them might try to generate a new currency "redeemable" in, or "backed" by, gold. Exactly how they might do this, or even if they could do it, one cannot predict, because such a new bank currency would have to be as secure as the alternative currency, which would require that it not be based on fractional reserves (or that it offered to its users some great economic advantage that offset the risk from fractional reserves). Yet, if even some of the banks could move in that direction, it would tend to stabilize the present system, and perhaps allow for its orderly long-term transformation or liquidation, rather than sudden collapse.

To be sure, the adoption of an alternative gold currency would face political hurdles. For example, adoption of gold as currency at the State level would be complicated by claims of the General Government to tax exchanges of gold for Federal Reserve Notes, and exchanges of gold for goods and services (which are now erroneously treated as some sort of "barter" transactions). In the midst of a nationwide economic breakdown, however, any State which adopted an alternative gold currency would be in an especially favorable bargaining position, and would probably be able to negotiate an accommodation with the United States Treasury.

Even if prudence did not prevail at the bargaining table, the State could sue the President of the United States, the Secretary of the Treasury, and the Board of Governors of the Federal Reserve System, *in the "original Jurisdiction" of the Supreme Court,*[4395] for their failures to maintain all forms of United States currency at the statutory par—which now should be about $42-2/9 *per* ounce of gold, not some $1,600.00 or more.[4396] With the publicity such a suit would receive in the context of the present economic crisis, the matter would become a political issue to end all political issues—in comparison to which President Andrew Jackson's fight with the second Bank of the United States would appear to have been an exchange of pleasantries. Under such circumstances, would the Justices of the Supreme Court dare to rule that the States are not entitled to protect their own people from

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[4395] *See* U.S. Const. art. III, § 2, cl. 2: "In all Cases * * * in which a State shall be Party, the supreme Court shall have original Jurisdiction."

[4396] *See* 31 U.S.C. §§ 5119(a) and 5117(b).

economic ruin caused by the incompetence or corruption of the politicians, bureaucrats, bankers, and financial manipulators in the District of Columbia and New York City? ***Would the Justices dare to deny the people the right to ward off these vampires with "a cross of gold"?*** And if the Justices did rule against the States' attempts to bring about meaningful monetary reform, would not their obstructionism sweep away the General Government's very last shred of credibility? In that event, would not the States and their citizens then put into action Nancy Reagan's *dictum*—"Just say 'No!'"—and simply refuse to comply with all demands from that Government for payments of unconstitutional taxes that hindered the use of the alternative currency—and then back up those refusals in the most effective manner?

Actually, for numerous reasons, the Justices might be expected to rule in favor of the States: *First*, (as explained above) they could simply fall back on judicial precedents favorable to the States. *Second*, they would surely recognize their own inability to correct the underlying problem in the course of overruling those precedents and deciding the cases against the States; whereas, in reliance on those precedents, the States could take actions that might have a favorable result. *Third*, the Justices would be inclined to view the entire matter as constituting a "political question" at the highest constitutional level—that is, between the States and their people, on the one side, and public officials in the General Government and their clients in special-interest groups, on the other side. Ruling for the States would allow the parties to the dispute to settle it by political means, which as a practical matter would provide the only method for resolution of the controversy. *Fourth*, the Justices would want to avoid the loss of credibility that the Judiciary would suffer amongst the vast mass of Americans if the courts ruled against the States. *And fifth*, they would fear the severe economic, political, and social consequences which would undoubtedly arise if they denied the States a free hand, the present monetary and banking systems irretrievably collapsed, and no alternative currency were then available for the people's use.

Why, then, are not more of the champions of sound money, limited government, and free markets actively promoting the adoption of an alternative gold currency? The present economic crisis presents the best opportunity since 1932 for taking the steps necessary and sufficient to free the American people from their thralldom to the Federal Reserve System and the vicious factions behind it. Under the pressure of this crisis, common people are finally awakening to their predicament, and sensing what needs to be done—because, as Samuel Johnson once observed, nothing focuses a man's mind more sharply than his impending hanging. Moreover, this may be the last opportunity of its kind for a long time to come. For if "the financial community" can succeed in jury-rigging some *supra*-national global currency and central bank, the Ponzi scheme of *fiat* currency can probably be kept inflated for another generation, until a final, utterly catastrophic breakdown sweeps

across the entire world. So, the American people must be convinced *now*—immediately, if not sooner—*ahora mismo*, as our Spanish-speaking friends would say—that this country's economy cannot be restored by mere repair or renovation of the existing edifice of money and banking, but only by its total replacement. The present structure is rotten to its very foundations, and even below. It lacks the capacity to survive—and can claim no right to be saved. A new structure must be built from the ground up, on a new site, according to a different plan, with better workmen. If this can be accomplished, then for the first time in generations Americans, indeed all of mankind, will enjoy honest weights and measures in the monetary field—and with that reform, will have a realistic hope to restore honest commerce and honest politics as well.

APPENDIX B

"A Cross of Debt"—A re-edited version of the full text of an address part of which was presented at the May, 2011, Meeting of the Committee for Monetary Research & Education, in New York City.

At the Democratic National Convention in 1896, Williams Jennings Bryan intoned: "You shall not crucify mankind on a cross of gold!" No society, though, has ever been crucified on a cross of gold—at least when gold functioned as actual money. But many have been crucified on a cross of debt—particularly when debt masqueraded as currency. And America is now on the road to her Golgotha, leading to her crucifixion. Being no saint myself, I am not inclined to say of those planning to perform this crucifixion: "Forgive them, Father, for they know not what they do." Because they know perfectly well what they are doing.

At base, the problem reduces to an alliance between two voracious crime families: avaricious bankers and financial speculators, on one side, in league with ambitious careerist politicians, on the other. Their strategy has always been to link the moneyed class with the General Government's Treasury, so as to advance the special interests of both families. The bankers and speculators incorporate the Treasury as an integral part of their business plans. Rogue politicians and public officials agree to coördinate the Treasury with, if not subordinate it to, the bankers and speculators in order to ensure their own accession to and continuance in office. And the common people pay the costs.

This is an old scheme. Well before America's War of Independence, in his *Commentaries on the Laws of England*, Sir William Blackstone trenchantly explained how it worked in the Mother Country. After discussing the "several branches of the revenue", Blackstone turned to how these sums were appropriated,

> first and principally, to the payment of the interest of the national debt.
>
> IN order to take a clear and comprehensive view of the nature of this national debt, it must first be premised, that after the [English] revolution [of 1688], when our new connexions with Europe introduced a new system of foreign politics, the expenses of the nation, not only in settling the new establishment, but in maintaining long wars, * * * increased to an unusual degree: insomuch that it was not thought advisable to raise all the expenses of any one year by taxes to be levied within that year, lest the unaccustomed weight of them should create

murmurs among the people. It was therefore the policy of the times to anticipate the revenues of their posterity, by borrowing immense sums for the current service of the state, and to lay no more taxes upon the subject than would suffice to pay the annual interest of the sums to be borrowed: by this means converting the principal debt into a new species of property, transferrable from one man to another at any time and in any quantity. * * * This laid the foundation of what is called the national debt * * * .

BY this means the quantity of property in the kingdom is greatly encreased in idea, compared with former times; yet if we coolly consider it, not at all encreased in reality. We may boast of large fortunes, and quantities of money in the funds. But where does this money exist? It exists only in name, in paper, in public faith, in parliamentary security: and that is undoubtedly sufficient for the creditors of the public to rely on. But then what is the pledge, which the public faith has pawned for the security of these debts? The land, the trade, and the personal industry of the subject; from which the money must arise that supplies the several taxes. In these therefore, and these only, the property of the public creditors does really and intrinsically exist: and of course the land, the trade, and the personal industry of individuals, are diminished in their true value just so much as they are pledged to answer. * * * In short, the property of a creditor of the public consists in a certain portion of the national taxes: by how much therefore he is the richer, by so much the nation, which pays these taxes, is the poorer.

THE only advantage, that can result to a nation from public debts, is the encrease of circulation by multiplying the cash of the kingdom, and creating a new species of money, always ready to be employed in any beneficial undertaking, by means of it's transferrable quality; and yet producing some profit, even when it lies idle and unemployed. A certain proportion of debt seems therefore to be highly useful to a trading people; but * * * [t]h[i]s much is indisputably certain, that the present magnitude of our national incumbrances very far exceeds all calculations of commercial benefit, and is productive of the greatest inconveniences. For, first, the enormous taxes, that are raised upon the necessaries of life for the payment of the interest of this debt, are a hurt both to trade and manufactures, by raising the price as well of the artificer's subsistence, as of the raw material, and of course, in a much greater proportion, the price of the commodity itself. Secondly if part of this debt be owing to foreigners, either they draw out of the kingdom annually a considerable quantity of specie for the interest; or else it is made an argument to grant them unreasonable privileges in order to induce them to reside here. Thirdly if the whole be owing to subjects only, it is then charging the active and industrious subject, who pays his share of the taxes, to maintain the indolent and idle creditor who receives them. Lastly, and principally, it weakens the internal strength of a state, by anticipating those resources which should be reserved to defend it in case of necessity.

> The interest we now pay for our debts would be nearly sufficient to maintain any war, that any national motives could require.[4397]

This system of not "rais[ing] all the expenses of any one year by taxes to be levied within that year, lest the unaccustomed weight of them should create murmurs among the people", plainly proceeded from *distrust* that the people would actually agree with their governors that the "unaccustomed weight" of taxation the officials wanted them to bear was justified—which reflected either a cynical disdain for the people's intelligence, or the officials' guilty consciences that the people were right. The "funding" scheme operated under the *deception* of "anticipat[ing] the revenues of [the people's] posterity, by borrowing immense sums for the current service of the state, and * * * lay[ing] no more taxes upon the subject than would suffice to pay the annual interest of the sums to be borrowed"—while shifting the "unaccustomed weight" of taxation to unknown individuals in some distant future, individuals who neither were represented nor were capable of being represented in the Parliament which imposed such burdens on them. And, ultimately, this system manifested the *contempt* in which officialdom held both the present and future generations of citizens: the present generation, as greedy fools ever ready to pile their own burdens onto the backs of posterity; future generations, as fit subjects for the very epitome of tyranny, "taxation without representation".

As Blackstone pointed out, the British "funding" system "convert[ed] the principal debt into a new species of property": a claim by the public creditors on "[t]he land, the trade, and the personal industry of the [people]; from which the money must arise that supplie[d] the * * * taxes" to pay interest on the debt. This "new species of property" amounted to alienation by the present generation of politicians to the public creditors of the labor of future generations of workers, without those workers' knowledge, let alone consent. Future generations were condemned, without votes or even a hearing, to be born with crushing burdens of debt already laid upon their backs, their lives mortgaged to the involuntary servitude of paying perpetual taxes to defray perpetual interest on perpetual indebtedness. This was a formula for intergenerational serfdom, and for irreconcilable class conflicts that would inevitably and inexorably lead to a National disaster: the public creditors in the present seeking to expand the National debt and bring more and more private resources under governmental control so as to assure the payment of ever-mounting interest; the taxpayers in the future seeking to limit the disappearance of social wealth into the black hole of political redistribution before the National economy collapsed—and the struggle raging until either the debt crushed the country, or the country somehow threw off the debt (and with it the public creditors and their political henchmen).

[4397] *Ante* note 142, Volume 1, at 325-328.

Upon her separation from Great Britain, America did not distance herself from the Mother Country's "funding" scheme. To the contrary: The tainted genius of Alexander Hamilton, as the first Secretary of the Treasury, fastened that incubus onto this country's throat, from which it has sucked America's lifeblood since then. Hamilton schemed to ally the propertied class of financial speculators with the political class of officeholders by providing the speculators with a permanent personal financial interest in supporting the General Government, and the officeholders with a permanent personal political interest in allowing the speculators to exercise influence in the counsels of government disproportionate to that of all other citizens—thus attenuating, if not frustrating entirely, the effect of widespread suffrage by insinuating into the polity a surreptitious advantage for the wealthy.[4398] In Hamilton's imagination, this arrangement would serve to strengthen the General Government. That it would also cause that Government to enrich financially and empower politically the speculators—and, at length, to find itself held a veritable hostage to them—seemed to escape his notice.

By itself, Hamilton's "funding" scheme was bad enough. Worse yet, it included not only permanent public indebtedness, but also a nascent national bank—the first Bank of the United States—intended to assert control over the Nation's currency by creating "money" out of nothing through the financial card-trick of fractional reserves. Although sometimes met with strong political resistance—as during the Jacksonian era, when the second Bank of the United States was disestablished—Hamilton's system gradually expanded in institutional scope and power with the creation of the National Banking System in the 1860s and then the Federal Reserve System in 1913.[4399] Upon the complete integration of bank and state in the latter year arose the potential for—indeed, in light of fallen human nature, the certainty of—the elephantiasis of public indebtedness. For the encouragement of which, propagandists during Franklin Roosevelt's New Deal broadcast the Keynesian apology that no amount of public debt is really a burden, because "we owe it to ourselves". Unfortunately, the truth of the matter is that "we" do not owe it "to ourselves". Rather, *some* Americans, present and future, supposedly owe it to a *different* group composed of both Americans and foreigners. Effectively, the public debt mortgages the property and productive capacity of the entire country to the speculators in government paper and the money-managers whose control over paper currency and bank-credit enables that debt to be floated on the froth of Ponzi finance.

The grotesque size of the National debt which Americans now purportedly owe as a consequence of the actions of their putative "representatives" in Congress—and the impossibility of this sum's ever being paid by the putative

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[4398] *See, e.g.,* C. Bowers, *Jefferson and Hamilton, ante* note 1598, at 45.

[4399] *See generally* E. Vieira, Jr., *Pieces of Eight, ante* note 39, Volume 1, at 260-389, 689-866.

debtors in real terms—should by now have awakened every thinking person to the realization that Hamilton's system, as refined in technique and expanded in scope by Abraham Lincoln, Woodrow Wilson, Franklin Roosevelt, and their successors in office, has dragged this country into the worst financial crisis in its history.

More importantly yet, this crisis is not merely accidental, or coincidental, but the necessary, inevitable, inexorable, *and even intended* consequence of the operation of Hamilton's system. As Hamilton's opponent, Thomas Jefferson, warned the Americans of his day in words that should resonate even more vibrantly now: "the principle of spending money to be paid by posterity, under the name of funding, is but swindling futurity on a large scale".[4400] Today, it is no longer a matter of "swindling futurity on a *large* scale"; rather, the "swindling" has swelled to such a *stupendous* scale that numbers of near-astronomical magnitudes must be employed to describe it.

"[S]windling", however, is not the product of the unconscious forces of Nature. It cannot occur without human action—that is, without *purposeful* behavior by *identifiable* individuals. So the critical questions become, "With respect to America's National debt, *who* is 'swindling futurity on a large scale'?" and "*Why* are they not being punished in proportion to their crimes?"

In its origin and structurally, public debt is *not* the same as private debt. Although formal "lenders" and "borrowers" are to be found in both cases, where public debt is concerned the actual borrowers are never also the primary payors. Although the people's purported "representatives" negotiate the loans, they pledge their constituents' assets as collateral. Here lies the fatal defect in Hamilton's and every other similar "funding" system: *Because the individuals who borrow are different individuals from those who will ultimately be forced to pay, the interests of the borrowers, as well as of the lenders, can (and usually do) become so disconnected from the interests of the payors that the borrowers collude with the lenders at the expense of the payors.*

At that point, the "funding" system becomes an exceedingly dangerous combination amongst rogue public officials and financial speculators against the general public, for at least two reasons:

- *First*, it is a combination especially easy to contrive and manage. On the one hand, the "representatives" can be coöpted or captured by the lenders and the well organized and funded special-interest groups allied with them. On the other hand, many among the affected population can exert no countervailing political influence—indeed, can have no way of knowing, let alone doing anything, about what is being imposed upon them—because they are either in their minorities or not even in existence at all when are

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[4400] Letter of Thomas Jefferson to John Taylor, 28 May 1816, *in The Works of Thomas Jefferson, ante* note 3952, Volume XI, at 533.

incurred the debts for the repayment of which they will eventually be held liable.

• *Second,* it is a combination especially prone to get out of hand, because of the synergistic interaction among human avarice, ambition, and the appetite for abusive powers. On the one hand, the lenders are intent upon securing for themselves a stream of income guaranteed by "the full faith and credit" of the government—which means, in actuality, the government's ability and willingness to apply unlimited force to the people in order to extract from them the wherewithal to pay the debt. For that reason, the lenders will promote expansion of the government's power to tax and otherwise loot the citizenry. As a practical matter, the lenders "invest" in the metastasis of the apparatus of governmental coercion. In addition, the lenders "invest" in the metastasis of governmental powers across the board, so as to create new excuses for the government to spend and therefore to borrow. A frugal government is the financial speculators' worst nightmare, because then they would have to invest in private enterprises that, lacking the ability to coerce customers into buying their products, might fail. Thus, on the side of the lenders, the Hamiltonian "funding" system is a formula for ever-expanding statism.

So, too, on the side of the public officials who incur the debts. Rogue officials favor ever-increasing public debt as a means to increase governmental spending, which rationalizes ever-increasing governmental power. The larger and more powerful the government, the more secure their political careers, and the greater the authority, personal prestige, and financial benefits that accrue to them.

Worse yet, in the process of incurring public debt, the lenders often effectively sit on both sides of the bargaining table. Of course, on one side, the lenders represent themselves. But, on the other side, the public officials represent the lenders, too, because the lenders either secure the election of those officials through campaign-contributions or capture them later on through lobbying and other forms of behind-the-scenes influence. *Next to no one* at the table stands up for Mr. and Mrs. America and their children, who will be made to foot the bill.

Finally, because the borrower is always the servant of the lender, once the public debt has grown sufficiently large that public finance has degenerated effectively into a Ponzi scheme, the lenders hold even honest public officials hostage. Just as with the dope-fiend who is always dependent upon his next "fix", public officials must enter into more and ever more loans—constantly raising "the debt ceiling" of their addiction—or the government will collapse in financial ruin. So, just as with the dope-fiend

who steals from his family and friends in order to support his habit and to avoid having to "go cold turkey", public officials will impose any financial burden on the masses in order to salvage their own careers.

It is no answer to these objections to posit the possibility that a significant proportion of the general public may, directly or indirectly, hold some large part of the public debt.[4401] *First*, as this proportion of the public always exists in the present, not the future, its mere size does not obviate—but in fact on that score may exacerbate—the intergenerational conflict inherent in public indebtedness. *Second*, no reason exists why a significant proportion of the public—even comprising a sizeable majority—cannot constitute a classic "faction" inimical to the common good.[4402]

Today in America, this process has progressed to the point at which the interests of the borrowers and the lenders have become, not simply adverse, but even aggressively antagonistic, to the interests of the payors. The speculators in New York City and their political puppets in the District of Columbia are arrayed against the vast mass of Americans, both present and future, in a conflict that is not amenable to compromise. The question is, "Can common Americans prevail, and if so *how*?"

It has become somewhat trite to point out that the Chinese ideograph for "crisis" includes the ideas "danger" and "opportunity". But that observation still has merit. At this juncture, the "opportunity" is for Americans finally to realize that Hamilton's system has not worked, *and can never be made to work*, and therefore must be replaced—immediately, if not sooner. The present situation provides Americans with the best chance they have ever had to kill two vultures with one stone: *first*, to sever the link between the elephantiasis of governmental debt and the amassment of excessive and abusive powers by rogue public officials; *second*, to eliminate, gradually but inexorably, debt-currency, fractional-reserve central banking, and the integration of bank and state, without which the present gigantic Ponzi-pyramid of supposed public debt could never have been erected.

The "danger" is that, while the relatively few Americans astute enough to understand the full implications of their predicament are mulling over what do to about it, rogue politicians and the crowd of bankers and financial speculators who pull their strings will set out to betray this country once again—and in their expectation decisively and finally—by

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[4401] *See* 31 U.S.C. § 3102(b). And many investment funds open to the public maintain public debt as significant parts of their portfolios.

[4402] *See The Federalist* No. 10 (James Madison) (emphasis supplied): "By a faction I understand a number of citizens, *whether amounting to a majority or a minority of the whole*, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."

(i) "stabilizing" the tottering Federal Reserve System through the banking cartel's integration into a *supra*-national central bank capable of emitting a *supra*-national currency,[4403] closely followed by

(ii) "stabilizing" America's National debt with loans made and payable in the new currency—complete, of course, with severe "conditionalities" that will set in stone the pyramid of perpetual public debt with the cement of the people's permanent penury.

This would be a "decisive" betrayal, because the Forces of Darkness expect that, once a *supra*-national central bank and *fiat* currency had been set into operation, and this country's crushing load of National debt tied to that new financial régime, Americans would be unable to do anything—economically, politically, or legally—about it for generations, if ever. For the borrower is servant to the lender; and if the debt could never be paid off, the servitude could never be ended. After all, what have Americans been able to do about the depredations of the Federal Reserve System in the nearly one hundred years since its illegitimate birth in 1913? From the collapse of the economy in 1932 and the seizure of the people's gold in 1933-1934, to the palpably criminal "bail outs", "quantitative easings", corrupt fixing of interest-rates, and suppression of the prices of gold and silver of the present day, no crimes have been too outrageous for the banking and financial racketeers to commit—*yet* ***next to nothing*** *has been done about any of them*. So, if a *domestic* central bank has proven to be largely immune from popular control, how much more immune will a ***supra****-national* central bank be?

Moreover, this immunity will have the most serious of consequences. For, just as the erection of the Federal Reserve System effectively transferred *supreme domestic governmental power* to bankers and financial speculators, so that Congress has become shamelessly subservient to them, so will the establishment of a *supra*-national central bank effectively transfer America's very *National sovereignty* to that cabal, so that Congress will become, not merely impotent, but completely irrelevant to the scheme of financial control which will be fastened upon the American people. ***Thus, this is a complot, not simply for violating the Constitution of the United States, but beyond that for overthrowing the Declaration of Independence.***

So, the main thing is to recognize that, at base, America is confronted, not with a merely *economic* problem, but with a profoundly *political and legal* problem. If the latter is not solved in time, the former will eventuate in catastrophe. Politically, Americans must decide once and for all *who* is in control of the government of the United States—WE THE PEOPLE, *or* the bankers, the financial

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[4403] This is a plan on which the Forces of Darkness have long cogitated. *See, e.g.,* the detailed charts between pages 150 and 151 *in* Hans Heymann, *Plan for Permanent Peace* (New York, New York: Harper & Brothers Publishers, 1941).

speculators allied with them, and their lap-dog political front-men. And once the proper order of precedence has been established, Americans must determine to use the Constitution and laws: (i) to separate the Treasury from financial speculators to the greatest degree possible, and (ii) to separate bank from state finally and absolutely. As I have already dealt with the second of these in my address "Cross of Gold", presented to this assembly at its October meeting in 2010,[4404] I shall focus only on the first of these goals.

How might Americans go about separating the Treasury from financial speculators to the greatest degree possible? The best way to proceed is for WE THE PEOPLE to act through their States, as economic, political, and especially legal vehicles for "change we can believe in".

A. The first step in this corrective process must be to prevent the present problem from becoming any more serious, by imposing *strict limitations* on public indebtedness in the future. To saddle future generations of Americans with a staggering load of public debt is more than just financially imprudent or even morally problematic. At some point, it becomes positively illegal. The only time the Constitution expressly addresses the concerns of the future is when it declares WE THE PEOPLE'S intent "to * * * secure the Blessings of Liberty to ourselves *and our Posterity*".[4405] Now, generally a servant is subject to the control of his master. Therefore, relative to his master, the servant is deprived of liberty. Specifically, "the borrower is servant to the lender"—his servitude proportional to the degree of his indebtedness. So, if "our Posterity" are cast in the rôle of involuntary "borrowers" of sums so huge that repayment in real terms is impossible, they are thereby consigned to the permanent status of "servants"—and worse than even indentured servants, because they never agreed to their servitude—and in that thralldom are not "secure[d]" in "the Blessings of Liberty", but instead are stripped of them.

This is contrary to the explicit purpose of the Constitution "to * * * establish Justice" as a permanent condition.[4406] For "our Posterity" will have had no notice of, will have been afforded no hearing as to, will have taken no other part in, and certainly will never have given their permission for, the transactions that incurred the supposed public debt for the repayment of which they will be taxed or otherwise mulct. It will have been *physically impossible* for those of "our Posterity" who were not even alive at the time to be observers of, let alone parties to, these transactions. Therefore, imposing a liability upon them to pay off these debts—ultimately to be enforced through taxation imposed at the point of bayonets—amounts to the quintessential case of "taxation without representation".

[4404] *See* APPENDIX A, *ante*, at 1903.

[4405] U.S. Const. preamble (emphasis supplied).

[4406] U.S. Const. preamble.

It is bootless to contend that "our Posterity" will have been "*virtually* represented" by the past and present generations of Americans. Historically, this apology is lame. America's Founders were "virtually represented" by members of Parliament who were actually their contemporaries—and nonetheless they rejected such "representation" as insufficient, if not fraudulent. Indeed, "imposing Taxes on us without our Consent" in the present was one of the "Facts submitted to a candid world" which the Declaration of Independent set out as evidence that "[t]he history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny". One wonders how "imposing Debts on us without our Consent", on an intergenerational basis, could sound any less in usurpation and tyranny.

In principle, too, the apology of "virtual representation" is nonsensical.

- *First,* even if "representatives" elected in the present can properly "represent" the generation that ensconced them in office—which is an highly debatable point under present political conditions—they cannot "represent" future generations the circumstances of which must be entirely unknown to and unknowable by them. How can "representatives" today possibly judge whether "our Posterity" in some future time will be able to afford such a gargantuan debt in the face of the vicissitudes that may then plague them?

- *Second*, "representatives" elected in the present cannot presume, let alone know, that "our Posterity" would even concur in the actual process—always convoluted, often corrupt—by which the public debt is incurred today, let alone accept the results of that process. To the contrary: As rational beings, "our Posterity" would *never* agree to afford *carte blanche* to intertemporal "virtual representation", because both the "representatives" and their constituents in the present are not neutral arbiters, but instead are patently self-interested parties intent upon enjoying the immediate benefits of deficit finance in the present while sloughing off its inevitable burdens onto the future. Such "representatives" are absolutely disqualified as "trustees" of the public interest as far as "our Posterity" is concerned, because their own interests are inexorably adverse to those of the purported "beneficiaries" of their actions.

- *Third*, "representatives" elected in the present can hardly conclude that "our Posterity" would necessarily accept as valuable at all, let alone worth the cost, the particular governmental programs on which those "representatives" expended the moneys they borrowed.

The complete corrective to this intergenerational conflict of interests would be to eliminate altogether, or at least drastically curtail, the power of Congress "[t]o

borrow Money on the credit of the United States".[4407] That course of action, however, would be cumbersome, because it would require a *very specific* Amendment of the Constitution, which would have to be "propose[d]" by Congress itself—unless Americans want to play political Russian Roulette by calling for a constitutional convention.[4408]

In the interim, the best that can be done is to recognize that, if *some* public debt is arguably justified on the ground that it may become unavoidably necessary—perhaps, for example, during a properly declared "War" fully justifiable under "the Laws of Nature and of Nature's God"[4409]—nonetheless in incurring any such debt the fiduciary responsibility of the present generation to "our Posterity" must be of the very highest order. *No* debt should be incurred that is not constitutionally "necessary and proper" beyond a reasonable doubt.[4410] So, the prudent as well as the circumspect approach for the present should be to enforce strict "checks and balances" on the exercise of the governmental power "[t]o borrow Money".

Now, the ultimate practical "check and balance" on speculation is *uncertainty*. Lenders do not lend freely to borrowers who are not likely to repay. Public officials have been able to amass the present gargantuan debt, because they have purported "[t]o borrow Money *on the credit of the United States*".[4411] And lenders have relied on what is called "the full faith and credit of the United States" (a phrase, by the way, which the Constitution never uses)—or, more descriptively, what has always been the robotic willingness of common Americans to continue to pay the bills passed on to them by public officials in the name of the United States.

At base, though, "the credit of the United States" is a legal fiction. It can extend only to those actions of public officials that are *constitutional*. So not all purported "public debt" is lawful simply because it comes forth stamped with some official's formal approval. The legitimacy of any ostensible "public debt" is contingent upon its *rectitude*, not simply its naked existence. The Constitution itself declares that "[t]he validity of the public debt of the United States, *authorized by law*, * * * shall not be questioned".[4412] This limitation embodies the recognition that some supposed "public debts" may *not*, after all, be "authorized by law"—as, for

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[4407] U.S. Const. art. I, § 8, cl. 2.

[4408] *See* U.S. Const. art. V.

[4409] *See* U.S. Const. art. I, § 8, cl. 11 *and* Declaration of Independence.

[4410] *See* U.S. Const. art. I, § 8, cl. 18.

[4411] U.S. Const. art. I, § 8, cl. 2 (emphasis supplied).

[4412] U.S. Const. amend. XIV, § 4 (emphasis supplied). *See also* 31 U.S.C. 3102(a) (emphasis supplied): "With the approval of the President, the Secretary of the Treasury may borrow on the credit of the United States Government amounts necessary for expenditures *authorized by law* and may issue bonds of the Government for the amounts borrowed * * * ."

instance, when they are unconstitutional or otherwise illegal—and that *all* alleged "public debts" *may* be "questioned" on that very ground.

Indeed, the supremacy of the Constitution[4413] requires that all ostensible "public debts"—no less than any and all other actions of public officials—*should* be capable of being "questioned" at all times. For "[i]t cannot be presumed that any clause of the constitution is intended to be without effect".[4414] And inasmuch as the power of Congress "[t]o borrow Money on the credit of the United States" is a delegated power, limited by its terms, therefore the burden of establishing that it has been properly exercised in any and every case "is upon those making the claim"—namely, *the public officials and the lenders who purport to incur the debt*.[4415] If that burden cannot be carried with respect to any portion of the purported "public debt", then such part is null and void. For the alleged assumption of "public debt" always involves some supposed "law". If that "law" is unconstitutional, then it is no "law" at all. "[I]t confers no rights * * * imposes no duties * * * [and] is, in legal contemplation, as inoperative as though it had never been passed".[4416] But only if these principles are *actually applied* to the *present* "public debt" will America burn the bridges between the financial speculators on Wall Street and the Treasury on Pennsylvania Avenue. And the time for such incendiary action has arrived. Under contemporary circumstances, the purported "public debt" of the United States not only *should be* but *shall have to be* more than just "questioned", because its cancerous growth has set into motion an autocatalytic reaction which, unless soon quenched, will ignite the worst of all possible economic conflagrations: an hyperinflationary depression.

The formula for calculating what portion of the purported "public debt" is legitimate and what portion is not is straightforward. Bills for raising revenue are inevitably tied to governmental spending, the former being the effect and the latter the cause. As the Constitution declares, "Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States".[4417] In any particular year, the government's budget typically provides that so much is to be spent on certain activities—and to pay for it, so much is to be raised through taxes;[4418] so much through borrowing;[4419] so much (perhaps) through "dispos[al] of * * * the

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[4413] *See* U.S. Const. art. VI, cl. 2.

[4414] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803). *Accord*, Knowlton v. Moore, 178 U.S. 41, 87 (1900); Blake v. McClung, 172 U.S. 239, 261 (1898).

[4415] *See* Bute v. Illinois, 333 U.S. 640, 653 (1948).

[4416] Norton v. Shelby County, 118 U.S. 425, 442 (1886).

[4417] U.S. Const. art. I, § 8, cl. 1.

[4418] U.S. Const. art. I, § 8, cl. 1.

[4419] U.S. Const. art. I, § 8, cl. 2.

Territory or other Property belonging to the United States";[4420] and so much through any other sources of governmental income. So, because governmental income and expenditures are thus inextricably linked, in order to determine the unconstitutional portion of any amount of ostensible "public debt" incurred in any fiscal year, one need only determine what proportion of the expenditures for that year, related to that debt, are unconstitutional.

If a specific program is tied to a particular loan, then the unconstitutionality of that program will determine the unconstitutionality of that loan. If the program is unconstitutional, the debt incurred to float it is null and void.[4421] But if the money the Treasury borrows goes into its general fund, not tied to any particular program, then some formula for allocating the reduction of debt in relation to unconstitutional activities must be employed. For example, let

> **T** (TAXES COLLECTED) + **D** (DEBT INCURRED) + **S** (SALES OF PROPERTY) = **E** (EXPENDITURES); *and*
> **X** = THE AMOUNT OF **E** THAT INVOLVES UNCONSTITUTIONAL ACTIVITIES.

Now, **X** cannot easily be applied to reduce **S**, because, in contradistinction to "Taxes, Duties, Imposts and Excises" which may be expended "to pay the Debts and provide for the common Defence and general Welfare of the United States",[4422] and to borrowing which must be "authorized by law",[4423] the Constitution imposes no specific limitation on the discretion of Congress to "dispose of * * * the Territory or other Property of the United States".[4424] Of course, any such disposal would have to further the goals set out in the Constitution's Preamble. So, if some sale of property were made specifically in order to finance an unconstitutional program, that sale could be rescinded. As of now, though, few of these transactions occur. So, for the sake of simplicity at this point, this source of income may be disregarded. (In the future, though, things may be different, as will be discussed below.)

X should be applied to **D** before being applied to **T**, precisely in order to discourage lending to the General Government, because, more than any other source of governmental income, lending facilitates and encourages unconstitutional expenditures. After all, unlike taxpayers, lenders act voluntarily and presumably with access to adequate information from the General Government's budget and other official sources. Thus, they lend their money knowing full well (or at least on

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[4420] U.S. Const. art. IV, § 3, cl. 2.

[4421] *See* the discussion of Hanauer v. Doane, 79 U.S. (12 Wallace) 342 (1871), *post,* at 1942.

[4422] U.S. Const. art. I, § 8, cl. 1.

[4423] *Compare* U.S. Const. amend. XIV, § 4 *with* art. I, § 8, cl. 2.

[4424] *See* U.S. Const. art. IV, § 3, cl. 2.

adequate notice of) how it will be spent, and implicitly approving of those expenditures. In addition, just as are the public officials with whom they deal, lenders are chargeable with full knowledge of the powers—*and the disabilities*—of the General Government, and therefore of which portions of the budget are legitimate or not. So, to the extent that some portion of the public debt subsidizes unconstitutional or otherwise illegal expenditures in the relevant budget, the lenders are *in pari delicto* with the rogue public officials who borrow and spend the money, aiding those officials in perpetrating a fraud on the American people by purporting to impose a liability on the people to repay a debt for expenditures which cannot be charged to them in the first place. Therefore, when the time comes for repayment of the alleged debt, the lenders are surely not entitled to that portion which was illegally incurred in the first place. Indeed, because of their wrongdoing, arguably they are entitled to *nothing at all.*

This result is well supported by judicial precedent of long standing. For example, in *Hanauer* v. *Doane*,[4425] the Supreme Court considered whether a loan, a portion of which was known by the lender to be applied to the purchase of supplies for the Confederate States Army, was repayable, in whole or in part. The Court held that "[i]f either of the[ ] portions of the consideration on which the notes were given was illegal, the notes are void *in toto*. Such is the elementary rule, for which it is unnecessary to cite authorities."[4426] As the Court explained,

> [w]ith whatever impunity a man may lend money or sell goods to another who he knows intends to devote them to a use that is only *malum prohibitum*, or of inferior criminality, he cannot do it without turpitude, when he knows or has every reason to believe that such money or goods are to be used for the perpetration of a heinous crime, and that they were procured for that purpose.
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> No crime is greater than treason. He who, being bound by his allegiance to a government, sells goods to the agent of an armed combination to overthrow that government, knowing that the purchaser buys them for that treasonable purpose, is himself guilty of treason or a misprision thereof. He voluntarily aids the treason. He cannot be permitted to stand on the nice metaphysical distinction that, although he knows that the purchaser buys the goods for the purpose of aiding the rebellion, he does not sell them for that purpose. The consequences of his acts are too serious and enormous to admit of such a plea. He must be taken to intend the consequences of his own voluntary act.[4427]

[4425] 79 U.S. (12 Wallace) 342 (1871).

[4426] *Id.* (12 Wallace) at 345.

[4427] *Id.* (12 Wallace) at 346, 347.

Support for the Confederate States Army in the field was, of course, a *treasonous* activity, explicitly so defined by the Constitution.[4428] The fundamental point, though, is not that such support was specifically "Treason", but that it was a violation of the Constitution. "Treason" is a crime only because the Constitution makes it so. But *every* unconstitutional act into which rogue public officials enter knowingly and willfully, or with reckless disregard for the consequences, or in willful blindness to the truth, is also a crime, because those officials "shall be bound by Oath or Affirmation, to support th[e] Constitution",[4429] and because various statutes so declare.[4430] And if those rogues or their myrmidons then accost WE THE PEOPLE with arms, in order to collect the money to pay for their illegal acts, their assaults amount to no less than "Treason". For *every* unconstitutional act on the part of rogue public officials constitutes a "combination to overthrow th[e] government", in the sense of setting aside the Constitution, at least in part; and *every* attempt forcibly to compel obedience from WE THE PEOPLE through the deployment of "law-enforcement agencies" constitutes "an armed combination to overthrow th[e] government". So *any* loan for which *any* part of the consideration is the performance of an act that is a violation of the Constitution is "void *in toto*".

Thus,

> • If **X** is less than **D**, then each bond, note, or other evidence of obligation that makes up the total debt is declared null and void to the extent of **X ÷ D** times its face value. This relieves the taxpayers of any liability to repay this amount of debt.
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> • If **X** is equal to **D**, then the total debt is declared null and void. This relieves the taxpayers of any liability to repay any of the debt. And,
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> • If **X** is greater than **D**, then the total debt is declared null and void, and a credit to the extent of **(X – D) ÷ T** times the tax paid by each taxpayer for the year in question is to be applied to the taxpayer's next year's tax. This relieves the taxpayers of any liability to repay any of the debt, and refunds to them the excessive taxes that they paid.

This calculation may become arithmetically more complicated if some expenditures for a particular year are for service of debts incurred in relation to budgets of previous years. But the same principle applies. A further complication is that some public debt will have to be excluded from the calculation altogether on

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[4428] *See* U.S. Const. art. III, § 3, cl. 1 *and Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 126 (1807).

[4429] U.S. Const. art. VI, cl. 3.

[4430] *See* 18 U.S.C. §§ 241 and 242.

equitable grounds. For example, the Social Security System's so-called "trust fund" has been compelled to "invest" its receipts in public debt. In equity, then, that portion of the debt cannot be liquidated, except to the extent that the Social Security payments it finances can themselves be constitutionally reduced or even cancelled.[4431]

Through this procedure, invalid "public debt" is *not* "repudiated"; it is *not* "nullified"; it is *not* "cancelled"; it is *not* even "dishonored"—rather, *it is recognized as never having come into legal existence in the first place*. Neither can it be said that invalid "public debt" is left unpaid. *All* debts are *always* paid in practice—if not by the debtor, then by the creditor, or by some third party surety or guarantor. The only question is, "*Who* pays *what*, and on what grounds?"

Were this procedure applied today, financial speculators would lose their enthusiasm for "investing" in public debt, unless they were legally assured that whatever part of the General Government's budget that debt financed were completely constitutional. Astute lenders would purchase only public debt explicitly tied to specific expenditures for specific programs, the legality of which could easily be assessed. Even then, they would likely demand official "certificates of constitutionality" for any program that could not be fully justified on the very face of the Constitution. As any such certificates coming from Congress or the Executive would be merely indicative, but not dispositive, of the question without a *judicial* determination—which would require at least some sort of formal declaratory judgment on the matter—uncertainty would discourage any but the hardiest lenders from risking their capital on any loan that had the least taint of unconstitutionality attached to it.

The States should take the lead in the process of identifying those portions of the budget (and derivatively of the public debt) that are illegal, if only to reassert their authority under the Tenth Amendment. After all, in order to begin to enforce that Amendment, Americans need to become clear on what "powers [are] not delegated to the United States by the Constitution", but "are reserved to the States respectively, or to the people". Inasmuch as no one can reasonably expect officials of the General Government to investigate, educate, and mobilize the people on this subject, the task devolves upon the States.

B. This still leaves the legitimate part of the existing debt—no small amount, by any means. It can be reduced, though, (i) by exercising the General Government's reserved right to cancel certain contingent liabilities, (ii) by liquidating the assets that the government can best spare, and (iii) by raising some additional revenue. The rather piquant irony is that Americans can both combine reduction of the public debt with separation of bank and state, and turn the present

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[4431] *See* Flemming v. Nestor, 363 U.S. 603 (1960).

fiat-currency system, which the speculators and politicians created in order to increase the public debt, into the means to eliminate it.

1. The first step in resolving this problem will be to repeal the provision of law that requires the Treasury to redeem Federal Reserve Notes for "lawful money"[4432]—thus beginning the separation of bank and state by imposing the entire burden for redemption on the twelve Federal Reserve Banks alone, where in economic rationality and justice it belongs. This reform can be accomplished simply by statute, and immediately, under the aegis of Section 30 of the original Federal Reserve Act, in which Congress "expressly reserved" "[t]he right to amend, alter, or repeal th[at] Act" at any time, in any particular, and for any reason.[4433]

2. The second step in dealing with the legitimate portion of the existing public debt requires one to understand that, today, *all public debt is payable in only* ***notional*** *"dollars"*. Notice, I did not say merely "nominal", but instead *notional*, "dollars"—because under actual Congressional practices and the Supreme Court's "precedents", the "dollar" is *anything* that Congress says it is. As a matter of this body of supposed law, the understanding when public debts are contracted is that the plenary power of Congress is then and thereafter always to be read into the word "dollar".

In addition—again, under actual Congressional practices and the Supreme Court's "precedents"—Congress may make *anything* a "legal tender" for a "dollar". For instance, Congress can declare that a contract originally payable in some number of gold or silver "dollars" can be paid instead with pieces of paper labeled "legal tender". As a matter of this body of supposed law, the understanding when public debts are contracted is that the plenary power of Congress to declare things "legal tender" for "dollars" is then and thereafter always to be applicable to any debt denominated in undifferentiated "dollars".[4434]

Moreover, according to its own practices and the Judiciary's "precedents", Congress can "regulate the Value" of an ounce of coined gold at a nominal "$50", and an ounce of coined silver at a nominal "$1", and a base-metallic coin at a nominal "$1", and a piece of paper at a nominal "$50" or a nominal "$1" or any other nominal value it chooses. And no one can legally complain that the

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[4432] 12 U.S.C. § 411.

[4433] An Act To provide for the establishment of Federal reserve banks, to furnish an elastic currency, to afford means of rediscounting commercial paper, to establish a more effective supervision of banking in the United States, and for other purposes ("Federal Reserve Act"), Act of 23 December 1913, CHAP. 6, § 30, 38 Stat. 251, 275. *See generally* E. Vieira, Jr., *Pieces of Eight, ante* note 39, Volume 2, at 1549-1576.

[4434] In contrast, a private debt, or the debt of some State, explicitly denominated in, say, United States "gold dollars" or "silver dollars" of the standard of 1985 would have to be paid in such "dollars", and no others. *See* 31 U.S.C. §§ 5112(a) (7) through (10) and (e); *and* 5118(a) and (d)(2). The General Government, however, has purported to disable itself from entering into, and to render unenforceable, such so-called "gold-clause contracts". *See* 31 U.S.C. 5112(b) and (c).

purchasing power (say) of the pieces of paper or the base-metallic coins with an aggregate nominal value of "$50" is nowhere near the purchasing power of fifty one-ounce silver coins, let alone a one-ounce gold coin.[4435]

(Of course, I do not concede that any of these practices or "precedents" are in any way constitutional. But, in the present crisis, I am willing to seize upon the old adage that "it takes a crooked stick to beat a mad dog".)

It was said of John Law that he tried "to coin the soil of France". But John Law's monetary powers were next to nothing compared to those that Congress, with the Supreme Court's approbation, claims to exercise today. So, if Congress can declare *anything* to be a "dollar", and to be "legal tender" for a "dollar", and to be taken at whatever monetary value it so chooses, why cannot Congress also declare that some area of the public lands shall be a "dollar" or "legal tender" for a "dollar" specifically for and in payment of the public debt, "dollar for dollar", and for no other purpose—and thus "coin the soil" of the United States?[4436] Certainly, such action falls within the explicit constitutional powers of Congress "to dispose of * * * the Territory or other Property belonging to the United States"; and within the putative power "[t]o * * * regulate the Value [of Money]" any old way,[4437] and to declare "legal tender", which powers, although they lack any constitutional basis, Congress and the Supreme Court nevertheless say that Congress enjoys. And no relevant statute precludes such action.[4438]

This method of paying off the public debt would be triply beneficial:

> *First*, it could eliminate a very large portion, if not the *entirety*, of the debt *all at once*—because the new "public-debt-reduction dollar" can consist of *any* area of land that Congress might choose to stipulate. No need exists for Congress to establish that the unit of payment in land be equivalent in value, according to some external standard, to any other "dollar" in circulation when the debt was incurred, or when it is paid.[4439] Indeed, because the "dollar" is today purely notional, no such standard can possibly exist. Rather, the unit of land designated as the "dollar" for the specific

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[4435] *See, e.g.,* Thompson v. Butler, 95 U.S. 694 (1878).

[4436] What effectively would amount to a "*dirt* dollar" would hardly be such an innovation as it sounds. After all, silver and gold are simply specific components of "dirt" (that is, earth or ground), that happen to exhibit greater purchasing powers, ounce for ounce, in the marketplace than most other components, such as zinc, copper, lead, iron, or silicon. Yet some components of dirt—such as platinum, palladium, rhodium, and rubidium—are even more valuable, ounce for ounce, than either silver or gold. So (all constitutional objections aside) if a *refined* "dirt dollar" of silver or gold is legitimate, no principled objection to an *un*refined "dirt dollar" should be tenable.

[4437] U.S. Const. art. IV, § 3, cl. 2 *and* art. I, § 8, cl. 5, respectively.

[4438] *E.g.,* 31 U.S.C. § 5118(b) declares that "[t]he United States Government may not pay out any gold coin". It does *not* say that the government may not pay out aliquots of public land.

[4439] *See* Perry v. United States, 294 U.S. 330 (1935).

purpose of paying off the public debt must itself constitute the only standard of monetary value applicable to that transaction, because so defined by Congressional edict.

Second, this method of paying off the public debt would liquidate the vast holdings of territory for which the United States lack any constitutional sanction, and return ownership, use, and regulatory authority over these lands to the States and private parties, where they belong.[4440] The sudden increase in the real wealth of the States and their people would significantly mitigate the present economic doldrums in which they find themselves, and augur well for future economic prosperity and growth.

Third, both the lenders and the borrower (the General Government) would find the transaction advantageous. The General Government, of course, would benefit, because its debt would be more or less eliminated, and because the elimination of the debt would relieve a great deal of the pressure now being exerted on the Federal Reserve System and the Treasury which, if not somehow vented, is likely to cause an hyperinflationary explosion of the System's paper currency, with Heaven knows what terrible consequences. The lenders would approve, too, because they would receive *real value* in land for their bonds *right now*, instead of grossly depreciated paper "dollars" that almost certainly would be worth next to nothing when finally paid.

To be sure, the initial practical problem in effectuating this proposal will be that the unit of land designated as the "dollar" exclusively for the purpose of paying off the public debt will be, not only quite small in size, but also not localized in any particular place. Rather, each unit will comprise a very small fraction of—as the lawyers say, "an undivided interest in"—the total public lands available for distribution. So a mechanism will need to be created to establish and regulate a market for trading these new "land-unit dollars", in order to pass particular areas of the available territory into private control. Also, ***careful regulation will be necessary so that, although many of the "land-unit dollars" may initially have to be paid out to foreign interests, none of the territory shall come or remain under foreign control when final allocation, division, and disposition of the land takes place***.

3. If, for legitimate strategic reasons, distribution of the entirety of the public lands is deemed undesirable for sufficient constitutional reasons,[4441] then what remains of the public debt should be paid off with specially targeted taxes, including:

[4440] *See* U.S. Const. art. I, § 8, cl. 17. *See generally* Bill Howard and Bill Redd, *Statehood: The Territorial Imperative* (Helper, Utah: Bookcliff Publishing, 2005).

[4441] *See* U.S. Const. art. I, § 8, cl. 17.

a. A confiscatory "Excise[ ]" on all nonproductive "financial transactions", such as "credit default swaps" and other speculative gambling contracts, both when they are entered into and when they are paid off.[4442] "[T]he power to tax involves the power to destroy".[4443] And in this case rightly so.

b. A non-apportioned tax on the possession of certain types of non-productive assets held for personal consumption and use.[4444]

c. A complex of "Taxes, Duties, [and] Imposts" aimed at curbing all manifestations of "globalism" and "the new world order" that are detrimental to the National independence, sovereignty, and security of the United States.[4445] At the minimum, every job transferred from an American to some foreign worker, every unit of capital exported for overseas investment, and every product of strategic value imported into this country, when it could (and should) be produced in this country, should result in a significant tax being imposed on the enterprise and persons responsible.

d. A "Dut[y]" on all goods imported from Mexico (and, to be fair, from Canada, too), calculated on the basis of the costs of apprehending and deporting illegal aliens who have crossed into the United States across the Mexican (or the Canadian) border.

C. After the public debt is thus radically reduced, the General Government should be required to finance itself largely on a "pay as you go" basis, through taxation. After all, if the money is there to be borrowed, it is there to be taxed. (If it is not already there—and subject to taxation—then what is its source?) Of course, *foreign* money that might be available to be borrowed may not be taxable. But because "the borrower is servant to the lender", the government should not be to any significant degree dependent upon foreign money in the first place. Foreign loans inevitably create political entanglements, subjecting the government to financial pressures applied for alien political ends always detrimental to America's rational self-interest.

"Pay as you go" will return control of the government to the people. For taxpayers will simply refuse to "pay the freight" for governmental programs that are either unnecessary or wasteful—and will so instruct their representatives. Or, if their representatives prove recalcitrant, the people will remove them from office.

[4442] *See* U.S. Const. art. I, § 8, cl. 1.

[4443] McCulloch v. Maryland, 17 U.S. (4 Wheaton) 316, 431 (1819).

[4444] *See* Hylton v. United States, 3 U.S. (3 Dallas) 171 (1796). *See also* Billings v. United States, 232 U.S. 261 (1914).

[4445] *See* U.S. Const. art. I, § 8, cl. 1.

D. The practical question then becomes, "*Who* will come forward to bell this cat?"

Self-evidently, the necessary reforms will not come from anyone in or aspiring to Congress, at least not without pulling a mouthful of political teeth. So WE THE PEOPLE must turn to the States. The first step must be the formation of a "blue-ribbon" investigatory commission, formed initially by one or a few far-sighted State legislatures, to determine and widely publicize the percentage of the General Governments's expenditures (and therefore its debt) that is arguably illegitimate, and to explain how the legitimate portion can be paid off in whole or in large measure through "coining" the public lands. With these data and recommendations in hand, the States would then admonish the General Government that, if suitable reforms were not implemented immediately in Washington, the States would take direct action themselves. Precisely what that action would be, I must leave for another day.

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For the reader's convenience (on the presumption that the Internet version will remain available), all quotations from, citations to, and page references in these materials have been conformed to the PDF files. Peculiar to these materials is that the pages in some instances are numbered sequentially for particular sessions of the General Assembly, and in other instances are numbered sequentially for all of the sessions throughout a particular volume. So a particular volume may contain more than one page with the same page number. For that reason, to indicate specific pages in any volume, the special style "{ -- }" will be used, in conjunction with identification of the relevant session. In addition, where the number of the PDF volume differs from the number of the bound volume, both numbers will be given, the number of the PDF volume first, followed by the number of the bound volume in brackets. Thus, for example: "...Volume 2 [1], at {32}" indicates that the quoted material is to be found in PDF Volume 2, at page 32, where page "32" may refer to the pagination of the volume as a whole or of the particular session identified in the citation, as the case may be. If only one number is given for a particular volume, then the number of the volume in both the PDF and the bound versions is the same.

In addition, extraneous material in the titles of the various sessions has been deleted.

• *PUBLIC LAWS OF RHODE ISLAND, 1719*, which contains the ACTS AND LAWS, of His Majesties COLONY OF Rhode-Island AND *Providence=Plantations* IN AMERICA (Boston, Massachusetts: John Allen, [1719]) (hereinafter cited as "*Public Laws of Rhode Island, 1719*"), available in the Rhode Island State Archives, Providence, Rhode Island. This compilation can also be found in THE CHARTER AND THE ACTS AND LAWS OF HIS MAJESTIES COLONY OF Rhode-Island AND Providence=Plantations In *America*, 1719 (Providence, Rhode Island: Sidney S. Rider and Burnett Rider, 1895), now available in a digitized version by Google™ Books.

• *PUBLIC LAWS OF RHODE ISLAND, 1730, 1730-36*, which contains the ACTS and LAWS of His Majesty's COLONY of Rhode-Island, and Providence-Plantations, In *AMERICA* (Newport, Rhode Island: James Franklin, 1730), bound together with various statutes from the period 1730 through 1736 (all hereinafter cited as "*Public Laws of Rhode Island, 1730*"), available in the Rhode Island State Archives, Providence, Rhode Island.

• *PUBLIC LAWS OF RHODE ISLAND, 1744, 1745-52*, which contains the ACTS and LAWS Of His MAJESTY'S COLONY OF Rhode-Island, AND Providence-Plantations, In NEW-ENGLAND, In AMERICA (Newport, Rhode Island: The Widow Franklin, 1745) (hereinafter cited as "*Public Laws of Rhode Island, 1744*"), bound together with the ACTS AND LAWS Of His MAJESTY'S COLONY OF Rhode-Island, AND Providence-Plantations, In NEW-ENGLAND, In AMERICA. From *Anno* 1745, to *Anno* 1752 (Newport, Rhode Island: J. Franklin, 1752) (hereinafter cited as "*Public Laws of Rhode Island, 1752*"), available in the Rhode Island State Archives, Providence, Rhode Island. The compilation originally published in 1745 can also be found in *Acts and laws, of His Majesty's colony of Rhode-Island, and Providence-Plantations, in New-England, in America,* ECCO Eighteenth Century Collections Online, Print Editions. The compilation published in 1752 can be found in *Acts and laws of His Majesty's colony of Rhode-Island, and Providence-Plantations in America: from anno 1745 to anno 1752,* Sabin Americana, Print Editions 1500-1926.

• *PUBLIC LAWS OF RHODE ISLAND, 1767*, which contains the ACTS AND LAWS OF The English COLONY OF RHODE ISLAND AND PROVIDENCE-PLANTATIONS IN NEW-ENGLAND, IN AMERICA (Newport, Rhode Island: Samuel Hall, 1767) (hereinafter cited as "*Public Laws of Rhode Island, 1767*"), available in the Rhode Island State Archives, Providence, Rhode Island.

• *PUBLIC LAWS OF RHODE ISLAND, 1772,* which contains the ACTS AND LAWS OF The English Colony of RHODE-ISLAND AND PROVIDENCE-PLANTATIONS IN NEW-ENGLAND IN

AMERICA, Made and passed since the Revision in June, 1767 (Newport, Rhode Island: Solomon Southwick, 1772), available in the Rhode Island State Archives, Providence, Rhode Island. This compilation can also be obtained in the Fac-Simile Reprint, Rhode Island Digest Laws 1772, Issued by Harry Gregory, Providence, R.I., 1893; now available in a digitized version by Google™ Books.

•Part 12 (Rhode Island) *of* The Selective Service System, *Backgrounds of Selective Service, Military Obligation: The American Tradition, A Compilation of the Enactments of Compulsion From the Earliest Settlements of the Original Thirteen Colonies in 1607 Through the Articles of Confederation in 1789*, Special Monograph No. 1, Volume II (14 parts) (Washington, D.C.: Government Printing Office, 1947) (hereinafter cited as "*Military Obligation, Rhode Island*"), available on microfiche from the Law Library Microfilm Consortium, University of Hawaii-Windward Campus.

SOUTH CAROLINA—

Part 13 (South Carolina) *of* The Selective Service System, *Backgrounds of Selective Service, Military Obligation: The American Tradition, A Compilation of the Enactments of Compulsion From the Earliest Settlements of the Original Thirteen Colonies in 1607 Through the Articles of Confederation in 1789*, Special Monograph No. 1, Volume II (14 parts) (Washington, D.C.: Government Printing Office, 1947) (hereinafter cited as "*Military Obligation, South Carolina*"), available on microfiche from the Law Library Microfilm Consortium, University of Hawaii-Windward Campus.

VIRGINIA—

•William Waller Hening, *The Statutes at Large; Being a Collection of all the Laws of Virginia from the First Session of the Legislature, in the Year 1619* (13 volumes) (hereinafter cited as "*Laws of Virginia*, Volume 1, 2, 3, ... *et cetera*"). This set includes Volume I, 1619-1660 (New York: R. & W. & G. Barton, 1823); Volume II, 1660-1662 (New York, New York: R. & W. & G. Barton, 1823); Volume III, 1684-1710 (Philadelphia, Pennsylvania: T. Desilver, 1823); Volume IV, 1711-1736 (Richmond, Virginia: W.W. Gray, 1820); Volume V, 1738-1748 (Richmond, Virginia: W.W. Gray, 1819); Volume VI, 1748-1756 (Richmond, Virginia: W.W. Gray, 1819); Volume VII, 1756-1763 (Richmond, Virginia: Franklin Press, 1820); Volume VIII, 1764-1773 (Richmond, Virginia: J. & G. Cochran, 1821); Volume IX, 1775-1778 (Richmond, Virginia: J. & G. Cochran, 1821); Volume X, 1779-1781 (Richmond, Virginia: G. Cochran, 1822); Volume XI, 1782-1784 (Richmond, Virginia: G. Cochran, 1823); Volume XII, 1785-1788 (Richmond, Virginia: G. Cochran, 1823); and Volume XIII, 1789-1792 (Philadelphia, Pennsylvania: T. Desilver, 1823)—available in many libraries and in a CD version from <www.heritagebooks.com>. *Nota bene:* The date given for a statute drawn from these materials is the year in which the session of the General Assembly which enacted that statute *closed.* Also, extraneous material in the titles of the various sessions has been deleted.

•EXECUTIVE JOURNALS OF THE Council *of* Colonial Virginia (hereinafter cited as "*Executive Journals of Virginia*, Volume 1, 2, 3, ... *et cetera*"). These materials include Volume I (June 11, 1688–June 22, 1699), H.R. McIlwaine, Editor (Richmond, Virginia: The Virginia State Library, 1925); Volume II (August 3, 1699–April 27, 1705), H.R. McIlwaine, Editor (Richmond, Virginia: The Virginia State Library, 1927); Volume III (May 1, 1705–October 23, 1721), H.R. McIlwaine, Editor (Richmond, Virginia: The Virginia State Library, 1928); Volume IV (October 25, 1721–October 28, 1739), H.R. McIlwane, Editor (Richmond, Virginia: The Virginia State Library (1930); Volume V (November 1, 1739–May 7, 1754), William L. Hall, Editor (Richmond Virginia: Virginia State Library, Second Edition, 1967); and Volume VI (June 20, 1754–May 3, 1775), Benjamin J. Hillman, Editor (Richmond, Virginia: Virginia State Library, 1966).

Overall, for ease of reading, Arabic numerals have generally been substituted for Roman numerals in identifying all of the various volumes among the references.

ENDNOTES PROPER

EN-1 — CHAP. I, *A* DECLARATION *of* RIGHTS *made by the representatives of the good people of* Virginia, *assembled in full and free Convention; which rights do pertain to them, and their posterity, as the basis and foundation of government* [*Unanimously adopted June* 12, 1776], Article 13, *At a General Convention of Delegates and Representatives, from the several counties and corporations of Virginia, held at the Capitol in the City of Williamsburg, on Monday the 6th of May,* 1776, *in Laws of Virginia*, Volume 9, at 111.

EN-2— This statute is dated "1699" in LAWS AND ACTS OF RHODE ISLAND, AND PROVIDENCE PLANTATIONS Made from the First Settlement in 1636 to 1705, at 92, *Reprinted in* J.D. Cushing, Editor, *The Earliest Acts and Laws of the Colony of Rhode Island and Providence Plantations* (Wilmington, Delaware: M. Glazier, 1977), at 107. Dated "1701", it appears *At the Generall Assembly and Election held for the Collony at Newport, the 7th of May*, 1701, *in Rhode Island Records*, Volume 3, at 430. Reprinted from a compilation dated "1705", it appears in *Military Obligation, Rhode Island,* at 37.

EN-3 — LAWS Made and Past by the General Assembly of His Majesties Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, begun and Held at *Newport*, the Seventh Day of *May*, 1718, and Continued by Adjournments to the Ninth Day of *September* following, *in Public Laws of Rhode Island, 1719*, at 85; *in Public Laws of Rhode Island, 1730*, at 90; *and in Public Laws of Rhode Island, 1744*, at 65.

EN-4 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Newport, the 14th day of June*, 1726, *in Rhode Island Records*, Volume 4, at 377, *identified by title when repealed by* An Act for repealing an Act made and pass'd the Fourteenth Day of *June*, 1726, being, *An Act for regulating the Militia, and the Election of the Officers of each respective Company in this Colony*, LAWS, Made and pass'd by the General Assembly of His Majesty's Colony of *Rhode-Island* and *Providence-Plantations*, in *New-England*, held at *Newport*, on the first *Wednesday* of *May*, 1730, *in Public Laws of Rhode Island, 1730*, at 212.

EN-5 — An Act for the Relief of Tender Consciences, and for preventing their being burthened with Military Duty, LAWS, Made and pass'd by the General Assembly of His Majesty's Colony of *Rhode-Island* and *Providence-Plantations*, in *New-England*, held at *Newport*, by Adjournment, on the third *Monday* of *June*, 1730, *in Public Laws of Rhode Island, 1730*, at 217.

EN-6 — An ACT for erecting an ARTILLERY COMPANY in the Towns of *Westerly* and *Charlestown*, At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England* in *America*; begun (in Consequence of Warrants issued by his Honour the Governor) and held at *Providence*, on Wednesday the first of *January*, One Thousand Seven Hundred and Fifty-five, *in Rhode Island Acts and Resolves*, Volume 2, at {63}.

EN-7 — At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England* in AMERICA; begun and held by Adjournment at *Providence*, on the first Monday of *February*, One Thousand Seven Hundred and Fifty-five, *in Rhode Island Acts and Resolves*, Volume 2, at {71}.

EN-8 — At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England* in AMERICA; begun and held by Adjournment at *South-Kingston*, upon the last Monday in *February*, One Thousand Seven Hundred and Fifty-six, *in Rhode Island Acts and Resolves*, Volume 2, at {73}.

EN-9 — *Public Laws of Rhode Island, 1767*, at 179. This Act was part of An ACT, establishing the Revisement of the Laws of this Colony, and for the putting the same in Force, *in* A LAW, Made and passed at the General Assembly of the Colony of *Rhode-Island* and *Providence Plantations*, held at *Providence* on the First Monday in *December,* 1766, *in Public Laws of Rhode Island, 1767*, at 3-5.

EN-10 — At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {150}. *Also in Rhode Island Records,* Volume 7, at 269.

EN-11 — AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {29}.

EN-12 — CHAP. II, § I, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 118.

EN-13 — CHAP. II, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 16.

EN-14 — CHAP. II, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February*, 1752. *And from thence continued by several prorogations, to Thursday the 14th day of February*, 1754, *in Laws of Virginia*, Volume 6, at 421.

EN-15 — CHAP. II, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 530.

EN-16 — CHAP. III, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday, the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 93.

EN-17 — CHAP. IV, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274.

EN-18 — CHAP. III, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 534.

EN-19 — CHAP. XXXI, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November*, 1766, *in Laws of Virginia*, Volume 8, at 241.

EN-20 — CHAP. II, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-21 — CHAP. I, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 267.

EN-22 — CHAP. XX, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of* Williamsburg, *on* Monday, *the third of* May, *one thousand seven hundred and seventy-nine, in Laws of Virginia,* Volume 10, at 83.

EN-23 — CHAP. VIII, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the seventh day of* May, *one thousand seven hundred and eighty-one, in Laws of Virginia*, Volume 10, at 416.

EN-24 — CHAP. XLIV, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday, *the sixth day of* May, *one thousand seven hundred and eighty-two, in Laws of Virginia,* Volume 11, at 173.

EN-25 — CHAP. XXVIII, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October, one thousand seven hundred eighty-four, in Laws of Virginia*, Volume 11, at 476.

EN-26 — CHAP. I, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five, in Laws of Virginia*, Volume 12, at 9.

EN-27 — *See* CHAPTER DCCL, AN ACT TO REGULATE THE MILITIA OF THE COMMONWEALTH OF PENNSYLVANIA (17 March 1777), Laws enacted in the first sitting of the first general assembly of the commonwealth of Pennsylvania, which began at Philadelphia, November 28, 1776, and was continued by adjournment to March 21, 1777, *in Pennsylvania Statutes,* Volume 9, at 75-94; CHAPTER DCCLX, A SUPPLEMENT TO THE ACT, ENTITLED "AN ACT TO REGULATE THE MILITIA OF THE COMMONWEALTH OF PENNSYLVANIA" (19 June 1777), *in Pennsylvania Statutes*, Volume 9, at 131-136; CHAPTER DCCLXXIII, AN ACT FOR MAKING MORE EQUAL THE BURDEN OF THE PUBLIC DEFENSE AND FOR FILLING THE QUOTA OF TROOPS TO BE RAISED IN THIS STATE (26 December 1777), *in Pennsylvania Statutes*, Volume 9, at 167-169; CHAPTER

DCCLXXXI, A FURTHER SUPPLEMENT TO THE ACT, ENTITLED "AN ACT TO REGULATE THE MILITIA OF THE COMMONWEALTH OF PENNSYLVANIA" (30 December 1777), *in Pennsylvania Statutes*, Volume 9, at 185-189.

This long absence of Militia laws contravened the charter originally granted to William Penn. *See* THE CHARTER OF CHARLES the Second, of *England*, *Scotland*, *France*, and *Ireland*, KING, Defender of the Faith, &c., Unto WILLIAM PENN, Proprietary and Governor of the Province of *Pensilvania*, 4 March 1681, § XVI, *in Military Obligation, Pennsylvania*, at 4. The same appears, dated 27 June 1682, in *Pennsylvania Statutes*, Volume 1, Appendix I, ¶ [16], at 312. *See also* Commission of Benjamin Fletcher as Governor of Pennsylvania and the Three Lower Counties, from King William & Queen Mary, 21 October 1692, *from Colonial Records of Pennsylvania, 1683-1790* (Philadelphia, Pennsylvania: 1852-1853), *reproduced in* W. Keith Kavenagh, Editor, *Foundations of Colonial America: A Documentary History, Volume II, Middle Atlantic Colonies, Part 1* (New York, New York: Chelsea House, 1983), at 920.

In 1755, Pennsylvania did enact a Militia law mandating only *voluntary* enlistments; but this was repealed in 1756 by order of the King in Council. CHAPTER CCCCV, AN ACT FOR THE BETTER ORDERING AND REGULATING SUCH AS ARE WILLING AND DESIROUS TO BE UNITED FOR MILITARY PURPOSES WITHIN THIS PROVINCE (25 November 1755), At a General Assembly begun and holden at Philadelphia, the fourteenth day of October 1755, and continued by adjournment until the twenty-fourth day of September, 1756, *in Pennsylvania Statutes*, Volume 5, at 197-201, *disallowed and declared void and of no effect* (7 July 1756), *in id.*, Appendix XXI, at 532. In 1757, another Militia law was proposed, but not enacted. *See* AN ACT FOR FORMING AND REGULATING THE MILITIA OF THE PROVINCE OF PENNSYLVANIA; WHICH PASSED THE HOUSE OF ASSEMBLY AT THEIR SESSION IN MARCH, 1757, TOGETHER WITH THE AMENDMENTS PROPOSED BY THE GOVERNOR, *Pennsylvania Statutes,* Volume 5, Appendix XXI, at 609-635.

EN-28 — THE CHARTER Granted by His MAJESTY King *CHARLES* The SECOND TO THE COLONY OF Rhode-Island, AND Providence-Plantations, In *AMERICA*, 8 July 1663, *in Public Laws of Rhode Island, 1719*, at 5. Also in *Public Laws of Rhode Island, 1744,* at 10-13 (separately paginated).

EN-29 — AN ACT establishing an Independent Company, by the Name of *The Light-Infantry* for the County of *Providence*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England* in *America*, begun and holden, by Adjournment, at *Newport*, within and for the said Colony, on the Second Monday in *June*, One Thousand Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {36}. *Accord, e.g.*, *Proceedings of the General Assembly of the State of Rhode Island and Providence Plantations, at Providence, on the last Monday in February*, 1792, *in Rhode Island Records*, Volume 10, at 468 (The Governor's Independent Company of Light Infantry), 469 (Scituate Light Infantry), and 470 (Federal Protectors).

EN-30 — At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England* in *America*; begun and holden by Adjournment at *Providence*, within and for the Colony aforesaid, on the Third *Monday* in *August*, One Thousand Seven Hundred and Seventy-five, *in Rhode Island Acts and Resolves*, Volume 7 [8], at {103}. *Accord*, *Rules and Orders of the Army of Observation, of the Colony of Rhode Island, Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at East Greenwich, on the second Monday in June*, 1775, *in Rhode Island Records*, Volume 7, at 340.

EN-31 — An ACT for the better forming, regulating and conducting the military Force of this State, At the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {29}.

EN-32 — An Act to incorporate the Bristol Grenadiers, At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden at South-Kingstown, within and for the State aforesaid, on the last Monday in October, One Thousand Seven Hundred and Ninety-nine, *in Rhode Island Acts and Resolves*, Volume 18 [20], at {23}.

EN-33 — An Act in addition to an act, entituled "An act for the relief of persons of tender consciences; and for preventing their being burthened with military duty", *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at South Kingstown, on Thursday, the 17th day of April*, 1777, *in Rhode Island Records*, Volume 8, at 204.

EN-34 — An ACT for the confiscating the Estates of certain Persons therein described, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {24-25}.

EN-35 — *Acts and Orders of the Generall Assembly, sitting at Newport, May the* 3, 1665, *in Rhode Island Records*, Volume 2, at 116-117.

EN-36 — *Attorney General's Opinion upon the Address from Rhode Island, of August* 2, 1692, *in Rhode Island Records*, Volume 3, at 293. *Accord*, *Order of Council upon the Address from Rhode Island, concerning the Militia*, 2 August 1694, *in Rhode Island Records*, Volume 3, at 296-297.

EN-37 — An ACT for settling the Militia of the Towns of *Bristol*, *Tiverton*, *Little-Compton*, *Warren*, and *Cumberland*, LAWS, *Made and pass'd at a General Assembly of His Majesty's Colony of* Rhode-Island *and* Providence-Plantations *in* New-England, *begun and held* (*by Virtue of a Warrant from his Honour the Governor*) at Providence, *on the seventeenth Day of* February, 1746, *in Public Laws of Rhode Island, 1744*, at 30-31.

EN-38 — An Act for the Establishing of *Watches* throughout this Colony, both in Time of *War* and *Peace*, A LAW, Made and pass'd by the General Assembly of His Majesty's Colony of *Rhode-Island*, and *Providence-Plantations*, held at *Newport*, by Adjournment to the Eighth Day of *September*, 1719, *in Public Laws of Rhode Island, 1744*, at 80.

EN-39 — An ACT for the more effectual Establishing a *Military Watch in Time of War*, throughout this Colony, LAWS, Made and pass'd by the General Assembly of His Majesty's Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, held by Adjournment, at *South-Kingstown*, on the Twenty Seventh Day of *October*, 1742, *in Public Laws of Rhode Island, 1744*, at 248.

EN-40 — [Number] 18, The General Court of Election began and held at Portsmouth, from the 16th of March to the 19th of the same mo., 1641, *in Rhode Island Records*, Volume 1, at 115.

EN-41 — At the Generall Court of Election held on the 16th & 17th of March, att Newport, 1642, *in Rhode Island Records*, Volume 1, at 120-121.

EN-42 — [General Town Meeting in Portsmouth,] The 10th of Aprill, 1643, *in Rhode Island Records*, Volume 1, at 80.

EN-43 — *Proceedings of the Generall Assembly held for the Collony of Rhode Island and Providence Plantations at Newport, the 4th of September*, 1666, *in Rhode Island Records*, Volume 2, at 171-172.

EN-44 — [Number] 15, *The General Court of Commissioners held for the Collony, Warwicke, November the 2d*, 1658, *in Rhode Island Records*, Volume 1, at 403.

EN-45 — [A Town Meeting in Portsmouth,] 5th of October 1643], *in Rhode Island Records*, Volume 1, at 77; [Number] 13, *June the 30th*, 1655[,] *The Court of Commissioners at Portsmouth*, *in Rhode Island Records*, Volume 1, at 320-321; [Number] 15, *The General Court of Commissioners held for the Collony, Warwicke, November the 2d*, 1658, *in Rhode Island Records*, Volume 1, at 403; *Acts and Orders of the Generall Assembly, sitting at Newport, May the* 3, 1665, *in Rhode Island Records*, Volume 2, at 117; [Number] 2, *By the Governor and Councill att Newport, the 13th and 14th of May*, 1667, *in Rhode Island Records*, Volume 2, at 196; *Att a meeting of the Generall Councill, at Newport, on Thursday, August* 26, 1669, *in Rhode Island Records*, Volume 2, at 282; *Proceedings of the Generall Assembly of the Collony of Rhode Island and Providence Plantations, held at Newport, the 13th of March*, 1675-6, [Session of] *Aprill the 4th*[, 1676], *in Rhode Island Records*, Volume 2, at 536.

EN-46 — *Acts and Orders made at the Generall Courte of Election held at Newport, May the 23d,* (1650), *for the Colonie of Providence Plantations*, *in Rhode Island Records*, Volume 1, at 221-222; [Number] 2, *By the Governor and Councill att Newport, the 13th and 14th of May*, 1667, *in Rhode island Records*, Volume 2, at 196.

EN-47 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at Providence, on Monday, the 7th day of July*, 1777, *in Rhode Island Records*, Volume 8, at 278; AT the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island* and *Providence Plantations*, begun and holden (in Consequence of Warrants issued by his Excellency the Governor) at *Providence*, within and for the State aforesaid, on *Thursday* the Twenty-eighth Day of *May*, One Thousand Seven Hundred and Seventy-eight, *in Rhode Island Acts and Resolves*, Volume 9 [11], at {8}; An ACT for the better forming, regulating and conducting the military Force of this State, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {31-32}; An ACT in Addition to, and Amendment of, an Act, passed in *October*, A.D. 1779, entituled, "An Act for the better forming, regulating and conducting, the military Force of this State", At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden, by Adjournment, at *South-Kingstown*, within and for the said State, on the Third *Monday* in *March*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {51-52}.

EN-48 — [Number] 29, Acts and Orders Made and agreed upon at the Generall Court of Election, held at Portsmouth, in Rhode Island, the 19, 20, 21 of May, 1647, for the Colonie and Province of Providence, *in Rhode Island Records*, Volume 1, at 154; [Number] 7, *The General Court of Commissioners held for the Collony, at Portsmouth, March the 10th*, 1657-8, *in Rhode Island Records*, Volume 1, at 371-373; An ACT in Addition to

the several Acts regulating the Militia in this Colony, At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England* in AMERICA; begun and held by Adjournment at *Providence*, on the first Monday of *February*, One Thousand Seven Hundred and Fifty-five, *in Rhode Island Acts and Resolves*, Volume 2, at {72}; An ACT, regulating the Militia in this Colony, *part of* An Act, establishing the Revisement of the Laws of this Colony, and for putting the same in Force, *in* A LAW, Made and passed at the General Assembly of the Colony of *Rhode-Island* and *Providence-Plantations*, held at Providence on the First Monday in December, 1766, *in Public Laws of Rhode Island, 1767*, at 183; *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on the second Monday in January*, 1776, *in Rhode Island Records*, Volume 7, at 422-423; An Act for purchasing Two Thousand Arms for the Colony, &c., At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden (in Consequence of Warrants issued by his Honor the Governor), at *East-Greenwich*, within and for the said Colony, on *Monday* the Eighteenth Day of *March*, One Thousand Seven Hundred and Seventy-six, *in Rhode Island Acts and Resolves*, Volume 8 [9], at {304-305}; At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island* and *Providence Plantations*, begun and holden, by Adjournment, at *Providence*, within and for the said State, on Monday the Twenty-third Day of *December*, One Thousand, Seven Hundred and Seventy-six, *in Rhode Island Acts and Resolves*, Volume 8 [9], at {16}; At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island* and *Providence Plantations*, begun and holden, by Adjournment, at *Providence*, within and for the said State, on the Third Monday in *June*, One Thousand, Seven Hundred and Seventy-seven, *in Rhode Island Acts and Resolves*, Volume 9 [10], at {14}; *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at Providence, on Monday, the 7th day of July*, 1777, *in Rhode Island Records*, Volume 8, at 278; An ACT for the better forming, regulating and conducting the military Force of this State, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {37-38}.

EN-49 — An ACT for the better forming, regulating and conducting the military Force of this State, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {35}.

EN-50 — *Acts, Orders and Proceedings of the Governor and Councill of His Majestys Collony of Rhode Island and Providence Plantations, held at Newport, May,* 1667, *in Rhode Island Records*, Volume 2, at 192-193.

EN-51 — An Act in addition to an act, entituled "An act for the relief of persons of tender consciences; and for preventing their being burthened with military duty", *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at South Kingstown, on Thursday, the 17th day of April*, 1777, *in Rhode Island Records*, Volume 8, at 204-205; *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at Providence, on Monday, the 27th day of October*, 1777, *in Rhode Island Records*, Volume 8, at 318; *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at East Greenwich, on Monday, the 1st day of December*, 1777, *in Rhode Island Records*, Volume 8, at 334.

EN-52 — An Act for the Establishing of *Watches* throughout this Colony, both in Time of *War* and *Peace*, A LAW, Made and pass'd by the General Assembly of His Majesty's Colony of *Rhode-Island*, and *Providence-Plantations*, held at *Newport*, by Adjournment to the Eighth Day of *September*, 1719, *in Public Laws of Rhode Island, 1744*, at 80.

EN-53 — [Number] 29, At the General Courte held on the 14th day of the 7th mo. [September], 1640, *in Rhode Island Records*, Volume 1, at 109; *Acts and Orders made at the Generall Courte of Election held at Newport, May the 23d,* (1650), *for the Colonie of Providence Plantations*, *in Rhode Island Records*, Volume 1, at 223-224.

EN-54 — *Proceedings of the General Assembly, for the State of Rhode Island and Providence Plantations, at Newport, on the third Monday in July*, 1780, *in Rhode Island Records*, Volume 9, at 192-193.

EN-55 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, the last Wednesday of October*, 1738, *in Rhode Island Records*, Volume 4, at 548-549; *At the* GENERAL ASSEMBLY *of the* GOVERNOR *and* COMPANY *of the* English *Colony of* Rhode-Island, *and* Providence-Plantations, *in* New-England, *in* America; *begun and held at* Newport *by Adjournment*, *on the second* Monday *of* June, *One Thousand Seven Hundred and Fifty-three*, *in Rhode Island Acts and Resolves*, Volume 2 [1], at {24}; At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England* in *America*; begun and held at *South-Kingstown* in said Colony, on the last Wednesday of *October*, *One Thousand Seven Hundred and Fifty-three*, *in Rhode Island Acts and Resolves*, Volume 2 [1], at {44}; At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England* in AMERICA; begun and held by Adjournment at

Providence, on the first Monday of *February*, One Thousand Seven Hundred and Fifty-five, *in Rhode Island Acts and Resolves*, Volume 2, at {76}; *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Newport, on the second Monday in June*, 1776, *in Rhode Island Records*, Volume 7, at 568-569; *Proceedings of the General Assembly of the State of Rhode Island and Providence Plantations, at Providence, on the fourth Monday in May*, 1781, *in Rhode Island Records*, Volume 9, at 412; *Proceedings of the General Assembly of the State of Rhode Island and Providence Plantations, at Providence, on the last Monday in January*, 1782, *Rhode Island Records*, Volume 9, at 508.

EN-56 — By the Body Politicke in the Ile of Aqethnec, Inhabiting this present, 25 of 9: month. 1639, *in Rhode Island Records*, Volume 1, at 93.

EN-57— At the Generall Court of Election held on the 16th & 17th of March, att Newport, 1642, *in Rhode Island Records*, Volume 1, at 120-121.

EN-58 — Acts and Orders Made and agreed upon at the Generall Court of Election, held at Portsmouth, in Rhode Island, the 19, 20, 21 of May, 1647, for the Colonie and Province of Providence, *in Rhode Island Records*, Volume 1, at 153.

EN-59 — *Acts and Orders of the Generall Assembly, sitting at Newport, May the* 3, 1665, *in Rhode Island Records*, Volume 2, at 116.

EN-60 — *Proceedings of the Generall Assembly held for the Collony of Rhode Island and Providence Plantations at Newport, the* 1*st of May*, 1677, *in Rhode Island Records*, Volume 2, at 568.

EN-61 — *At the Generall Assembly and Election held for the Collony at Newport, the 7th of May*, 1701, *in Rhode Island Records*, Volume 3, at 433-434. This statute is dated "1699" in LAWS AND ACTS OF RHODE ISLAND, AND PROVIDENCE PLANTATIONS Made from the First Settlement in 1636 to 1705, at 92, *reprinted in* J.D. Cushing, Editor, *The Earliest Acts and Laws of the Colony of Rhode Island and Providence Plantations* (Wilmington, Delaware: M. Glazier, 1977), at 107. Reprinted from a compilation dated "1705", it appears in *Military Obligation, Rhode Island*, at 37.

EN-62 — [Number] 18, The Generall Court of Election began and held at Portsmouth, from the 16th of March to the 19th of the same mo., 1641, *in Rhode Island Records*, Volume 1, at 115.

EN-63— *Proceedings of the Generall Assembly held for the Collony of Rhode Island and Providence Plantations at Newport, the* 19*th day of June*, 1705, *in Rhode Island Records*, Volume 3, at 534.

EN-64 — An Act for Declaring the Rights and Priviledges of His Majesties Subjects within this Colony, LAWS Made and Past by the General Assembly of His Majesties Colony of *Rhode-Island*, and *Providence-Plantations* in *New-England*. Begun and Held at *Newport*, the first day of *March*[,] 1663, *in Public Laws of Rhode Island, 1719*, at 3.

EN-65 — An Act directing the admitting of Freemen in the several Towns in this Colony, LAWS Made and past by the General Assembly of His Majesty's Colony of *Rhode-Island*, and *Providence-Plantations*, Held at *Newport*, the last *Tuesday* of *February*, 1729, *in Public Laws of Rhode Island, 1730*, at 207.

EN-66 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Newport, the* 16*th day of June,* 1713, *in Rhode Island Records,* Volume 4, at 155.

EN-67 — *Proceedings of the General Assembly held for the Colony of Rhode Island and Providence Plantations, at Newport, the* 15*th day of June*, 1714, *in Rhode Island Records,* Volume 4, at 173.

EN-68 — *See Order of Council upon the Address from Rhode Island, concerning the Militia* (2 April 1694)*, in Rhode Island Records,* Volume 3, at 297.

EN-69 — An Act for the Repealing of several Laws relating to the Militia within this Colony, and for further Regulation of the same. LAWS Made and Past by the General Assembly of His Majesties Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, begun and Held at *Newport*, the Seventh Day of *May*, 1718, and Continued by Adjournments to the Ninth Day of *September* following, *in Public Laws of Rhode Island, 1719*, at 86-87; *in Public Laws of Rhode Island, 1730*, at 91-92; *and in Public Laws of Rhode Island, 1744*, at 66.

EN-70 — *Proceedings of the General Assembly held for the Colony of Rhode Island and Providence Plantations, at Newport, the* 14*th day of June*, 1726, *in Rhode Island Records,* Volume 4, at 377-378.

EN-71 — An Act for the more effectual putting the Colony into a proper Posture of Defence, A LAW Made and pass'd by the General Assembly of His Majesty's Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, held by Adjournment, at *Warwick*, the Twenty-Seventh Day of *January*, 1740, *in Public Laws of Rhode Island, 1744*, at 232-233.

EN-72 — *E.g., Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Newport, the first Wednesday of May,* 1773, *in Rhode Island Records*, Volume 7, at 206; *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Newport, the first Wednesday of May,* 1774, *in Rhode Island Records*, Volume 7, at 241-242; *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, the first Wednesday of May,* 1775, *in Rhode Island Records*, Volume 7, at 314-315; *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Newport, on the second Monday in June*, 1776, *in Rhode Island Records*, Volume 7, at 574-575 (towns of Newport and Exeter); *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at Providence, on Monday, the 23d day of December*, 1776, *in Rhode Island Records*, Volume 9, at 73-74, 84-85 (officers for particular Militia units); *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at South Kingstown, on Monday, the 19th day of May*, 1777, *in Rhode Island Records*, Volume 10, at 244 (officers for particular Militia units); *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at East Greenwich, on the second Monday in February*, 1778, *in Rhode Island Records*, Volume 8, at 354-356 (officers for particular Militia units); *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at Providence, on the first Wednesday in May,* 1779, *in Rhode Island Records*, Volume 12, at 544-545 (officers for particular Militia units); *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at South Kingstown, on the second Monday in June*, 1779, *in Rhode Island Records*, Volume 12, at 563-566 (officers for various Alarm Companies and other Militia units); *Proceedings of the General Assembly of the State of Rhode Island and Providence Plantations, at Providence, on the fourth Monday in May,* 1781, *in Rhode Island Records*, Volume 9, at 403-410 (officers for particular Militia units).

See generally, Joseph J. Smith, *Civil and Military List of Rhode Island, 1647-1800. A List of All Officers Elected by the General Assembly from the Organization of the Legislative Government of the Colony to 1800* (Providence, Rhode Island: Preston and Rounds Co., 1900).

EN-73 — At the General Assembly of the Governor and Company of the State of *Rhode-Island,* and *Providence-Plantations,* begun and holden (by Adjournment) at *Newport,* within and for the State aforesaid, on the Third *Monday* in *July*, One Thousand Seven Hundred and Eighty, *in Rhode Island Acts and Resolves,* Volume 10 [13], at {51-52}.

EN-74 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at South Kingstown, on the last Monday of October*, 1776, *in Rhode Island Records*, Volume 8, at 8; *Proceedings of the General Assembly, for the State of Rhode Island and Providence Plantations, at Newport, on the third Monday in July*, 1780, *in Rhode Island Records*, Volume 9, at 192-193. *See also* At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden by Adjournment at *South-Kingstown*, within and for the State aforesaid, on the Second *Monday* in *June*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {13-14}.

EN-75 — AN ACT, *for putting in Force the Laws of England,* in all Cases where no particular Law of this Colony hath Provided a Remedy, LAWS Made and Pass'd by the General Assembly of His Majesty's Colony of *Rhode-Island*, and *Providence-Plantations,* Held at *Newport*, the Thirtieth Day of *April*, 1700, *in Public Laws of Rhode Island, 1744*, at 28; *and in Public Laws of Rhode Island, 1719*, at 45.

EN-76 — LAWS, *Made and passed at a General Assembly of His Majesty's Colony of* Rhode-Island *and* Providence-Plantations *in* New-England, *begun and held by Adjournment at* South-Kingstown, *on the last* Tuesday *of* February, 1749, *in Public Laws of Rhode Island, 1752*, at 70-72 (***bold-face emphasis supplied***). *Also in Rhode Island Records*, Volume 5, at 288-289.

EN-77 — AT A GRAND ASSEMBLY HELD AT JAMES CITY MARCH THE 23D 1661-2, *in Laws of Virginia*, Volume 2, at 43 (***bold-face*** emphasis supplied).

EN-78 — CHAP. V, *An ordinance to enable the present magistrates and officers to continue the administration of justice, and for settling the general mode of proceedings in criminal and other cases till the same can be more amply provided for*, § VI, *At a General Convention of Delegates and Representatives, from the several counties and corporations of Virginia, held at the Capitol in the City of Williamsburg, on Monday the 6th of May*, 1776, *in Laws of Virginia*, Volume 9, at 127.

EN-79 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Newport, on the second Monday in June*, 1776, *in Rhode Island Records*, Volume 7, at 566-567.

EN-80 — An Act for the settling a Constable's watch in every respective town in this Collony, and for punishing those that shall neglect the same, *Proceedings of the Generall Assembly held for the Collony of Rhode Island and Providence Plantations, at Newport, the 29th day of August,* 1700, *in Rhode Island Records*, Volume 3, at 424.

EN-81 — An Act for the better regulating the militia, and for punishing offenders as shall not conform to the law thereunto relating, *Proceedings of the Generall Assembly held for the Collony of Rhode Island and Providence Plantations, at Newport, May the 6th*, 1701, *in Rhode Island Records,* Volume 3, at 431.

EN-82 — *Acts and Orders of the Generall Assembly, sitting at Newport, May the* 3, 1665, *in Rhode Island Records*, Volume 2, at 118-119.

EN-83 — *Acts and Orders made at the Generall Court of Eelection held at Warwick this* 18*th of May,* 1652, *in Rhode Island Records,* Volume 1, at 243.

EN-84 — An Act for preventing clandestine importations and exportations of passengers, or negroes, or Indian slaves into or out of this colony; and for the more effectual putting in execution an act, entitled an act for supporting the Governor in the performance of his engagement to the act of navigation, made at Newport, April 30, 1700, *Proceedings of the General Assembly held for the Colony of Rhode Island and Providence Plantations, at Newport, the 27th of February*, 1711-12, *in Rhode Islands Records*, Volume 4, at 133-135.

EN-85 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Newport, the first Wednesday in May*, 1732, *in Rhode Island Records*, Volume 4, at 471.

EN-86 — *E.g.*, AN ACT to Prevent Slaves from Running away from their Masters, &c., LAWS Made and Past by the General Assembly of His Majesties Colony of *Rhode-Island*, and *Providence-Plantations*, &c. Held at *Providence*, the Twenty Seventh Day of *October*, 1714, *in Public Laws of Rhode Island, 1719*, at 70; *and in Public Laws of Rhode Island, 1744,* at 49.

EN-87 — An Act relating to freeing mulatto and negro slaves, *Proceedings of the General Assembly held for the Colony of Rhode Island and Providence Plantations, at Newport, the third Tuesday of February*, 1728-9, *in Rhode Island Records*, Volume 4, at 415-416.

EN-88 — An Act to prevent the commanders of privateers, or masters of any other vessels, from carrying slaves out of this colony, *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Newport, on Monday, the 13th day of June*, 1757, *in Rhode Island Records*, Volume 6, at 64-65.

EN-89 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at South Kingstown, the last Wednesday of October*, 1743, *in Rhode Island Records*, Volume 5, at 72-73.

EN-90 — An Act to restrict negroes and Indians for walking in unseasonable times in the night, and at other times not allowable, *Proceedings of the Generall Assembly held for the Collony of Rhode Island and Providence Plantations, at Newport, the 4th of January*, 1703-4, *in Rhode Island Records*, Volume 3, at 492-493; An Act to prevent all persons keeping house within this colony, from entertaining Indian, negro or mulatto servants or slaves, *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, the third Monday of March*, 1750-51, *in Rhode Island Records*, Volume 5, at 320-321 & note †.

EN-91 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, the 27th of October*, 1714, *in Rhode Island Records*, Volume 4, at 179-180.

EN-92 — *E.g.*, AN ACT Prohibiting Negroes and Indians from being abroad at unseasonable times of the Night, and for Punishing those that shall Entertain them contrary hereto, LAWS Made and Past by the General assembly of Her Majesties Colony of *Rhode-Island*, and *Providence-Plantations*, &c. Held at *Newport*, the Fourth Day of *January*, 1704, *in Public Laws of Rhode Island, 1719*, at 52, *and in Public Laws of Rhode Island, 1744,* at 35; *An ACT to prevent all Persons keeping House within this Colony, from entertaining* Indian, Negro, *or* Mulatto *Servants or Slaves, At the* GENERAL ASSEMBLY *of the* GOVERNOR *and* COMPANY *of the* English *Colony of* Rhode-Island, *and* Providence-Plantations, *in* New-England, *in* America; *begun and held by Adjournment at* Providence, *on the third* Monday *of* March, *One Thousand Seven Hundred and Fifty* [1751], *in Rhode Island Acts and Resolves*, Volume 1, at {86}.

EN-93 — *At the Generall Assembly and Election held at Newport, the 2d of May*, 1705, *in Rhode Island Records*. Volume 3, at 526.

EN-94 — *See, e.g., Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at South Kingstown, the last Wednesday of October*, 1743, *in Rhode Island Records*, Volume 5, at 72-73.

EN-95 — Letter of Governor Samuel Cranston to the British Board of Trade, 5 December 1708, *in Rhode Island Records*, Volume 4, at 59.

EN-96 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Newport, the second Monday in June,* 1749, *in Rhode Island Records*, Volume 5, at 270.

EN-97 — *Report of the Committee, appointed by the General Assembly, to take the number of the Inhabitants of the Colony, Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Newport, on the second Monday in June*, 1774, *in Rhode Island Records*, Volume 7, at 253.

EN-98 — A Summary of the Inhabitants in the several Towns in the State of Rhode Island, taken A.D. 1782, by order of the General Assembly of said State, *Proceedings of the General Assembly of the State of Rhode Island and Providence Plantations, at Providence, on the last Monday in February*, 1783, *in Rhode Island Records*, Volume 9, at 652-653.

EN-99 — An Act relating to freeing mulatto and negro slaves, *Proceedings of the General Assembly held for the Colony of Rhode Island and Providence Plantations, at Newport, the third Tuesday of February,* 1728-9, *in Rhode Island Records*, Volume 4, and 415-416; An Act authorizing the manumission of negroes, mulattoes, and others, and for the gradual abolition of slavery, *Proceedings of the General Assembly of the State of Rhode Island and Providence Plantations, at Providence, on the last Monday in February*, 1784, *in Rhode Island Records*, Volume 10, at 7-8; An Act repealing part of an Act entitled "An Act authorizing the manumission of negroes, mulattoes, and others, and for the gradual abolition of slavery", *Proceedings of the General Assembly of the State of Rhode Island and Providence Plantations, at South Kingstown, on the last Monday in October*, 1785, *in Rhode Island Records*, Volume 10, at 132-133.

EN-100 — An Act prohibiting the importation of Negroes into this Colony, *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Newport, on the second Monday in June*, 1774, *in Rhode Island Records*, Volume 7, at 251.

EN-101 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at East Greenwich, on the second Monday in February, 1778*, *in Rhode Island Records*, Volume 8, at 358-360.

EN-102 — *See Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at Providence, on the first Wednesday in May,* 1778, *in Rhode Island Records,* Volume 8, at 399.

EN-103 — At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden (by Adjournment) at *Providence*, within and for the State aforesaid, on the first *Monday* in *July*, One Thousand Seven Hundred and Eighty, *in Rhode Island Acts and Resolves*, Volume 10 [13], at {7}; An ACT for raising Six Hundred and Thirty able-bodied effective Men, At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden (by Adjournment) at *Newport*, within and for the State aforesaid, on the Third *Monday* in *July*, One Thousand Seven Hundred and Eighty, *in Rhode Island Acts and Resolves*, Volume 10 [13], at {29}; An ACT for raising Two Hundred and Fifty-nine Men, to make up the full Quota of this State's Forces in the Army of the United States, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden (in Consequence of Warrants issued by his Excellency the Governor) at *Providence*, within and for the said State, on *Monday* the Twenty-fifth Day of *February*, One Thousand Seven Hundred and Eighty-two, *in Rhode Island Acts and Resolves*, Volume 12 [15], at {11}.

EN-104 — By the Body Politicke in the Ile of Aqethnec, Inhabiting this present, 25 of 9: month. 1639, *in Rhode Island Records*, Volume 1, at 94 (emphasis supplied). *Accord,* At a Generall Towne Meetinge at Portsmouth, 1st of March, 1643, *in Rhode Island Records*, Volume 1, at 79 ("that *every man* do come armed unto the [general town] meeting upon every sixth day") (emphasis supplied).

EN-105 — At a Generall Towne Meetinge at Portsmouth, 1st of March, 1643, *in Rhode Island Records*, Volume 1, at 79, *and* [A General Town Meeting in Portsmouth,] 5th of October, 1643, *in Rhode Island Records*, Volume 1, at 77 (emphases supplied).

EN-106 — [A General Town Meeting in Portsmouth,] The 10th of Aprill, 1643, *in Rhode Island Records*, Volume 1, at 80, *and* [A General Town Meeting in Portsmouth,] 5th of October, 1643, *in Rhode Island Records*, Volume 1, at 77 (emphases supplied).

EN-107 — *June y^e^ 28th,* 1655. *The Court of Commissioners at Portsmouth*, *in Rhode Island Records*, Volume 1, at 320 (emphasis supplied).

EN-108 — *Att a meeting of the Generall Councill, at Newport, on Thursday, August* 26, 1669, *in Rhode Island Records*, Volume 2, at 282 (emphasis supplied).

EN-109 — *Acts, Orders and Proceedings of the Governor and Councill of His Majestys Collony of Rhode Island and Providence Plantations, held at Newport, May,* 1667, *in Rhode Island Records*, Volume 2, at 192, 193 (emphasis supplied).

EN-110 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on Wednesday, the 28th day of June*, 1775, *in Rhode Island Records*, Volume 7, at 356 (emphasis supplied).

EN-111 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on Wednesday, the 28th day of June*, 1775, *in Rhode Island Records*, Volume 7, at 358 (emphasis supplied).

EN-112 — An ACT for raising Six Hundred and Thirty able-bodied effective Men, At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden (by Adjournment) at *Newport*, within and for the State aforesaid, on the Third *Monday* in *July*, One Thousand Seven Hundred and Eighty, *in Rhode Island Acts and Resolves*, Volume 10 [13], at {29} (emphasis supplied). *Accord,* At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden (by Adjournment) at *Providence*, within and for the State aforesaid, on the first *Monday* in *July*, One Thousand Seven Hundred and Eighty, *in Rhode Island Acts and Resolves*, Volume 10 [13], at {7}.

EN-113 — *See* An Act for the electing of commissioned officers of the severall train bands in this Colony, *Proceedings of the Generall Assembly held for the Collony of Rhode Island and Providence Plantations at Newport, the 19th day of June*, 1705, *in Rhode Island Records*, Volume 3, at 534; An Act for numbering all persons able to bear arms within this state, *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at Providence, on the fourth Monday in March*, 1777, *in Rhode Island Records*, Volume 8, at 189.

EN-114 — *Acts and Orders of the Generall Assembly, sitting at Newport, May the* 3, 1665, *in Rhode Island Records*, Volume 2, at 115; *and Proceedings of the Generall Assembly held for the Collony of Rhode Island and Providence Plantations at Newport, the* 1*st of May*, 1677, *in Rhode Island Records*, Volume 2, at 570. *See also* An Act for the Repealing several Laws relating to the Militia within this Colony, and for further regulating the same, LAWS Made and Past by the General Assembly of His Majesties Colony of *Rhode-Island* and *Providence-Plantations*, in *New-England*, begun and Held at *Newport*, the Seventh Day of *May*, 1718, and Continued by Adjournments to the Ninth Day of *September* following, *in Public Laws of Rhode Island*, 1719, at 86 ("all male Persons Residing for the space of Three Months within this Colony, from the Age of Sixteen, to the Age of Sixty Years, shall bear Arms in their Respective Train-Bands or Companies", with certain exceptions). In later compilations, however, this appears as "from the Age of Sixteen, to the Age of Fifty Years". *Public Laws of Rhode Island, 1730*, at 91; *Public Laws of Rhode Island, 1744, at 65.*

EN-115 — *E.g.,* Acts and Orders Made and agreed upon at the Generall Court of Election, held at Portsmouth, in Rhode Island, the 19, 20, 21 of May, 1647, for the Colonie and Province of Providence, *in Rhode Island Records*, Volume 1, at 154; An Act for the Repealing several Laws relating to the Militia within this Colony, and for further Regulation of the same, LAWS Made and Past by the General Assembly of His Majesties Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, begun and Held at *Newport*, the Seventh Day of *May*, 1718, and Continued by Adjournments to the Ninth Day of *September* following, *in Public Laws of Rhode Island, 1719*, at 87-89, *in Public Laws of Rhode Island, 1730*, at 93-95, *and in Public laws of Rhode Island, 1744,* at 67-69; An ACT in Addition to the several Acts regulating the Militia in this Colony, At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England* in AMERICA; begun and held by Adjournment at *Providence*, on the first Monday of *February*, One Thousand Seven Hundred and Fifty-five, *in Rhode Island Acts and Resolves*, Volume 2, at {71-72}; An ACT, regulating the Militia in this Colony, *part of* An ACT, establishing the Revisement of the Laws of this Colony, and for putting the same in Force, *in* A LAW, Made and passed at the General Assembly of the Colony of *Rhode-Island* and *Providence-Plantations*, held at *Providence* on the First Monday in *December*, 1766, *in Public Laws of Rhode Island, 1767*, at 182, 184-185; *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at East Greenwich, on Tuesday, the* 10*th day of December*, 1776, *in Rhode Island Records*, Volume 8, at 67; An ACT for the better forming, regulating and conducting the military Force of this State, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {35}.

EN-116 — At a Generall Meeting upon Publicke notice, the 5th of the 9th month, 1638, *in Rhode Island Records*, Volume 1, at 61; An Act for the Repealing several Laws relating to the Militia within this Colony, and for further Regulation of the same, LAWS Made and Past by the General Assembly of His Majesties Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, begun and Held at *Newport*, the Seventh Day of *May*, 1718, and Continued by Adjournments to the Ninth Day of *September* following, *in Public Laws of Rhode Island, 1719*, at 86, *in Public Laws of Rhode Island, 1730*, at 91, *and in Public Laws of Rhode Island, 1744,* at 65; An ACT, regulating the Militia in this Colony, *part of* An ACT, establishing the Revisement of the Laws of this Colony, and for putting the same in Force, *in* A LAW, Made and passed at the General Assembly of the Colony of *Rhode-Island* and *Providence-Plantations*, held at *Providence* on the First Monday in *December*, 1766, *in Public Laws of Rhode Island, 1767*, at 179; An ACT for the better forming, regulating and conducting the military Force of this State, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {29}.

EN-117 — *E.g.,* LAWS Made and Past by the General Assembly of His Majesties Colony of *Rhode-Island*, and *Providence-Plantations,* in *New-England*, begun and Held at *Newport,* the Seventh Day of *May*, 1718, and Continued by Adjournments to the Ninth Day of *September* following, *in Public Laws of Rhode Island, 1719,* at 89; *in Public Laws of Rhode Island, 1730,* at 94-95; *and in Public Laws of Rhode Island, 1744*, at 69.

EN-118 — An Act for numbering all persons able to bear arms within this state, *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at Providence, on the fourth Monday in March*, 1777, *in Rhode Island Records*, Volume 8, at 189.

EN-119 — An ACT for the better forming, regulating and conducting the military Force of this State, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {35}.

EN-120 — An ACT for the better forming, regulating and conducting the military Force of this State, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {32-33}.

EN-121 — *E.g., Proceedings of a Meetinge of the Generall Assembly, May the fowerth*, 1664, *at Newport*, *in Rhode Island Records*, Volume 2, at 52; *Acts and Orders of the Generall Assembly, sitting at Newport, May the* 3, 1665, *in Rhode Island Records*, Volume 2, at 115; *Proceedings of the Generall Assembly held for the Collony of Rhode Island and Providence Plantations at Newport, the* 27*th day of October*, 1680, *in Rhode Island Records*, Volume 3, at 93; An Act for the better regulating the militia, and for punishing offenders as shall not conform to the law thereunto relating, *At the Generall Assembly and Election held for the Collony at Newport, the* 7*th of May*, 1701, *in Rhode Island Records*, Volume 3, at 430-431, 433-434; *Proceedings of the Generall Assembly held for the Collony of Rhode Island and Providence Plantations at Newport, the* 19*th day of June*, 1705, *in Rhode Island Records*, Volume 3, at 534; An Act for the Repealing several Laws relating to the Militia within this Colony, and for further Regulation of the same, LAWS Made and Past by the General Assembly of His Majesties Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, begun and Held at *Newport*, the Seventh Day of *May*, 1718, and Continued by Adjournments to the Ninth Day of *September* following, *in Public Laws of Rhode Island, 1719,* at 87-88, *in Public Laws of Rhode Island, 1730*, at 93, *and in Public Laws of Rhode Island, 1744,* at 67-68; *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Newport, the* 14*th day of June*, 1726, *in Rhode Island Records*, Volume 4, at 379; An Act for raising the Fines of enlisted Soldiers of the Train'd Bands in this Colony, LAWS, Made and pass'd by the General Assembly of His Majesty's Colony of *Rhode-Island* and *Providence-Plantations*, in *New-England*, held at *Newport*, by Adjournment, on the second *Monday* of *June*, 1731, *in Public Laws of Rhode Island, 1730*, at 237; *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, the last Wednesday of October*, 1738, *in Rhode Island Records*, Volume 4, at 548; *At the* GENERAL ASSEMBLY *of the* GOVERNOR *and* COMPANY *of the* English *Colony of* Rhode-Island, *and* Providence-Plantations, *in* New-England, *in* America; *begun and held at* Newport *by Adjournment*, *on the second* Monday *of* June, *One Thousand Seven Hundred and Fifty-three*, *in Rhode Island Acts and Resolves*, Volume 2 [1], at {24}; An ACT in Addition to the several Acts regulating the Militia in this Colony, At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England* in AMERICA; begun and held by Adjournment at *Providence*, on the first Monday of *February*, One Thousand Seven Hundred and Fifty-five, *in Rhode Island Acts and Resolves*, Volume 2, at {71}; At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, in AMERICA; begun and held by Adjournment at *South-Kingstown*, upon the last Monday in *February*, One Thousand Seven Hundred and Fifty-six, *in Rhode Island Acts and Resolves*, Volume 2, at {66}; An Act for raising one-sixth part of the militia in this colony, to proceed immediately to Albany, to join the forces which have marched, to oppose the French, near Lake George, *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Newport, on the* 10*th day of August*, 1757, *in Rhode Island Records*, Volume 6, at 76; An ACT, regulating the Militia in this Colony, *part of* An Act, establishing the Revisement of the Laws of this Colony, and for putting the same in Force, *in* A LAW, Made and passed at the General Assembly of the Colony of *Rhode-Island* and *Providence-Plantations*, held at Providence on the First Monday in December, 1766, *in Public Laws of Rhode Island, 1767*, at 182; AN ACT establishing an Independent Company, by the Name of *The Light-Infantry* for the County of *Providence*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, by Adjournment, at *Newport*, within and for the said Colony, on the Second Monday in *June*, One Thousand Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {38}; An ACT in addition to, and amendment of, an Act entitled "An Act regulating the Militia of this Colony["], At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at

Providence, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {150}; An ACT for inlisting One Fourth Part of the Militia of the Colony, as Minute-Men, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*; begun and holden, (in Consequence of Warrants issued by his Honor the Deputy-Governor) at *Providence*, within and for the Colony aforesaid, on *Wednesday*, the Twenty-eighth Day of *June*, One Thousand Seven Hundred and Seventy-five, *in Rhode Island Acts and Resolves*, Volume 7 [8], at {78}.

EN-122 — *Proceedings of the Generall Assembly of the Collony of Rhode Island and Providence Plantations, held at Newport, the 13th of March*, 1675-6, [Session of] *Aprill the 4th*[, 1676], *in Rhode Island Records*, Volume 2, at 536.

EN-123 — *Proceedings of the Generall Assembly held for the Collony of Rhode Island and Providence Plantations at Newport, the 1st of May*, 1677, *in Rhode Island Records*, Volume 2, at 568-569.

EN-124 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on the second Monday in January*, 1776, *in Rhode Island Records*, Volume 7, at 422-423.

EN-125 — An Act for purchasing Two Thousand Arms for the Colony, &c., At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*; begun and holden (in Consequence of Warrants issued by his Honor the Governor), at *East-Greenwich*, within and for the said Colony, on *Monday* the Eighteenth Day of *March*, One Thousand Seven Hundred and Seventy-six, *in Rhode Island Acts and Resolves*, Volume 8 [9], at {303-305}.

EN-126 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at East Greenwich, on Tuesday, the 10th day of December*, 1776, *in Rhode Island Records*, Volume 8, at 67.

EN-127 — An ACT for the better forming, regulating and conducting the military Force of this State, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {35}.

EN-128 — An Act for enlisting one-fourth part of the militia of this colony, as minute men, *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on Wednesday, the 28th day of June,* 1775, *in Rhode Island Records,* Volume 7, at 358, 360, 360-361.

EN-129 — An Act appointing and ordering one foot company or training band, to attend on the general election, *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on the last Wednesday of October,* 1734, *in Rhode Island Records,* Volume 4, at 500.

EN-130 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at East Greenwich, on Tuesday, the 10th day of December,* 1776, *in Rhode Island Records,* Volume 8, at 66.

EN-131 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at Providence, on Monday, the 23d day of December,* 1776, *in Rhode Island Records,* Volume 8, at 105.

EN-132 — At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island* and *Providence Plantations,* begun and holden, by Adjournment, at *Providence,* within and for the said State, on Monday the Twenty-third Day of *December*, One Thousand, Seven Hundred and Seventy-Six, *in Rhode Island Acts and Resolves*, Volume 8 [9], at {15-16}.

EN-133 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at Providence, on the first Monday in February,* 1777, *in Rhode Island Records,* Volume 8, at 120-121.

EN-134 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at South Kingstown, on Thursday, the 17th day of April,* 1777, *in Rhode Island Records,* Volume 8, at 197-198.

EN-135 — At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations,* begun and holden (in Consequence of Warrants issued by his Excellency the Governor) at *Providence,* within and for the State aforesaid, on *Monday* the Seventh Day of *July,* One Thousand Seven Hundred and Seventy-seven, *in Rhode Island Acts and Resolves,* Volume 9 [10], at {5-6}.

EN-136 — AT the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island* and *Providence Plantations*, begun and holden, by Adjournment, at *South-Kingstown,* within and for the State aforesaid, on Monday the Twenty-second Day of *September,* One Thousand Seven Hundred and Seventy-seven, *in Rhode Island Acts and Resolves,* Volume 9 [10], at {8}.

EN-137 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at Providence, on Monday, the 27th day of October*, 1777, *in Rhode Island Records*, Volume 8, at 317.

EN-138 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at Providence, on Friday, the* 19*th day of December,* 1777, *in Rhode Island Records,* Volume 8, at 350.

EN-139 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at East Greenwich, on the last Monday in June,* 1778, *in Rhode Island Records,* Volume 8, at 429.

EN-140 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at East Greenwich, on the last Monday in June,* 1778, *in Rhode Island Records,* Volume 8, at 432-433.

EN-141 — An ACT for embodying and bringing into the Field Twelve Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and no longer Term, and not to be marched out of the same, At the General Assembly of the Governor and Company of the State of *Rhode-Island,* and *Providence-Plantations,* begun and holden (by Adjournment) at *South-Kingstown,* within and for the State aforesaid, on the Fourth *Monday* in *February*, One Thousand Seven Hundred and Eighty-One, *in Rhode Island Acts and Resolves,* Volume 11 [14], at {5, 7, 8}.

An ACT for incorporating and bringing into the Field Five Hundred able-bodied effective Men, of the Militia, to serve within this State for one Month, from the Time of their Rendezvous, and no longer, and not to be marched out of the same, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island,* and *Providence-Plantations,* begun and holden, by Adjournment, at *Providence*, within and for the State aforesaid, on the Fourth *Monday* in *May,* One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves,* Volume 11 [14], at {11, 14, 15}.

An ACT for incorporating and bringing into the Field Five Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and for no longer Term, and not to be marched out of the same, At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence-Plantations,* begun and holden by Adjournment at *Newport,* within and for the said State, on the Third *Monday* in *August,* One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves,* Volume 11 [14], at {39, 41, 42}.

EN-142 — By the Body Politicke in the Ile of Aqethnec, Inhabiting this present, 25 of 9: month. 1639, *in Rhode Island Records*, Volume 1, at 93; At the Generall Courte Held at Portsmouth on the 6th of August, 1640, *in Rhode Island Records*, Volume 1, at 104.

EN-143 — By the Body Politicke in the Ile of Aqethnec, Inhabiting this present, 25 of 9: month. 1639, *in Rhode Island Records*, Volume 1, at 94 (emphasis supplied). *Accord*, At a Generall Towne Meetinge at Portsmouth, 1st of March, 1643, *in Rhode Island Records*, Volume 1, at 79.

EN-144 — At a Generall Towne Meetinge at Portsmouth, 1st of March, 1643, *in Rhode Island Records*, Volume 1, at 79, *and* [A General Town Meeting in Portsmouth,] 5th of October, 1643, *in Rhode Island Records*, Volume 1, at 77 (emphasis supplied).

EN-145 — *E.g.*, [Number] 29, At the General Courte held on the 14th day of the 7th mo. [September], 1640, *in Rhode Island Records*, Volume 1, at 109.

EN-146 — *Acts and Orders of the Generall Assembly, sitting at Newport, May the* 3, 1665, *in Rhode Island Records*, Volume 2, at 117.

EN-147 — *Acts and Orders made at the Generall Courte of Election held at Newport, May the 23d,* (1650), *for the Colonie of Providence Plantations*, *in Rhode Island Records*, Volume 1, at 223-224.

EN-148 — An Act for Declaring the Rights and Priviledges of His Majesties Subjects within this Colony, LAWS, Made and pass'd by the General Assembly of His Majesty's Colony of *Rhode-Island*, and *Providence-Plantations*, Begun and Held at *Newport*, the first Day of March, 1663, *in Public Laws of Rhode Island, 1719*, at 3.

EN-149 — THE CHARTER Granted by His MAJESTY King *CHARLES* The Second TO THE COLONY OF Rhode-Island, AND Providence-Plantations, In *AMERICA*, July 8, 1663, *in Public Laws of Rhode Island, 1719*, at 2.

EN-150 — At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden by Adjournment, at *Providence*, within and for the State aforesaid, on *Monday* the Twenty-fourth Day of *February*, 1783, *in Rhode Island Acts and Resolves*, Volume 12 [15], at {79}.

EN-151 — [Number] 29, Acts and Orders Made and agreed upon at the Generall Court of Election, held at Portsmouth, in Rhode Island, the 19, 20, 21 of May, 1647, for the Colonie and Province of Providence, *in Rhode Island Records*, Volume 1, at 154.

EN-152 — *The General Court of Commissioners held for the Collony, Warwicke, November the* 2*d*, 1658, *in Rhode Island Records*, Volume 1, at 403.

EN-153 — *Acts and Orders of the Generall Assembly, sitting at Newport, May the* 3, 1665, *in Rhode Island Records*, Volume 2, at 115.

EN-154 — *Proceedings of the Generall Assembly held for the Collony of Rhode Island and Providence Plantations at Newport, the* 1*st of May*, 1677, *in Rhode Island Records*, Volume 2, at 570.

EN-155 — An Act for the better regulating the militia, and for punishing offenders as shall not conform to the law thereunto relating, *At the Generall Assembly and Election held for the Collony at Newport, the* 7*th of May*, 1701, *in Rhode Island Records*, Volume 3, at 430-431, 433. This statute is dated "1699" in LAWS AND ACTS OF RHODE ISLAND, AND PROVIDENCE PLANTATIONS Made from the First Settlement in 1636 to 1705, at 92, *reprinted in* J.D. Cushing, Editor, *The Earliest Acts and Laws of the Colony of Rhode Island and Providence Plantations* (Wilmington, Delaware: M. Glazier, 1977), at 107. Reprinted from a compilation dated "1705", it appears in *Military Obligation, Rhode Island*, at 37.

EN-156 — An Act for the Repealing several Laws relating to the Militia within this Colony, and for further Regulation of the same, LAWS Made and Past by the General Assembly of His Majesties Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, begun and Held at *Newport*, the Seventh Day of *May*, 1718, and Continued by Adjournments to the Ninth Day of *September* following, *in Public Laws of Rhode Island, 1719*, at 86, 87, 90; *in Public Laws of Rhode Island, 1730*, at 91, 93, 96; *and in Public Laws of Rhode Island, 1744,* at 65, 67, 71.

EN-157 — An ACT in Addition to the several Acts regulating the Militia in this Colony, At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England* in AMERICA; begun and held by Adjournment at *Providence*, on the first Monday of *February*, One Thousand Seven Hundred and Fifty-five, *in Rhode Island Acts and Resolves*, Volume 2, at {72}.

EN-158 — An ACT, regulating the Militia in this Colony, *part of* An ACT, establishing the Revisement of the Laws of this Colony, and for the putting the same in Force, *in* A LAW, Made and passed at the General Assembly of the Colony of *Rhode-Island* and *Providence Plantations*, held at *Providence* on the First Monday in *December,* 1766, *in Public Laws of Rhode Island, 1767*, at 179, 182, 187.

EN-159 — An ACT in addition to, and amendment of, an Act entitled "An Act regulating the Militia of this Colony["], At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*; begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {150}.

EN-160 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on Wednesday, the* 28*th day of June*, 1775, *in Rhode Island Records*, Volume 7, at 358.

EN-161 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on the second Monday in January*, 1776, *in Rhode Island Records*, Volume 7, at 423.

EN-162 — AT the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island* and *Providence Plantations*, begun and holden (in Consequence of Warrants issued by his Excellency the Governor) at *Providence*, within and for the State aforesaid, on *Thursday* the Twenty-eighth Day of *May*, One Thousand Seven Hundred and Seventy-eight, *in Rhode Island Acts and Resolves*, Volume 9 [11], at {8}.

EN-163 — An ACT for the better forming, regulating and conducting the military Force of this State, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {31-32}.

EN-164 — An ACT for embodying and bringing into the Field Twelve Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and no longer Term, and not to be marched out of the same, At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden (by Adjournment) at *South-Kingstown*, within and for the State aforesaid, on the Fourth *Monday* in *February*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {8}. *Accord*, An ACT for incorporating and bringing into the Field Five Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and no longer, and not to be marched out of the same, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden, by Adjournment, at *Providence*, within and for the said State, on the Fourth *Monday* in *May*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {15}; *and* An ACT for incorporating and bringing into the Field Five Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and for no longer Term,

and not to be marched out of the same, At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden by Adjournment at *Newport*, within and for the said State, on the Third *Monday* in *August*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {41}.

EN-165 — An ACT in Addition to, and Amendment of, an Act, passed in *October*, A.D. 1779, entituled, "An Act for the better forming, regulating and conducting, the Military Force of this State", At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence-Plantations*, begun and holden, by Adjournment, at *South-Kingstown*, within and for the said State, on the Third *Monday* in *March*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {51-52}.

EN-166 — An Act for the Repealing several Laws relating to the Militia within this Colony, and for further Regulation of the same, LAWS Made and Past by the General Assembly of His Majesties Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, begun and Held at *Newport*, the Seventh Day of *May*, 1718, and Continued by Adjournments to the Ninth Day of *September* following, *in Public Laws of Rhode Island, 1719,* at 88; *in Public Laws of Rhode Island, 1730*, at 94; *and in Public Laws of Rhode Island, 1744,* at 69.

EN-167 — An ACT in Addition to the several Acts regulating the Militia in this Colony, At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, in AMERICA; begun and held by Adjournment at *Providence*, on the first Monday of *Februar*y, One Thousand Seven Hundred and Fifty-five, *in Rhode Island Acts and Resolves*, Volume 2, at {71-72}.

EN-168 — An ACT, regulating the Militia in this Colony, *part of* An ACT, establishing the Revisement of the Laws of this Colony, and for the putting the same in Force, *in* A LAW, Made and passed at the General Assembly of the Colony of *Rhode-Island* and *Providence Plantations*, held at *Providence* on the First Monday in *December,* 1766, *in Public Laws of Rhode Island, 1767*, at 184.

EN-169 — An ACT in addition to, and amendment of, an Act entitled "An Act regulating the Militia of this Colony["], At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*; begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {150-151}. *Also in Rhode Island Records*, Volume 7, at 269-270.

EN-170 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on Wednesday, the 28th day of June*, 1775, *in Rhode Island Records*, Volume 7, at 358.

EN-171 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at East Greenwich, on Tuesday, the 10th day of December*, 1776, *in Rhode Island Records*, Volume 8, at 67.

EN-172 — AT the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island* and *Providence Plantations*, begun and holden (in Consequence of Warrants issued by his Excellency the Governor) at *Providence*, within and for the State aforesaid, on *Thursday* the Twenty-eighth Day of *May*, One Thousand Seven Hundred and Seventy-eight, *in Rhode Island Acts and Resolves*, Volume 9 [11], at {8}.

EN-173 — An ACT for the better forming, regulating and conducting the military Force of this State, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {35, 32}.

EN-174 — *See, e.g.*, An Act for Punishing Criminal Offenses, LAWS Made and Past by the General Assembly of His Majesties Colony of *Rhode-Island*, and *Providence-Plantations* in *New-England*. Begun and Held at *Newport*, the first day of *March* 1663, *in Public Laws of Rhode Island, 1719*, at 4-5.

EN-175 — *Acts and Orders made at the Generall Courte of Election held at Newport, May the 23d,* (1650), *for the Colonie of Providence Plantations*, *in Rhode Island Records*, Volume 1, at 221-222 (emphasis supplied).

EN-176 — *Acts and Orders of the Generall Assembly, sitting at Newport, May the* 3, 1665, *in Rhode Island Records*, Volume 2, at 115 (emphasis supplied).

EN-177 — *At the Generall Assembly and Election held for the Collony at Newport, the 7th of May*, 1701, *in Rhode Island Records*, Volume 3, at 433 (emphasis supplied).

EN-178 — An ACT in Addition to the several Acts regulating the Militia in this Colony, At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, in AMERICA; begun and held by Adjournment at *Providence*, on the first Monday of *Februar*y, One Thousand Seven Hundred and Fifty-five, *in Rhode Island Acts and Resolves*, Volume 2, at {72} (emphasis supplied).

EN-179 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on Wednesday, the 28th day of June*, 1775, *in Rhode Island Records*, Volume 7, at 358 (emphasis supplied).

EN-180 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on the second Monday in January*, 1776, *in Rhode Island Records*, Volume 7, at 423 (emphasis supplied).

EN-181 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on the first Monday of September*, 1776, *in Rhode Island Records*, Volume 7, at 608 (emphasis supplied).

EN-182 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at East Greenwich, on Tuesday, the 10th day of December*, 1776, *in Rhode Island Records*, Volume 8, at 67 (emphasis supplied).

EN-183 — An ACT for the better forming, regulating and conducting the military Force of this State, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {31-32}.

EN-184 — An ACT for furnishing the Soldiers who shall inlist into this State's Service for Three Months with Guns, and necessary Accoutrements, At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden (by Adjournment) at *Newport*, within and for the State aforesaid, on the Third *Monday* in *July*, One Thousand Seven Hundred and Eighty, *in Rhode Island Acts and Resolves*, Volume 10 [13], at {56, 55} (emphasis supplied in part).

EN-185 — An ACT for embodying and bringing into the Field Twelve Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and no longer Term, and not to be marched out of the same, At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden (by Adjournment) at *South-Kingstown*, within and for the State aforesaid, on the Fourth *Monday* in *February*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {8} (emphasis supplied). *Accord*, An ACT for incorporating and bringing into the Field Five Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and no longer, and not to be marched out of the same, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden, by Adjournment, at *Providence*, within and for the State aforesaid, on the Fourth *Monday* in *May*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {15}; *and also* An ACT for incorporating and bringing into the Field Five Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and for no longer Term, and not to be marched out of the same, At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden by Adjournment at *Newport*, within and for the said State, on the Third *Monday* in *August*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {41}.

EN-186 — An ACT in Addition to, and Amendment of, an Act, passed in *October*, A.D. 1779, entituled, "An Act for the better forming, regulating and conducting, the Military Force of this State", At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence-Plantations*, begun and holden, by Adjournment, at *South-Kingstown*, within and for the said State, on the Third *Monday* in *March*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {51-52} (emphasis supplied).

EN-187 — Acts and Orders Made and agreed upon at the Generall Court of Election, held at Portsmouth, in Rhode Island, the 19, 20, 21 of May, Anno. 1647, for the Colonie and Province of Providence, *in Rhode Island Records*, Volume 1, at 154 (emphasis supplied).

EN-188 — An Act for the Repealing several Laws relating to the Militia within this Colony, and for further Regulation of the same, LAWS Made and Past by the General Assembly of His Majesties Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, begun and Held at *Newport*, the Seventh Day of *May*, 1718, and Continued by Adjournments to the Ninth Day of *September* following, *in Public Laws of Rhode Island, 1719*, at 87, 88 (emphasis supplied); *in Public Laws of Rhode Island, 1730*, at 93, 94; *and in Public Laws of Rhode Island, 1744,* at 67, 69.

EN-189 — An ACT, regulating the Militia in this Colony, *part of* An ACT, establishing the Revisement of the Laws of this Colony, and for the putting the same in Force, *in* A LAW, Made and passed at the General Assembly of the Colony of *Rhode-Island* and *Providence Plantations*, held at *Providence* on the First Monday in

December, 1766, *in Public Laws of Rhode Island, 1767*, at 182, 184, 187 (emphasis supplied).

EN-190 — An ACT in addition to, and amendment of, an Act entitled "An Act regulating the Militia of this Colony["], At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {150, 151} (emphasis supplied). *Also in Rhode Island* Records, Volume 7, at 269, 270.

EN-191 — [A General Town Meeting in Portsmouth,] 5th of October, 1643, *in Rhode Island Records*, Volume 1, at 77 (emphasis supplied).

EN-192 — *Acts and Orders of the Generall Assembly, sitting at Newport, May the* 3, 1665, *in Rhode Island Records*, Volume 2, at 117 (emphasis supplied).

EN-193 — *Proceedings of the Generall Assembly held for the Collony of Rhode Island and Providence Plantations at Newport, the* 1*st of May*, 1677, *in Rhode Island Records*, Volume 2, at 570 (emphasis supplied).

EN-194 — An Act for the Repealing several Laws relating to the Militia within this Colony, and for further Regulation of the same, LAWS Made and Past by the General Assembly of His Majesties Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, begun and Held at *Newport*, the Seventh Day of *May*, 1718, and Continued by Adjournments to the Ninth Day of *September* following, *in Public Laws of Rhode Island, 1719*, at 87, 88; *in Public Laws of Rhode Island, 1730*, at 93, 94; *and in Public Laws of Rhode Island, 1744,* at 67, 69.

EN-195 — An ACT, regulating the Militia in this Colony, *part of* An ACT, establishing the Revisement of the Laws of this Colony, and for the putting the same in Force, *in* A LAW, Made and passed at the General Assembly of the Colony of *Rhode-Island* and *Providence Plantations*, held at *Providence* on the First Monday in *December,* 1766, *in Public Laws of Rhode Island, 1767*, at 182, 184-185.

EN-196 — An ACT for the better forming, regulating and conducting the military Force of this State, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {31-32} (emphasis supplied).

EN-197 — At the Generall Courte Held at Portsmouth on the 6th of August, 1640, *in Rhode Island Records*, Volume 1, at 104 (emphasis supplied).

EN-198 — At a Generall Towne Meetinge at Portsmouth, 1st of March, 1643, *in Rhode Island Records*, Volume 1, at 79 (emphasis supplied).

EN-199 — *Proceedings of a Meetinge of the Generall Assembly, May the fowerth*, 1664, *at Newport*, *in Rhode Island Records*, Volume 2, at 52 (emphasis supplied).

EN-200 — *At the Generall Assembly and Election held in his Majesty's name, May the* 2*d*, 1677, *in Rhode Island Records*, Volume 2, at 569 (emphasis supplied). *Accord, Proceedings of the Generall Assembly held for the Collony of Rhode Island and Providence Plantations at Newport, the* 1*st of May*, 1677, *in Rhode Island Records*, Volume 2, at 576 (emphasis supplied).

EN-201 — An Act for the better regulating the militia, and for punishing offenders as shall not conform to the law thereunto relating, *At the Generall Assembly and Election held for the Collony at Newport, the* 7*th of May*, 1701, *in Rhode Island Records*, Volume 3, at 430-431 (emphasis supplied). This statute is dated "1699" in LAWS AND ACTS OF RHODE ISLAND, AND PROVIDENCE PLANTATIONS Made from the First Settlement in 1636 to 1705, at 92, *reprinted in* J.D. in Cushing, Editor, *The Earliest Acts and Laws of the Colony of Rhode Island and Providence Plantations* (Wilmington, Delaware: M. Glazier, 1977), at 107. Reprinted from a compilation dated "1705", it appears in *Military Obligation, Rhode Island*, at 37.

EN-202 — An Act for the Repealing several Laws relating to the Militia within this Colony, and for further Regulation of the same, LAWS Made and Past by the General Assembly of His Majesties Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, begun and Held at *Newport*, the Seventh Day of *May*, 1718, and Continued by Adjournments to the Ninth Day of *September* following, *in Public Laws of Rhode Island, 1719*, at 87-88 (emphasis supplied); *in Public Laws of Rhode Island, 1730*, at 93; *and in Public Laws of Rhode Island, 1744,* at 67-68.

EN-203 — An ACT, regulating the Militia in this Colony, *part of* An ACT, establishing the Revisement of the Laws of this Colony, and for the putting the same in Force, *in* A LAW, Made and passed at the General Assembly of the Colony of *Rhode-Island* and *Providence Plantations*, held at *Providence* on the First Monday in *December,* 1766, *in Public Laws of Rhode Island, 1767*, at 182-183 (emphasis supplied).

EN-204 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at Providence, on the fourth Monday in March*, 1777, *in Rhode Island Records*, Volume 8, at 181 (emphasis supplied). *Accord*, At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden (in Consequence of Warrants issued by his Excellency the Governor) at *Providence*, within and for the State aforesaid, on *Monday* the Seventh Day of *July*, One Thousand Seven Hundred and Seventy-seven, *in Rhode Island Acts and Resolves*, Volume 9 [10], at {6} ("either by himself or a good able-bodied and suitable Person in his Stead"); *and Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at Providence, on Monday, the 7th day of July*, 1777, *in Rhode Island Records*, Volume 8, at 277 (same).

EN-205 — An ACT for the better forming, regulating and conducting the military Force of this State, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {36-37} (emphasis supplied).

EN-206 — An ACT in Addition to, and Amendment of, an Act, passed in *October*, A.D. 1779, entituled, "An Act for the better forming, regulating and conducting, the Military Force of this State", At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence-Plantations*, begun and holden, by Adjournment, at *South-Kingstown*, within and for the said State, on the Third *Monday* in *March*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {51-52} (emphasis supplied).

EN-207 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on the first Monday in December,* 1774, *in Rhode Island Records*, Volume 7, at 266-267.

EN-208 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at South Kingstown, on Monday, the 9th day of March,* 1778, *in Rhode Island Records,* Volume 8, at 384.

EN-209 —Acts and Orders Made and agreed upon at the Generall Court of Election, held at Portsmouth, in Rhode Island, the 19, 20, 21 of May, Anno. 1647, for the Colonie and Province of Providence, *in Rhode Island Records*, Volume 1, at 154.

EN-210 — *Acts and Orders of the Generall Assembly, sitting at Newport, May the* 3, 1665, *in Rhode Island Records*, Volume 2, at 115.

EN-211 — *Acts and Orders of the Generall Assembly, sitting at Newport, May the* 3, 1665, *in Rhode Island Records*, Volume 2, at 115.

EN-212 — *At the Generall Assembly and Election held in his Majesty's name, May the 2d*, 1677, *at Newport*, *in Rhode Island Records*, Volume 2, at 570-571.

EN-213 — LAWS Made and Past by the General Assembly of his Majesties Colony of *Rhode-Island,* and *Providence-Plantations,* in *New-England*, begun and Held at *Newport*, the Seventh Day of *May*, 1718, and Continued by Adjournments to the Ninth Day of *September* following, *in Public Laws of Rhode Island, 1719*, at 88; *in Public Laws of Rhode Island, 1730,* at 93; *and in Public Laws of Rhode Island, 1744,* at 68.

EN-214 — An ACT in Addition to, and Amendment of the several Acts regulating the Militia, At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations* in *New-England*, in AMERICA; begun and held by Adjournment at *South-Kingstown*, upon the last Monday in *February*, One Thousand Seven Hundred and Fifty-six, *in Rhode Island Acts and Resolves*, Volume 2, at {73}.

EN-215 — An ACT, regulating the Militia in this Colony, *part of* An ACT, establishing the Revisement of the Laws of this Colony, and for the putting the same in Force, *in* A LAW, Made and passed at the General Assembly of the Colony of *Rhode-Island* and *Providence Plantations*, held at *Providence* on the First Monday in *December,* 1766, *in Public Laws of Rhode Island, 1767*, at 183.

EN-216 — An ACT in Addition to, and Amendment of, an Act, passed in *October*, A.D. 1779, entituled, "An Act for the better forming, regulating and conducting, the Military Force of this State", At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence-Plantations*, begun and holden, by Adjournment, at *South-Kingstown*, within and for the said State, on the Third *Monday* in *March*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {52}.

EN-217 — *Acts and Orders of the Generall Assembly, sitting at Newport, May the* 3, 1665, *in Rhode Island Records*, Volume 2, at 114-116.

EN-218 — An ACT for raising Four Companies in this Colony, of One Hundred Men each, Officers included, to be imployed on a secret Expedition, in case other Governments shall join and carry on the proposed Enterprize, At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in AMERICA; begun, in Consequence of Warrants issued by his Honor the Governor, and held at *Providence* on Thursday the sixth of *March*, One Thousand Seven Hundred and Fifty-five, *in Rhode Island Acts and Resolves*, Volume 2, at {85-86}.

EN-219 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at East Greenwich, on the last Monday in February*, 1776, *in Rhode Island Records*, Volume 7, at 463.

EN-220 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at East Greenwich, on Thursday, the 21st day of November*, 1776, *in Rhode Island Records*, Volume 8, at 42-44. *Accord, Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on the second Monday in January*, 1776, *in Rhode Island Records*, Volume 7, at 431, 432, *and also Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at East Greenwich, on Tuesday, the 10th day of December*, 1776, *in Rhode Island Records*, Volume 8, at 62.

EN-221 — An ACT for furnishing the Soldiers who shall inlist into this State's Service for Three Months with Guns, and necessary Accoutrements, At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden (by Adjournment) at *Newport*, within and for the State aforesaid, on the Third *Monday* in *July*, One Thousand Seven Hundred and Eighty, *Rhode Island Acts and Resolves*, Volume 10 [13], at {56}.

EN-222 — Acts and Orders Made and agreed upon at the Generall Court of Election, held at Portsmouth, in Rhode Island, the 19, 20, 21 of May, 1647, for the Colonie and Province of Providence, *in Rhode Island Records*, Volume 1, at 153, 154.

EN-223 — *Acts and Orders made at the Generall Courte of Election held at Newport, May the 23d,* (1650), *for the Colonie of Providence Plantations*, *in Rhode Island Records*, Volume 1, at 221-222.

EN-224 — [Number] 7, *The General Court of Commissioners held for the Collony, at Portsmouth, March the 10th*, 1657-8, *in Rhode Island Records*, Volume 1, at 373.

EN-225 — *Proceedings of the Generall Assembly of the Collony of Rhode Island and Providence Plantations, held at Newport, the 25th of October*, 1676, [Session of] *October 27th, in Rhode Island Records,* Volume 2, at 555.

EN-226 — *Proceedings of the Generall Assembly held for the Collony of Rhode Island and Providence Plantations at Newport, the 27th day of October*, 1680, *in Rhode Island Records*, Volume 3, at 93-94.

EN-227 — An Act for the better regulating the militia, and for punishing offenders as shall not conform to the law thereunto relating, *At the Generall Assembly and Election held for the Collony at Newport, the 7th of May*, 1701, *in Rhode Island Records*, Volume 3, at 434-435. This statute is dated "1699" in LAWS AND ACTS OF RHODE ISLAND, AND PROVIDENCE PLANTATIONS Made from the First Settlement in 1636 to 1705, at 92, *reprinted from* J.D. Cushing, Editor, *The Earliest Acts and Laws of the Colony of Rhode Island and Providence Plantations* (Wilmington, Delaware: M. Glazier, 1977), at 107. Reprinted from a compilation dated "1705", it appears in *Military Obligation, Rhode Island*, at 37.

EN-228 — An Act for the Repealing several Laws relating to the Militia within this Colony, and for further Regulation of the same, LAWS Made and Past by the General Assembly of His Majesties Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, begun and Held at *Newport*, the Seventh Day of *May*, 1718, and Continued by Adjournments to the Ninth Day of *September* following, *in Public Laws of Rhode Island, 1719,* at 88; *in Public Laws of Rhode Island, 1730*, at 94; *and in Public Laws of Rhode Island, 1744,* at 68.

EN-229 — An ACT in Addition to the several Acts regulating the Militia in this Colony, At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, in AMERICA; begun and held by Adjournment at *Providence*, on the first Monday of *February*, One Thousand Seven Hundred and Fifty-five, *in Rhode Island Acts and Resolves*, Volume 2, at {72}.

EN-230 — An ACT, regulating the Militia in this Colony, *part of* An ACT, establishing the Revisement of the Laws of this Colony, and for the putting the same in Force, *in* A LAW, Made and passed at the General Assembly of the Colony of *Rhode-Island* and *Providence Plantations*, held at *Providence* on the First Monday in *December,* 1766, *in Public Laws of Rhode Island, 1767*, at 183.

EN-231 — An ACT for the better forming, regulating and conducting the military Force of this State, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {37-38}.

EN-232 — [Number] 7, *The General Court of Commissioners held for the Collony, at Portsmouth, March the 10th*, 1657-8, *in Rhode Island Records*, Volume 1, at 373.

EN-233 — *At the Generall Assembly and Election held at Newport, the 2d of May*, 1705, *in Rhode Island Records*, Volume 3, at 526.

EN-234 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on the second Monday in January*, 1776, *in Rhode Island Records*, Volume 7, at 423.

EN-235 — An Act for purchasing Two Thousand Arms for the Colony, &c., At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden (in Consequence of Warrants issued by his Honor the Governor) at *East-Greenwich*, within and for the said Colony, on *Monday* the Eighteenth Day of *March*, One Thousand Seven Hundred and Seventy-six, *in Rhode Island Acts and Resolves*, Volume 8 [9], at {303-305}.

EN-236 — At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island* and *Providence Plantations*, begun and holden, by Adjournment, at *Providence*, within and for the said State, on Monday the Twenty-third Day of *December*, One Thousand, Seven Hundred and Seventy-six, *in Rhode Island Acts and Resolves*, Volume 8 [9], at {16}.

EN-237 — At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island* and *Providence Plantations*, begun and holden, by Adjournment, at *South-Kingstown*, within and for the State aforesaid, on the Fourth Monday in *March*, One Thousand, Seven Hundred and Seventy-seven, *in Rhode Island Acts and Resolves*, Volume 8 [10], at {6}.

EN-238 — AT the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island* and *Providence Plantations*, begun and holden, by Adjournment, at *Providence*, within and for the said State, on the Third Monday in *June*, One Thousand, Seven Hundred and Seventy-seven, *in Rhode Island Acts and Resolves*, Volume 9 [10], at {14}.

EN-239 — AT the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island* and *Providence Plantations*, begun and holden, by Adjournment, at *Providence*, within and for the said State, on the Third Monday in *June*, One Thousand, Seven Hundred and Seventy-seven, *in Rhode Island Acts and Resolves*, Volume 9 [10], at {32}.

EN-240 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at Providence, on Monday, the 7th day of July*, 1777, *in Rhode Island Records*, Volume 8, at 278.

EN-241 — An ACT for incorporating and bringing into the Field Five Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and no longer, and not to be marched out of the same, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden, by Adjournment, at *Providence*, within and for the State aforesaid, on the Fourth *Monday* in *May*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {15}. *Accord,* An ACT for embodying and bringing into the Field Twelve Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and no longer Term, and not to be marched out of the same, At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden (by Adjournment) at *South-Kingstown*, within and for the State aforesaid, on the Fourth *Monday* in *February*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {8}; *and* An ACT for incorporating and bringing into the Field Five Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and for no longer Term, and not to be marched out of the same, At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden by Adjournment at *Newport*, within and for the said State, on the Third *Monday* in *August*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {41-42}.

EN-242 — AN ACT to prevent the Soldiery, within this State, selling and squandering away the Camp Utensils, &c., AT the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island* and *Providence Plantations*, begun and holden, by Adjournment, at *East-Greenwich*, within and for the State aforesaid, on Monday the First Day of *December*, One Thousand Seven Hundred and Seventy-seven, *in Rhode Island Acts and Resolves*, Volume 9 [10], at {16}.

EN-243 — An Act for raising one-sixth part of the militia in this colony, to proceed immediately to Albany, to join the Forces which have marched, to oppose the French, near Lake George, *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Newport, on the 10th day of August*, 1757, *in Rhode Island Records*, Volume 6, at 77, 78.

EN-244 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at East Greenwich, on Thursday, the 21st day of November*, 1776, *in Rhode Island Records*, Volume 8, at 43.

EN-245 — An ACT for furnishing the Soldiers who shall inlist into this State's Service for Three Months with Guns, and necessary Accoutrements, At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden (by Adjournment) at *Newport*, within and for the State aforesaid, on the Third *Monday* in *July*, One Thousand Seven Hundred and Eighty, *in Rhode Island Acts and Resolves*, Volume 10 [13], at {54-55}.

EN-246 — At the General Assembly of the Governor and Company of the State of *Rhode-Island,* and *Providence-Plantations,* begun and holden (by Adjournment) at *Newport*, within and for the State aforesaid, on the Third *Monday* in *July,* One Thousand Seven Hundred and Eighty, *in Rhode Island Acts and Resolves,* Volume 10 [13], at {56}.

EN-247 — An Act to prevent the soldiers in the pay of this colony from embezzling and destroying the arms which they have been furnished with, at the expense of the government, *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Newport, on Monday, the 13th day of June,* 1757, *in Rhode Island Records,* Volume 6, at 67-68.

EN-248 — An Act for raising a regiment, to serve for three months, *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at East Greenwich, on Thursday, the 21st day of November,* 1776, *in Rhode Island Records,* Volume 8, at 42-44 (emphasis supplied).

EN-249 — An ACT for raising Four Companies in this Colony, of One Hundred Men each, Officers included, to be imployed on a secret Expedition, in case other Governments shall join and carry on the proposed Enterprize, At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England,* in AMERICA; begun, in Consequence of Warrants issued by his Honor the Governor, and held at *Providence* on Thursday the sixth of *March*. One Thousand Seven Hundred and Fifty-five, *in Rhode Island Acts and Resolves*, Volume 2, at {85-86}.

EN-250 — An Act for embodying, supplying and paying, the army of observation ordered to be raised for the defence of the colony, *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, the first Wednesday of May,* 1775, *in Rhode Island Records*, Volume 7, at 318.

EN-251 — An Act for embodying, supplying and paying a regiment, consisting of five hundred men, for the defence of the United Colonies in general, and of this colony, in particular, *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on Tuesday, the 31st day of October,* 1775, *in Rhode Island Records,* Volume 7, at 385.

EN-252 — An Act for raising an additional regiment, for the defence of the United Colonies in general, and this colony in particular, and for embodying the same; and the regiment ordered to be raised at the last session of Assembly, into one brigade, *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on the second Monday in January,* 1776, *in Rhode Island Records,* Volume 7, at 432.

EN-253 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at East Greenwich, on Thursday, the 21st day of November*, 1776, *in Rhode Island Records*, Volume 8, at 43-44.

EN-254 — An Act for raising, embodying, supplying and paying two regiments of infantry, each consisting of seven hundred and fifty men; and a regiment or train of artillery, consisting of three hundred men, for the defence of the United States, in general, and of this state, in particular, *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at East Greenwich, on Tuesday, the 10th day of December*, 1776, *in Rhode Island Records*, Volume 8, at 62.

EN-255 — An ACT for furnishing the Soldiers who shall inlist into this State's Service for Three Months with Guns, and necessary Accoutrements, At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden (by Adjournment) at *Newport*, within and for the State aforesaid, on the Third *Monday* in *July*, One Thousand Seven Hundred and Eighty, *in Rhode Island Acts and Resolves*, Volume 10 [13], at {56}.

EN-256 — *Proceedings of the General Assembly of the State of Rhode Island and Providence Plantations, at South Kingstown, on the last Monday in October*, 1781, *in Rhode Island Records*, Volume 9, at 481.

EN-257 — An Act for raising and equipping fifteen hundred men, *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at Providence, on Friday, the 19th day of December,* 1777, *in Rhode Island Records,* Volume 8, at 345, 346 (emphasis supplied).

EN-258 — *E.g.,* An Act for raising four companies in this colony, of one hundred men each, officers included, to be employed on a secret expedition, in case other governments shall join and carry on the proposed enterprise, *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, the 6th day of March*, 1755, *in Rhode Island Records*, Volume 5, at 420; An Act for embodying, supplying and paying, the army of observation ordered to be raised for the defence of the colony, *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, the first Wednesday of May,* 1775, *in Rhode Island Records,* Volume 7, at 318; An Act for embodying, supplying and paying a regiment, consisting of five hundred men, for the defence of the United Colonies in general, and of this colony, in particular, *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on Tuesday, the 31st day of October,* 1775, *in Rhode Island Records,* Volume 7, at 384-385; An Act for raising an additional regiment, for the defence of the United Colonies in general, and this colony in particular, and for embodying the same; and the regiment ordered to be raised at the last session of Assembly, into one brigade, *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on the second Monday in January,* 1776, *in Rhode Island Records,* Volume 7, at 432; An Act for raising, embodying, supplying and paying, two regiments of infantry, each consisting of seven hundred and fifty men; and a regiment or train of artillery, consisting of three hundred men, for the defence of the United States, in general, and of this state, in particular, *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at East Greenwich, on Tuesday, the 10th day of December,* 1776, *in Rhode Island Records,* Volume 8, at 62.

EN-259 — *An* ACT *for raising and equipping Fifteen Hundred Men*, AT the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island* and *Providence Plantations*, begun and holden (by Adjournment) at *East-Greenwich*, within and for the State aforesaid, on the last *Monday* in *February*, One Thousand Seven Hundred and Seventy-Nine, *in Rhode Island Acts and Resolves,* Volume 10 [12], at {14-15} (***bold-faced emphasis*** supplied).

EN-260 — An Act to prevent the soldiery, within this state, selling and squandering away the camp utensils, &c., *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at East Greenwich, on Monday, the 1st day of December,* 1777, *in Rhode Island Records,* Volume 8, at 326.

EN-261 — [Number] 29, Acts and Orders Made and agreed upon at the Generall Court of Election, held at Portsmouth, in Rhode Island, the 19, 20, 21 of May, 1647, for the Colonie and Province of Providence, *in Rhode Island Records*, Volume 1, at 154.

EN-262 — [Number] 15, *The General Court of Commissioners held for the Collony, Warwicke, November the 2d*, 1658, *in Rhode Island Records*, Volume 1, at 403.

EN-263 — *Proceedings of the Generall Assembly held for the Collony of Rhode Island and Providence Plantations at Newport, the 1st of May*, 1677, *in Rhode island Records*, Volume 2, at 570.

EN-264 — An Act for the better regulating the militia, and for punishing offenders as shall not conform to the law thereunto relating, *At the Generall Assembly and Election held for the Collony at Newport, the 7th of May*, 1701, *in Rhode Island Records*, Volume 3, at 430-431. This statute is dated "1699" in LAWS AND ACTS OF RHODE ISLAND, AND PROVIDENCE PLANTATIONS Made from the First Settlement in 1636 to 1705, at 92, *reprinted in* J.D. Cushing, Editor, *The Earliest Acts and Laws of the Colony of Rhode Island and Providence Plantations* (Wilmington, Delaware: M. Glazier, 1977), at 107. Reprinted from a compilation dated "1705", it appears in *Military Obligation, Rhode Island*, at 37.

EN-265 — An Act for the Repealing several Laws relating to the Militia within this Colony, and for further Regulation of the same, LAWS Made and Past by the General Assembly of His Majesties Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, begun and Held at *Newport*, the Seventh Day of *May*, 1718, and Continued by Adjournments to the Ninth Day of *September* following, *in Public Laws of Rhode Island, 1719*, at 86, 87, 90; *in Public Laws of Rhode Island, 1730*, at 91, 93, 96; *and in Public Laws of Rhode Island, 1744,* at 65, 67, 71.

EN-266 — An ACT, regulating the Militia in this Colony, *part of* An ACT, establishing the Revisement of the Laws of this Colony, and for the putting the same in Force, *in* A LAW, Made and passed at the General Assembly of the Colony of *Rhode-Island* and *Providence Plantations*, held at *Providence* on the First Monday in *December,* 1766, *in Public Laws of Rhode Island, 1767*, at 179, 182.

EN-267 — An ACT in addition to, and amendment of, an Act entitled "An Act regulating the Militia of this Colony["], At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*; begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {150}.

EN-268 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on the second Monday in January*, 1776, *in Rhode Island Records*, Volume 7, at 423.

EN-269 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at East Greenwich, on the last Monday in February*, 1776, *in Rhode Island Records*, Volume 7, at 463.

EN-270 — An Act for purchasing Two Thousand Arms for the Colony, &c., At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*; begun and holden (in Consequence of Warrants issued by his Honor the Governor), at *East-Greenwich*, within and for the said Colony, on *Monday* the Eighteenth Day of *March*, One Thousand Seven Hundred and Seventy-six, *in Rhode Island Acts and Resolves*, Volume 8 [9], at {305}.

EN-271 — AT the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island* and *Providence Plantations*, begun and holden (in Consequence of Warrants issued by his Excellency the Governor) at *Providence*, within and for the State aforesaid, on *Thursday* the Twenty-eighth Day of *May*, One Thousand Seven Hundred and Seventy-eight, *in Rhode Island Acts and Resolves*, Volume 9 [11], at {8}.

EN-272 — An ACT for the better forming, regulating and conducting the military Force of this State, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {31-32}.

EN-273 — An ACT for embodying and bringing into the Field Twelve Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and no longer Term, and not to be marched out of the same, At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden (by Adjournment) at *South-Kingstown*, within and for the State aforesaid, on the Fourth *Monday* in *February*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {8}. *Accord*, An ACT for incorporating and bringing into the Field Five Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and no longer, and not to be marched out of the same, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden, by Adjournment, at *Providence*, within and for the State aforesaid, on the Fourth *Monday* in *May*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {15}; An ACT for incorporating and bringing into the Field Five Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and for no longer Term, and not to be marched out of the same, At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden by Adjournment at *Newport*, within and for the said State, on the Third *Monday* in *August*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {41}.

EN-274 — An ACT in Addition to, and Amendment of, an Act, passed in *October*, A.D. 1779, entituled, "An Act for the better forming, regulating and conducting, the Military Force of this State", At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence-Plantations*, begun and holden, by Adjournment, at *South-Kingstown*, within and for the said State, on the Third *Monday* in *March*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {51-52}.

EN-275 — An Act for the Repealing several Laws relating to the Militia within this Colony, and for further Regulation of the same, LAWS Made and Past by the General Assembly of His Majesties Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, begun and Held at *Newport*, the Seventh Day of *May*, 1718, and Continued by Adjournments to the Ninth Day of *September* following, *in Public Laws of Rhode Island, 1719*, at 87-88; *in Public Laws of Rhode Island, 1730*, at 93; *and in Public Laws of Rhode Island, 1744,* at 67-68.

EN-276 — An ACT, regulating the Militia in this Colony, *part of* An ACT, establishing the Revisement of the Laws of this Colony, and for the putting the same in Force, *in* A LAW, Made and passed at the General Assembly of the Colony of *Rhode-Island* and *Providence Plantations*, held at *Providence* on the First Monday in *December,* 1766, *in Public Laws of Rhode Island, 1767*, at 182.

EN-277 — By the Body Politicke in the Ile of Aqethnec, Inhabiting this present, 25 of 9: month. 1639, *in Rhode Island Records*, Volume 1, at 93.

EN-278 — [General Town Meeting in Portsmouth,] The 10th of Aprill, 1643, *Rhode Island Records*, Volume 1, at 80 (emphasis supplied).

EN-279 — [A General Town Meeting in Portsmouth,] 5th of October, 1643, *in Rhode Island Records*, Volume 1, at 77 (emphasis supplied).

EN-280 — [Number] 13, June y^{e} 28th, 1655. *The Court of Commissioners at Portsmouth*, *in Rhode Island Records*, Volume 1, at 320 (emphasis supplied).

EN-281 — *Acts and Orders of the Generall Assembly, sitting at Newport, May the* 3, 1665, *in Rhode Island Records*, Volume 2, at 117 (emphasis supplied).

EN-282 — [Number] 2, *By the Governor and Councill att Newport, the* 13*th and* 14*th of May*, 1667, *in Rhode Island Records*, Volume 2, at 196 (emphasis supplied).

EN-283 — *Att a meeting of the Generall Councill, at Newport, on Thursday, August* 26, 1669, *in Rhode Island Records*, Volume 2, at 282.

EN-284 — *Proceedings of the Generall Assembly of the Collony of Rhode Island and Providence Plantations, held at Newport, the* 13*th of March*, 1675-6, [Session of] *Aprill the* 4*th*[, 1676], *in Rhode Island Records*, Volume 2, at 536 (emphasis supplied).

EN-285 — An Act for the Repealing several Laws relating to the Militia within this Colony, and for further Regulation of the same, LAWS Made and Past by the General Assembly of His Majesties Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, begun and Held at *Newport*, the Seventh Day of *May*, 1718, and Continued by Adjournments to the Ninth Day of *September* following, *in Public Laws of Rhode Island, 1719*, at 88; *in Public Laws of Rhode Island, 1730*, at 94; *and in Public Laws of Rhode Island, 1744,* at 69.

EN-286 — An ACT in Addition to the several Acts regulating the Militia in this Colony, At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, in AMERICA; begun and held by Adjournment at *Providence*, on the first Monday of *Februar*y, One Thousand Seven Hundred and Fifty-five, *in Rhode Island Acts and Resolves*, Volume 2, at {72}.

EN-287 — An ACT, regulating the Militia in this Colony, *part of* An ACT, establishing the Revisement of the Laws of this Colony, and for the putting the same in Force, *in* A LAW, Made and passed at the General Assembly of the Colony of *Rhode-Island* and *Providence Plantations*, held at *Providence* on the First Monday in *December,* 1766, *in Public Laws of Rhode Island, 1767*, at 184-185.

EN-288 — An ACT in addition to, and amendment of, an Act entitled "An Act regulating the Militia of this Colony["], At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {151}.

EN-289 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on Wednesday, the* 28*th day of June*, 1775, *in Rhode Island Records*, Volume 7, at 356 (emphasis supplied).

EN-290 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at East Greenwich, on Thursday, the* 21*st day of November,* 1776, *in Rhode Island Records*, Volume 8, at 44-45.

EN-291 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at East Greenwich, on the second Monday in September*, 1779, *in Rhode Island Records*, Volume 8, at 595.

EN-292 —[A General Town Meeting in Portsmouth,] 5th of October, 1643, *in Rhode Island Records*, Volume 1, at 77 (emphasis supplied).

EN-293 — *Acts and Orders made at the Generall Courte of Election held at Newport, May the 23d,* (1650), *for the Colonie of Providence Plantations*, *in Rhode Island Records*, Volume 1, at 221-222.

EN-294 — [Number] 2, *By the Governor and Councill att Newport, the* 13*th and* 14*th of May*, 1667, *in Rhode Island Records*, Volume 2, at 196.

EN-295 — *Acts and Orders of the Generall Assembly, sitting at Newport, May the* 3, 1665, *in Rhode Island Records*, Volume 2, at 115 (emphasis supplied).

EN-296 — An Act for the better regulating the militia, and for punishing offenders as shall not conform to the law thereunto relating, *At the Generall Assembly and Election held for the Collony at Newport, the* 7*th of May*, 1701, *in Rhode Island Records*, Volume 3, at 433 (emphasis supplied).This statute is dated "1699" in LAWS AND ACTS OF RHODE ISLAND, AND PROVIDENCE PLANTATIONS Made from the First Settlement in 1636 to 1705, at 92, *reprinted in* J.D. Cushing, Editor, *The Earliest Acts and Laws of the Colony of Rhode Island and Providence Plantations* (Wilmington, Delaware: M. Glazier, 1977), at 107. Reprinted from a compilation dated "1705", it appears in *Military Obligation, Rhode Island*, at 37.

EN-297 — An Act for the Repealing several Laws relating to the Militia within this Colony, and for further Regulation of the same, LAWS Made and Past by the General Assembly of His Majesties Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, begun and Held at *Newport*, the Seventh Day of *May*, 1718, and Continued by Adjournments to the Ninth Day of *September* following, *in Public Laws of Rhode Island, 1719*,

at 87, 88; *in Public Laws of Rhode Island, 1730*, at 93, 94; *and in Public Laws of Rhode Island, 1744,* at 67, 69.

EN-298 — An ACT in Addition to the several Acts regulating the Militia in this Colony, At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, in AMERICA; begun and held by Adjournment at *Providence*, on the first Monday of *Februar*y, One Thousand Seven Hundred and Fifty-five, *in Rhode Island Acts and Resolves*, Volume 2, at {72} (emphasis supplied).

EN-299 — An ACT, regulating the Militia in this Colony, *part of* An ACT, establishing the Revisement of the Laws of this Colony, and for the putting the same in Force, *in* A LAW, Made and passed at the General Assembly of the Colony of *Rhode-Island* and *Providence Plantations*, held at *Providence* on the First Monday in *December,* 1766, *in Public Laws of Rhode Island, 1767*, at 182, 184-185.

EN-300 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on Wednesday, the 28th day of June*, 1775, *in Rhode Island Records*, Volume 7, at 358 (emphasis supplied).

EN-301 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on the second Monday in January*, 1776, *in Rhode Island Records*, Volume 7, at 423 (emphasis supplied).

EN-302 — An ACT for the better forming, regulating and conducting the military Force of this State, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {31-32}.

EN-303 — An ACT for embodying and bringing into the Field Twelve Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and no longer Term, and not to be marched out of the same, At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden (by Adjournment) at *South-Kingstown*, within and for the State aforesaid, on the Fourth *Monday* in *February*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {8} (emphasis supplied). *Accord*, An ACT for incorporating and bringing into the Field Five Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and no longer, and not to be marched out of the same, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island,* and *Providence-Plantations*, begun and holden, by Adjournment, at *Providence*, within and for the State aforesaid, on the Fourth *Monday* in *May*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {15}; *and* An ACT for incorporating and bringing into the Field Five Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and for no longer Term, and not to be marched out of the same, At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden by Adjournment at *Newport*, within and for the said State, on the Third *Monday* in *August*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {41}.

EN-304 — An ACT in Addition to, and Amendment of, an Act, passed in *October*, A.D. 1779, entituled, "An Act for the better forming, regulating and conducting, the Military Force of this State", At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence-Plantations*, begun and holden, by Adjournment, at *South-Kingstown*, within and for the said State, on the Third *Monday* in *March*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {51-52} (emphasis supplied).

EN-305 — An ACT in Addition to an Act of the General Assembly of this Colony, made and pass'd at *Providence* the sixth Day of *March* last, for raising Four Hundred Men, to be employed in Conjunction with the Troops of other Governments, upon an Expedition, for erecting a strong Fort upon the rocky Eminence near *Crown-Point*, At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, in AMERICA; begun and held at *Newport*, on the first *Wednesday* of *May*, One Thousand Seven Hundred and Fifty-five, *in Rhode Island Acts and Resolves*, Volume 2, at {17}.

EN-306 — An Act for raising one-sixth part of the militia in this colony, to proceed immediately to Albany, to join the forces which have marched, to oppose the French, near Lake George, *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Newport, on the 10th day of August*, 1757, *in Rhode Island Records*, Volume 6, at 77.

EN-307 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on the first Monday in December*, 1774, *in Rhode Island Records*, Volume 7, at 266.

EN-308 — At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden (in Consequence of Warrants issued by his Honor the Deputy-Governor) at *Providence*, within and for the Colony aforesaid, on *Tuesday* the Thirty-first Day of *October*, One Thousand Seven Hundred and Seventy-five, *in Rhode Island Acts and Resolves*, Volume 7 [8], at {198}.

EN-309 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on the second Monday in January*, 1776, *in Rhode Island Records*, Volume 7, at 423.

EN-310 — An Act for purchasing Two Thousand Arms for the Colony, &c., At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden (in Consequence of Warrants issued by his Honor the Governor) at *East-Greenwich*, within and for the said Colony, on *Monday* the Eighteenth Day of *March*, One Thousand Seven Hundred and Seventy-six, *in Rhode Island Acts and Resolves*, Volume 8 [9], at {303}.

EN-311 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at South Kingstown, on Thursday, the 17th day of April*, 1777, *in Rhode Island Records*, Volume 8, at 210.

EN-312 — AT the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island* and *Providence Plantations*, begun and holden, by Adjournment, at *Providence*, within and for the said State, on the Third Monday in *June*, One Thousand, Seven Hundred and Seventy-seven, *in Rhode Island Acts and Resolves*, Volume 9 [10], at {14}.

EN-313 — AT the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island* and *Providence Plantations*, begun and holden, by Adjournment, at *Providence*, within and for the said State, on the Third Monday in *June*, One Thousand, Seven Hundred and Seventy-seven, *in Rhode Island Acts and Resolves*, Volume 9 [10], at {32}.

EN-314 — At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden (in Consequence of *Warrants* issued by his Excellency the Governor) at *Providence*, within and for the State aforesaid, on *Friday* the Nineteenth Day of *December*, One Thousand Seven Hundred and Seventy-seven, *in Rhode Island Acts and Resolves*, Volume 9 [10], at {10}. *See also* AT the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island* and *Providence Plantations*, begun and holden (in Consequence of Warrants issued by his Excellency the Governor) at *Providence*, within and for the State aforesaid, on *Thursday* the Twenty-eighth Day of *May*, One Thousand Seven Hundred and Seventy-eight, *in Rhode Island Acts and Resolves*, Volume 9 [11], at {6, 7}.

EN-315 — An ACT for embodying and bringing into the Field Twelve Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and no longer Term, and not to be marched out of the same, At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden (by Adjournment) at *South-Kingstown*, within and for the State aforesaid, on the Fourth *Monday* in *February*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {8}. *Accord*, An ACT for incorporating and bringing into the Field Five Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and no longer, and not to be marched out of the same, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden, by Adjournment, at *Providence*, within and for the State aforesaid, on the Fourth *Monday* in *May*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {15}; An ACT for incorporating and bringing into the Field Five Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and for no longer Term, and not to be marched out of the same, At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden by Adjournment at *Newport*, within and for the said State, on the Third *Monday* in *August*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {41-42}.

EN-316 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on the first Monday in December*, 1774, *in Rhode Island Records*, Volume 7, at 266.

EN-317 — AN ACT, for Levying of a Duty on Tonnage of Shipping, LAWS Made and Past by the General Assembly of Her Majesties Colony of *Rhode-Island,* and *Providence-Plantations,* &c. Held at *Newport,* the Fourth Day of *January*, 1704, *in Public Laws of Rhode Island, 1719,* at 51, *and in Public Laws of Rhode Island, 1744,* at 34.

EN-318 — At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in

December, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {141}.

EN-319 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on the second Monday in January,* 1776, *in Rhode Island Records*, Volume 7, at 410.

EN-320 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on the first Monday of September,* 1776, *in Rhode Island Records*, Volume 7, at 606.

EN-321 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on the first Monday of September,* 1776, *in Rhode Island Records*, Volume 7, at 606-607.

EN-322 — At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island* and *Providence Plantations*, begun and holden, by Adjournment, at *Providence*, within and for the said State, on Monday the Twenty-third Day of *December*, One Thousand, Seven Hundred and Seventy-six, *in Rhode Island Acts and Resolves*, Volume 8 [9], at {40}.

EN-323 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at South Kingstown, on Thursday, the 17th day of April*, 1777, *in Rhode Island Records*, Volume 8, at 210.

EN-324 — *By the Governor and Councill att Newport, the 13th and 14th of May*, 1667, *in Rhode Island Records*, Volume 2, at 196 (emphasis supplied).

EN-325 — An ACT in Addition to an Act of the General Assembly of this Colony, made and pass'd at *Providence* the sixth Day of *March* last, for raising Four Hundred Men, to be employed in Conjunction with the Troops of other Governments, upon an Expedition, for erecting a strong Fort upon the rocky Eminence near *Crown-Point*, At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, in AMERICA; begun and held at *Newport*, on the first *Wednesday* of *May*, One Thousand Seven Hundred and Fifty-five, *in Rhode Island Acts and Resolves*, Volume 2, at {17}.

EN-326 — An ACT for raising Four Companies in this Colony, of One Hundred Men each, Officers included, to be imployed on a secret Expedition, in case other Governments shall join and carry on the proposed Enterprize, At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, in AMERICA; begun, in Consequence of Warrants issued by his Honor the Governor, and held at *Providence* on *Thursday* the sixth of *March*, One Thousand Seven Hundred and Fifty-five, *in Rhode Island Acts and Resolves*, Volume 2, at {87}.

EN-327 — An Act for raising one-sixth part of the militia in this colony, to proceed immediately to Albany, to join the forces which have marched, to oppose the French, near Lake George, *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Newport, on the 10th day of August*, 1757, *in Rhode Island Records*, Volume 6, at 77.

EN-328 — AT the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island* and *Providence Plantations*, begun and holden, by Adjournment, at *South-Kingstown*, within and for the State aforesaid, on Monday the Twenty-second Day of *September*, One Thousand Seven Hundred and Seventy-seven, *in Rhode Island Acts and Resolves*, Volume 9 [10], at {9}.

EN-329 — An ACT for furnishing the Soldiers who shall inlist into this State's Service for Three Months with Guns, and necessary Accoutrements, At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden (by Adjournment) at *Newport*, within and for the State aforesaid, on the Third *Monday* in *July*, One Thousand Seven Hundred and Eighty, *in Rhode Island Acts and Resolves*, Volume 10 [13], at {54-55}.

EN-330 — An ACT for embodying and bringing into the Field Twelve Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and no longer Term, and not to be marched out of the same, At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden (by Adjournment) at *South-Kingstown*, within and for the State aforesaid, on the Fourth *Monday* in *February*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {8}. *Accord*, An ACT for incorporating and bringing into the Field Five Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and no longer, and not to be marched out of the same, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden, by Adjournment, at *Providence*, within and for the State aforesaid, on the Fourth *Monday* in *May*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {15}; *and* An ACT for incorporating and bringing into the Field Five Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and for no longer Term, and not to be marched out of the same, At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden by Adjournment at *Newport*, within and

for the said State, on the Third *Monday* in *August*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {42}.

EN-331 — AT the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island* and *Providence Plantations*, begun and holden, by Adjournment, at *South-Kingstown*, within and for the State aforesaid, on the Fourth Monday in *March*, One Thousand, Seven Hundred and Seventy-seven, *in Rhode Island Acts and Resolves*, Volume 8 [10], at {5}.

EN-332 — AT the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island* and *Providence Plantations*, begun and holden (in Consequence of Warrants issued by his Excellency the Governor) at *Providence*, within and for the State aforesaid, on *Thursday* the Twenty-eighth Day of *May*, One Thousand Seven Hundred and Seventy-eight, *Rhode Island Acts and Resolves*, Volume 9 [11], at {9}.

EN-333 — An Act for raising one-sixth part of the militia in this colony, to proceed immediately to Albany, to join the forces which have marched, to oppose the French, near Lake George, *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Newport, on the 10th day of August*, 1757, *in Rhode Island Records*, Volume 6, at 77.

EN-334 — AT the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island* and *Providence Plantations*, begun and holden, by Adjournment, at *Providence*, within and for the said State, on the Third Monday in *June*, One Thousand, Seven Hundred and Seventy-seven, *in Rhode Island Acts and Resolves*, Volume 9 [10], at {9}.

EN-335 — An ACT for furnishing the Soldiers who shall inlist into this State's Service for Three Months with Guns, and necessary Accoutrements, At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden (by Adjournment) at *Newport*, within and for the State aforesaid, on the Third *Monday* in *July*, One Thousand Seven Hundred and Eighty, *in Rhode Island Acts and Resolves*, Volume 10 [13], at {55}.

EN-336 — At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence-Plantations*, begun and holden, by Adjournment, at *South-Kingstown*, within and for the said State, on the Third *Monday* in *March*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {4}.

EN-337 — At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden by Adjournment, at *East-Greenwich*, within and for the State aforesaid, on the last *Monday* in *November*, One Thousand Seven Hundred and Eighty-two, *in Rhode Island Acts and Resolves*, Volume 12 [15], at {25}.

EN-338 — At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden by Adjournment at *South-Kingstown*, within and for the State aforesaid, on the Fourth *Monday* in *August*, One Thousand Seven Hundred and Eighty-four, *in Rhode Island Acts and Resolves*, Volume 13 [16], at {20}.

EN-339 — At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden by Adjournment, at *Newport*, within and for the State aforesaid, on the Second *Monday* in *June*, One Thousand Seven Hundred and Eighty-two, *in Rhode Island Acts and Resolves*, Volume 12 [15], at {4}.

EN-340 — *Proceedings of the General Assembly of the State of Rhode Island and Providence Plantations, at Newport, on the fourth Monday in June*, 1786, *in Rhode Island Records*, Volume 10, at 202. *Also in* At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden, by Adjournment, at *Newport*, within and for the State aforesaid, on the Fourth *Monday* in *June*, One Thousand Seven Hundred and Eighty-six, *in Rhode Island Acts and Resolves*, Volume 14 [17], at {3}.

EN-341 — *Acts and Orders made at the Generall Courte of Election held at Newport, May the 23d,* (1650), *for the Colonie of Providence Plantations*, *in Rhode Island Records*, Volume 1, at 221-222 (emphasis supplied).

EN-342 — AT the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island* and *Providence Plantations*, begun and holden, by Adjournment, at *Providence*, within and for the said State, on the Third Monday in *June*, One Thousand, Seven Hundred and Seventy-seven, *in Rhode Island Acts and Resolves*, Volume 9 [10], at {33}. *See to like effect*, At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden by Adjournment, at *Providence*, within and for the State aforesaid, on *Monday* the Eighteenth Day of *August*, One Thousand Seven Hundred and Seventy-seven, *in Rhode Island Acts and Resolves*, Volume 9 [10], at {8}; AT the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island* and *Providence Plantations*, begun and holden, by Adjournment, at *South-Kingstown*, within and for the State aforesaid, on Monday the Twenty-second Day of *September*, One Thousand Seven Hundred and Seventy-seven, *in Rhode Island Acts and Resolves*, Volume 9 [10], at {6}; *and*

At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden by Adjournment at *East-Greenwich*, within and for the said State, on the Second *Monday* in *September*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {4}.

EN-343 — At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden by Adjournment, at *Providence*, within and for the State aforesaid, on the First *Monday* in *March*, One Thousand Seven Hundred and Seventy-seven, *in Rhode Island Acts and Resolves*, Volume 8 [10], at {10}.

EN-344 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on the first Monday in December*, 1774, *in Rhode Island Records*, Volume 7, at 271.

EN-345 — AN ACT for the Inspection of GUNPOWDER, manufactured within this State, AT the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island*, and *Providence Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last Monday of *October*, One Thousand, Seven Hundred and Seventy-six, *in Rhode Island Acts and Resolves*, Volume 8 [9], at {25}.

EN-346 — At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden by Adjournment at *Providence*, within and for the Colony aforesaid, on the Third *Monday* in *August*, One Thousand Seven Hundred and Seventy-five, *in Rhode Island Acts and Resolves*, Volume 7 [8], at {106}.

EN-347 — An Act for encouraging the manufactures of saltpeter and gunpowder, *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on the second Monday in January*, 1776, *in Rhode Island Records*, Volume 7, at 428-430.

EN-348 — LAWS Made and Past by the General Assembly of His Majesties Colony of *Rhode-Island,* and *Providence-Plantations,* in *New-England,* begun and Held at *Newport*, the Seventh Day of *May*, 1718, and Continued by Adjournments to the Ninth Day of *September* following, *in Public Laws of Rhode Island, 1719*, at 86; *in Public Laws of Rhode Island, 1730,* at 91; *and in Public Laws of Rhode Island, 1744,* at 65-66.

EN-349 — An ACT for settling the Militia of the Towns of *Bristol*, *Tiverton*, *Little-Compton*, *Warren*, and *Cumberland*, LAWS, *Made and pass'd at a General Assembly of His Majesty's Colony of* Rhode-Island *and* Providence-Plantations *in* New-England, *begun and held* (*by Virtue of a Warrant from his Honour the* Governor) at Providence, *on the seventeenth Day of* February, 1746, *in Public Laws of Rhode Island, 1752*, at 30-31.

EN-350 — An ACT for the better forming, regulating and conducting the military Force of this State, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {31}.

EN-351 — At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden at *Providence*, within and for the said Colony, on the First *Wednesday* in *May*, One Thousand Seven Hundred and Seventy-five, *in Rhode Island Acts and Resolves*, Volume 7 [8], at {5}.

EN-352 — At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden at *Providence*, within and for the said Colony, on the First *Wednesday* in *May*, One Thousand Seven Hundred and Seventy-five, *in Rhode Island Acts and Resolves*, Volume 7 [8], at {5-6}.

EN-353 — An ACT for dividing the First Company of Trained Bands in *Scituate*, in the County of *Providence*, into Two, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, by Adjournment, at *East-Greenwich*, within and for the said Colony, on the Second *Monday* in *June*, One Thousand Seven Hundred and Seventy-five, *in Rhode Island Acts and Resolves*, Volume 7 [8], at {28}.

EN-354 — An ACT dividing the Company of Militia, in the Town of *Johnston*, into Two Companies, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, by Adjournment, at *East-Greenwich*, within and for the said Colony, on the Second *Monday* in *June*, One Thousand Seven Hundred and Seventy-five, *in Rhode Island Acts and Resolves*, Volume 7 [8], at {31-32}.

EN-355 — *At the* GENERAL ASSEMBLY *of the* GOVERNOR *and* COMPANY *of the* English *Colony of* Rhode-Island, *and* Providence-Plantations, *in* New-England, *in* America; *begun and held at* Newport *by Adjournment*, *on the second* Monday *of* June, *One Thousand Seven Hundred and Fifty-three*, *in Rhode Island Acts and Resolves*, Volume 2 [1], at {24}. *See* At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-*

Island, and *Providence-Plantations*, in *New-England* in *America*; begun and held at *South-Kingstown* in said Colony, on the last Wednesday of *October*, *One Thousand Seven Hundred and Fifty-three*, *in Rhode Island Acts and Resolves*, Volume 2 [1], at {44} (accepting the division of the Company).

EN-356 — An ACT dividing the Second Trained Band, or Company of Militia, in the Town of *Coventry*, into Two Companies, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, by Adjournment, at *East-Greenwich*, within and for the said Colony, on the Second *Monday* in *June*, One Thousand Seven Hundred and Seventy-five, *in Rhode Island Acts and Resolves*, Volume 7 [8], at {67-68}. *To like purpose and effect*, An ACT dividing the First Trained Band, or Company of Militia, in the Town of *Coventry*, into Two Companies, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, by Adjournment, at *East-Greenwich*, within and for the said Colony, on the Second *Monday* in *June*, One Thousand Seven Hundred and Seventy-five, *in Rhode Island Acts and Resolves*, Volume 7 [8], at {66-67}.

EN-357 — *Proceedings of the General Assembly, for the State of Rhode Island and Providence Plantations, at Newport, on the third Monday in July*, 1780, *in Rhode Island Records*, Volume 9, at 192-193.

EN-358 — *Proceedings of the General Assembly of the State of Rhode Island and Providence Plantations, at Providence, on the fourth Monday in May*, 1781, *in Rhode Island Records*, Volume 9, at 412.

EN-359 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations at Providence, the last Wednesday of October*, 1738, *in Rhode Island Records*, Volume 4, at 548-549 (Providence); At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, in AMERICA; begun and held by Adjournment at *Providence*, on the first Monday of *February*, One Thousand Seven Hundred and Fifty-five, *in Rhode Island Acts and Resolves*, Volume 2, at {76} (Providence); *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Newport, on the second Monday in June*, 1776, *in Rhode Island Records*, Volume 7, at 568-569 (Exeter); *Proceedings of the General Assembly of the State of Rhode Island and Providence Plantations, at Providence, on the last Monday in January*, 1782, *in Rhode Island Records*, Volume 9, at 508 (Foster).

EN-360 — An Act for enlisting one-fourth part of the militia of the colony, as minute men, *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on Wednesday, the 28th day of June*, 1775, *in Rhode Island Records*, Volume 7, at 358-360.

EN-361 — [Number] 18, The General Court of Election began and held at Portsmouth, from the 16th of March to the 19th of the same mo., 1641, *in Rhode Island Records*, Volume 1, at 115.

EN-362 — At the Generall Court of Election held on the 16th & 17th of March, att Newport, 1642, *in Rhode Island Records*, Volume 1, at 120-121.

EN-363 — [Number] 29, Acts and Orders Made and agreed upon at the Generall Court of Election, held at Portsmouth, in Rhode Island, the 19, 20, 21 of May, 1647, for the Colonie and Province of Providence, *in Rhode Island Records*, Volume 1, at 153.

EN-364 — *Proceedings of the Generall Assembly held for the Collony of Rhode Island and Providence Plantations at Newport, the 19th day of June*, 1705, *in Rhode Island Records*, Volume 3, at 534, *repealed by* An Act for the more effectual putting the Colony into a proper Posture of Defence, A LAW, Made and pass'd by the General Assembly of His Majesty's Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, held by Adjournment, at *Warwick*, the Twenty Seventh Day of *January*, 1740, *in Public Laws of Rhode Island, 1744*, at 232.

EN-365 — *Proceedings of the General Assembly, for the State of Rhode Island and Providence Plantations, at Newport, on the third Monday in July*, 1780, *in Rhode Island Records*, Volume 9, at 192-193.

EN-366 — An Act for the Establishing of *Watches* throughout this Colony, both in Time of *War* and *Peace*, A LAW, Made and Pass'd by the General Assembly of His Majesty's Colony of *Rhode-Island*, and *Providence-Plantations*, held at *Newport*, by Adjournment to the Eighth Day of *September*, 1719, *in Public Laws of Rhode Island, 1744*, at 80.

EN-367 — At the General Courte held on the 14th day of the 7th mo. [September], 1640, *in Rhode Island Records*, Volume 1, at 109.

EN-368 — *Acts and Orders made at the Generall Courte of Election held at Newport, May the 23d,* (1650), *for the Colonie of Providence Plantations*, *in Rhode Island Records*, Volume 1, at 223-224.

EN-369 — *Acts and Orders made at the Generall Courte of Election held at Newport, May the 23d,* (1650), *for the Colonie of Providence Plantations*, *in Rhode Island Records*, Volume 1, at 221-222.

EN-370 — [Number] 13, *June y^e^ 28th,* 1655. *The Court of Commissioners at Portsmouth*, *in Rhode Island Records*, Volume 1, at 320.

EN-371 — [Number] 15,*The General Court of Commissioners held for the Collony, Warwicke, November the 2d*, 1658, *in Rhode Island Records*, Volume 1, at 403.

EN-372 — *Acts and Orders of the Generall Assembly, sitting at Newport, May the* 3, 1665, *in Rhode Island Records*, Volume 2, at 117.

EN-373 — [Number] 2, *By the Governor and Councill att Newport, the* 13*th and* 14*th of May*, 1667, *in Rhode Island Records*, Volume 2, at 196.

EN-374 — *Att a meeting of the Generall Councill, at Newport, on Thursday, August* 26, 1669, *in Rhode Island Records*, Volume 2, at 282.

EN-375 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on Wednesday, the* 28*th day of June*, 1775, *in Rhode Island Records*, Volume 7, at 356.

EN-376 — [Number] 29, Acts and Orders Made and agreed upon at the Generall Court of Election, held at Portsmouth, in Rhode Island, the 19, 20, 21 of May, 1647, for the Colonie and Province of Providence, *in Rhode Island Records*, Volume 1, at 154.

EN-377 — [Number] 7, *The General Court of Commissioners held for the Collony, at Portsmouth, March the* 10*th*, 1657-8, *in Rhode Island Records*, Volume 1, at 373.

EN-378 — An ACT in Addition to the several Acts regulating the Militia in this Colony, At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, in AMERICA; begun and held by Adjournment at *Providence*, on the first Monday of *Februa*ry, One Thousand Seven Hundred and Fifty-five, *Rhode Island Acts and Resolves*, Volume 2, at {72}.

EN-379 — An ACT, regulating the Militia in this Colony, *part of* An ACT, establishing the Revisement of the Laws of this Colony, and for the putting the same in Force, *in* A LAW, Made and passed at the General Assembly of the Colony of *Rhode-Island* and *Providence Plantations*, held at *Providence* on the First Monday in *December,* 1766, *in Public Laws of Rhode Island, 1767*, at 183.

EN-380 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on the second Monday in Januar*y, 1776, *in Rhode Island Record*s, Volume 7, at 422-423.

EN-381 — An Act for purchasing Two Thousand Arms for the Colony, &c., At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden (in Consequence of Warrants issued by his Honor the Governor) at *East-Greenwich*, within and for the said Colony, on *Monda*y the Eighteenth Day of *March*, One Thousand Seven Hundred and Seventy-six, *in Rhode Island Acts and Resolves*, Volume 8 [9], at {303-305}.

EN-382 — At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island* and *Providence Plantations*, begun and holden, by Adjournment, at *Providence*, within and for the said State, on Monday the Twenty-third Day of *December*, One Thousand, Seven Hundred and Seventy-six, *in Rhode Island Acts and Resolves*, Volume 8 [9], at {16}.

EN-383 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at Providence, on Monday, the* 7*th day of July*, 1777, *in Rhode Island Records*, Volume 8, at 278.

EN-384 — An ACT for incorporating and bringing into the Field Five Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and no longer, and not to be marched out of the same, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden, by Adjournment, at *Providence*, within and for the State aforesaid, on the Fourth *Monday* in *May*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {15}. *Accord*, An ACT for embodying and bringing into the Field Five Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and no longer Term, and not to be marched out of the same, At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence-Plantations*, begun and holden (by Adjournment) at *South-Kingstown*, within and for the State aforesaid, on the Fourth *Monday* in *Februar*y, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {8}; *and* An ACT for incorporating and bringing into the Field Five Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and for no longer Term, and not to be marched out of the same, At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden by Adjournment at *Newport*, within and for the said State, on the Third *Monday* in *August*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {41-42}.

EN-385 — *Proceedings of the Generall Assembly held for the Collony of Rhode Island and Providence Plantations at Newport, the 4th of September*, 1666, *in Rhode Island Records*, Volume 2, at 171-172.

EN-386 — AT the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island* and *Providence Plantations*, begun and holden (in Consequence of Warrants issued by his Excellency the Governor) at *Providence*, within and for the State aforesaid, on *Thursday* the Twenty-eighth Day of *May*, One Thousand Seven Hundred and Seventy-eight, *in Rhode Island Acts and Resolves*, Volume 9 [11], at {8}.

EN-387 — An ACT for the better forming, regulating and conducting the military Force of this State, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {31-32}.

EN-388 — An ACT in Addition to, and Amendment of, an Act, passed in *October*, A.D. 1779, entituled, "An Act for the better forming, regulating and conducting, the Military Force of this State", At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence-Plantations*, begun and holden, by Adjournment, at *South-Kingstown*, within and for the said State, on the Third *Monday* in *March*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {51-52}.

EN-389 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at Providence, on Monday, the 27th day of October*, 1777, *in Rhode Island Records*, Volume 8, at 317-318. *Accord*, *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at East Greenwich, on Monday, the 1st day of December*, 1777, *in Rhode Island Records*, Volume 8, at 333-334.

EN-390 — An ACT for filling up and completing this State's Quota of the Continental Army, At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden by Adjournment, at *East-Greenwich*, within and for the State aforesaid, on the last *Monday* in *November*, One Thousand Seven Hundred and Eighty, *in Rhode Island Acts and Resolves*, Volume 10 [13], at {37}.

EN-391 — *E.g.,* By the Body Politicke in the Ile of Aqethnec, Inhabiting this present, 25 of 9: month. 1639, *in Rhode Island Records*, Volume 1, at 93 ("the Traine Band"); [Number] 20, At the Generall Courte Held at Portsmouth on the 6th of August, 1640, *in Rhode Island Records*, Volume 1, at 104 ("the Bands of each Plantation"); [Number] 18, The General Court of Election began and held at Portsmouth, from the 16th of March, to the 19th of the same mo., 1641, *in Rhode Island Records*, Volume 1, at 115 ("the Traine Bands"); At the Generall Court of Election held on the 16th & 17th of March, att Newport, 1642, *in Rhode Island Records*, Volume 1, at 121 ("the Traine Bands"); [Number] 29, Acts and Orders Made and agreed upon at the Generall Court of Election, held at Portsmouth, in Rhode Island, the 19, 20, 21 of May, 1647, for the Colonie and Province of Providence, *in Rhode Island Records*, Volume 1, at 153 ("the Bands of each plantation or Towne", "Train Bands"); *Proceedings of the Generall Assembly held for the Collony of Rhode Island and Providence Plantations at Newport, the 4th of September*, 1666, *in Rhode Island Records*, Volume 2, at 171 ("trayne band"); *At the Generall Assembly and Election held in his Majesty's name, May the 2d*, 1677, *at Newport, in Rhode Island Records*, Volume 2, at 568 ("Traine Bands"); *Proceedings of the Generall Assembly held for the Collony of Rhode Island and Providence Plantations at Newport, the 27th day of October*, 1680, *in Rhode Island Records*, Volume 3, at 93-94 ("Traine Bands"); *At the Generall Assembly and Election held for the Collony at Newport, the 7th of May*, 1701, *in Rhode Island Records*, Volume 3, at 433 ("Train Band"); *Proceedings of the Generall Assembly held for the Collony of Rhode Island and Providence Plantations at Newport, the 19th day of June*, 1705, *in Rhode Island Records*, Volume 3, at 534 ("Train Band"); An Act for the Repealing several Laws relating to the Militia within this Colony, and for further Regulation of the same, LAWS Made and Past by the General Assembly of His Majesties Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, begun and Held at *Newport*, the Seventh Day of *May*, 1718, and Continued by Adjournments to the Ninth Day of *September* following, *in Public Laws of Rhode Island, 1719,* at 86, 87, *in Public Laws of Rhode Island, 1730*, at 91, 93, *and in Public Laws of Rhode Island, 1744,* at 65, 68 ("Train bands", "Train'd band"); *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Newport, the 14th day of June*, 1726, *in Rhode Island Records*, Volume 4, at 377 ("trained bands"); An Act for raising the Fines of enlisted Soldiers of the Train'd Bands in this Colony, LAWS, Made and pass'd by the General Assembly of His Majesty's Colony of *Rhode-Island* and *Providence-Plantations*, in *New-England*, held at *Newport*, by Adjournment, on the second *Monday* of *June*, 1731, *in Public Laws of Rhode Island, 1730*, at 237; *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, the last Wednesday of October*, 1738, *in Rhode Island Records*, Volume 4, at 548 ("train band"); An ACT ordering and appointing the Militia, or train'd Bands, in this Colony, to muster twice a Year, LAWS, *Made and pass'd at a General Assembly of His Majesty's Colony of* Rhode-Island *and* Providence-Plantations *in* New-England, *held by Adjournment at* Newport, *on the Twenty-First Day of* September, 1745, *in Public Laws of Rhode Island, 1752*, at 2; An ACT for settling the Militia of the Towns of *Bristol*, *Tiverton*, *Little-Compton*, *Warren*, and *Cumberland*, LAWS, *Made and pass'd at a General Assembly of His*

Majesty's Colony of Rhode-Island *and* Providence-Plantations *in* New-England, *begun and held* (*by Virtue of a Warrant from his Honour the Governor*) at Providence, *on the seventeenth Day of* February, 1746, *in Public Laws of Rhode Island, 1752*, at 30-31 ("train'd Band"); *At the* GENERAL ASSEMBLY *of the* GOVERNOR *and* COMPANY *of the* English *Colony of* Rhode-Island, *and* Providence-Plantations, *in* New-England, *in* America; *begun and held at* Newport *by Adjournment, on the second* Monday *of* June, *One Thousand Seven Hundred and Fifty-three*, *in Rhode Island Acts and Resolves*, Volume 2 [1], at {24} ("train'd Band"); An ACT for erecting an ARTILLERY COMPANY in the Towns of *Westerly* and *Charlestown*, At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, in AMERICA; begun (in Consequence of Warrants issued by his Honor the Governor) and held at *Providence*, on Wednesday the first of *January*, One Thousand Seven Hundred and Fifty-five, *in Rhode Island Acts and Resolves*, Volume 2, at {64} ("train'd Bands"); At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, in AMERICA; begun and held by Adjournment at *South-Kingstown*, upon the last Monday in *February*, One Thousand Seven Hundred and Fifty-six, *in Rhode Island Acts and Resolves*, Volume 2, at {66} ("trained Band"); An ACT, regulating the Militia in this Colony, *in Public Laws of Rhode Island, 1767*, at 179 ("trained Bands"); AN ACT establishing an Independent Company, by the Name of *The Light-Infantry* for the County of *Providence*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, by Adjournment, at *Newport*, within and for the said Colony, on the Second Monday in *June*, One Thousand Seven Hundred and Seventy-four, *Rhode Island Acts and Resolves*, Volume 7, at {38} ("trained Bands"); *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Newport, on the second Monday in June*, 1776, *in Rhode Island Records*, Volume 7, at 575 ("trained bands"); *Proceedings of the General Assembly of the State of Rhode Island and Providence Plantations, at East Greenwich, on the last Monday in February*, 1780, *in Rhode Island Records*, Volume 9, at 7 ("Trained Bands"); *Proceedings of the General Assembly of the State of Rhode Island and Providence Plantations, at South Kingstown, on the second Monday in June*, 1780, *in Rhode Islands Records*, Volume 9, at 94 ("Trained Bands"); *Proceedings of the General Assembly of the State of Rhode Island and Providence Plantations, at Providence, on the fourth Monday in May*, 1781, *in Rhode Island Records*, Volume 9, at 412 ("trained band"); *Proceedings of the General Assembly of the State of Rhode Island and Providence Plantations, at Providence, on the last Monday in January*, 1782, *in Rhode Island Records*, Volume 9, at 508 ("trained band").

EN-392 — *E.g., At the Generall Assembly and Election held for the Collony at Newport, the 7th of May*, 1701, *in Rhode Island Records*, Volume 3, at 433-434; An Act for the Repealing several Laws relating to the Militia within this Colony, and for further Regulation of the same, LAWS Made and Past by the General Assembly of His Majesties Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, begun and Held at *Newport*, the Seventh Day of *May*, 1718, and Continued by Adjournments to the Ninth Day of *September* following, *in Public Laws of Rhode Island, 1719,* at 90-91, *in Public Laws of Rhode Island, 1730,* at 96-97, *and in Public Laws of Rhode Island, 1744,* at 71-72; An ACT for settling the Militia of the Towns of *Bristol*, *Tiverton*, *Little-Compton*, *Warren*, and *Cumberland*, LAWS, *Made and pass'd at a General Assembly of His Majesty's Colony of* Rhode-Island *and* Providence-Plantations *in* New-England, *begun and held* (*by Virtue of a Warrant from his Honour the Governor*) at Providence, *on the seventeenth Day of* February, 1746, *in Public Laws of Rhode Island, 1752*, at 31; An ACT, regulating the Militia in this Colony, *in Public Laws of Rhode Island, 1767*, at 187.

EN-393 — *E.g., Proceedings of the Generall Assembly held for the Collony of Rhode Island and Providence Plantations at Newport, the 27th day of October*, 1680, *in Rhode Island Records*, Volume 3, at 94; An Act for the Repealing several Laws relating to the Militia within this Colony, and for further Regulation of the same, LAWS Made and Past by the General Assembly of His Majesties Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, begun and Held at *Newport*, the Seventh Day of *May*, 1718, and Continued by Adjournments to the Ninth Day of *September* following, *in Public Laws of Rhode Island, 1719,* at 86, 87, 88, 89, *in Public Laws of Rhode Island, 1730*, at 91, 93, 94, 97, *and in Public Laws of Rhode Island, 1744,* at 65, 68, 69, 70; *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Newport, the 14th day of June*, 1726, *in Rhode Island Records*, Volume 4, at 377; An Act for raising the Fines of enlisted Soldiers of the Train'd Bands in this Colony, LAWS, Made and pass'd by the General Assembly of His Majesty's Colony of *Rhode-Island* and *Providence-Plantations*, in *New-England*, held at *Newport*, by Adjournment, on the second *Monday* of *June*, 1731, *in Public Laws of Rhode Island, 1730*, at 237; *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, the last Wednesday of October*, 1738, *in Rhode Island Records*, Volume 4, at 548-549; An Act for the more effectual putting the Colony into a proper Posture of Defence, A LAW, Made and pass'd by the General Assembly of His Majesty's Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*; held by Adjournment, at *Warwick*, the Twenty-Seventh Day of *January*, 1740, *in Public Laws of Rhode Island, 1744*, at 233; An ACT ordering and appointing the Militia, or train'd Bands, in this Colony, to muster twice a Year, LAWS, *Made and pass'd at a General Assembly of His Majesty's Colony of* Rhode-Island *and* Providence-Plantations *in* New-England, *held by Adjournment at* Newport, *on the Twenty-First Day of* September, 1745, *in Public Laws of Rhode Island, 1752*, at 2; *At the* GENERAL

ASSEMBLY *of the* GOVERNOR *and* COMPANY *of the* English *Colony of* Rhode-Island, *and* Providence-Plantations, *in* New-England, *in* America; *begun and held at* Newport *by Adjournment*, *on the second* Monday *of* June, *One Thousand Seven Hundred and Fifty-three*, *in Rhode Island Acts and Resolves*, Volume 2 [1], at {24}; An ACT for erecting an ARTILLERY COMPANY in the Towns of *Westerly* and *Charlestown*, At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, in AMERICA; begun (in Consequence of Warrants issued by his Honor the Governor) and held at *Providence*, on Wednesday the first of *January*, One Thousand Seven Hundred and Fifty-five, *in Rhode Island Acts and Resolves*, Volume 2, at {64}; An ACT in Addition to the several Acts regulating the Militia in this Colony, At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, in AMERICA; begun and held by Adjournment at *Providence*, on the first Monday of *February*, One Thousand Seven Hundred and Fifty-five, *in Rhode Island Acts and Resolves*, Volume 2, at {72}; At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, in AMERICA; begun and held by Adjournment at *South-Kingstown*, upon the last Monday in *February*, One Thousand Seven Hundred and Fifty-six, *in Rhode Island Acts and Resolves*, Volume 2, at {66}; An Act for raising one-sixth part of the militia in this colony, to proceed immediately to Albany, to join the forces which have marched, to oppose the French, near Lake George, *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Newport, on the* 10*th day of August*, 1757, *in Rhode Island Records*, Volume 6, at 75; An ACT, regulating the Militia in this Colony, *in Public Laws of Rhode Island, 1767*, at 183, 185, 187; AN ACT establishing an Independent Company, by the Name of *The Light-Infantry* for the County of *Providence*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, by Adjournment, at *Newport*, within and for the said Colony, on the Second Monday in *June*, One Thousand Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {38}; An ACT in addition to, and amendment of, an Act entitled "An Act regulating the Militia of this Colony["], At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {151}; *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Newport, on the second Monday in June*, 1776, *in Rhode Island Records*, Volume 7, at 567; *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Newport, on the second Monday in June*, 1776, *in Rhode Island Records*, Volume 7, at 568-569, 575; *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on the first Monday of September*, 1776, *in Rhode Island Records*, Volume 7, at 608; *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at East Greenwich, on Tuesday, the* 10*th day of December*, 1776, *in Rhode Island Records*, Volume 8, at 67; At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island* and *Providence Plantations*, begun and holden, by Adjournment, at *Providence*, within and for the said State, on Monday the Twenty-third Day of *December*, One Thousand, Seven Hundred and Seventy-six, *in Rhode Island Acts and Resolves*, Volume 8 [9], at {15}; *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at South Kingstown, on Thursday, the* 17*th day of April*, 1777, *in Rhode Island Records*, Volume 8, at 197; An Act in addition to an act, entitled "An act for the relief of persons of tender consciences; and for preventing their being burthened with military duty", *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at South Kingstown, on Thursday, the* 17*th day of April*, 1777, *in Rhode Island Records*, Volume 8, at 207; *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at Providence, on the first Wednesday in May*, 1777, *in Rhode Island Records*, Volume 8, at 226; *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at Providence, on Monday, the* 7*th day of July*, 1777, *in Rhode Island Records*, Volume 8, at 278; At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden (in Consequence of Warrants issued by his Excellency the Governor) at *Providence*, within and for the State aforesaid, on *Monday* the Seventh Day of *July*, One Thousand Seven Hundred and Seventy-seven, *in Rhode Island Acts and Resolves*, Volume 9 [10], at {5-6}; AT the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island* and *Providence Plantations*, begun and holden, by Adjournment, at *South-Kingstown*, within and for the State aforesaid, on Monday the Twenty-second Day of *September*, One Thousand Seven Hundred and Seventy-seven, *in Rhode Island Acts and Resolves*, Volume 9 [10], at {8}; *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at Providence, on Monday, the* 27*th day of October*, 1777, *in Rhode Island Records*, Volume 8, at 317; An ACT for the better forming, regulating and conducting the military Force of this State, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {32-35}; *Proceedings of the General Assembly of the State of Rhode Island and Providence Plantations, at East Greenwich, on the last Monday in February*,

1780, *in Rhode Island Records*, Volume 9, at 7; *Proceedings of the General Assembly of the State of Rhode Island and Providence Plantations, at South Kingstown, on the second Monday in June*, 1780, *in Rhode Island Records*, Volume 9, at 94; An ACT for embodying and bringing into the Field Twelve Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and no longer Term, and not to be marched out of the same, At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden (by Adjournment) at *South-Kingstown*, within and for the State aforesaid, on the Fourth *Monday* in *February*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {5- 6}; An ACT in Addition to, and Amendment of, an Act, passed in *October*, A.D. 1779, entituled, "An Act for the better forming, regulating and conducting, the military Force of this State", At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence-Plantations*, begun and holden, by Adjournment, at *South-Kingstown*, within and for the said State, on the Third *Monday* in *March*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {51}; *Proceedings of the General Assembly of the State of Rhode Island and Providence Plantations, at Providence, on the fourth Monday in May*, 1781, *in Rhode Island Records*, Volume 9, at 404-410, 412; An ACT for incorporating and bringing into the Field Five Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and no longer, and not to be marched out of the same, AT the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden, by Adjournment, at *Providence*, within and for the State aforesaid, on the Fourth *Monday* in *May*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {12-13}; *Proceedings of the General Assembly of the State of Rhode Island and Providence Plantations, at Providence, on Tuesday, July 3d*, 1781, *in Rhode Island Records*, Volume 9, at 438; An ACT for incorporating and bringing into the Field Five Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and for no longer Term, and not to be marched out of the same, At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden by Adjournment at *Newport*, within and for the said State, on the Third *Monday* in *August*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {40}; *Proceedings of the General Assembly of the State of Rhode Island and Providence Plantations, at Providence, on the last Monday in January*, 1782, *in Rhode Island Records*, Volume 9, at 508.

EN-394 — *Acts and Orders of the Generall Assembly, sitting at Newport, May the* 3, 1665, *in Rhode Island Records*, Volume 2, at 115.

EN-395 — *Proceedings of the Generall Assembly held for the Collony of Rhode Island and Providence Plantations at Newport, the* 1*st of May*, 1677, *in Rhode Island Records*, Volume 2, at 570.

EN-396 — [Number] 30, At a Generall Meeting upon Publicke notice, the 5th of the 9th month, 1638, *in Rhode Island Records*, Volume 1, at 61 (Town of Portsmouth).

EN-397 — An Act for the Repealing several Laws relating to the Militia within this Colony, and for further Regulation of the same, LAWS Made and Past by the General Assembly of His Majesties Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, begun and Held at *Newport*, the Seventh Day of *May*, 1718, and Continued by Adjournments to the Ninth Day of *September* following, *in Public Laws of Rhode Island, 1719*, at 86; *in Public Laws of Rhode Island, 1730*, at 91; *and in Public Laws of Rhode Island, 1744,* at 65.

EN-398 — An ACT, regulating the Militia in this Colony, *part of* An ACT, establishing the Revisement of the Laws of this Colony, and for the putting the same in Force, *in* A LAW, Made and passed at the General Assembly of the Colony of *Rhode-Island* and *Providence Plantations*, held at *Providence* on the First Monday in *December,* 1766, *in Public Laws of Rhode Island, 1767*, at 179.

EN-399 — An ACT for the better forming, regulating and conducting the military Force of this State, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {29}.

EN-400 — [Number] 30, At a Generall Meeting upon Publicke notice, the 5th of the 9th month, 1638, *in Rhode Island Records*, Volume 1, at 61 (Town of Portsmouth).

EN-401 — [Number] 20, At the Generall Courte Held at Portsmouth on the 6th of August, 1640, *in Rhode Island Records*, Volume 1, at 104.

EN-402 — At the Generall Court of Election held on the 16th & 17th of March, att Newport, 1642, *in Rhode Island Records*, Volume 1, at 121.

EN-403 — Acts and Orders Made and agreed upon at the Generall Court of Election, held at Portsmouth, in Rhode Island, the 19, 20, 21 of May, 1647, for the Colonie and Province of Providence, *in Rhode Island Records*, Volume 1, at 153. *Continued by* [Number] 7, *The General Court of Commissioners held for the Collony, at Portsmouth, March the* 10*th*, 1657-8, *in Rhode Island Records*, Volume 1, at 370-372.

EN-404 — *Proceedings of a Meetinge of the Generall Assembly, May the fowerth*, 1664, *at Newport*, *in Rhode Island Records*, Volume 2, at 52.

EN-405 —*Acts and Orders of the Generall Assembly, sitting at Newport, May the* 3, 1665, *in Rhode Island Records*, Volume 2, at 114-115.

EN-406 — *Proceedings of the Generall Assembly of the Collony of Rhode Island and Providence Plantations, held at Newport, the 25th of October*, 1676, [Session of] *October 27th, in Rhode Island Records,* Volume 2, at 555.

EN-407 — *Proceedings of the Generall Assembly held for the Collony of Rhode Island and Providence Plantations at Newport, the* 1*st of May*, 1677, *in Rhode Island Records*, Volume 2, at 568-569.

EN-408 — An Act for the better regulating the militia, and for punishing offenders as shall not conform to the law thereunto relating, *At the Generall Assembly and Election held for the Collony at Newport, the* 7*th of May*, 1701, *in Rhode Island Records*, Volume 3, at 430-431. This statute is dated "1699" in LAWS AND ACTS OF RHODE ISLAND, AND PROVIDENCE PLANTATIONS Made from the First Settlement in 1636 to 1705, at 92, *reprinted from* J.D. Cushing, Editor, *The Earliest Acts and Laws of the Colony of Rhode Island and Providence Plantations* (Wilmington, Delaware: M. Glazier, 1977), at 107. Reprinted from a compilation dated "1705", it appears in *Military Obligation, Rhode Island*, at 37.

EN-409 — *At the Generall Assembly and Election held at Newport, the* 6*th of May*, 1702, *in Rhode Island Records*, Volume 3, at 453.

EN-410 — An Act for the Repealing several Laws relating to the Militia within this Colony, and for further Regulation of the same, LAWS Made and Past by the General Assembly of His Majesties Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, begun and Held at *Newport*, the Seventh Day of *May*, 1718, and Continued by Adjournments to the Ninth Day of *September* following, *in Public Laws of Rhode Island, 1719*, at 87-88, 90; *in Public Laws of Rhode Island, 1730*, at 93, 96; *and in Public Laws of Rhode Island, 1744,* at 68, 71.

EN-411 — An Act for the more effectual putting the Colony into a proper Posture of Defence, A LAW, Made and pass'd by the General Assembly of His Majesty's Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, held by Adjournment, at *Warwick*, the Twenty Seventh Day of *January*, 1740, *in Public Laws of Rhode Island, 1744*, at 233.

EN-412 — An ACT ordering and appointing the Militia, or train'd Bands, in this Colony, to muster twice a Year, LAWS, *Made and pass'd at a General Assembly of His Majesty's Colony of* Rhode-Island *and* Providence-Plantations *in* New-England, *held by Adjournment at* Newport, *on the fourth Tuesday of* September, 1745, *in Public Laws of Rhode Island, 1752*, at 2.

EN-413 — An ACT, regulating the Militia in this Colony, *part of* An ACT, establishing the Revisement of the Laws of this Colony, and for the putting the same in Force, *in* A LAW, Made and passed at the General Assembly of the Colony of *Rhode-Island* and *Providence Plantations*, held at *Providence* on the First Monday in *December,* 1766, *in Public Laws of Rhode Island, 1767*, at 182, 187, 188.

EN-414 — An ACT in addition to, and amendment of, an Act entitled "An Act regulating the Militia of this Colony["], At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {151}.

EN-415 — An ACT for the better forming, regulating and conducting the military Force of this State, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {34}.

EN-416 — *Acts and Orders of the Generall Assembly, sitting at Newport, May the* 3, 1665, *in Rhode Island Records*, Volume 2, at 114-115.

EN-417 — *At the Generall Assembly and Election held at Newport, the* 6*th of May*, 1702, *in Rhode Island Records*, Volume 3, at 453. For the Act of 1677, which continued the Act of 1655 in this regard, *see Proceedings of the Generall Assembly held for the Collony of Rhode Island and Providence Plantations at Newport, the* 1*st of May*, 1677, *in Rhode Island Records*, Volume 2, at 568-569.

EN-418 — An Act for enlisting one-fourth part of the militia of the colony, as minute men, *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on Wednesday, the 28th day of June*, 1775, *in Rhode Island Records*, Volume 7, at 358-361.

EN-419 — An ACT for inlisting One Fourth Part of the Militia of the Colony, as Minute-Men, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, (in Consequence of Warrants issued by his Honor the Deputy-Governor) at *Providence*, within and for the Colony aforesaid, on *Wednesday*, the Twenty-eighth Day of *June*, One Thousand Seven Hundred and Seventy-five, *in Rhode Island Acts and Resolves*, Volume 7 [8], at {78-79, 80}.

EN-420 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, the 14th day of March*, 1757, *in Rhode Island Records*, Volume 6, at 34-35.

EN-421 — An Act for raising one-sixth part of the militia in this colony, to proceed immediately to Albany, to join the forces which have marched, to oppose the French, near Lake George, *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Newport, on the 10th day of August*, 1757, *in Rhode Island Records*, Volume 6, at 75-76.

EN-422 — At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island* and *Providence Plantations*, begun and holden, by Adjournment, at *Providence*, within and for the said State, on Monday the Twenty-third Day of *December*, One Thousand, Seven Hundred and Seventy-six, *in Rhode Island Acts and Resolves*, Volume 8 [9], at {15}.

EN-423 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at South Kingstown, on Thursday, the 17th day of April*, 1777, *in Rhode Island Records*, Volume 8, at 197-198.

EN-424 — At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden (in Consequence of Warrants issued by his Excellency the Governor) at *Providence*, within and for the State aforesaid, on *Monday* the Seventh Day of *July*, One Thousand Seven Hundred and Seventy-seven, *in Rhode Island Acts and Resolves*, Volume 9 [10], at {5}.

EN-425 — At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island* and *Providence Plantations*, begun and holden, by Adjournment, at *South-Kingstown*, within and for the State aforesaid, on Monday the Twenty-second Day of *September*, One Thousand Seven Hundred and Seventy-seven, *in Rhode Island Acts and Resolves*, Volume 9 [10], at {8}.

EN-426 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at Providence, on Monday, the 27th day of October*, 1777, *in Rhode Island Records*, Volume 8, at 317.

EN-427 — An ACT for embodying and bringing into the Field Twelve Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and no longer Term, and not to be marched out of the same, At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden (by Adjournment) at *South-Kingstown*, within and for the State aforesaid, on the Fourth *Monday* in *February*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {5-7}. *Accord*, An ACT for incorporating and bringing into the Field Five Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and no longer, and not to be marched out of the same, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden, by Adjournment, at *Providence*, within and for the State aforesaid, on the Fourth *Monday* in *May*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {11-13}; *and* An ACT for incorporating and bringing into the Field Five Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and for no longer Term, and not to be marched out of the same, At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden by Adjournment at *Newport*, within and for the said State, on the Third *Monday* in *August*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {39-41}.

EN-428 — An ACT for inlisting One Fourth Part of the Militia of the Colony, as Minute-Men, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*; begun and holden, (in Consequence of Warrants issued by his Honor the Deputy-Governor) at *Providence*, within and for the Colony aforesaid, on *Wednesday*, the Twenty-eighth Day of *June*, One Thousand Seven Hundred and Seventy-five, *in Rhode Island Acts and Resolves*, Volume 7 [8], at {80}.

EN-429 — *Acts, Orders and Proceedings of the Governor and Councill of His Majestys Collony of Rhode Island and Providence Plantations, held at Newport, May,* 1667, *in Rhode Island Records*, Volume 2, at 192-193.

EN-430 — At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden (by Adjournment) at *Providence*, within and for the State aforesaid, on the first *Monday* in *July*, One Thousand Seven Hundred and Eighty, *in Rhode Island Acts and Resolves*, Volume 10 [13], at {6-7, 9}. *Accord*, An ACT for raising Six Hundred and Thirty able-bodied effective Men, At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden (by Adjournment) at *Newport*, within and for the State aforesaid, on the Third *Monday* in *July*, One Thousand Seven Hundred and Eighty, *in Rhode Island Acts and Resolves*, Volume 10 [13], at {28-31}.

EN-431 — An ACT for filling up and completing this State's Quota of the Continental Army, At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden by Adjournment, at *East-Greenwich*, within and for the State aforesaid, on the last *Monday* in *November*, One Thousand Seven Hundred and Eighty, *in Rhode Island Acts and Resolves*, Volume 10 [13], at {35, 37-38}.

EN-432 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at South Kingstown, on Thursday, the* 17*th day of April*, 1777, *in Rhode Island Records*, Volume 8, at 197-198.

EN-433 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at East Greenwich, on Monday, the* 1*st day of December,* 1777, *in Rhode Island Records,* Volume 8, at 333-334.

EN-434 — An ACT for embodying and bringing into the Field Twelve Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and no longer Term, and not to be marched out of the same, At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden (by Adjournment) at *South-Kingstown*, within and for the State aforesaid, on the Fourth *Monday* in *February*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {7}. *Accord,* An ACT for incorporating and bringing into the Field Five Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and no longer, and not to be marched out of the same, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden, by Adjournment, at *Providence*, within and for the State aforesaid, on the Fourth *Monday* in *May*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {14}; *and* An ACT for incorporating and bringing into the Field Five Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and for no longer Term, and not to be marched out of the same, At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden by Adjournment at *Newport*, within and for the said State, on the Third *Monday* in *August*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {41}.

EN-435 — AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden, by Adjournment, at *Providence*, within and for the State aforesaid, on the Fourth *Monday* in *May*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {32}.

EN-436 — An Act in addition to an act, entituled "An act for the relief of persons of tender consciences; and for preventing their being burthened with military duty", *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at South Kingstown, on Thursday, the* 17*th day of April*, 1777, *in Rhode Island Records*, Volume 8, at 206-207.

EN-437 — An Act for the Repealing several Laws relating to the Militia within this Colony, and for further Regulation of the same, LAWS Made and Past by the General Assembly of His Majesties Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, begun and Held at *Newport*, the Seventh Day of *May*, 1718, and Continued by Adjournments to the Ninth Day of *September* following, *in Public Laws of Rhode Island, 1719,* at 89; *in Public Laws of Rhode Island, 1730*, at 94-95; *and in Public Laws of Rhode Island, 1744,* at 69.

EN-438 — An ACT, regulating the Militia in this Colony, *part of* An ACT, establishing the Revisement of the Laws of this Colony, and for the putting the same in Force, *in* A LAW, Made and passed at the General Assembly of the Colony of *Rhode-Island* and *Providence Plantations*, held at *Providence* on the First Monday in *December,* 1766, *in Public Laws of Rhode Island, 1767*, at 185.

EN-439 — An ACT for the better forming, regulating and conducting the military Force of this State, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {35}.

EN-440 — At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden by Adjournment, at *Providence*, within and for the State aforesaid, on the First *Monday* in *February*, One Thousand Seven Hundred and Seventy-seven, *in Rhode Island Acts and Resolves*, Volume 8 [10], at {10}.

EN-441 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at South Kingstown, on Thursday, the 17th day of April*, 1777, *in Rhode Island Records*, Volume 8, at 197-198 (emphasis supplied).

EN-442 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Newport, the 6th day of May*, 1713, *in Rhode Island Records*, Volume 4, at 149 (emphasis supplied).

EN-443 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at Providence, on the first Wednesday in May*, 1777, *in Rhode Island Records*, Volume 8, at 226.

EN-444 — An ACT for putting this Colony in a Posture of Defence, and for rend'ring the *Militia* in the several Towns thereof, more Useful in Time of an *Actual Invasion*, LAWS, Made and pass'd by the General Assembly of His Majesty's Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*; held by Adjournment, at *Newport*, the Twenty Second Day of *May*, 1744, *in Public Laws of Rhode Island, 1744*, at 289. *Accord*, An ACT, regulating the Militia in this Colony, *part of* An ACT, establishing the Revisement of the Laws of this Colony, and for the putting the same in Force, *in* A LAW, Made and passed at the General Assembly of the Colony of *Rhode-Island* and *Providence Plantations*, held at *Providence* on the First Monday in *December,* 1766, *in Public Laws of Rhode Island, 1767*, at 186 (monetary fine of "Twelve Pounds").

EN-445 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at East Greenwich, on Tuesday, the 10th day of December*, 1776, *in Rhode Island Records*, Volume 8, at 67.

EN-446 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at East Greenwich, on the second Monday in September*, 1779, *in Rhode Island Records*, Volume 8, at 595.

EN-447 — An Act for purchasing Two Thousand Arms for the Colony, &c., At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden (in Consequence of Warrants issued by his Honor the Governor) at *East-Greenwich*, within and for the said Colony, on *Monday* the Eighteenth Day of *March*, One Thousand Seven Hundred and Seventy-six, *in Rhode Island Acts and Resolves*, Volume 8 [9], at {303, 304-305}.

EN-448 — At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island* and *Providence Plantations*, begun and holden, by Adjournment, at *Providence*, within and for the said State, on Monday the Twenty-third Day of *December*, One Thousand, Seven Hundred and Seventy-six, *in Rhode Island Acts and Resolves*, Volume 8 [9], at {15, 16}.

EN-449 — AT the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island* and *Providence Plantations*, begun and holden, by Adjournment, at *South-Kingstown*, within and for the State aforesaid, on Monday the Twenty-second Day of *September*, One Thousand Seven Hundred and Seventy-seven, *in Rhode Island Acts and Resolves*, Volume 9 [10], at {8, 9}.

EN-450 — At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden (in Consequence of Warrants issued by his Excellency the Governor) at *Providence*, within and for the State aforesaid, on *Monday* the Seventh Day of *July*, One Thousand Seven Hundred and Seventy-seven, *in Rhode Island Acts and Resolves*, Volume 9 [10], at {5, 6}.

EN-451 — An ACT for the better forming, regulating and conducting the military Force of this State, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {32-33}.

EN-452 — An ACT for the better forming, regulating and conducting the military force of this State, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {32-33}.

EN-453 — *E.g.,* An ACT establishing an Independent Company, in the County of *Newport*, by the Name of the *Newport* LIGHT-INFANTRY, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*; begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {93-97}.

EN-454 — *E.g.,* An ACT establishing an Independent Troop of Horse in the County of *Providence*, by the Name of the *Captain-General's Cavaliers* for the County of *Providence*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden (in Consequence of Warrants issued by his Honor the Deputy-Governor) at *Providence*, within and for the Colony aforesaid, on *Tuesday* the Thirty-first Day of *October*, One Thousand Seven Hundred and Seventy-five, *in Rhode Island Acts and Resolves*, Volume 7 [8], at {144-147}.

EN-455 — *E.g.,* An ACT for erecting an ARTILLERY COMPANY in the Towns of *Westerly* and *Charlestown*, At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, in AMERICA; begun (in Consequence of Warrants issued by his Honor the Governor) and held at *Providence*, on Wednesday the first of *January*, One Thousand Seven Hundred and Fifty-five, *in Rhode Island Acts and Resolves*, Volume 2, at {63-65}.

EN-456 — An ACT for erecting an ARTILLERY COMPANY in the Towns of *Westerly* and *Charlestown*, At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, in AMERICA; begun and held (in Consequence of Warrants issued by his Honour the Governor) and held at *Providence*, on Wednesday the first of *January*, One Thousand Seven Hundred and Fifty-five, *in Rhode Island Acts and Resolves*, Volume 2, at {63}.

EN-457 — AN ACT establishing an Independent Company, by the Name of *The Light-Infantry* for the County of *Providence*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, by Adjournment, at *Newport*, within and for the said Colony, on the Second Monday in *June*, One Thousand Seven Hundred and Seventy-Four, *in Rhode Island Acts and Resolves*, Volume 7, at {36-37}. *Accord*, An ACT establishing an Independent Company, in the County of *Newport*, by the Name of the *Newport* LIGHT-INFANTRY, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {94}; An ACT establishing an Independent Company, by the Name of the *Pawtuxet* Rangers, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {105}; An ACT establishing a Military Company, by the Name of the *Scituate Hunters*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {128}; An ACT for establishing a Military Company, by the Name of the *Train of Artillery*, in the County of *Providence*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {134}; AN ACT establishing a Military Company, by the Name of the *Providence Fusiliers*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {138}; An ACT establishing an Independent Company in the County of *King's County*, by the Name of the *Kingston Reds*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden (in Consequence of Warrants issued by his Honor the Deputy-Governor) at *Providence*, within and for the Colony aforesaid, on *Tuesday*, the Thirty-first Day of *October*, One Thousand Seven Hundred and Seventy-five, *in Rhode Island Acts and Resolves*, Volume 7 [8], at {141}; An ACT establishing an Independent Troop of Horse in the County of *Providence*, by the Name of the *Captain-General's Cavaliers* for the County of *Providence*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden (in Consequence of Warrants issued by his Honor the Deputy-Governor) at *Providence*, within and for the Colony aforesaid, on *Tuesday*, the Thirty-first Day of *October*, One Thousand Seven Hundred and Seventy-five, *in Rhode Island Acts and Resolves*, Volume 7 [8], at {144}; AN ACT establishing an Independent Company by the Name of the *Smithfield* and *Cumberland* RANGERS, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden at *Newport*, within and for the said Colony, on the First Wednesday in *May*, One Thousand, Seven Hundred and Seventy-six, *in Rhode Island Acts and Resolves*, Volume 8 [9], at {16-17}.

EN-458 — An ACT establishing a Company, in the Town of *Providence*, to be called, and known by, the Name of the *Providence Grenadier* Company, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {97-98}.

EN-459 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on the last Wednesday in October,* 1774, *in Rhode Island Records,* Volume 7, at 257-258.

EN-460 — An ACT, regulating the Militia in this Colony, *in Public Laws of Rhode Island, 1767*, at 189-190. This Act was part of An ACT, establishing the Revisement of the Laws of this Colony, and for the putting the same in Force, *in* A LAW, Made and passed at the General Assembly of the Colony of *Rhode-Island* and *Providence Plantations*, held at *Providence* on the First Monday in *December,* 1766, *in Public Laws of Rhode Island, 1767*, at 3-5.

EN-461 —An ACT for the better forming, regulating and conducting the military Force of this State, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {38}.

EN-462 — An ACT establishing a Military Company, by the Name of the *Scituate Hunters*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {130}.

EN-463 — An ACT for establishing a Military Company, by the Name of the *Train of Artillery*, in the County of *Providence*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {136}. *Accord*, AN ACT incorporating a Military Company, by the Name of the *North-Providence Rangers*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {147}.

EN-464 — AN ACT establishing a Military Company, by the Name of the *Providence Fusiliers*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England* in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {141}.

EN-465 — AN ACT establishing an Independent Company, by the Name of *The Light-Infantry* for the County of *Providence*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, by Adjournment, at *Newport*, within and for the said Colony, on the Second Monday in *June*, One Thousand Seven Hundred and Seventy-Four, *in Rhode Island Acts and Resolves*, Volume 7, at {36}. *Accord*, An ACT establishing an Independent Company, in the County of *Newport*, by the Name of the *Newport* LIGHT-INFANTRY, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {93-94}; AN ACT establishing an Independent Company, by the Name of the *Kentish* Guards, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {101}; An ACT establishing an Independent Company, by the Name of the *Pawtuxet* Rangers, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {104}; An ACT establishing a Military Company, by the Name of the *Scituate Hunters*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7,

at {127-128}; AN ACT establishing a Military Company, by the Name of the *Providence Fusiliers*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {138}; An ACT for establishing an Independent Company in the County of *King's County*, by the Name of the *Kingston Reds*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden (in Consequence of Warrants issued by his Honor the Deputy-Governor) at *Providence*, within and for the Colony aforesaid, on *Tuesday*, the Thirty-first Day of *October*, One Thousand Seven Hundred and Seventy-five, *in Rhode Island Acts and Resolves*, Volume 7 [8], at {141}; An ACT establishing an Independent Troop of Horse in the County of *Providence*, by the Name of the *Captain-General's Cavaliers* for the County of *Providence*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden (in Consequence of Warrants issued by his Honor the Deputy-Governor) at *Providence*, within and for the Colony aforesaid, on *Tuesday*, the Thirty-first Day of *October*, One Thousand Seven Hundred and Seventy-five, *in Rhode Island Acts and Resolves*, Volume 7 [8], at {144}; AN ACT establishing an Independent Company by the Name of the *Smithfield* and *Cumberland* RANGERS, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden at *Newport*, within and for the said Colony, on the First Wednesday in *May*, One Thousand, Seven Hundred and Seventy-six, *in Rhode Island Acts and Resolves*, Volume 8 [9], at {15}.

EN-466 — An ACT for establishing a Military Company, by the Name of the *Train of Artillery*, in the County of *Providence*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {133}.

EN-467 — AN ACT establishing an Independent Company, by the Name of the Company of *Light-Infantry*, of the Town of *Gloucester*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {121-122}.

EN-468 — An ACT for erecting an ARTILLERY COMPANY in the Towns of *Westerly* and *Charlestown*, At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, in AMERICA; begun (in Consequence of Warrants issued by his Honour the Governor) and held at *Providence*, on Wednesday the first of *January*, One Thousand Seven Hundred and Fifty-five, *in Rhode Island Acts and Resolves*, Volume 2, at {63}. *Accord*, An ACT for establishing an Independent Company in the County of *King's County*, by the Name of the *Kingston Reds*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden (in Consequence of Warrants issued by his Honor the Deputy-Governor) at *Providence*, within and for the Colony aforesaid, on *Tuesday*, the Thirty-first Day of *October*, One Thousand Seven Hundred and Seventy-five, *in Rhode Island Acts and Resolves*, Volume 7 [8], at {141}.

EN-469 — AN ACT establishing an Independent Company, by the Name of *The Light-Infantry* for the County of *Providence*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, by Adjournment, at *Newport*, within and for the said Colony, on the Second Monday in *June*, One Thousand Seven Hundred and Seventy-Four, *in Rhode Island Acts and Resolves*, Volume 7, at {36}. *Accord*, An ACT establishing an Independent Company, in the County of *Newport*, by the Name of the *Newport* LIGHT-INFANTRY, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {94}; AN ACT establishing an Independent Company, by the Name of the *Kentish* Guards, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {102}; An ACT establishing an Independent Company, by the Name of the *Pawtuxet* Rangers, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {105}; An ACT establishing a Military Company, by the Name

of the *Scituate Hunters*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {128}; An ACT for establishing a Military Company, by the Name of the *Train of Artillery*, in the County of *Providence*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {134}; AN ACT establishing a Military Company, by the Name of the *Providence Fusiliers*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {138}; An ACT establishing an Independent Troop of Horse in the County of *Providence*, by the Name of the *Captain-General's Cavaliers* for the County of *Providence*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden (in Consequence of Warrants issued by his Honor the Deputy-Governor) at *Providence*, within and for the Colony aforesaid, on *Tuesday*, the Thirty-first Day of *October*, One Thousand Seven Hundred and Seventy-five, *in Rhode Island Acts and Resolves*, Volume 7 [8], at {144}; AN ACT establishing an Independent Company by the Name of the *Smithfield* and *Cumberland* RANGERS, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden at *Newport*, within and for the said Colony, on the First Wednesday in *May*, One Thousand, Seven Hundred and Seventy-six, *in Rhode Island Acts and Resolves*, Volume 8 [9], at {16}.

EN-470 — An ACT for erecting an ARTILLERY COMPANY in the Towns of *Westerly* and *Charlestown*, At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, in AMERICA; begun (in Consequence of Warrants issued by his Honour the Governor) and held at *Providence*, on Wednesday the first of *January*, One Thousand Seven Hundred and Fifty-five, *in Rhode Island Acts and Resolves*, Volume 2, at {63} (25 named men); At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, in AMERICA; begun and held by Adjournment at *South-Kingstown*, upon the last Monday in *February*, One Thousand Seven Hundred and Fifty-Six, *in Rhode Island Acts and Resolves*, Volume 2, at {66} (30 named men); AN ACT establishing an Independent Company, by the Name of *The Light-Infantry* for the County of *Providence*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, by Adjournment, at *Newport*, within and for the said Colony, on the Second Monday in *June*, One Thousand Seven Hundred and Seventy-Four, *in Rhode Island Acts and Resolves*, Volume 7, at {36} (16 named men); An ACT establishing an Independent Company, in the County of *Newport*, by the Name of the *Newport* LIGHT-INFANTRY, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {94} (40 named men); An ACT establishing a Company, in the Town of Providence, to be called, and known by, the Name of the *Providence Grenadier* Company, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {97} (2 named men and other unnamed "Freemen, and Inhabitants, of the Town of *Providence*"); AN ACT establishing an Independent Company, by the Name of the *Kentish* Guards, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {101} (38 named men); An ACT establishing an Independent Company, by the Name of the *Pawtuxet* Rangers, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {104-105} (50 named men); AN ACT establishing an Independent Company, by the Name of the Company of *Light-Infantry*, of the Town of *Gloucester*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {122} (14 named men); An ACT establishing a Military Company, by the Name of the *Scituate Hunters*, At the GENERAL ASSEMBLY of the

GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {128} (28 named men); An ACT for establishing a Military Company, by the Name of the *Train of Artillery*, in the County of *Providence*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England* in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {133} (7 named men); AN ACT establishing a Military Company, by the Name of the *Providence Fusiliers*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {138} (17 named men); An ACT for establishing an Independent Company in the County of *King's County*, by the Name of the *Kingston Reds*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden (in Consequence of Warrants issued by his Honor the Deputy-Governor) at *Providence*, within and for the Colony aforesaid, on *Tuesday*, the Thirty-first Day of *October*, One Thousand Seven Hundred and Seventy-five, *in Rhode Island Acts and Resolves*, Volume 7 [8], at {141} (31 named men); An ACT establishing an Independent Troop of Horse in the County of *Providence*, by the Name of the *Captain-General's Cavaliers* for the County of *Providence*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden (in Consequence of Warrants issued by his Honor the Deputy-Governor) at *Providence*, within and for the Colony aforesaid, on *Tuesday*, the Thirty-first Day of *October*, One Thousand Seven Hundred and Seventy-five, *in Rhode Island Acts and Resolves*, Volume 7 [8], at {144} (18 named men); AN ACT establishing an Independent Company by the Name of the *Smithfield* and *Cumberland* RANGERS, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden at *Newport*, within and for the said Colony, on the First Wednesday in *May*, One Thousand, Seven Hundred and Seventy-six, *in Rhode Island Acts and Resolves*, Volume 8 [9], at {15-16} (93 named individuals).

EN-471 — An ACT establishing a Military Company, by the Name of the *Scituate Hunters*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {128}. *Accord*, An ACT establishing an Independent Troop of Horse in the County of *Providence*, by the Name of the *Captain-General's Cavaliers* for the County of *Providence*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden (in Consequence of Warrants issued by his Honor the Deputy-Governor) at *Providence*, within and for the Colony aforesaid, on *Tuesday*, the Thirty-first Day of *October*, One Thousand Seven Hundred and Seventy-five, *in Rhode Island Acts and Resolves*, Volume 7 [8], at {144}.

EN-472 — An ACT for erecting an ARTILLERY COMPANY in the Towns of *Westerly* and *Charlestown*, At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England* in AMERICA; begun (in Consequence of Warrants issued by his Honour the Governor) and held at *Providence*, on Wednesday the first of *January*, One Thousand Seven Hundred and Fifty-five, *in Rhode Island Acts and Resolves*, Volume 2, at {63}.

EN-473 — AN ACT establishing an Independent Company, by the Name of *The Light-Infantry* for the County of *Providence*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, by Adjournment, at *Newport*, within and for the said Colony, on the Second Monday in *June*, One Thousand Seven Hundred and Seventy-Four, *in Rhode Island Acts and Resolves*, Volume 7, at {36}. *Accord*, An ACT establishing an Independent Company, in the County of *Newport*, by the Name of the *Newport* LIGHT-INFANTRY, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {94}; An ACT for establishing a Military Company, by the Name of the *Train of Artillery*, in the County of *Providence*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and*

Resolves, Volume 7, at {134}; An ACT establishing a Military Company, by the Name of the *Providence Fusiliers*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {138}; AN ACT establishing an Independent Company by the Name of the *Smithfield* and *Cumberland* RANGERS, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden at *Newport*, within and for the said Colony, on the First Wednesday in *May*, One Thousand, Seven Hundred and Seventy-six, *in Rhode Island Acts and Resolves*, Volume 8 [9], at {16}.

EN-474 — AN ACT establishing an Independent Company, by the Name of the *Kentish* Guards, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {102}. *Accord*, An ACT establishing an Independent Company, by the Name of the *Pawtuxet* Rangers, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {105}; An ACT establishing an Independent Company in the County of *King's County*, by the Name of the *Kingston Reds*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden (in Consequence of Warrants issued by his Honor the Deputy-Governor) at *Providence*, within and for the Colony aforesaid, on *Tuesday*, the Thirty-first Day of *October*, One Thousand Seven Hundred and Seventy-five, *in Rhode Island Acts and Resolves*, Volume 7 [8], at {141}.

EN-475 — An ACT establishing a Company, in the Town of Providence, to be called, and known by, the Name of the *Providence Grenadier* Company, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {98, 99}.

EN-476 — AN ACT incorporating a Military Company, by the Name of the *North-Providence Rangers*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {147}.

EN-477 — AN ACT establishing an Independent Company, by the Name of the Company of *Light-Infantry*, of the Town of *Gloucester*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {122}.

EN-478 — AN ACT incorporating a Military Company, by the Name of the *North-Providence Rangers*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {146}.

EN-479 — At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, in AMERICA; begun and held by Adjournment at *South-Kingstown*, upon the last Monday in *February*, One Thousand Seven Hundred and Fifty-Six, *in Rhode Island Acts and Resolves*, Volume 2, at {66}.

EN-480 — An ACT for erecting an ARTILLERY COMPANY in the Towns of *Westerly* and *Charlestown*, At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, in AMERICA; begun (in Consequence of Warrants issued by his Honour the Governor) and held at *Providence*, on Wednesday the first of *January*, One Thousand Seven Hundred and Fifty-five, *in Rhode Island Acts and Resolves*, Volume 2, at {64}. *Accord*, AN ACT establishing an Independent Company, by the Name of *The Light-Infantry* for the County of *Providence*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, by Adjournment, at *Newport*, within and for the said Colony, on the Second Monday in *June*, One Thousand Seven Hundred and Seventy-Four, *in Rhode Island Acts and Resolves*, Volume 7, at {37}; An ACT establishing an Independent Company, in the County of *Newport*, by the Name of the

Newport LIGHT-INFANTRY, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {94-95}; AN ACT establishing an Independent Company, by the Name of the *Kentish* Guards, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {102}; An ACT establishing an Independent Company, by the Name of the *Pawtuxet* Rangers, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {105}; An ACT establishing a Military Company, by the Name of the *Scituate Hunters*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {128-129}; An ACT for establishing a Military Company, by the Name of the *Train of Artillery*, in the County of *Providence*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {134}; AN ACT establishing a Military Company, by the Name of the *Providence Fusiliers*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {139}; An ACT establishing an Independent Company in the County of *King's County*, by the Name of the *Kingston Reds*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden (in Consequence of Warrants issued by his Honor the Deputy-Governor) at *Providence*, within and for the Colony aforesaid, on *Tuesday*, the Thirty-first Day of *October*, One Thousand Seven Hundred and Seventy-five, *in Rhode Island Acts and Resolves*, Volume 7 [8], at {141-142}; An ACT establishing an Independent Troop of Horse in the County of *Providence*, by the Name of the *Captain-General's Cavaliers* for the County of *Providence*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden (in Consequence of Warrants issued by his Honor the Deputy-Governor) at *Providence*, within and for the Colony aforesaid, on *Tuesday*, the Thirty-first Day of *October*, One Thousand Seven Hundred and Seventy-five, *in Rhode Island Acts and Resolves*, Volume 7 [8], at {144}; AN ACT establishing an Independent Company by the Name of the *Smithfield* and *Cumberland* RANGERS, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden at *Newport*, within and for the said Colony, on the First Wednesday in *May*, One Thousand, Seven Hundred and Seventy-six, *in Rhode Island Acts and Resolves*, Volume 8 [9], at {17}.

EN-481 — An ACT establishing a Company, in the Town of Providence, to be called, and known by, the Name of the *Providence Grenadier* Company, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {98}.

EN-482 — AN ACT incorporating a Military Company, by the Name of the *North-Providence Rangers*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {146}.

EN-483 — An ACT for erecting an ARTILLERY COMPANY in the Towns of *Westerly* and *Charlestown*, At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, in AMERICA; begun (in Consequence of Warrants issued by his Honour the Governor) and held at *Providence*, on Wednesday the first of *January*, One Thousand Seven Hundred and Fifty-five, *in Rhode Island Acts and Resolves*, Volume 2, at {64}. *Accord*, AN ACT establishing an Independent Company, by the Name of *The Light-Infantry* for the County of *Providence*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, by Adjournment, at *Newport*, within and for the said Colony, on the Second

Monday in *June*, One Thousand Seven Hundred and Seventy-Four, *in Rhode Island Acts and Resolves*, Volume 7, at {37}; An ACT establishing an Independent Company, in the County of *Newport*, by the Name of the *Newport* LIGHT-INFANTRY, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {95}; AN ACT establishing an Independent Company, by the Name of the *Kentish* Guards, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {102}; An ACT establishing an Independent Company, by the Name of the *Pawtuxet* Rangers, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {105-106}; An ACT establishing an Independent Company in the County of *King's County*, by the Name of the *Kingston Reds*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden (in Consequence of Warrants issued by his Honor the Deputy-Governor) at *Providence*, within and for the Colony aforesaid, on *Tuesday*, the Thirty-first Day of *October*, One Thousand Seven Hundred and Seventy-five, *in Rhode Island Acts and Resolves*, Volume 7 [8], at {142}; An ACT establishing an Independent Troop of Horse in the County of *Providence*, by the Name of the *Captain-General's Cavaliers* for the County of *Providence*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden (in Consequence of Warrants issued by his Honor the Deputy-Governor) at *Providence*, within and for the Colony aforesaid, on *Tuesday*, the Thirty-first Day of *October*, One Thousand Seven Hundred and Seventy-five, *in Rhode Island Acts and Resolves*, Volume 7 [8], at {145}; AN ACT establishing an Independent Company by the Name of the *Smithfield* and *Cumberland* RANGERS, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden at *Newport*, within and for the said Colony, on the First Wednesday in *May*, One Thousand, Seven Hundred and Seventy-six, *in Rhode Island Acts and Resolves*, Volume 8 [9], at {17}.

EN-484 — An ACT establishing a Company, in the Town of Providence, to be called, and known by, the Name of the *Providence Grenadier* Company, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {99-100}.

EN-485 — An ACT incorporating a Military Company, by the Name of the *North-Providence Rangers*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {147}.

EN-486 — An ACT for erecting an ARTILLERY COMPANY in the Towns of *Westerly* and *Charlestown*, At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, in AMERICA; begun (in Consequence of Warrants issued by his Honour the Governor) and held at *Providence*, on Wednesday the first of *January*, One Thousand Seven Hundred and Fifty-five, *in Rhode Island Acts and Resolves*, Volume 2, at {63}.

EN-487 — An ACT incorporating a Military Company, by the Name of the *North-Providence Rangers*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {147}.

EN-488 — An ACT for erecting an ARTILLERY COMPANY in the Towns of *Westerly* and *Charlestown*, At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, in AMERICA; begun (in Consequence of Warrants issued by his Honour the Governor) and held at *Providence*, on Wednesday the first of *January*, One Thousand Seven Hundred and Fifty-five, *in Rhode Island Acts and Resolves*, Volume 2, at {64}. *Accord*, AN ACT establishing an Independent Company, by the Name of *The Light-Infantry* for the County of *Providence*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, by Adjournment, at *Newport*, within and for the said Colony, on the Second Monday in *June*, One Thousand Seven Hundred and Seventy-Four, *in Rhode Island Acts and Resolves*, Volume 7, at {38} (twelve shillings); An ACT establishing an Independent Company, in the County of *Newport*, by

the Name of the *Newport* LIGHT-INFANTRY, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {95-96} (twelve shillings); An ACT establishing a Military Company, by the Name of the *Scituate Hunters*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {129} (twelve shillings); An ACT for establishing a Military Company, by the Name of the *Train of Artillery*, in the County of *Providence*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {135} (twelve shillings); AN ACT establishing a Military Company, by the Name of the *Providence Fusiliers*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {139-140} (twelve shillings); An ACT establishing an Independent Troop of Horse in the County of *Providence*, by the Name of the *Captain-General's Cavaliers* for the County of *Providence*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden (in Consequence of Warrants issued by his Honor the Deputy-Governor) at *Providence*, within and for the Colony aforesaid, on *Tuesday*, the Thirty-first Day of *October*, One Thousand Seven Hundred and Seventy-five, *in Rhode Island Acts and Resolves*, Volume 7 [8], at {145-146} (twenty shillings); AN ACT establishing an Independent Company by the Name of the *Smithfield* and *Cumberland* RANGERS, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden at *Newport*, within and for the said Colony, on the First Wednesday in *May*, One Thousand, Seven Hundred and Seventy-six, *in Rhode Island Acts and Resolves*, Volume 8 [9], at {17-18} (twelve shillings).

EN-489 — An ACT establishing a Company, in the Town of Providence, to be called, and known by, the Name of the *Providence Grenadier* Company, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {99}.

EN-490 — AN ACT establishing an Independent Company, by the Name of the *Kentish* Guards, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {103}. *Accord*, An ACT establishing an Independent Company, by the Name of the *Pawtuxet* Rangers, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {106}; An ACT establishing an Independent Company in the County of *King's County*, by the Name of the *Kingston Reds*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden (in Consequence of Warrants issued by his Honor the Deputy-Governor) at *Providence*, within and for the Colony aforesaid, on *Tuesday*, the Thirty-first Day of *October*, One Thousand Seven Hundred and Seventy-five, *in Rhode Island Acts and Resolves*, Volume 7 [8], at {142}.

EN-491 — An ACT for augmenting the Fines laid upon the Non-attendance of the Independent Troop of Horse in the County of *Providence*, called the *Captain-General's Cavaliers*, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-Nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {16}.

EN-492 — An ACT establishing a Company, in the Town of Providence, to be called, and known by, the Name of the *Providence Grenadier* Company, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {98, 99}.

EN-493 — An ACT establishing an Independent Troop of Horse in the County of *Providence*, by the Name of the *Captain-General's Cavaliers* for the County of *Providence*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden (in Consequence of Warrants issued by his Honor the Deputy-Governor) at *Providence*, within and for the Colony aforesaid, on *Tuesday*, the Thirty-first Day of *October*, One Thousand Seven Hundred and Seventy-five, *in Rhode Island Acts and Resolves*, Volume 7 [8], at {147}.

EN-494 — At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {141}.

EN-495 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at East Greenwich, on Thursday, the* 21*st day of November,* 1776, *in Rhode Island Records*, Volume 8, at 44-45.

EN-496 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at East Greenwich, on the second Monday in September*, 1779, *in Rhode Island Records*, Volume 8, at 595.

EN-497 — An ACT for erecting an ARTILLERY COMPANY in the Towns of *Westerly* and *Charlestown*, At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England* in AMERICA; begun (in Consequence of Warrants issued by his Honour the Governor) and held at *Providence*, on Wednesday the first of *January*, One Thousand Seven Hundred and Fifty-five, *in Rhode Island Acts and Resolves*, Volume 2, at {64}. *Accord*, AN ACT establishing an Independent Company, by the Name of *The Light-Infantry* for the County of *Providence*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, by Adjournment, at *Newport*, within and for the said Colony, on the Second Monday in *June*, One Thousand Seven Hundred and Seventy-Four, *in Rhode Island Acts and Resolves*, Volume 7, at {37} (three pounds for the Captain and six shillings for common soldiers); An ACT establishing an Independent Company, in the County of *Newport*, by the Name of the *Newport* LIGHT-INFANTRY, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {95} (forty shillings for the Captain and six shillings for common soldiers); AN ACT establishing an Independent Company, by the Name of the *Kentish* Guards, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {102-103} (three pounds for the Captain and six shillings for private soldiers); An ACT establishing an Independent Company, by the Name of the *Pawtuxet* Rangers, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {106} (three pounds for the Captain and six shillings for private soldiers); An ACT establishing a Military Company, by the Name of the *Scituate Hunters*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {129} (fifty shillings for the Captain and three shillings for common soldiers); An ACT for establishing a Military Company, by the Name of the *Train of Artillery*, in the County of *Providence*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {134-135} (three pounds for the Captain and six shillings for common soldiers); AN ACT establishing a Military Company, by the Name of the *Providence Fusiliers*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {139} (two pounds for the Captain-Lieutenant and six shillings for common soldiers); An ACT establishing an Independent Company in the County of *King's County*, by the Name of the *Kingston Reds*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden (in Consequence of Warrants issued by his Honor the Deputy-

Governor) at *Providence*, within and for the Colony aforesaid, on *Tuesday*, the Thirty-first Day of *October*, One Thousand Seven Hundred and Seventy-five, *in Rhode Island Acts and Resolves*, Volume 7 [8], at {142} (forty shillings for the Captain and four shillings and sixpence for private soldiers); An ACT establishing an Independent Troop of Horse in the County of *Providence*, by the Name of the *Captain-General's Cavaliers* for the County of *Providence*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden (in Consequence of Warrants issued by his Honor the Deputy-Governor) at *Providence*, within and for the Colony aforesaid, on *Tuesday*, the Thirty-first Day of *October*, One Thousand Seven Hundred and Seventy-five, *in Rhode Island Acts and Resolves*, Volume 7 [8], at {145} (three pounds for the Captain and twelve shillings for common soldiers); AN ACT establishing an Independent Company by the Name of the *Smithfield* and *Cumberland* RANGERS, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden at *Newport*, within and for the said Colony, on the First Wednesday in *May*, One Thousand, Seven Hundred and Seventy-six, *in Rhode Island Acts and Resolves*, Volume 8 [9], at {17} (twenty shillings for the Captain and three shillings for private soldiers).

EN-498 — An ACT for erecting an ARTILLERY COMPANY in the Towns of *Westerly* and *Charlestown*, At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, in AMERICA; begun (in Consequence of Warrants issued by his Honour the Governor) and held at *Providence*, on Wednesday the first of *January*, One Thousand Seven Hundred and Fifty-five, *in Rhode Island Acts and Resolves*, Volume 2, at {63}.

EN-499 — AN ACT establishing an Independent Company, by the Name of the Company of *Light-Infantry*, of the Town of *Gloucester*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {121-122}.

EN-500 — An ACT for erecting an ARTILLERY COMPANY in the Towns of *Westerly* and *Charlestown*, At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, in AMERICA; begun (in Consequence of Warrants issued by his Honour the Governor) and held at *Providence*, on Wednesday the first of *January*, One Thousand Seven Hundred and Fifty-five, *in Rhode Island Acts and Resolves*, Volume 2, at {64}. *Accord*, AN ACT establishing an Independent Company, by the Name of *The Light-Infantry* for the County of *Providence*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, by Adjournment, at *Newport*, within and for the said Colony, on the Second Monday in *June*, One Thousand Seven Hundred and Seventy-Four, *in Rhode Island Acts and Resolves*, Volume 7, at {37}; An ACT establishing an Independent Company, in the County of *Newport*, by the Name of the *Newport* LIGHT-INFANTRY, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {95}; AN ACT establishing an Independent Company, by the Name of the *Kentish* Guards, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {102}; An ACT establishing an Independent Company, by the Name of the *Pawtuxet* Rangers, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {105}; An ACT establishing a Military Company, by the Name of the *Scituate Hunters*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {129}; An ACT for establishing a Military Company, by the Name of the *Train of Artillery*, in the County of *Providence*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {134}; AN ACT establishing a Military Company, by the Name of the *Providence Fusiliers*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7,

at {139}; An ACT establishing an Independent Company in the County of *King's County*, by the Name of the *Kingston Reds*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden (in Consequence of Warrants issued by his Honor the Deputy-Governor) at *Providence*, within and for the Colony aforesaid, on *Tuesday*, the Thirty-first Day of *October*, One Thousand Seven Hundred and Seventy-five, *in Rhode Island Acts and Resolves*, Volume 7 [8], at {142}; An ACT establishing an Independent Troop of Horse in the County of *Providence*, by the Name of the *Captain-General's Cavaliers* for the County of *Providence*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden (in Consequence of Warrants issued by his Honor the Deputy-Governor) at *Providence*, within and for the Colony aforesaid, on *Tuesday*, the Thirty-first Day of *October*, One Thousand Seven Hundred and Seventy-five, *in Rhode Island Acts and Resolves*, Volume 7 [8], at {145}; AN ACT establishing an Independent Company by the Name of the *Smithfield* and *Cumberland* RANGERS, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden at *Newport*, within and for the said Colony, on the First Wednesday in *May*, One Thousand, Seven Hundred and Seventy-six, *in Rhode Island Acts and Resolves*, Volume 8 [9], at {17}.

EN-501 — An ACT establishing a Company, in the Town of Providence, to be called, and known by, the Name of the *Providence Grenadier* Company, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {99}.

EN-502 — An ACT for erecting an ARTILLERY COMPANY in the Towns of *Westerly* and *Charlestown*, At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, in AMERICA; begun (in Consequence of Warrants issued by his Honour the Governor) and held at *Providence*, on Wednesday the first of *January*, One Thousand Seven Hundred and Fifty-five, *in Rhode Island Acts and Resolves*, Volume 2, at {64}. *Accord*, AN ACT establishing an Independent Company, by the Name of *The Light-Infantry* for the County of *Providence*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, by Adjournment, at *Newport*, within and for the said Colony, on the Second Monday in *June*, One Thousand Seven Hundred and Seventy-Four, *in Rhode Island Acts and Resolves*, Volume 7, at {38}; An ACT establishing an Independent Company, in the County of *Newport*, by the Name of the *Newport* LIGHT-INFANTRY, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {96}; AN ACT establishing an Independent Company, by the Name of the *Kentish* Guards, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {103}; An ACT establishing an Independent Company, by the Name of the *Pawtuxet* Rangers, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {106}; An ACT establishing an Independent Company in the County of *King's County*, by the Name of the *Kingston Reds*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden (in Consequence of Warrants issued by his Honor the Deputy-Governor) at *Providence*, within and for the Colony aforesaid, on *Tuesday*, the Thirty-first Day of *October*, One Thousand Seven Hundred and Seventy-five, *in Rhode Island Acts and Resolves*, Volume 7 [8], at {142-143}; An ACT establishing an Independent Troop of Horse in the County of *Providence*, by the Name of the *Captain-General's Cavaliers* for the County of *Providence*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden (in Consequence of Warrants issued by his Honor the Deputy-Governor) at *Providence*, within and for the Colony aforesaid, on *Tuesday*, the Thirty-first Day of *October*, One Thousand Seven Hundred and Seventy-five, *in Rhode Island Acts and Resolves*, Volume 7 [8], at {146}; AN ACT establishing an Independent Company by the Name of the *Smithfield* and *Cumberland* RANGERS, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden at *Newport*, within and for the said Colony, on the First Wednesday in *May*, One Thousand, Seven Hundred and Seventy-six, *in Rhode Island Acts and Resolves*, Volume 8 [9], at {18}.

EN-503 — An ACT establishing a Military Company, by the Name of the *Scituate Hunters*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {129}. *Accord*, An ACT for establishing a Military Company, by the Name of the *Train of Artillery*, in the County of *Providence*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {135}; AN ACT establishing a Military Company, by the Name of the *Providence Fusiliers*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {140}.

EN-504 — AN ACT incorporating a Military Company, by the Name of the *North-Providence Rangers*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {147}.

EN-505 — An ACT establishing a Company, in the Town of *Providence*, to be called, and known by, the Name of the *Providence Grenadier* Company, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {99}.

EN-506 — An ACT for erecting an ARTILLERY COMPANY in the Towns of *Westerly* and *Charlestown*, At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, in AMERICA; begun (in Consequence of Warrants issued by his Honour the Governor) and held at *Providence*, on Wednesday the first of *January*, One Thousand Seven Hundred and Fifty-five, *in Rhode Island Acts and Resolves*, Volume 2, at {65}. *Accord*, AN ACT establishing an Independent Company, by the Name of *The Light-Infantry* for the County of *Providence*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, by Adjournment, at *Newport*, within and for the said Colony, on the Second Monday in *June*, One Thousand Seven Hundred and Seventy-Four, *in Rhode Island Acts and Resolves*, Volume 7, at {39}; An ACT establishing an Independent Company, in the County of *Newport*, by the Name of the *Newport* LIGHT-INFANTRY, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {96-97}; AN ACT establishing an Independent Company by the Name of the *Smithfield* and *Cumberland* RANGERS, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden at *Newport*, within and for the said Colony, on the First Wednesday in *May*, One Thousand, Seven Hundred and Seventy-six, *in Rhode Island Acts and Resolves*, Volume 8 [9], at {18}.

EN-507 — AN ACT establishing an Independent Company, by the Name of the *Kentish* Guards, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {104}. *Accord*, An ACT establishing an Independent Company, by the Name of the *Pawtuxet* Rangers, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {107}; An ACT establishing an Independent Company in the County of *King's County*, by the Name of the *Kingston Reds*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden (in Consequence of Warrants issued by his Honor the Deputy-Governor) at *Providence*, within and for the Colony aforesaid, on *Tuesday*, the Thirty-first Day of *October*, One Thousand Seven Hundred and Seventy-five, *in Rhode Island Acts and Resolves*, Volume 7 [8], at {143}.

EN-508 — An ACT establishing an Independent Troop of Horse in the County of *Providence*, by the Name of the *Captain-General's Cavaliers* for the County of *Providence*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden (in Consequence of Warrants issued by his Honor the Deputy-Governor) at *Providence*, within and for the Colony aforesaid, on *Tuesday*, the Thirty-first Day of *October*, One Thousand Seven Hundred and Seventy-five, *in Rhode Island Acts and Resolves*, Volume 7 [8], at {147}.

EN-509 — At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, in AMERICA; begun and held by Adjournment at *South-Kingstown*, upon the last Monday in *February*, One Thousand Seven Hundred and Fifty-Six, *in Rhode Island Acts and Resolves*, Volume 2, at {66}.

EN-510 — AN ACT establishing an Independent Company, by the Name of the Company of *Light-Infantry*, of the Town of *Gloucester*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {122}.

EN-511 — An ACT establishing an Independent Company in the County of *King's County*, by the Name of the *Kingston Reds*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden (in Consequence of Warrants issued by his Honor the Deputy-Governor) at *Providence*, within and for the Colony aforesaid, on *Tuesday*, the Thirty-first Day of *October*, One Thousand Seven Hundred and Seventy-five, *in Rhode Island Acts and Resolves*, Volume 7 [8], at {143}. *To the same effect,* An ACT establishing an Independent Company, by the Name of the *Pawtuxet* Rangers, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {107} ("Second Independent Company").

EN-512 — An ACT establishing a Military Company, by the Name of the *Scituate Hunters*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {130}.

EN-513 — AN ACT establishing an Independent Company, by the Name of *The Light-Infantry* for the County of *Providence*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, by Adjournment, at *Newport*, within and for the said Colony, on the Second Monday in *June*, One Thousand Seven Hundred and Seventy-Four, *in Rhode Island Acts and Resolves*, Volume 7, at {39}.

EN-514 — An ACT establishing a Company, in the Town of *Providence*, to be called, and known by, the Name of the *Providence Grenadier* Company, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {99-100}.

EN-515 — AN ACT establishing an Independent Company, by the Name of the Company of *Light-Infantry*, of the Town of *Gloucester*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {122}.

EN-516 — AN ACT establishing a Military Company, by the Name of the *Providence Fusiliers*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {140}.

EN-517 — An ACT establishing an Independent Troop of Horse in the County of *Providence*, by the Name of the *Captain-General's Cavaliers* for the County of *Providence*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden (in Consequence of Warrants issued by his Honor the Deputy-Governor) at *Providence*, within and for the Colony aforesaid, on *Tuesday*, the Thirty-first Day of *October*, One Thousand Seven Hundred and Seventy-five, *in Rhode Island Acts and Resolves*, Volume 7 [8], at {146}.

EN-518 — An ACT for inlisting One Fourth Part of the Militia of the Colony, as Minute-Men, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, (in Consequence of Warrants issued by his Honor the Deputy-Governor) at *Providence*, within and for the Colony aforesaid, on *Wednesday*, the Twenty-eighth Day of *June*, One Thousand Seven Hundred and Seventy-five, *in Rhode Island Acts and Resolves*, Volume 7 [8], at {78, 80, 81} (emphasis supplied).

EN-519 — At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden by Adjournment, at *Providence*, within and for the State aforesaid, on the First *Monday* in *March*, One Thousand Seven Hundred and Seventy-seven, *in Rhode Island Acts and Resolves*, Volume 8 [10], at {10}.

EN-520 — An ACT for embodying and bringing into the Field Twelve Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and no longer Term, and not to be marched out of the same, At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence Plantations*, begun and holden (by Adjournment) at *South-Kingstown*, within and for the State aforesaid, on the Fourth *Monday* in *February*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {5, 6} (emphasis supplied). *Accord*, An ACT for incorporating and bringing into the Field Five Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and no longer, and not to be marched out of the same, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence Plantations*, begun and holden, by Adjournment, at *Providence*, within and for the State aforesaid, on the Fourth *Monday* in *May*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {11-13}; An ACT for incorporating and bringing into the Field Five Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and for no longer Term, and not to be marched out of the same, At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden by Adjournment at *Newport*, within and for the said State, on the Third *Monday* in *August*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {39-40}.

EN-521 — At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island* and *Providence Plantations*, begun and holden, by Adjournment, at *Providence*, within and for the said State, on Monday the Twenty-third Day of *December*, One Thousand, Seven Hundred and Seventy-six, *in Rhode Island Acts and Resolves*, Volume 8 [9], at {15}; *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at South Kingstown, on Thursday, the 17th day of April, 1777, in Rhode Island Records*, Volume 8, at 197-198; At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden (in Consequence of Warrants issued by his Excellency the Governor) at *Providence*, within and for the State aforesaid, on *Monday* the Seventh Day of *July*, One Thousand Seven Hundred and Seventy-seven, *in Rhode Island Acts and Resolves*, Volume 9 [10], at {5-6}; AT the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island* and *Providence Plantations*, begun and holden, by Adjournment, at *South-Kingstown*, within and for the State aforesaid, on Monday the Twenty-second Day of *September*, One Thousand Seven Hundred and Seventy-seven, *in Rhode Island Acts and Resolves*, Volume 9 [10], at {8}; *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at Providence, on Monday, the 27th day of October, 1777, in Rhode Island Records*, Volume 8, at 317-318.

EN-522 — AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden, by Adjournment, at *Providence*, within and for the State aforesaid, on the Fourth *Monday* in *May*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {32}.

EN-523 — AN ACT establishing an Independent Company, by the name of the *Kentish Guards*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England* in *America*, begun and holden, at *Providence*, within and for the said Colony, on the last Wednesday in *October*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {101-104}.

EN-524 — By the Body Politicke in the Ile of Aqethnec, Inhabiting this present, 25 of 9: month. 1639, *in Rhode Island Records*, Volume 1, at 94.

EN-525 — At a Generall Towne Meetinge at Portsmouth, 1st of March, 1643, *in Rhode Island Records*, Volume 1, at 79.

EN-526 — *Proceedings of the Generall Assembly of the Collony of Rhode Island and Providence Plantations, held at Newport, the 13th of March*, 1675-6, [Session of] *Aprill the 4th*[, 1676], *in Rhode Island Records*, Volume 2, at 536.

EN-527 — An Act for the better regulating the militia, and for punishing offenders as shall not conform to the law thereunto relating, *At the Generall Assembly and Election held for the Collony at Newport, the 7th of May*, 1701, *in Rhode Island Records*, Volume 3, at 432. This statute is dated "1699" in LAWS AND ACTS OF RHODE ISLAND, AND PROVIDENCE PLANTATIONS Made from the First Settlement in 1636 to 1705, at 92, *reprinted in* J.D. Cushing, Editor, *The Earliest Acts and Laws of the Colony of Rhode Island and Providence Plantations* (Wilmington, Delaware: M. Glazier, 1977), at 107. Reprinted from a compilation dated "1705", it appears in *Military Obligation, Rhode Island*, at 37.

EN-528 — An Act for the Establishing of *Watches* throughout this Colony, both in Time of *War* and *Peace*, A LAW, Made and pass'd by the General Assembly of His Majesty's Colony of *Rhode-Island*, and *Providence-Plantations*, held at *Newport*, by Adjournment to the Eighth Day of *September*, 1719, *in Public Laws of Rhode Island, 1744*, at 80.

EN-529 — An Act for the Relief of Tender Consciences, and for preventing their being burthened with Military Duty, LAWS, Made and pass'd by the General Assembly of His Majesty's Colony of *Rhode-Island* and *Providence-Plantations*, in *New-England*, held at *Newport*, by Adjournment, on the third *Monday* of *June*, 1730, *in Public Laws of Rhode Island, 1730*, at 218.

EN-530 — An Act for the more effectual putting the Colony into a proper Posture of Defence, A LAW, Made and pass'd by the General Assembly of His Majesty's Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*; held by Adjournment, at *Warwick*, the Twenty-Seventh Day of *January*, 1740, *in Public Laws of Rhode Island, 1744*, at 234.

EN-531 — An ACT for erecting an ARTILLERY COMPANY in the Towns of *Westerly* and *Charlestown*, At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, in AMERICA; begun (in Consequence of Warrants issued by his Honor the Governor) and held at *Providence*, on Wednesday the first of *January*, One Thousand Seven Hundred and Fifty-five, *in Rhode Island Acts and Resolves*, Volume 2, at {64}.

EN-532 — An ACT, regulating the Militia in this Colony, *part of* An ACT, establishing the Revisement of the Laws of this Colony, and for the putting the same in Force, *in* A LAW, Made and passed at the General Assembly of the Colony of *Rhode-Island* and *Providence Plantations*, held at *Providence* on the First Monday in *December,* 1766, *in Public Laws of Rhode Island, 1767*, at 185.

EN-533 — AN ACT establishing an Independent Company, by the Name of *The Light-Infantry* for the County of *Providence*, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, by Adjournment, at *Newport*, within and for the said Colony, on the Second Monday in *June*, One Thousand Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {38}.

EN-534 — At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden by Adjournment, at *Providence*, within and for the Colony aforesaid, on the Second *Monday* in *January*, One Thousand Seven Hundred and Seventy-six, *in Rhode Island Acts and Resolves*, Volume 8 [9], at {221}.

EN-535 — An Act for the better regulating the militia, and for punishing offenders as shall not conform to the law thereunto relating, *At the Generall Assembly and Election held for the Collony at Newport, the 7th of May*, 1701, *in Rhode Island Records*, Volume 3, at 432. This statute is dated "1699" in LAWS AND ACTS OF RHODE ISLAND, AND PROVIDENCE PLANTATIONS Made from the First Settlement in 1636 to 1705, at 92, *reprinted in* J.D. Cushing, Editor, *The Earliest Acts and Laws of the Colony of Rhode Island and Providence Plantations* (Wilmington, Delaware: M. Glazier, 1977), at 107. Reprinted from a compilation dated "1705", it appears in *Military Obligation, Rhode Island*, at 37.

EN-536 — An ACT for putting this Colony in a Posture of Defence, and for rend'ring the *Militia* in the several Towns thereof, more Useful in Time of an *Actual Invasion*, LAWS, Made and pass'd by the General Assembly of His Majesty's Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*; held by Adjournment, at *Newport*, the Twenty Second Day of *May*, 1744, *in Public Laws of Rhode Island, 1744*, at 289.

EN-537 — An Act for the better regulating the militia, and for punishing offenders as shall not conform to the law thereunto relating, *At the Generall Assembly and Election held for the Collony at Newport, the 7th of May*, 1701, *in Rhode Island Records*, Volume 3, at 434-435. This statute is dated "1699" in LAWS AND ACTS OF RHODE ISLAND, AND PROVIDENCE PLANTATIONS Made from the First Settlement in 1636 to 1705, at 92, *reprinted in* J.D. Cushing, Editor, *The Earliest Acts and Laws of the Colony of Rhode Island and Providence*

Plantations (Wilmington, Delaware: M. Glazier, 1977), at 107. Reprinted from a compilation dated "1705", it appears in *Military Obligation, Rhode Island*, at 37.

EN-538 — *An ACT to prevent all Persons keeping House within this Colony, from entertaining* Indian, Negro, *or* Mulatto *Servants or Slaves*, *At the* GENERAL ASSEMBLY *of the* GOVERNOR *and* COMPANY *of the* English *Colony of* Rhode-Island, *and* Providence-Plantations, *in* New-England, *in* America; *begun and held by Adjournment at* Providence, *on the third* Monday *of* March, *One Thousand Seven Hundred and Fifty* [1751], *in Rhode Island Acts and Resolves*, Volume 1, at {86}.

EN-539 — An ACT for the better forming, regulating and conducting the military Force of this State, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {32-33, 38}.

EN-540 — *At the Generall Assembly and Election held in his Majesty's name, May the 2d*, 1677, *at Newport, in Rhode Island Records*, Volume 2, at 570.

EN-541 — *E.g.*, An Act for the Repealing several Laws relating to the Militia within this Colony, and for further Regulation of the same, LAWS Made and Past by the General Assembly of His Majesties Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, begun and Held at *Newport*, the Seventh Day of *May*, 1718, and Continued by Adjournments to the Ninth Day of *September* following, *in Public Laws of Rhode Island, 1719*, at 86, *in Public Laws of Rhode Island, 1730*, at 91, *and in Public Laws of Rhode Island, 1744*, at 65; An ACT, regulating the Militia in this Colony, *in Public Laws of Rhode Island, 1767*, at 179, 185; At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island* and *Providence Plantations*, begun and holden, by Adjournment, at *Providence*, within and for the said State, on Monday the Twenty-third Day of *December*, One Thousand, Seven Hundred and Seventy-six, *in Rhode Island Acts and Resolves*, Volume 8 [9], at {15}; An Act for numbering all persons able to bear arms within this state, *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at Providence, on the fourth Monday in March*, 1777, *in Rhode Island Records*, Volume 8, at 189; An ACT for the better forming, regulating and conducting the military Force of this State, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {35}; At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden (by Adjournment) at *Providence*, within and for the State aforesaid, on the first *Monday* in *July*, One Thousand Seven Hundred and Eighty, *in Rhode Island Acts and Resolves*, Volume 10 [13], at {7}; An ACT for filling up and completing this State's Quota of the Continental Army, At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden by Adjournment, at *East-Greenwich*, within and for the State aforesaid, on the last *Monday* in *November*, One Thousand Seven Hundred and Eighty, *in Rhode Island Acts and Resolves*, Volume 10 [13], at {37}.

EN-542 — An ACT for the better forming, regulating and conducting the military Force of this State, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {29}.

EN-543 — *E.g.*, *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, the 14th day of March,* 1757, *in Rhode Island Records*, Volume 6, at 35; An Act for raising one-sixth part of the militia in this colony, to proceed immediately to Albany, to join the forces which have marched, to oppose the French, near Lake George, *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Newport, on the* 10*th day of August*, 1757, *in Rhode Island Records*, Volume 6, at 76; An ACT for embodying, supplying and paying, the Army of Observation ordered to be raised for the Defence of the Colony, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden at *Providence*, within and for the said Colony, on the First *Wednesday* in *May*, One Thousand Seven Hundred and Seventy-five, *in Rhode Island Acts and Resolves*, Volume 7 [8], at {8}; *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on the second Monday in January*, 1776, *in Rhode Island Records*, Volume 7, at 431, 432; An Act for raising, embodying, supplying and paying, two regiments of infantry, each consisting of seven hundred and fifty men; and a regiment or train of artillery, consisting of three hundred men, for the defence of the United States, in general, and of this state, in particular, *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at East Greenwich, on Tuesday, the* 10*th day of December*, 1776, *in Rhode Island Records*, Volume 8, at 62; *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at Providence, on the first Wednesday in May*, 1777, *in Rhode Island Records*, Volume 8, at 226; An ACT for the better forming, regulating

and conducting the military Force of this State, At the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {31, 32}; At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden (by Adjournment) at *Providence*, within and for the State aforesaid, on the first *Monday* in *July*, One Thousand Seven Hundred and Eighty, *in Rhode Island Acts and Resolves*, Volume 10 [13], at {6, 9}; An ACT for raising Six Hundred and Thirty able-bodied effective Men, At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden (by Adjournment) at *Newport*, within and for the State aforesaid, on the Third *Monday* in *July*, One Thousand Seven Hundred and Eighty, *in Rhode Island Acts and Resolves*, Volume 10 [13], at {28, 30, 33}; An ACT for filling up and completing this State's Quota of the Continental Army, At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden by Adjournment, at *East-Greenwich*, within and for the State aforesaid, on the last *Monday* in *November*, One Thousand Seven Hundred and Eighty, *in Rhode Island Acts and Resolves*, Volume 10 [13], at {35, 37, 38, 40}.

EN-544 — *E.g.*, [A General Town Meeting in Portsmouth,] 5th of October, 1643, *in Rhode Island Records*, Volume 1, at 77; [Number] 20, At the Generall Courte Held at Portsmouth on the 6th of August, 1640, *in Rhode Island Records*, Volume 1, at 104; *Acts and Orders made at the Generall Courte of Election held at Newport, May the 23d,* (1650), *for the Colonie of Providence Plantations*, *in Rhode Island Records*, Volume 1, at 221; [Number] 7, *The General Court of Commissioners held for the Collony, at Portsmouth, March the 10th*, 1657-8, *in Rhode Island Records*, Volume 1, at 373; *Acts and Orders of the Generall Assembly, sitting at Newport, May the* 3, 1665, *in Rhode Island Records*, Volume 2, at 115, 117; *Proceedings of the Generall Assembly held for the Collony of Rhode Island and Providence Plantations at Newport, the 13th of August*, 1673, *in Rhode Island Records*, Volume 2, at 498; *At the Generall Assembly and Election held in his Majesty's name, May the 2d*, 1677, *at Newport, in Rhode Island Records*, Volume 2, at 572; *At the Generall Assembly and Election held at Newport, the 2d of May*, 1705, *in Rhode Island Records*, Volume 3, at 526; An Act for impressing such and so many men as shall be wanted, after the returns made to the several field officers, to complete and make up the four hundred and fifty men, by the General Assembly, at their last session, ordered to be raised in this colony for the ensuing campaign, *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, the 14th day of March*, 1757, *in Rhode Island Records*, Volume 6, at 34-35; An Act for raising one-sixth part of the militia in this colony, to proceed immediately to Albany, to join the forces which have marched, to oppose the French, near Lake George, *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Newport, on the 10th day of August*, 1757, *in Rhode Island Records*, Volume 6, at 75-77; *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on the 22d day of April*, 1775, *in Rhode Island Records*, Volume 7, at 310; An ACT for embodying, supplying and paying, the Army of Observation ordered to be raised for the Defence of the Colony, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden at *Providence*, within and for the said Colony, on the First *Wednesday* in *May*, One Thousand Seven Hundred and Seventy-five, *in Rhode Island Acts and Resolves*, Volume 7 [8], at {7}; *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on Wednesday, the 28th day of June*, 1775, *in Rhode Island Records*, Volume 7, at 358; An Act for embodying, supplying and paying a regiment, consisting of five hundred men, for the defence of the United Colonies in general, and of this colony, in particular, *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on Tuesday, the 31st day of October*, 1775, *in Rhode Island Records*, Volume 7, at 384-385; At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden by Adjournment, at *Providence*, within and for the Colony aforesaid, on the Second *Monday* in *January*, One Thousand Seven Hundred and Seventy-six, *in Rhode Island Acts and Resolves*, Volume 8 [9], at {221}; An Act in addition to an act, entituled "An act for the relief of persons of tender consciences; and for preventing their being burthened with military duty", *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at South Kingstown, on Thursday, the 17th day of April*, 1777, *in Rhode Island Records*, Volume 8, at 204; *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at Providence, on the first Wednesday in May*, 1777, *in Rhode Island Records*, Volume 8, at 226; At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden by Adjournment at *South-Kingstown*, within and for the State aforesaid, on the Second *Monday* in *June*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {13}; An ACT for filling up and completing this State's Quota of the Continental Army, At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden by Adjournment, at *East-Greenwich*, within and for the State aforesaid, on the last *Monday* in *November*, One Thousand Seven Hundred and Eighty, *in Rhode Island Acts and Resolves*, Volume 10 [13], at {35, 36, 37, 40, 41}.

EN-545 — An Act for the better regulating the militia, and for punishing offenders as shall not conform to the law thereunto relating, *At the Generall Assembly and Election held for the Collony at Newport, the 7th of May*, 1701, *in Rhode Island Records*, Volume 3, at 430-431. This statute is dated "1699" in LAWS AND ACTS OF RHODE ISLAND, AND PROVIDENCE PLANTATIONS Made from the First Settlement in 1636 to 1705, at 92, *reprinted in* J.D. Cushing, Editor, *The Earliest Acts and Laws of the Colony of Rhode Island and Providence Plantations* (Wilmington, Delaware: M. Glazier, 1977), at 107. Reprinted from a compilation dated "1705", it appears in *Military Obligation, Rhode Island*, at 37.

EN-546 — [Number] 20, At the Generall Courte Held at Portsmouth on the 6th of August, 1640, *in Rhode Island Records*, Volume 1, at 104.

EN-547 — An Act for the better regulating the militia, and for punishing offenders as shall not conform to the law thereunto relating, *At the Generall Assembly and Election held for the Collony at Newport, the 7th of May*, 1701, *in Rhode Island Records*, Volume 3, at 431-432 (emphasis supplied).

EN-548 — *Acts and Orders of the Generall Assembly, sitting at Newport, May the* 3, 1665, *in Rhode Island Records*, Volume 2, at 115.

EN-549 — An Act for the better regulating the militia, and for punishing offenders as shall not conform to the law thereunto relating, *At the Generall Assembly and Election held for the Collony at Newport, the 7th of May*, 1701, *in Rhode Island Records*, Volume 3, at 432.

EN-550 — *Acts and Orders of the Generall Assembly, sitting at Newport, May the* 3, 1665, *in Rhode Island Records*, Volume 2, at 115.

EN-551 — *At the Generall Assembly and Election held in his Majesty's name, May the 2d*, 1677, *at Newport, in Rhode Island Records*, Volume 2, at 570-571.

EN-552 — LAWS Made and Past by the General Assembly of his Majesties Colony of *Rhode-Island,* and *Providence-Plantations,* in *New-England*, begun and Held at *Newport*, the Seventh Day of *May*, 1718, and Continued by Adjournments to the Ninth Day of *September* following, *in Public Laws of Rhode Island, 1719*, at 88; *in Public Laws of Rhode Island, 1730,* at 93; *and in Public Laws of Rhode Island, 1744,* at 68.

EN-553 — An ACT in Addition to, and Amendment of the several Acts regulating the Militia, At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations* in *New-England*, in AMERICA; begun and held by Adjournment at *South-Kingstown*, upon the last Monday in *February*, One Thousand Seven Hundred and Fifty-six, *in Rhode Island Acts and Resolves*, Volume 2, at {73}.

EN-554 — An ACT, regulating the Militia in this Colony, *part of* An ACT, establishing the Revisement of the Laws of this Colony, and for the putting the same in Force, *in* A LAW, Made and passed at the General Assembly of the Colony of *Rhode-Island* and *Providence Plantations*, held at *Providence* on the First Monday in *December,* 1766, *in Public Laws of Rhode Island, 1767*, at 183.

EN-555 — An ACT in Addition to, and Amendment of, an Act, passed in *October*, A.D. 1779, entituled, "An Act for the better forming, regulating and conducting, the military Force of this State", At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence-Plantations*, begun and holden, by Adjournment, at *South-Kingstown*, within and for the said State, on the Third *Monday* in *March*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {52}.

EN-556 — An ACT for the better forming, regulating and conducting the military Force of this State, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves,* Volume 10 [12], at {32}.

EN-557 — [Number] 30, At a Generall Meeting upon Publicke notice, the 5th of the 9th month, 1638, *in Rhode Island Records*, Volume 1, at 61 (Town of Portsmouth).

EN-558 — An Act for the better regulating the militia, and for punishing offenders as shall not conform to the law thereunto relating, *At the Generall Assembly and Election held for the Collony at Newport, the 7th of May*, 1701, *in Rhode Island Records*, Volume 3, at 430-431. This statute is dated "1699" in LAWS AND ACTS OF RHODE ISLAND, AND PROVIDENCE PLANTATIONS Made from the First Settlement in 1636 to 1705, at 92, *reprinted in* J.D. Cushing, Editor, *The Earliest Acts and Laws of the Colony of Rhode Island and Providence Plantations* (Wilmington, Delaware: M. Glazier, 1977), at 107. Reprinted from a compilation dated "1705", it appears in *Military Obligation, Rhode Island*, at 37.

EN-559 — An Act for the better regulating the militia, and for punishing offenders as shall not conform to the law thereunto relating, *At the Generall Assembly and Election held for the Collony at Newport, the 7th of May*, 1701, *in Rhode Island Records*, Volume 3, at 432.

EN-560 — An Act for the Repealing several Laws relating to the Militia within this Colony, and for further Regulation of the same, LAWS Made and Past by the General Assembly of His Majesties Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, begun and Held at *Newport*, the Seventh Day of *May*, 1718, and Continued by Adjournments to the Ninth Day of *September* following, *in Public Laws of Rhode Island, 1719,* at 86, 89; *in Public Laws of Rhode Island, 1730*, at 91, 94-95; *and in Public Laws of Rhode Island, 1744,* at 65, 69.

EN-561 — An ACT, regulating the Militia in this Colony, *part of* An ACT, establishing the Revisement of the Laws of this Colony, and for the putting the same in Force, *in* A LAW, Made and passed at the General Assembly of the Colony of *Rhode-Island* and *Providence Plantations*, held at *Providence* on the First Monday in *December,* 1766, *in Public Laws of Rhode Island, 1767*, at 179, 184-185.

EN-562 — An ACT for the better forming, regulating and conducting the military Force of this State, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {29, 31-32, 32-33, 35}.

EN-563 — *Proceedings of the Generall Assembly held for the Collony of Rhode Island and Providence Plantations at Newport, the 13th of August*, 1673, *in Rhode Island Records*, Volume 2, at 498.

EN-564 — An Act for the Repealing several Laws relating to the Militia within this Colony, and for further Regulation of the same, LAWS Made and Past by the General Assembly of His Majesties Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, begun and Held at *Newport*, the Seventh Day of *May*, 1718, and Continued by Adjournments to the Ninth Day of *September* following, *in Public Laws of Rhode Island, 1719,* at 86; *in Public Laws of Rhode Island, 1730*, at 91; *and in Public Laws of Rhode Island, 1744,* at 65.

EN-565 — An ACT, regulating the Militia in this Colony, *part of* An ACT, establishing the Revisement of the Laws of this Colony, and for the putting the same in Force, *in* A LAW, Made and passed at the General Assembly of the Colony of *Rhode-Island* and *Providence Plantations*, held at *Providence* on the First Monday in *December,* 1766, *in Public Laws of Rhode Island, 1767*, at 179.

EN-566 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at South Kingstown, on Thursday, the 17th day of April*, 1777, *in Rhode Island Records*, Volume 8, at 198.

EN-567 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at South Kingstown, on Monday, the 26th day of October,* 1778, *in Rhode Island Records,* Volume 8, at 470.

EN-568 — An ACT for the better forming, regulating and conducting the military Force of this State, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {32}.

EN-569 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Newport, the 6th day of May*, 1713, *in Rhode Island Records*, Volume 4, at 149 (emphasis supplied).

EN-570 — An Act for the Repealing several Laws relating to the Militia within this Colony, and for further Regulation of the same, LAWS Made and Past by the General Assembly of His Majesties Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, begun and Held at *Newport*, the Seventh Day of *May*, 1718, and Continued by Adjournments to the Ninth Day of *September* following, *in Public Laws of Rhode Island, 1719,* at 86, 88, 89, *in Public Laws of Rhode Island, 1730*, at 91, 94-95, *and in Public Laws of Rhode Island, 1744,* at 65. 69; An ACT, regulating the Militia in this Colony, *part of* An ACT, establishing the Revisement of the Laws of this Colony, and for the putting the same in Force, *in* A LAW, Made and passed at the General Assembly of the Colony of *Rhode-Island* and *Providence Plantations*, held at *Providence* on the First Monday in *December*, 1766, *in Public Laws of Rhode Island, 1767*, at 179, 184, 185.

EN-571 — An ACT for the better forming, regulating and conducting the military Force of this State, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {29, 32-33, 35, 36}.

EN-572 — *Acts and Orders of the Generall Assembly, sitting at Newport, May the 3*, 1665, *in Rhode Island Records*, Volume 2, at 115.

EN-573 — *At the Generall Assembly and Election held in his Majesty's name, May the 2d*, 1677, *at Newport, in Rhode Island Records*, Volume 2, at 570.

EN-574 — An Act for the Repealing several Laws relating to the Militia within this Colony, and for further Regulation of the same, LAWS Made and Past by the General Assembly of His Majesties Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, begun and Held at *Newport*, the Seventh Day of *May*, 1718, and Continued by Adjournments to the Ninth Day of *September* following, *in Public Laws of Rhode Island, 1719,* at 86; *in Public Laws of Rhode Island, 1730*, at 91; *and in Public Laws of Rhode Island, 1744,* at 65.

EN-575 — An ACT, regulating the Militia in this Colony, *part of* An ACT, establishing the Revisement of the Laws of this Colony, and for the putting the same in Force, *in* A LAW, Made and passed at the General Assembly of the Colony of *Rhode-Island* and *Providence-Plantations*, held at *Providence* on the First Monday in *December*, 1766, *in Public Laws of Rhode Island, 1766,* at 179.

EN-576 — An ACT for the better forming, regulating and conducting the military Force of this State, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {32}.

EN-577 — At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden by Adjournment, at *Providence*, within and for the State aforesaid, on the First *Monday* in *February*, One thousand Seven Hundred and Seventy-seven, in Rhode Island Acts and Resolves, Volume 8 [10], at {10}.

EN-578 — An ACT to oblige the *Commission Officers* in the *Militia*, to *train*, unless they have served *Five Years*, or excused by the General Assembly, LAWS, Made and pass'd by the General Assembly of His Majesty's Colony of *Rhode-Island,* and *Providence-Plantations,* in *New-England*, held at *Newport,* the last *Wednesday* in *February,* 1736, *in Public Laws of Rhode Island, 1744,* at 196.

EN-579 — *At the Generall Assembly and Election held in his Majesty's name, May the 2d*, 1677, *at Newport, in Rhode Island Records*, Volume 2, at 570.

EN-580 — An Act for the Repealing several Laws relating to the Militia within this Colony, and for further Regulation of the same, LAWS Made and Past by the General Assembly of His Majesties Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, begun and Held at *Newport*, the Seventh Day of *May*, 1718, and Continued by Adjournments to the Ninth Day of *September* following, *in Public Laws of Rhode Island, 1719,* at 86; *in Public Laws of Rhode Island, 1730*, at 91; *and in Public Laws of Rhode Islands, 1744,* at 65.

EN-581 — An ACT, regulating the Militia in this Colony, *part of* An ACT, establishing the Revisement of the Laws of this Colony, and for the putting the same in Force, *in* A LAW, Made and passed at the General Assembly of the Colony of *Rhode-Island* and *Providence Plantations*, held at *Providence* on the First Monday in *December,* 1766, *in Public Laws of Rhode Island, 1767*, at 179.

EN-582 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at Providence, on Thursday, the 28th day of May,* 1778, *in Rhode Island Records,* Volume 8, at 421-422.

EN-583 — An ACT for the better forming, regulating and conducting the military Force of this State, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {32}.

EN-584 — *See, e.g.,* An ACT for better Regulating the several Ferries within this Colony, LAWS, *Made and passed at a General Assembly of His Majesty's Colony of* Rhode-Island *and* Providence-Plantations *in* New-England, *on the last Monday in* August, 1747, *in Public Laws of Rhode Island, 1752,* at 40; An ACT for raising the Prices of Ferriage, at the several Ferries in this Colony, LAWS, *Made and passed at a General Assembly of His Majesty's Colony of* Rhode-Island *and* Providence-Plantations *in* New-England; *begun and held at* Providence, *on the last Wednesday of* October, 1750, *in Public Laws of Rhode Island, 1752,* at 80.

EN-585 — An ACT for the better forming, regulating and conducting the military Force of this State, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations,* begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {31}.

EN-586 — An Act for the Repealing several Laws relating to the Militia within this Colony, and for further Regulation of the same, LAWS Made and Past by the General Assembly of His Majesties Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, begun and Held at *Newport*, the Seventh Day of *May*, 1718, and Continued by Adjournments to the Ninth Day of *September* following, *in Public Laws of Rhode Island, 1719,* at 86; *in Public Laws of Rhode Island, 1730*, at 91; *and in Public Laws of Rhode Island, 1744,* at 65.

EN-587 — An ACT, regulating the Militia in this Colony, *part of* An ACT, establishing the Revisement of the Laws of this Colony, and for the putting the same in Force, *in* A LAW, Made and passed at the General Assembly of the Colony of *Rhode-Island* and *Providence Plantations*, held at *Providence* on the First Monday in *December,* 1766, *in Public Laws of Rhode Island, 1767*, at 179.

EN-588 — An ACT for the better forming, regulating and conducting the military Force of this State, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves,* Volume 10 [12], at {32}.

EN-589 — An ACT for the better forming, regulating and conducting the military Force of this State, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 12, at {32-33}.

EN-590 — An Act for the Repealing several Laws relating to the Militia within this Colony, and for further Regulation of the same, LAWS Made and Past by the General Assembly of His Majesties Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, begun and Held at *Newport*, the Seventh Day of *May*, 1718, and Continued by Adjournments to the Ninth Day of *September* following, *in Public Laws of Rhode Island, 1719*, at 86, 88, 89; *in Public Laws of Rhode Island, 1739*, at 91, 94-95; *and in Public Laws of Rhode Island, 1744*, at 65, 69.

EN-591 — An ACT, regulating the Militia in this Colony, *part of* An ACT, establishing the Revisement of the Laws of this Colony, and for the putting the same in Force, *in* A LAW, Made and passed at the General Assembly of the Colony of *Rhode-Island* and *Providence Plantations*, held at *Providence* on the First Monday in *December*, 1766, *in Public Laws of Rhode Island, 1767*, at 179, 184-185.

EN-592 — An ACT for the better forming, regulating and conducting the military Force of this State, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {29, 32-33, 35, 36}.

EN-593 — An ACT in Addition to an Act of the General Assembly of this Colony, made and pass'd at *Providence* the sixth Day of *March* last, for raising Four Hundred Men, to be employed in Conjunction with the Troops of other Governments, upon an Expedition, for erecting a strong Fort upon the rocky Eminence near *Crown-Point*, At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in AMERICA; begun and held at *Newport*, on the first *Wednesday* of *May*, One Thousand Seven Hundred and Fifty-five, *in Rhode Island Acts and Resolves*, Volume 2, at {17}.

EN-594 — At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden by Adjournment, at *Providence*, within and for the State aforesaid, on the First *Monday* in *March*, One Thousand Seven Hundred and Seventy-seven, *in Rhode Island Acts and Resolves*, Volume 8 [10], at {10}.

EN-595 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at Providence, on the first Wednesday in May*, 1777, *in Rhode Island Records*, Volume 8, at 226.

EN-596 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at South Kingstown, on Monday, the 26th day of October,* 1778, *in Rhode Island Records,* Volume 8, at 470.

EN-597 — An Act for the Repealing several Laws relating to the Militia within this Colony, and for further Regulation of the same, LAWS Made and Past by the General Assembly of His Majesties Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, begun and Held at *Newport*, the Seventh Day of *May*, 1718, and Continued by Adjournments to the Ninth Day of *September* following, *in Public Laws of Rhode Island, 1719,* at 88; *in Public Laws of Rhode Island, 1730,* at 94; *and in Public Laws of Rhode Island, 1744,* at 69.

EN-598 — An ACT, regulating the Militia in this Colony, *part of* An ACT, establishing the Revisement of the Laws of this Colony, and for the putting the same in Force, *in* A LAW, Made and passed at the General Assembly of the Colony of *Rhode-Island* and *Providence Plantations*, held at *Providence* on the First Monday in *December*, 1766, *in Public Laws of Rhode Island, 1767*, at 184-185.

EN-599 — An ACT in addition to, and amendment of, an Act entitled "An Act regulating the Militia of this Colony["], At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {151}.

EN-600 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on Wednesday, the 28th day of June*, 1775, *in Rhode Island Records*, Volume 7, at 358.

EN-601 — An Act for purchasing Two Thousand Arms for the Colony, &c., At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden (in Consequence of Warrants issued by his Honor the Governor) at *East-Greenwich*, within and for the said Colony, on *Monday* the Eighteenth Day of *March*, One Thousand Seven Hundred and Seventy-six, *in Rhode Island Acts and Resolves*, Volume 8 [9], at {305}.

EN-602 — AT the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island* and *Providence Plantations*, begun and holden (in Consequence of Warrants issued by his Excellency the Governor) at *Providence*, within and for the State aforesaid, on *Thursday* the Twenty-eighth Day of *May*, One Thousand Seven Hundred and Seventy-eight, *in Rhode Island Acts and Resolves*, Volume 9 [11], at {8}.

EN-603 — An ACT for the better forming, regulating and conducting the military Force of this State, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {32-33, 35}.

EN-604 — An Act in addition to an act, entituled "An act for the relief of persons of tender consciences; and for preventing their being burthened with military duty", *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at South Kingstown, on Thursday, the 17th day of April*, 1777, *in Rhode Island Records*, Volume 8, at 204-205, 206-207 (emphasis supplied).

EN-605 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at Providence, on the first Wednesday in May*, 1777, *in Rhode Island Records*, Volume 8, at 226 (emphasis supplied).

EN-606 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at Providence, on the 18th day of August*, 1777, *in Rhode Island Records*, Volume 8, at 298 (emphasis supplied).

EN-607 — An ACT for putting this Colony in a Posture of Defence, and for rend'ring the *Militia* in the several Towns thereof, more Useful in Time of an *Actual Invasion*, LAWS, Made and pass'd by the General Assembly of His Majesty's Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*; held by Adjournment, at *Newport*, the Twenty Second Day of *May*, 1744, *in Public Laws of Rhode Island, 1744*, at 289.

EN-608 — An Act for impressing such and so many men as shall be wanted, after the returns to the several field officers, to complete and make up the four hundred and fifty men, by the General Assembly, at their last session, ordered to be raised in this colony for the ensuing campaign, *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, the 14th day of March*, 1757, *in Rhode Island Records*, Volume 6, at 35.

EN-609 — An Act for raising one-sixth part of the militia in this colony, to proceed immediately to Albany, to join the forces which have marched, to oppose the French, near Lake George, *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Newport, on the 10th day of August*, 1757, *in Rhode Island Records*, Volume 6, at 76.

EN-610 — At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island* and *Providence Plantations*, begun and holden, by Adjournment, at *Providence*, within and for the said State, on Monday the Twenty-third Day of *December*, One Thousand, Seven Hundred and Seventy-six, *in Rhode Island Acts and Resolves*, Volume 8 [9], at {15-16}.

EN-611 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at South Kingstown, on Thursday, the 17th day of April*, 1777, *in Rhode Island Records*, Volume 8, at 198.

EN-612 — At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden (in Consequence of Warrants issued by his Excellency the Governor) at *Providence*, within and for the State aforesaid, on *Monday* the Seventh Day of *July*, One Thousand Seven Hundred and Seventy-seven, *in Rhode Island Acts and Resolves*, Volume 9 [10], at {6}.

EN-613 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at Providence, on Monday, the 27th day of October*, 1777, *in Rhode Island Records*, Volume 8, at 318. *Accord, Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at East Greenwich, on Monday, the 1st day of December*, 1777, *in Rhode Island Records*, Volume 8, at 334.

EN-614 — An ACT for the better forming, regulating and conducting the military Force of this State, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {37}.

EN-615 — At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden (by Adjournment) at *Providence*, within and for the State aforesaid, on the first *Monday* in *July*, One Thousand Seven Hundred and Eighty, *in Rhode Island Acts and Resolves*, Volume 10 [13], at {9}. *Accord*, An ACT for raising Six Hundred and Thirty able-bodied effective Men, At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden (by Adjournment) at *Newport*, within and for the State aforesaid, on the Third *Monday* in *July*, One Thousand Seven Hundred and Eighty, *in Rhode Island Acts and Resolves*, Volume 10 [13], at {33}; An ACT for filling up and completing this State's Quota of the Continental Army, At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden by Adjournment, at *East-Greenwich*, within and for the State aforesaid, on the last *Monday* in *November*, One Thousand Seven Hundred and Eighty, *in Rhode Island Acts and Resolves*, Volume 10 [13], at {40}.

EN-616 — An ACT for embodying and bringing into the Field Twelve Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and no longer Term, and not to be marched out of the same, At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence Plantations*, begun and holden (by Adjournment) at *South-Kingstown*, within and for the State aforesaid, on the Fourth *Monday* in *February*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {8}. *Accord*, An ACT for incorporating and bringing into the Field Five Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and no longer, and not to be marched out of the same, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden, by Adjournment, at *Providence*, within and for the State aforesaid, on the Fourth *Monday* in *May*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {15}.

EN-617 — An ACT for incorporating and bringing into the Field Five Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and for no longer Term, and not to be marched out of the same, At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden by Adjournment at *Newport*, within and for the said State, on the Third *Monday* in *August*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {42}.

EN-618 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at South Kingstown, on Thursday, the 17th day of April*, 1777, *in Rhode Island Records*, Volume 8, at 197-198.

EN-619 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at Providence, on Monday, the 27th day of October*, 1777, *in Rhode Island Records*, Volume 8, at 317, 318.

EN-620 — An Act in addition to an act, entitled "An Act for the relief of persons of tender consciences; and for preventing their being burthened with military duty", *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at South Kingstown, on Thursday, the 17th of April*, 1777, *in Rhode Island Records*, Volume 8, at 206-207; *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at Providence, on the first Wednesday in May*, 1777, *in Rhode Island Records*, Volume 8, at 226.

EN-621 — *Acts, Orders and Proceedings of the Governor and Councill of His Majestys Collony of Rhode Island and Providence Plantations, held at Newport, May,* 1667, *in Rhode Island Records*, Volume 2, at 192-193.

EN-622 — At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island* and *Providence Plantations*, begun and holden, by Adjournment, at *Providence*, within and for the said State, on Monday the Twenty-third Day of *December*, One Thousand, Seven Hundred and Seventy-six, *in Rhode Island Acts and Resolves*, Volume 8 [9], at {16} (emphasis supplied).

EN-623 — At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden (in Consequence of Warrants issued by his Excellency the Governor) at *Providence*, within and for the State aforesaid, on *Monday* the Seventh Day of *July*, One Thousand Seven Hundred and Seventy-seven, *in Rhode Island Acts and Resolves*, Volume 9 [10], at {6} (emphasis supplied).

EN-624 — An Act for impressing such and so many men as shall be wanted, after the returns made to the several field officers, to complete and make up the four hundred and fifty men, by the General Assembly, at their last session, ordered to be raised in this colony for the ensuing campaign, *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, the 14th day of March*, 1757, *in Rhode Island Records*, Volume 6, at 35.

EN-625 — *Proceedings of the Generall Assembly held for the Collony of Rhode Island and Providence Plantations at Newport, the 13th of August*, 1673, *in Rhode Island Records*, Volume 2, at 498-499.

EN-626 — *At the Generall Assembly and Election held for the Collony at Newport, the 7th of May*, 1701, *Rhode Island Records*, Volume 3, at 433.

EN-627 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Newport, the 14th day of June*, 1726, *Rhode Island Records*, Volume 4, at 379-380.

EN-628 — An Act for the Relief of Tender Consciences, and for preventing their being burthened with Military Duty, LAWS, Made and pass'd by the General Assembly of His Majesty's Colony of *Rhode-Island* and *Providence-Plantations*, in *New-England*, held at *Newport*, by Adjournment, on the third *Monday* of *June*, 1730, *in Public Laws of Rhode Island, 1730*, at 217-218.

EN-629 — An Act for the more effectual putting the Colony into a proper Posture of Defence, A LAW, Made and pass'd by the General Assembly of His Majesty's Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*; held by Adjournment, at *Warwick*, the Twenty-Seventh Day of *January*, 1740, *in Public Laws of Rhode Island, 1744*, at 234.

EN-630 — An ACT for the Relief of Persons of *Tender Consciences*; and for Preventing their being burthened with *Military Duty*, LAWS, Made and pass'd by the General Assembly of His Majesty's Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, held by Adjournment, at *Newport*, on the Twenty-First Day of *August*, 1744, *in Public Laws of Rhode Island, 1744*, at 293-294.

EN-631 — An ACT, regulating the Militia in this Colony, *part of* An ACT, establishing the Revisement of the Laws of this Colony, and for the putting the same in Force, *in* A LAW, Made and passed at the General Assembly of the Colony of *Rhode-Island* and *Providence Plantations*, held at *Providence* on the First Monday in *December,* 1766, *in Public Laws of Rhode Island, 1767*, at 185-186.

EN-632 — An ACT for the Relief of Persons of tender Consciences, and for preventing their being burthened with military Duty, At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden by Adjournment, at *Providence*, within and for the State aforesaid, on the First *Monday* in *February*, One Thousand Seven Hundred and Seventy-seven, *in Rhode Island Acts and Resolves*, Volume 8 [10], at {8-9}.

EN-633 — An Act in addition to an act, entituled "An act for the relief of persons of tender consciences; and for preventing their being burthened with military duty", *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at South Kingstown, on Thursday, the 17th day of April*, 1777, *in Rhode Island Records*, Volume 8, at 204-205. For the "affirmation", *see Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at Providence, on the first Monday in February*, 1777, *in Rhode Island Records*, Volume 8, at 122.

EN-634 — An ACT for the better forming, regulating and conducting the military Force of this State, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {38}.

EN-635 — *Proceedings of the Generall Assembly of the Colony of Rhode Island and Providence Plantations, held at Newport, the 2d of May,* 1676, *in Rhode Island Records*, Volume 2, at 549.

EN-636 — *Proceedings of the Generall Assembly of the Collony of Rhode Island and Providence Plantations, held at Newport, the 25th of October*, 1676, *in Rhode Island Records*, Volume 2, at 555.

EN-637 — *At the Generall Assembly and Election held in his Majesty's name, May the 2d*, 1677, *at Newport, in Rhode Island Records*, Volume 2, at 567-568, 570.

EN-638 — *See* An Act for Punishing Criminal Offences, LAWS Made and Past by the General Assembly of his Majesties Colony of *Rhode-Island* and *Providence-Plantations* in *New-England.* Begun and Held at *Newport*, the first day of *March* 1662, *in Public Laws of Rhode Island, 1719*, at 5.

EN-639 — By the Body Politicke in the Ile of Aqethnec, Inhabiting this present, 25 of 9: month. 1639, *in Rhode Island Records*, Volume 1, at 94.

EN-640 — At the Generall Quarter Court which was adjourned to the present 17th of 10th mo., 1639[, in the Town of Newport], *in Rhode Island Records*, Volume 1, at 95.

EN-641 — [Number] 20, At the Generall Courte Held at Portsmouth on the 6th of August, 1640, *in Rhode Island Records*, Volume 1, at 104.

EN-642 — [A General Town Meeting in Portsmouth,] The 10th of Aprill, 1643, *in Rhode Island Records*, Volume 1, at 80.

EN-643 — [A General Town Meeting in Portsmouth,] 5th of October, 1643, *in Rhode Island Records*, Volume 1, at 77.

EN-644 — [Number] 29, Acts and Orders Made and agreed upon at the Generall Court of Election, held at Portsmouth, in Rhode Island, the 19, 20, 21 of May, 1647, for the Colonie and Province of Providence, *in Rhode Island Records*, Volume 1, at 153.

EN-645 — *Acts and Orders made at the Generall Courte of Election held at Newport, May the 23d,* (1650), *for the Colonie of Providence Plantations*, *in Rhode Island Records*, Volume 1, at 221-222.

EN-646 — *Proceedings of a Meetinge of the Generall Assembly, May the fowerth*, 1664, *at Newport*, *in Rhode Island Records*, Volume 2, at 52.

EN-647 — *Acts and Orders of the Generall Assembly, sitting at Newport, May the* 3, 1665, *in Rhode Island Records*, Volume 2, at 115, 117.

EN-648 — *Proceedings of the Generall Assembly held for the Collony of Rhode Island and Providence Plantations at Newport, the 4th of September*, 1666, *in Rhode Island Records*, Volume 2, at 172.

EN-649 — *By the Governor and Councill att Newport, the 13th and 14th of May*, 1667, *in Rhode Island Records*, Volume 2, at 196.

EN-650 — *Proceedings of the Generall Assembly held for the Collony of Rhode Island and Providence Plantations at Newport, the 1st of May*, 1677, *in Rhode Island Records*, Volume 2, at 569, 570, 570-571, 576, 577.

EN-651 — *Proceedings of the Generall Assembly held for the Collony of Rhode Island and Providence Plantations at Newport, the 27th day of October*, 1680, *in Rhode Island Records*, Volume 3, at 93.

EN-652 — An Act for the better regulating the militia, and for punishing offenders as shall not conform to the law thereunto relating, *At the Generall Assembly and Election held for the Collony at Newport, the 7th of May*, 1701, *in Rhode Island Records*, Volume 3, at 430-431, 432. This statute is dated "1699" in LAWS AND ACTS OF RHODE ISLAND, AND PROVIDENCE PLANTATIONS Made from the First Settlement in 1636 to 1705, at 92, *reprinted in* J.D. Cushing, Editor, *The Earliest Acts and Laws of the Colony of Rhode Island and Providence Plantations* (Wilmington, Delaware: M. Glazier, 1977), at 107. Reprinted from a compilation dated "1705", it appears in *Military Obligation, Rhode Island*, at 37.

EN-653 — *At the Generall Assembly and Election held at Newport, the 6th of May*, 1702, *in Rhode Island Records*, Volume 3, at 454.

EN-654 — An Act for the Repealing several Laws relating to the Militia within this Colony, and for further Regulation of the same, LAWS Made and Past by the General Assembly of His Majesties Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, begun and Held at *Newport*, the Seventh Day of *May*, 1718, and Continued by Adjournments to the Ninth Day of *September* following, *Public Laws of Rhode Island, 1719,* at 88, 88, 89; *in Public Laws of Rhode Island, 1730*, at 93, 94, 94-95; *and in Public Laws of Rhode Island, 1744,* at 68, 69.

EN-655 — An Act for the Establishing of *Watches* throughout this Colony, both in Time of *War* and *Peace*, A LAW, Made and pass'd by the General Assembly of His Majesty's Colony of *Rhode-Island*, and *Providence-Plantations*, held at *Newport*, by Adjournment to the Eighth Day of *September*, 1719, *in Public Laws of Rhode Island, 1744*, at 80.

EN-656 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Newport, the 14th day of June*, 1726, *in Rhode Island Records*, Volume 4, at 379.

EN-657 — An Act for raising the Fines of enlisted Soldiers of the Train'd Bands in this Colony, LAWS, Made and pass'd by the General Assembly of His Majesty's Colony of *Rhode-Island* and *Providence-Plantations*, in *New-England*, held at *Newport*, by Adjournment, on the second *Monday* of *June*, 1731, *in Public Laws of Rhode Island, 1730*, at 237.

EN-658 — An Act for the more effectual putting the Colony into a proper Posture of Defence, A LAW, Made and pass'd by the General Assembly of His Majesty's Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, held by Adjournment, at *Warwick*, the Twenty Seventh Day of *January*, 1740, *in Public Laws of Rhode Island, 1744*, at 233.

EN-659 — An ACT for the more effectual Establishing a *Military Watch in Time of War*, throughout this Colony, LAWS, Made and pass'd by the General Assembly of His Majesty's Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, held by Adjournment, at *South-Kingstown*, on the Twenty Seventh Day of *October*, 1742, *in Public Laws of Rhode Island, 1744*, at 248.

EN-660 — An ACT for putting this Colony in a Posture of Defence, and for rend'ring the *Militia* in the several Towns thereof, more Useful in Time of an *Actual Invasion*, LAWS, Made and pass'd by the General Assembly of His Majesty's Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*; held by Adjournment, at *Newport*, the Twenty Second Day of *May*, 1744, *in Public Laws of Rhode Island, 1744*, at 289.

EN-661 — An ACT in Addition to the several Acts regulating the Militia in this Colony, At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, in AMERICA; begun and held by Adjournment at *Providence*, on the first Monday of *Februa*ry, One Thousand Seven Hundred and Fifty-five, *in Rhode Island Acts and Resolves*, Volume 2, at {71-72, 73}.

EN-662 — An ACT in Addition to, and Amendment of the several Acts regulating the Militia, At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, in AMERICA; begun and held by Adjournment at *South-Kingstown*, upon the last Monday in *Februa*ry, One Thousand Seven Hundred and Fifty-six, *in Rhode Island Acts and Resolves*, Volume 2, at {73}.

EN-663 — An ACT, regulating the Militia in this Colony, *part of* An ACT, establishing the Revisement of the Laws of this Colony, and for the putting the same in Force, *in* A LAW, Made and passed at the General Assembly of the Colony of *Rhode-Island* and *Providence Plantations*, held at *Providence* on the First Monday in *December,* 1766, *in Public Laws of Rhode Island, 1767*, at 182-188.

EN-664 — An ACT in addition to, and amendment of, an Act entitled "An Act regulating the Militia of this Colony["], At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {150, 151}. *Also in Rhode Island Records*, Volume 7, at 269, 270.

EN-665 — At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island* and *Providence Plantations*, begun and holden, by Adjournment, at *Providence*, within and for the said State, on Monday the Twenty-third Day of *December*, One Thousand, Seven Hundred and Seventy-six, *in Rhode Island Acts and Resolves*, Volume 8 [9], at {15-16}.

EN-666 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at Providence, on the fourth Monday in March*, 1777, *in Rhode Island Records*, Volume 8, at 181-182.

EN-667 — At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden (in Consequence of Warrants issued by his Excellency the Governor) at *Providence*, within and for the State aforesaid, on *Monday* the Seventh Day of *July*, One Thousand Seven Hundred and Seventy-seven, *in Rhode Island Acts and Resolves*, Volume 9 [10], at {6}.

EN-668 — AT the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island* and *Providence Plantations*, begun and holden (in Consequence of Warrants issued by his Excellency the Governor) at *Providence*, within and for the State aforesaid, on *Thursday* the Twenty-eighth Day of *May*, One Thousand Seven Hundred and Seventy-eight, *in Rhode Island Acts and Resolves*, Volume 9 [11], at {8}.

EN-669 — An ACT for the better forming, regulating and conducting the military Force of this State, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {35-37}.

EN-670 — At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden (by Adjournment) at *Providence*, within and for the State aforesaid, on the first *Monday* in *July*, One Thousand Seven Hundred and Eighty, *in Rhode Island Acts and Resolves*, Volume 10 [13], at {9}. *Accord*, An ACT for raising Six Hundred and Thirty able-bodied effective Men, At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden (by Adjournment) at *Newport*, within and for the State aforesaid, on the Third *Monday* in *July*, One Thousand Seven Hundred and Eighty, *in Rhode Island Acts and Resolves*, Volume 10 [13], at {33}; An ACT for filling up and completing this State's Quota of the Continental Army, At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden by Adjournment, at *East-Greenwich*, within and for the State aforesaid, on the last *Monday* in *November*, One Thousand Seven Hundred and Eighty, *in Rhode Island Acts and Resolves*, Volume 10 [13], at {40}.

EN-671 — An ACT in Addition to, and Amendment of, an Act, passed in *October*, A.D. 1779, entituled, "An Act for the better forming, regulating and conducting, the military Force of this State", At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence-Plantations*, begun and holden, by Adjournment, at *South-Kingstown*, within and for the said State, on the Third *Monday* in *March*,

One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {51-52}.

EN-672 — An ACT for incorporating and bringing into the Field Five Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and for no longer Term, and not to be marched out of the same, At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden by Adjournment at *Newport*, within and for the said State, on the Third *Monday* in *August*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 14, at {42}.

EN-673 — *Proceedings of the Generall Assembly held for the Collony of Rhode Island and Providence Plantations at Newport, the 4th of September*, 1666, *in Rhode Island Records*, Volume 2, at 172.

EN-674 — LAWS Made and Past by the General Assembly of His Majesties Colony of *Rhode-Island,* and *Providence-Plantations,* in *New-England,* begun and Held at *Newport,* the Seventh Day of *May,* 1718, *in Public Laws of Rhode Island, 1719*, at 88; *in Public Laws of Rhode Island, 1730*, at 93; *and in Public Laws of Rhode Island, 1744*, at 68.

EN-675 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Newport, the 14th day of June*, 1726, *in Rhode Island Records*, Volume 4, at 379-380.

EN-676 — An ACT in Addition to the several Acts regulating the Militia in this Colony, At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, in AMERICA; begun and held by Adjournment at *Providence*, on the first Monday of *February*, One Thousand Seven Hundred and Fifty-five, *in Rhode Island Acts and Resolves*, Volume 2, at {72}.

EN-677 — An ACT, regulating the Militia in this Colony, *part of* An ACT, establishing the Revisement of the Laws of this Colony, and for the putting the same in Force, *in* A LAW, Made and passed at the General Assembly of the Colony of *Rhode-Island* and *Providence Plantations*, held at *Providence* on the First Monday in *December,* 1766, *in Public Laws of Rhode Island, 1767*, at 184.

EN-678 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on the second Monday in January*, 1776, *in Rhode Island Records*, Volume 7, at 423. *Accord*, An Act for purchasing Two Thousand Arms for the Colony, &c., At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden (in Consequence of Warrants issued by his Honor the Governor), at *East-Greenwich*, within and for the said Colony, on *Monday* the Eighteenth Day of *March*, One Thousand Seven Hundred and Seventy-six, *in Rhode Island Acts and Resolves*, Volume 8 [9], at {305-306}.

EN-679 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at South Kingstown, on Thursday, the 17th day of April*, 1777, *in Rhode Island Records*, Volume 8, at 198.

EN-680 — AT the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island* and *Providence Plantations*, begun and holden (in Consequence of Warrants issued by his Excellency the Governor) at *Providence*, within and for the State aforesaid, on *Thursday* the Twenty-eighth Day of *May*, One Thousand Seven Hundred and Seventy-eight, *in Rhode Island Acts and Resolves*, Volume 9 [11], at {8}.

EN-681 — AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {20-21}.

EN-682 — An ACT for the better forming, regulating and conducting the military Force of this State, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {36}.

EN-683 — An ACT in Addition to, and Amendment of, an Act, passed in *October*, A.D. 1779, entituled, "An Act for the better forming, regulating and conducting, the military Force of this State", At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence-Plantations*, begun and holden, by Adjournment, at *South-Kingstown*, within and for the said State, on the Third *Monday* in *March*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {51-52}.

EN-684 — An Act for the Repealing several Laws relating to the Militia within this Colony, and for further Regulation of the same, LAWS Made and Past by the General Assembly of His Majesties Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, begun and Held at *Newport*, the Seventh Day of *May*, 1718, and Continued by Adjournments to the Ninth Day of *September* following, *in Public Laws of Rhode Island, 1719,* at 88 *in Public Laws of Rhode Island, 1730*, at 94; *and in Public Laws of Rhode Island, 1744,* at 68.

EN-685 — An ACT for putting this Colony in a Posture of Defence, and for rend'ring the *Militia* in the several Towns thereof, more Useful in Time of an *Actual Invasion*, LAWS, Made and pass'd by the General Assembly of His Majesty's Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*; held by Adjournment, at *Newport*, the Twenty Second Day of *May*, 1744, *in Public Laws of Rhode Island, 1744*, at 289.

EN-686 — An ACT in Addition to, and Amendment of the several Acts regulating the Militia, At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, in AMERICA; begun and held by Adjournment at *South-Kingstown*, upon the last Monday in *Februar*y, One Thousand Seven Hundred and Fifty-six, *in Rhode Island Acts and Resolves*, Volume 2, at {73}.

EN-687 — An ACT, regulating the Militia in this Colony, *part of* An ACT, establishing the Revisement of the Laws of this Colony, and for the putting the same in Force, *in* A LAW, Made and passed at the General Assembly of the Colony of *Rhode-Island* and *Providence Plantations*, held at *Providence* on the First Monday in *December,* 1766, *in Public Laws of Rhode Island, 1767*, at 183, 186.

EN-688 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at Providence, on Monday, the 23 day of December*, 1776, *in Rhode Island Records*, Volume 8, at 94-95.

EN-689 — An ACT for the better forming, regulating and conducting the military Force of this State, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {36-37}.

EN-690 — At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden (by Adjournment) at *Providence*, within and for the State aforesaid, on the first *Monday* in *July*, One Thousand Seven Hundred and Eighty, *in Rhode Island Acts and Resolves*, Volume 10 [13], at {9-10}. *Accord,* An ACT for raising Six Hundred and Thirty able-bodied effective Men, At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden (by Adjournment) at *Newport*, within and for the State aforesaid, on the Third *Monday* in *July*, One Thousand Seven Hundred and Eighty, *in Rhode Island Acts and Resolves*, Volume 10 [13], at {33}.

EN-691 — An ACT for raising Two Hundred and Twenty effective Men, for Three Years or during the War, to complete the Quota of this State, of the Army proposed to be raised by Congress, for the Defence of the United States, At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence-Plantations*, begun and holden at *Providence*, within and for the State aforesaid, on the Fourth *Monday* in *October*, One Thousand Seven Hundred and Eighty, *in Rhode Island Acts and Resolves*, Volume 10 [13], at {13}.

EN-692 — An ACT for embodying and bringing into the Field Twelve Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and no longer Term, and not to be marched out of the same, At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden (by Adjournment) at *South-Kingstown*, within and for the State aforesaid, on the Fourth *Monday* in *Februar*y, Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {8}. *Accord*, An ACT for incorporating and bringing into the Field Five Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and no longer, and not to be marched out of the same, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden, by Adjournment, at *Providence*, within and for the State aforesaid, on the Fourth *Monday* in *May*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {15}.

EN-693 — An ACT in Addition to, and Amendment of, an Act, passed in *October*, A.D. 1779, entituled, "An Act for the better forming, regulating and conducting, the military Force of this State", At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence-Plantations*, begun and holden, by Adjournment, at *South-Kingstown*, within and for the said State, on the Third *Monday* in *March*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {52}.

EN-694 — An ACT for mitigating of Penalties on Delinquents, heretofore called forth to do military Duty, and for directing Fines to be paid into the General-Treasury, in Lieu of the Town-Treasuries, At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden by Adjournment at *Newport*, within and for the said State, on the Third *Monday* in *August*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {31-32}.

EN-695 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Newport, the 6th day of May*, 1713, *in Rhode Island Records*, Volume 4, at 149 (emphasis supplied).

EN-696 — *Proceedings of a Meetinge of the Generall Assembly, May the fowerth*, 1664, *at Newport*, *in Rhode Island Records*, Volume 2, at 51-52.

EN-697 — *Acts and Orders of the Generall Assembly, sitting at Newport, May the* 3, 1665, *in Rhode Island Records*, Volume 2, at 114-116.

EN-698 — *Proceedings of the Generall Assembly held for the Collony of Rhode Island and Providence Plantations at Newport, the 4th of September*, 1666, *in Rhode Island Records*, Volume 2, at 171-172.

EN-699 — *At the Generall Assembly and Election held at Newport, the 6th of May*, 1702, *in Rhode Island Records*, Volume 3, at 453.

EN-700 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Newport, the 14th day of June*, 1726, *in Rhode Island Records*, Volume 4, at 377-379.

EN-701 — An ACT ordering and appointing the Militia, or train'd Bands, in this Colony, to muster twice a Year, LAWS, *Made and pass'd at a General Assembly of His Majesty's Colony of* Rhode-Island *and* Providence-Plantations *in* New-England, *held by Adjournment at* Newport, *on the Twenty-First Day of* September, 1745, *in Public Laws of Rhode Island, 1752*, at 2.

EN-702 — An ACT in Addition to the several Acts regulating the Militia in this Colony, At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, in AMERICA; begun and held by Adjournment at *Providence*, on the first Monday of *February*, One Thousand Seven Hundred and Fifty-five, *in Rhode Island Acts and Resolves*, Volume 2, at {71}.

EN-703 — Letter of 25 January 1776 from Nicholas Cooke, Governor of Rhode Island, to General George Washington, *in Rhode Island Records*, Volume 7, at 501.

EN-704 — *Acts, Orders and Proceedings of the Governor and Councill of His Majestys Collony of Rhode Island and Providence Plantations, held at Newport, May,* 1667, *in Rhode Island Records*, Volume 2, at 193.

EN-705 — *Att a meeting of the Generall Councill, at Newport, on Thursday, August* 26, 1669, *in Rhode Island Records*, Volume 2, at 282.

EN-706 — An Act empowering the members of the upper and lower houses of Assembly, to tender to such of the inhabitants as are hereinafter mentioned, a declaration, or test for subscription, *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Newport, on the second Monday in June*, 1776, *in Rhode Island Records*, Volume 7, at 566-567.

EN-707 — At the Generall Court of Election held on the 16th & 17th of March, att Newport, 1642, *in Rhode Island Records*, Volume 1, at 123.

EN-708 — [Number] 31, Acts and Orders Made and agreed upon at the Generall Court of Election, held at Portsmouth, in Rhode Island, the 19, 20, 21 of May, 1647, for the Colonie and Province of Providence, *in Rhode Island Records*, Volume 1, at 155.

EN-709 — *Acts and Orders made at the Generall Courte of Election held at Newport, May the 23d,* (1650), *for the Colonie of Providence Plantations*, *in Rhode Island Records*, Volume 1, at 226.

EN-710 — An ACT for the Punishment of Persons who shall be found guilty of holding a traitorous Correspondence with the Ministry of *Great-Britain*, or any of their Officers or Agents, or of supplying the ministerial Army or Navy, that now is or may be employed in *America* against the United Colonies, with Provisions, Cannon, Arms, Ammunition, warlike or naval Stores, or of acting as Pilots on board any of their Ships and Vessels, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden (in Consequence of Warrants issued by his Honor the Deputy-Governor) at *Providence*, within and for the Colony aforesaid, on *Tuesday* the Thirty-first Day of *October*, One Thousand Seven Hundred and Seventy-five, *in Rhode Island Acts and Resolves*, Volume 7 [8], at {160-161}.

EN-711 — AN ACT for the Inspection of GUNPOWDER, manufactured within this State, AT the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island*, and *Providence Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last Monday of *October*, One Thousand, Seven Hundred and Seventy-six, *in Rhode Island Acts and Resolves*, Volume 8 [9], at {25}.

EN-712 — At the Generall Court of Election held on the 16th & 17th of March, att Newport, 1642, *in Rhode Island Records*, Volume 1, at 123.

EN-713 — At a Generall Meeting upon Publicke notice [in the Town of Portsmouth], the 5th of the 9th month, 1638, *in Rhode Island Records*, Volume 1, at 61.

EN-714 — By the Body Politicke in the Ile of Aqethnec, Inhabiting this present, 25 of 9: month. 1639, *in Rhode Island Records*, Volume 1, at 93-94.

EN-715 — At the Generall Quarter Court which was adjourned to the present 17th of 10th mo., 1639[, in the Town of Newport], *in Rhode Island Records*, Volume 1, at 95.

EN-716 — At the General Courte Held at Portsmouth on the 6th of August, 1640, *in Rhode Island Records*, Volume 1, at 104-105.

EN-717 — [Number] 31, The Orders and Lawes made at the Generall Courte, held att Newport, the 17th of September, 1641, *in Rhode Island Records*, Volume 1, at 118.

EN-718 — [A General Town Meeting in Portsmouth,] 5th of October, 1643, *in Rhode Island Records*, Volume 1, at 77.

EN-719 — At a Generall Towne Meetinge at Portsmouth, 1st of March, 1643, *in Rhode Island Records*, Volume 1, at 79.

EN-720 — An Act for preventing Mischief being done in the Town of *Newport*, or in any other Town in this Government, by firing of Guns and Pistols, and throwing of Squibs, Fire-Works, &c. in the Streets or Lanes of the Town of *Newport*, or other Towns, or in Any Tavern in any Town in this Colony, LAWS, Made and pass'd by the General Assembly of His Majesty's Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, held at *Warwick*, on the last *Wednesday* of *October*, 1731, *in Public Laws of Rhode Island, 1730*, at 240-241.

EN-721 — AN ACT to prevent shooting with Guns and Pistols across Highways, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*; begun and holden by Adjournment, at *Newport*, within and for the said Colony, on the Second Monday in *September*, One Thousand Seven Hundred and Sixty-eight, *in Rhode Island Acts and Resolves*, Volume 5, at {44}. *Also in Public Laws of Rhode Island, 1772,* at 11.

EN-722 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on the first Monday in December,* 1774, *in Rhode Island Records*, Volume 7, at 266-267.

EN-723 — AN ACT in Addition to an Act, made and passed by the General Assembly, at their Session held at *Newport*, on the First Wednesday of *May*, A.D. 1750, entituled, *An Act providing in case of Fire breaking out in the Town of* Newport, *and for the more speedy extinguishing thereof; and for preserving of Goods endangered thereby,* [At] the General Assembly of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, in *America*; begun and holden by Adjournment, at *Newport*, within and for the said Colony, on the second Monday of *June*, One Thousand Seven Hundred and Sixty-two, *in Rhode Island Acts and Resolves*, Volume 4, at 132.

EN-724 — An Act for encouraging the manufactures of saltpeter and gunpowder, *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on the second Monday in January*, 1776, *in Rhode Island Records*, Volume 7, at 430.

EN-725 — ACT I, *An act for the defence of the country*, AT A GRAND ASSEMBLIE HOLDEN AT JAMES CITTIE BY PROROGATION FROM THE TWENTIETH OF SEPTEMBER[,] 1671, TO THE TWENTY-FOURTH OF SEPTEMBER[,] 1672, *in Laws of Virginia*, Volume 2, at 294. This Act was ordered to "be putt into strict and effectual execution", AT A GRAND ASSEMBLIE HELD ATT JAMES CITTIE BY PROROGATION FROM THE ONE AND TWENTIETH DAY OF SEPTEMBER, 1674, TO THE SEAVENTH DAY OF MARCH, 1676, *in Laws of Virginia*, Volume 2, at 339.

EN-726 — CHAP. II, *An Act, for the better Regulation of the Militia*, § I, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 16; CHAP. II, *An Act for the better regulating and training the Militia*, § I, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 530.

EN-727 — A DECLARATION *of* RIGHTS *made by the representatives of the good people of* Virginia, *assembled in full and free Convention; which rights do pertain to them, and their posterity, as the basis and foundation of government*, 12 June 1776, Articles 1, 2, and 13, *At a General Convention of Delegates and Representatives, from the several counties and corporations of Virginia, held at the Capitol in the City of Williamsburg, on Monday the 6th of May,* 1776, *in Laws of Virginia*, Volume 9, at 109, 111.

EN-728 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § I, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond*, on Monday the eighteenth day of October[,], *one thousand seven hundred eighty-four*, *in Laws of Virginia*, Volume 11, at 476; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § I, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *in one thousand seven hundred and eighty-five*, *in Laws of Virginia*, Volume 12, at 9.

EN-729 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, § I, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 118.

EN-730 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 335.

EN-731 — CHAP. V, *An Act for making more effectual provision against Invasions and Insurrections*, § I, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, 1727, *in Laws of Virginia*, Volume 4, at 197. *Continued*, CHAP. IV, *An act to continue the Act, for making more effectual provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, [1727]. *And from thence continued, by several prorogations, to the eighteenth day of May*, 1732, *in Laws of Virginia*, Volume 4, at 323; CHAP. IV, *An Act for further continuing the Act*, For making more effectual provision against Invasions and Insurrections, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, [1727]. *And from thence continued, by several prorogations, to the twenty second day of August*, 1734, *in Laws of Virginia*, Volume 4, at 395; CHAP. III, *An Act, for reviving the Act, For making more effective provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 24; CHAP. VI, *An Act, for continuing and amending the Act*, Intituled, *An Act, for making more effectual Provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on Friday the first day of August*, [1735]. *And from thence continued, by several prorogations, to the twenty second day of May*, 1740, *in Laws of Virginia*, Volume 5, at 99; CHAP. IV, *An Act, for continuing an Act, made in the first year of his majesty's reign, intituled, an Act for making more effectual provision against invasions and insurrections; and one other act, intituled, an Act, for continuing and amending the aforementioned Act*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on Thursday, the sixth day of May*, [1741]. *And from thence continued, by several prorogations, to Tuesday, the fourth day of September*, 1744, *in Laws of Virginia*, Volume 5, at 228.

CHAP. XXXIX, *An Act for making provision against Invasions and Insurrections*, § I, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *The College in Williamsburg, the twenty-seventh day of October*, 1748, *in Laws of Virginia*, Volume 6, at 112-113. *Continued,* CHAP. II, *An Act for continuing an act, intituled, An Act for making provision against invasions and insurrections, At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February*, 1752. *And from thence continued by several prorogations, to Thursday the first day of November*, 1753, *in Laws of Virginia*, Volume 6, at 350.

EN-732 — ACT IV, *An act for suppressing of tumults, routs, &c.*, AT A GRAND ASSEMBLIE, HOLDEN AT JAMES CITTIE THE FIFTH DAY OF JUNE[,] 1676, *in Laws of Virginia*, Volume 2, at 352.

EN-733 — ACT V, *An act for restraining and punishing of Pirates and Privateers*, AT A GENERALL ASSEMBLY, BEGUN AT JAMES CITTY THE 27th DAY OF APRIL, 1699, *in Laws of Virginia*, Volume 3, at 177.

EN-734 — *See Executive Journals of Virginia*, Volume 1, at 10 and 12 (1680), 158 (1690), 445-446 (1699); *Executive Journals of Virginia*, Volume 2, at 46 (1700), 135-136 (1701), 235 (1702), 318 (1703); *Executive Journals of Virginia*, Volume 3, at 92 (1706), 146 (1707), 180 (1708), 215-216 (1709), 243-244 (1710), 272 (1711), 304-305 (1712), 371 (1714), 398 (1715), 425 (1716), 447-448 (1717), 470-471 (1718), 500 (1719), 543 (1721); *Executive Journals of Virginia*, Volume 4, at 12 (1722), 34 (1723), 66-67 (1724), 85-86 (1725), 100 (1726), 129-130 (1727), 171 and 173 (1728), 200 (1729), 215 (1730), 235 (1731), 273-274 (1732), 297 (1733), 319 (1734), 348-349 (1735), 368 and 369 (1736), 391-392, 393, and 406 (1737), 421 and 425 (1738), 439 and 442 (1739); *Executive Journals of Virginia*, Volume 5, at 10 (1740), 56 (1741), 70 and 72 (1741), 91 (1742), 127 and 132 (1743), 150-151 (1744), 180 (1745), 212-213 (1746), 238 (1747), 259 (1748), 291-292 (1749), 318 (1750), 348-349 (1751); *Executive Journals of Virginia*, Volume 6, at 281 (1767), 307 (1768), 435-436 (1771), 508 (1772).

EN-735 — ACT XVI, *An act for suppressing outlying Slaves*, AT A GENERALL ASSEMBLY, BEGUN AT JAMES CITTY THE 16TH DAY OF APRIL, 1691, *in Laws of Virginia*, Volume 3, at 86.

EN-736 — CHAP. I, *An Act for granting an aid to his majesty for the better protection of this colony, and for other purposes therein mentioned*, § I, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday, the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven*, *in Laws of Virginia*, Volume 7, at 70-71.

EN-737 — CHAP. III, *An Act, for raising Levies and Recruits, to serve in the present War, against the* Spaniards, *in* America, § II, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on Friday the first day of August*, [1735]. *And from thence continued, by several prorogations, to the 22nd day of May*, 1740, *in Laws of Virginia*, Volume 5, at 95. *Accord,* CHAP. II, *An Act for raising levies and recruits to serve in the present expedition against the French, on the Ohio*, § II, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February*, 1752. *And from thence continued by several prorogations, to Thursday the 17th day of October*, 1754, *in Laws of Virginia*, Volume 6, at 438-439.

EN-738 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 341-342.

EN-739 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, § XXI, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 124.

EN-740 — CHAP. II, *An Act for the better regulating and training the Militia*, § IX, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 535.

EN-741 — CHAP. III, *An Act for the better regulating and disciplining the Militia*, § X, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 96-98. *Continued,* CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-742 — CHAP. VIII, *An act to amend the act for regulating and disciplining the militia, and for other purposes*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the seventh day of* May, *one thousand seven hundred and eighty-one, in Laws of Virginia*, Volume 10, at 417.

EN-743 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § X, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four, in Laws of Virginia*, Volume 11, at 491; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § X, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five, in Laws of Virginia*, Volume 12, at 22.

EN-744 — CHAP. II, *An Act, for the better Regulation of the Militia*, § XV, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 22.

EN-745 — CHAP. II, *An Act for the better regulating and training the Militia*, § XXI [*sic,* "XVI" was meant], *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 539.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § XVII, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday*[,] *the twenty-fifth day of March*, 1756, *and from thence*

continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia, Volume 7, at 101. *Continued,* CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-746 — CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § VII, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538.

CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § IX, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 244-245; *continued,* CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-747 — CHAP. VIII, *An act to amend the act for regulating and disciplining the militia, and for other purposes*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the seventh day of* May, *one thousand seven hundred and eighty-one, in Laws of Virginia*, Volume 10, at 418.

EN-748 — Aprill 2[d] 1692, *in Executive Journals of Virginia*, Volume 1, at 220.

EN-749 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 336.

EN-750 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, §§ III and IV, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 118-119.

EN-751 — CHAP. II, *An Act, for the better Regulation of the Militia*, §§ III and IV, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 16-17.

EN-752 — CHAP. II, *An Act for the better regulating and training the Militia*, §§ III and IV, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 531.

EN-753 — CHAP. III, *An Act for the better regulating and disciplining the Militia*, §III, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 93-94. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274.

EN-754 — CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § II, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 534.

EN-755 — CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § I, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 241-242.

EN-756 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the County of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 28.

EN-757 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 267-268.

EN-758 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § II, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four, in Laws of Virginia*, Volume 11, at 476-477; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § III, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five, in Laws of Virginia*, Volume 12, at 10.

EN-759 — CHAP. III, *An Act prescribing the method of appointing sheriffs; and for limiting the time of their continuance in office, and directing their duty therein*, § III, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, 1705, *in Laws of Virginia*, Volume 3, at 247; *continued with amendments,* CHAP. IV, *An Act for supply of certain defects found in an Act prescribing the method of appointing Sherifs*, AT A GENERAL ASSEMBLY BEGUN AND HOLDEN AT *The Capitol, in the City of Williamsburg, on the second day of November,* 1720, *in Laws of Virginia*, Volume 4, at 84; *"made perpetual" by* CHAP. XIV, *An Act to revive the Act for supply of certain defects found in an Act prescribing the method for appointing Sherifs*, AT A GENERAL ASSEMBLY BEGUN AND HELD AT *Williamsburg, the first day of February,* 1727. *And from thence continued, by several prorogations, to the twenty-first day of May,* 1730, *in Laws of Virginia*, Volume 4, at 300. *And see* CHAP. II, *An ordinance for appointing sheriffs, At a Convention of Delegates held at the town of Richmond, in the colony of Virginia, on Friday the first of December, one thousand seven hundred and seventy-five, in Laws of Virginia,* Volume 9, at 91.

EN-760 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 337.

EN-761 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, § III, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 119.

EN-762 — CHAP. II, *An Act, for the better Regulation of the Militia*, § III, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 16-17.

EN-763 — CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, §§ III and V, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 537; *and* CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* §§ II and VII, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 242, 243-244; *continued,* CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-764 — At a Council held May 2d 1758, *in Executive Journals of Virginia*, Volume 6, at 88-89 (emphasis supplied).

EN-765 — May the 18th 1691, *in Executive Journals of Virginia*, Volume 1, at 183. *See* June. 3. 1699, *in Executive Journals of Virginia*, Volume 1, at 443-445.

EN-766 — December the 8th 1715, *in Executive Journals of Virginia*, Volume 3, at 419-420.

EN-767 — *E.g.,* July the 31th 1691, *in Executive Journals of Virginia*, Volume 1, at 193; October 27th 1691, *in Executive Journals of Virginia*, Volume 1, at 202; June. 3. 1699, *in Executive Journals of Virginia*, Volume 1, at 443-445.

EN-768 — July the 31th 1691, *in Executive Journals of Virginia*, Volume 1, at 193.

EN-769 — *See* CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § III, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four*, *in Laws of Virginia*, Volume 11, at 481. *But officers removed or displaced under the preceding Act reinstated,* CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § II, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five*, *in Laws of Virginia*, Volume 12, at 10.

EN-770 — [Number] 16th, [Royal Instructions of 1688], *in Executive Journals of Virginia*, Volume 1, at 515.

EN-771 — ACT II, The GENERAL ASSEMBLY HOLDEN THE 16TH DAY OF OCTOBER, 1629, *in Laws of Virginia*, Volume 1, at 140.

EN-772 — ACT VII, *An Act for the better defence of the Country*, ATT A GENERALL ASSEMBLY, BEGUN AT JAMES CITTY THE SIXTEENTH DAY OF APRILL, ONE THOUSAND SIX HUNDRED EIGHTY-FOUR, *in Laws of Virginia*, Volume 3, at 17-18. *Repealed,* Act IX, *An act repealing the 7th act of assembly made at James Cittie the 16th day of Aprill,* 1684, ATT A GENERALL ASSEMBLY, BEGUN AT JAMES CITTY THE FIRST DAY OF OCTOBER, 1685, AND THENCE PROROGUED BY SEVERALL PROROGATIONS TO THE 20TH DAY OF OCTOBER, 1686, *in Laws of Virginia*, Volume 3, at 38.

EN-773 — CHAP. XXXI, *An act for security and defence of the country in times of danger*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 362-363. *Accord—*

CHAP. V, *An Act for making more effectual provision against Invasions and Insurrections*, § II, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February,* 1727, *in Laws of Virginia*, Volume 4, at 197-198. *Continued*, CHAP. IV, *An act to continue the Act, for making more effectual provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, [1727]. *And from thence continued, by several prorogations, to the eighteenth day of May*, 1732, *in Laws of Virginia*, Volume 4, at 323; CHAP. IV, *An Act for further continuing the Act*, For making more effectual provision against Invasions and Insurrections, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, [1727]. *And from thence continued, by several prorogations, to the twenty second day of August*, 1734, *in Laws of Virginia*, Volume 4, at 395; CHAP. III, *An Act, for reviving the Act, For making more effective provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 24; CHAP. VI, *An Act, for continuing and amending the Act*, Intituled, *An Act, for making more effectual Provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on Friday the first day of August*, [1735]. *And from thence continued, by several prorogations, to the twenty second day of May*, 1740, *in Laws of Virginia*, Volume 5, at 99; CHAP. IV, *An Act, for continuing an Act, made in the first year of his majesty's reign, intituled, an Act for making more effectual provision against invasions and insurrections; and one other act, intituled, an Act, for continuing and amending the aforementioned Act*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on Thursday, the sixth day of May*, [1741]. *And from thence continued, by several prorogations, to Tuesday, the fourth day of September*, 1744, *in Laws of Virginia*, Volume 5, at 228.

CHAP. XXXIX, *An Act for making provision against Invasions and Insurrections*, § II, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *The College in Williamsburg, the twenty-seventh day of October*, 1748, *in Laws of Virginia*, Volume 6, at 113. *Continued,* CHAP. II, *An Act for continuing an act, intituled, An Act for making provision against invasions and insurrections, At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February*, 1752. *And from thence continued by several prorogations, to Thursday the first day of November*, 1753, *in Laws of Virginia*, Volume 6, at 350.

CHAP. IV, *An Act for reducing the several acts for making provision against invasions and insurrections into one act*, § I, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday, the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven*, *in Laws of Virginia*, Volume 7, at 106-107. *Continued*, CHAP. IV, *An Act for continuing an act, intituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758, *in Laws of Virginia*, Volume 7, at 237; CHAP. V, *An Act for further continuing*

an Act, intituled, An Act for reducing the several Acts for making provision against Invasions and Insurrections, into one Act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September, 1758; and from thence continued by several prorogations to Thursday the twenty-second of February, 1759, in Laws of Virginia, Volume 7, at 275; CHAP. II, *An Act for further continuing an act, entituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September, 1758; and from thence continued by several prorogations to Thursday the fifth of March, 1761, in Laws of Virginia*, Volume 7, at 384; CHAP. IV, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May, 1761, and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 539; CHAP. I, *An act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May, 1761, and from thence continued by several prorogations to Tuesday the 30th of October, 1764, in Laws of Virginia*, Volume 8, at 37; CHAP. I, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November, 1766, in Laws of Virginia*, Volume 8, at 189; CHAP. V, *An Act for further continuing the Act, inituled an Act for reducing the several acts of Assembly for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in the City of Williamsburg, on Tuesday, in the seventh day of November, 1769, in Laws of Virginia*, Volume 8, at 334; CHAP. III, *An act for further continuing the act, intituled An act for reducing the several acts of assembly, for making provision against invasions and insurrections, into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Monday the tenth day of February, one thousand seven hundred and seventy-two, in Laws of Virginia*, Volume 8, at 514.

EN-774 — CHAP. IV, *An Act for reducing the several acts for making provision against invasions and insurrections into one act*, § XIV, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday, the twenty-fifth day of March, 1756, and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 113. *Continued*, CHAP. IV, *An Act for continuing an act, intituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September, 1758, in Laws of Virginia*, Volume 7, at 237; CHAP. V, *An Act for further continuing an Act, intituled, An Act for reducing the several Acts for making provision against Invasions and Insurrections, into one Act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September, 1758; and from thence continued by several prorogations to Thursday the twenty-second of February, 1759, in Laws of Virginia*, Volume 7, at 275; CHAP. II, *An Act for further continuing an act, entituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September, 1758; and from thence continued by several prorogations to Thursday the fifth of March, 1761, in Laws of Virginia*, Volume 7, at 384; CHAP. IV, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May, 1761, and from thence continued by several prorogations to Tuesday the 2d of November* 1762, *in Laws of Virginia*, Volume 7, at 539; CHAP. I, *An act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May, 1761, and from thence continued by several prorogations to Tuesday the 30th of October, 1764, in Laws of Virginia*, Volume 8, at 37; CHAP. I, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November, 1766, in Laws of Virginia*, Volume 8, at 189; CHAP. V, *An Act for further continuing the Act, intituled an Act for reducing the several acts of Assembly for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in the City of Williamsburg, on Tuesday, in the seventh day of November, 1769, in Laws of Virginia*, Volume 8, at 334; CHAP. III, *An act for further continuing the act, intituled An act for reducing the several acts of assembly, for making provision against invasions and insurrections, into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Monday the tenth day of February, one thousand seven hundred and seventy-two, in Laws of Virginia*, Volume 8, at 514.

EN-775 — CHAP. XXXII, *An act to revive and amend an act entitled An act for giving further powers to the governour and council,* AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the sixteenth day of* October, *one thousand seven hundred and eighty, in Laws of Virginia*, Volume 10, at 386-387.

EN-776 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, §§ VI and VII, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four, in Laws of Virginia*, Volume 11, at 485; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, §§ VI and VII, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five, in Laws of Virginia*, Volume 12, at 16-17.

EN-777 — CHAP. II, *An act to amend the several acts respecting the militia*, § V, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the fifteenth day of October*[,] *one thousand seven hundred and eighty-seven, in Laws of Virginia*, Volume 12, at 433.

EN-778 — CHAP. IV, *An Act for reducing the several acts for making provision against invasions and insurrections into one act*, § IV, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday, the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 108. *Continued*, CHAP. IV, *An Act for continuing an act, intituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758, *in Laws of Virginia*, Volume 7, at 237; CHAP. V, *An Act for further continuing an Act, intituled, An Act for reducing the several Acts for making provision against Invasions and Insurrections, into one Act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758*; and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 275; CHAP. II, *An Act for further continuing an act, entituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758*; and from thence continued by several prorogations to Thursday the fifth of March*, 1761, *in Laws of Virginia*, Volume 7, at 384; CHAP. IV, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 539; CHAP. I, *An act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 30th of October*, 1764, *in Laws of Virginia*, Volume 8, at 37; CHAP. I, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November*, 1766, *in Laws of Virginia*, Volume 8, at 189; CHAP. V, *An Act for further continuing the Act, intituled an Act for reducing the several acts of Assembly for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in the City of Williamsburg, on Tuesday, in the seventh day of November*, 1769, *in Laws of Virginia*, Volume 8, at 334; CHAP. III, *An act for further continuing the act, intituled An act for reducing the several acts of assembly, for making provision against invasions and insurrections, into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Monday the tenth day of February, one thousand seven hundred and seventy-two, in Laws of Virginia*, Volume 8, at 514.

EN-779 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § XI, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four, in Laws of Virginia*, Volume 11, at 491-493. *Substantially reënacted,* CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § XI, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five, in Laws of Virginia*, Volume 12, at 22-24.

EN-780 — ACT VII, *An Act for the better defence of the Country*, ATT A GENERALL ASSEMBLY, BEGUN AT JAMES CITTY THE SIXTEENTH DAY OF APRILL, ONE THOUSAND SIX HUNDRED EIGHTY-FOUR, *in Laws of Virginia*, Volume 3, at 19-20. *Repealed*, Act IX, *An act repealing the 7th act of assembly made at James Cittie the 16th day of Aprill,* 1684, ATT A GENERALL ASSEMBLY, BEGUN AT JAMES CITTY THE FIRST DAY OF OCTOBER, 1685, AND THENCE PROROGUED BY SEVERALL PROROGATIONS TO THE 20TH DAY OF OCTOBER, 1686, *in Laws of Virginia*, Volume 3, at 38.

EN-781 — CHAP. V, *An Act for making more effectual provision against Invasions and Insurrections*, § III, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, 1727, *in Laws of Virginia*, Volume 4, at 198. *Continued*, CHAP. IV, *An act to continue the Act, for making more effectual provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of*

February, [1727]. *And from thence continued, by several prorogations, to the eighteenth day of May*, 1732, *in Laws of Virginia*, Volume 4, at 323; CHAP. IV, *An Act for further continuing the Act*, For making more effectual provision against Invasions and Insurrections, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, [1727]. *And from thence continued, by several prorogations, to the twenty second day of August*, 1734, *in Laws of Virginia*, Volume 4, at 395; CHAP. III, *An Act, for reviving the Act, For making more effective provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 24; CHAP. VI, *An Act, for continuing and amending the Act*, Intituled, *An Act, for making more effectual Provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on Friday the first day of August*, [1735]. *And from thence continued, by several prorogations, to the twenty second day of May*, 1740, *in Laws of Virginia*, Volume 5, at 99; CHAP. IV, *An Act, for continuing an Act, made in the first year of his majesty's reign, intituled, an Act for making more effectual provision against invasions and insurrections; and one other act, intituled, an Act, for continuing and amending the aforementioned Act*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on Thursday, the sixth day of May*, [1741]. *And from thence continued, by several prorogations, to Tuesday, the fourth day of September*, 1744, *in Laws of Virginia*, Volume 5, at 228.

CHAP. XXXIX, *An Act for making provision against Invasions and Insurrections*, § III, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *The College in Williamsburg, the twenty-seventh day of October*, 1748, *in Laws of Virginia*, Volume 6, at 113-114. *Continued,* CHAP. II, *An Act for continuing an act, intituled, An Act for making provision against invasions and insurrections, At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February*, 1751. *And from thence continued by several prorogations, to Thursday the first day of November*, 1753, *in Laws of Virginia*, Volume 6, at 350.

EN-782 — CHAP. IV, *An Act for reducing the several acts for making provision against invasions and insurrections into one act*, § II, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday, the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven*, *in Laws of Virginia*, Volume 7, at 107-108. *Continued*, CHAP. IV, *An Act for continuing an act, intituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758, *in Laws of Virginia*, Volume 7, at 237; CHAP. V, *An Act for further continuing an Act, intituled, An Act for reducing the several Acts for making provision against Invasions and Insurrections, into one Act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 275; CHAP. II, *An Act for further continuing an act, entituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the fifth of March*, 1761, *in Laws of Virginia*, Volume 7, at 384; CHAP. IV, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 539; CHAP. I, *An act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 30th of October*, 1764, *in Laws of Virginia*, Volume 8, at 37; CHAP. I, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November*, 1766, *in Laws of Virginia*, Volume 8, at 189; CHAP. V, *An Act for further continuing the Act, intituled an Act for reducing the several acts of Assembly for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in the City of Williamsburg, on Tuesday, in the seventh day of November*, 1769, *in Laws of Virginia*, Volume 8, at 334; CHAP. III, *An act for further continuing the act, intituled An act for reducing the several acts of assembly, for making provision against invasions and insurrections, into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Monday the tenth day of February, one thousand seven hundred and seventy-two*, *in Laws of Virginia*, Volume 8, at 514.

EN-783 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § XIII, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four*, *in Laws of Virginia*, Volume 11, at 493-494. *Substantially reënacted,* CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § XII, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of*

Richmond, on Monday the seventeenth day of October[,] *one thousand seven hundred and eighty-five, in Laws of Virginia*, Volume 12, at 24.

EN-784 — CHAP. I, *An Act for speedily recruiting the Virginia Regiments on the continental establishment, and for raising additional troops of Volunteers*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the twentieth day of October, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 348.

EN-785 — At a Council Held July 26th 1742, *in Executive Journals of Virginia*, Volume 5, at 94-95 & note 48.

EN-786 — CHAP. III, *An act for amending an act, intituled, An act for making provision against invasions and insurrections*, § X, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 548.

EN-787 — CHAP. I, *An Act for raising the Sum of Twenty-five Thousand Pounds, for the better protection of the Inhabitants on the Frontiers of this Colony, and for other purposes therein mentioned*, § XV, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *in Laws of Virginia*, Volume 7, at 17.

EN-788 — CHAP. I, *An Ordinance for raising an additional number of forces for the defence and protection of this colony, and for other purposes therein mentioned, At a Convention of Delegates held at the town of Richmond, in the colony of Virginia, on Friday the first of December, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 85, 81.

EN-789 — CHAP. XXXI, *An act for security and defence of the country in times of danger*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 362-363.

EN-790 — CHAP. V, *An Act for making more effectual provision against Invasions and Insurrections*, § II, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, 1727, *in Laws of Virginia*, Volume 4, at 197-198. *Continued*, CHAP. IV, *An act to continue the Act, for making more effectual provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, [1727]. *And from thence continued, by several prorogations, to the eighteenth day of May*, 1732, *in Laws of Virginia*, Volume 4, at 323; CHAP. IV, *An Act for further continuing the Act*, For making more effectual provision against Invasions and Insurrections, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, [1727]. *And from thence continued, by several prorogations, to the twenty second day of August*, 1734, *in Laws of Virginia*, Volume 4, at 395; CHAP. III, *An Act, for reviving the Act, For making more effective provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 24; CHAP. VI, *An Act, for continuing and amending the Act*, Intituled, *An Act, for making more effectual Provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on Friday the first day of August*, [1735]. *And from thence continued, by several prorogations, to the twenty second day of May*, 1740, *in Laws of Virginia*, Volume 5, at 99; CHAP. IV, *An Act, for continuing an Act, made in the first year of his majesty's reign, intituled, an Act for making more effectual provision against invasions and insurrections; and one other act, intituled, an Act, for continuing and amending the aforementioned Act*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on Thursday, the sixth day of May*, [1741]. *And from thence continued, by several prorogations, to Tuesday, the fourth day of September*, 1744, *in Laws of Virginia*, Volume 5, at 228.

CHAP. XXXIX, *An Act for making provision against Invasions and Insurrections*, § II, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *The College in Williamsburg, the twenty-seventh day of October*, 1748, *in Laws of Virginia*, Volume 6, at 113. *Continued,* CHAP. II, *An Act for continuing an act, intituled, An Act for making provision against invasions and insurrections, At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February*, 1752. *And from thence continued by several prorogations, to Thursday the first day of November*, 1753, *in Laws of Virginia*, Volume 6, at 350.

EN-791 — CHAP. IV, *An Act for reducing the several acts for making provision against invasions and insurrections into one act*, § I, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday, the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 106-107. *Continued*, CHAP. IV, *An Act for continuing an act, intituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758, *in Laws of Virginia*, Volume 7, at 237; CHAP. V, *An Act for further continuing*

an Act, intituled, An Act for reducing the several Acts for making provision against Invasions and Insurrections, into one Act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September, 1758; and from thence continued by several prorogations to Thursday the twenty-second of February, 1759, in Laws of Virginia, Volume 7, at 275; CHAP. II, *An Act for further continuing an act, entituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September, 1758; and from thence continued by several prorogations to Thursday the fifth of March, 1761, in Laws of Virginia*, Volume 7, at 384; CHAP. IV, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May, 1761, and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 539; CHAP. I, *An act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May, 1761, and from thence continued by several prorogations to Tuesday the 30th of October, 1764, in Laws of Virginia*, Volume 8, at 37; CHAP. I, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 189; CHAP. V, *An Act for further continuing the Act, intituled an Act for reducing the several acts of Assembly for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in the City of Williamsburg, on Tuesday, in the seventh day of November, 1769, in Laws of Virginia*, Volume 8, at 334; CHAP. III, *An act for further continuing the act, intituled An act for reducing the several acts of assembly, for making provision against invasions and insurrections, into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Monday the tenth day of February, one thousand seven hundred and seventy-two, in Laws of Virginia*, Volume 8, at 514.

EN-792 — CHAP. XXXII, *An act to revive and amend an act entitled An act for giving further powers to the governour and council*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the sixteenth day of* October, *one thousand seven hundred and eighty, in Laws of Virginia*, Volume 10, at 386-387.

EN-793 — A Proclamation (6 May 1775), *in Executive Journals of Virginia*, Volume 6, at 665.

EN-794 — A Proclamation (7 November 1775), *in Executive Journals of Virginia*, Volume 6, at 669.

EN-795 — ACT IV, *An act for suppressing of tumults, routs, &c.*, AT A GRAND ASSEMBLIE, HOLDEN AT JAMES CITTIE THE FIFTH DAY OF JUNE[,] 1676, *in Laws of Virginia*, Volume 2, at 352.

EN-796 — October the 25th 1707, *in Executive Journals of Virginia*, Volume 3, at 159.

EN-797 — November the 26th 1711, *in Executive Journals of Virginia*, Volume 3, at 291.

EN-798 — At a Council held at the Capitol the 26th day of March 1732, *in Executive Journals of Virginia*, Volume 4, at 263-264.

EN-799 — *Quoted in Narratives of Early Virginia, 1606-1625*, Lyon G. Tyler, Editor (New York, New York: Charles Scribner's Sons, 1907), at 273. But, "[t]he acts passed at the general assembly in 1619 * * * never received * * * sanction * * * in England", and therefore "could not have the force of laws". *Laws of Virginia*, Volume 1, at 122, note.

EN-800 — ACT LI, A GRAND ASSEMBLY HOLDEN AT JAMES CITTY THE 21st OF ffEBRUARY, 1631-2, *in Laws of Virginia*, Volume 1, at 174. *Reënacted,* ACT XLV, A GRAND ASSEMBLY HOLDEN AT JAMES CITTY THE 4TH DAY OF SEPTEMBER, 1632, *in Laws of Virginia*, Volume 1, at 198.

EN-801 — ACT XLI, AT A GRAND ASSEMBLIE HOLDEN AT JAMES CITTY THE SECOND DAY OF MARCH, 1642-3, *in Laws of Virginia*, Volume 1, at 263.

EN-802 — A Proclamation for the more effectual putting in Execution the Laws concerning the Militia: And for preventing the unlawful Concourse of Negros, and other slaves (29 October 1736), *in Executive Journals of Virginia*, Volume 4, at 471.

EN-803 — CHAP. II, *An Act, for the better Regulation of the Militia*, § VIII, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 19.

CHAP. II, *An Act for the better regulating and training the Militia*, § VIII, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 534.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly,*

begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven*, *in Laws of Virginia*, Volume 7, at 96. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-804 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 29-30.

EN-805 — At a Council held at the Capitol the 28th day of Oct[r] 1730, *in Executive Journals of Virginia*, Volume 4, at 228.

EN-806 — *See, e.g.*, October 24th 1687, *in Executive Journals of Virginia*, Volume 1, at 86-87; At a Council held at Williamsburgh the 21st day of March 1709, *in Executive Journals of Virginia*, Volume 3, at 234-235; A Proclamation for preventing the unlawful Meetings and Combinations of Negro's and other Slaves (28 October 1730), *in Executive Journals of Virginia*, Volume 4, at 462-463.

EN-807 — CHAP. V, *An Act for making more effectual provision against Invasions and Insurrections*, § XVIII, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, 1727, *in Laws of Virginia*, Volume 4, at 202-203. *Continued,* CHAP. IV, *An act to continue the Act, for making more effectual provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, [1727], *And from thence continued, by several prorogations, to the eighteenth day of May*, 1732, *in Laws of Virginia*, Volume 4, at 323; CHAP. IV, *An Act for further continuing the Act*, For making more effectual provision against Invasions and Insurrections, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, [1727]. *And from thence continued, by several prorogations, to the twenty second day of August*, 1734, *in Laws of Virginia*, Volume 4, at 395; CHAP. III, *An Act, for reviving the Act, For making more effective provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 24; CHAP. VI, *An Act, for continuing and amending the Act*, Intituled, *An Act, for making more effectual Provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on Friday the first day of August*, [1735]. *And from thence continued, by several prorogations, to the twenty second day of May*, 1740, *in Laws of Virginia*, Volume 5, at 99; CHAP. IV, *An Act, for continuing an Act, made in the first year of his majesty's reign, intituled, an Act for making more effectual provision against invasions and insurrections; and one other act, intituled, an Act, for continuing and amending the aforementioned Act*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on Thursday, the sixth day of May*, [1741]. *And from thence continued, by several prorogations, to Tuesday, the fourth day of September*, 1744, *in Laws of Virginia*, Volume 5, at 228.

EN-808 — CHAP. II, *An Act, for the better Regulation of the Militia*, § VIII, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 19.

EN-809 — CHAP. II, *An Act for amending the act, intituled, An Act for the better regulation of the militia*, § I, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February*, 1752. *And from thence continued by several prorogations, to Thursday the 14th day of February*, 1754, *in Laws of Virginia*, Volume 6, at 421-422.

EN-810 — CHAP. II, *An Act for the better regulating and training the Militia*, § XXVI, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 542-543.

EN-811 — CHAP. III, *An Act for the better regulating and disciplining the Militia*, § XXVII, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday, the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven*, *in Laws of Virginia*, Volume 7, at 104-105. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538.

EN-812 — CHAP. VII, *An act to amend so much of the act for the better regulating and training the militia, as relates to the appointment of patrollers, their duty and reward*, § I, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November* 1766, *in Laws of Virginia*, Volume 8, at 195-196. *Continued,* CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, seven hundred and sixty nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one*, *in Laws of Virginia*, Volume 8, at 503.

EN-813 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five*, *in Laws of Virginia*, Volume 9, at 33.

EN-814 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven*, *in Laws of Virginia*, Volume 9, at 273.

EN-815 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § VIII, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four*, *in Laws of Virginia*, Volume 11, at 489; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § VIII, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five*, *in Laws of Virginia*, Volume 12, at 20.

EN-816 — ACT V, ATT A GRAND ASSEMBLY BEGINNING THE TWELFTH OF OCTOBER, 1648, *in Laws of Virginia*, Volume 1, at 355 (***bold-face emphasis*** supplied).

EN-817 — ACT I, *An act for the defence of the country*, AT A GRAND ASSEMBLIE HOLDEN AT JAMES CITTIE BY PROROGATION FROM THE TWENTIETH OF SEPTEMBER[,] 1671, TO THE TWENTY-FOURTH OF SEPTEMBER[,] 1672, *in Laws of Virginia*, Volume 2, at 294 (***bold-face emphasis*** supplied). This Act was ordered to "be putt into strict and effectual execution", AT A GRAND ASSEMBLIE HELD ATT JAMES CITTIE BY PROROGATION FROM THE ONE AND TWENTIETH DAY OF SEPTEMBER, 1674, TO THE SEAVENTH DAY OF MARCH, [1676,] *in Laws of Virginia*, Volume 2, at 339.

EN-818 — A DECLARATION *of* RIGHTS *made by the representatives of the good people of* Virginia, *assembled in full and free Convention; which rights do pertain to them, and their posterity, as the basis and foundation of government*, 12 June 1776, Article 13, *At a General Convention of Delegates and Representatives, from the several counties and corporations of Virginia, held at the Capitol in the City of Williamsburg, on Monday the 6th of May,* 1776, *in Laws of Virginia*, Volume 9, at 111 (***bold-face emphasis*** supplied).

EN-819 — CHAP. XIX, *An Act for obliging the several delinquent counties and divisions of militia in this commonwealth, to furnish one twenty fifth man*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of* Williamsburg, *on* Monday *the third day of* May, *one thousand seven hundred and seventy-nine*, *in Laws of Virginia*, Volume 10, at 82 (***bold-face emphasis*** supplied). *Mandated to be employed*, CHAP. L, *An act for re-enlisting the troops of this state in the continental army, and for other purposes*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol in the City of* Williamsburg, *on* Monday *the fourth day of* October, *one thousand seven hundred and seventy nine*, *in Laws of Virginia*, Volume 10, at 214-215.

EN-820 —*Quoted in Narratives of Early Virginia, 1606-1625*, Lyon G. Tyler, Editor (New York, New ork: Charles Scribner's Sons, 1907), at 273. "The acts passed at the general assembly in 1619", however, "never received * * * sanction * * * in England", and therefore "could not have the force of laws". *Laws of Virginia*, Volume 1, at 122, note.

EN-821 — [Numbers] 24 and 25, LAWS and ORDERS *Concluded on by the General Assembly, March the 5th*, 1623-4, *in Laws of Virginia*, Volume 1, at 127. *Reënacted,* ACTS XLVII [Law No. 24] *and* XLVIII [Law No. 25], A GRAND ASSEMBLY HOLDEN AT JAMES CITTY THE 21st OF ffEBRUARY 1631-2, *in Laws of Virginia*, Volume 1, at 173; *and* ACT XLII [Law No. 25], A GRAND ASSEMBLY HOLDEN AT JAMES CITTY THE 4TH DAY OF SEPTEMBER, 1632, *in Laws of Virginia*, Volume 1, at 198.

EN-822 — ACT II, THE GENERAL ASSEMBLY HOLDEN THE 16TH DAY OF OCTOBER, 1629, *in Laws of Virginia*, Volume 1, at 140.

EN-823 — ACT LI, A GRAND ASSEMBLY HOLDEN AT JAMES CITTY THE 21st OF ffEBRUARY[,] 1631-2, *in Laws of Virginia*, Volume 1, at 174. *Reënacted,* ACT XLV, A GRAND ASSEMBLY HOLDEN AT JAMES CITTY THE 4TH DAY OF SEPTEMBER, 1632, *in Laws of Virginia*, Volume 1, at 198.

EN-824 — ACT X, ATT A GRAND ASSEMBLY, 6TH JANUARY 1639, *in Laws of Virginia*, Volume 1, at 226.

EN-825 — ACT XLI, AT A GRAND ASSEMBLIE HOLDEN AT JAMES CITTY THE SECOND DAY OF MARCH, 1642-3, *in Laws of Virginia*, Volume 1, at 263.

EN-826 — ACT VIII, ATT A GRAND ASSEMBLY HOLDEN ATT JAMES CITTYE THE 17TH OF F*ebruary*, 1644-5, *in Laws of Virginia*, Volume 1, at 292.

EN-827 — ACT XXV, *Provision to bee made for Amunition*, ATT A GRAND ASSEMBLY, HELD AT JAMES CITTIE, MARCH 7, 1658-9, *in Laws of Virginia*, Volume 1, at 525. *Reënacted,* ACT CXX, *Supply of ammunition*, AT A GRAND ASSEMBLY HELD AT JAMES CITY MARCH THE 23D[,] 1661-2, *in Laws of Virginia*, Volume 2, at 126-127.

EN-828 — ACT I, *An act for the defence of the country*, AT A GRAND ASSEMBLIE HOLDEN AT JAMES CITTIE BY PROROGATION FROM THE TWENTIETH OF SEPTEMBER[,] 1671, TO THE TWENTY-FOURTH OF SEPTEMBER 1672, *in Laws of Virginia*, Volume 2, at 294.

EN-829 — October 24th 1687, *in Executive Journals of Virginia*, Volume 1, at 85-86.

EN-830 — Communication of the Governor to the Sheriffs of the Colony, 2 December 1690, *in Executive Journals of Virginia*, Volume 1, at 155.

EN-831 — ACT V, *An act for restraining and punishing of Pirates and Privateers*, AT A GENERALL ASSEMBLY, BEGUN AT JAMES CITTY THE 27th DAY OF APRIL, 1699, *in Laws of Virginia*, Volume 3, at 177.

EN-832 — May ye 28th 1702, *in Executive Journals of Virginia*, Volume 2, at 248.

EN-833 — At a Council held at her Majestys Royal College of William & Mary June ye 17th 1703, *in Executive Journals of Virginia*, Volume 2, at 321.

EN-834 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 335, 337-338.

EN-835 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, §§ II and XXVI, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 118, 125.

EN-836 — CHAP. V, *An Act for making more effectual provision against Invasions and Insurrections*, § II, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, 1727, *in Laws of Virginia*, Volume 4, at 197. *Continued*, CHAP. IV, *An act to continue the Act, for making more effectual provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, [1727]. *And from thence continued, by several prorogations, to the eighteenth day of May*, 1732, *in Laws of Virginia*, Volume 4, at 323; CHAP. IV, An Act for further continuing the Act, For making more effectual provision against Invasions and Insurrections, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, [1727]. *And from thence continued, by several prorogations, to the twenty second day of August*, 1734, *in Laws of Virginia*, Volume 4, at 395; CHAP. III, *An Act, for reviving the Act, For making more effective provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 24; CHAP. VI, *An Act, for continuing and amending the Act*, Intituled, *An Act, for making more effectual Provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on Friday the first day of August*, [1735]. *And from thence continued, by several prorogations, to the twenty second day of May*, 1740, *in Laws of Virginia*, Volume 5, at 99; CHAP. IV, *An Act, for continuing an Act, made in the first year of his majesty's reign, intituled, an Act for making more effectual provision against invasions and insurrections; and one other act, intituled, an Act, for continuing and amending the aforementioned Act*, AT A

GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on Thursday, the sixth day of May*, [1741]. *And from thence continued, by several prorogations, to Tuesday, the fourth day of September*, 1744, *in Laws of Virginia*, Volume 5, at 228.

CHAP. XXXIX, *An Act for making provision against Invasions and Insurrections*, § II, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *The College in Williamsburg, the twenty-seventh day of October*, 1748, *in Laws of Virginia*, Volume 6, at 113. *Continued,* CHAP. II, *An Act for continuing an act, intituled, An Act for making provision against invasions and insurrections, At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February*, 1752. *And from thence continued by several prorogations, to Thursday the first day of November*, 1753, *in Laws of Virginia*, Volume 6, at 350.

EN-837 — CHAP. II, *An Act, for the better Regulation of the Militia*, § II, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 16.

EN-838 — CHAP. II, *An Act for the better regulating and training the Militia*, § III, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 531.

EN-839 — CHAP. IV, *An Act for reducing the several acts for making provision against invasions and insurrections into one act*, §§ I and XIV, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday, the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 106-107, 113. *Continued*, CHAP. IV, *An Act for continuing an act, intituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September,* 1758, *in Laws of Virginia*, Volume 7, at 237; CHAP. V, *An Act for further continuing an Act, intituled, An Act for reducing the several Acts for making provision against Invasions and Insurrections, into one Act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758*; and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 275; CHAP. II, *An Act for further continuing an act, entituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758*; and from thence continued by several prorogations to Thursday the fifth of March*, 1761, *in Laws of Virginia*, Volume 7, at 384; CHAP. IV, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 539; CHAP. I, *An act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 30th of October*, 1764, *in Laws of Virginia*, Volume 8, at 37; CHAP. I, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 189; CHAP. V, *An Act for further continuing the Act, intituled an Act for reducing the several acts of Assembly for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in the City of Williamsburg, on Tuesday, in the seventh day of November*, 1769, *in Laws of Virginia*, Volume 8, at 334; CHAP. III, *An act for further continuing the act, intituled An act for reducing the several acts of assembly, for making provision against invasions and insurrections, into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Monday the tenth day of February, one thousand seven hundred and seventy-two, in Laws of Virginia*, Volume 8, at 514.

EN-840 — CHAP. III, *An Act for the better regulating and disciplining the Militia*, § II, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 93. *Continued,* CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766,

in Laws of Virginia, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-841 — At a Council held August the 1st 1763, *in Executive Journals of Virginia*, Volume 6, at 267.

EN-842 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 16-17, 27.

EN-843 — CHAP. I, *An Ordinance for raising an additional number of forces for the defence and protection of this colony, and for other purposes therein mentioned, At a Convention of Delegates held at the town of Richmond, in the colony of Virginia, on Friday the first of December, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 89-90.

EN-844 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 267-268, 270.

EN-845 — CHAP. VII, *An act for providing against Invasions and Insurrections*, §§ I and II, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 291-292.

EN-846 — CHAP. XVII, *An act for regulating and disciplining the militia of the city of Williamsburg and borough of Norfolk*, § I, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 313.

EN-847 — CHAP. I, *An act to embody militia for the relief of South Carolina, and for other purposes*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the first day of* May, *one thousand seven hundred and eighty, in Laws of Virginia*, Volume 10, at 221, 225.

EN-848 — CHAP. XII, *An act for speedily recruiting the quota of this state for the continental army*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the first day of* May, *one thousand seven hundred and eighty, in Laws of Virginia*, Volume 10, at 257-259. *See to like effect* CHAP. III, *An Act for recruiting this state's quota of troops to serve in the continental army*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the sixteenth day of* October, *one thousand seven hundred and eighty, in Laws of Virginia*, Volume 10, at 327-333, 337.

EN-849 — CHAP. III, *An act for recruiting this state's quota of troops to serve in the army of the United States*, §§ I, II, and III, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the sixth day of* May, *one thousand seven hundred and eighty-two, in Laws of Virginia*, Volume 11, at 14-16.

EN-850 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § II, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four, in Laws of Virginia*, Volume 11, at 476-477, 481; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § III, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five, in Laws of Virginia*, Volume 12, at 10, 14.

EN-851 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 336-337.

EN-852 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, §§ II, III, and IV, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four, in Laws of Virginia*, Volume 11, at 476-477, 483-484; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, §§ III and IV, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five, in Laws of Virginia*, Volume 12, at 10, 14-15.

EN-853 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 337-338 (emphasis supplied).

EN-854 — A DECLARATION *of* RIGHTS *made by the representatives of the good people of* Virginia, *assembled in full and free Convention; which rights do pertain to them, and their posterity, as the basis and foundation of government*, 12 June 1776, Articles 1, 3, and 13, *At a General Convention of Delegates and Representatives, from the several counties and corporations of Virginia, held at the Capitol in the City of Williamsburg, on Monday the 6th of May,* 1776, *in Laws of Virginia*, Volume 9, at 109, 109-110, 111.

EN-855 — *Quoted in Narratives of Early Virginia, 1606-1625*, Lyon G. Tyler, Editor (New York, New York: Charles Scribner's Sons, 1907), at 273. "The acts passed at the general assembly in 1619", however, "never received * * * sanction * * * in England", and therefore "could not have the force of laws". *Laws of Virginia*, Volume 1, at 122, note.

EN-856 — ACT LI, A GRAND ASSEMBLY HOLDEN AT JAMES CITTY THE 21st OF ffEBRUARY, 1631-2, *in Laws of Virginia*, Volume 1, at 174. *Reënacted,* ACT XLV, A GRAND ASSEMBLY HOLDEN AT JAMES CITTY THE 4TH DAY OF SEPTEMBER, 1632, *in Laws of Virginia*, Volume 1, at 198.

EN-857 — ACT XLI, AT A GRAND ASSEMBLIE HOLDEN AT JAMES CITTY THE SECOND DAY OF MARCH, 1642-3, *in Laws of Virginia*, Volume 1, at 263.

EN-858 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 336.

EN-859 — CHAP. II, *An Act for the better regulating and training the Militia*, § III, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 531.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § II, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 93. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-860 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 27.

EN-861 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 267-268.

EN-862 — CHAP. XLIX, *An act concerning Servants and Slaves*, § XIII, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 451.

EN-863 — CHAP. I, *An Ordinance for raising an additional number of forces for the defence and protection of this colony, and for other purposes therein mentioned, At a Convention of Delegates held at the town of Richmond, in the colony of Virginia, on Friday the first of December, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 81.

EN-864 — CHAP. I, *An Act for speedily recruiting the Virginia Regiments on the continental establishment, and for raising additional troops of Volunteers*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the twentieth day of October, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 342.

EN-865 — CHAP. III, *An act for raising a Battalion of Infantry for garrison duty, and for other purposes,* AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fourth day of May, one thousand seven hundred and seventy eight, in Laws of Virginia*, Volume 9, at 452.

EN-866 — ACT X, ATT A GRAND ASSEMBLY[,] 6TH JANUARY, 1639, *in Laws of Virginia*, Volume 1, at 226.

EN-867 — ACT X, *An act for preventing Negroes Insurrections*, AT A GENERALL ASSEMBLIE, BEGUNNE AT JAMES CITTIE THE EIGHTH DAY OF JUNE, 1680, *in Laws of Virginia*, Volume 2, at 481.

EN-868 — CHAP. XLIX, *An act concerning Servants and Slaves*, § XXXV, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 459.

EN-869 — A Proclamation (21 March 1709 [1709/10]), *in Executive Journals of Virginia*, Volume 3, at 574.

EN-870 — CHAP. IV, *An act directing the trial of Slaves, committing capital crimes; and for the more effectual punishing conspiracies and insurrections of them; and for the better government of Negros, Mulattos, and* Indians, *bond or free*, § XIV, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 131; CHAP. XXXVIII, *An Act directing the trial of Slaves committing capital crimes; and for the more effectual punishing conspiracies and insurrections of them; and for the better government of negroes, mulattoes, and Indians, bond or free*, § XVIII, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *The College in Williamsburg, the twenty-seventh day of October*, 1748, *in Laws of Virginia*, Volume 6, at 109-110.

EN-871 — CHAP. LXXVIII, *An act declaring what persons shall be deemed mulattoes*, § I, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five, in Laws of Virginia*, Volume 12, at 184.

EN-872 — CHAP. LXXVII, *An act concerning slaves*, § IV, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five, in Laws of Virginia*, Volume 12, at 182.

EN-873 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 335-336.

EN-874 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, §§ V and VI, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 119.

EN-875 — CHAP. II, *An Act, for the better Regulation of the Militia*, §§ V and VI, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 17.

EN-876 — CHAP. II, *An Act for the better regulating and training the Militia*, §§ V and VII, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 531, 533.

EN-877 — CHAP. III, *An Act for the better regulating and disciplining the Militia*, §§ IV and VII, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday, the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 94, 95. *Continued,* CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of*

November, 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-878 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 267-268.

EN-879 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 336.

EN-880 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, § II, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 118; CHAP. II, *An Act, for the better Regulation of the Militia*, § II, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 16.

EN-881 — CHAP. II, *An Act for the better regulating and training the Militia*, § III, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 531.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § II, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 93. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-882 — CHAP. XXIII, *An act declaring the Negro, Mulatto, and Indian slaves within this dominion, to be real estate,* AT A GENERAL ASSEMBLY BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 333.

EN-883 — CHAP. II, *An Act for the better regulating and training the Militia*, § VII, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 533 (emphasis supplied).

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § VII, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 95 (emphasis supplied). *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled*

An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia, Volume 8, at 503.

EN-884 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 27.

EN-885 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § II, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four, in Laws of Virginia*, Volume 11, at 476-477; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § III, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five, in Laws of Virginia*, Volume 12, at 10.

EN-886 — CHAP. II, *An act for the more speedily completeing the Quota of Troops to be raised in this commonwealth for the continental army, and for other purposes*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 280.

EN-887 — ACT II, THE GENERAL ASSEMBLY HOLDEN THE 16TH DAY OF OCTOBER, 1629, *in Laws of Virginia*, Volume 1, at 140.

EN-888 — ACT VIII, ATT A GRAND ASSEMBLY HOLDEN ATT JAMES CITTYE THE 17TH OF *February*, 1644-5, *in Laws of Virginia*, Volume 1, at 292.

EN-889 — ACT I, *An act for carrying on a warre against the barbarous Indians*, AT A GRAND ASSEMBLIE, HOLDEN AT JAMES CITTIE THE FIFTH DAY OF JUNE[,] 1676, *in Laws of Virginia*, Volume 2, at 349.

EN-890 — ACT I, *An act for the defence of the country against the incursions of the Indian enemy*, ATT A GRAND ASSEMBLY, BEGUNN AT JAMES CITTY THE 25TH OF APRIL, 1679, *in Laws of Virginia*, Volume 2, at 433-435.

EN-891 — ACT VII, *An act disbanding the present souldiers in garrisons in the fforts on the heads of the severall rivers, as alsoe for the raiseing of other forces in their stead*, ATT A GENERALL ASSEMBLY, BEGUNN ATT JAMES CITTY NOVEM. THE TENTH[,] 1682, *in Laws of Virginia*, Volume 2, at 499.

EN-892 — ACT VII, *An Act for the better defence of the Country*, ATT A GENERALL ASSEMBLY, BEGUN AT JAMES CITTY THE SIXTEENTH DAY OF APRILL, ONE THOUSAND SIX HUNDRED EIGHTY-FOUR, *in Laws of Virginia*, Volume 3, at 17-18. *Repealed*, Act IX, *An act repealing the 7th act of assembly made at James Cittie the 16th day of Aprill,* 1684, ATT A GENERALL ASSEMBLY, BEGUN AT JAMES CITTY THE FIRST DAY OF OCTOBER, 1685, AND THENCE PROROGUED BY SEVERALL PROROGATIONS TO THE 20TH DAY OF OCTOBER, 1686, *in Laws of Virginia*, Volume 3, at 38.

EN-893 — Poropotanke June 17th 1684, *in Executive Journals of Virginia*, Volume 1, at 56-57.

EN-894 — Att a Councill held at James Citty March the 7th 1690 [1690-91], *in Executive Journals of Virginia*, Volume 1, at 168.

EN-895 — CHAP. I, *An Act for appointing Rangers*, AT A GENERAL ASSEMBLY, BEGUN AT *The Capitol, the twenty-fifth day of October*, 1710; *and then continued by several prorogations, to the seventh day of November*, 1711, *in Laws of Virginia*, Volume 4, at 9-10.

EN-896 — CHAP. II, *An Act to explain an act, intituled, An act for raising the sum of twenty thousand pounds, for the protection of his majesty's subjects, against the insults and encroachments of the French; and for other purposes therein mentioned*, § IX, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Thursday the first day of May, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 465.

EN-897 — CHAP. I, *An Act for raising the sum of forty thousand pounds, for the protection of his majesty's subjects on the frontiers of this colony*, § X, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 527.

EN-898 —CHAP. I, *An Act for raising the Sum of Twenty-five Thousand Pounds, for the better protection of the Inhabitants on the Frontiers of this Colony, and for other purposes therein mentioned*, § X, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *in Laws of Virginia*, Volume 7, at 14-15.

EN-899 — CHAP. I, *An Ordinance for raising an additional number of forces for the defence and protection of this colony, and for other purposes therein mentioned, At a Convention of Delegates held at the town of Richmond, in the colony of Virginia, on Friday the first of December, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 89-90.

EN-900 — CHAP. II, *An act for the more speedily completeing the Quota of Troops to be raised in this commonwealth for the continental army, and for other purposes*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 276-277.

EN-901 — CHAP. VII, *An act for providing against Invasions and Insurrections*, §§ I and II, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 291-292.

EN-902 — CHAP. I, *An Act for speedily recruiting the Virginia Regiments on the continental establishment, and for raising additional troops of Volunteers*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the twentieth day of October, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 337-338, 342-343.

EN-903 — CHAP. XIX, *An Act for obliging the several delinquent counties and divisions of militia in this commonwealth, to furnish one twenty fifth man*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of* Williamsburg, *on* Monday *the third day of* May, *one thousand seven hundred and seventy-nine, in Laws of Virginia*, Volume 10, at 82. *Mandated to be employed*, CHAP. L, *An act for re-enlisting the troops of this state in the continental army, and for other purposes*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol in the City of* Williamsburg, *on* Monday *the fourth day of* October, *one thousand seven hundred and seventy nine, in Laws of Virginia*, Volume 10, at 214-215.

EN-904 — CHAP. III, *An act for recruiting this state's quota of troops to serve in the army of the United States*, §§ I, II, and III, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the sixth day of* May, *one thousand seven hundred and eighty-two, in Laws of Virginia*, Volume 11, at 14-16.

EN-905 — CHAP. III, *An Act, for raising Levies and Recruits, to serve in the present War, against the* Spaniards, *in* America, §§ I, II, and III, AT A General Assembly, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on Friday the first day of August*, [1735]. *And from thence continued, by several prorogations to the twenty second day of May*, 1740, *in Laws of Virginia*, Volume 5, at 94-96.

EN-906 — CHAP. II, *An Act for raising levies and recruits to serve in the present expedition against the French, on the Ohio*, §§ I, II, and III, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February*, 1752. *And from thence continued by several prorogations, to Thursday the 17th day of October*, 1754, *in Laws of Virginia*, Volume 6, at 438-439. [In the volume cited, the erroneous page number "421" is given for the actual page "439".]

EN-907 — CHAP. II, *An Act to explain an act, intituled, An act for raising the sum of twenty thousand pounds, for the protection of his majesty's subjects, against the insults and encroachments of the French; and for other purposes therein mentioned*, § IX, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Thursday the first day of May, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 465.

EN-908 — CHAP. I, *An Act for raising the sum of forty thousand pounds, for the protection of his majesty's subjects on the frontiers of this colony*, § X, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 527.

EN-909 — CHAP. I, *An Act for raising the Sum of Twenty-five Thousand Pounds, for the better protection of the Inhabitants on the Frontiers of this Colony, and for other purposes therein mentioned*, § X, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *in Laws of Virginia*, Volume 7, at 14-15.

EN-910 — CHAP. I, *An Act for granting an aid to his majesty for the better protection of this colony, and for other purposes therein mentioned*, § I, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday, the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 70-71.

EN-911 — CHAP. II, *An act for the more speedily completeing the Quota of Troops to be raised in this commonwealth for the continental army, and for other purposes*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 276-277.

EN-912 — CHAP. I, *An Act for speedily recruiting the Virginia Regiments on the continental establishment, and for raising additional troops of Volunteers*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the twentieth day of October, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 337-339, 341.

EN-913 — ACT I, *An act for carrying on a warre against the barbarous Indians*, AT A GRAND ASSEMBLIE, HOLDEN AT JAMES CITTIE THE FIFTH DAY OF JUNE[,] 1676, *in Laws of Virginia*, Volume 2, at 346.

EN-914 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, § III, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 118-119.

EN-915 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, § XXVII, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 125.

EN-916 — CHAP. II, *An Act, for the better Regulation of the Militia*, § III, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 16-17.

EN-917 — CHAP. I, *An Act for raising the sum of forty thousand pounds, for the protection of his majesty's subjects on the frontiers of this colony*, § X, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 527.

EN-918 — CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia*, § IV, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November*[,] 1766, *in Laws of Virginia*, Volume 8, at 242-243. *Continued*, CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-919 — CHAP. I, *An Ordinance for raising an additional number of forces for the defence and protection of this colony, and for other purposes therein mentioned, At a Convention of Delegates held at the town of Richmond, in the colony of Virginia, on Friday the first of December, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 89-90.

EN-920 — CHAP. II, *An act for the more speedily completeing the Quota of Troops to be raised in this commonwealth for the continental army, and for other purposes*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 276-278.

EN-921 — CHAP. VII, *An act for providing against Invasions and Insurrections*, § II, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 292.

EN-922 — CHAP. I, *An Act for speedily recruiting the Virginia Regiments on the continental establishment, and for raising additional troops of Volunteers*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the twentieth day of October, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 337, 343, 345.

EN-923 — CHAP. XX, *An act for the better regulation and discipline of the militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of* Williamsburg, *on* Monday *the third day of* May, *one thousand seven hundred and seventy-nine, in Laws of Virginia*, Volume 10, at 84.

EN-924 — CHAP. I, *An act to embody militia for the relief of South Carolina, and for other purposes*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the first day of* May, *one thousand seven hundred and eighty*, *in Laws of Virginia*, Volume 10, at 225.

EN-925 — CHAP. XII, *An act for speedily recruiting the quota of this state for the continental army*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the first day of* May, *one thousand seven hundred and eighty*, *in Laws of Virginia*, Volume 10, at 257, 259.

EN-926 — CHAP. XII, *An act for speedily recruiting the quota of this state for the continental army*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the first day of* May, *one thousand seven hundred and eighty*, *in Laws of Virginia*, Volume 10, at 261-262. *See to like effect* CHAP. III, *An Act for recruiting this state's quota of troops to serve in the continental army*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the sixteenth day of* October, *one thousand seven hundred and eighty*, *in Laws of Virginia*, Volume 10, at 334-335.

EN-927 — CHAP. III, *An Act for recruiting this state's quota of troops to serve in the continental army*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the sixteenth day of* October, *one thousand seven hundred and eighty*, *in Laws of Virginia*, Volume 10, at 333.

EN-928 — CHAP. VIII, *An act to amend the act for regulating and disciplining the militia, and for other purposes*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the seventh day of* May, *one thousand seven hundred and eighty-one*, *in Laws of Virginia*, Volume 10, at 416-417.

EN-929 — CHAP. VIII, *An act to amend the act for regulating and disciplining the militia, and for other purposes*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the seventh day of* May, *one thousand seven hundred and eighty-one*, *in Laws of Virginia*, Volume 10, at 417.

EN-930 — CHAP. XLIV, *An act to amend the act, intituled, An act for establishing and regulating the militia*, § VII, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the twenty-first day of* October, *one thousand seven hundred and eighty-two*, *in Laws of Virginia*, Volume 11, at 175.

EN-931 — CHAP. XII, *An act for speedily recruiting the quota of this state for the continental army*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the first day of* May, *one thousand seven hundred and eighty*, *in Laws of Virginia*, Volume 10, at 259.

EN-932 — CHAP. III, *An Act for recruiting this state's quota of troops to serve in the continental army*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the sixteenth day of* October, *one thousand seven hundred and eighty*, *in Laws of Virginia*, Volume 10, at 337.

EN-933 — CHAP. III, *An Act for recruiting this state's quota of troops to serve in the continental army*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the sixteenth day of* October, *one thousand seven hundred and eighty*, *in Laws of Virginia*, Volume 10, at 335-336.

EN-934 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven*, *in Laws of Virginia*, Volume 9, at 267-268 (emphasis supplied).

EN-935 — CHAP. VIII, *An act to amend the act for regulating and disciplining the militia, and for other purposes*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the seventh day of* May, *one thousand seven hundred and eighty-one*, *in Laws of Virginia*, Volume 10, at 416-417.

EN-936 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 335 (emphasis supplied).

EN-937 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, §§ II and XXVI, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 118, 125 (emphases supplied).

EN-938 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 337.

EN-939 —CHAP. II, *An Act for the settling and better Regulation of the Militia*, § III, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 118-119.

EN-940 — CHAP. II, *An Act, for the better Regulation of the Militia*, § III, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 16-17.

EN-941 — CHAP. II, *An Act for the better regulating and training the Militia*, §§ IV and VI, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 531, 532-533.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, §§ III and V, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 93-94. 94-95. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May,* 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-942 — CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, §§ II and III, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 534, 537. [In this volume, pages 535 and 536 are blank.] *Reinacted with amendments,* CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* §§ I and II, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 241-242. *Continued,* CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-943 — CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § V, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 537. *Rëenacted with amendments*, CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § VII, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 243-244. *Continued,* CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-944 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 28.

EN-945 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 267; CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § II, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four, in Laws of Virginia*, Volume 11, at 476-477; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § III, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the*

City of Richmond, on Monday the seventeenth day of October[,] *one thousand seven hundred and eighty-five*, *in Laws of Virginia*, Volume 12, at 10.

EN-946 — CHAP. V, *An Act for making more effectual provision against Invasions and Insurrections*, § I, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg*, *the first day of February*, 1727, *in Laws of Virginia*, Volume 4, at 197. *Continued*, CHAP. IV, *An act to continue the Act*, *for making more effectual provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg*, *the first day of February*, [1727]. *And from thence continued*, *by several prorogations*, *to the eighteenth day of May*, 1732, *in Laws of Virginia*, Volume 4, at 323; CHAP. IV, *An Act for further continuing the Act*, For making more effectual provision against Invasions and Insurrections, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg*, *the first day of February*, [1727]. *And from thence continued*, *by several prorogations*, *to the twenty second day of August*, 1734, *in Laws of Virginia*, Volume 4, at 395; CHAP. III, *An Act*, *for reviving the Act*, *For making more effective provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol*, *in the City of Williamsburg*, *on the first day of August*, [1735]. *And from thence continued*, *by several prorogations*, *to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 24; CHAP. VI, *An Act*, *for continuing and amending the Act*, Intituled, *An Act*, *for making more effectual Provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol*, *in the City of Williamsburg*, *on Friday the first day of August*, [1735]. *And from thence continued*, *by several prorogations, to the twenty second day of May*, 1740, *in Laws of Virginia*, Volume 5, at 99; CHAP. IV, *An Act*, *for continuing an Act*, *made in the first year of his majesty's reign*, *intituled*, *an Act for making more effectual provision against invasions and insurrections*; *and one other act*, *intituled*, *an Act*, *for continuing and amending the aforementioned Act*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol*, *in the City of Williamsburg*, *on Thursday*, *the sixth day of May*, [1741]. *And from thence continued*, *by several prorogations*, *to Tuesday*, *the fourth day of September*, 1744, *in Laws of Virginia*, Volume 5, at 228.

CHAP. XXXIX, *An Act for making provision against Invasions and Insurrections*, § I, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *The College in Williamsburg*, *the twenty-seventh day of October*, 1748, *in Laws of Virginia*, Volume 6, at 112-113. *Continued,* CHAP. II, *An Act for continuing an act*, *intituled*, *An Act for making provision against invasions and insurrections*, *At a General Assembly*, *begun and held at the College in the City of Williamsburg*, *on Thursday the twenty seventh day of February*, 1752. *And from thence continued by several prorogations*, *to Thursday the first day of November*, 1753, *in Laws of Virginia*, Volume 6, at 350.

EN-947 — CHAP. XXXVIII, *An act directing the trial of Slaves committing capital crimes; and for the more effectual punishing conspiracies and insurrections of them; and for the better government of negroes, mulattoes, and Indians, bond or free*, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *The College, in Williamsburg, the twenty-seventh day of October*, 1748, *in Laws of Virginia*, Volume 6, at 104.

EN-948 — *See, e.g.*, October 24th 1687, *in Executive Journals of Virginia*, Volume 1, at 86-87; At a Council held at Williamsburgh the 21st day of March 1709, *in Executive Journals of Virginia*, Volume 3, at 234-235.

EN-949 — CHAP. XVI, *An act to set free* Will, *a Negro belonging to Robert Ruffin*, AT A GENERAL ASSEMBLY, BEGUN AND HOLDEN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-FIFTH DAY OF OCTOBER, 1710, *in Laws of Virginia*, Volume 3, at 537.

EN-950 — CHAP. V, *An Act for making more effectual provision against Invasions and Insurrections*, § XVIII, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg*, *the first day of February*, 1727, *in Laws of Virginia*, Volume 4, at 203. *Continued,* CHAP. IV, *An act to continue the Act*, *for making more effectual provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg*, *the first day of February*, [1727], *And from thence continued*, *by several prorogations*, *to the eighteenth day of May*, 1732, *in Laws of Virginia*, Volume 4, at 323; CHAP. IV, *An Act for further continuing the Act*, For making more effectual provision against Invasions and Insurrections, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg*, *the first day of February*, [1727]. *And from thence continued*, *by several prorogations*, *to the twenty second day of August*, 1734, *in Laws of Virginia*, Volume 4, at 395; CHAP. III, *An Act*, *for reviving the Act*, *For making more effective provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol*, *in the City of Williamsburg*, *on the first day of August*, [1735]. *And from thence continued*, *by several prorogations*, *to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 24; CHAP. VI, *An Act*, *for continuing and amending the Act*, Intituled, *An Act*, *for making more effectual Provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol*, *in the City of Williamsburg*, *on Friday the first day of August*, [1735]. *And from thence continued*, *by several prorogations, to the twenty second day of May*, 1740, *in Laws of Virginia*, Volume 5, at 99; CHAP. IV, *An Act*, *for continuing an Act*, *made in the first year of his majesty's reign*, *intituled*, *an Act for making more effectual provision against invasions and insurrections*; *and one other act*, *intituled*, *an Act*, *for continuing and amending the aforementioned Act*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol*, *in the City of Williamsburg*, *on Thursday*, *the sixth day of May*, [1741]. *And from thence continued*, *by several prorogations*, *to Tuesday*, *the fourth day of September*, 1744, *in Laws of Virginia*, Volume 5, at 228.

EN-951 — CHAP. II, *An Act, for the better Regulation of the Militia*, § VIII, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 19.

EN-952 — CHAP. II, *An Act for amending the act, intituled, An Act for the better regulation of the militia*, § I, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February*, 1752. *And from thence continued by several prorogations, to Thursday the 14th day of February*, 1754, *in Laws of Virginia*, Volume 6, at 421-422; CHAP. II, *An Act for the better regulating and training the Militia*, § XXVI, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 543.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § XXVII, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 105. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538.

EN-953 — CHAP. VII, *An act to amend so much of the act for the better regulating and training the militia, as relates to the appointment of patrollers, their duty and reward*, § I, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November* 1766, *in Laws of Virginia*, Volume 8, at 196. *Continued,* CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-954 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 33.

EN-955 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 273.

EN-956 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § VIII, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four, in Laws of Virginia*, Volume 11, at 489; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § VIII, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five, in Laws of Virginia*, Volume 12, at 20.

EN-957 — CHAP. V, *An Act for making more effectual provision against Invasions and Insurrections*, §§ VIII, IX, and X, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, 1727, *in Laws of Virginia*, Volume 4, at 200-201. *Continued*, CHAP. IV, *An act to continue the Act, for making more effectual provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, [1727]. *And from thence continued, by several prorogations, to the eighteenth day of May*, 1732 *in Laws of Virginia*, Volume 4, at 323; CHAP. IV, *An Act for further continuing the Act*, For making more effectual provision against Invasions and Insurrections, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, [1727]. *And from thence continued, by several prorogations, to the twenty second day of August*, 1734, *in Laws of Virginia*, Volume 4, at 395; CHAP. III, *An Act, for reviving the Act, For making more effective provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 24; CHAP. VI, *An Act, for continuing and amending the Act*, Intituled, *An Act, for making more effectual Provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in*

the City of Williamsburg, on Friday the first day of August, [1735]. *And from thence continued, by several prorogations, to the twenty second day of May*, 1740, *in Laws of Virginia*, Volume 5, at 99; CHAP. IV, *An Act, for continuing an Act, made in the first year of his majesty's reign, intituled, an Act for making more effectual provision against invasions and insurrections; and one other act, intituled, an Act, for continuing and amending the aforementioned Act*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on Thursday, the sixth day of May*, [1741]. *And from thence continued, by several prorogations, to Tuesday, the fourth day of September*, 1744, *in Laws of Virginia*, Volume 5, at 228.

EN-958 — CHAP. XXXIX, *An Act for making provision against Invasions and Insurrections*, §§ VIII and IX, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *The College in Williamsburg, the twenty-seventh day of October*, 1748, *in Laws of Virginia*, Volume 6, at 116. *Continued,* CHAP. II, *An Act for continuing an act, intituled, An Act for making provision against invasions and insurrections, At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February*, 1752. *And from thence continued by several prorogations, to Thursday the first day of November*, 1753, *in Laws of Virginia*, Volume 6, at 350.

EN-959 — CHAP. II, *An Act for raising levies and recruits to serve in the present expedition against the French, on the Ohio*, § IV, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February*, 1752. *And from thence continued by several prorogations, to Thursday the 17th day of October*, 1754, *in Laws of Virginia*, Volume 6, at 439. [In the book, the erroneous number "421" is given for this page.]

EN-960 — CHAP. I, *An Act for raising the sum of forty thousand pounds, for the protection of his majesty's subjects on the frontiers of this colony*, § X. *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 527.

EN-961 — CHAP. IV, *An Act for reducing the several acts for making provision against invasions and insurrections into one act*, § XII, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday, the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 112. *Continued*, CHAP. IV, *An Act for continuing an act, intituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758, *in Laws of Virginia*, Volume 7, at 237; CHAP. V, *An Act for further continuing an Act, intituled, An Act for reducing the several Acts for making provision against Invasions and Insurrections, into one Act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September, 1758; and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 275; CHAP. II, *An Act for further continuing an act, entituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the fifth of March*, 1761, *in Laws of Virginia*, Volume 7, at 384; CHAP. IV, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 539; CHAP. I, *An act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 30th of October*, 1764, *in Laws of Virginia*, Volume 8, at 37; CHAP. I, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 189; CHAP. V, *An Act for further continuing the Act, intituled an Act for reducing the several acts of Assembly for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in the City of Williamsburg, on Tuesday, in the seventh day of November*, 1769, *in Laws of Virginia*, Volume 8, at 334; CHAP. III, *An act for further continuing the act, intituled An act for reducing the several acts of assembly, for making provision against invasions and insurrections, into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Monday the tenth day of February, one thousand seven hundred and seventy-two, in Laws of Virginia*, Volume 8, at 514.

EN-962 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 21, 23.

EN-963 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § VII, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four*, *in Laws of Virginia*, Volume 11, at 487-488; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § VII, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five*, *in Laws of Virginia*, Volume 12, at 18-19.

EN-964 — ACT VII, *An act disbanding the present souldiers in garrisons in the fforts on the heads of the severall rivers, as alsoe for the raiseing of other forces in their stead*, ATT A GENERALL ASSEMBLY, BEGUNN ATT JAMES CITTY NOVEM.[,] 1682, *in Laws of Virginia*, Volume 2, at 500.

EN-965 — ACT I, *An act for carrying on a warre against the barbarous Indians*, AT A GRAND ASSEMBLIE, HOLDEN AT JAMES CITTIE THE FIFTH DAY OF JUNE[,] 1676, *in Laws of Virginia*, Volume 2, at 346.

EN-966 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 342; CHAP. II, *An Act for the settling and better Regulation of the Militia*, § XXII, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 124.

EN-967 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven*, *in Laws of Virginia*, Volume 9, at 270, 272.

EN-968 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § XI, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[.] *one thousand seven hundred eighty-four*, *in Laws of Virginia*, Volume 11, at 493; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § XI, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five*, *in Laws of Virginia*, Volume 12, at 24.

EN-969 — CHAP. II, *An Act for raising levies and recruits to serve in the present expedition against the French, on the Ohio*, § V, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February*, 1752. *And from thence continued by several prorogations, to Thursday the 17th day of October*, 1754, *in Laws of Virginia*, Volume 6, at 439. [In the book, the erroneous page number "421" is given for this page.]

EN-970 — CHAP. I, *An Ordinance for raising an additional number of forces for the defence and protection of this colony, and for other purposes therein mentioned, At a Convention of Delegates held at the town of Richmond, in the colony of Virginia, on Friday the first of December, one thousand seven hundred and seventy-five*, *in Laws of Virginia*, Volume 9, at 91.

EN-971 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five*, *in Laws of Virginia*, Volume 9, at 22-23.

EN-972 — CHAP. I, *An Ordinance for raising an additional number of forces for the defence and protection of this colony, and for other purposes therein mentioned, At a Convention of Delegates held at the town of Richmond, in the colony of Virginia, on Friday the first of December, one thousand seven hundred and seventy-five*, *in Laws of Virginia*, Volume 9, at 89-90.

EN-973 — CHAP. XII, *An ordinance for amending an ordinance for raising and embodying a sufficient force for the defence and protection of this colony, and for other purposes therein mentioned. At a General Convention of Delegates and Representatives, from the several counties and corporations of Virginia, held at the Capitol in the City of Williamsburg, on Monday the 6th of May*, 1776, *in Laws of Virginia*, Volume 9, at 139-140.

EN-974 — CHAP. VII, *An act for providing against Invasions and Insurrections*, §§ I and II, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven*, *in Laws of Virginia*, Volume 9, at 291-292.

EN-975 — CHAP. I, *An act to embody militia for the relief of South Carolina, and for other purposes*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the first day of* May, *one thousand seven hundred and eighty*, *in Laws of Virginia*, Volume 10, at 221.

EN-976 — CHAP. XLIV, *An act to amend the act, intituled, An act for establishing and regulating the militia*, § IV, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the twenty-first day of* October, *one thousand seven hundred and eighty-two*, *in Laws of Virginia*, Volume 11, at 174.

EN-977 — CHAP. II, *An act to amend the act for regulating and disciplining the militia, and for other purposes*, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the sixteenth day of October*[,] *one thousand seven hundred and eighty-six*, *in Laws of Virginia*, Volume 12, at 234.

EN-978 — CHAP. XXXI, *An act for security and defence of the country in times of danger*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 362-363.

EN-979 — CHAP. V, *An Act for making more effectual provision against Invasions and Insurrections*, § II, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, 1727, *in Laws of Virginia*, Volume 4, at 197-198. *Continued*, CHAP. IV, *An act to continue the Act, for making more effectual provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, [1727]. *And from thence continued, by several prorogations, to the eighteenth day of May*, 1732, *in Laws of Virginia*, Volume 4, at 323; CHAP. IV, An Act for further continuing the Act, For making more effectual provision against Invasions and Insurrections, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, [1727]. *And from thence continued, by several prorogations, to the twenty second day of August*, 1734, *in Laws of Virginia*, Volume 4, at 395; CHAP. III, *An Act, for reviving the Act, For making more effective provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 24; CHAP. VI, *An Act, for continuing and amending the Act*, Intituled, *An Act, for making more effectual Provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on Friday the first day of August*, [1735]. *And from thence continued, by several prorogations, to the twenty second day of May*, 1740, *in Laws of Virginia*, Volume 5, at 99; CHAP. IV, *An Act, for continuing an Act, made in the first year of his majesty's reign, intituled, an Act for making more effectual provision against invasions and insurrections; and one other act, intituled, an Act, for continuing and amending the aforementioned Act*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on Thursday, the sixth day of May*, [1741]. *And from thence continued, by several prorogations, to Tuesday, the fourth day of September*, 1744, *in Laws of Virginia*, Volume 5, at 228.

EN-980 — CHAP. XXXIX, *An Act for making provision against Invasions and Insurrections*, § II, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *The College in Williamsburg, the twenty-seventh day of October*, 1748, *in Laws of Virginia*, Volume 6, at 113. *Continued,* CHAP. II, *An Act for continuing an act, intituled, An Act for making provision against invasions and insurrections, At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February*, 1752. *And from thence continued by several prorogations, to Thursday the first day of November*, 1753, *in Laws of Virginia*, Volume 6, at 350.

EN-981 — CHAP. IV, *An Act for reducing the several acts for making provision against invasions and insurrections into one act*, § I, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday, the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven*, *in Laws of Virginia*, Volume 7, at 106-107. *Continued*, CHAP. IV, *An Act for continuing an act, intituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758, *in Laws of Virginia*, Volume 7, at 237; CHAP. V, *An Act for further continuing an Act, intituled, An Act for reducing the several Acts for making provision against Invasions and Insurrections, into one Act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 275; CHAP. II, *An Act for further continuing an act, entituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the fifth of March*, 1761, *in Laws of Virginia*, Volume 7, at 384; CHAP. IV, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 539; CHAP. I, *An act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 30th of October*, 1764, *in Laws of Virginia*, Volume 8, at 37; CHAP. I, *An Act for further continuing the act for reducing the several acts for making provision against invasions*

and insurrections into one act, At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November, 1766, *in Laws of Virginia*, Volume 8, at 189; CHAP. V, *An Act for further continuing the Act, intituled an Act for reducing the several acts of Assembly for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in the City of Williamsburg, on Tuesday, in the seventh day of November*, 1769, *in Laws of Virginia*, Volume 8, at 334; CHAP. III, *An act for further continuing the act, intituled An act for reducing the several acts of assembly, for making provision against invasions and insurrections, into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Monday the tenth day of February, one thousand seven hundred and seventy-two, in Laws of Virginia*, Volume 8, at 514.

EN-982 — CHAP. II, *An Act to explain an act, intituled, An act for raising the sum of twenty thousand pounds, for the protection of his majesty's subjects, against the insults and encroachments of the French; and for other purposes therein mentioned*, § IX, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Thursday the first day of May, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 465.

EN-983 — CHAP. III, *An act for amending an act, intituled, An act for making provision against invasions and insurrections*, § X, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 548.

EN-984 — CHAP. I, *An Act for raising the Sum of Twenty-five Thousand Pounds, for the better protection of the Inhabitants on the Frontiers of this Colony, and for other purposes therein mentioned*, § XV, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *in Laws of Virginia*, Volume 7, at 17.

EN-985 — CHAP. I, *An Ordinance for raising an additional number of forces for the defence and protection of this colony, and for other purposes therein mentioned, At a Convention of Delegates held at the town of Richmond, in the colony of Virginia, on Friday the first of December, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 85.

EN-986 — A DECLARATION *of* RIGHTS *made by the representatives of the good people of* Virginia, *assembled in full and free Convention; which rights do pertain to them, and their posterity, as the basis and foundation of government*, 12 July 1776, Articles 3 and 13, *At a General Convention of Delegates and Representatives, from the several counties and corporations of Virginia, held at the Capitol in the City of Williamsburg, on Monday the 6th of May,* 1776, *in Laws of Virginia*, Volume 9, at 109-110, 111.

EN-987 — CHAP. IV, *An act for establishing martial law within twenty miles of the American army, or the enemy's camp,* AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the seventh of* May, *one thousand seven hundred and eighty-one, in Laws of Virginia*, Volume 10, at 411 (***bold-faced emphasis*** *supplied)*.

EN-988 — ACT I, *An act for the defence of the country*, AT A GRAND ASSEMBLIE HOLDEN AT JAMES CITTIE BY PROROGATION FROM THE TWENTIETH OF SEPTEMBER[,] 1671, TO THE TWENTY-FOURTH OF SEPTEMBER[,] 1672, *in Laws of Virginia*, Volume 2, at 294.

EN-989 — [Number] 27, LAWS and ORDERS *Concluded on by the General Assembly, March the 5th*, 1623-4, *in Laws of Virginia*, Volume 1, at 127.

EN-990 — ACT X, ATT A GRAND ASSEMBLY, 6TH JANUARY, 1639, *in Laws of Virginia*, Volume 1, at 226.

EN-991 — ACT V, ATT A GRAND ASSEMBLY HOLDEN AT JAMES CITTIE THE FIRST OF OCTOBER, 1644, in *Laws of Virginia*, Volume 1, at 286.

EN-992 — ACT III, ATT A GRAND ASSEMBLY HOLDEN ATT JAMES CITTY THE TWENTIETH OF NOVEMBER, 1645, *in Laws of Virginia*, Volume 1, at 300-301.

EN-993 — ACT XXV, *Provision to bee made for Amunition*, ATT A GRAND ASSEMBLY HELD AT JAMES CITTIE, MARCH 7, 1658-9, *in Laws of Virginia*, Volume 1, at 525 (***bold-faced emphasis*** supplied). *Reënacted*, ACT CXX, *Supply of ammunition*, AT A GRAND ASSEMBLY HELD AT JAMES CITY MARCH THE 23D[,] 1661-2, *in Laws of Virginia*, Volume 2, at 126.

EN-994 — ACT II, *An act providing for the supply of armes and ammunition*, ATT A GRAND ASSEMBLY, HOLDEN AT JAMES CITY BY PROROGATION FROM THE 24TH DAY OF SEPTEMBER, 1672, TO THE 20TH OF OCTOBER, 1673, *in Laws of Virginia*, Volume 2, at 304 (***bold-faced emphasis*** supplied). This Act was ordered to "be putt into strict and effectual execution", AT A GRAND ASSEMBLIE HELD ATT JAMES CITTIE BY

PROROGATION FROM THE ONE AND TWENTIETH DAY OF SEPTEMBER, 1674, TO THE SEAVENTH DAY OF MARCH, [1676,] *in Laws of Virginia*, Volume 2, at 339.

EN-995 — ACT IV, *An act for the better supply of the country with armes and ammunition*, ATT A GENERALL ASSEMBLY, BEGUN AT JAMES CITTY THE SIXTEENTH DAY OF APRILL, ONE THOUSAND SIX HUNDRED EIGHTY-FOUR, *in Laws of Virginia*, Volume 3, at 13-14 (***bold-faced emphasis*** supplied) (footnotes omitted).

EN-996 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 337-339 (***bold-faced emphasis*** supplied).

EN-997 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, §§ VII, IX, and XI, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 120, 121 (***bold-faced emphasis*** supplied).

EN-998 — CHAP. II, *An Act, for the better Regulation of the Militia*, §§ V, XI, and XII, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 17, 21 (***bold-faced emphasis*** supplied).

EN-999 — CHAP. II, *An Act for the better regulating and training the Militia*, §§ V, XIII, and XIV, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five*, *in Laws of Virginia*, Volume 6, at 531-532, 537-538 (***bold-faced emphasis*** supplied).

EN-1000 — CHAP. III, *An Act for the better regulating and disciplining the Militia*, §§ IV, XIV, and XV, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven*, *in Laws of Virginia*, Volume 7, at 94, 99-100 (emphasis supplied in part). *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one*, *in Laws of Virginia*, Volume 8, at 503.

EN-1001 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five*, *in Laws of Virginia*, Volume 9, at 28, 31 (***bold-faced emphasis*** supplied).

EN-1002 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven*, *in Laws of Virginia*, Volume 9, at 268-269 (***bold-faced emphasis*** supplied).

EN-1003 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, §§ II, VI, XI, and XII, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four*, *in Laws of Virginia*, Volume 11, at 478-479, 485, 493 (***bold-faced emphasis*** supplied).

EN-1004 — CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, §§ III, VI, and XI, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five*, *in Laws of Virginia*, Volume 12, at 12, 16, 24 (***bold-faced emphasis*** supplied).

EN-1005 — CHAP. XVII, *An act for regulating and disciplining the militia of the city of Williamsburg and borough of Norfolk*, §§ I and II, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 313.

EN-1006 — *See* CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 267.

EN-1007 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 336-337, 338 (emphasis supplied).

EN-1008 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, §§ III, VII, and IX, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 118-119, 120 (emphasis supplied).

EN-1009 — CHAP. II, *An Act, for the better Regulation of the Militia*, §§ III, V, and XI, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 16-17, 21 (emphasis supplied).

EN-1010 — CHAP. II, *An Act for the better regulating and training the Militia*, §§ V and VI, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 532-533 (emphasis supplied).

CHAP. III, *An Act for the better regulating and disciplining the Militia*, §§ IV and V, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 94-95 (minor variations in spelling and syntax). *Continued,* CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia,* § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1011 — CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, §§ II, III, and V, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 534, 537 (emphasis supplied in part). [In this volume, pages 535 and 536 are blank.]

EN-1012 — CHAP. XXXI, *An Act to continue and amend the act for the better regulating and disciplining the militia,* §§ I, II, and VII, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth of November,* 1766, *in Laws of Virginia*, Volume 8, at 242, 243-244 (emphasis supplied). *Continued as amended,* CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1013 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 28 (emphasis supplied).

EN-1014 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 336, 338.

EN-1015 — CHAP. I, *An Ordinance for raising an additional number of forces for the defence and protection of this colony, and for other purposes therein mentioned, At a Convention of Delegates held at the town of Richmond, in the colony of Virginia, on Friday the first of December, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 89.

EN-1016 — CHAP. I, *An Act, for the better security of the Country in the present time of Danger*, § V, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on Friday, the first day of August*, [1735]. *And from thence continued, by several prorogations, to the 22nd day of May*, 1740, *in Laws of Virginia*, Volume 5, at 91.

EN-1017 — Att a Councill held at James Citty Jan^{r}y 27th 1691 [1691-2], *in Executive Journals of Virginia*, Volume 1, at 215.

EN-1018 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 28.

EN-1019 — Octob^{r} the 23^{d} 1690, *in Executive Journals of Virginia*, Volume 1, at 133.

EN-1020 — May the 18th 1691, *in Executive Journals of Virginia*, Volume 1, at 185.

EN-1021 — CHAP. II, *An Act for the better regulating and training the Militia*, § V, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 532.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § IV, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March,* 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 94 ("order of the court-martial", rather than application of "chief commanding officer in the county", required to initiate the process). *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1022 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 28-29, 31.

EN-1023 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 269, 272-273.

EN-1024 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § II, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four, in Laws of Virginia*, Volume 11, at 479-480; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § III, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five, in Laws of Virginia*, Volume 12, at 12-13.

EN-1025 — CHAP. XLII, *An act concerning the militia*, § I, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the twentieth day of October, one thousand seven hundred and eighty-eight*, *in Laws of Virginia*, Volume 12, at 697.

EN-1026 — CHAP. XLIX, *An act concerning Servants and Slaves*, § XIII, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER,1705, *in Laws of Virginia*, Volume 3, at 451.

EN-1027 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 338.

EN-1028 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, §§ VII, VIII, and IX, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 120; CHAP. II, *An Act, for the better Regulation of the Militia*, §§ V, X, and XI, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 17, 21.

EN-1029 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 336; CHAP. II, *An Act for the settling and better Regulation of the Militia*, §§ II, III, and IV, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 118-119; CHAP. II, *An Act, for the better Regulation of the Militia*, §§ II, III, and IV, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 16-17.

EN-1030 — CHAP. II, *An Act for the better regulating and training the Militia*, §§ III, X, XIII, and XV, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five*, *in Laws of Virginia*, Volume 6, at 531, 536-537, 537-538, 539.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, §§ II, XI, XIV, and XVI, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven*, *in Laws of Virginia*, Volume 7, at 93, 98, 99-100, 100-101. *Continued,* CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one*, *in Laws of Virginia*, Volume 8, at 503.

EN-1031 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five*, *in Laws of Virginia*, Volume 9, at 27, 30, 31, 32.

EN-1032 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven*, *in Laws of Virginia*, Volume 9, at 267-268, 269-271.

EN-1033 — CHAP. XLIX, *An act concerning Servants and Slaves*, § XIII, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER,1705, *in Laws of Virginia*, Volume 3, at 451.

EN-1034 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 338; CHAP. II, *An Act for the settling and better Regulation of the Militia*, § VIII, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 120.

EN-1035 — CHAP. II, *An Act, for the better Regulation of the Militia*, §§ VII and X, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 18, 21.

EN-1036 — CHAP. II, *An Act for the better regulating and training the Militia*, §§ VIII and X, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 533, 536-537.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, §§ VIII and X, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 95-96, 98. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1037 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 29-30.

EN-1038 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 268, 270.

EN-1039 — ACT VII, *An act disbanding the present souldiers in garrisons in the fforts on the heads of the severall rivers, as alsoe for the raiseing of other forces in their stead*, ATT A GENERALL ASSEMBLY, BEGUNN ATT JAMES CITTY NOVEM. THE TENTH[,] 1682, *in Laws of Virginia*, Volume 2, at 500.

EN-1040 — ACT VII, *An Act for the better defence of the Country*, ATT A GENERALL ASSEMBLY, BEGUN AT JAMES CITTY THE SIXTEENTH DAY OF APRILL, ONE THOUSAND SIX HUNDRED EIGHTY-FOUR, *in Laws of Virginia*, Volume 3, at 18, 22. *Repealed*, Act IX, *An act repealing the 7th act of assembly made at James Cittie the 16th day of Aprill,* 1684, ATT A GENERALL ASSEMBLY, BEGUN AT JAMES CITTY THE FIRST DAY OF OCTOBER, 1685, AND THENCE PROROGUED BY SEVERALL PROROGATIONS TO THE 20TH DAY OF OCTOBER, 1686, *in Laws of Virginia*, Volume 3, at 38.

EN-1041 — ACT XV, *An act for the better defence of the country*, AT A GENERALL ASSEMBLY, BEGUN AT JAMES CITTY THE 16TH DAY OF APRIL, 1691, *in Laws of Virginia*, Volume 3, at 83. *Reënacted*, ACT I, *An act for the better defence of the Countrey*, AT A GENERAL ASSEMBLY, BEGUN AT JAMES CITTY THE 16TH DAY OF APRIL, 1691. *And thence continued by prorogation to the first day of Aprill*, 1692, *in Laws of Virginia*, Volume 3, at 99-100. *See to like effect* ACT VI, *An act for continuing the Rangers at the head of the four great Rivers*, AT A GENERAL ASSEMBLY, BEGUN AT JAMES CITTY THE 2nd DAY OF MARCH, 1692-3, *in Laws of Virginia*, Volume 3, at 115; ACT I, *An act appointing Rangers on the frontiers of the four great rivers*, ATT A GENERALL ASSEMBLY, BEGUN ATT JAMES CITTY. THE 10th DAY OF OCTOBER[,] 1693, *in Laws of Virginia*, Volume 3, at 119; ACT I, *An act appoynting Rangers att the heads of the four great rivers*, ATT A GENERALL ASSEMBLY, BEGUN ATT JAMES CITTY THE 18TH DAY OF APRIL, 1695, *in Laws of Virginia*, Volume 3, at 126.

EN-1042 — CHAP. I, *An Act for appointing Rangers*, AT A GENERAL ASSEMBLY, BEGUN AT *The Capitol*, *the twenty-fifth day of October*, 1710; *and then continued by several prorogations*, *to the seventh day of November*, 1711, *in Laws of Virginia*, Volume 4, at 11.

EN-1043 — CHAP. V, *An Act for making more effectual provision against Invasions and Insurrections*, §§ I, VIII, IX, and X, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg*, *the first day of February*, 1727, *in Laws of Virginia*, Volume 4, at 197, 200-201. *Continued*, CHAP. IV, *An act to continue the Act*, *for making more effectual provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg*, *the first day of February*, [1727]. *And from thence continued*, *by several prorogations*, *to the eighteenth day of May*, 1732, *in Laws of Virginia*, Volume 4, at 323; CHAP. IV, *An Act for further continuing the Act*, For making more effectual provision against Invasions and Insurrections, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg*, *the first day of February*, 1727. *And from thence continued*, *by several prorogations*, *to the twenty second day of August*, 1734, *in Laws of Virginia*, Volume 4, at 395; CHAP. III, *An Act*, *for reviving the Act*, *For making more effective provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol*, *in the City of Williamsburg*, *on the first day of August*, [1735]. *And from thence continued*, *by several prorogations*, *to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 24; CHAP. VI, *An Act*, *for continuing and amending the Act*, Intituled, *An Act*, *for making more effectual Provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol*, *in the City of Williamsburg*, *on Friday the first day of August*, [1735]. *And from thence continued*, *by several prorogations, to the twenty second day of May*, 1740, *in Laws of Virginia*, Volume 5, at 99; CHAP. IV, *An Act*, *for continuing an Act*, *made in the first year of his majesty's reign*, *intituled*, *an Act for making more effectual provision against invasions and insurrections*; *and one other act*, *intituled*, *an Act*, *for continuing and amending the aforementioned Act*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol*, *in the City of Williamsburg*, *on Thursday*, *the sixth day of May*, [1741]. *And from thence continued*, *by several prorogations*, *to Tuesday*, *the fourth day of September*, 1744, *in Laws of Virginia*, Volume 5, at 228.

CHAP. XXXIX, *An Act for making provision against Invasions and Insurrections*, §§ I, VIII, and IX, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *The College in Williamsburg*, *the twenty-seventh day of October*, 1748, *in Laws of Virginia*, Volume 6, at 112-113, 116. *Continued,* CHAP. II, *An Act for continuing an act*, *intituled*, *An Act for making provision against invasions and insurrections*, *At a General Assembly*, *begun and held at the College in the City of Williamsburg*, *on Thursday the twenty seventh day of February*, 1751. *And from thence continued by several prorogations*, *to Thursday the first day of November*, 1753, *in Laws of Virginia*, Volume 6, at 350.

EN-1044 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony*, *AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia*, *held at Richmond town*, *in the county of Henrico*, *on Monday the seventeenth day of July*, *one thousand seven hundred and seventy-five*, *in Laws of Virginia*, Volume 9, at 12, 20.

EN-1045 — CHAP. I, *An Ordinance for raising an additional number of forces for the defence and protection of this colony*, *and for other purposes therein mentioned*, *At a Convention of Delegates held at the town of Richmond*, *in the colony of Virginia*, *on Friday the first of December*, *one thousand seven hundred and seventy-five*, *in Laws of Virginia*, Volume 9, at 81-82, 87.

EN-1046 — CHAP. XI, *An ordinance for augmenting the ninth regiment of regular forces, providing for the better defence of the frontiers of this colony, and for raising six troops of horse*, *At a General Convention of Delegates and Representatives*, *from the several counties and corporations of Virginia*, *held at the Capitol in the City of Williamsburg*, *on Monday the 6th of May*, 1776, *in Laws of Virginia*, Volume 9, at 137-138.

EN-1047 — CHAP. XIII, *An ordinance to supply certain defects in a former ordinance of this convention for raising six troops of horse*, *At a General Convention of Delegates and Representatives*, *from the several counties and corporations of Virginia*, *held at the Capitol in the City of Williamsburg*, *on Monday the 6th of May*, 1776, *in Laws of Virginia*, Volume 9, at 143.

EN-1048 — At a Council held May 1st 1758, *in Executive Journals of Virginia*, Volume 6, at 87-88.

EN-1049 — ACT I, *An act for carrying on a warre against the barbarous Indians*, AT A GRAND ASSEMBLIE, HOLDEN AT JAMES CITTIE THE FIFTH DAY OF JUNE[,] 1676, *in Laws of Virginia*, Volume 2, at 346.

EN-1050 — ACT VII, *An Act for the better defence of the Country*, ATT A GENERALL ASSEMBLY, BEGUN AT JAMES CITTY THE SIXTEENTH DAY OF APRILL, ONE THOUSAND SIX HUNDRED EIGHTY-FOUR, *in Laws of Virginia*, Volume 3, at 20. *Repealed*, Act IX, *An act repealing the 7th act of assembly made at James Cittie the 16th day of Aprill,* 1684, ATT A GENERALL ASSEMBLY, BEGUN AT JAMES CITTY THE FIRST DAY OF OCTOBER, 1685, AND THENCE PROROGUED BY SEVERALL PROROGATIONS TO THE 20TH DAY OF OCTOBER, 1686, *in Laws of Virginia*, Volume 3, at 38.

EN-1051 — CHAP. II, *An act for raising a regiment of Horse*, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fourth day of May, one thousand seven hundred and seventy eight*, *in Laws of Virginia*, Volume 9, at 449-450.

EN-1052 — CHAP. XXXII, *An act to revive and amend an act entitled An act for giving farther powers to the governour and council*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the sixteenth day of* October, *one thousand seven hundred and eighty*, *in Laws of Virginia*, Volume 10, at 386-387.

EN-1053 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, §§ XI and XII, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four*, *in Laws of Virginia*, Volume 11, at 493; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § XI, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five*, *in Laws of Virginia*, Volume 12, at 24.

EN-1054 — *See in that particular period of time, An* ACT *for better settling and regulating the Militia of this Colony of* New Jersey, *for the Repelling Invasions, and Suppressing Insurrections and Rebellions, At a General assembly of New-Jersey, holden the eighth day of May 1746*, *in New Jersey Archives, 1746-1760,* at 8, 10. *Continued, An* ACT *to continue an Act, entituled*, An Act for better Settling and Regulating the Militia of this Colony of *New-Jersey*; for the Repelling Invasions, and Suppressing Insurrections and Rebellions, *At a General Assembly of New Jersey, continued to the 17th day of November 1747, and then begun at Burlington*, *in New Jersey Archives 1746-1760*, at 48; *An* ACT *to further continue an Act entitled, an* ACT *for better settling and regulating the Militia of this Colony of* New-Jersey; *for the repelling Invasions and suppressing Insurrections and Rebellions*, *Acts and laws of New-Jersey: at a General Assembly begun February 20th, 1748-9 at Burlington, and continued to the 28th of March 1749*, *in New Jersey Archives, 1746-1760*, at 141; *An* ACT *to revive an Act, entitled, An* ACT *for the better settling and regulating the Militia of this Colony, for the repelling Invasions, and suppressing Insurrections and Rebellions* [1750/51], *cited without text in New Jersey Archives, 1746-1760*, at 161; *An* ACT *to further continue an Act, entituled*, An Act for better settling and regulating the Militia of this Colony of *New-Jersey*, for the repelling Invasions and suppressing Insurrections and Rebellions, *passed in the nineteenth Year of his present Majesty's Reign, At a Session of General Assembly of New-Jersey; begun at Burlington, on the sixteenth day of May 1753; and ended on the 8th day of June following, in New Jersey Archives, 1746-1760*, at 254; An ACT for continuing several ACTS of the *General Assembly* of this Colony, which will expire at the End of this present Session, by their own Limitation, or soon after, *At a session of General Assembly of New-Jersey, held at Elizabeth-Town, May 20, 1756, and continued till the second day of June following, in New Jersey Archives, 1746-1760*, at 412.

EN-1055 — CHAP. IV, *An Act for raising a body of Volunteers for the defence of the commonwealth*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of* Williamsburg, *on* Monday *the third day of* May, *one thousand seven hundred and seventy-nine*, *in Laws of Virginia*, Volume 10, at 19, 20-21.

EN-1056 — ACT VIII, ATT A GRAND ASSEMBLY HOLDEN ATT JAMES CITTYE THE 17TH OF FEBRUARY, 1644-5, *in Laws of Virginia*, Volume 1, at 292-293.

EN-1057 — ACT I, *An act for carrying on a warre against the barbarous Indians*, AT A GRAND ASSEMBLIE, HOLDEN AT JAMES CITTIE THE FIFTH DAY OF JUNE[,] 1676, *in Laws of Virginia*, Volume 2, at 348.

EN-1058 — ACT I, *An act for the defence of the country against the incursions of the Indian enemy*, ATT A GRAND ASSEMBLY, BEGUNN AT JAMES CITTY THE 25TH OF APRIL, 1679, *in Laws of Virginia*, Volume 2, at 433-435.

EN-1059 — ACT VII, *An act disbanding the present souldiers in garrisons in the fforts on the heads of the severall rivers, as alsoe for the raiseing of other forces in their stead*, ATT A GENERALL ASSEMBLY, BEGUNN ATT JAMES CITTY NOVEM. THE TENTH[,] 1682, *in Laws of Virginia*, Volume 2, at 499.

EN-1060 — ACT VII, *An Act for the better defence of the Country*, ATT A GENERALL ASSEMBLY, BEGUN AT JAMES CITTY THE SIXTEENTH DAY OF APRILL, ONE THOUSAND SIX HUNDRED EIGHTY-FOUR, *in Laws of Virginia*, Volume 3, at 17-18. *Repealed*, Act IX, *An act repealing the 7th act of assembly made at James Cittie the 16th day of Aprill,* 1684, ATT A GENERALL ASSEMBLY, BEGUN AT JAMES CITTY THE FIRST DAY OF OCTOBER, 1685, AND THENCE PROROGUED BY SEVERALL PROROGATIONS TO THE 20TH DAY OF OCTOBER, 1686, *in Laws of Virginia*, Volume 3, at 38.

EN-1061 — CHAP. I, *An Act for appointing Rangers*, AT A GENERAL ASSEMBLY, BEGUN AT *The Capitol, the twenty-fifth day of October*, 1710; *and then continued by several prorogations, to the seventh day of November*, 1711, *in Laws of Virginia*, Volume 4, at 9-10.

EN-1062 — CHAP. I, *An act for appointing commissioners to examine and state the accounts of the militia lately ordered out into actual service, and for other purposes therein mentioned*, § II, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May,* 1761, *and from thence continued by several prorogations to Thursday the 12th of January*, 1764, *in Laws of Virginia*, Volume 8, at 10.

EN-1063 — CHAP. VII, *An act for providing against Invasions and Insurrections*, § II, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 292.

EN-1064 — ACT V, ATT A GRAND ASSEMBLY HOLDEN ATT JAMES CITTY THE TWENTIETH OF NOVEMBER, 1645, *in Laws of Virginia*, Volume 1, at 301.

EN-1065 — James Citty November 29th 1683, *in Executive Journals of Virginia*, Volume 1, at 54.

EN-1066 — Aprill 26th 1689, *in Executive Journals of Virginia*, Volume 1, at 106.

EN-1067 — ACT XII, ATT AN ASSEMBLY HELD AT JAMES CITTIE, [Session of 10 March 1655-6], *in Laws of Virginia*, Volume 1, at 401-402. *Substantially reënacted*, ACT CIV, *Against Shooteing at Drinkeings*, AT A GRAND ASSEMBLY HELD AT JAMES CITTIE, MARCH 13th, 1657-8, *in Laws of Virginia*, Volume 1, at 480.

EN-1068 — ACT XXV, *Provision to bee made for Amunition*, ATT A GRAND ASSEMBLY, HELD AT JAMES CITTIE, MARCH 7, 1658-9, *in Laws of Virginia*, Volume 1, at 525. *Reënacted*, ACT CXX, *Supply of ammunition*, AT A GRAND ASSEMBLY HELD AT JAMES CITY MARCH THE 23D[,] 1661-2, *in Laws of Virginia*, Volume 2, at 126.

EN-1069 — ACT XXI, *An act against refractory Souldiers*, AT A GRAND ASSEMBLIE HOLDEN AT JAMES CITTIE BY PROROGATION FROM THE 5th OF JUNE 1666, TO THE TWENTIE THIRD OF OCTOBER 1666, *in Laws of Virginia*, Volume 2, at 246.

EN-1070 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 342.

EN-1071 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, § XXIII, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 124-125.

EN-1072 — CHAP. II, *An Act, for the better Regulation of the Militia*, §§ IX and X, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 19-20.

EN-1073 — CHAP. II, *An Act for the better regulating and training the Militia*, §§ V and IX, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 532, 535.

EN-1074 — CHAP. III, *An Act for the better regulating and disciplining the Militia*, §§ X and XIX, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 97, 102. *Continued,* CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, §IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May,* 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1075 — CHAP. IV, *An Act for reducing the several acts for making provision against invasions and insurrections into one act*, § XXII, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday, the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the*

fourteenth of April, one thousand seven hundred and fifty-seven, *in Laws of Virginia*, Volume 7, at 115. *Continued*, CHAP. IV, *An Act for continuing an act, intituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758, *in Laws of Virginia*, Volume 7, at 237; CHAP. V, *An Act for further continuing an Act, intituled, An Act for reducing the several Acts for making provision against Invasions and Insurrections, into one Act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758*; and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 275; CHAP. II, *An Act for further continuing an act, entituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758*; and from thence continued by several prorogations to Thursday the fifth of March*, 1761, *in Laws of Virginia*, Volume 7, at 384; CHAP. IV, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 539; CHAP. I, *An act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 30th of October*, 1764, *in Laws of Virginia*, Volume 8, at 37; CHAP. I, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November*, 1766, *in Laws of Virginia*, Volume 8, at 189; CHAP. V, *An Act for further continuing the Act, intituled an Act for reducing the several acts of Assembly for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in the City of Williamsburg, on Tuesday, in the seventh day of November*, 1769, *in Laws of Virginia*, Volume 8, at 334; CHAP. III, *An act for further continuing the act, intituled An act for reducing the several acts of assembly, for making provision against invasions and insurrections, into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Monday the tenth day of February, one thousand seven hundred and seventy-two*, *in Laws of Virginia*, Volume 8, at 514.

EN-1076 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five*, *in Laws of Virginia*, Volume 9, at 31, 33. *Applied in* CHAP. I, *An Ordinance for raising an additional number of forces for the defence and protection of this colony, and for other purposes therein mentioned, At a Convention of Delegates held at the town of Richmond, in the colony of Virginia, on Friday the first of December, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 91.

EN-1077 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven*, *in Laws of Virginia*, Volume 9, at 272-273.

EN-1078 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § II, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four*, *in Laws of Virginia*, Volume 11, at 479; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § III, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five*, *in Laws of Virginia*, Volume 12, at 12.

EN-1079 — Aprill 2d 1692, *in Executive Journals of Virginia*, Volume 1, at 220.

EN-1080 — At a Council held March the 24. 1772, *in Executive Journals of Virginia*, Volume 6, at 451.

EN-1081 — ACT XVIII, ATT A GRAND ASSEMBLY HOLDEN ATT JAMES CITTYE THE 17TH OF *February*, 1644-5, *in Laws of Virginia*, Volume 1, at 297.

EN-1082 — AT A GRAND ASSEMBLY HELD AT JAMES CITTY BY PROROGATION FROM THE 10TH OF MARCH, 1655, TO THIS INSTANT, FIRST OF DECEMBER, 1656, *in Laws of Virginia*, Volume 1, at 425.

EN-1083 — ACT VII, *An act for provision of ammunition*, AT A GRAND ASSEMBLIE HOLDEN AT JAMES CITTIE BY PROROGATION FROM THE 5th OF JUNE[,] 1666, TO THE TWENTIE THIRD OF OCTOBER[,] 1666, *in Laws of Virginia*, Volume 2, at 238.

EN-1084 — ACT II, *An act providing for the supply of armes and ammunition*, ATT A GRAND ASSEMBLY, HOLDEN AT JAMES CITY BY PROROGATION FROM THE 24TH DAY OF SEPTEMBER, 1672, TO THE 20TH OF OCTOBER, 1673, *in Laws of Virginia*, Volume 2, at 304. This Act was ordered to "be putt into strict and effectual

execution", AT A GRAND ASSEMBLIE HELD ATT JAMES CITTIE BY PROROGATION FROM THE ONE AND TWENTIETH DAY OF SEPTEMBER, 1674, TO THE SEAVENTH DAY OF MARCH, 1676, *in Laws of Virginia*, Volume 2, at 339-340.

EN-1085 — CHAP. I, *An Act, for the better security of the Country in the present time of Danger*, §§ I and II, AT A General Assembly, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on Friday, the first day of August*, [1735]. *And from thence continued, by several prorogations, to the 22nd day of May*, 1740, *in Laws of Virginia*, Volume 5, at 90.

EN-1086 — CHAP. II, *An Act for the better regulating and training the Militia*, § V, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 532.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § IV, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March,* 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 94 (an "order of the court-martial", rather than an application of the "chief commanding officer in the county", required to initiate the process). *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1087 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 12, 28-29.

EN-1088 — CHAP. VI, *An Ordinance for providing arms and ammunition for the use of this colony, At a Convention for the Counties and Corporations in the Colony of Virginia, held at Richond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 71-73.

EN-1089 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 14. *Accord*, CHAP. I, *An Ordinance for raising an additional number of forces for the defence and protection of this colony, and for other purposes therein mentioned, At a Convention of Delegates held at the town of Richmond, in the colony of Virginia, on Friday the first of December, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 84.

EN-1090 — CHAP. I, *An Ordinance for raising an additional number of forces for the defence and protection of this colony, and for other purposes therein mentioned, At a Convention of Delegates held at the town of Richmond, in the colony of Virginia, on Friday the first of December, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 81.

EN-1091 — CHAP. III, *An ordinance for amending an ordinance intituled An ordinance for providing arms and ammunition for the use of this colony, At a Convention of Delegates held at the town of Richmond, in the colony of Virginia, on Friday the first of December, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 94.

EN-1092 — CHAP. XXIX, *An act for providing arms and ammunition for the defence of the state*, §§ I and III, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October, one thousand seven hundred eighty-four, in Laws of Virginia*, Volume 11, at 494.

EN-1093 — CHAP. II, *An act to amend the several acts respecting the militia*, § I, AT A GENERAL ASSEMBLY BEGIN AND HELD *At the Public Buildings in the City of Richmond, on Monday the fifteenth day of October[,] one thousand seven hundred and eight-seven, in Laws of Virginia,* Volume 12, at 432.

EN-1094 — Aprill 27th 1692, *in Executive Journals of Virginia*, Volume 1, at 230.

EN-1095 — ACT LXIII, AT A GRAND ASSEMBLIE HOLDEN AT JAMES CITTY THE SECOND DAY OF MARCH, 1642-3, *in Laws of Virginia*, Volume 1, at 277.

EN-1096 — June 21th Middle Plantation, *in Executive Journals of Virginia*, Volume 1, at 25.

EN-1097 — March 13th 1682-3, *in Executive Journals of Virginia*, Volume 1, at 40.

EN-1098 — Att a Councill held at James Citty March the 7th 1690 [1690-91], *in Executive Journals of Virginia*, Volume 1, at 167-168.

EN-1099 — May the 18th 1691, *in Executive Journals of Virginia*, Volume 1, at 184.

EN-1100 — Att a Councill held att James Citty ye 14th Janry 1692 [1692-3], *in Executive Journals of Virginia*, Volume 1, at 275.

EN-1101 — February 25. 1698 [1698-99], *in Executive Journals of Virginia*, Volume 1, at 411.

EN-1102 — At ye Council Chamber at his majtes Royal College of Wm and Mary July 3d & 4th 1701, *in Executive Journals of Virginia*, Volume 2, at 173.

EN-1103 — At a Council held at her Majestys Royal College of William and Mary August 26th 1703, *in Executive Journals of Virginia*, Volume 2, at 334.

EN-1104 — May the 31st 1705, *in Executive Journals of Virginia*, Volume 3, at 14.

EN-1105 — At a Council held at the Capitol the 18th day of March 1707 [1707/8], *in Executive Journals of Virginia*, Volume 3, at 167.

EN-1106 — At a Council held at the Capitol the 18th of February 1708, *in Executive Journals of Virginia*, Volume 3, at 207.

EN-1107 — Aprill the 29th 1710, *in Executive Journals of Virginia*, Volume 3, at 246.

EN-1108 — Aprill the 29th 1710, *in Executive Journals of Virginia*, Volume 3, at 246.

EN-1109 — Aprill the 29th 1710, *in Executive Journals of Virginia*, Volume 3, at 246. *Accord*, Aprill the 30th 1713, *in Executive Journals of Virginia*, Volume 3, at 339.

EN-1110 — CHAP. III, *An act for erecting a Magazine*, §§ I and II, AT A GENERAL ASSEMBLY, BEGUN AT *The Capitol, the twenty-second day of October*, 1712; *and thence continued, by several prorogations, to the sixteenth day of November*, 1714, *in Laws of Virginia*, Volume 4, at 55-56.

EN-1111 — January the 16th 1717, *in Executive Journals of Virginia*, Volume 3, at 462.

EN-1112 — CHAP. V, *An Act for making more effectual provision against Invasions and Insurrections*, §§ XXI and XXII, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, 1727, *in Laws of Virginia*, Volume 4, at 203. *Continued,* CHAP. IV, *An act to continue the Act, for making more effectual provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, [1727]. *And from thence continued, by several prorogations, to the eighteenth day of May*, 1732, *in Laws of Virginia*, Volume 4, at 323; CHAP. IV, *An Act for further continuing the Act*, For making more effectual provision against Invasions and Insurrections, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, [1727]. *And from thence continued, by several prorogations, to the twenty second day of August*, 1734, *in Laws of Virginia*, Volume 4, at 395; CHAP. III, *An Act, for reviving the Act, For making more effective provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 24; CHAP. VI, *An Act, for continuing and amending the Act*, Intituled, *An Act, for making more effectual Provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on Friday the first day of August*, [1735]. *And from thence continued, by several prorogations, to the twenty second day of May*, 1740, *in Laws of Virginia*, Volume 5, at 99; CHAP. IV, *An Act, for continuing an Act, made in the first year of his majesty's reign, intituled, an Act for making more effectual provision against invasions and insurrections; and one other act, intituled, an Act, for continuing and amending the aforementioned Act*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on Thursday, the sixth day of May*, [1741]. *And from thence continued, by several prorogations, to Tuesday, the fourth day of September*, 1744, *in Laws of Virginia*, Volume 5, at 228.

CHAP. XXXIX, *An Act for making provision against Invasions and Insurrections*, § XII, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *The College in Williamsburg, the twenty-seventh day of October*, 1748, *in Laws of Virginia*, Volume 6, at 118. *Continued,* CHAP. II, *An Act for continuing an act, intituled, An Act for making provision against invasions and insurrections, At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February*, 1751. *And from thence continued by several prorogations, to Thursday the first day of November*, 1753, *in Laws of Virginia*, Volume 6, at 350.

CHAP. IV, *An Act for reducing the several acts for making provision against invasions and insurrections into one act*, § XV, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday, the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 113-114. *Continued*, CHAP. IV, *An Act for continuing an act, intituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*,1758, *in Laws of Virginia*, Volume 7, at 237; CHAP. V, *An Act for further continuing an Act, intituled, An Act for reducing the several Acts for making provision against Invasions and Insurrections, into one Act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 275; CHAP. II, *An Act for further continuing an act, entituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the fifth of March*, 1761, *in Laws of Virginia*, Volume 7, at 384; CHAP. IV, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 539; CHAP. I, *An act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 30th of October*, 1764, *in Laws of Virginia*, Volume 8, at 37; CHAP. I, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November*, 1766, *in Laws of Virginia*, Volume 8, at 189; CHAP. V, *An Act for further continuing the Act, inituled an Act for reducing the several acts of Assembly for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in the City of Williamsburg, on Tuesday, in the seventh day of November*, 1769, *in Laws of Virginia*, Volume 8, at 334; CHAP. III, *An act for further continuing the act, intituled An act for reducing the several acts of assembly, for making provision against invasions and insurrections, into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Monday the tenth day of February, one thousand seven hundred and seventy-two, in Laws of Virginia*, Volume 8, at 514.

EN-1113 — At a Council held at the Capitol April the 22[d] 1738, *in Executive Journals of Virginia*, Volume 4, at 414.

EN-1114 — CHAP. I, *An Ordinance for raising an additional number of forces for the defence and protection of this colony, and for other purposes therein mentioned, At a Convention of Delegates held at the town of Richmond, in the colony of Virginia, on Friday the first of December, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 90.

EN-1115 — CHAP. VII, *An act for providing against Invasions and Insurrections*, § II, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 292.

EN-1116 — CHAP. XXVII, *An act for putting the eastern frontier of this commonwealth into a posture of defence,* AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the first day of* May, *one thousand seven hundred and eighty, in Laws of Virginia,* Volume 10, at 296.

EN-1117 — CHAP. I, *An act to raise two legions for the defence of the state*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Thursday *the first day of* March, *one thousand seven hundred and eighty-one, in Laws of Virginia*, Volume 10, at 391-392. *See also* CHAP. III, *An act to amend the act for raising two legions for the defence of the state*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the seventh day of* May, *one thousand seven hundred and eighty-one, in Laws of Virginia*, Volume 10, at 410.

EN-1118 — CHAP. III, *An act for erecting a Magazine*, § III, AT A GENERAL ASSEMBLY, BEGUN AT *The Capitol, the twenty-second day of October,* 1712, *and thence continued, by several prorogations, to the sixteenth day of November*, 1714, *in Laws of Virginia*, Volume 4, at 56.

EN-1119 — At a Council held at the Capitol April 26th 1723, *in Executive Journals of Virginia*, Volume 4, at 31-32.

EN-1120 — *Executive Journals of Virginia*, Volume 3, at 357 (1713), 372 (1714), 426 and 433 (1716), 447 and 460 (1717), 477 and 485 (1718), 502 and 515 (1719), 535 (1720), 545 (1721); *Executive Journals of Virginia*, Volume 4, at 4 (1721), 23 (1722), 41 and 57 (1723), 69 and 76 (1724), 85 (1725), 101 and 120 (1726), 153 (1727), 174 and 192 (1728), 203 and 211 (1729), 216 and 232 (1730), 242 and 255 (1731), 280 and 292 (1732), 300 and 314 (1733), 322 and 337 (1734), 352 and 363 (1735), 370 and 385 (1736), 396 (1737), 417 (1738), 438 (1739); *Executive Journals of Virginia*, Volume 5, at 3 (1739), 21 and 37 (1740), 52 and 74 (1741), 88 and 102 (1742), 120 and 136 (1743), 143 and 166 (1744), 174 and 192 (1745), 210 and 224 (1746), 246 (1747), 252 and 275 (1748), 287 and 305 (1749), 317 and 343 (1750), 348 and 370 (1751), 398 and 412 (1752), 426 and 453 (1753), 470 (1754); *Executive Journals of Virginia*, Volume 6, at 46 and 72 (1757), 90 and 119 (1758), 138 and 147 (1759), 158 and 175 (1760), 187 and 201 (1761), 219 and 237 (1762), 254 (1763), 284 (1767), 290 and 305 (1768), 317 and 333 (1769), 343 and 379 (1770), 409 and 437 (1771), 460 and 511 (1772), 525 and 550 (1773), 562 (1774).

EN-1121 — At a Council held at James City Febr 25th 1698, *in Executive Journals of Virginia*, Volume 2, at 152.

EN-1122 — Fryday, Aprill, 28th 1699, *in Executive Journals of Virginia*, Volume 1, at 426.

EN-1123 — November the 28th 1705, *in Executive Journals of Virginia*, Volume 3, at 62-63.

EN-1124 — Aprill the 30th 1713, *in Executive Journals of Virginia*, Volume 3, at 339.

EN-1125 — At a Councill held at James City Febry the 22. 1699, *in Executive Journals of Virginia*, Volume 2, at 40.

EN-1126 — June. 7. 1699, *in Executive Journals of Virginia*, Volume 1, at 448.

EN-1127 — At a Council held at her Majestys Royal College of William and Mary August 26th 1703, *in Executive Journals of Virginia*, Volume 2, at 333-334.

EN-1128 — March 3d 1703 [1703/4], *in Executive Journals of Virginia*, Volume 2, at 352-353.

EN-1129 — April 27th 1704, *in Executive Journals of Virginia*, Volume 2, at 360.

EN-1130 — May the 6th 1704, *in Executive Journals of Virginia*, Volume 2, at 366.

EN-1131 — May the 31st 1705, *in Executive Journals of Virginia*, Volume 3, at 14.

EN-1132 — November ye 26th 1705, *in Executive Journals of Virginia*, Volume 3, at 56-57.

EN-1133 — At a Council held at the Capitol the Sixteenth day of April 1712, *in Executive Journals of Virginia*, Volume 3, at 304.

EN-1134 — At a Council Held July 8th 1760, *in Executive Journals of Virginia*, Volume 6, at 166.

EN-1135 — At a Council held Septemr. 15th 1763, *in Executive Journals of Virginia*, Volume 6, at 270.

EN-1136 — At ye Council Chamber at his majtes Royal College of Wm and Mary July 3d & 4th 1701, *in Executive Journals of Virginia*, Volume 2, at 173.

EN-1137 — At a Council held November 6th 1750, *in Executive Journals of Virginia*, Volume 5, at 344.

EN-1138 — CHAP. VI, *An Ordinance for providing arms and ammunition for the use of this colony, AT a Convention for the Counties and Corporations in the Colony of Virginia, held at Richond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five*, *in Laws of Virginia*, Volume 9, at 72.

EN-1139 — ACT II, *An act providing for the supply of armes and ammunition*, ATT A GRAND ASSEMBLY, HOLDEN AT JAMES CITY BY PROROGATION FROM THE 24TH DAY OF SEPTEMBER, 1672, TO THE 20TH OF OCTOBER, 1673, *in Laws of Virginia*, Volume 2, at 304-305. This Act was ordered to "be putt into strict and effectual execution", AT A GRAND ASSEMBLIE HELD ATT JAMES CITTIE BY PROROGATION FROM THE ONE AND TWENTIETH DAY OF SEPTEMBER, 1674, TO THE SEAVENTH DAY OF MARCH, [1676,] *in Laws of Virginia*, Volume 2, at 339.

EN-1140 — ACT VII, *An act disbanding the present souldiers in garrisons in the fforts on the heads of the severall rivers, as alsoe for the raiseing of other forces in their stead*, ATT A GENERALL ASSEMBLY, BEGUNN ATT JAMES CITTY NOVEM. THE TENTH[,] 1682, *in Laws of Virginia*, Volume 2, at 500.

EN-1141 — ACT VII, *An Act for the better defence of the Country*, ATT A GENERALL ASSEMBLY, BEGUN AT JAMES CITTY THE SIXTEENTH DAY OF APRILL, ONE THOUSAND SIX HUNDRED EIGHTY-FOUR, *in Laws of Virginia*, Volume 3, at 20. *Repealed*, Act IX, *An act repealing the 7th act of assembly made at James Cittie the 16th day of Aprill,* 1684, ATT A GENERALL ASSEMBLY, BEGUN AT JAMES CITTY THE FIRST DAY OF OCTOBER, 1685, AND THENCE PROROGUED BY SEVERALL PROROGATIONS TO THE 20TH DAY OF OCTOBER, 1686, *in Laws of Virginia*, Volume 3, at 38.

EN-1142 — ACT XIX, ATT A GRAND ASSEMBLY HOLDEN ATT JAMES CITTYE THE 17TH OF FEBRUARY, 1644-5, *in Laws of Virginia*, Volume 1, at 297.

EN-1143 — ACT IV, *An act for the better supply of the country with armes and ammunition*, ATT A GENERALL ASSEMBLY, BEGUN AT JAMES CITTY THE SIXTEENTH DAY OF APRILL, ONE THOUSAND SIX HUNDRED EIGHTY-FOUR, *in Laws of Virginia*, Volume 3, at 13 (footnotes omitted).

EN-1144 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 339.

EN-1145 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, § XI, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 121.

EN-1146 — CHAP. II, *An Act, for the better Regulation of the Militia*, § XII, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 21-22.

EN-1147 — CHAP. II, *An Act for the better regulating and training the Militia*, §§ XIII and XIV, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 538.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § XV, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 100. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1148 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 31.

EN-1149 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 269.

EN-1150 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § XI, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four, in Laws of Virginia*, Volume 11, at 493; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § XI, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five, in Laws of Virginia*, Volume 12, at 24.

EN-1151 — *Quoted in Narratives of Early Virginia, 1606-1625*, Lyon G. Tyler, Editor (New York, New York: Charles Scribner's Sons, 1907), at 273. "The acts passed at the general assembly in 1619", however, "never received * * * sanction * * * in England", and therefore "could not have the force of laws". *Laws of Virginia*, Volume 1, at 122, note.

EN-1152 — [Numbers 24 and 25], LAWS and ORDERS *Concluded on by the General Assembly, March the 5th*, 1623-4, *in Laws of Virginia*, Volume 1, at 127. *Reënacted,* ACTS XLVII [Law No. 24] *and* XLVIII [Law No. 25], A GRAND ASSEMBLY HOLDEN AT JAMES CITTY THE 21st OF ffEBRUARY[,] 1631-2, *in Laws of Virginia*, Volume 1, at 173; *and* ACT XLII [Law No. 25], A GRAND ASSEMBLY HOLDEN AT JAMES CITTY THE 4TH DAY OF SEPTEMBER, 1632, *in Laws of Virginia*, Volume 1, at 198.

EN-1153 — ACT LI, A GRAND ASSEMBLY HOLDEN AT JAMES CITTY THE 21st OF ffEBRUARY[,] 1631-2, *in Laws of Virginia*, Volume 1, at 174. *Reënacted,* ACT XLV, A GRAND ASSEMBLY HOLDEN AT JAMES CITTY THE 4TH DAY OF SEPTEMBER, 1632, *in Laws of Virginia*, Volume 1, at 198.

EN-1154 — ACT XLI, AT A GRAND ASSEMBLIE HOLDEN AT JAMES CITTY THE SECOND DAY OF MARCH, 1642-3, *in Laws of Virginia*, Volume 1, at 263.

EN-1155 — ACT I, *An act for the defence of the country*, AT A GRAND ASSEMBLIE HOLDEN AT JAMES CITTIE BY PROROGATION FROM THE TWENTIETH OF SEPTEMBER[,] 1671, TO THE TWENTY-FOURTH OF SEPTEMBER[,] 1672, *in Laws of Virginia*, Volume 2, at 294.

EN-1156 — ACT IV, *An act for the better supply of the country with armes and ammunition*, ATT A GENERALL ASSEMBLY, BEGUN AT JAMES CITTY THE SIXTEENTH DAY OF APRILL, ONE THOUSAND SIX HUNDRED EIGHTY-FOUR, *in Laws of Virginia*, Volume 3, at 13-14 (footnote omitted).

EN-1157 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 336, 337, 338.

EN-1158 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, §§ VII and IX, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 120.

EN-1159 — CHAP. II, *An Act, for the better Regulation of the Militia*, §§ V, VIII, and XI, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 17, 19, 21.

EN-1160 — CHAP. XXXIX, *An Act for making provision against Invasions and Insurrections*, § IV, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *The College in Williamsburg, the twenty-seventh day of October*, 1748, *in Laws of Virginia*, Volume 6, at 114. *Continued,* CHAP. II, *An Act for continuing an act, intituled, An Act for making provision against invasions and insurrections, At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February*, 1752. *And from thence continued by several prorogations, to Thursday the first day of November*, 1753, *in Laws of Virginia*, Volume 6, at 350.

CHAP. IV, *An Act for reducing the several acts for making provision against invasions and insurrections into one act*, § IV, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday, the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven*, *in Laws of Virginia*, Volume 7, at 108. *Continued,* CHAP. IV, *An Act for continuing an act, intituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758, *in Laws of Virginia*, Volume 7, at 237; CHAP. V, *An Act for further continuing an Act, intituled, An Act for reducing the several Acts for making provision against Invasions and Insurrections, into one Act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 275; CHAP. II, *An Act for further continuing an act, entituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the fifth of March*, 1761, *in Laws of Virginia*, Volume 7, at 384; CHAP. IV, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 539; CHAP. I, *An act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 30th of October*, 1764, *in Laws of Virginia*, Volume 8, at 37;

CHAP. I, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 189; CHAP. V, *An Act for further continuing the Act, intituled an Act for reducing the several acts of Assembly for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in the City of Williamsburg, on Tuesday, in the seventh day of November,* 1769, *in Laws of Virginia*, Volume 8, at 334; CHAP. III, *An act for further continuing the act, intituled An act for reducing the several acts of assembly, for making provision against invasions and insurrections, into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Monday the tenth day of February, one thousand seven hundred and seventy-two, in Laws of Virginia*, Volume 8, at 514.

EN-1161 — CHAP. II, *An Act for the better regulating and training the Militia*, §§ V, VIII, and XIII, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 531-532, 534, 537-538.

EN-1162 — CHAP. III, *An Act for the better regulating and disciplining the Militia*, §§ IV, IX, and XIV, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March,* 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 94, 96, 99. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September,* 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February,* 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May,* 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; *continued,* CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1163 — CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § V, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May,* 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 537.

EN-1164 — CHAP. XXXI, *An Act to continue and amend the act for the better regulating and disciplining the militia*, § VII, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 243-244. *Continued*, CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1165 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 20, 28, 29-30, 31.

EN-1166 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 268-269.

EN-1167 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, §§ II and VI, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four, in Laws of Virginia*, Volume 11, at 478-479, 485; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, §§ III and VI, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five, in Laws of Virginia*, Volume 12, at 12, 16.

EN-1168 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, § V, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 119.

EN-1169 — CHAP. II, *An Act, for the better Regulation of the Militia*, § VI, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 17.

CHAP. II, *An Act for the better regulating and training the Militia*, § VII, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 533.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § VII, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 95. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1170 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 267-268.

EN-1171 — CHAP. V, *An Act for making more effectual provision against Invasions and Insurrections*, § III, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, 1727, *in Laws of Virginia*, Volume 4, at 198. *Continued,* CHAP. IV, *An act to continue the Act, for making more effectual provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, [1727]. *And from thence continued, by several prorogations, to the eighteenth day of May*, 1732, *in Laws of Virginia*, Volume 4, at 323; CHAP. IV, *An Act for further continuing the Act*, For making more effectual provision against Invasions and Insurrections, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, [1727]. *And from thence continued, by several prorogations, to the twenty second day of August*, 1734, *in Laws of Virginia*, Volume 4, at 395; CHAP. III, *An Act, for reviving the Act, For making more effective provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 24; CHAP. VI, *An Act, for continuing and amending the Act*, Intituled, *An Act, for making more effectual Provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on Friday the first day of August*, [1735]. *And from thence continued, by several prorogations, to the twenty second day of May*, 1740, *in Laws of Virginia*, Volume 5, at 99; CHAP. IV, *An Act, for continuing an Act, made in the first year of his majesty's reign, intituled, an Act for making more effectual provision against invasions and insurrections; and one other act, intituled, an Act, for continuing and amending the aforementioned Act*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on Thursday, the sixth day of May*, [1741]. *And from thence continued, by several prorogations, to Tuesday, the fourth day of September*, 1744, *in Laws of Virginia*, Volume 5, at 228.

CHAP. XXXIX, *An Act for making provision against Invasions and Insurrections*, § III, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *The College in Williamsburg, the twenty-seventh day of October*, 1748, *in Laws of Virginia*, Volume 6, at 113. *Continued,* CHAP. II, *An Act for continuing an act, intituled, An Act for making provision against invasions and insurrections, At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February*, 1751. *And from thence continued by several prorogations, to Thursday the first day of November*, 1753, *in Laws of Virginia*, Volume 6, at 350.

EN-1172 — CHAP. IV, *An Act for reducing the several acts for making provision against invasions and insurrections into one act*, § II, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday, the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven*, *in Laws of Virginia*, Volume 7, at 107. *Continued*, CHAP. IV, *An Act for continuing an act, intituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*,1758, *in Laws of Virginia*, Volume 7, at 237; CHAP. V, *An Act for further continuing an Act, intituled, An Act for reducing the several Acts for making provision against Invasions and Insurrections, into one Act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 275; CHAP. II, *An Act for further continuing an act, entituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the fifth of March*, 1761, *in Laws of Virginia*, Volume 7, at 384; CHAP. IV, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 539; CHAP. I, *An act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 30th of October*, 1764, *in Laws of Virginia*, Volume 8, at 37; CHAP. I, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November*, 1766, *in Laws of Virginia*, Volume 8, at 189; *An Act for further continuing the Act, inituled an Act for reducing the several acts of Assembly for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in the City of Williamsburg, on Tuesday, in the seventh day of November*, 1769, *in Laws of Virginia*, Volume 8, at 334; CHAP. III, *An act for further continuing the act, intituled An act for reducing the several acts of assembly, for making provision against invasions and insurrections, into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Monday the tenth day of February, one thousand seven hundred and seventy-two*, *in Laws of Virginia*, Volume 8, at 514.

EN-1173 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § VII, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four*, *in Laws of Virginia*, Volume 11, at 487; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § VII, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five*, *in Laws of Virginia*, Volume 12, at 18.

EN-1174 — November y^{e} 26th 1705, *in Executive Journals of Virginia*, Volume 3, at 56-57.

EN-1175 — Aprill the 29th 1710, *in Executive Journals of Virginia*, Volume 3, at 246.

EN-1176 — January the 16th 1717, *in Executive Journals of Virginia*, Volume 3, at 462.

EN-1177 — *See* CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five*, *in Laws of Virginia*, Volume 9, at 16-24.

EN-1178 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five*, *in Laws of Virginia*, Volume 9, at 20.

EN-1179 — CHAP. I, *An Ordinance for raising an additional number of forces for the defence and protection of this colony, and for other purposes therein mentioned, At a Convention of Delegates held at the town of Richmond, in the colony of Virginia, on Friday the first of December, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 87.

EN-1180 — ACT I, *An act for the defence of the country*, AT A GRAND ASSEMBLIE HOLDEN AT JAMES CITTIE BY PROROGATION FROM THE TWENTIETH OF SEPTEMBER[,] 1671, TO THE TWENTY-FOURTH OF SEPTEMBER[,] 1672, *in Laws of Virginia*, Volume 2, at 294.

EN-1181 — ACT LVI, A GRAND ASSEMBLY HOLDEN AT JAMES CITTY THE 21st OF ffEBRUARY[,] 1631-2, *in Laws of Virginia*, Volume 1, at 174-175. *Reënacted by* ACT LIII, A GRAND ASSEMBLY HOLDEN AT JAMES CITTY THE 4TH DAY OF SEPTEMBER, 1632, *in Laws of Virginia*, Volume 1, at 200.

EN-1182 — ACT II, *An act providing for the supply of armes and ammunition*, ATT A GRAND ASSEMBLY, HOLDEN AT JAMES CITY BY PROROGATION FROM THE 24TH DAY OF SEPTEMBER, 1672, TO THE 20TH OF OCTOBER, 1673, *in Laws of Virginia*, Volume 2, at 304. This Act was ordered to "be putt into strict and effectual execution", AT A GRAND ASSEMBLIE HELD ATT JAMES CITTIE BY PROROGATION FROM THE ONE AND TWENTIETH DAY OF SEPTEMBER, 1674, TO THE SEAVENTH DAY OF MARCH, 1676, *in Laws of Virginia*, Volume 2, at 339.

EN-1183 — May y^{e} 28th 1702, *in Executive Journals of Virginia*, Volume 2, at 248.

EN-1184 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER,1705, *in Laws of Virginia*, Volume 3, at 340, 338.

CHAP. II, *An Act for the settling and better Regulation of the Militia*, §§ XVII and VIII, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg*, *the fifth day of December*, 1722, *and by writ of prorogation*, *begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 123, 120.

EN-1185 — *Contrast* CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 338, *with* CHAP. II, *An Act for the settling and better Regulation of the Militia*, § IX, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg*, *the fifth day of December*, 1722, *and by writ of prorogation*, *begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 120.

EN-1186 — CHAP. II, *An Act*, *for the better Regulation of the Militia*, §§ V, VII, VIII, X, XI, and XIII, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol*, *in the City of Williamsburg*, *on the first day of August*, [1735]. *And from thence continued*, *by several prorogations*, *to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 17, 18, 19, 21, 22.

EN-1187 — CHAP. XXXIX, *An Act for making provision against Invasions and Insurrections*, § IV, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *The College in Williamsburg*, *the twenty-seventh day of October*, 1748, *in Laws of Virginia*, Volume 6, at 114 (fine of "ten pounds"). *Continued,* CHAP. II, *An Act for continuing an act*, *intituled*, *An Act for making provision against invasions and insurrections*, *At a General Assembly*, *begun and held at the College in the City of Williamsburg*, *on Thursday the twenty seventh day of February*, 1752. *And from thence continued by several prorogations*, *to Thursday the first day of November*, 1753, *in Laws of Virginia*, Volume 6, at 350.

CHAP. IV, *An Act for reducing the several acts for making provision against invasions and insurrections into one act*, § IV, *At a General Assembly*, *begun and held at the Capitol*, *in Williamsburg*, *on Thursday*, *the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April*, *one thousand seven hundred and fifty-seven*, *in Laws of Virginia*, Volume 7, at 108 (fine of "twenty pounds"). *Continued*, CHAP. IV, *An Act for continuing an act*, *intituled*, *An Act for reducing the several acts for making provision against invasions and insurrections into one act*, *At a General Assembly*, *begun and held at the Capitol*, *in Williamsburg*, *on Thursday the fourteenth day of September*, 1758, *in Laws of Virginia*, Volume 7, at 237; CHAP. V, *An Act for further continuing an Act*, *intituled*, *An Act for reducing the several Acts for making provision against Invasions and Insurrections*, *into one Act*, *At a General Assembly*, *begun and held at the Capitol*, *in Williamsburg*, *on Thursday the fourteenth day of September*, 1758*; and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 275; CHAP. II, *An Act for further continuing an act*, *entituled*, *An Act for reducing the several acts for making provision against invasions and insurrections into one act*, *At a General Assembly*, *begun and held at the Capitol*, *in Williamsburg*, *on Thursday the fourteenth day of September*, 1758*; and from thence continued by several prorogations to Thursday the fifth of March*, 1761, *in Laws of Virginia*, Volume 7, at 384; CHAP. IV, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act*, *At a General Assembly*, *begun and held at the Capitol*, *in the City of Williamsburg*, *on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 539; CHAP. I, *An act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act*, *At a General Assembly*, *begun and held at the Capitol*, *in the City of Williamsburg*, *on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 30th of October*, 1764, *in Laws of Virginia*, Volume 8, at 37; CHAP. I, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act*, *At a General Assembly*, *begun and held at the Capitol in Williamsburg*, *on Thursday the sixth day of November*, 1766, *in Laws of Virginia*, Volume 8, at 189; CHAP. V, *An Act for further continuing the Act*, *intituled an Act for reducing the several acts of Assembly for making provision against invasions and insurrections into one act*, *At a General Assembly*, *begun and held at the Capitol in the City of*

Williamsburg, on Tuesday, in the seventh day of November, 1769, *in Laws of Virginia*, Volume 8, at 334; CHAP. III, *An act for further continuing the act, intituled An act for reducing the several acts of assembly, for making provision against invasions and insurrections, into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Monday the tenth day of February, one thousand seven hundred and seventy-two, in Laws of Virginia*, Volume 8, at 514.

EN-1188 — CHAP. II, *An Act for the better regulating and training the Militia*, §§ VIII, X, XIII, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 534, 536, 537-538.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, §§ IX, XI, and XIV, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 96, 98, 99. *Continued,* CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1189 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 29-30.

EN-1190 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 269-270.

EN-1191 — CHAP. XXVII, *An act for putting the eastern frontier of this commonwealth into a posture of defence,* AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the first day of* May, *one thousand seven hundred and eighty, in Laws of Virginia,* Volume 10, at 296-297.

EN-1192 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, §§ II, VI, and XI, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four, in Laws of Virginia*, Volume 11, at 478-479, 480, 485, 493; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, §§ III, VI, and XI, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five, in Laws of Virginia*, Volume 12, at 12, 13, 16, 24.

EN-1193 — CHAP. II, *An Act for the better regulating and training the Militia*, § XIII, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in* 6 *in Laws of Virginia*, Volume 6, at 537-538.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § XIV, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 99-100. *Continued,* CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at

538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1194 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § II, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four, in Laws of Virginia*, Volume 11, at 481; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § III, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five, in Laws of Virginia*, Volume 12, at 14.

EN-1195 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 337, 338.

EN-1196 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, § VII, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December,* 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 120.

EN-1197 — CHAP. II, *An Act, for the better Regulation of the Militia*, § V, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August,* [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 17.

EN-1198 — CHAP. II, *An Act for the better regulating and training the Militia*, § V, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 531-532.

EN-1199 — CHAP. III, *An Act for the better regulating and disciplining the Militia*, § IV, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 94. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia,* § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1200 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 28.

EN-1201 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, and in the first year of the Commonwealth, in Laws of Virginia*, Volume 9, at 269.

EN-1202 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § II, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four, in Laws of Virginia*, Volume 11, at 478-479; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § III, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the*

seventeenth day of October[,] *one thousand seven hundred and eighty-five*, *in Laws of Virginia*, Volume 12, at 12.

EN-1203 — James Citty October 25th 1684, *in Executive Journals of Virginia*, Volume 1, at 67.

EN-1204 — June 4th 1690, *in Executive Journals of Virginia*, Volume 1, at 117-118. *Reasserted*, July 26th 1690, *in Executive Journals of Virginia*, Volume 1, at 125.

EN-1205 — Ordr to the Sheriffs touching ye Militia and Ordr touching Stores & ca, 8 December 1691, *in Executive Journals of Virginia*, Volume 1, at 210.

EN-1206 — May 19th 1695, *in Executive Journals of Virginia*, Volume 1, at 330.

EN-1207 — At the Councill Chamber at his Majtis Royall Colledge of William and Mary ye 8thof May 1701, *in Executive Journals of Virginia*, Volume 2, at 142.

EN-1208 — At a Council held at her Majestys Royal College of William & Mary June ye 17th 1703, *in Executive Journals of Virginia*, Volume 2, at 322.

EN-1209 — May the 9th 1706, *in Executive Journals of Virginia*, Volume 3, at 90.

EN-1210 — August the 9th 1706, *in Executive Journals of Virginia*, Volume 3, at 119.

EN-1211 — At a Council held at the Capitol the 10th day of February 1709 [1709/10], *in Executive Journals of Virginia*, Volume 3, at 206.

EN-1212 — At a Council held at the Capitol the Sixteenth day of August 1711, *in Executive Journals of Virginia*, Volume 3, at 282.

EN-1213 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER,1705, *in Laws of Virginia*, Volume 3, at 337, 338.

EN-1214 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, §§ VII, VIII, and IX, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg*, *the fifth day of December*, 1722, *and by writ of prorogation*, *begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 120.

EN-1215 — CHAP. II, *An Act*, *for the better Regulation of the Militia*, §§ V, X, XI, and XIII, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol*, *in the City of Williamsburg*, *on the first day of August*, [1735]. *And from thence continued*, *by several prorogations*, *to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 17, 21, 22.

EN-1216 — CHAP. XXXIX, *An Act for making provision against Invasions and Insurrections*, § IV, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *The College in Williamsburg*, *the twenty-seventh day of October*, 1748, *in Laws of Virginia*, Volume 6, at 114. *Continued,* CHAP. II, *An Act for continuing an act*, *intituled*, *An Act for making provision against invasions and insurrections*, *At a General Assembly*, *begun and held at the College in the City of Williamsburg*, *on Thursday the twenty seventh day of February*, 1752. *And from thence continued by several prorogations*, *to Thursday the first day of November*, 1753, *in Laws of Virginia*, Volume 6, at 350.

CHAP. IV, *An Act for reducing the several acts for making provision against invasions and insurrections into one act*, § IV, *At a General Assembly*, *begun and held at the Capitol*, *in Williamsburg*, *on Thursday*, *the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April*, *one thousand seven hundred and fifty-seven*, *in Laws of Virginia*, Volume 7, at 108. *Continued*, CHAP. IV, *An Act for continuing an act*, *intituled*, *An Act for reducing the several acts for making provision against invasions and insurrections into one act*, *At a General Assembly*, *begun and held at the Capitol*, *in Williamsburg*, *on Thursday the fourteenth day of September*, 1758, *in Laws of Virginia*, Volume 7, at 237; CHAP. V, *An Act for further continuing an Act*, *intituled*, *An Act for reducing the several Acts for making provision against Invasions and Insurrections*, *into one Act*, *At a General Assembly*, *begun and held at the Capitol*, *in Williamsburg*, *on Thursday the fourteenth day of September*, 1758*; and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 275; CHAP. II, *An Act for further continuing an act*, *entituled*, *An Act for reducing the several acts for making provision against invasions and insurrections into one act*, *At a General Assembly*, *begun and held at the Capitol*, *in Williamsburg*, *on Thursday the fourteenth day of September*, 1758*; and from thence continued by several prorogations to Thursday the fifth of March*, 1761, *in Laws of Virginia*, Volume 7, at 384; CHAP. IV, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act*, *At a General Assembly*, *begun and held at the Capitol*, *in the City of Williamsburg*, *on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 539; CHAP. I, *An act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act*, *At a General Assembly*, *begun and held at the Capitol*, *in the City of Williamsburg*, *on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 30th of October*, 1764, *in Laws of Virginia*, Volume 8, at 37; CHAP. I, *An Act for further continuing the act for reducing the several acts for making provision against invasions*

and insurrections into one act, *At a General Assembly*, *begun and held at the Capitol in Williamsburg*, *on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 189; CHAP. V, *An Act for further continuing the Act*, *intituled an Act for reducing the several acts of Assembly for making provision against invasions and insurrections into one act*, *At a General Assembly*, *begun and held at the Capitol in the City of Williamsburg*, *on Tuesday*, *in the seventh day of November*, 1769, *in Laws of Virginia*, Volume 8, at 334; CHAP. III, *An act for further continuing the act*, *intituled An act for reducing the several acts of assembly*, *for making provision against invasions and insurrections*, *into one act*, *At a General Assembly*, *begun and held at the Capitol*, *in the City of Williamsburg*, *on Monday the tenth day of February*, *one thousand seven hundred and seventy-two*, *in Laws of Virginia*, Volume 8, at 514.

EN-1217 — CHAP. II, *An Act for the better regulating and training the Militia*, §§ V, X, and XIII, *At a General Assembly*, *begun and held at the College in the City of Williamsburg*, *on Thursday the twenty seventh day of February*, *one thousand seven hundred and fifty two. And from thence continued by several prorogations*, *to Tuesday the fifth day of August*, *one thousand seven hundred and fifty five*, *in Laws of Virginia*, Volume 6, at 531-532, 536-537, 537-538.

EN-1218 — CHAP. III, *An Act for the better regulating and disciplining the Militia*, §§ IV, XI, and XIV, *At a General Assembly*, *begun and held at the Capitol*, *in Williamsburg*, *on Thursday*, *the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April*, *one thousand seven hundred and fifty-seven*, *in Laws of Virginia*, Volume 7, at 94, 98-99, 99. *Continued*, CHAP. IV, *An Act for continuing an Act*, *intituled*, *An Act for the better regulating and disciplining the Militia*, *At a General Assembly*, *begun and held at the Capitol*, *in Williamsburg*, *on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly*, *begun and held at the Capitol*, *in the City of Williamsburg*, *on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia*, *At a General Assembly*, *begun and held at the Capitol*, *in the City of Williamsburg*, *the seventh day of November*, *one thousand seven hundred and sixty-nine*, *and from thence continued by several prorogations*, *and convened by proclamation the eleventh day of July*, *one thousand seven hundred and seventy-one*, *in Laws of Virginia*, Volume 8, at 503.

EN-1219 — CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, §V, *At a General Assembly*, *begun and held at the Capitol*, *in the City of Williamsburg*, *on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 537. *Continued with amendment*, CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § VII, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 243-244 (providing an exemption for Quakers); *continued,* CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia*, *At a General Assembly*, *begun and held at the Capitol*, *in the City of Williamsburg*, *the seventh day of November*, *one thousand seven hundred and sixty-nine*, *and from thence continued by several prorogations*, *and convened by proclamation the eleventh day of July*, *one thousand seven hundred and seventy-one*, *in Laws of Virginia*, Volume 8, at 503.

EN-1220 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony*, *AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia*, *held at Richmond town*, *in the county of Henrico*, *on Monday the seventeenth day of July*, *one thousand seven hundred and seventy-five*, *in Laws of Virginia*, Volume 9, at 26-27, 28, 30, 31.

EN-1221 — CHAP. I, *An Ordinance for raising an additional number of forces for the defence and protection of this colony*, *and for other purposes therein mentioned*, *At a Convention of Delegates held at the town of Richmond*, *in the colony of Virginia*, *on Friday the first of December*, *one thousand seven hundred and seventy-five*, *in Laws of Virginia*, Volume 9, at 87, 89.

EN-1222 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol*, *in the City of Williamsburg*, *on Monday the fifth day of May*, *one thousand seven hundred and seventy seven*, *in Laws of Virginia*, Volume 9, at 270.

EN-1223 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia*, *and guarding against invasions and insurrections*, § XI, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond*, *on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four*, *in Laws of Virginia*, Volume 11, at 493; CHAP. I, *An act to amend and reduce into one act*, *the several laws for regulating and disciplining the militia*, *and guarding against invasions and insurrections*, § XI, AT A GENERAL

ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five*, *in Laws of Virginia*, Volume 12, at 24.

EN-1224 — A Proclamation for the more effectual putting in Execution the Laws concerning the Militia: And for preventing the unlawful Concourse of Negros, and other slaves (29 October 1736), *in Executive Journals of Virginia*, Volume 4, at 471.

EN-1225 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 337, 338.

CHAP. II, *An Act for the settling and better Regulation of the Militia*, §§ VII and VIII, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 120.

CHAP. II, *An Act, for the better Regulation of the Militia*, §§ V and XI, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 17, 21.

CHAP. II, *An Act for the better regulating and training the Militia*, §§ V and XIII, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five*, *in Laws of Virginia*, Volume 6, at 531-532, 535.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, §§ IV and XIV, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday, the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven*, *in Laws of Virginia*, Volume 7, at 94, 99. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one*, *in Laws of Virginia*, Volume 8, at 503.

EN-1226 — CHAP. II, *An Act for the better regulating and training the Militia*, § XIII, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five*, *in Laws of Virginia*, Volume 6, at 538.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § XIV, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven*, *in Laws of Virginia*, Volume 7, at 99-100. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one*, *in Laws of Virginia*, Volume 8, at 503.

EN-1227 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 337; CHAP. III, *An Act for amending and further continuing the act for the better regulating and*

disciplining the Militia, § V, *At a General Assembly*, *begun and held at the Capitol*, *in the City of Williamsburg*, *on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 537; *and* CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § VII, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 243-244. The Acts of 1762 and 1766 *continued by* CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia*, *At a General Assembly*, *begun and held at the Capitol*, *in the City of Williamsburg*, *the seventh day of November*, *one thousand seven hundred and sixty nine*, *and from thence continued by several prorogations*, *and convened by proclamation the eleventh day of July*, *one thousand seven hundred and seventy-one*, *in Laws of Virginia*, Volume 8, at 503.

EN-1228 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 337.

EN-1229 — ACT LXIII, AT A GRAND ASSEMBLIE HOLDEN AT JAMES CITTY THE SECOND DAY OF MARCH, 1642-3, *in Laws of Virginia*, Volume 1, at 277.

EN-1230 — CHAP. III, *An act for erecting a Magazine*, §§ I and II, AT A GENERAL ASSEMBLY, BEGUN AT *The Capitol*, *the twenty-second day of October*, 1712; *and thence continued*, *by several prorogations*, *to the sixteenth day of November*, 1714, *in Laws of Virginia*, Volume 4, at 55-56.

EN-1231 — CHAP. I, *An act to raise two legions for the defence of the state*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Thursday *the first day of* March, *one thousand seven hundred and eighty-one*, *in Laws of Virginia*, Volume 10, at 391-392.

EN-1232 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony*, *AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia*, *held at Richmond town*, *in the county of Henrico*, *on Monday the seventeenth day of July*, *one thousand seven hundred and seventy-five*, *in Laws of Virginia*, Volume 9, at 12.

EN-1233 — CHAP. I, *An Ordinance for raising an additional number of forces for the defence and protection of this colony, and for other purposes therein mentioned, At a Convention of Delegates held at the town of Richmond, in the colony of Virginia, on Friday the first of December, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 81-82.

EN-1234 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony*, *AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia*, *held at Richmond town*, *in the county of Henrico*, *on Monday the seventeenth day of July*, *one thousand seven hundred and seventy-five*, *in Laws of Virginia*, Volume 9, at 20.

EN-1235 — CHAP. I, *An Ordinance for raising an additional number of forces for the defence and protection of this colony*, *and for other purposes therein mentioned*, *At a Convention of Delegates held at the town of Richmond*, *in the colony of Virginia*, *on Friday the first of December*, *one thousand seven hundred and seventy-five*, *in Laws of Virginia*, Volume 9, at 90.

EN-1236 — CHAP. V, *An Act for making more effectual provision against Invasions and Insurrections*, §§ XXI and XXII, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg*, *the first day of February*, 1727, *in Laws of Virginia*, Volume 4, at 203. *Continued,* CHAP. IV, *An act to continue the Act*, *for making more effectual provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg*, *the first day of February,* [1727]. *And from thence continued*, *by several prorogations*, *to the eighteenth day of May*, 1732, *in Laws of Virginia*, Volume 4, at 323; CHAP. IV, *An Act for further continuing the Act*, For making more effectual provision against Invasions and Insurrections, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg*, *the first day of February,* [1727]. *And from thence continued*, *by several prorogations*, *to the twenty second day of August*, 1734, *in Laws of Virginia*, Volume 4, at 395; CHAP. III, *An Act*, *for reviving the Act*, *For making more effective provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol*, *in the City of Williamsburg*, *on the first day of August*, [1735]. *And from thence continued*, *by several prorogations*, *to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 24; CHAP. VI, *An Act*, *for continuing and amending the Act*, Intituled, *An Act*, *for making more effectual Provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol*, *in the City of Williamsburg*, *on Friday the first day of August*, [1735]. *And from thence continued*, *by several prorogations, to the twenty second day of May*, 1740, *in Laws of Virginia*, Volume 5, at 99; CHAP. IV, *An Act*, *for continuing an Act*, *made in the first year of his majesty's reign*, *intituled*, *an Act for making more effectual provision against invasions and insurrections*; *and one other act*, *intituled*, *an Act*, *for continuing and amending the aforementioned Act*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol*, *in the City of Williamsburg*, *on Thursday*, *the sixth day of May*, [1741]. *And from thence continued*, *by several prorogations*, *to Tuesday*, *the fourth day of*

September, 1744, *in Laws of Virginia*, Volume 5, at 228.

CHAP. XXXIX, *An Act for making provision against Invasions and Insurrections*, § XII, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *The College in Williamsburg, the twenty-seventh day of October*, 1748, *in Laws of Virginia*, Volume 6, at 118. *Continued,* CHAP. II, *An Act for continuing an act, intituled, An Act for making provision against invasions and insurrections, At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February*, 1751. *And from thence continued by several prorogations, to Thursday the first day of November*, 1753, *in Laws of Virginia*, Volume 6, at 350.

CHAP. IV, *An Act for reducing the several acts for making provision against invasions and insurrections into one act*, § XV, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday, the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 113-114. *Continued*, CHAP. IV, *An Act for continuing an act, intituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*,1758, *in Laws of Virginia*, Volume 7, at 237; CHAP. V, *An Act for further continuing an Act, intituled, An Act for reducing the several Acts for making provision against Invasions and Insurrections, into one Act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September, 1758; and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 275; CHAP. II, *An Act for further continuing an act, entituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758*; and from thence continued by several prorogations to Thursday the fifth of March*, 1761, *in Laws of Virginia*, Volume 7, at 384; CHAP. IV, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 539; CHAP. I, *An act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 30th of October*, 1764, *in Laws of Virginia*, Volume 8, at 37; CHAP. I, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November*, 1766, *in Laws of Virginia*, Volume 8, at 189; CHAP. V, *An Act for further continuing the Act, inituled an Act for reducing the several acts of Assembly for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in the City of Williamsburg, on Tuesday, in the seventh day of November*, 1769, *in Laws of Virginia*, Volume 8, at 334; CHAP. III, *An act for further continuing the act, intituled An act for reducing the several acts of assembly, for making provision against invasions and insurrections, into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Monday the tenth day of February, one thousand seven hundred and seventy-two, in Laws of Virginia*, Volume 8, at 514.

EN-1237 — CHAP. VII, *An act for providing against Invasions and Insurrections*, § II, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 292-293.

EN-1238 — CHAP. XII, *An act for the recovery of arms and accoutrements belonging to the state*, §§ I and II, AT A GENERAL ASSEMBLY, BEGUN AND HELD *at the Public Buildings in the City of Richmond, on Monday the twenty-first day of October, one thousand seven hundred and eighty-two, in Laws of Virginia*, Volume 11, at 132.

EN-1239 — CHAP. XLIV, *An act to amend the act, intituled, An act for establishing and regulating the militia*, §§ IV and VI, AT A GENERAL ASSEMBLY, BEGUN AND HELD *at the Public Buildings in the City of Richmond, on Monday the twenty-first day of October, one thousand seven hundred and eighty-two, in Laws of Virginia*, Volume 11, at 174.

EN-1240 — CHAP. V, *An Act for making more effectual provision against Invasions and Insurrections*, § I, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, 1727, *in Laws of Virginia*, Volume 4, at 197.

EN-1241 — CHAP. V, *An Act for making more effectual provision against Invasions and Insurrections*, §§ XXI, VIII, and IX, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, 1727, *in Laws of Virginia*, Volume 4, at 203, 200-201.

EN-1242 — CHAP. II, *An Act for the better regulating and training the Militia*, § V, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 532.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § IV, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March,* 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 94. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1243 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 28-29.

EN-1244 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 269.

EN-1245 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § II, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four, in Laws of Virginia*, Volume 11, at 479-480; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § III, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five, in Laws of Virginia*, Volume 12, at 12-13.

EN-1246 — CHAP. II, *An act to amend the several acts respecting the militia*, § I, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the fifteenth day of October*[,] *one thousand seven hundred and eighty-seven, in Laws of Virginia*, Volume 12, at 432.

EN-1247 — ACT XLIX, A GRAND ASSEMBLY HOLDEN AT JAMES CITTY THE 4TH DAY OF SEPTEMBER, 1632, *in Laws of Virginia*, Volume 1, at 199.

EN-1248 — CHAP. I, *An Ordinance for raising an additional number of forces for the defence and protection of this colony, and for other purposes therein mentioned, At a Convention of Delegates held at the town of Richmond, in the colony of Virginia, on Friday the first of December, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 90, 87 (***bold-faced emphasis*** supplied). *See also* CHAP. II, *An Ordinance for the better government of the forces to be raised and employed in the service of the colony and dominion of Virginia*, art. I, *AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 36. The latter statute declared simply, "I will obey the orders of such officers who may be set over me", whereas the former statute specified, "I will * * * obey the *lawful* commands of my superiour officers" (emphasis supplied).

EN-1249 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 12, 20.

EN-1250 — *See, e.g.,* CHAP. XLIV, *An act to amend the act, intituled, An act for establishing and regulating the militia*, §§ IV and VI, AT A GENERAL ASSEMBLY, *Begun and held at the Public Buildings in the City of Richmond, on Monday the twenty-first day of October, one thousand seven hundred and eighty-two, in Laws of Virginia*, Volume 11, at 174.

EN-1251 — ACT XLI, AT A GRAND ASSEMBLIE HOLDEN AT JAMES CITTY THE SECOND DAY OF MARCH, 1642-3, *in Laws of Virginia*, Volume 1, at 263.

EN-1252 — ACT XXV, *Provision to bee made for Amunition*, ATT A GRAND ASSEMBLY HELD AT JAMES CITTIE, MARCH 7, 1658-9, *in Laws of Virginia*, Volume 1, at 525. *Reënacted,* ACT CXX, *Supply of ammunition*, AT A GRAND ASSEMBLY HELD AT JAMES CITY MARCH THE 23D[,] 1661-2, *in Laws of Virginia*, Volume 2, at 126.

EN-1253 — ACT I, *An act for carrying on a warre against the barbarous Indians*, AT A GRAND ASSEMBLIE, HOLDEN AT JAMES CITTIE THE FIFTH DAY OF JUNE[,] 1676, *in Laws of Virginia*, Volume 2, at 344.

EN-1254 — ACT IV, *An act for the better supply of the country with armes and ammunition*, ATT A GENERALL ASSEMBLY, BEGUN AT JAMES CITTY THE SIXTEENTH DAY OF APRILL, ONE THOUSAND SIX HUNDRED EIGHTY-FOUR, *in Laws of Virginia*, Volume 3, at 13-14 (footnote omitted).

EN-1255 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *Laws of Virginia*, Volume 3, at 338.

EN-1256 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, § VII, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg*, *the fifth day of December*, 1722, *and by writ of prorogation*, *begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 120.

EN-1257 — CHAP. II, *An Act*, *for the better Regulation of the Militia*, §§ V and XI, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol*, *in the City of Williamsburg*, *on the first day of August*, [1735]. *And from thence continued*, *by several prorogations*, *to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 17, 21.

EN-1258 — CHAP. II, *An Act for the better regulating and training the Militia*, §§ V, VIII, and XIII, *At a General Assembly*, *begun and held at the College in the City of Williamsburg*, *on Thursday the twenty seventh day of February*, *one thousand seven hundred and fifty two*. *And from thence continued by several prorogations*, *to Tuesday the fifth day of August*, *one thousand seven hundred and fifty five*, *in Laws of Virginia*, Volume 6, at 531-532, 534, 537-538.

EN-1259 — CHAP. III, *An Act for the better regulating and disciplining the Militia*, §§ IV, IX, and XIV, *At a General Assembly*, *begun and held at the Capitol*, *in Williamsburg*, *on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April*, *one thousand seven hundred and fifty-seven*, *in Laws of Virginia*, Volume 7, at 94, 96, 99. *Continued*, CHAP. IV, *An Act for continuing an Act*, *intitutled*, *An Act for the better regulating and disciplining the Militia*, *At a General Assembly*, *begun and held at the Capitol*, *in Williamsburg*, *on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly*, *begun and held at the Capitol*, *in the City of Williamsburg*, *on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1260 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol*, *in the City of Williamsburg*, *on Monday the fifth day of May*, *one thousand seven hundred and seventy seven*, *in Laws of Virginia*, Volume 9, at 268-269.

EN-1261 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § II, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four, in Laws of Virginia*, Volume 11, at 478-479; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § III, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five, in Laws of Virginia*, Volume 12, at 12.

EN-1262 — ACT I, *An act for the defence of the country*, AT A GRAND ASSEMBLIE HOLDEN AT JAMES CITTIE BY PROROGATION FROM THE TWENTIETH OF SEPTEMBER[,] 1671, TO THE TWENTY-FOURTH OF SEPTEMBER[,] 1672, *in Laws of Virginia*, Volume 2, at 294 (emphasis supplied). This Act was ordered to "be putt into strict and effectual execution", AT A GRAND ASSEMBLIE HELD ATT JAMES CITTIE BY PROROGATION FROM THE ONE AND TWENTIETH DAY OF SEPTEMBER, 1674, TO THE SEAVENTH DAY OF MARCH, [1676,] *in Laws*

of Virginia, Volume 2, at 339.

EN-1263 — CHAP. I, *An Act, for the better security of the Country in the present time of Danger*, § I, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on Friday the first day of August*, [1735]. *And from thence continued, by several prorogations to the 22d day of May*, 1740, *in Laws of Virginia*, Volume 5, at 90 (emphasis supplied).

EN-1264 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the County of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five*, *in Laws of Virginia*, Volume 9, at 12, 20.

EN-1265 — ACT XLI, AT A GRAND ASSEMBLIE HOLDEN AT JAMES CITTY THE SECOND DAY OF MARCH, 1642-3, *in Laws of Virginia*, Volume 1, at 263.

EN-1266 — ACT XXV, *Provision to bee made for Amunition*, ATT A GRAND ASSEMBLY HELD AT JAMES CITTIE, MARCH 7, 1658-9, *in Laws of Virginia*, Volume 1, at 525. *Reënacted,* ACT CXX, *Supply of ammunition*, AT A GRAND ASSEMBLY HELD AT JAMES CITY MARCH THE 23D[,] 1661-2, *in Laws of Virginia*, Volume 2, at 126.

EN-1267 — ACT I, *An act for carrying on a warre against the barbarous Indians*, AT A GRAND ASSEMBLIE, HOLDEN AT JAMES CITTIE THE FIFTH DAY OF JUNE[,] 1676, *in Laws of Virginia*, Volume 2, at 344.

EN-1268 — ACT IV, *An act for the better supply of the country with armes and ammunition*, ATT A GENERALL ASSEMBLY, BEGUN AT JAMES CITTY THE SIXTEENTH DAY OF APRILL, ONE THOUSAND SIX HUNDRED EIGHTY-FOUR, *in Laws of Virginia*, Volume 3, at 13 (footnotes omitted).

EN-1269 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 338.

EN-1270 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, § VII, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 120.

EN-1271 — CHAP. II, *An Act, for the better Regulation of the Militia*, § V, AT A GENERAL ASSEMBLY, summoned TO BE HELD AT *The Capitol, in the City of Williamsburg*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 17.

EN-1272 — CHAP. II, *An Act for the better regulating and training the Militia*, § V, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five*, *in Laws of Virginia*, Volume 6, at 531-532.

EN-1273 — CHAP. III, *An Act for the better regulating and disciplining the Militia*, § IV, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven*, *in Laws of Virginia*, Volume 7, at 94. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § X, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one*, *in Laws of Virginia*, Volume 8, at 503.

EN-1274 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five*, *in Laws of Virginia*, Volume 9, at 28.

EN-1275 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven*, *in Laws of Virginia*, Volume 9, at 268-269.

EN-1276 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § II, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four*, *in Laws of Virginia*, Volume 11, at 478-479; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § III, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five*, *in Laws of Virginia*, Volume 12, at 12.

EN-1277 — ACT IV, *An act for the better supply of the country with armes and ammunition*, ATT A GENERALL ASSEMBLY, BEGUN AT JAMES CITTY THE SIXTEENTH DAY OF APRILL, ONE THOUSAND SIX HUNDRED EIGHTY-FOUR, *in Laws of Virginia*, Volume 3, at 13 (footnotes omitted) (emphasis supplied in part).

EN-1278 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 338.

EN-1279 — November y^{e} 26th 1705, *Executive Journals of Virginia*, Volume 3, at 56, 58.

EN-1280 — August the 9th 1706, *Executive Journals of Virginia*, Volume 3, at 119.

EN-1281 — Aprill the 29th 1710, *Executive Journals of Virginia*, Volume 3, at 246.

EN-1282 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, § IX, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 120 (emphasis supplied); CHAP. II, *An Act, for the better Regulation of the Militia*, § XI, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 21 (emphasis supplied).

EN-1283 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 338.

EN-1284 — CHAP. II, *An Act for the better regulating and training the Militia*, § XIII, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five*, *in Laws of Virginia*, Volume 6, at 537-538 (emphasis supplied).

Slightly different but substantively equivalent language in CHAP. III, *An Act for the better regulating and disciplining the Militia*, § XIV, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven*, *in Laws of Virginia*, Volume 7, at 99-100. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one*, *in Laws of Virginia*, Volume 8, at 503.

EN-1285 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five*, *in Laws of Virginia*, Volume 9, at 12, 20, 27, 28 (emphasis supplied).

EN-1286 — CHAP. I, *An Ordinance for raising an additional number of forces for the defence and protection of this colony, and for other purposes therein mentioned, At a Convention of Delegates held at the town of Richmond, in the colony of Virginia, on Friday the first of December, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 81-82, 87 (emphasis supplied).

EN-1287 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, §§ II and VI, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four, in Laws of Virginia*, Volume 11, at 481, 485 (emphasis supplied); CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, §§ III and VI, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five, in Laws of Virginia*, Volume 12, at 14, 16.

EN-1288 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 12-13.

EN-1289 — CHAP. I, *An Ordinance for raising an additional number of forces for the defence and protection of this colony, and for other purposes therein mentioned, At a Convention of Delegates held at the town of Richmond, in the colony of Virginia, on Friday the first of December, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 81-82.

EN-1290 — CHAP. II, *An Act for the better regulating and training the Militia*, § XIII, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 538.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § XIV, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 99. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, §IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1291 — ACT XIV, ATT A GRAND ASSEMBLY HOLDEN ATT JAMES CITTYE THE 17TH OF F*ebruary*, 1644-5, *in Laws of Virginia*, Volume 1, at 296. *Reënacted*, ACT XLVI, *Free Trade to bee allowed*, AT A GRAND ASSEMBLY HELD AT JAMES CITTIE, MARCH 13th, 1657-8, *in Laws of Virginia*, Volume 1, at 463.

ACT CXIV, *Free trade*, AT A GRAND ASSEMBLY HELD AT JAMES CITY MARCH THE 23D[,] 1661-2, *in Laws of Virginia*, Volume 2, at 124.

EN-1292 — AT A GRAND ASSEMBLY, BEGUNN AT GREEN SPRING THE 20TH DAY OF FEBRUARY, 1676-7, *in Laws of Virginia*, Volume 2, at 403.

EN-1293 — CHAP. XVII, *An Act for disposing of the publick stores of gunpowder in the Magazine in the city of Williamsburg*, §§ I and II, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 594.

EN-1294 — CHAP. XXIII, *An act for appointing Commissioners to examine and state the accounts of the Militia lately ordered out into actual service, and for other purposes therein mentioned*, § II, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th day of May*, 1761, *and from thence continued by several prorogations to Tuesday the 30th of October*, 1764, *in Laws of Virginia*, Volume 8, at 125-126.

EN-1295 — CHAP. XXXI, *An act for the sale of the useless military stores in the Magazine of Williamsburg*, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th day of May*, 1761, *and from thence continued by several prorogations to Tuesday the 30th of October*, 1764, *in Laws of Virginia*, Volume 8, at 146.

EN-1296 — CHAP. IV, *An Act for raising a body of Volunteers for the defence of the commonwealth*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of* Williamsburg, *on* Monday *the third day of* May, *one thousand seven hundred and seventy-nine, in Laws of Virginia*, Volume 10, at 20-21.

EN-1297 — ACT V, *An act for Tradesmen to worke on theire trades*, A GRAND ASSEMBLY HOLDEN AT JAMES CITTY THE FIRST DAY OF FEBRUARY, 1632-3, *in Laws of Virginia*, Volume 1, at 208.

EN-1298 — ACT I, *An act for the defence of the country*, AT A GRAND ASSEMBLIE HOLDEN AT JAMES CITTIE BY PROROGATION FROM THE TWENTIETH OF SEPTEMBER 1671, TO THE TWENTY-FOURTH OF SEPTEMBER 1672, *in Laws of Virginia*, Volume 2, at 294-295. This Act was ordered to "be putt into strict and effectual execution", AT A GRAND ASSEMBLIE HELD ATT JAMES CITTIE BY PROROGATION FROM THE ONE AND TWENTIETH DAY OF SEPTEMBER, 1674, TO THE SEAVENTH DAY OF MARCH, [1675,] *in Laws of Virginia*, Volume 2, at 339-340.

EN-1299 — Att a Council held at James Citty Jan^{r}y 27th 1691 [1691-92], *in Executive Journals of Virginia*, Volume 1, at 215.

EN-1300 — CHAP. XXXI, *An act for security and defence of the country in times of danger*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 362-363, 366. Similar provisions appeared in—

CHAP. V, *An Act for making more effectual provision against Invasions and Insurrections*, § II, IV, and XI, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg*, the first day *of February*, 1727, *in Laws of Virginia*, Volume 4, at 197, 199, 201. *Continued*, CHAP. IV, *An act to continue the Act, for making more effectual provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, [1727]. *And from thence continued, by several prorogations, to the eighteenth day of May*, 1732, *in Laws of Virginia*, Volume 4, at 323; CHAP. IV, *An Act for further continuing the Act*, For making more effectual provision against Invasions and Insurrections, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, [1727]. *And from thence continued, by several prorogations, to the twenty second day of August*, 1734, *in Laws of Virginia*, Volume 4, at 395; CHAP. III, *An Act, for reviving the Act, For making more effective provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 24; CHAP. VI, *An Act, for continuing and amending the Act*, Intituled, *An Act, for making more effectual Provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on Friday the first day of August*, [1735]. *And from thence continued, by several prorogations, to the twenty second day of May*, 1740, *in Laws of Virginia*, Volume 5, at 99; CHAP. IV, *An Act, for continuing an Act, made in the first year of his majesty's reign, intituled, an Act for making more effectual provision against invasions and insurrections; and one other act, intituled, an Act, for continuing and amending the aforementioned Act*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on Thursday, the sixth day of May*, [1741]. *And from thence continued, by several prorogations, to Tuesday, the fourth day of September*, 1744, *in Laws of Virginia*, Volume 5, at 228.

CHAP. XXXIX, *An Act for making provision against Invasions and Insurrections*, § II, V, and X, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *The College in Williamsburg, the twenty-seventh day of October*, 1748, *in Laws of Virginia*, Volume 6, at 113, 115, 117. *Continued,* CHAP. II, *An Act for continuing an act, intituled, An Act for making provision against invasions and insurrections, At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February*, 1752. *And from thence continued by several prorogations, to Thursday the first day of November*, 1753, *in Laws of Virginia*, Volume 6, at 350.

CHAP. II, *An Act for amending the several acts, for making provision against invasions and insurrections, and for amending and explaining an act passed this present session of Assembly, intituled, An Act for raising the sum of twenty five thousand pounds for the better protection of the inhabitants on the frontiers of this colony, and for other purposes therein mentioned*, §§ I and IV, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *in Laws of Virginia*, Volume 7, at 26-27, 28.

CHAP. IV, *An Act for reducing the several acts for making provision against invasions and insurrections into one act*, § I, IX, and XIII, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday, the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 106, 111, 112. *Continued*, CHAP. IV, *An Act for continuing an act, intituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on*

Thursday the fourteenth day of September, 1758, *in Laws of Virginia*, Volume 7, at 237; CHAP. V, *An Act for further continuing an Act, intituled, An Act for reducing the several Acts for making provision against Invasions and Insurrections, into one Act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758*; and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 275; CHAP. II, *An Act for further continuing an act, entituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758*; and from thence continued by several prorogations to Thursday the fifth of March*, 1761, *in Laws of Virginia*, Volume 7, at 384; CHAP. IV, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 539; CHAP. I, *An act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 30th of October*, 1764, *in Laws of Virginia*, Volume 8, at 37; CHAP. I, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 189; CHAP. V, *An Act for further continuing the Act, intituled an Act for reducing the several acts of Assembly for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in the City of Williamsburg, on Tuesday, in the seventh day of November*, 1769, *in Laws of Virginia*, Volume 8, at 334; CHAP. III, *An act for further continuing the act, intituled An act for reducing the several acts of assembly, for making provision against invasions and insurrections, into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Monday the tenth day of February, one thousand seven hundred and seventy-two, in Laws of Virginia*, Volume 8, at 514.

EN-1301 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 267.

EN-1302 — CHAP. III, *An act for raising a Battalion of Infantry for garrison duty, and for other purposes,* AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fourth day of May, one thousand seven hundred and seventy eight, in Laws of Virginia*, Volume 9, at 452.

EN-1303 — CHAP. III, *An act for the encouragement of Iron Works*, §§ V and VI, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 305.

EN-1304 — CHAP. XXIX, *An act for providing arms and ammunition for the defence of the state*, § I, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October, one thousand seven hundred eighty-four, in Laws of Virginia*, Volume 11, at 494.

EN-1305 — CHAP. V, *An Act for making more effectual provision against Invasions and Insurrections*, § I, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, 1727, *in Laws of Virginia*, Volume 4, at 197. *Continued*, CHAP. IV, *An act to continue the Act, for making more effectual provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, [1727]. *And from thence continued, by several prorogations, to the eighteenth day of May*, 1732, *in Laws of Virginia*, Volume 4, at 323; CHAP. IV, *An Act for further continuing the Act*, For making more effectual provision against Invasions and Insurrections, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February,* [1727]. *And from thence continued, by several prorogations, to the twenty second day of August*, 1734, *in Laws of Virginia*, Volume 4, at 395; CHAP. III, *An Act, for reviving the Act, For making more effective provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 24; CHAP. VI, *An Act, for continuing and amending the Act*, Intituled, *An Act, for making more effectual Provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on Friday the first day of August*, [1735]. *And from thence continued, by several prorogations, to the twenty second day of May*, 1740, *in Laws of Virginia*, Volume 5, at 99; CHAP. IV, *An Act, for continuing an Act, made in the first year of his majesty's reign, intituled, an Act for making more effectual provision against invasions and insurrections; and one other act, intituled, an Act, for continuing and amending the aforementioned Act*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on Thursday, the sixth day of May,* [1741]. *And from thence continued, by several prorogations, to Tuesday, the fourth day of September*, 1744, *in Laws of Virginia*, Volume 5, at 228.

CHAP. XXXIX, *An Act for making provision against Invasions and Insurrections*, § I, AT A GENERAL

ASSEMBLY, BEGUN AND HELD AT *The College in Williamsburg, the twenty-seventh day of October*, 1748, *in Laws of Virginia*, Volume 6, at 112-113. *Continued,* CHAP. II, *An Act for continuing an act, intituled, An Act for making provision against invasions and insurrections, At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February*, 1752. *And from thence continued by several prorogations, to Thursday the first day of November*, 1753, *in Laws of Virginia*, Volume 6, at 350.

EN-1306 — May the 18th 1691, *in Executive Journals of Virginia*, Volume 1, at 184.

EN-1307 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 335-336, 337.

EN-1308 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, § II, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 118.

EN-1309 — CHAP. X, *An Act for enlarging the jurisdiction of the Court of Hustings, in the City of* Williamsburg, *within the limits thereof*, § IV, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 140.

CHAP. II, *An Act, for the better Regulation of the Militia*, § XIX, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 23-24.

CHAP. II, *An Act for the better regulating and training the Militia*, § XXIII, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 541-542.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § XXIV, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 103-104. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 33.

EN-1310 — CHAP. II, *An Act, for the better Regulation of the Militia*, § II, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 16.

EN-1311 — CHAP. II, *An Act for the better regulating and training the Militia*, § III, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 531.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § II, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 93. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the*

twenty-second of February, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1312 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 27-28.

EN-1313 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 267-268.

EN-1314 — CHAP. XVII, *An act for regulating and disciplining the militia of the city of Williamsburg and borough of Norfolk*, § I, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 313.

EN-1315 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § II, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four, in Laws of Virginia*, Volume 11, at 476-477; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § III, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five, in Laws of Virginia*, Volume 12, at 10.

EN-1316 — CHAP. II, *An act to amend the act for regulating and disciplining the militia, and for other purposes*, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the sixteenth day of October*[,] *one thousand seven hundred and eighty-six, in Laws of Virginia*, Volume 12, at 234.

EN-1317 — CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § IV, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 242. *Continued,* CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1318 — June. 3. 1699, *in Executive Journals of Virginia*, Volume 1, at 443-445.

EN-1319 — Apr^{ll} 25th [1701], *in Executive Journals of Virginia*, Volume 2, at 138.

EN-1320 — At a Council at his Majestys Royal College of William & Mary March y^{e} 12th 1701/2, *in Executive Journals of Virginia*, Volume 2, at 225.

EN-1321 — At a Council held at the Capitol the 10th day of June 1707, *in Executive Journals of Virginia*, Volume 3, at 151.

EN-1322 — December the 8th 1715, *in Executive Journals of Virginia*, Volume 3, at 419-420.

EN-1323 — ACT VII, *An Act for the better defence of the Country*, ATT A GENERALL ASSEMBLY, BEGUN AT JAMES CITTY THE SIXTEENTH DAY OF APRILL, ONE THOUSAND SIX HUNDRED EIGHTY-FOUR, *in Laws of Virginia*, Volume 3, at 18. *Repealed*, Act IX, *An act repealing the 7th act of assembly made at James Cittie the 16th day of Aprill,* 1684, ATT A GENERALL ASSEMBLY, BEGUN AT JAMES CITTY THE FIRST DAY OF OCTOBER, 1685, AND THENCE PROROGUED BY SEVERALL PROROGATIONS TO THE 20TH DAY OF OCTOBER, 1686, *in Laws of Virginia*, Volume 3, at 38.

EN-1324 — November the 28th 1705, *in Executive Journals of Virginia*, Volume 3, at 60.

EN-1325 — *See* At a Council held at the Capitol April 18th 1743, *in Executive Journals of Virginia*, Volume 5, at 115-116 (petition dismissed).

EN-1326 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 335-336.

EN-1327 — CHAP. X, *An Act for enlarging the jurisdiction of the Court of Hustings, in the City of* Williamsburg, *within the limits thereof*, § IV, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 140.

CHAP. II, *An Act, for the better Regulation of the Militia*, § XIX, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 23-24.

CHAP. II, *An Act for the better regulating and training the Militia*, § XXIII, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 541-542.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § XXIV, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 103-104. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1328 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, § XXV, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 125; CHAP. II, *An Act, for the better Regulation of the Militia*, § XVI, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 23.

EN-1329 — CHAP. II, *An Act for the better regulating and training the Militia*, § II, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 530-531.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § I, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 93. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, §IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1330 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 27, 29, 33.

EN-1331 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 268.

EN-1332 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § II, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four, in Laws of Virginia*, Volume 11, at 477; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § III, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five, in Laws of Virginia*, Volume 12, at 10.

EN-1333 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 10.

EN-1334 — ACT LXIII, AT A GRAND ASSEMBLIE HOLDEN AT JAMES CITTY THE SECOND DAY OF MARCH, 1642-3, *in Laws of Virginia*, Volume 1, at 277.

EN-1335 — AT A GRAND ASSEMBLY HELD AT JAMES CITTY BY PROROGATION FROM THE 10TH OF MARCH, 1655, TO THIS INSTANT, FIRST OF DECEMBER, 1656, *in Laws of Virginia*, Volume 1, at 425.

EN-1336 — ACT VII, *An act for provision of ammunition*, AT A GRAND ASSEMBLIE HOLDEN AT JAMES CITTIE BY PROROGATION FROM THE 5th OF JUNE[,] 1666, TO THE TWENTIE THIRD OF OCTOBER[,] 1666, *in Laws of Virginia*, Volume 2, at 238.

EN-1337 — ACT II, *An act providing for the supply of armes and ammunition*, ATT A GRAND ASSEMBLY, HOLDEN AT JAMES CITY BY PROROGATION FROM THE 24TH DAY OF SEPTEMBER, 1672, TO THE 20TH OF OCTOBER, 1673, *in Laws of Virginia*, Volume 2, at 304-305. This Act was ordered to "be putt into strict and effectual execution" AT A GRAND ASSEMBLIE HELD ATT JAMES CITTIE BY PROROGATION FROM THE ONE AND TWENTIETH DAY OF SEPTEMBER, 1674, TO THE SEAVENTH DAY OF MARCH, [1676], *in Laws of Virginia*, Volume 2, at 339.

EN-1338 — ACT I, *An act for carrying on a warre against the barbarous Indians*, AT A GRAND ASSEMBLIE, HOLDEN AT JAMES CITTIE THE FIFTH DAY OF JUNE[,] 1676, *in Laws of Virginia*, Volume 2, at 344.

EN-1339 — CHAP. II, *An Act for the better regulating and training the Militia*, § V, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 532.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § IV, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 94. *Continued,* CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1340 — CHAP. II, *An Act for the better regulating and training the Militia*, § VI, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 532-533.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § V, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 94-95. *Continued,* CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; *continued with amendments*, CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1341 — CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, §§ II and III, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 534, 537. [In this volume, pages 535 and 536 are blank.]

EN-1342 — CHAP. XXXI, *An Act to continue and amend the act for the better regulating and disciplining the militia*, §§ I and II, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth of November,* 1766, *in Laws of Virginia*, Volume 8, at 242. *Continued*, CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1343 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 28.

EN-1344 — November the 28th 1705, *in Executive Journals of Virginia*, Volume 3, at 62-63.

EN-1345 — At a Council held at the Capitol the 18th day of March 1707 [1707/8], *in Executive Journals of Virginia*, Volume 3, at 167.

EN-1346 — At a Council held at the Capitol the 18th of February 1708, *in Executive Journals of Virginia*, Volume 3, at 207.

EN-1347 — At a Council held at the Capitol April the 22d 1738, *in Executive Journals of Virginia*, Volume 4, at 414.

EN-1348 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 339.

EN-1349 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, § XIII, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 121-122.

EN-1350 — CHAP. II, *An Act, for the better Regulation of the Militia*, § VII, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 18.

EN-1351 — CHAP. II, *An Act for the better regulating and training the Militia*, § VIII, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day*

of August, one thousand seven hundred and fifty five, in Laws of Virginia, Volume 6, at 533-534.

EN-1352 — CHAP. III, *An Act for the better regulating and disciplining the Militia*, § VIII, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 96. *Continued*, CHAP IV, *An Act for continuing an Act, intituled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274.

EN-1353 — CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § VI, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 537-538.

CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § VIII, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 244. *Continued*, CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 29.

EN-1354 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 22, 29.

EN-1355 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 271.

EN-1356 — CHAP. XX, *An act for the better regulation and discipline of the militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of* Williamsburg, *on* Monday, *the third of* May, *one thousand seven hundred and seventy-nine, in Laws of Virginia,* Volume 10, at 84.

EN-1357 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § VI, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four, in Laws of Virginia*, Volume 11, at 485; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § VI, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five, in Laws of Virginia*, Volume 12, at 16.

EN-1358 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 271.

EN-1359 — CHAP. XX, *An act for the better regulation and discipline of the militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of* Williamsburg, *on* Monday, *the third of* May, *one thousand seven hundred and seventy-nine, in Laws of Virginia,* Volume 10, at 84.

EN-1360 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § VI, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four, in Laws of Virginia*, Volume 11, at 485; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § VI, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five, in Laws of Virginia*, Volume 12, at 16.

EN-1361 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 340-341. Substantially equivalent language in CHAP. II, *An Act for the settling and better*

Regulation of the Militia, §§ XVIII and XIX, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 123.

EN-1362 — CHAP. X, *An act for enlarging the jurisdiction of the Court of Hustings, in the City of* Williamsburg, *within the limits thereof*, § IV, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 141.

EN-1363 — CHAP. II, *An Act, for the better Regulation of the Militia*, § IX, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 19.

CHAP. II, *An Act for the better regulating and training the Militia*, § IX, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 534.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § X, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 96-97. *Continued,* CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, §IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1364 — CHAP. II, *An Act for the better regulating and training the Militia*, § XXIV, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 542.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § XXV, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 104. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1365 — CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § VII, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538.

CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § IX, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 244-245. *Continued,* CHAP. II, *An act for further continuing the act,*

intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia, Volume 8, at 503.

EN-1366 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 30, 33.

EN-1367 — CHAP. XII, *An ordinance for amending an ordinance for raising and embodying a sufficient force for the defence and protection of this colony, and for other purposes therein mentioned. At a General Convention of Delegates and Representatives, from the several counties and corporations of Virginia, held at the Capitol in the City of Williamsburg, on Monday the 6th of May*, 1776, *in Laws of Virginia*, Volume 9, at 140-141.

EN-1368 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 271.

EN-1369 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, §§ IX and X, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October, one thousand seven hundred eighty-four, in Laws of Virginia*, Volume 11, at 490-491; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, §§ IX and X, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five, in Laws of Virginia*, Volume 12, at 21-22.

EN-1370 — ACT XXV, *Provision to bee made for Amunition*, ATT A GRAND ASSEMBLY, HELD AT JAMES CITTIE, MARCH 7, 1658-9, *in Laws of Virginia*, Volume 1, at 525. *Reënacted,* ACT CXX, *Supply of ammunition*, AT A GRAND ASSEMBLY HELD AT JAMES CITY MARCH THE 23D[,] 1661-2, *in Laws of Virginia*, Volume 2, at 126-127.

EN-1371 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 342; CHAP. II, *An Act for the settling and better Regulation of the Militia*, § XXIII, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 124-125.

EN-1372 — CHAP. II, *An Act, for the better Regulation of the Militia*, § IX, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 19-20.

EN-1373 — CHAP. II, *An Act, for the better Regulation of the Militia*, § X, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 20.

CHAP. II, *An Act for the better regulating and training the Militia*, § XIX, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 541.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § XIX, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 102. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, §IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued*

by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia, Volume 8, at 503.

EN-1374 — CHAP. I, *An Act, for the better security of the Country in the present time of Danger*, § IV, AT A General Assembly, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on Friday, the first day of August*, [1735]. *And from thence continued, by several prorogations, to the 22nd day of May*, 1740, *in Laws of Virginia*, Volume 5, at 91.

EN-1375 — CHAP. XXXIX, *An Act for making provision against Invasions and Insurrections*, § IV, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *The College in Williamsburg, the twenty-seventh day of October*, 1748, *in Laws of Virginia*, Volume 6, at 114. *Continued,* CHAP. II, *An Act for continuing an act, intituled, An Act for making provision against invasions and insurrections, At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February*, 1752. *And from thence continued by several prorogations, to Thursday the first day of November*, 1753, *in Laws of Virginia*, Volume 6, at 350.

EN-1376 — CHAP. II, *An Act for the better regulating and training the Militia*, §§ V and IX, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 532, 535.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, §§ IV and X, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday, the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 94, 97. *Continued,* CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; *continued,* CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1377 — CHAP. IV, *An Act for reducing the several acts for making provision against invasions and insurrections into one act*, § XXII, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday, the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 115. *Continued,* CHAP. IV, *An Act for continuing an act, intituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758, *in Laws of Virginia*, Volume 7, at 237; CHAP. V, *An Act for further continuing an Act, intituled, An Act for reducing the several Acts for making provision against Invasions and Insurrections, into one Act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758*; and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 275; CHAP. II, *An Act for further continuing an act, entituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758*; and from thence continued by several prorogations to Thursday the fifth of March*, 1761, *in Laws of Virginia*, Volume 7, at 384; CHAP. IV, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 539; CHAP. I, *An act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 30th of October*, 1764, *in Laws of Virginia*, Volume 8, at 37; CHAP. I, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November*, 1766, *in Laws of Virginia*, Volume 8, at 189; CHAP. V, *An Act for further continuing the Act, intituled an Act for reducing the several acts of Assembly for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in the City of Williamsburg, on*

Tuesday, in the seventh day of November, 1769, *in Laws of Virginia*, Volume 8, at 334; CHAP. III, *An act for further continuing the act, intituled An act for reducing the several acts of assembly, for making provision against invasions and insurrections, into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Monday the tenth day of February, one thousand seven hundred and seventy-two*, *in Laws of Virginia*, Volume 8, at 514.

EN-1378 — CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § II, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 242. *Continued*, CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one*, *in Laws of Virginia*, Volume 8, at 503.

EN-1379 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 31, 31, 33.

EN-1380 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven*, *in Laws of Virginia*, Volume 9, at 272-273.

EN-1381 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, §§ II and VI, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four*, *in Laws of Virginia*, Volume 11, at 479, 485; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, §§ III and VI, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five*, *in Laws of Virginia*, Volume 12, at 12, 16.

EN-1382 — At a Council held March the 24. 1772, *in Executive Journals of Virginia*, Volume 6, at 451.

EN-1383 — Nos. 23 and 24 of King James II's Instructions to the Governor of Virginia, 27 February 1688, *in Executive Journals of Virginia*, Volume 1, at 516, ¶¶ 23 and 24.

EN-1384 — At y^{e} Council Chamber at his maj^{tes} Royal College of W^{m} and Mary July 3^{d} & 4th 1701, *in Executive Journals of Virginia*, Volume 2, at 173.

EN-1385 — ACT LVI, A GRAND ASSEMBLY HOLDEN AT JAMES CITTY THE 21st OF ffEBRUARY, 1631-2, *in Laws of Virginia*, Volume 1, at 174-175. *Reënacted,* Act LIII, A GRAND ASSEMBLY HOLDEN AT JAMES CITTY THE 4TH DAY OF SEPTEMBER, 1632, *in Laws of Virginia*, Volume 1, at 200.

EN-1386 — ACT VII, *An act disbanding the present souldiers in garrisons in the fforts on the heads of the severall rivers, as alsoe for the raiseing of other forces in their stead*, ATT A GENERALL ASSEMBLY, BEGUNN ATT JAMES CITTY NOVEM. 1682, *in Laws of Virginia*, Volume 2, at 499-500.

EN-1387 — ACT IV, *An act for the better supply of the country with armes and ammunition*, ATT A GENERALL ASSEMBLY, BEGUN AT JAMES CITTY THE SIXTEENTH DAY OF APRILL, ONE THOUSAND SIX HUNDRED EIGHTY-FOUR, *in Laws of Virginia*, Volume 3, at 14.

EN-1388 — ACT VII, *An Act for the better defence of the Country*, ATT A GENERALL ASSEMBLY, BEGUN AT JAMES CITTY THE SIXTEENTH DAY OF APRILL, ONE THOUSAND SIX HUNDRED EIGHTY-FOUR, *in Laws of Virginia*, Volume 3, at 18. *Repealed*, Act IX, *An act repealing the 7th act of assembly made at James Cittie the 16th day of Aprill,* 1684, ATT A GENERALL ASSEMBLY, BEGUN AT JAMES CITTY THE FIRST DAY OF OCTOBER, 1685, AND THENCE PROROGUED BY SEVERALL PROROGATIONS TO THE 20TH DAY OF OCTOBER, 1686, *in Laws of Virginia*, Volume 3, at 38.

EN-1389 — At a Council held at her Majestys Royal College of William & Mary June y^{e} 17th 1703, *in Executive Journals of Virginia*, Volume 2, at 321.

EN-1390 — March 3^{d} 1703 [1703/4], *in Executive Journals of Virginia*, Volume 2, at 352.

EN-1391 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 339.

EN-1392 — At a Council held at the Capitol the Sixteenth day of August 1711, *in Executive Journals of Virginia*, Volume 3, at 282.

EN-1393 — At a Council held at the Capitol the first day of April 1712, *in Executive Journals of Virginia*, Volume 3, at 303.

EN-1394 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, § XII, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 121.

EN-1395 — CHAP. X, *An Act for enlarging the jurisdiction of the Court of Hustings, in the City of* Williamsburg, *within the limits thereof*, § IV, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 140.

CHAP. II, *An Act, for the better Regulation of the Militia*, § XIX, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 23.

CHAP. II, *An Act for the better regulating and training the Militia*, § XXIII, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 541.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § XXIV, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday, the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 103. *Continued,* CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1396 — CHAP. II, *An Act, for the better Regulation of the Militia*, §§ VII and X, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 18, 21.

EN-1397 — CHAP. I, *An Act, for the better security of the Country in the present time of Danger*, §§ IV, I, and VII, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on Friday, the first day of August*, [1735]. *And from thence continued, by several prorogations to the 22nd day of May*, 1740, *in Laws of Virginia*, Volume 5, at 91, 90, 91.

EN-1398 —CHAP. II, *An Act for the better regulating and training the Militia*, §§ VIII and X, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 533, 537.

EN-1399 — CHAP. III, *An Act for the better regulating and disciplining the Militia*, §§ VIII and XI, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday, the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 95-96, 98. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274.

EN-1400 — CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § VI, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,]

1762, *in Laws of Virginia*, Volume 7, at 537.

CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § VIII, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 244. *Continued*, CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1401 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 29.

EN-1402 — CHAP. XII, *An ordinance for amending an ordinance for raising and embodying a sufficient force for the defence and protection of this colony, and for other purposes therein mentioned, At a General Convention of Delegates and Representatives, from the several counties and corporations of Virginia, held at the Capitol in the City of Williamsburg, on Monday the 6th of May,* 1776, *in Laws of Virginia*, Volume 9, at 140.

EN-1403 — CHAP. I, *An act for regulating and disciplining the Militia,* AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 268.

EN-1404 — CHAP. XVII, *An act for regulating and disciplining the militia of the city of Williamsburg and borough of Norfolk,* § II, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 313.

EN-1405 — CHAP. XX, *An act for the better regulation and discipline of the militia,* AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of* Williamsburg, *on* Monday *the third day of* May, *one thousand seven hundred and seventy-nine, in Laws of Virginia*, Volume 10, at 83.

EN-1406 — CHAP. XXVII, *An act for putting the eastern frontier of this commonwealth into a posture of defence,* AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the first day of* May, *one thousand seven hundred and eighty, in Laws of Virginia,* Volume 10, at 296-297.

EN-1407 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections,* § II, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four, in Laws of Virginia*, Volume 11, at 477-478.

EN-1408 — CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections,* § III, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five, in Laws of Virginia*, Volume 12, at 11-12.

EN-1409 — October, 26, 1699, *in Executive Journals of Virginia*, Volume 2, at 19.

EN-1410 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 28.

EN-1411 — CHAP. I, *An act for regulating and disciplining the Militia,* AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 268-269.

EN-1412 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections,* § II, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October, one thousand seven hundred eighty-four, in Laws of Virginia*, Volume 11, at 479; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections,* § III, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five, in Laws of Virginia*, Volume 12, at 12.

EN-1413 — At a Council held at the Capitol the 1st of November 1728, *in Executive Journals of Virginia*, Volume 4, at 189.

EN-1414 — At a Council held November 6th 1752, *in Executive Journals of Virginia*, Volume 5, at 412-413.

EN-1415 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § V, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four*, *in Laws of Virginia*, Volume 11, at 484; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § V, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five*, *in Laws of Virginia*, Volume 12, at 15.

EN-1416 — [Number] 28, LAWS and ORDERS *Concluded on by the General Assembly, March the 5th*, 1623-4, *in Laws of Virginia*, Volume 1, at 127. *Reënacted as* ACT XLIX *by* A GRAND ASSEMBLY HOLDEN AT JAMES CITTY THE 21st OF ffEBRUARY[,] 1631-2, *in Laws of Virginia*, Volume 1, at 173, *and as* ACT XLIII *by* A GRAND ASSEMBLY HOLDEN AT JAMES CITTY THE 4TH DAY OF SEPTEMBER, 1632, *in Laws of Virginia*, Volume 1, at 198.

EN-1417 — ACT VII, *An act disbanding the present souldiers in garrisons in the fforts on the heads of the severall rivers, as alsoe for the raiseing of other forces in their stead*, ATT A GENERALL ASSEMBLY, BEGUNN ATT JAMES CITTY NOVEM. THE TENTH[,] 1682, *in Laws of Virginia*, Volume 2, at 500.

EN-1418 — ACT VII, *An Act for the better defence of the Country*, ATT A GENERALL ASSEMBLY, BEGUN AT JAMES CITTY THE SIXTEENTH DAY OF APRILL, ONE THOUSAND SIX HUNDRED EIGHTY-FOUR, *in Laws of Virginia*, Volume 3, at 18-19. *Repealed*, Act IX, *An act repealing the 7th act of assembly made at James Cittie the 16th day of Aprill,* 1684, ATT A GENERALL ASSEMBLY, BEGUN AT JAMES CITTY THE FIRST DAY OF OCTOBER, 1685, AND THENCE PROROGUED BY SEVERALL PROROGATIONS TO THE 20TH DAY OF OCTOBER, 1686, *in Laws of Virginia*, Volume 3, at 38.

EN-1419 — At a Council held at James Citty the ninth day of August, 1699, *in Executive Journals of Virginia*, Volume 2, at 5-6. *Substantially the same,* May 7 1700, *in Executive Journals of Virginia*, Volume 2, at 69; At a Councill held at M^r^ Auditor Byrds March y^e^ 9^th^ 1700 [1701], *in Executive Journals of Virginia*, Volume 2, at 129-130; At the Councill Chamber at his Maj^tis^ Royall Colledge of William and Mary y^e^ 8^th^of May 1701, *in Executive Journals of Virginia*, Volume 2, at 141-142; At y^e^ Council Chamber at his maj^tes^ Royal College of W^m^ and Mary July 3^d^ & 4^th^ 1701, *in Executive Journals of Virginia*, Volume 2, at 174-175; At a Council held at her Majestys Royal College of William & Mary June y^e^ 17^th^ 1703, *in Executive Journals of Virginia*, Volume 2, at 320-321; March 3^d^ 1703 [1703/4], *in Executive Journals of Virginia*, Volume 2, at 353; February the 9^th^ 1704 [1704/5], *in Executive Journals of Virginia*, Volume 2, at 425.

EN-1420 — At a Council held at the Capitol the 10^th^ day of February 1709 [1709/10], *in Executive Journals of Virginia*, Volume 3, at 206.

EN-1421 — CHAP. V, *An Act for making more effectual provision against Invasions and Insurrections*, §§ VI and VII, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, 1727, *in Laws of Virginia*, Volume 4, at 199-200. *Continued,* CHAP. IV, *An act to continue the Act, for making more effectual provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, [1727], *And from thence continued, by several prorogations, to the eighteenth day of May*, 1732, *in Laws of Virginia*, Volume 4, at 323; CHAP. IV, *An Act for further continuing the Act*, For making more effectual provision against Invasions and Insurrections, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, [1727]. *And from thence continued, by several prorogations, to the twenty second day of August*, 1734, *in Laws of Virginia*, Volume 4, at 395; CHAP. III, *An Act, for reviving the Act, For making more effective provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 24; CHAP. VI, *An Act, for continuing and amending the Act*, Intituled, *An Act, for making more effectual Provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on Friday the first day of August*, [1735]. *And from thence continued, by several prorogations to the twenty second day of May*, 1740, *in Laws of Virginia*, Volume 5, at 99; CHAP. IV, *An Act, for continuing an Act, made in the first year of his majesty's reign, intituled, an Act for making more effectual provision against invasions and insurrections; and one other act, intituled, an Act, for continuing and amending the aforementioned Act*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on Thursday, the sixth day of May*, [1741]. *And from thence continued, by several prorogations, to Tuesday, the fourth day of September*, 1744, *in Laws of Virginia*, Volume 5, at 228.

CHAP. XXXIX, *An Act for making provision against Invasions and Insurrections*, § VII, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *The College in Williamsburg, the twenty-seventh day of October*, 1748, *in Laws of Virginia*, Volume 6, at 115-116. *Continued,* CHAP. II, *An Act for continuing an act, intituled, An Act for making provision against invasions and insurrections, At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February*, 1752. *And from thence continued by several*

prorogations, to Thursday the first day of November, 1753, *in Laws of Virginia*, Volume 6, at 350.

CHAP. IV, *An Act for reducing the several acts for making provision against invasions and insurrections into one act*, § XI, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday, the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven*, *in Laws of Virginia*, Volume 7, at 112. *Continued*, CHAP. IV, *An Act for continuing an act, intituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758, *in Laws of Virginia*, Volume 7, at 237; CHAP. V, *An Act for further continuing an Act, intituled, An Act for reducing the several Acts for making provision against Invasions and Insurrections, into one Act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 275; CHAP. II, *An Act for further continuing an act, entituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the fifth of March*, 1761 *in Laws of Virginia*, Volume 7, at 384; CHAP. IV, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November* 1762, *in Laws of Virginia*, Volume 7, at 539; CHAP. I, *An act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 30th of October*, 1764, *in Laws of Virginia*, Volume 8, at 37; CHAP. I, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November*, 1766, *in Laws of Virginia*, Volume 8, at 189; CHAP. V, *An Act for further continuing the Act, inituled an Act for reducing the several acts of Assembly for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in the City of Williamsburg, on Tuesday, the seventh day of November*, 1769, *in Laws of Virginia*, Volume 8, at 334; CHAP. III, *An act for further continuing the act, intituled An act for reducing the several acts of assembly, for making provision against invasions and insurrections, into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Monday the tenth day of February, one thousand seven hundred and seventy-two*, *in Laws of Virginia*, Volume 8, at 514.

EN-1422 — At y^{e} Council Chamber at his maj^{tes} Royal College of W^{m} and Mary July 3^{d} & 4th 1701, *in Executive Journals of Virginia*, Volume 2, at 173.

EN-1423 — ACT VII, *An Act for the better defence of the Country*, ATT A GENERALL ASSEMBLY, BEGUN AT JAMES CITTY THE SIXTEENTH DAY OF APRILL, ONE THOUSAND SIX HUNDRED EIGHTY-FOUR, *in Laws of Virginia*, Volume 3, at 19-20, 22. *Repealed*, Act IX, *An act repealing the 7th act of assembly made at James Cittie the 16th day of Aprill,* 1684, ATT A GENERALL ASSEMBLY, BEGUN AT JAMES CITTY THE FIRST DAY OF OCTOBER, 1685, AND THENCE PROROGUED BY SEVERALL PROROGATIONS TO THE 20TH DAY OF OCTOBER, 1686, *in Laws of Virginia*, Volume 3, at 38.

EN-1424 — Att a Councill held at James Citty Jan^{r}y 15th 1690 [1690-91], *in Executive Journals of Virginia*, Volume 1, at 142.

EN-1425 — June. 7. 1699, *in Executive Journals of Virginia*, Volume 1, at 448.

EN-1426 — CHAP. V, *An Act for making more effectual provision against Invasions and Insurrections*, § III, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, 1727, *in Laws of Virginia*, Volume 4, at 198. *Continued*, CHAP. IV, *An act to continue the Act, for making more effectual provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, [1727]. *And from thence continued, by several prorogations, to the eighteenth day of May*, 1732, *in Laws of Virginia*, Volume 4, at 323; CHAP. IV, *An Act for further continuing the Act*, For making more effectual provision against Invasions and Insurrections, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, [1727]. *And from thence continued, by several prorogations, to the twenty second day of August*, 1734, *in Laws of Virginia*, Volume 4, at 395; CHAP. III, *An Act, for reviving the Act, For making more effective provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 24; CHAP. VI, *An Act, for continuing and amending the Act*, Intituled, *An Act, for making more effectual Provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on Friday the first day of August*, [1735]. *And from thence continued, by several prorogations, to the twenty second day of May*, 1740, *in Laws of Virginia*, Volume 5, at 99; CHAP. IV, *An Act, for continuing an Act, made in the first year of his majesty's reign, intituled, an Act for making more effectual provision against invasions and*

insurrections; *and one other act*, *intituled*, *an Act*, *for continuing and amending the aforementioned Act*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol*, *in the City of Williamsburg*, *on Thursday*, *the sixth day of May*, [1741]. *And from thence continued*, *by several prorogations*, *to Tuesday*, *the fourth day of September*, 1744, *in Laws of Virginia*, Volume 5, at 228.

CHAP. XXXIX, *An Act for making provision against Invasions and Insurrections*, § III, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *The College in Williamsburg*, *the twenty-seventh day of October*, 1748, *in Laws of Virginia*, Volume 6, at 113-114. *Continued,* CHAP. II, *An Act for continuing an act*, *intituled*, *An Act for making provision against invasions and insurrections*, *At a General Assembly*, *begun and held at the College in the City of Williamsburg*, *on Thursday the twenty seventh day of February*, 1752. *And from thence continued by several prorogations*, *to Thursday the first day of November*, 1753, *in Laws of Virginia*, Volume 6, at 350.

EN-1427 — CHAP. III, *An act for amending an act*, *intituled*, *An act for making provision against invasions and insurrections*, § II, *At a General Assembly*, *begun and held at the College in the City of Williamsburg*, *on Thursday the twenty seventh day of February*, *one thousand seven hundred and fifty two*. *And from thence continued by several prorogations*, *to Tuesday the fifth day of August*, *one thousand seven hundred and fifty five*, *in Laws of Virginia*, Volume 6, at 544-545.

EN-1428 — CHAP. IV, *An Act for reducing the several acts for making provision against invasions and insurrections into one act*, § II, *At a General Assembly*, *begun and held at the Capitol*, *in Williamsburg*, *on Thursday*, *the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April*, *one thousand seven hundred and fifty-seven*, *in Laws of Virginia*, Volume 7, at 107-108. *Continued*, CHAP. IV, *An Act for continuing an act*, *intituled*, *An Act for reducing the several acts for making provision against invasions and insurrections into one act*, *At a General Assembly*, *begun and held at the Capitol*, *in Williamsburg*, *on Thursday the fourteenth day of September*, 1758, *in Laws of Virginia*, Volume 7, at 237; CHAP. V, *An Act for further continuing an Act*, *intituled*, *An Act for reducing the several Acts for making provision against Invasions and Insurrections*, *into one Act*, *At a General Assembly*, *begun and held at the Capitol*, *in Williamsburg*, *on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 275; CHAP. II, *An Act for further continuing an act*, *entituled*, *An Act for reducing the several acts for making provision against invasions and insurrections into one act*, *At a General Assembly*, *begun and held at the Capitol*, *in Williamsburg*, *on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the fifth of March*, 1761, *in Laws of Virginia*, Volume 7, at 384; CHAP. IV, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act*, *At a General Assembly*, *begun and held at the Capitol*, *in the City of Williamsburg*, *on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 539; CHAP. I, *An act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act*, *At a General Assembly*, *begun and held at the Capitol*, *in the City of Williamsburg*, *on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 30th of October*, 1764, *in Laws of Virginia*, Volume 8, at 37; CHAP. I, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act*, *At a General Assembly*, *begun and held at the Capitol in Williamsburg*, *on Thursday the sixth day of November*, 1766, *in Laws of Virginia*, Volume 8, at 189; CHAP. V, *An Act for further continuing the Act*, *intituled an Act for reducing the several acts of Assembly for making provision against invasions and insurrections into one act*, *At a General Assembly*, *begun and held at the Capitol in the City of Williamsburg*, *on Tuesday*, *in the seventh day of November*, 1769, *in Laws of Virginia*, Volume 8, at 334; CHAP. III, *An act for further continuing the act*, *intituled An act for reducing the several acts of assembly*, *for making provision against invasions and insurrections*, *into one act*, *At a General Assembly*, *begun and held at the Capitol*, *in the City of Williamsburg*, *on Monday the tenth day of February*, *one thousand seven hundred and seventy-two*, *in Laws of Virginia*, Volume 8, at 514.

EN-1429 — CHAP. XII, *An ordinance for amending an ordinance for raising and embodying a sufficient force for the defence and protection of this colony, and for other purposes therein mentioned. At a General Convention of Delegates and Representatives, from the several counties and corporations of Virginia, held at the Capitol in the City of Williamsburg, on Monday the 6th of May*, 1776, *in Laws of Virginia*, Volume 9, at 139.

EN-1430 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § VII, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond*, *on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four*, *in Laws of Virginia*, Volume 11, at 487; CHAP. I, *An act to amend and reduce into one act*, *the several laws for regulating and disciplining the militia*, *and guarding against invasions and insurrections*, § VII, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond*, *on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five*, *in Laws of Virginia*, Volume 12, at 18.

EN-1431 — CHAP. X, *An act for enlarging the jurisdiction of the Court of Hustings, in the City of* Williamsburg, *within the limits thereof*, § IV, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 141-142.

CHAP. II, *An Act, for the better Regulation of the Militia*, § XIX, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 23-24.

CHAP. II, *An Act for the better regulating and training the Militia*, § XXIII, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 541-542.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § XXIV, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday, the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 103-104. *Continued,* CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1432 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held* at Richmond town, in the county of Henrico, *on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 33.

EN-1433 — CHAP. V, *An Act for making more effectual provision against Invasions and Insurrections*, § II, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg*, the first day *of February*, 1727, *in Laws of Virginia*, Volume 4, at 197-198. *Continued*, CHAP. IV, *An act to continue the Act, for making more effectual provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February,* [1727]. *And from thence continued, by several prorogations, to the eighteenth day of May*, 1732, *in Laws of Virginia*, Volume 4, at 323; CHAP. IV, *An Act for further continuing the Act*, For making more effectual provision against Invasions and Insurrections, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February,* [1727]. *And from thence continued, by several prorogations, to the twenty second day of August*, 1734, *in Laws of Virginia*, Volume 4, at 395; CHAP. III, *An Act, for reviving the Act, For making more effective provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 24; CHAP. VI, *An Act, for continuing and amending the Act*, Intituled, *An Act, for making more effectual Provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on Friday the first day of August*, [1735]. *And from thence continued, by several prorogations, to the twenty second day of May*, 1740, *in Laws of Virginia*, Volume 5, at 99; CHAP. IV, *An Act, for continuing an Act, made in the first year of his majesty's reign, intituled, an Act for making more effectual provision against invasions and insurrections; and one other act, intituled, an Act, for continuing and amending the aforementioned Act*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on Thursday, the sixth day of May,* [1741]. *And from thence continued, by several prorogations, to Tuesday, the fourth day of September*, 1744, *in Laws of Virginia*, Volume 5, at 228.

CHAP. XXXIX, *An Act for making provision against Invasions and Insurrections*, § II, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *The College in Williamsburg, the twenty-seventh day of October*, 1748, *in Laws of Virginia*, Volume 6, at 113. *Continued,* CHAP. II, *An Act for continuing an act, intituled, An Act for making provision against invasions and insurrections, At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February*, 1752. *And from thence continued by several prorogations, to Thursday the first day of November*, 1753, *in Laws of Virginia*, Volume 6, at 350.

CHAP. IV, *An Act for reducing the several acts for making provision against invasions and insurrections into one act*, § I, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday, the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven*, *in Laws of Virginia*, Volume 7, at 106-107. *Continued*, CHAP. IV, *An Act for continuing an act, intituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758, *in Laws of Virginia*, Volume 7, at 237; CHAP. V, *An Act for further continuing an Act, intituled, An Act for reducing the several Acts for making provision against Invasions and Insurrections, into one Act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 275; CHAP. II, *An Act for further continuing an act, entituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the fifth of March*, 1761, *in Laws of Virginia*, Volume 7, at 384; CHAP. IV, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 539; CHAP. I, *An act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 30th of October*, 1764, *in Laws of Virginia*, Volume 8, at 37; CHAP. I, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 189; CHAP. V, *An Act for further continuing the Act, intituled an Act for reducing the several acts of Assembly for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in the City of Williamsburg, on Tuesday, in the seventh day of November*, 1769, *in Laws of Virginia*, Volume 8, at 334; CHAP. III, *An act for further continuing the act, intituled An act for reducing the several acts of assembly, for making provision against invasions and insurrections, into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Monday the tenth day of February, one thousand seven hundred and seventy-two*, *in Laws of Virginia*, Volume 8, at 514.

EN-1434 — CHAP. III, *An ordinance appointing a Committee of Safety, for the more effectual carrying into execution the several rules and regulations established by this convention for the protection of this colony, AT a Convention of Delegates for the Counties and Corporations of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 50-51.

EN-1435 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, §§ VI and VII, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four*, *in Laws of Virginia*, Volume 11, at 485; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, §§ VI and VII, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five*, *in Laws of Virginia*, Volume 12, at 16-17.

EN-1436 — Att a Councill held Att James Citty May 3[d] 1682, *in Executive Journals of Virginia*, Volume 1, at 18-19.

EN-1437 — CHAP. V, *An Act for making more effectual provision against Invasions and Insurrections*, § XVIII, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, 1727, *in Laws of Virginia*, Volume 4, at 202-203. *Continued,* CHAP. IV, *An act to continue the Act, for making more effectual provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February,* [1727], *And from thence continued, by several prorogations, to the eighteenth day of May*, 1732, *in Laws of Virginia*, Volume 4, at 323; CHAP. IV, *An Act for further continuing the Act*, For making more effectual provision against Invasions and Insurrections, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February,* [1727]. *And from thence continued, by several prorogations, to the twenty second day of August*, 1734, *in Laws of Virginia*, Volume 4, at 395; CHAP. III, *An Act, for reviving the Act, For making more effective provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 24; CHAP. VI, *An Act, for continuing and amending the Act*, Intituled, *An Act, for making more effectual Provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of*

Williamsburg, on Friday the first day of August, [1735]. *And from thence continued, by several prorogations, to the twenty second day of May,* 1740, *in Laws of Virginia*, Volume 5, at 99; CHAP. IV, *An Act, for continuing an Act, made in the first year of his majesty's reign, intituled, an Act for making more effectual provision against invasions and insurrections; and one other act, intituled, an Act, for continuing and amending the aforementioned Act,* AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on Thursday, the sixth day of May,* [1741]. *And from thence continued, by several prorogations, to Tuesday, the fourth day of September,* 1744, *in Laws of Virginia*, Volume 5, at 228.

EN-1438 — CHAP. II, *An Act, for the better Regulation of the Militia,* § VIII, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August,* [1735]. *And from thence continued, by several prorogations, to the first day of November,* 1738, *in Laws of Virginia*, Volume 5, at 19.

EN-1439 — CHAP. II, *An Act for amending the act, intituled, An Act for the better regulation of the militia,* § I, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February,* 1752. *And from thence continued by several prorogations, to Thursday the 14th day of February,* 1754, *in Laws of Virginia*, Volume 6, at 421.

CHAP. II, *An Act for the better regulating and training the Militia,* § XXVI, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 542-543.

CHAP. III, *An Act for the better regulating and disciplining the Militia,* § XXVII, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday, the twenty-fifth day of March,* 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 104-105. *Continued,* CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September,* 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February,* 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia,* §IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May,* 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538.

CHAP. VII, *An act to amend so much of the act for the better regulating and training the militia, as relates to the appointment of patrollers, their duty and reward,* § I, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 195-196. *Continued,* CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia,* Volume 8, at 503.

EN-1440 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held* at Richmond town, in the county of Henrico, *on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 33.

EN-1441 — CHAP. I, *An act for regulating and disciplining the Militia,* AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 273.

CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections,* § VIII, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four, in Laws of Virginia*, Volume 11, at 489; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections,* § VIII, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five, in Laws of Virginia*, Volume 12, at 20.

EN-1442 — At a Council held at the Capitol the 28th day of Oct[r] 1730, *in Executive Journals of Virginia*, Volume 4, at 228. *Accord,* A Proclamation for the more effectual putting in Execution the Laws concerning the Militia: And for preventing the unlawful Concourse of Negros, and other slaves (29 October 1736), *in Executive Journals of Virginia*, Volume 4, at 471.

EN-1443 — *Quoted in Narratives of Early Virginia, 1606-1625*, Lyon G. Tyler, Editor (New York, New York: Charles Scribner's Sons, 1907), at 273. But, "[t]he acts passed at the general assembly in 1619 * * * never received * * * sanction * * * in England", and therefore "could not have the force of laws". *Laws of Virginia*, Volume 1, at 122, note.

EN-1444 — ACT LI, A GRAND ASSEMBLY HOLDEN AT JAMES CITTY THE 21st OF ffEBRUARY, 1631-2, *in Laws of Virginia*, Volume 1, at 174. *Reënacted,* ACT XLV, A GRAND ASSEMBLY HOLDEN AT JAMES CITTY THE 4TH DAY OF SEPTEMBER, 1632, *in Laws of Virginia*, Volume 1, at 198.

EN-1445 — ACT XLI, AT A GRAND ASSEMBLIE HOLDEN AT JAMES CITTY THE SECOND DAY OF MARCH, 1642-3, *in Laws of Virginia*, Volume 1, at 263.

EN-1446 — A Proclamation for the more effectual putting in Execution the Laws concerning the Militia: And for preventing the unlawful Concourse of Negros, and other slaves (29 October 1736), *in Executive Journals of Virginia*, Volume 4, at 471.

EN-1447 — CHAP. II, *An Act, for the better Regulation of the Militia*, § VIII, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 19.

CHAP. II, *An Act for the better regulating and training the Militia*, § VIII, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 534.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 96. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1448 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 29-30.

EN-1449 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 16.

EN-1450 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held* at Richmond town, in the county of Henrico, *on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 22-23.

EN-1451 — CHAP. XII, *An ordinance for amending an ordinance for raising and embodying a sufficient force for the defence and protection of this colony, and for other purposes therein mentioned, At a General Convention of Delegates and Representatives, from the several counties and corporations of Virginia, held at the Capitol in the City of Williamsburg, on Monday the 6th of May*, 1776, *in Laws of Virginia*, Volume 9, at 140.

EN-1452 — CHAP. XIII, *An Act for making a farther provision for the internal security and defence of this country*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol in the City of Williamsburg, on Monday the seventh day of October, one thousand seven hundred and seventy six, in Laws of Virginia*, Volume 9, at 198.

EN-1453 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 16-17.

EN-1454 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 18-19.

EN-1455 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 19.

EN-1456 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 17-18. *See also* CHAP. I, *An Ordinance for raising an additional number of forces for the defence and protection of this colony, and for other purposes therein mentioned, At a Convention of Delegates held at the town of Richmond, in the colony of Virginia, on Friday the first of December, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 88.

EN-1457 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 20-21, *as amended by* CHAP. I, *An Ordinance for raising an additional number of forces for the defence and protection of this colony, and for other purposes therein mentioned, At a Convention of Delegates held at the town of Richmond, in the colony of Virginia, on Friday the first of December, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 90.

EN-1458 — *See* CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 29, *as amended by* CHAP. I, *An Ordinance for raising an additional number of forces for the defence and protection of this colony, and for other purposes therein mentioned, At a Convention of Delegates held at the town of Richmond, in the colony of Virginia, on Friday the first of December, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 90.

EN-1459 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 25-26.

EN-1460 — May y^{e} 28th 1702, *in Executive Journals of Virginia*, Volume 2, at 248.

EN-1461 — At a Council held at the Capitol the Sixteenth day of August 1711, *in Executive Journals of Virginia*, Volume 3, at 282.

EN-1462 — At a Council held at the Capitol the first day of April 1712, *in Executive Journals of Virginia*, Volume 3, at 303.

EN-1463 — At a Council held at the Capitol the 10thday of February 1709 [1709/10], *in Executive Journals of Virginia*, Volume 3, at 206.

EN-1464 — At a Council held at the Capitol the 18th day of March 1736, *in Executive Journals of Virginia*, Volume 4, at 389.

EN-1465 — At a Council held October 31st 1743, *in Executive Journals of Virginia*, Volume 5, at 134.

EN-1466 — At a Council held June 12. 1745, *in Executive Journals of Virginia*, Volume 5, at 178-179.

EN-1467 — CHAP. I, *An Act for appointing Rangers*, AT A GENERAL ASSEMBLY, BEGUN AT *The Capitol, the twenty-fifth day of October*, 1710; *and then continued by several prorogations, to the seventh day of November*, 1711, *in Laws of Virginia*, Volume 4, at 9-10.

EN-1468 — At a Council held at the Capitol the 15th of October 1711, *in Executive Journals of Virginia*, Volume 3, at 286. *Accord*, At a Council held at the Capitol the tenth day of June 1712, *in Executive Journals of Virginia*, Volume 3, at 315; At a Council held at the Capitol the fifth day of March 1712 [1712/13], *in Executive Journals of Virginia*, Volume 3, at 332.

EN-1469 — May the 2^{d} 1713, *in Executive Journals of Virginia*, Volume 3, at 342.

EN-1470 — At a Council held at Williamsburgh August the 12th 1713, *in Executive Journals of Virginia*, Volume 3, at 347.

EN-1471 — CHAP. II, *An Act to explain an act, intituled, An act for raising the sum of twenty thousand pounds, for the protection of his majesty's subjects, against the insults and encroachments of the French; and for other purposes therein mentioned*, § IX, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Thursday the first day of May, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 465.

EN-1472 — CHAP. II, *An act to amend the several acts respecting the militia*, § V, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the fifteenth day of October*[,] *one thousand seven hundred and eighty-seven, in Laws of Virginia*, Volume 12, at 433.

EN-1473 — At a Council held at the Capitol y^e^ 12^th^ day of June 1716, *in Executive Journals of Virginia*, Volume 3, at 428.

EN-1474 — At y^e^ Council Chamber at his maj^tes^ Royal College of W^m^ and Mary July 3^d^ & 4^th^ 1701, *in Executive Journals of Virginia*, Volume 2, at 174.

EN-1475 — At a Council held at her Majestys Royal College of William & Mary June y^e^ 17^th^ 1703, *in Executive Journals of Virginia*, Volume 2, at 321.

EN-1476 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, §§ II, III, and IV, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four, in Laws of Virginia*, Volume 11, at 476-477, 483-484; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, §§ III and IV, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five, in Laws of Virginia*, Volume 12, at 10, 14-15.

EN-1477 — CHAP. V, *An Act for making more effectual provision against Invasions and Insurrections*, §§ XIX and XX, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, 1727, *in Laws of Virginia*, Volume 4, at 203. *Continued*, CHAP. IV, *An act to continue the Act, for making more effectual provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, [1727]. *And from thence continued, by several prorogations, to the eighteenth day of May*, 1732, *in Laws of Virginia*, Volume 4, at 323; CHAP. IV, *An Act for further continuing the Act*, For making more effectual provision against Invasions and Insurrections, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, [1727]. *And from thence continued, by several prorogations, to the twenty second day of August*, 1734, *in Laws of Virginia*, Volume 4, at 395; CHAP. III, *An Act, for reviving the Act, For making more effective provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 24; CHAP. VI, *An Act, for continuing and amending the Act*, Intituled, *An Act, for making more effectual Provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on Friday the first day of August*, [1735]. *And from thence continued, by several prorogations, to the twenty second day of May*, 1740, *in Laws of Virginia*, Volume 5, at 99; CHAP. IV, *An Act, for continuing an Act, made in the first year of his majesty's reign, intituled, an Act for making more effectual provision against invasions and insurrections; and one other act, intituled, an Act, for continuing and amending the aforementioned Act*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on Thursday, the sixth day of May*, [1741]. *And from thence continued, by several prorogations, to Tuesday, the fourth day of September*, 1744, *in Laws of Virginia*, Volume 5, at 228.

CHAP. XXXIX, *An Act for making provision against Invasions and Insurrections*, § XI, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *The College in Williamsburg, the twenty-seventh day of October*, 1748, *in Laws of Virginia*, Volume 6, at 117-118. *Continued,* CHAP. II, *An Act for continuing an act, intituled, An Act for making provision against invasions and insurrections, At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February*, 1752. *And from thence continued by several prorogations, to Thursday the first day of November*, 1753, *in Laws of Virginia*, Volume 6, at 350.

EN-1478 — CHAP. IV, *An Act for reducing the several acts for making provision against invasions and insurrections into one act*, § XIV, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday, the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 113. *Continued*, CHAP. IV, *An Act for continuing an act, intituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758, *in Laws of Virginia*, Volume 7, at 237; CHAP. V, *An Act for further continuing an Act, intituled, An Act for reducing the several Acts for making provision against Invasions and*

Insurrections, into one Act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September, 1758; and from thence continued by several prorogations to Thursday the twenty-second of February, 1759, in Laws of Virginia, Volume 7, at 275; CHAP. II, *An Act for further continuing an act, entituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September, 1758; and from thence continued by several prorogations to Thursday the fifth of March, 1761, in Laws of Virginia*, Volume 7, at 384; CHAP. IV, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May, 1761, and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 539; CHAP. I, *An act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May, 1761, and from thence continued by several prorogations to Tuesday the 30th of October, 1764, in Laws of Virginia*, Volume 8, at 37; CHAP. I, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November, 1766, in Laws of Virginia*, Volume 8, at 189; CHAP. V, *An Act for further continuing the Act, inituled an Act for reducing the several acts of Assembly for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in the City of Williamsburg, on Tuesday, in the seventh day of November, 1769, in Laws of Virginia*, Volume 8, at 334; CHAP. III, *An act for further continuing the act, intituled An act for reducing the several acts of assembly, for making provision against invasions and insurrections, into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Monday the tenth day of February, one thousand seven hundred and seventy-two, in Laws of Virginia*, Volume 8, at 514.

EN-1479 — CHAP. XLIV, *An act to amend the act, intituled, An act for establishing and regulating the militia*, §§ I, II, and III, AT A GENERAL ASSEMBLY, *Begun and held at the Public Buildings in the Town of Richmond, on Monday the twenty-first day of October, one thousand seven hundred and eighty-two, in Laws of Virginia*, Volume 11, at 173.

EN-1480 — CHAP. I, *An Ordinance for raising an additional number of forces for the defence and protection of this colony, and for other purposes therein mentioned, At a Convention of Delegates held at the town of Richmond, in the colony of Virginia, on Friday the first of December, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 82.

EN-1481 — CHAP. I, *An Ordinance for raising an additional number of forces for the defence and protection of this colony, and for other purposes therein mentioned, At a Convention of Delegates held at the town of Richmond, in the colony of Virginia, on Friday the first of December, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 76.

EN-1482 — *See* C. 35, *An act, to reduce into one, all acts and parts of acts, for regulating the Militia of this Commonwealth*, §§ 39 through 43, The Revised Code OF THE LAWS OF VIRGINIA: BEING A *COLLECTION OF ALL SUCH ACTS* OF THE GENERAL ASSEMBLY, OF A PUBLIC AND PERMANENT NATURE, AS ARE NOW IN FORCE; WITH A GENERAL INDEX (Richmond, Virginia: Thomas Ritchie, 1819), Volume I, at 105-107; CHAP. XX, An act providing for the encouragement of volunteer companies in this commonwealth (Passed March 21st, 1832), ACTS PASSED AT A GENERAL ASSEMBLY OF THE COMMONWEALTH OF VIRGINIA, BEGUN AND HELD AT THE CAPITOL, IN THE CITY OF RICHMOND, ON MONDAY, THE FIFTH DAY OF DECEMBER, ONE THOUSAND EIGHT HUNDRED AND THIRTY-ONE (Richmond, Virginia: Thomas Ritchie, 1832), at 17; CHAP. 22, An ACT for the better organization of the militia [Passed March 8, 1834], §§ 58 through 63, ACTS PASSED AT A GENERAL ASSEMBLY OF THE COMMONWEALTH OF VIRGINIA, BEGUN AND HELD AT THE CAPITOL, IN THE CITY OF RICHMOND, ON MONDAY, THE SECOND DAY OF DECEMBER, ONE THOUSAND EIGHT HUNDRED AND THIRTY-THREE (Richmond, Virginia: Thomas Ritchie, 1834), at 38-40; CHAP. 22, An ACT to provide for the collection of fines in volunteer companies [Passed February 10, 1846], ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, PASSED AT THE SESSION COMMENCING DECEMBER 1, 1845, AND ENDING MARCH 6, 1846 (Richmond, Virginia: Samuel Shepherd, 1846), at 22; CHAP. 21, An ACT concerning the Militia [Passed March 29, 1851], §§ 11 through 15, ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, PASSED AT THE SESSION OF 1850-51 (Richmond, Virginia: William F. Ritchie, 1851); CHAP. 51, An ACT to amend an act passed the 29th day of March 1851, concerning volunteers [Passed May 19, 1852], ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, PASSED IN 1852 (Richmond, Virginia: William F. Ritchie, 1852); CHAP. 20, An ACT providing for the enrollment of the militia by the commissioners of the revenue, the abolition of musters, and a reorganization of the volunteer corps [Passed April 1, 1853], §§ 15, 16, 19 through 30, and 34, ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, PASSED IN 1852-3 (Richmond, Virginia: William F. Ritchie, 1853), at 35-37; Chap. 22, An ACT to organize the militia and provide for the defence of the commonwealth [Passed March 2, 1858], § 16, ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, PASSED IN 1857-8, at 35; CHAP. 6, An ACT for the Better Organization of the Militia of the Commonwealth [Passed March 30, 1860], §§ 13 through 30 and 52, ACTS OF

THE GENERAL ASSEMBLY OF THE STATE OF VIRGINIA, PASSED IN 1859-60 (Richmond, Virginia: William F. Ritchie, 1860), at 91-95, 102.

EN-1483 — *See* CHAP. II, *An Act, for the better Regulation of the Militia*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 16; CHAP. II, *An Act for the better regulating and training the Militia, At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 530; CHAP. III, *An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 93; CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 534; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 241.

EN-1484 — *See* CHAP. II, *An Act, for the better Regulation of the Militia*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 16; CHAP. II, *An Act for the better regulating and training the Militia, At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 530; CHAP. III, *An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 93; CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 534; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 241; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

Technically, the Act of 1755 superseded, rather than continued or amended, the Act of 1738. But the former was so close in substance to the latter that the distinction is largely without a difference.

EN-1485 — A Proclamation (3 May 1775), *in Executive Journals of Virginia*, Volume 6, at 582.

EN-1486 — A Proclamation (28 March 1775), *in Executive Journals of Virginia*, Volume 6, at 663-664.

EN-1487 — A Proclamation (6 May 1775), *in Executive Journals of Virginia*, Volume 6, at 665.

EN-1488 — CHAP. V, *An Act for making more effectual provision against Invasions and Insurrections*, § III, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, 1727, *in Laws of Virginia*, Volume 4, at 198. *Continued*, CHAP. IV, *An act to continue the Act, for making more effectual provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, [1727]. *And from thence continued, by several prorogations, to the eighteenth day of May*, 1732, *in Laws of Virginia*, Volume 4, at 323; CHAP. IV, *An Act for further continuing the Act*, For making more effectual provision against Invasions and Insurrections, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, [1727]. *And from thence continued, by several prorogations, to the twenty second day of August*, 1734, *in Laws of Virginia*, Volume 4, at 395; CHAP. III, *An Act, for reviving the Act, For*

making more effective provision against Invasions and Insurrections, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol*, *in the City of Williamsburg*, *on the first day of August*, [1735]. *And from thence continued*, *by several prorogations*, *to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 24; CHAP. VI, *An Act*, *for continuing and amending the Act*, Intituled, *An Act*, *for making more effectual Provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol*, *in the City of Williamsburg*, *on Friday the first day of August*, [1735]. *And from thence continued*, *by several prorogations, to the twenty second day of May*, 1740, *in Laws of Virginia*, Volume 5, at 99; CHAP. IV, *An Act*, *for continuing an Act*, *made in the first year of his majesty's reign*, *intituled*, *an Act for making more effectual provision against invasions and insurrections*; *and one other act*, *intituled*, *an Act*, *for continuing and amending the aforementioned Act*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol*, *in the City of Williamsburg*, *on Thursday*, *the sixth day of May*, [1741]. *And from thence continued*, *by several prorogations*, *to Tuesday*, *the fourth day of September*, 1744, *in Laws of Virginia*, Volume 5, at 228.

CHAP. XXXIX, *An Act for making provision against Invasions and Insurrections*, § III, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *The College in Williamsburg*, *the twenty-seventh day of October*, 1748, *in Laws of Virginia*, Volume 6, at 113-114. *Continued,* CHAP. II, *An Act for continuing an act*, *intituled*, *An Act for making provision against invasions and insurrections*, *At a General Assembly*, *begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February*, 1752. *And from thence continued by several prorogations*, *to Thursday the first day of November*, 1753, *in Laws of Virginia*, Volume 6, at 350.

EN-1489 — CHAP. IV, *An Act for reducing the several acts for making provision against invasions and insurrections into one act*, § II, *At a General Assembly*, *begun and held at the Capitol*, *in Williamsburg*, *on Thursday*, *the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven*, *in Laws of Virginia*, Volume 7, at 107-108. *Continued*, CHAP. IV, *An Act for continuing an act*, *intituled*, *An Act for reducing the several acts for making provision against invasions and insurrections into one act*, *At a General Assembly*, *begun and held at the Capitol*, *in Williamsburg*, *on Thursday the fourteenth day of September*, 1758, *in Laws of Virginia*, Volume 7, at 237; CHAP. V, *An Act for further continuing an Act*, *intituled*, *An Act for reducing the several Acts for making provision against Invasions and Insurrections*, *into one Act*, *At a General Assembly*, *begun and held at the Capitol*, *in Williamsburg*, *on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 275; CHAP. II, *An Act for further continuing an act*, *entituled*, *An Act for reducing the several acts for making provision against invasions and insurrections into one act*, *At a General Assembly*, *begun and held at the Capitol*, *in Williamsburg*, *on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the fifth of March*, 1761, *in Laws of Virginia*, Volume 7, at 384; CHAP. IV, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act*, *At a General Assembly*, *begun and held at the Capitol*, *in the City of Williamsburg*, *on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 539; CHAP. I, *An act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act*, *At a General Assembly*, *begun and held at the Capitol*, *in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 30th of October*, 1764, *in Laws of Virginia*, Volume 8, at 37; CHAP. I, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act*, *At a General Assembly*, *begun and held at the Capitol in Williamsburg*, *on Thursday the sixth day of November*, 1766, *in Laws of Virginia*, Volume 8, at 189; CHAP. V, *An Act for further continuing the Act*, *intituled an Act for reducing the several acts of Assembly for making provision against invasions and insurrections into one act*, *At a General Assembly*, *begun and held at the Capitol in the City of Williamsburg*, *on Tuesday*, *in the seventh day of November*, 1769, *in Laws of Virginia*, Volume 8, at 334; CHAP. III, *An act for further continuing the act*, *intituled An act for reducing the several acts of assembly*, *for making provision against invasions and insurrections*, *into one act*, *At a General Assembly*, *begun and held at the Capitol*, *in the City of Williamsburg*, *on Monday the tenth day of February*, *one thousand seven hundred and seventy-two*, *in Laws of Virginia*, Volume 8, at 514.

EN-1490 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 9. The section quoted in the text appears at page 24. This ordinance was soon supplemented by CHAP. I, *An Ordinance for raising an additional number of forces for the defence and protection of this colony, and for other purposes therein mentioned, At a Convention of Delegates held at the town of Richmond, in the colony of Virginia, on Friday the first of December, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 75.

EN-1491 — CHAP. VII, *An ordinance for establishing a mode of punishment for the enemies to America in this colony, At a Convention of Delegates held at the town of Richmond, in the colony of Virginia, on Friday the first of December, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 101.

EN-1492 — CHAP. III, *An ordinance appointing a Committee of Safety, for the more effectual carrying into execution the several rules and regulations established by this convention for the protection of this colony, AT a Convention of Delegates for the Counties and Corporations of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 50, 51.

EN-1493 — A Proclamation (7 November 1775), *in Executive Journals of Virginia*, Volume 6, at 669.

EN-1494 — A Proclamation (7 November 1775), *in Executive Journals of Virginia*, Volume 6, at 669-670.

EN-1495 — CHAP. I, *An Ordinance for raising an additional number of forces for the defence and protection of this colony, and for other purposes therein mentioned, At a Convention of Delegates held at the town of Richmond, in the colony of Virginia, on Friday the first of December, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 75.

EN-1496 — ACT II, THE GENERAL ASSEMBLY HOLDEN THE 16TH DAY OF OCTOBER, 1629, *in Laws of Virginia*, Volume 1, at 140 (emphasis supplied).

EN-1497 — ACT V, ATT A GRAND ASSEMBLY HOLDEN AT JAMES CITTIE THE FIRST OF OCTOBER, 1644, in *Laws of Virginia*, Volume 1, at 286.

EN-1498 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 335.

EN-1499 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, § II, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 118.

EN-1500 — CHAP. II, *An Act, for the better Regulation of the Militia*, § II, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 16.

EN-1501 — CHAP. II, *An Act for the better regulating and training the Militia*, § III, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 531.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § II, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 93. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1502 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 27-28.

EN-1503 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 267-268.

EN-1504 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § II, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four, in Laws of Virginia*, Volume 11, at 476-477; CHAP. I, *An act to amend and reduce into one act, the several*

laws for regulating and disciplining the militia, and guarding against invasions and insurrections, § III, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five*, *in Laws of Virginia*, Volume 12, at 10.

EN-1505 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 335-336.

EN-1506 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, §§ II, III, and IV, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 118-119.

EN-1507 — CHAP. II, *An Act, for the better Regulation of the Militia*, §§ II, III, and IV, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 16-17.

EN-1508 — CHAP. II, *An Act for the better regulating and training the Militia*, §§ III, IV, and VI, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 531, 532-533.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, §§ II, III, and V, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 93-95. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1509 — *See* CHAP. II, *An Act for the better regulating and training the Militia*, §§ III and VIII, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 531, 533.

See CHAP. III, *An Act for the better regulating and disciplining the Militia*, §§ II and VIII, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 93, 95-96. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1510 — *See* CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and*

seventy-five, in Laws of Virginia, Volume 9, at 27-28; CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 267-268; CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § II, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four, in Laws of Virginia*, Volume 11, at 476-477; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § III, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five, in Laws of Virginia*, Volume 12, at 10.

EN-1511 — CHAP. III, *An Act, for raising Levies and Recruits, to serve in the present War, against the* Spaniards, *in* America, §§ II and III, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on Friday, the first day of August*, [1736]. *And from thence continued, by several prorogations to the 22nd day of May*, 1740, *in Laws of Virginia*, Volume 5, at 95-96.

EN-1512 — CHAP. II, *An Act for amending the act, intituled, An Act for the better regulation of the militia*, § I, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February*, 1752. *And from thence continued by several prorogations, to Thursday the 14th day of February*, 1754, *in Laws of Virginia*, Volume 6, at 421.

EN-1513 — CHAP. II, *An Act for raising levies and recruits to serve in the present expedition against the French, on the Ohio*, §§ I and II, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February,* 1752. *And from thence continued by several prorogations, to Thursday the 17th day of October*, 1754, *in Laws of Virginia*, Volume 6, at 438.

EN-1514 — CHAP. II, *An Act for the better regulating and training the Militia*, § XV, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 539.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § XVI, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 100-101. *Continued*, CHAP IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1515 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 32.

EN-1516 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 270-271.

EN-1517 — ACT X, ATT A GRAND ASSEMBLY[,] 6TH JANUARY, 1639, *in Laws of Virginia*, Volume 1, at 226.

EN-1518 — CHAP. IV, *An act declaring who shall not bear office in this country*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 250.

EN-1519 — CHAP. IV, *An Act directing the trial of Slaves, committing capital crimes; and for the more effectual punishing conspiracies and insurrections of them; and for the better government of Negros, Mulattos, and* Indians, *bond or free*, § XXIII, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 133-134.

EN-1520 — CHAP. XIII, *An act directing the method of trial of criminals for capital offenses; and for other purposes therein mentioned*, § X, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *The College, in Williamsburg; the twenty seventh day of October*, 1748, *in Laws of Virginia*, Volume 5, at 546-547.

EN-1521 — CHAP. XXXVIII, *An act directing the trial of Slaves committing capital crimes; and for the more effectual punishing conspiracies and insurrections of them; and for the better government of negroes, mulattoes, and Indians, bond or free*, § XX, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *The College in Williamsburg, the twenty-seventh day of October*, 1748, *in Laws of Virginia*, Volume 6, at 110.

EN-1522 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 335-336.

EN-1523 — **GEORGIA:** AN ACT *For Regulating the Militia of this province and for the Security and better Defence of the same,* 24 January 1755, *in Georgia Colonial Records*, Volume 18, at 38-46; AN ACT *For the better ordering the Militia,* 29 September 1773, *in Georgia Colonial Records,* Volume 19 (Part I) at 324-330. **SOUTH CAROLINA:** AN ACT FOR THE BETTER REGULATING THE MILITIA OF THIS PROVINCE, AND FOR REPEALING THE FORMER ACTS FOR REGULATING THE MILITIA; AND FOR REPEALING AN ACT ENTITLED "AN ACT FOR THE FURTHER SECURITY AND BETTER DEFENCE OF THIS PROVINCE", 13 June 1747, §§ XXXVIII through XLIII, *in Military Obligation, South Carolina*, at 51-54; AN ACT FOR THE REGULATION OF THE MILITIA OF THIS STATE; AND FOR REPEALING SUCH LAWS AS HAVE HITHERTO BEEN ENACTED FOR THE GOVERNMENT OF THE MILITIA, 28 March 1778, §§ XXX through XXXII, *in Military Obligation, South Carolina*, at 74-75.

EN-1524 — CHAP. II, *An act for the more speedily completeing the Quota of Troops to be raised in this commonwealth for the continental army, and for other purposes*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven*, *in Laws of Virginia*, Volume 9, at 280.

EN-1525 — May 23[, 1691], *in Executive Journals of Virginia*, Volume 1, at 526.

EN-1526 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, §§ II, IV, V, and VI, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 118, 119.

EN-1527 — CHAP. II, *An Act, for the better Regulation of the Militia*, §§ II, V, and VI, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 16, 17.

EN-1528 — CHAP. II, *An Act for the better regulating and training the Militia*, §§ III, V, and VII, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five*, *in Laws of Virginia*, Volume 6, at 531, 533.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, §§ II, IV, and VII, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven*, *in Laws of Virginia*, Volume 7, at 93, 94, 95. *Continued,* CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 53; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1529 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven*, *in Laws of Virginia*, Volume 9, at 267-268.

EN-1530 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 27-28; CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § II, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four*, *in Laws of Virginia*, Volume 11, at 476-477; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § III, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five*, *in Laws of Virginia*, Volume 12, at 10.

EN-1531 — ACT LI, A GRAND ASSEMBLY HOLDEN AT JAMES CITTY THE 21st OF ffEBRUARY[,] 1631-2, *in Laws of Virginia*, Volume 1, at 174. *Reënacted,* ACT XLV, A GRAND ASSEMBLY HOLDEN AT JAMES CITTY THE 4TH DAY OF SEPTEMBER, 1632, *in Laws of Virginia*, Volume 1, at 198.

EN-1532 — ACT X, ATT A GRAND ASSEMBLY, 6TH JANUARY 1639, *in Laws of Virginia*, Volume 1, at 226.

EN-1533 — ACT XXV, *Provision to bee made for Amunition*, ATT A GRAND ASSEMBLY, HELD AT JAMES CITTIE, MARCH 7, 1658-9, *in Laws of Virginia*, Volume 1, at 525. *Reënacted,* ACT CXX, *Supply of ammunition*, AT A GRAND ASSEMBLY HELD AT JAMES CITY MARCH THE 23D[,] 1661-2, *in Laws of Virginia*, Volume 2, at 126-127.

EN-1534 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 335.

EN-1535 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, §§ II and XXVI, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 118, 125.

EN-1536 — CHAP. II, *An Act, for the better Regulation of the Militia*, §§ II and IX, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 16, 19.

EN-1537 — CHAP. II, *An Act for the better regulating and training the Militia*, § III, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five*, *in Laws of Virginia*, Volume 6, at 531.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § II, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven*, *in Laws of Virginia*, Volume 7, at 93. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1538 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 27-28.

EN-1539 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven*, *in Laws of Virginia*, Volume 9, at 267-268.

EN-1540 — CHAP. XII, *An act for speedily recruiting the quota of this state for the continental army*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the first day of* May, *one thousand seven hundred and eighty*, *in Laws of Virginia*, Volume 10, at 257-258.

EN-1541 — CHAP. III, *An Act for recruiting this state's quota of troops to serve in the continental army*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the sixteenth day of* October, *one thousand seven hundred and eighty*, *in Laws of Virginia*, Volume 10, at 337.

EN-1542 — CHAP. XXXVII, *An act for incorporating the rector and trustees of Liberty Hall Academy*, § II, AT A GENERAL ASSEMBLY, *Begun and held at the Public Buildings in the City of Richmond, on Monday the twenty-first day of October, one thousand seven hundred and eighty-two, in Laws of Virginia*, Volume 11, at 166.

EN-1543 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § II, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four*, *in Laws of Virginia*, Volume 11, at 476-477; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § III, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five*, *in Laws of Virginia*, Volume 12, at 10.

EN-1544 — ACT LI, A GRAND ASSEMBLY HOLDEN AT JAMES CITTY THE 21st OF ffEBRUARY, 1631-2, *in Laws of Virginia*, Volume 1, at 174. *Reënacted by* ACT XLV, A GRAND ASSEMBLY HOLDEN AT JAMES CITTY THE 4TH DAY OF SEPTEMBER, 1632, *in Laws of Virginia*, Volume 1, at 198.

EN-1545 — ACT V, ATT A GRAND ASSEMBLY HOLDEN AT JAMES CITTIE THE FIRST OF OCTOBER, 1644, *in Laws of Virginia*, Volume 1, at 286.

EN-1546 — ACT XXV, *Provision to bee made for Amunition*, ATT A GRAND ASSEMBLY HELD AT JAMES CITTIE, MARCH 7, 1658-9, *in Laws of Virginia*, Volume 1, at 525. *Reënacted by* ACT CXX, *Supply of ammunition*, AT A GRAND ASSEMBLY HELD AT JAMES CITY MARCH THE 23D[,] 1661-2, *in Laws of Virginia*, Volume 2, at 126.

EN-1547 — May the 18th 1691, *in Executive Journals of Virginia*, Volume 1, at 184.

EN-1548 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 335-336, 337.

EN-1549 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, §§ II and XXVI, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 118, 125.

EN-1550 — CHAP. II, *An Act, for the better Regulation of the Militia*, §§ II and IX, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 16, 19.

EN-1551 — CHAP. II, *An Act for the better regulating and training the Militia*, §§ III and IX, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five*, *in Laws of Virginia*, Volume 6, at 531, 534.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, §§ II and X, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven*, *in Laws of Virginia*, Volume 7, at 93, 96. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia, § IX, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled*

An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia, Volume 8, at 503.

EN-1552 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 30.

EN-1553 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 271.

EN-1554 — CHAP. II, *An act to amend the several acts respecting the militia*, § VI, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the fifteenth day of October*[,] *one thousand seven hundred and eighty-seven, in Laws of Virginia*, Volume 12, at 433.

EN-1555 — May 23[, 1691], *in Executive Journals of Virginia*, Volume 1, at 526.

EN-1556 — CHAP. II, *An Act for the better regulating and training the Militia*, § IV, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 531.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § III, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 93-94. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1557 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 28.

EN-1558 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 267-268.

EN-1559 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § II, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four, in Laws of Virginia*, Volume 11, at 476-477; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § III, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five, in Laws of Virginia*, Volume 12, at 10.

EN-1560 — CHAP. II, *An Act for the better regulating and training the Militia*, § VI, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 532-533 (emphasis supplied).

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § V, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued*

by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia, Volume 7, at 94-95. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1561 — CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § II, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November* 1762, *in Laws of Virginia*, Volume 7, at 534 (emphasis supplied).

CHAP. XXXI, *An Act to continue and amend the act for the better regulating and disciplining the militia*, § I, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 242. *Continued,* CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1562 — Aprill 2[d] 1692, *in Executive Journals of Virginia*, Volume 1, at 220.

EN-1563 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 336-337.

EN-1564 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, § III, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 118-119.

EN-1565 — CHAP. II, *An Act, for the better Regulation of the Militia*, §§ III and XIII, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 16-17, 22.

EN-1566 — CHAP. II, *An Act for the better regulating and training the Militia*, §§ IV and VI, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 531, 532-533.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, §§ III and V, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 93-94, 94-95. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1567 — CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, §§ II, III, and V, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November* 1762, *in Laws of Virginia*, Volume 7, at 534 and 537. [Pages 535 and 536 are blank in the original book.]

CHAP. XXXI, *An Act to continue and amend the act for the better regulating and disciplining the militia*, §§ I, II, and VII, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 242, 243-244. *Continued,* CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1568 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held* at Richmond town, in the county of Henrico, *on Monday the seventeenth day of July, thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 28.

EN-1569 — CHAP. II, *An Act, for the better Regulation of the Militia*, § VIII, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 19.

CHAP. II, *An Act for amending the act, intituled, An Act for the better regulation of the militia*, § I, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February*, 1752. *And from thence continued by several prorogations, to Thursday the 14th day of February*, 1754, *in Laws of Virginia*, Volume 6, at 422.

EN-1570 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 342.

EN-1571 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, § XXIV, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 125.

EN-1572 — CHAP. II, *An Act, for the better Regulation of the Militia*, § VII, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 19.

EN-1573 — CHAP. II, *An Act for the better regulating and training the Militia*, § VIII, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 534.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 96. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1574 — May 23[, 1691], *in Executive Journals of Virginia*, Volume 1, at 526.

EN-1575 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 336.

EN-1576 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, § IV, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 119.

EN-1577 — CHAP. II, *An Act, for the better Regulation of the Militia*, § IV, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 17.

EN-1578 — CHAP. XXII, *An Act, to prevent the Inhabitants of the Borough of* Norfolk, *from being compelled to serve in the Militia of the County of* Norfolk; *and to exempt Sailors or Seamen, in actual pay on board any Ship or Vessel, from serving in the Militia*, § VI, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 82.

EN-1579 — CHAP. II, *An Act for the better regulating and training the Militia*, §§ IV and VI, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 531, 532.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, §§ III and V, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 93-94, 94-95. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1580 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 28.

EN-1581 — CHAP. I, *An Ordinance for raising an additional number of forces for the defence and protection of this colony, and for other purposes therein mentioned, At a Convention of Delegates held at the town of Richmond, in the colony of Virginia, on Friday the first of December, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 89.

EN-1582 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 267-268.

EN-1583 — CHAP. IV, *An act to exempt artificers employed at iron works from militia duty*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Thursday *the first day of* March, *one thousand seven hundred and eighty-one, in Laws of Virginia*, Volume 10, at 397. *Continued*, CHAP. XII, *An act for continuing an act entitled An act to exempt artificers employed at iron works from militia duty*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the seventh day of* May, *one thousand seven hundred and eighty-one, in Laws of Virginia*, Volume 10, at 425; CHAP. III, *An act for farther continuing an act entitled an act to exempt artificers employed at iron works from militia duty*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the fifth day of* November, *one thousand seven hundred and eighty-one, in Laws of Virginia*, Volume 10, at 444.

EN-1584 — CHAP. I, *An act for establishing pilots and regulating their fees*, § VIII, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the fifth day of May, one thousand seven hundred and eighty-three, in Laws of Virginia*, Volume 11, at 189. *Continued*, CHAP. XXXVIII, *An act to amend and reduce into one act, the several acts for regulating pilots, and ascertaining their fees*, § IX, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the*

sixteenth day of October[,] *one thousand seven hundred and eighty-six*, *in Laws of Virginia*, Volume 12, at 302.

EN-1585 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § II, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four*, *in Laws of Virginia*, Volume 11, at 476-477; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § III, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five*, *in Laws of Virginia*, Volume 12, at 10.

EN-1586 — CHAP. I, *An Act for raising the Sum of Twenty-five Thousand Pounds, for the better protection of the Inhabitants on the Frontiers of this Colony, and for other purposes therein mentioned*, § XIV, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *in Laws of Virginia*, Volume 7, at 17.

EN-1587 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 336.

EN-1588 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, §§ IV and VI, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 119.

EN-1589 — CHAP. II, *An Act, for the better Regulation of the Militia*, §§ IV and XIV, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 17, 22.

EN-1590 — CHAP. II, *An Act for the better regulating and training the Militia*, §§ IV and XV, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five*, *in Laws of Virginia*, Volume 6, at 531, 538-539.

EN-1591 — CHAP. III, *An Act for the better regulating and disciplining the Militia*, §§ III and XVI, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 93-94, 100. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1592 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 28, 31-32.

EN-1593 — CHAP. XII, An Act to exempt the Inhabitants of any County, wherein any Iron-Works are or shall be erected, from clearing or repairing the Roads leading to and from the same; for making satisfaction to the Owners of any Lands lying contiguous to such Roads, for the timber which shall be taken, for making or repairing Bridges in such Roads: And for giving further encouragements to adventurers in Iron-works, § VII, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, 1727. *And from thence continued, by several prorogations, to the twenty-first day of May*, 1730, *in Laws of Virginia*, Volume 4, at 298-299; CHAP. XLVI, *An Act for encouraging adventurers in Iron-Works*, § V, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *The College in Williamsburg, the twenty-seventh day of October*, 1748, *in Laws of Virginia*, Volume 6, at 138-139.

EN-1594 — CHAP. X, *An act to amend and reduce the several acts of assembly for the inspection of tobacco, into one act*, § XLVII, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the fifth day of May, one thousand seven hundred and eighty-three*, *in Laws of Virginia*, Volume 11, at 246.

EN-1595 — CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, §§ II, III, and V, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November* 1762, *in Laws of Virginia*, Volume 7, at 534, 537 (emphasis supplied). [Pages 535 and 536 are blank in the original book.]

CHAP. XXXI, *An Act to continue and amend the act for the better regulating and disciplining the militia*, §§ I, II, and VII, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 242, 243. *Continued,* CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1596 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 336.

EN-1597 — CHAP. IV, *An Act for amending the Act concerning Servants and Slaves; and for the further preventing the clandestine transportation of Persons out of this Colony*, § VII, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, the fifth day of December*, 1722. *And by writ of prorogation, begun and holden on the ninth day of May,* 1723. *And from thence continued by several prorogations, to the twelfth day of May*, 1726, *in Laws of Virginia*, Volume 4, at 170.

EN-1598 — CHAP. II, *An Act, for the better Regulation of the Militia*, §§ II and III, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 16-17.

EN-1599 — CHAP. I, *An Act, for the better security of the Country in the present time of Danger*, § III, AT A GENERAL ASSEMBLY SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on Friday, the first day of August*, [1735]. *And from thence continued, by several prorogations, to the 22nd day of May*, 1740, *in Laws of Virginia*, Volume 5, at 91.

EN-1600 — CHAP. I, *An Act, for the better security of the Country in the present time of Danger*, §§ VI and VII, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on Friday, the first day of August*, [1735]. *And from thence continued, by several prorogations, to the 22nd day of May*, 1740, *in Laws of Virginia*, Volume 5, at 91.

EN-1601 — CHAP. I, *An Ordinance for raising an additional number of forces for the defence and protection of this colony, and for other purposes therein mentioned, At a Convention of Delegates held at the town of Richmond, in the colony of Virginia, on Friday the first of December, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 89.

EN-1602 — CHAP. XII, *An ordinance for amending an ordinance for raising and embodying a sufficient force for the defence and protection of this colony, and for other purposes therein mentioned, At a General Convention of Delegates and Representatives, from the several counties and corporations of Virginia, held at the Capitol in the City of Williamsburg, on Monday the 6th of May*, 1776, *in Laws of Virginia*, Volume 9, at 139.

EN-1603 — CHAP. XII, *An act for speedily recruiting the quota of this state for the continental army*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the first day of* May, *one thousand seven hundred and eighty, in Laws of Virginia*, Volume 10, at 262.

EN-1604 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held* at Richmond town, in the county of Henrico, *on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 28.

EN-1605 — CHAP. XVII, *An act for regulating and disciplining the militia of the city of Williamsburg and borough of Norfolk*, §§ I and II, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 313.

EN-1606 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § II, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four, in Laws of Virginia*, Volume 11, at 476-477.

EN-1607 — CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § III, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five, in Laws of Virginia*, Volume 12, at 10.

EN-1608 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 338.

EN-1609 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, § IX, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 120; CHAP. II, *An Act, for the better Regulation of the Militia*, § XI, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 21.

EN-1610 — CHAP. I, *An Act, for the better security of the Country in the present time of Danger*, § V, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on Friday, the first day of August*, [1735]. *And from thence continued, by several prorogations, to the 22nd day of May*, 1740, *in Laws of Virginia*, Volume 5, at 91.

EN-1611 — CHAP. II, *An Act for the better regulating and training the Militia*, § XIII, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 537-538.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § XIV, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 99. *Continued*, CHAP IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1612 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 31.

EN-1613 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 269.

EN-1614 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § VI, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four, in Laws of Virginia*, Volume 11, at 485; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § VI, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five, in Laws of Virginia*, Volume 12, at 16.

EN-1615 — CHAP. II, *An act for the more speedily completeing the Quota of Troops to be raised in this commonwealth for the continental army, and for other purposes*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven*, *in Laws of Virginia*, Volume 9, at 275.

EN-1616 — CHAP. I, *An Act for speedily recruiting the Virginia Regiments on the continental establishment, and for raising additional troops of Volunteers*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the twentieth day of October, one thousand seven hundred and seventy seven*, *in Laws of Virginia*, Volume 9, at 337, 338-340.

EN-1617 — CHAP. XII, *An act for speedily recruiting the quota of this state for the continental army*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the first day of* May, *one thousand seven hundred and eighty*, *in Laws of Virginia*, Volume 10, at 257, 259.

EN-1618 — CHAP. III, *An Act for recruiting this state's quota of troops to serve in the continental army*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the sixteenth day of* October, *one thousand seven hundred and eighty*, *in Laws of Virginia*, Volume 10, at 337.

EN-1619 — CHAP. VIII, *An act to amend the act for regulating and disciplining the militia, and for other purposes*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the seventh day of* May, *one thousand seven hundred and eighty-one*, *in Laws of Virginia*, Volume 10, at 420.

EN-1620 — CHAP. III, *An act to oblige the free white male inhabitants of this state above a certain age to give assurance of Allegiance to the same, and for other purposes*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven*, *in Laws of Virginia*, Volume 9, at 281, 282.

EN-1621 — CHAP. II, *An Act, for the better Regulation of the Militia*, § VI, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 17.

CHAP. II, *An Act for the better regulating and training the Militia*, § VII, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 533.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § VII, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 95. *Continued,* CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 53; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1622 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 340; CHAP. II, *An Act for the settling and better Regulation of the Militia*, § XVI, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 122-123.

EN-1623 — CHAP. II, *An Act, for the better Regulation of the Militia*, § X, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 21.

EN-1624 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 339; CHAP. II, *An Act for the settling and better Regulation of the Militia*, § XII, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation,*

begun and holden on the ninth day of May, 1723, *in Laws of Virginia*, Volume 4, at 121 (substantially the same provision).

EN-1625 — CHAP. II, *An Act, for the better Regulation of the Militia*, §§ VII and X, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 18, 21.

EN-1626 — CHAP. I, *An Act, for the better security of the Country in the present time of Danger*, § IV, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on Friday, the first day of August*, [1735]. *And from thence continued, by several prorogations, to the 22nd day of May*, 1740, *in Laws of Virginia*, Volume 5, at 91.

EN-1627 — CHAP. II, *An Act for the better regulating and training the Militia*, §§ VIII and X, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 533, 537.

EN-1628 — CHAP. III, *An Act for the better regulating and disciplining the Militia*, §§ VIII and XI, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 95-96, 98. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1629 — *CHAP. I, An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 29, 30.

EN-1630 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 268, 270. *Amended by* CHAP. XX, *An act for the better regulation and discipline of the militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of* Williamsburg, *on* Monday, *the third day of* May, *one thousand seven hundred and seventy-nine, in Laws of Virginia,* Volume 10, at 83-84 (the general musters were to be held in March and October, and the penalty for a non-commissioned officer's or soldier's failure to appear was raised to "three pounds").

EN-1631 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, §§ II and XI, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four, in Laws of Virginia*, Volume 11, at 477-478, 493.

EN-1632 — CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, §§ III and XI, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five, in Laws of Virginia*, Volume 12, at 11, 24.

EN-1633 — CHAP. II, *An Act, for the better Regulation of the Militia*, § III, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 16-17.

EN-1634 — CHAP. II, *An Act for the better regulating and training the Militia*, § V, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 531.

EN-1635 — CHAP. XXXI, *An Act to continue and amend the act for the better regulating and disciplining the militia*, §§ I, IV, V, and VI, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 242-243. *Continued*, CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1636 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 34.

EN-1637 — CHAP. I, *An Act for speedily recruiting the Virginia Regiments on the continental establishment, and for raising additional troops of Volunteers*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the twentieth day of October, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 345.

See also CHAP. III, *An Act for recruiting this state's quota of troops to serve in the continental army*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the sixteenth day of* October, *one thousand seven hundred and eighty, in Laws of Virginia*, Volume 10, at 334-335.

EN-1638 — CHAP. XII, *An act for speedily recruiting the quota of this state for the continental army*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the first day of* May, *one thousand seven hundred and eighty, in Laws of Virginia*, Volume 10, at 261-262.

See to like effect, CHAP. III, *An Act for recruiting this state's quota of troops to serve in the continental army*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the sixteenth day of* October, *one thousand seven hundred and eighty, and in the fifth year of the commonwealth, in Laws of Virginia*, Volume 10, at 334-335.

EN-1639 — CHAP. VIII, *An act to amend the act for regulating and disciplining the militia, and for other purposes*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the seventh day of* May, *one thousand seven hundred and eighty-one, in Laws of Virginia*, Volume 10, at 417-418.

EN-1640 — CHAP. III, *An act for recruiting this state's quota of troops to serve in the army of the United States*, § VI, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the sixth day of* May, *one thousand seven hundred and eighty-two, in Laws of Virginia*, Volume 11, at 18.

EN-1641 — CHAP. XLIV, *An act to amend the act, intituled, An act for establishing and regulating the militia*, § VII, AT A GENERAL ASSEMBLY, *Begun and held at the Public Buildings in the City of Richmond, on Monday the twenty-first day of October, one thousand seven hundred and eighty-two, in Laws of Virginia*, Volume 11, at 175.

EN-1642 — CHAP. XXII, *An act to exempt Quakers from attending musters*, §§ I and II, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the third day of May, one thousand seven hundred eighty-four, in Laws of Virginia*, Volume 11, at 389.

EN-1643 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § XIII, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four, in Laws of Virginia*, Volume 11, at 493-494; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § XII, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five, in Laws of Virginia*, Volume 12, at 24.

EN-1644 — CHAP. II, *An Act, for the better Regulation of the Militia*, § III, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 16-17 (emphasis supplied).

EN-1645 — CHAP. II, *An Act, for the better Regulation of the Militia*, § II, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 16.

EN-1646 — CHAP. III, *An act to oblige the free white male inhabitants of this state above a certain age to give assurance of Allegiance to the same, and for other purposes*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven*, *in Laws of Virginia*, Volume 9, at 281, 282 (***bold-face emphasis*** supplied).

EN-1647 — CHAP. II, *An Act, for the better Regulation of the Militia*, § VI, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 17.

CHAP. II, *An Act for the better regulating and training the Militia*, § VII, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five*, *in Laws of Virginia*, Volume 6, at 533.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § VII, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven*, *in Laws of Virginia*, Volume 7, at 95. *Continued,* CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 53; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1648 — CHAP. IV, *An act declaring who shall not bear office in this country*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 250-251.

EN-1649 — CHAP. XLVII, *An act for regulating the practice of Attornies*, § III, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *The College, in Williamsburg, the twenty-seventh day of October*, 1748, *in Laws of Virginia*, Volume 6, at 142.

EN-1650 — CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, §§ II and V, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*, 1762, *in Laws of Virginia*, Volume 7, at 534, 537. [In this volume, pages 535 and 536 are blank.]

CHAP. XXXI, *An Act to continue and amend the act for the better regulating and disciplining the militia,* §§ I and VII, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November, 1766, in Laws of Virginia*, Volume 8, at 242, 243-244. *Continued*, CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1651 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 19.

EN-1652 — CHAP. I, *An Ordinance for raising an additional number of forces for the defence and protection of this colony, and for other purposes therein mentioned, At a Convention of Delegates held at the town of Richmond, in the colony of Virginia, on Friday the first of December, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 81.

EN-1653 — CHAP. III, *An Act for recruiting this state's quota of troops to serve in the continental army*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the sixteenth day of* October, *one thousand seven hundred and eighty*, *in Laws of Virginia*, Volume 10, at 337.

EN-1654 — ACT XLVII, A GRAND ASSEMBLY HOLDEN AT JAMES CITTY THE 4TH DAY OF SEPTEMBER, 1632, *in Laws of Virginia*, Volume 1, at 198.

EN-1655 — May y^{e} 21th 1702, *in Executive Journals of Virginia*, Volume 2, at 242.

EN-1656 — ACT II, *An act providing for the supply of armes and ammunition*, ATT A GRAND ASSEMBLY, HOLDEN AT JAMES CITY BY PROROGATION FROM THE 24TH DAY OF SEPTEMBER, 1672, TO THE 20TH OF OCTOBER, 1673, *in Laws of Virginia*, Volume 2, at 304. This Act was ordered to "be putt into strict and effectual execution" AT A GRAND ASSEMBLIE HELD ATT JAMES CITTIE BY PROROGATION FROM THE ONE AND TWENTIETH DAY OF SEPTEMBER, 1674, TO THE SEAVENTH DAY OF MARCH, [1676,] *in Laws of Virginia*, Volume 2, at 339.

EN-1657 — James Citty October 25th 1684, *in Executive Journals of Virginia*, Volume 1, at 66-67.

EN-1658 — June 4th 1690, *in Executive Journals of Virginia*, Volume 1, at 117-118. *Reasserted*, July 26th 1690, *in Executive Journals of Virginia*, Volume 1, at 125.

EN-1659 — Ord^{r} to the Sheriffs touching y^{e} Militia and Ord^{r} touching Stores & ca, 8 December 1691, *in Executive Journals of Virginia*, Volume 1, at 210.

EN-1660 — May 19th 1695, *in Executive Journals of Virginia*, Volume 1, at 330.

EN-1661 — October, the seventh and twentieth, 1699, *in Executive Journals of Virginia*, Volume 2, at 20-21.

EN-1662 — At James City Aprill. 6: 1700, *in Executive Journals of Virginia*, Volume 2, at 46.

EN-1663 — At the Councill Chamber at his Maj^{tis} Royall Colledge of William and Mary y^{e} 8thof May 1701, *in Executive Journals of Virginia*, Volume 2, at 142.

EN-1664 — May y^{e} 28th 1702, *in Executive Journals of Virginia*, Volume 2, at 248.

EN-1665 — At a Council held at her Majestys Royal College of William & Mary June y^{e} 17th 1703, *in Executive Journals of Virginia*, Volume 2, at 321, 322.

EN-1666 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 337-338.

EN-1667 — At a Council held at the Capitol the Sixteenth day of August 1711, *in Executive Journals of Virginia*, Volume 3, at 282.

EN-1668 — Octob^{r} the 23^{d} 1690, *in Executive Journals of Virginia*, Volume 1, at 134.

EN-1669 — Att a Councill held at Yorke Court house Jan^{r}y 26th 1690 [1690-1691], *in Executive Journals of Virginia*, Volume 1, at 148.

EN-1670 — Att a Council held at James Citty Jan^{r}y 27th 1691 [1691-2], *in Executive Journals of Virginia*, Volume 1, at 215.

EN-1671 — At James Citty, Mounday October, 24. 1699, *in Executive Journals of Virginia*, Volume 2, at 14.

EN-1672 — May y^{e} 28th 1702, *in Executive Journals of Virginia*, Volume 2, at 247-248.

EN-1673 — Aug^{r} 28th 1702, *in Executive Journals of Virginia*, Volume 2, at 272.

EN-1674 — Oct^{r} 26th 1732, *in Executive Journals of Virginia*, Volume 4, at 288.

EN-1675 — October the 29th 1736, *in Executive Journals of Virginia*, Volume 4, at 383.

EN-1676 — At a Council held August the 1st 1763, *in Executive Journals of Virginia*, Volume 6, at 268.

EN-1677 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 34-35.

EN-1678 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 274.

EN-1679 — CHAP. XX, *An act for the better regulation and discipline of the militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of* Williamsburg, *on* Monday, *the third of* May, *one thousand seven hundred and seventy-nine, in Laws of Virginia,* Volume 10, at 85.

EN-1680 — CHAP. VIII, *An act to amend the act for regulating and disciplining the militia, and for other purposes*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the seventh day of* May, *one thousand seven hundred and eighty-one*, *in Laws of Virginia*, Volume 10, at 420-421.

EN-1681 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § V, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four*, *in Laws of Virginia*, Volume 11, at 484; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § V, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five*, *in Laws of Virginia*, Volume 12, at 15-16.

EN-1682 — AT A GRAND ASSEMBLIE HELD ATT JAMES CITTIE BY PROROGATION FROM THE ONE AND TWENTIETH DAY OF SEPTEMBER, 1674, TO THE SEAVENTH DAY OF MARCH, [1676,] *in Laws of Virginia*, Volume 2, at 339, *enforcing* ACT II, *An act providing for the supply of armes and ammunition*, ATT A GRAND ASSEMBLY, HOLDEN AT JAMES CITY BY PROROGATION FROM THE 24TH DAY OF SEPTEMBER, 1672, TO THE 20TH OF OCTOBER, 1673, *in Laws of Virginia*, Volume 2, at 304.

EN-1683 — Att a Councill held at James Citty July 24th 1690, *in Executive Journals of Virginia*, Volume 1, at 120. The "Law" referenced in this statute was ACT IV, *An act for the better supply of the country with armes and ammunition,* AT A GENERAL ASSEMBLY, BEGUN AT JAMES CITTY THE SIXTEENTH DAY OF APRILL, ONE THOUSAND SIX HUDRED EIGHTY-FOUR, *in Laws of Virginia*, Volume 3, at 13.

EN-1684 — Octobr the 23d 1690, *in Executive Journals of Virginia*, Volume 1, at 134.

EN-1685 — Att a Councill held at Yorke Court house Janry 26th 1690 [1690-1691], *in Executive Journals of Virginia*, Volume 1, at 148.

EN-1686 — Att a Councill held at Tindalls point Decembr 8th 1691, *in Executive Journals of Virginia*, Volume 1, at 207-208.

EN-1687 — Aprill 2d 1692, *in Executive Journals of Virginia*, Volume 1, at 220.

EN-1688 — At the Councill Chamber at his Majtis Royall Colledge of William and Mary ye 8thof May 1701, *in Executive Journals of Virginia*, Volume 2, at 142.

EN-1689 — At ye Council Chamber at his majtes Royal College of Wm and Mary July 3d & 4th 1701, *in Executive Journals of Virginia*, Volume 2, at 173-174.

EN-1690 — At a Council held at her Majestys Royal College of William & Mary June ye 17th 1703, *in Executive Journals of Virginia*, Volume 2, at 321.

EN-1691 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 340-341.

EN-1692 — May the 9th 1706, *in Executive Journals of Virginia*, Volume 3, at 90.

EN-1693 — August the 9th 1706, *in Executive Journals of Virginia*, Volume 3, at 119. The reference is to CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 338.

EN-1694 — At a Council held at the Capitol the 10th day of February 1709 [1709/10], *in Executive Journals of Virginia*, Volume 3, at 206.

EN-1695 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, §§ XVII and XVIII, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 123.

EN-1696 — At a Council held October the 27 1727, *in Executive Journals of Virginia*, Volume 4, at 150.

EN-1697 — A Proclamation for the more effectual putting in Execution the Laws concerning the Militia: And for preventing the unlawful Concourse of Negros, and other slaves (29 October 1736), *in Executive Journals of Virginia*, Volume 4, at 471.

EN-1698 — CHAP. II, *An Act, for the better Regulation of the Militia*, §§ VII and IX, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 18-19, 19-20; CHAP. II, *An Act for the better regulating and training the Militia*, §§ VIII and IX, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to*

Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia, Volume 6, at 534-535.

EN-1699 — By His Majesty's Lieutenant Governor, and Commander in Chief, of this Dominion (16 June 1755), *in Executive Journals of Virginia*, Volume 6, at 588-589.

EN-1700 — CHAP. III, *An Act for the better regulating and disciplining the Militia*, §§ IX and X, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 96-97. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1701 — At a Council held August 20th 1762, *in Executive Journals of Virginia*, Volume 6, at 231.

EN-1702 — At a Council held March the 24. 1772, *in Executive Journals of Virginia*, Volume 6, at 451.

EN-1703 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 29-30.

EN-1704 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 269.

EN-1705 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § II, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four, in Laws of Virginia*, Volume 11, at 480-481; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § III, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five, in Laws of Virginia*, Volume 12, at 13-14.

EN-1706 — *Narratives of Early Virginia, 1606-1625*, Lyon G. Tyler, Editor (New York, New York: Charles Scribner's Sons, 1907), at 273. It should be noted, though, that inasmuch as "[t]he acts passed at the general assembly in 1619 * * * never received * * * sanction * * * in England" they "could not have the force of laws". *Laws of Virginia*, Volume 1, at 122, note.

EN-1707 — ACT LI, A GRAND ASSEMBLY HOLDEN AT JAMES CITTY THE 21st OF ffEBRUARY, 1631-2, *in Laws of Virginia*, Volume 1, at 174, *reënacted by* Act XLV, A GRAND ASSEMBLY HOLDEN AT JAMES CITTY THE 4TH DAY OF SEPTEMBER, 1632, *in Laws of Virginia*, Volume 1, at 198.

EN-1708 — ACT XLI, AT A GRAND ASSEMBLIE HOLDEN AT JAMES CITTY THE SECOND DAY OF MARCH, 1642-3, *in Laws of Virginia*, Volume 1, at 263.

EN-1709 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, §§ VI and XIII, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 119-120, 121-122.

EN-1710 — CHAP. II, *An Act, for the better Regulation of the Militia*, § VII, AT A GENERAL ASSEMBLY, summoned TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 18.

EN-1711 — CHAP. III, *An act for amending an act, intituled, An act for making provision against invasions and insurrections*, §§ VII and VIII, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 547-548.

EN-1712 — CHAP. III, *An act for amending an act, intituled, An act for making provision against invasions and insurrections*, § IV, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 546.

CHAP. IV, *An Act for reducing the several acts for making provision against invasions and insurrections into one act*, § IV, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday, the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 108-109. *Continued,* CHAP. IV, *An Act for continuing an act, intituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758, *in Laws of Virginia*, Volume 7, at 237; CHAP. V, *An Act for further continuing an Act, intituled, An Act for reducing the several Acts for making provision against Invasions and Insurrections, into one Act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758*; and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 275; CHAP. II, *An Act for further continuing an act, entituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758*; and from thence continued by several prorogations to Thursday the fifth of March*, 1761, *in Laws of Virginia*, Volume 7, at 384; CHAP. IV, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 539; CHAP. I, *An act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 30th of October*, 1764, *in Laws of Virginia*, Volume 8, at 37; CHAP. I, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 189; CHAP. V, *An Act for further continuing the Act, intituled an Act for reducing the several acts of Assembly for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in the City of Williamsburg, on Tuesday, in the seventh day of November*, 1769, *in Laws of Virginia*, Volume 8, at 334; CHAP. III, *An act for further continuing the act, intituled An act for reducing the several acts of assembly, for making provision against invasions and insurrections, into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Monday the tenth day of February, one thousand seven hundred and seventy-two, in Laws of Virginia*, Volume 8, at 514.

EN-1713 — CHAP. IV, *An Act for reducing the several acts for making provision against invasions and insurrections into one act*, § VI, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday, the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 109-110. *Continued,* CHAP. IV, *An Act for continuing an act, intituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758, *in Laws of Virginia*, Volume 7, at 237; CHAP. V, *An Act for further continuing an Act, intituled, An Act for reducing the several Acts for making provision against Invasions and Insurrections, into one Act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758*; and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 275; CHAP. II, *An Act for further continuing an act, entituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758*; and from thence continued by several prorogations to Thursday the fifth of March*, 1761, *in Laws of Virginia*, Volume 7, at 384; CHAP. IV, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 539; CHAP. I, *An act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly,*

begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May, 1761, *and from thence continued by several prorogations to Tuesday the 30th of October*, 1764, *in Laws of Virginia*, Volume 8, at 37; CHAP. I, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 189; CHAP. V, *An Act for further continuing the Act, intituled an Act for reducing the several acts of Assembly for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in the City of Williamsburg, on Tuesday, in the seventh day of November*, 1769, *in Laws of Virginia*, Volume 8, at 334; CHAP. III, *An act for further continuing the act, intituled An act for reducing the several acts of assembly, for making provision against invasions and insurrections, into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Monday the tenth day of February, one thousand seven hundred and seventy-two, in Laws of Virginia*, Volume 8, at 514.

EN-1714 — CHAP. III, *An Act for the better regulating and disciplining the Militia*, § VIII, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 96. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274.

EN-1715 — CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § VI, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 537-538.

CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § VIII, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 244. *Continued,* CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 29.

CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 271.

EN-1716 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held* at Richmond town, in the county of Henrico, *on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 26-27.

EN-1717 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 269.

EN-1718 — CHAP. VIII, *An act to amend the act for regulating and disciplining the militia, and for other purposes*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the seventh day of* May, *one thousand seven hundred and eighty-one, in Laws of Virginia* Volume 10, at 418.

EN-1719 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § IX, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October, one thousand seven hundred eighty-four, in Laws of Virginia*, Volume 11, at 490.

EN-1720 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, §§ II and VI, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four, in Laws of Virginia*, Volume 11, at 479-480, 485; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, §§ III and VI, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five, in Laws of Virginia*, Volume 12, at

12-13, 16.

EN-1721 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 339-340.

EN-1722 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, § XIII, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 121-122.

EN-1723 — CHAP. II, *An Act, for the better Regulation of the Militia*, § VII, AT A GENERAL ASSEMBLY, summoned TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 18.

EN-1724 — CHAP. II, *An Act to explain an act, intituled, An act for raising the sum of twenty thousand pounds, for the protection of his majesty's subjects, against the insults and encroachments of the French; and for other purposes therein mentioned*, § IX, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Thursday the first day of May, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 465-466.

EN-1725 — CHAP. I, *An Act for raising the sum of forty thousand pounds, for the protection of his majesty's subjects on the frontiers of this colony*, § X, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 527.

EN-1726 — CHAP. II, *An Act for the better regulating and training the Militia*, § VIII, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 533-534.

EN-1727 — CHAP. IV, *An Act for reducing the several acts for making provision against invasions and insurrections into one act*, § XV, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday, the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 113-114. *Continued*, CHAP. IV, *An Act for continuing an act, intituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758, *in Laws of Virginia*, Volume 7, at 237; CHAP. V, *An Act for further continuing an Act, intituled, An Act for reducing the several Acts for making provision against Invasions and Insurrections, into one Act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758*; and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 275; CHAP. II, *An Act for further continuing an act, entituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758*; and from thence continued by several prorogations to Thursday the fifth of March*, 1761, *in Laws of Virginia*, Volume 7, at 384; CHAP. IV, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the* 26th of May, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 539; CHAP. I, *An act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 30th of October*, 1764, *in Laws of Virginia*, Volume 8, at 37; CHAP. I, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November*, 1766, *in Laws of Virginia*, Volume 8, at 189; CHAP. V, *An Act for further continuing the Act, inituled an Act for reducing the several acts of Assembly for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in the City of Williamsburg, on Tuesday, in the seventh day of November*, 1769, *in Laws of Virginia*, Volume 8, at 334; CHAP. III, *An act for further continuing the act, intituled An act for reducing the several acts of assembly, for making provision against invasions and insurrections, into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Monday the tenth day of February, one thousand seven hundred and seventy-two, in Laws of Virginia*, Volume 8, at 514.

EN-1728 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 22.

EN-1729 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol*, *in the City of Williamsburg*, *on Monday the fifth day of May*, *one thousand seven hundred and seventy seven*, *in Laws of Virginia*, Volume 9, at 271.

EN-1730 — CHAP. VII, *An act for providing against Invasions and Insurrections*, § II, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol*, *in the City of Williamsburg*, *on Monday the fifth day of May*, *one thousand seven hundred and seventy seven*, *in Laws of Virginia*, Volume 9, at 292-293.

EN-1731 — CHAP. XX, *An act for the better regulation and discipline of the militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of* Williamsburg, *on* Monday, *the third day of* May, *one thousand seven hundred and seventy-nine, in Laws of Virginia,* Volume 10, at 84.

EN-1732 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § VI, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond*, *on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four*, *in Laws of Virginia*, Volume 11, at 485; CHAP. I, *An act to amend and reduce into one act*, *the several laws for regulating and disciplining the militia*, *and guarding against invasions and insurrections*, § VI, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond*, *on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five*, *in Laws of Virginia*, Volume 12, at 16.

EN-1733 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol*, *in the City of Williamsburg*, *on Monday the fifth day of May*, *one thousand seven hundred and seventy seven*, *in Laws of Virginia*, Volume 9, at 271.

EN-1734 — CHAP. XX, *An act for the better regulation and discipline of the militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of* Williamsburg, *on* Monday, *the third day of* May, *one thousand seven hundred and seventy-nine, in Laws of Virginia,* Volume 10, at 84.

EN-1735 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § VI, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond*, *on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four*, *in Laws of Virginia*, Volume 11, at 485; CHAP. I, *An act to amend and reduce into one act*, *the several laws for regulating and disciplining the militia*, *and guarding against invasions and insurrections*, § VI, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond*, *on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five*, *in Laws of Virginia*, Volume 12, at 16.

EN-1736 — CHAP. XX, *An act for the better regulation and discipline of the militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of* Williamsburg, *on* Monday, *the third day of* May, *one thousand seven hundred and seventy-nine, in Laws of Virginia,* Volume 10, at 84.

EN-1737 — CHAP. I, *An act to embody militia for the relief of South Carolina, and for other purposes*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the first day of* May, *one thousand seven hundred and eighty*, *in Laws of Virginia*, Volume 10, at 221, 225.

EN-1738 — CHAP. III, *An Act for recruiting this state's quota of troops to serve in the continental army*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the sixteenth day of* October, *one thousand seven hundred and eighty*, *in Laws of Virginia*, Volume 10, at 335-336.

EN-1739 — CHAP. VIII, *An act to amend the act for regulating and disciplining the militia, and for other purposes*, at a GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the seventh day of* May, *one thousand seven hundred and eighty-one*, *in Laws of Virginia*, Volume 10, at 416-417.

EN-1740 — CHAP. XLIV, *An act to amend the act*, *intituled*, *An act for establishing and regulating the militia*, §§ IV and VI, AT A GENERAL ASSEMBLY, *Begun and held at the Public Buildings in the City of Richmond, on Monday the twenty-first day of October, one thousand seven hundred and eighty-two, in Laws of Virginia*, Volume 11, at 174.

EN-1741 — *Narratives of Early Virginia, 1606-1625*, Lyon G. Tyler, Editor (New York, New York: Charles Scribner's Sons, 1907), at 273. Inasmuch as "[t]he acts passed at the general assembly in 1619 * * * never received * * * sanction * * * in England", however, they "could not have the force of laws". *Laws of Virginia*, Volume 1, at 122, note.

EN-1742 — ACT LI, A GRAND ASSEMBLY HOLDEN AT JAMES CITTY THE 21st OF ffEBRUARY, 1631-2, *in Laws of Virginia*, Volume 1, at 174, *reënacted by* Act XLV, A GRAND ASSEMBLY HOLDEN AT JAMES CITTY THE 4TH DAY OF SEPTEMBER, 1632, *in Laws of Virginia*, Volume 1, at 198.

EN-1743 — ACT X, ATT A GRAND ASSEMBLY, 6TH JANUARY, 1639, *in Laws of Virginia*, Volume 1, at 226.

EN-1744 — ACT XLI, AT A GRAND ASSEMBLIE HOLDEN AT JAMES CITTY THE SECOND DAY OF MARCH, 1642-3, *in Laws of Virginia*, Volume 1, at 263.

EN-1745 — ACT XXV, *Provision to bee made for Amunition*, ATT A GRAND ASSEMBLY, HELD AT JAMES CITTIE, MARCH 7, 1658-9, *in Laws of Virginia*, Volume 1, at 525, *reënacted by* ACT CXX, *Supply of ammunition*, AT A GRAND ASSEMBLY HELD AT JAMES CITY MARCH THE 23D 1661-2, *in Laws of Virginia*, Volume 2, at 126-127.

EN-1746 — ACT XXI, *An act against refractory Souldiers*, AT A GRAND ASSEMBLIE HOLDEN AT JAMES CITTIE BY PROROGATION FROM THE 5th OF JUNE 1666, TO THE TWENTIE THIRD OF OCTOBER 1666, *in Laws of Virginia*, Volume 2, at 246.

EN-1747 — ACT II, *An act providing for the supply of armes and ammunition*, ATT A GRAND ASSEMBLY, HOLDEN AT JAMES CITY BY PROROGATION FROM THE 24TH DAY OF SEPTEMBER, 1672, TO THE 20TH OF OCTOBER, 1673, *in Laws of Virginia*, Volume 2, at 304-305, *ordered to "be putt into strict and effectual execution"*, AT A GRAND ASSEMBLIE HELD ATT JAMES CITTIE BY PROROGATION FROM THE ONE AND TWENTIETH DAY OF SEPTEMBER, 1674, TO THE SEAVENTH DAY OF MARCH, [1676,] *in Laws of Virginia*, Volume 2, at 339.

EN-1748 — ACT VII, *An act disbanding the present souldiers in garrisons in the fforts on the heads of the severall rivers, as alsoe for the raiseing of other forces in their stead*, ATT A GENERALL ASSEMBLY, BEGUNN ATT JAMES CITTY NOVEM. THE TENTH 1682, *in Laws of Virginia*, Volume 2, at 500.

EN-1749 — ACT IV, *An act for the better supply of the country with armes and ammunition*, ATT A GENERALL ASSEMBLY, BEGUN AT JAMES CITTY THE SIXTEENTH DAY OF APRILL, ONE THOUSAND SIX HUNDRED EIGHTY-FOUR, *in Laws of Virginia*, Volume 3, at 14 (footnote omitted).

EN-1750 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 337, 338, 339-340.

EN-1751 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, §§ VI, VIII, X, XIV, XV, and XVI, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 119, 120, 121, 122, 122-123.

EN-1752 — CHAP. II, *An Act, for the better Regulation of the Militia*, §§ X, XIII, and XV, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 20-21, 22.

EN-1753 — CHAP. XXXIX, *An Act for making provision against Invasions and Insurrections*, § IV, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *The College in Williamsburg, the twenty-seventh day of October*, 1748, *in Laws of Virginia*, Volume 6, at 114. *Continued,* CHAP. II, *An Act for continuing an act, intituled, An Act for making provision against invasions and insurrections, At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February*, 1752. *And from thence continued by several prorogations, to Thursday the first day of November*, 1753, *in Laws of Virginia*, Volume 6, at 350.

EN-1754 — CHAP. II, *An Act for amending the act, intituled, An Act for the better regulation of the militia*, § II, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February*, 1752. *And from thence continued by several prorogations, to Thursday the* 14*th day of February*, 1754, *in Laws of Virginia*, Volume 6, at 422.

EN-1755 — CHAP. II, *An Act to explain an act, intituled, An act for raising the sum of twenty thousand pounds, for the protection of his majesty's subjects, against the insults and encroachments of the French; and for other purposes therein mentioned*, § IX, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Thursday the first day of May, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 465-466.

EN-1756 — CHAP. I, *An Act for raising the sum of forty thousand pounds, for the protection of his majesty's subjects on the frontiers of this colony*, § X, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from*

thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia, Volume 6, at 527.

EN-1757 — CHAP. II, *An Act for the better regulating and training the Militia*, §§ V, VI, VIII, X, XI, XII, XV, XXI [*sic*, "XVI" was meant], XVII, and XXVII, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 532-533, 533-534, 535-537, 539-540, 543-544.

EN-1758 — CHAP. III, *An act for amending an act, intituled, An act for making provision against invasions and insurrections*, §§ IV, VII, and VIII, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 545-546, 547-548.

EN-1759 — CHAP. III, *An Act for the better regulating and disciplining the Militia*, §§ IV, V, XI, XII, XIII, XVI, XVII, XVIII, and XXVIII, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 94-95, 98-99, 100-102, 105-106. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1760 — CHAP. IV, *An Act for reducing the several acts for making provision against invasions and insurrections into one act*, §§ III, IV, VI, and XIV, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday, the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 108-109, 109-110, 113. *Continued,* CHAP. IV, *An Act for continuing an act, intituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758, *in Laws of Virginia*, Volume 7, at 237; CHAP. V, *An Act for further continuing an Act, intituled, An Act for reducing the several Acts for making provision against Invasions and Insurrections, into one Act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 275; CHAP. II, *An Act for further continuing an act, entituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the fifth of March*, 1761, *in Laws of Virginia*, Volume 7, at 384; CHAP. IV, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 539; CHAP. I, *An act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 30th of October*, 1764, *in Laws of Virginia*, Volume 8, at 37; CHAP. I, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 189; CHAP. V, *An Act for further continuing the Act, intituled an Act for reducing the several acts of Assembly for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in the City of Williamsburg, on Tuesday, in the seventh day of November*, 1769, *in Laws of Virginia*, Volume 8, at 334; CHAP. III, *An act for further continuing the act, intituled An act for reducing the several acts of assembly, for making provision against invasions and insurrections, into one act, At a General Assembly, begun and held at the Capitol, in*

the City of Williamsburg, on Monday the tenth day of February, one thousand seven hundred and seventy-two, in Laws of Virginia, Volume 8, at 514.

EN-1761 — CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, §§ II, III, V, and VI, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 534, 537, 537-538. [In this volume, pages 535 and 536 are blank.]

CHAP. XXXI, *An Act to continue and amend the act for the better regulating and disciplining the militia*, §§ I, II, and VII, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November*, 1766, *in Laws of Virginia*, Volume 8, at 242, 243-244. *Continued*, CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1762 — CHAP. VII, *An act to amend so much of the act for the better regulating and training the militia, as relates to the appointment of patrollers, their duty and reward*, §§ I and II, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November*, 1766, *in Laws of Virginia*, Volume 8, at 195-196.

EN-1763 — CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* §IV, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 242-243. *Continued*, CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1764 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 22, 25-27, 30-31, 31-32, 34-35.

EN-1765 — CHAP. I, *An Ordinance for raising an additional number of forces for the defence and protection of this colony, and for other purposes therein mentioned, At a Convention of Delegates held at the town of Richmond, in the colony of Virginia, on Friday the first of December, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 87, 89.

EN-1766 — CHAP. I, *An act for regulating and disciplining the Militia,* AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 268-271, 273-274.

EN-1767 — CHAP. II, *An act for the more speedily completeing the Quota of Troops to be raised in this commonwealth for the continental army, and for other purposes*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 276-278.

EN-1768 — CHAP. XX, *An act for the better regulation and discipline of the militia,* AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of* Williamsburg, *on* Monday, *the third day of* May, *one thousand seven hundred and seventy-nine, in Laws of Virginia,* Volume 10, at 83-85.

EN-1769 — CHAP. III, *An Act for recruiting this state's quota of troops to serve in the continental army*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the sixteenth day of* October, *one thousand seven hundred and eighty, in Laws of Virginia*, Volume 10, at 335-336.

EN-1770 — CHAP. VIII, *An act to amend the act for regulating and disciplining the militia, and for other purposes*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the seventh day of* May, *one thousand seven hundred and eighty-one, in Laws of Virginia*, Volume 10, at 417, 420-421.

EN-1771 — CHAP. XLIV, *An act to amend the act, intituled, An act for establishing and regulating the militia*, §§ IV, V, and VI, AT A GENERAL ASSEMBLY, *Begun and held at the Public Buildings in the Town of Richmond, on Monday the twenty-first day of October, one thousand seven hundred and eighty-two, in Laws of Virginia*, Volume 11, at 174.

EN-1772 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, §§ II, VIII, and XI, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four, in Laws of Virginia*, Volume 11, at 478-479, 489, 491-493; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, §§ III, VIII, and XI, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five, in Laws of Virginia*, Volume 12, at 11-13, 20, 22-24.

EN-1773 — CHAP. II, *An act to amend the act for regulating and disciplining the militia, and for other purposes*, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the sixteenth day of October*[,] *one thousand seven hundred and eighty-six, in Laws of Virginia*, Volume 12, at 234-235.

EN-1774 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 336.

EN-1775 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, § VI, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 119.

EN-1776 — CHAP. II, *An Act, for the better Regulation of the Militia*, § XIV, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 22.

CHAP. II, *An Act for the better regulating and training the Militia*, § XV, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 538-539.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § XVI, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 100. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 31-32.

EN-1777 — CHAP. XX, *An act for the better regulation and discipline of the militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of* Williamsburg, *on* Monday, *the third day of* May, *one thousand seven hundred and seventy-nine, in Laws of Virginia,* Volume 10, at 84.

EN-1778 — *E.g.*, CHAP. II, *An Act for the settling and better Regulation of the Militia*, §§ V and VI, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 119.

CHAP. II, *An Act, for the better Regulation of the Militia*, § VI, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 17.

CHAP. II, *An Act for the better regulating and training the Militia*, § VII, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 533.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § VII, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven*, *in Laws of Virginia*, Volume 7, at 95. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one*, *in Laws of Virginia*, Volume 8, at 503.

EN-1779 — ACT XLI, AT A GRAND ASSEMBLIE HOLDEN AT JAMES CITTY THE SECOND DAY OF MARCH, 1642-3, *in Laws of Virginia*, Volume 1, at 263.

EN-1780 — Att a Councill held at Yorke Court house Jan^{r}y 26th 1690 [1690-91], *in Executive Journals of Virginia,* Volume 1, at 148.

EN-1781 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 341-342.

EN-1782 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, § XXI, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 124.

EN-1783 — CHAP. II, *An Act, for the better Regulation of the Militia*, § X, AT A GENERAL ASSEMBLY, summoned TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 20.

EN-1784 — CHAP. XXXIX, *An Act for making provision against Invasions and Insurrections*, § IV, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *The College in Williamsburg, the twenty-seventh day of October*, 1748, *in Laws of Virginia*, Volume 6, at 114. *Continued,* CHAP. II, *An Act for continuing an act, intituled, An Act for making provision against invasions and insurrections, At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February*, 1752. *And from thence continued by several prorogations, to Thursday the first day of November*, 1753, *in Laws of Virginia*, Volume 6, at 350.

EN-1785 — CHAP. II, *An Act for the better regulating and training the Militia*, §§ V, IX, XV, and XIX, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five*, *in Laws of Virginia*, Volume 6, at 532, 534-535, 539, 541.

EN-1786 — CHAP. III, *An Act for the better regulating and disciplining the Militia*, §§ IV, X, XVI, and XIX, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven*, *in Laws of Virginia*, Volume 7, at 94, 96-98, 100-101, 102. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July,*

one thousand seven hundred and seventy-one, *in Laws of Virginia*, Volume 8, at 503.

EN-1787 — CHAP. IV, *An Act for reducing the several acts for making provision against invasions and insurrections into one act*, § XXII, *At a General Assembly*, *begun and held at the Capitol*, *in Williamsburg*, *on Thursday*, *the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April*, *one thousand seven hundred and fifty-seven*, *in Laws of Virginia*, Volume 7, at 115. *Continued*, CHAP. IV, *An Act for continuing an act*, *intituled*, *An Act for reducing the several acts for making provision against invasions and insurrections into one act*, *At a General Assembly*, *begun and held at the Capitol*, *in Williamsburg*, *on Thursday the fourteenth day of September*, 1758, *in Laws of Virginia*, Volume 7, at 237; CHAP. V, *An Act for further continuing an Act*, *intituled*, *An Act for reducing the several Acts for making provision against Invasions and Insurrections*, *into one Act*, *At a General Assembly*, *begun and held at the Capitol*, *in Williamsburg*, *on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 275; CHAP. II, *An Act for further continuing an act*, *entituled*, *An Act for reducing the several acts for making provision against invasions and insurrections into one act*, *At a General Assembly*, *begun and held at the Capitol*, *in Williamsburg*, *on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the fifth of March*, 1761, *in Laws of Virginia*, Volume 7, at 384; CHAP. IV, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act*, *At a General Assembly*, *begun and held at the Capitol*, *in the City of Williamsburg*, *on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 539; CHAP. I, *An act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act*, *At a General Assembly*, *begun and held at the Capitol*, *in the City of Williamsburg*, *on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 30th of October*, 1764, *in Laws of Virginia*, Volume 8, at 37; CHAP. I, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act*, *At a General Assembly*, *begun and held at the Capitol in Williamsburg*, *on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 189; CHAP. V, *An Act for further continuing the Act*, *intituled an Act for reducing the several acts of Assembly for making provision against invasions and insurrections into one act*, *At a General Assembly*, *begun and held at the Capitol in the City of Williamsburg*, *on Tuesday*, *in the seventh day of November*, 1769, *in Laws of Virginia*, Volume 8, at 334; CHAP. III, *An act for further continuing the act*, *intituled An act for reducing the several acts of assembly*, *for making provision against invasions and insurrections*, *into one act*, *At a General Assembly*, *begun and held at the Capitol*, *in the City of Williamsburg*, *on Monday the tenth day of February*, *one thousand seven hundred and seventy-two*, *in Laws of Virginia*, Volume 8, at 514.

EN-1788 — CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § IV, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 242-243. *Continued,* CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia*, *At a General Assembly*, *begun and held at the Capitol*, *in the City of Williamsburg*, *the seventh day of November*, *one thousand seven hundred and sixty-nine*, *and from thence continued by several prorogations*, *and convened by proclamation the eleventh day of July*, *one thousand seven hundred and seventy-one*, *in Laws of Virginia*, Volume 8, at 503.

EN-1789 — CHAP. I, *An Ordinance for raising an additional number of forces for the defence and protection of this colony*, *and for other purposes therein mentioned*, *At a Convention of Delegates held at the town of Richmond*, *in the colony of Virginia*, *on Friday the first of December*, *one thousand seven hundred and seventy-five*, *in Laws of Virginia*, Volume 9, at 91.

EN-1790 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol*, *in the City of Williamsburg*, *on Monday the fifth day of May*, *one thousand seven hundred and seventy seven*, *in Laws of Virginia*, Volume 9, at 272.

EN-1791 — CHAP. III, *An act for recruiting this state's quota of troops to serve in the army of the United States*, § III, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the sixth day of* May, *one thousand seven hundred and eighty-two*, *in Laws of Virginia*, Volume 11, at 15-16.

EN-1792 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia*, *and guarding against invasions and insurrections*, § X, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond*, *on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four*, *in Laws of Virginia*, Volume 11, at 491; CHAP. I, *An act to amend and reduce into one act*, *the several laws for regulating and disciplining the militia*, *and guarding against invasions and insurrections*, § X, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond*, *on Monday the seventeenth day of* October[,] *one thousand seven hundred and eighty-five*, *in Laws of Virginia*, Volume 12, at 22.

EN-1793 — CHAP. XII, *An act for speedily recruiting the quota of this state for the continental army*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the first day of* May, *one thousand seven hundred and eighty*, *in Laws of Virginia*, Volume 10, at 261-262. *See to like effect* CHAP. III, *An Act for recruiting this state's quota of troops to serve in the continental army,* AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the sixteenth day of* October, *one thousand seven hundred and eighty*, *in Laws of Virginia*, Volume 10, at 334-335.

EN-1794 — CHAP. VIII, *An act to amend the act for regulating and disciplining the militia, and for other purposes*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the seventh day of* May, *one thousand seven hundred and eighty-one*, *in Laws of Virginia*, Volume 10, at 417-418.

EN-1795 — CHAP. XLIV, *An act to amend the act, intituled, An act for establishing and regulating the militia*, § VII, AT A GENERAL ASSEMBLY, *Begun and held at the Public Buildings in the City of Richmond, on Monday the twenty-first day of October, one thousand seven hundred and eighty-two, in Laws of Virginia*, Volume 11, at 175.

EN-1796 — ACT XXV, *Provision to bee made for Amunition*, ATT A GRAND ASSEMBLY, HELD AT JAMES CITTIE, MARCH 7, 1658-9, *in Laws of Virginia*, Volume 1, at 525, *reënacted by* ACT CXX, *Supply of ammunition*, AT A GRAND ASSEMBLY HELD AT JAMES CITY MARCH THE 23D 1661-2, *in Laws of Virginia*, Volume 2, at 126-127.

EN-1797 — ACT XXI, *An act against refractory Souldiers*, AT A GRAND ASSEMBLIE HOLDEN AT JAMES CITTIE BY PROROGATION FROM THE 5th OF JUNE 1666, TO THE TWENTIE THIRD OF OCTOBER 1666, *in Laws of Virginia*, Volume 2, at 246.

EN-1798 — ACT IV, *An act for the better supply of the country with armes and ammunition*, ATT A GENERALL ASSEMBLY, BEGUN AT JAMES CITTY THE SIXTEENTH DAY OF APRILL, ONE THOUSAND SIX HUNDRED EIGHTY-FOUR, *in Laws of Virginia*, Volume 3, at 14 (footnote omitted).

EN-1799 — Octob^{r} the 23^{d} 1690, *in Executive Journals of Virginia*, Volume 1, at 134.

EN-1800 — Att a Councill held at Yorke Court house Jan^{r}y 26th 1690 [1690-1691], *in Executive Journals of Virginia*, Volume 1, at 148.

EN-1801 — Att a Councill held at Tindalls point Decemb^{r} 8th 1691, *in Executive Journals of Virginia*, Volume 1, at 207-208.

EN-1802 — Aprill 2^{d} 1692, *in Executive Journals of Virginia*, Volume 1, at 220.

EN-1803 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 342.

EN-1804 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, §§ XXII and XXIII, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg*, *the fifth day of December*, 1722, *and by writ of prorogation*, *begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 124-125.

EN-1805 — CHAP. II, *An Act*, *for the better Regulation of the Militia*, §§ IX and X, AT A GENERAL ASSEMBLY, summoned TO BE HELD AT *The Capitol*, *in the City of Williamsburg*, *on the first day of August*, [1735]. *And from thence continued*, *by several prorogations*, *to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 19-20, 20.

EN-1806 — CHAP. XXXIX, *An Act for making provision against Invasions and Insurrections*, § IV, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *The College in Williamsburg*, *the twenty-seventh day of October*, 1748, *in Laws of Virginia*, Volume 6, at 114. *Continued,* CHAP. II, *An Act for continuing an act*, *intituled*, *An Act for making provision against invasions and insurrections*, *At a General Assembly*, *begun and held at the College in the City of Williamsburg*, *on Thursday the twenty seventh day of February*, 1752. *And from thence continued by several prorogations*, *to Thursday the first day of November*, 1753, *in Laws of Virginia*, Volume 6, at 350.

EN-1807 — CHAP. II, *An Act for the better regulating and training the Militia*, §§ V, IX, and XIX, *At a General Assembly*, *begun and held at the College in the City of Williamsburg*, *on Thursday the twenty seventh day of February*, *one thousand seven hundred and fifty two. And from thence continued by several prorogations*, *to Tuesday the fifth day of August*, *one thousand seven hundred and fifty five*, *in Laws of Virginia*, Volume 6, at 532, 535, 541.

EN-1808 — CHAP. III, *An Act for the better regulating and disciplining the Militia*, §§ IV, X, and XIX, *At a General Assembly*, *begun and held at the Capitol*, *in Williamsburg*, *on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April*, *one thousand seven hundred and fifty-seven*, *in Laws of Virginia*, Volume 7, at 94, 96-97, 102. *Continued*, CHAP. IV, *An Act for continuing an Act*, *intitutled*, *An Act for the better regulating and disciplining the Militia*, *At a General Assembly*, *begun and held at the Capitol*, *in Williamsburg*, *on Thursday the fourteenth day of September*, 1758; *and from thence continued by*

several prorogations to Thursday the twenty-second of February, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1809 — CHAP. IV, *An Act for reducing the several acts for making provision against invasions and insurrections into one act*, § XXII, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday, the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 115. *Continued*, CHAP. IV, *An Act for continuing an act, intituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758, *in Laws of Virginia*, Volume 7, at 237; CHAP. V, *An Act for further continuing an Act, intituled, An Act for reducing the several Acts for making provision against Invasions and Insurrections, into one Act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758*; and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 275; CHAP. II, *An Act for further continuing an act, entituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758*; and from thence continued by several prorogations to Thursday the fifth of March*, 1761, *in Laws of Virginia*, Volume 7, at 384; CHAP. IV, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 539; CHAP. I, *An act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 30th of October*, 1764, *in Laws of Virginia*, Volume 8, at 37; CHAP. I, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 189; CHAP. V, *An Act for further continuing the Act, intituled an Act for reducing the several acts of Assembly for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in the City of Williamsburg, on Tuesday, in the seventh day of November*, 1769, *in Laws of Virginia*, Volume 8, at 334; CHAP. III, *An act for further continuing the act, intituled An act for reducing the several acts of assembly, for making provision against invasions and insurrections, into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Monday the tenth day of February, one thousand seven hundred and seventy-two, in Laws of Virginia*, Volume 8, at 514.

EN-1810 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 31, 33.

EN-1811 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 269-270, 272-273.

EN-1812 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, §§ II and IV, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four, in Laws of Virginia*, Volume 11, at 479, 483-484; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, §§ III and IV, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five, in Laws of Virginia*, Volume 12, at 12, 15.

EN-1813 — At a Council held March the 24. 1772, *in Executive Journals of Virginia*, Volume 6, at 451.

EN-1814 — CHAP. II, *An Act, for the better Regulation of the Militia*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 16.

EN-1815 — CHAP. II, *An Act for the better regulating and training the Militia*, § I, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 530.

EN-1816 — CHAP. VIII, *An act to amend the act for regulating and disciplining the militia, and for other purposes*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the seventh day of* May, *one thousand seven hundred and eighty-one, in Laws of Virginia*, Volume 10, at 421 (emphasis supplied).

EN-1817 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § II, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four, in Laws of Virginia*, Volume 11, at 479-480; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § III, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five, in Laws of Virginia*, Volume 12, at 12-13.

EN-1818 — CHAP. III, *An Act for the better regulating and disciplining the Militia*, § V, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 94-95. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1819 — CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, §§ II and III, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 534, 537. [In this volume, pages 535 and 536 are blank .]

EN-1820 — CHAP. XXXI, *An Act to continue and amend the act for the better regulating and disciplining the militia*, §§ I and II, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November*, 1766, *in Laws of Virginia*, Volume 8, at 242. *Continued*, CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1821 — *Quoted in Narratives of Early Virginia, 1606-1625*, Lyon G. Tyler, Editor (New York, New York: Charles Scribner's Sons, 1907), at 273 (emphasis supplied). But, "[t]he acts passed at the general assembly in 1619 * * * never received * * * sanction * * * in England", and therefore "could not have the force of laws". *Laws of Virginia*, Volume 1, at 122, note.

EN-1822 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 341; CHAP. II, *An Act for the settling and better Regulation of the Militia*, § XIX, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 123.

EN-1823 — CHAP. II, *An Act, for the better Regulation of the Militia,* § VII, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August* [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 18.

EN-1824 — CHAP. II, *An Act, for the better Regulation of the Militia,* §§ VII and IX, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August* [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 18-20.

EN-1825 — CHAP. II, *An Act for the better regulating and training the Militia*, §§ VIII and IX, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 533-535.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, §§ VIII, IX, and X, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 95-98. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May,* 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia,* Volume 9, at 29-30.

CHAP. I, *An act for regulating and disciplining the Militia,* AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia,* Volume 9, at 269, 271-272.

EN-1826 — CHAP. XX, *An act for the better regulation and discipline of the militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of* Williamsburg, *on* Monday, *the third day of* May, *one thousand seven hundred and seventy-nine, in Laws of Virginia,* Volume 10, at 83, 84.

EN-1827 — CHAP. VIII, *An act to amend the act for regulating and disciplining the militia, and for other purposes,* AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the seventh day of* May, *one thousand seven hundred and eighty-one, in Laws of Virginia*, Volume 10, at 418-419. *Applied in* CHAP. XLIV, *An act to amend the act, intituled, An act for establishing and regulating the militia,* § V, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the sixth day of* May, *one thousand seven hundred and eighty-two, in Laws of Virginia*, Volume 11, at 174.

EN-1828 — CHAP. III, *An act for amending an act, intituled, An act for making provision against invasions and insurrections*, §§ VII and VIII, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 547-548.

EN-1829 — CHAP. IV, *An Act for reducing the several acts for making provision against invasions and insurrections into one act*, § VI, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday, the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 109-110. *Continued,* CHAP. IV, *An Act for continuing an act, intituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758, *in Laws of Virginia*, Volume 7, at 237; CHAP. V, *An Act for further continuing an Act, intituled, An Act for reducing the several Acts for making provision against Invasions and Insurrections, into one Act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the*

fourteenth day of September, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 275; CHAP. II, *An Act for further continuing an act, entituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the fifth of March*, 1761, *in Laws of Virginia*, Volume 7, at 384; CHAP. IV, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 539; CHAP. I, *An act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 30th of October*, 1764, *in Laws of Virginia*, Volume 8, at 37; CHAP. I, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 189; CHAP. V, *An Act for further continuing the Act, intituled an Act for reducing the several acts of Assembly for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in the City of Williamsburg, on Tuesday, in the seventh day of November*, 1769, *in Laws of Virginia*, Volume 8, at 334; CHAP. III, *An act for further continuing the act, intituled An act for reducing the several acts of assembly, for making provision against invasions and insurrections, into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Monday the tenth day of February, one thousand seven hundred and seventy-two, in Laws of Virginia*, Volume 8, at 514.

EN-1830 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 339, 340.

EN-1831 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, §§ XII and XVI, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 121, 122-123.

EN-1832 — CHAP. II, *An Act, for the better Regulation of the Militia*, § X, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 21.

EN-1833 — CHAP. II, *An Act for the better regulating and training the Militia*, § X, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 535-537.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § XI, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 98. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1834 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, § XIII, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 121-122.

EN-1835 — CHAP. II, *An Act, for the better Regulation of the Militia*, § VII, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 18.

EN-1836 — CHAP. II, *An Act for the better regulating and training the Militia*, § VIII, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 533-534.

EN-1837 — CHAP. III, *An Act for the better regulating and disciplining the Militia*, § VIII, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 96. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1838 — Att a Councill held at James Citty Jan^{r}y 27th 1691 [1691-2], *in Executive Journals of Virginia*, Volume 1, at 215.

EN-1839 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 338.

EN-1840 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, § IX, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 120.

EN-1841 — CHAP. II, *An Act, for the better Regulation of the Militia*, § XI, AT A GENERAL ASSEMBLY, summoned TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 21.

EN-1842 — CHAP. II, *An Act for the better regulating and training the Militia*, §§ XII and XIII, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 537-538.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, §§ XIII and XIV, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 99. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1843 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 31.

EN-1844 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven*, *in Laws of Virginia*, Volume 9, at 269.

EN-1845 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § VI, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four*, *in Laws of Virginia*, Volume 11, at 485; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § VI, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five*, *in Laws of Virginia*, Volume 12, at 16.

EN-1846 — ACT VII, *An act disbanding the present souldiers in garrisons in the fforts on the heads of the severall rivers, as also for the raiseing of other forces in their stead,* AT A GENERAL ASSEMBLY, BEGUN ATT JAMES CITTY NOVEM. THE TENTH 1682, *in Laws of Virginia*, Volume 2, at 500.

EN-1847 — CHAP. II, *An Act for the better regulating and training the Militia*, § IX, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five*, *in Laws of Virginia*, Volume 6, at 534-535.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § X, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 97. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1848 — CHAP. XII, *An ordinance for amending an ordinance for raising and embodying a sufficient force for the defence and protection of this colony, and for other purposes therein mentioned, At a General Convention of Delegates and Representatives, from the several counties and corporations of Virginia, held at the Capitol in the City of Williamsburg, on Monday the 6th of May*, 1776, *in Laws of Virginia*, Volume 9, at 140.

EN-1849 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven*, *in Laws of Virginia*, Volume 9, at 269.

EN-1850 — Octob[r] the 23[d] 1690, *in Executive Journals of Virginia*, Volume 1, at 132-133.

EN-1851 — Att a Councill held at James Citty Jan[r]y 27[th] 1691 [1691-2], *in Executive Journals of Virginia*, Volume 1, at 215.

EN-1852 — Att a Councill held at James Citty Jan[r]y 27[th] 1691 [1691-2], *in Executive Journals of Virginia*, Volume 1, at 215.

EN-1853 — CHAP. I, *An Act, for the better security of the Country in the present time of Danger*, § V, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on Friday, the first day of August*, [1735]. *And from thence continued, by several prorogations, to the 22nd day of May*, 1740, *in Laws of Virginia*, Volume 5, at 91.

EN-1854 — CHAP. II, *An Act for the better regulating and training the Militia*, § V, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five*, *in Laws of Virginia*, Volume 6, at 532.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § IV, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence*

continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia, Volume 7, at 94. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1855 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 28-29.

EN-1856 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 269.

EN-1857 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § II, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four, in Laws of Virginia*, Volume 11, at 479; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § III, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five, in Laws of Virginia*, Volume 12, at 12.

EN-1858 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 340, 341; CHAP. II, *An Act for the settling and better Regulation of the Militia*, §§ XVII and XX, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 123-124.

EN-1859 — CHAP. II, *An Act, for the better Regulation of the Militia*, § IX, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 19-20.

EN-1860 — CHAP. II, *An Act for the better regulating and training the Militia*, §§ IX and X, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 534-535, 535-536.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, §§ X and XI, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 96-97, 98. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred*

and seventy-one, *in Laws of Virginia*, Volume 8, at 503.

EN-1861 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 22, 26, 30-31.

EN-1862 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol*, *in the City of Williamsburg*, *on Monday the fifth day of May*, *one thousand seven hundred and seventy seven*, *in Laws of Virginia*, Volume 9, at 271-272.

EN-1863 — CHAP. II, *An act for the more speedily completeing the Quota of Troops to be raised in this commonwealth for the continental army*, *and for other purposes*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol*, *in the City of Williamsburg*, *on Monday the fifth day of May*, *one thousand seven hundred and seventy seven*, *in Laws of Virginia*, Volume 9, at 276-278.

EN-1864 — CHAP. VII, *An act for providing against Invasions and Insurrections*, § II, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol*, *in the City of Williamsburg*, *on Monday the fifth day of May*, *one thousand seven hundred and seventy seven*, *in Laws of Virginia*, Volume 9, at 292.

EN-1865 — CHAP. I, *An act to embody militia for the relief of South Carolina, and for other purposes*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the first day of* May, *one thousand seven hundred and eighty*, *in Laws of Virginia*, Volume 10, at 225.

EN-1866 — CHAP. VIII, *An act to amend the act for regulating and disciplining the militia, and for other purposes*, at a GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the seventh day of* May, *one thousand seven hundred and eighty-one*, *in Laws of Virginia*, Volume 10, at 416-417.

EN-1867 — James Citty October 25th 1684, *in Executive Journals of Virginia*, Volume 1, at 67.

EN-1868 — July 26th 1690, *in Executive Journals of Virginia*, Volume 1, at 125.

EN-1869 — Ordr to the Sheriffs touching ye Militia and Ordr touching Stores & ca By the Rt Honoble the Lt Govr (8 December 1691), *in Executive Journals of Virginia*, Volume 1, at 210.

EN-1870 — May 19th 1695, *in Executive Journals of Virginia*, Volume 1, at 330.

EN-1871 — March 3d 1703 [1703/4], *in Executive Journals of Virginia*, Volume 2, at 352-353. *Accord*, April 27th 1704, *in Executive Journals of Virginia*, Volume 2, at 360.

EN-1872 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 340; CHAP. II, *An Act for the settling and better Regulation of the Militia*, § XVII, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg*, *the fifth day of December*, 1722, *and by writ of prorogation*, *begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 123.

EN-1873 — CHAP. II, *An Act, for the better Regulation of the Militia*, § IX, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 19.

EN-1874 — CHAP. II, *An Act for the better regulating and training the Militia*, § XIII, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 537-538.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § XIV, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 99-100. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued*

by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia, Volume 8, at 503.

EN-1875 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, §§ II and IX, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four, in Laws of Virginia*, Volume 11, at 479-480, 490; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, §§ III and IX, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five, in Laws of Virginia*, Volume 12, at 12-13, 21.

EN-1876 — CHAP. VIII, *An act to amend the act for regulating and disciplining the militia, and for other purposes*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the seventh day of* May, *one thousand seven hundred and eighty-one, in Laws of Virginia*, Volume 10, at 419.

EN-1877 — CHAP. II, *An act to amend the act for regulating and disciplining the militia, and for other purposes*, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the sixteenth day of October*[,] *one thousand seven hundred and eighty-six, in Laws of Virginia*, Volume 12, at 234-235.

EN-1878 — ACT IV, *An act for the better supply of the country with armes and ammunition*, ATT A GENERALL ASSEMBLY, BEGUN AT JAMES CITTY THE SIXTEENTH DAY OF APRILL, ONE THOUSAND SIX HUNDRED EIGHTY-FOUR, *in Laws of Virginia*, Volume 3, at 13 (footnotes omitted).

EN-1879 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 339.

EN-1880 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, § XI, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 121.

CHAP. II, *An Act, for the better Regulation of the Militia*, § XII, AT A GENERAL ASSEMBLY, summoned TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 21-22.

CHAP. II, *An Act for the better regulating and training the Militia*, §§ XIII and XIV, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 538.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § XV, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 100. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1881 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 31.

EN-1882 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 269.

EN-1883 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § XI, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four*, *in Laws of Virginia*, Volume 11, at 493; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § XI, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five*, *in Laws of Virginia*, Volume 12, at 24.

EN-1884 — CHAP. II, *An Act, for the better Regulation of the Militia*, § XIII, AT A GENERAL ASSEMBLY, summoned TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 22.

CHAP. II, *An Act for the better regulating and training the Militia*, § XIV, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five*, *in Laws of Virginia*, Volume 6, at 538.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § XV, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday, the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven*, *in Laws of Virginia*, Volume 7, at 100. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 534; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 241; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one*, *in Laws of Virginia*, Volume 8, at 503.

EN-1885 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 31.

EN-1886 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, in the year of our Lord one thousand seven hundred and seventy seven, and in the first year of the Commonwealth*, *in Laws of Virginia*, Volume 9, at 269-270.

EN-1887 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § XI, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four*, *in Laws of Virginia*, Volume 11, at 493; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § XI, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five*, *in Laws of Virginia*, Volume 12, at 24.

EN-1888 — CHAP. II, *An Act for amending the several acts, for making provision against invasions and insurrections, and for amending and explaining an act passed this present session of Assembly, intituled, An Act for raising the sum of twenty five thousand pounds for the better protection of the inhabitants on the frontiers of this colony, and for other purposes therein mentioned*, § X, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *in Laws of Virginia*, Volume 7, at 31. Presumably, "the several acts" to which this statute referred were CHAP. XXXIX, *An Act for making provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *The College in Williamsburg, the twenty-seventh day of October*, 1748, *in Laws of Virginia*, Volume 6, at 112; CHAP. II, *An Act for continuing an act, intituled, An Act for making provision against invasions and insurrections, At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February*, 1752. *And from thence continued by several prorogations, to Thursday the first day of November*, 1753, *in Laws of Virginia*, Volume 6, at 350; *and* CHAP. III, *An act for amending an act, intituled, An act for making provision against invasions and insurrections, At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh*

day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia, Volume 6, at 544.

CHAP. IV, *An Act for reducing the several acts for making provision against invasions and insurrections into one act*, § XIX, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday, the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 115. *Continued*, CHAP. IV, *An Act for continuing an act, intituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758, *in Laws of Virginia*, Volume 7, at 237; CHAP. V, *An Act for further continuing an Act, intituled, An Act for reducing the several Acts for making provision against Invasions and Insurrections, into one Act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 275; CHAP. II, *An Act for further continuing an act, entituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the fifth of March*, 1761, *in Laws of Virginia*, Volume 7, at 384; CHAP. IV, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 539; CHAP. I, *An act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 30th of October*, 1764, *in Laws of Virginia*, Volume 8, at 37; CHAP. I, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 189; CHAP. V, *An Act for further continuing the Act, intituled an Act for reducing the several acts of Assembly for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in the City of Williamsburg, on Tuesday, in the seventh day of November*, 1769, *in Laws of Virginia*, Volume 8, at 334; CHAP. III, *An act for further continuing the act, intituled An act for reducing the several acts of assembly, for making provision against invasions and insurrections, into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Monday the tenth day of February, one thousand seven hundred and seventy-two, in Laws of Virginia*, Volume 8, at 514.

EN-1889 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § XI, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four, in Laws of Virginia*, Volume 11, at 493; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § XI, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five, in Laws of Virginia*, Volume 12, at 24.

EN-1890 — CHAP. V, *An Act for making more effectual provision against Invasions and Insurrections*, §§ XVII and XVIII, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg*, the first day *of February*, 1727, *in Laws of Virginia*, Volume 4, at 202-203. *Continued*, CHAP. IV, *An act to continue the Act, for making more effectual provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, [1727]. *And from thence continued, by several prorogations, to the eighteenth day of May*, 1732, *in Laws of Virginia*, Volume 4, at 323; CHAP. IV, *An Act for further continuing the Act*, For making more effectual provision against Invasions and Insurrections, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, [1727]. *And from thence continued, by several prorogations, to the twenty second day of August*, 1734, *in Laws of Virginia*, Volume 4, at 395; CHAP. III, *An Act, for reviving the Act, For making more effective provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, summoned TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 24; CHAP. VI, *An Act, for continuing and amending the Act*, Intituled, *An Act, for making more effectual Provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on Friday the first day of August*, [1735]. *And from thence continued, by several prorogations to the twenty second day of May*, 1740, *in Laws of Virginia*, Volume 5, at 99; CHAP. IV, *An Act, for continuing an Act, made in the first year of his majesty's reign, intituled, an Act for making more effectual provision against invasions and insurrections; and one other act, intituled, an Act, for continuing and amending the aforementioned Act*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on Thursday, the sixth day of May*, [1741]. *And from thence continued, by several prorogations, to*

Tuesday, the fourth day of September, 1744, *in Laws of Virginia*, Volume 5, at 228.

EN-1891 — CHAP. IV, *An Act directing the trial of Slaves, committing capital crimes; and for the more effectual punishing conspiracies and insurrections of them; and for the better government of Negros, Mulattos, and* Indians, *bond or free*, § II, AT A GENERAL ASSEMBLY SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December,* 1722, *and by writ of prorogation, begun and holden on the ninth day of May,* 1723, *in Laws of Virginia*, Volume 4, at 126; CHAP. XXXVIII, *An Act directing the trial of Slaves committing capital crimes; and for the more effectual punishing of conspiracies and insurrections of them; and for the better government of negroes, mulattoes, and Indians, bond and free*, § II, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *The College in Williamsburg, the twenty-seventh day of October*, 1748, *in Laws of Virginia*, Volume 6, at 105.

EN-1892 — CHAP. IV, *An Act directing the trial of Slaves, committing capital crimes; and for the more effectual punishing conspiracies and insurrections of them; and for the better government of Negros, Mulattos, and* Indians, *bond or free*, § III, AT A GENERAL ASSEMBLY SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December,* 1722, *and by writ of prorogation, begun and holden on the ninth day of May,* 1723, *in Laws of Virginia*, Volume 4, at 127; CHAP. XXXVIII, *An Act directing the trial of Slaves committing capital crimes; and for the more effectual punishing of conspiracies and insurrections of them; and for the better government of negroes, mulattoes, and Indians, bond and free*, § VI, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *The College in Williamsburg, the twenty-seventh day of October*, 1748, *in Laws of Virginia*, Volume 6, at 105.

EN-1893 — CHAP. IV, *An Act directing the trial of Slaves, committing capital crimes; and for the more effectual punishing conspiracies and insurrections of them; and for the better government of Negros, Mulattos, and* Indians, *bond or free*, § XVI, AT A GENERAL ASSEMBLY SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December,* 1722, *and by writ of prorogation, begun and holden on the ninth day of May,* 1723, *in Laws of Virginia*, Volume 4, at 131-132. *Accord,* CHAP. XXXVIII, *An Act directing the trial of Slaves committing capital crimes; and for the more effectual punishing of conspiracies and insurrections of them; and for the better government of negroes, mulattoes, and Indians, bond and free*, § XXII, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *The College in Williamsburg, the twenty-seventh day of October*, 1748, *in Laws of Virginia*, Volume 6, at 111.

EN-1894 — CHAP. IV, *An Act directing the trial of Slaves, committing capital crimes; and for the more effectual punishing conspiracies and insurrections of them; and for the better government of Negros, Mulattos, and* Indians, *bond or free*, § XX, AT A GENERAL ASSEMBLY SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December,* 1722, *and by writ of prorogation, begun and holden on the ninth day of May,* 1723, *in Laws of Virginia*, Volume 4, at 133. *Accord,* CHAP. XXXVIII, *An Act directing the trial of Slaves committing capital crimes; and for the more effectual punishing of conspiracies and insurrections of them; and for the better government of negroes, mulattoes, and Indians, bond and free*, § XXV, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *The College in Williamsburg, the twenty-seventh day of October*, 1748, *in Laws of Virginia*, Volume 6, at 111-112.

EN-1895 — CHAP. IV, *An Act directing the trial of Slaves, committing capital crimes; and for the more effectual punishing conspiracies and insurrections of them; and for the better government of Negros, Mulattos, and* Indians, *bond or free*, § VIII, AT A GENERAL ASSEMBLY SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December,* 1722, *and by writ of prorogation, begun and holden on the ninth day of May,* 1723, *in Laws of Virginia*, Volume 4, at 128-129.

EN-1896 — CHAP. XXXVIII, *An Act directing the trial of Slaves committing capital crimes; and for the more effectual punishing of conspiracies and insurrections of them; and for the better government of negroes, mulattoes, and Indians, bond and free*, § XIII, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *The College in Williamsburg, the twenty-seventh day of October*, 1748, *in Laws of Virginia*, Volume 6, at 107-108.

EN-1897 — CHAP. IV, *An Act directing the trial of Slaves, committing capital crimes; and for the more effectual punishing conspiracies and insurrections of them; and for the better government of Negros, Mulattos, and* Indians, *bond or free*, § X, AT A GENERAL ASSEMBLY SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December,* 1722, *and by writ of prorogation, begun and holden on the ninth day of May,* 1723, *in Laws of Virginia*, Volume 4, at 129. *Accord,* CHAP. XXXVIII, *An Act directing the trial of Slaves committing capital crimes; and for the more effectual punishing of conspiracies and insurrections of them; and for the better government of negroes, mulattoes, and Indians, bond and free*, § XV, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *The College in Williamsburg, the twenty-seventh day of October*, 1748, *in Laws of Virginia*, Volume 6, at 108.

EN-1898 — CHAP. IV, *An Act directing the trial of Slaves, committing capital crimes; and for the more effectual punishing conspiracies and insurrections of them; and for the better government of Negros, Mulattos, and* Indians, *bond or free*, §§ XI and XII, AT A GENERAL ASSEMBLY SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December,* 1722, *and by writ of prorogation, begun and holden on the ninth day of May,* 1723, *in Laws of Virginia*, Volume 4, at 129-130. *Accord,* CHAP. XXXVIII, *An Act directing the trial of Slaves committing capital crimes; and for the more effectual punishing of conspiracies and insurrections of them; and for the better government of negroes, mulattoes, and Indians, bond and free*, § XVI, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *The College*

in Williamsburg, the twenty-seventh day of October, 1748, *in Laws of Virginia*, Volume 6, at 109.

EN-1899 — CHAP. II, *An Act for the better regulating and training the Militia*, § XXVIII, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five*, *in Laws of Virginia*, Volume 6, at 544.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § XXIX, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday, the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven*, *in Laws of Virginia*, Volume 7, at 106. *Continued*, CHAP. IV, *An Act for continuing an Act, intituled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one*, *in Laws of Virginia*, Volume 8, at 503.

EN-1900 — CHAP. III, *An act for amending an act, intituled, An act for making provision against invasions and insurrections*, § IX, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five*, *in Laws of Virginia*, Volume 6, at 548.

CHAP. IV, *An Act for reducing the several acts for making provision against invasions and insurrections into one act*, § VII, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday, the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven*, *in Laws of Virginia*, Volume 7, at 110. *Continued*, CHAP. IV, *An Act for continuing an act, intituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758, *in Laws of Virginia*, Volume 7, at 237; CHAP. V, *An Act for further continuing an Act, intituled, An Act for reducing the several Acts for making provision against Invasions and Insurrections, into one Act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 275; CHAP. II, *An Act for further continuing an act, entituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the fifth of March*, 1761, *in Laws of Virginia*, Volume 7, at 384; CHAP. IV, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 539; CHAP. I, *An act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 30th of October*, 1764, *in Laws of Virginia*, Volume 8, at 37; CHAP. I, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November*, 1766, *in Laws of Virginia*, Volume 8, at 189; CHAP. V, *An Act for further continuing the Act, inituled an Act for reducing the several acts of Assembly for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in the City of Williamsburg, on Tuesday, in the seventh day of November*, 1769, *in Laws of Virginia*, Volume 8, at 334; CHAP. III, *An act for further continuing the act, intituled An act for reducing the several acts of assembly, for making provision against invasions and insurrections, into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Monday the tenth day of February, one thousand seven hundred and seventy-two*, *in Laws of Virginia*, Volume 8, at 514.

EN-1901 — Att a Councill held at Middle Plantation Decemb^{r} 9th 1690, *in Executive Journals of Virginia*, Volume 1, at 139.

EN-1902 — Att a Councill held at Middle Plantation Decembr 9th 1690, *in Executive Journals of Virginia*, Volume 1, at 140.

EN-1903 — Att a Councill held at James Citty March the 7th 1690 [1690-91], *in Executive Journals of Virginia*, Volume 1, at 164.

EN-1904 — [Number] 29, LAWS and ORDERS *Concluded on by the General Assembly, March the 5th*, 1623-4, *in Laws of Virginia*, Volume 1, at 127, *reënacted as* ACT XLIV *by* A GRAND ASSEMBLY HOLDEN AT JAMES CITTY THE 4TH DAY OF SEPTEMBER, 1632, *in Laws of Virginia*, Volume 1, at 198.

EN-1905 — ACT XII, NOVEMBER 20, 1654, ATT AN ASSEMBLY HELD AT JAMES CITTIE, [Session of 10 March 1655-1656], *in Laws of Virginia*, Volume 1, at 401-402. *Substantially reënacted by* ACT CIV, *Against Shooteing at Drinkeings*, AT A GRAND ASSEMBLY HELD AT JAMES CITTIE, MARCH 13th, 1657-8, *in Laws of Virginia*, Volume 1, at 480.

ACT CXIX, *Against Shooting*, AT A GRAND ASSEMBLY HELD AT JAMES CITY MARCH THE 23D 1661-2, *in Laws of Virginia*, Volume 2, at 126.

EN-1906 — ACT III, *The Sabboth to bee kept holy*, AT A GRAND ASSEMBLY HELD AT JAMES CITTIE, MARCH 13th, 1657-8, *in Laws of Virginia*, Volume 1, at 434.

EN-1907 — ACT X, *An act that no Armes or Amunition be sould to the Indians*, ACTS MADE BY THE GRAND ASSEMBLY, HOLDEN AT JAMES CITTY, THE 21st AUGUST, 1633, *in Laws of Virginia*, Volume 1, at 219, *criminal penalty continued by* ACT XVII, ATT A GRAND ASSEMBLY, 6TH JANUARY, 1639, *in Laws of Virginia*, Volume 1, at 227.

EN-1908 — ACT XXII, AT A GRAND ASSEMBLIE HOLDEN AT JAMES CITTY THE SECOND DAY OF MARCH, 1642-3, *in Laws of Virginia*, Volume 1, at 255.

EN-1909 — ACT XXIII, AT A GRAND ASSEMBLIE HOLDEN AT JAMES CITTY THE SECOND DAY OF MARCH, 1642-3, *in Laws of Virginia*, Volume 1, at 255-256, *substantially reënacted by* ACT XVII, *No Amunition to be Sent or Sold to the Indians*, AT A GRAND ASSEMBLY HELD AT JAMES CITTIE, MARCH 13TH, 1657-8, *in Laws of Virginia*, Volume 1, at 441.

EN-1910 — ACT III, *Act concerning Imploying Indians with Guns*, NOVEMBER 20, 1654, ATT AN ASSEMBLY HELD AT JAMES CITTIE, *in Laws of Virginia*, Volume 1, at 391, *reënacted by* ACT LXXVIII, *Against Imploying Indians with Gunns*, AT A GRAND ASSEMBLY HELD AT JAMES CITTIE, MARCH 13th, 1657-8, *in Laws of Virginia*, Volume 1, at 470.

EN-1911 — ACT III, *An act prohibiting the sale of armes to Indians*, AT A GRAND ASSEMBLIE, HELD AT JAMES CITTIE BY PROROGATION FROM SEPTEMBER THE TWENTIETH 1664, TO OCTOBER THE TENTH 1665, *in Laws of Virginia*, Volume 2, at 215 (footnotes omitted).

EN-1912 — ACT II, *An act prohibiting trade with Indians*, AT A GRAND ASSEMBLIE HELD ATT JAMES CITTIE BY PROROGATION FROM THE ONE AND TWENTIETH DAY OF SEPTEMBER, 1674, TO THE SEAVENTH DAY OF MARCH, [1675,] *in Laws of Virginia*, Volume 2, at 336-337.

EN-1913 — ACT I, *An act for carrying on a warre against the barbarous Indians*, AT A GRAND ASSEMBLIE, HOLDEN AT JAMES CITTIE THE FIFTH DAY OF JUNE 1676, *in Laws of Virginia*, Volume 2, at 342.

EN-1914 — CHAP. XXV, *An act to prevent Indians hunting and ranging upon patented lands*, §§ I, II, and III, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 343.

EN-1915 — CHAP. LII, *An act for prevention of misunderstandings between the tributary* Indians, *and other her majesty's subjects of this colony and dominion*; *and for the free and open trade with all Indians whatsoever*, §§ VIII and IX, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 467.

EN-1916 — October the 25th 1707, *in Executive Journals of Virginia*, Volume 3, at 159. *Accord*, At a Council held at the Capitol the 4thof June, 1708, *in Executive Journals of Virginia*, Volume 3, at 182.

EN-1917 — ACT IV, *Indians to use their owne Gunns*, ATT A GRAND ASSEMBLY, HELD AT JAMES CITTIE, MARCH 7, 1658-9, *in Laws of Virginia*, Volume 1, at 518.

EN-1918 — ACT XXIV, *Free Trade with the Indians*, ATT A GRAND ASSEMBLY, HELD AT JAMES CITTIE, MARCH 7, 1658-9, *in Laws of Virginia*, Volume 1, at 525.

EN-1919 — ATT A GRAND ASSEMBLIE HELD ATT JAMES CITTIE IN VIRGINIA THE 23RD OF MARCH 1660-1, *in Laws of Virginia*, Volume 2, at 39.

EN-1920 — AT A GRAND ASSEMBLY, BEGUNN AT GREEN SPRING THE 20TH DAY OF FEBRUARY, 1676-7, *in Laws of Virginia*, Volume 2, at 403.

EN-1921 — ACT III, *An act lycensing trading with Indians*, ATT A GRAND ASSEMBLY, BEGUNNE AT MIDDLE PLANTATION ATT THE HOUSE OF CAPT. OTHO THORPE THE 10TH DAY OF OCTOBER, 1677, *in Laws of Virginia* Volume 2, at 410, 412.

EN-1922 — ACT VIII, *An act lycensing a free trade with Indians*, AT A GENERALL ASSEMBLIE, BEGUNNE AT JAMES CITTIE THE EIGHTH DAY OF JUNE, 1680, *in Laws of Virginia*, Volume 2, at 480, *expanded in scope*, ACT IX, *An act for a free trade with Indians*, AT A GENERALL ASSEMBLY, BEGUN AT JAMES CITTY THE 16TH DAY OF APRIL, 1691, *in Laws of Virginia*, Volume 3, at 69.

EN-1923 — CHAP. LII, *An act for prevention of misunderstandings between the tributary* Indians, *and other her majesty's subjects of this colony and dominion; and for a free and open trade with all Indians whatsoever*, § XII, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 468.

EN-1924 — CHAP. XXXVI, *An Act to confirm the title of lands purchased of the Nottoway Indians, and for other purposes therein mentioned*, § III, *At a General Assembly, begun and held at the College, in Williamsburg, on Thursday the twenty-seventh day of February*, 1752, *in Laws of Virginia*, Volume 6, at 286.

EN-1925 — July the 10th 1718, *in Executive Journals of Virginia*, Volume 3, at 481-482.

EN-1926 — ACT X, *An act for preventing Negroes Insurrections*, AT A GENERALL ASSEMBLIE, BEGUNNE AT JAMES CITTIE THE EIGHTH DAY OF JUNE, 1680, *in Laws of Virginia*, Volume 2, at 481-482.

EN-1927 — ACT III, *An additionall act for the better preventing insurrections by Negroes*, ATT A GENERALL ASSEMBLY, BEGUNN ATT JAMES CITTY NOVEM. THE TENTH 1682, *in Laws of Virginia*, Volume 2, at 493. *Accord,* CHAP. XLIX, *An act concerning Servants and Slaves*, § XXXII, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia,* Volume 3, at 458-459.

EN-1928 — CHAP. XLIX, *An act concerning Servants and Slaves*, § XXXV, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 459.

EN-1929 — A Proclamation (21 March 1709 [1709/10]), *in Executive Journals of Virginia*, Volume 3, at 574.

EN-1930 — CHAP. IV, *An act directing the trial of Slaves, committing capital crimes; and for the more effectual punishing conspiracies and insurrections of them; and for the better government of Negros, Mulattos, and* Indians, *bond or free*, §§ I, II, VIII, IX, and X, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 126, 128-129.

EN-1931 — CHAP. LXXVIII, *An act declaring what persons shall be deemed mulattoes*, § I, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five*, *in Laws of Virginia*, Volume 12, at 184.

EN-1932 — CHAP. XXXVIII, *An Act directing the trial of Slaves committing capital crimes; and for the more effectual punishing conspiracies and insurrections of them; and for the better government of negroes, mulattoes, and Indians, bond or free*, §§ I, II, XIII, XV, XVII, and XVIII, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *The College in Williamsburg, the twenty-seventh day of October*, 1748, *in Laws of Virginia*, Volume 6, at 104-105, 107-108, 108, 109.

EN-1933 — CHAP. LXXVII, *An act concerning slaves*, §§ III and IV, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five*, *in Laws of Virginia*, Volume 12, at 182.

EN-1934 — ACT X, ATT A GRAND ASSEMBLY 6TH JANUARY, 1639, *in Laws of Virginia*, Volume 1, at 226.

EN-1935 — ACT X, *An act for preventing Negroes Insurrections*, AT A GENERALL ASSEMBLIE, BEGUNNE AT JAMES CITTIE THE EIGHTH DAY OF JUNE, 1680, *in Laws of Virginia*, Volume 2, at 481.

EN-1936 — CHAP. XLIX, *An act concerning Servants and Slaves*, § XXXV, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 459.

EN-1937 — A Proclamation (21 March 1709 [1709/10]), *in Executive Journals of Virginia*, Volume 3, at 574.

EN-1938 — CHAP. IV, *An act directing the trial of Slaves, committing capital crimes; and for the more effectual punishing conspiracies and insurrections of them; and for the better government of Negros, Mulattos, and* Indians, *bond or free*, §§ XIV and XV, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 131.

EN-1939 — CHAP. XXXVIII, *An Act directing the trial of Slaves committing capital crimes; and for the more effectual punishing conspiracies and insurrections of them; and for the better government of negroes, mulattoes, and Indians, bond or free*, §§ XVIII and XIX, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *The College in Williamsburg, the twenty-seventh day of October*, 1748, *in Laws of Virginia*, Volume 6, at 109-110.

EN-1940 — CHAP. LXXVII, *An act concerning slaves*, § IV, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five*, *in Laws of Virginia*, Volume 12, at 182.

EN-1941 — CHAP. XXII, An act to amend an act entitled, "an act reducing into one the several acts concerning slaves, free negroes and mulattoes, and for other purposes" [Passed March 15th, 1832], § 4, ACTS PASSED AT A GENERAL ASSEMBLY OF THE COMMONWEALTH OF VIRGINIA, BEGUN AND HELD AT THE CAPITOL, IN THE CITY OF RICHMOND, ON MONDAY, THE FIFTH DAY OF DECEMBER, ONE THOUSAND EIGHT HUNDRED AND THIRTY-ONE (Richmond, Virginia: Thomas Ritchie, 1832), at 21.

EN-1942 — *Executive Journals of Virginia*, Volume 6, at 669-670. Dunmore's broadside is reproduced in James O. Horton & Lois E. Horton, *Slavery and the Making of America* (New York, New York: Oxford University Press, 2005), at 60.

EN-1943 — CHAP. I, *An Ordinance for raising an additional number of forces for the defence and protection of this colony, and for other purposes therein mentioned, At a Convention of Delegates held at the town of Richmond, in the colony of Virginia, on Friday the first of December, one thousand seven hundred and seventy-five*, *in Laws of Virginia*, Volume 9, at 75.

EN-1944 — CHAP. VII, *An ordinance for establishing a mode of punishment for the enemies to America in this colony, At a Convention of Delegates held at the town of Richmond, in the colony of Virginia, on Friday the first of December, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 106.

EN-1945 — CHAP. II, *An act for the more speedily completeing the Quota of Troops to be raised in this commonwealth for the continental army, and for other purposes*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven*, *in Laws of Virginia*, Volume 9, at 280.

EN-1946 — *See* CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 335-336 ("any servant by importation, or any slave" explicitly exempted).

CHAP. II, *An Act for the settling and better Regulation of the Militia*, § II, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 118.

CHAP. II, *An Act, for the better Regulation of the Militia*, § II, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 16.

CHAP. II, *An Act for the better regulating and training the Militia*, §§ III and VII, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five*, *in Laws of Virginia*, Volume 6, at 531 ("imported servants excepted"), 533 (only "free mulattoes, negroes and Indians" to be listed).

CHAP. III, *An Act for the better regulating and disciplining the Militia*, §§ II and VII, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven*, *in Laws of Virginia*, Volume 7, at 93 ("imported servants excepted"), 95 (only "free mulattoes, negroes, and Indians" to be listed). *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia*, § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of*

Virginia, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 27.

CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 267.

CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § II, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four, in Laws of Virginia*, Volume 11, at 476.

CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § III, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five, in Laws of Virginia*, Volume 12, at 10.

EN-1947 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, § V, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 119.

CHAP. II, *An Act, for the better Regulation of the Militia*, § VI, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 17.

CHAP. II, *An Act for the better regulating and training the Militia*, § VII, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 533.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § VII, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 95. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1948 — CHAP. II, *An Act, for the better Regulation of the Militia*, § VI, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 17.

EN-1949 — *See* CHAP. II, *An Act for the settling and better Regulation of the Militia*, § V, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 119.

EN-1950 — CHAP. II, *An Act for the better regulating and training the Militia*, § VII, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 533.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § VII, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence*

continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia, Volume 7, at 95. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1951 — CHAP. IV, *An Act for disarming Papists, and reputed Papists, refusing to take the oaths to the government*, §§ I, III, IV, and VII, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *in Laws of Virginia*, Volume 7, at 35-36, 36-37, 38.

EN-1952 — CHAP. VII, *An Ordinance to amend an ordinance entitled an ordinance for establishing a mode of punishment for the enemies of America in this colony, At a General Convention of Delegates and Representatives, from the several counties and corporations of Virginia, held at the Capitol in the City of Williamsburg, on Monday the 6th of May*, 1776, *in Laws of Virginia*, Volume 9, at 130-131.

EN-1953 — CHAP. III, *An act to oblige the free white male inhabitants of this state above a certain age to give assurance of Allegiance to the same, and for other purposes*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 281-282.

EN-1954 — *See* CHAP. II, *An Act, for the better Regulation of the Militia*, § VI, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 17.

CHAP. II, *An Act for the better regulating and training the Militia*, § VII, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 533.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § VII, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 95. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1955 — CHAP. VII, *An act for giving certain powers to the governour and council, and for punishing those who shall oppose the execution of laws*, AT A GENERAL ASSEMBLY, BEGIN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the seventh day of* May, *one thousand and seven hundred and eighty-one, in Laws of Virginia*, Volume 10, at 413-415.

EN-1956 — ACT XXI, ATT A GRAND ASSEMBLY 6TH JANUARY, 1639, *in Laws of Virginia*, Volume 1, at 228.

EN-1957 — ACT XI, AT A GRAND ASSEMBLIE HOLDEN AT JAMES CITTY THE SECOND DAY OF MARCH, 1642-3, *in Laws of Virginia*, Volume 1, at 248, *reënacted by* Act XIII, *Against shooting on other Mens' Lands*, AT A GRAND ASSEMBLY HELD AT JAMES CITTIE, MARCH 13th, 1657-8, *in Laws of Virginia*, Volume 1, at 437; *and substantially reënacted by* ACT LXXI, *Not to shoote or range upon other mens lands*, AT A GRAND ASSEMBLY HELD AT JAMES CITY MARCH THE 23D 1661-2, *in Laws of Virginia*, Volume 2, at 96. *See also* ACT X, ATT A GRAND ASSEMBLY HOLDEN ATT JAMES CITTY THE 17TH OF *February*, 1644-5, *in Laws of Virginia*, Volume 1, at 294 (amending the penalty to "100 pound of tobaccoe").

EN-1958 — ACT XXXV, AT A GRAND ASSEMBLIE HOLDEN AT JAMES CITTY THE SECOND DAY OF MARCH, 1642-3, *in Laws of Virginia*, Volume 1, at 261.

EN-1959 — CHAPTER CCCCV, AN ACT FOR THE BETTER ORDERING AND REGULATING SUCH AS ARE WILLING AND DESIROUS TO BE UNITED FOR MILITARY PURPOSES WITHIN THIS PROVINCE (25 November 1775), At a General Assembly begun and holden at Philadelphia, the fourteenth day of October, 1755, and continued by adjournments until the twenty-fourth day of September, 1756, *in Pennsylvania Statutes*, Volume 5, at 197-201.

EN-1960 — At the Court at Kensington, the 7th day of July, 1756, *in Pennsylvania Statutes,* Volume 5, Appendix XXI, at 532.

EN-1961 — CHAPTER DCCL, AN ACT TO REGULATE THE MILITIA OF THE COMMONWEALTH OF PENNSYLVANIA (17 March 1777), Laws enacted in the first sitting of the first general assembly of the commonwealth of Pennsylvania, which began at Philadelphia, November 28, 1776, and was continued by adjournments to March 21, 1777, *in Pennsylvania Statutes,* Volume 9, at 75-94; CHAPTER DCCLX, A SUPPLEMENT TO THE ACT, ENTITLED "AN ACT TO REGULATE THE MILITIA OF THE COMMONWEALTH OF PENNSYLVANIA" (19 June 1777), *in Pennsylvania Statutes*, Volume 9, at 131-136; CHAPTER DCCLXXIII, AN ACT FOR MAKING MORE EQUAL THE BURDEN OF THE PUBLIC DEFENSE AND FOR FILLING THE QUOTA OF TROOPS TO BE RAISED IN THIS STATE (26 December 1777), *in Pennsylvania Statutes*, Volume 9, at 167-169; CHAPTER DCCLXXXI, A FURTHER SUPPLEMENT TO THE ACT, ENTITLED "AN ACT TO REGULATE THE MILITIA OF THE COMMONWEALTH OF PENNSYLVANIA" (30 December 1777), *in Pennsylvania Statutes*, Volume 9, at 185-189.

EN-1962 — **VIRGINIA:** CHAP. V, *An Act for making more effectual provision against Invasions and Insurrections*, § VIII, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg*, the first day *of February*, 1727, *in Laws of Virginia*, Volume 4, at 200 ("the officers and soldiers which shall be drawn out into actual service"); CHAP. II, *An Act for amending the several acts, for making provision against invasions and insurrections, and for amending and explaining an act passed this present session of Assembly, intituled, An Act for raising the sum of twenty five thousand pounds for the better protection of the inhabitants on the frontiers of this colony, and for other purposes therein mentioned*, § X, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *in Laws of Virginia*, Volume 7, at 31 ("when the militia of any county shall be drawn out into actual service"); CHAP. XXXIX, *An Act for making provision against Invasions and Insurrections*, § VIII, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *The College in Williamsburg, the twenty-seventh day of October*, 1748, *in Laws of Virginia*, Volume 6, at 116 ("the officers and soldiers drawn out into actual service"); CHAP. IV, *An Act for reducing the several acts for making provision against invasions and insurrections into one act*, § XII, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday, the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven*, *in Laws of Virginia*, Volume 7, at 112 ("the officers and soldiers drawn out into actual service"); CHAP. I, *An act for appointing commissioners to examine and state the accounts of the militia lately ordered out into actual service, and for other purposes therein mentioned*, § I, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May,* 1761, *and from thence continued by several prorogations to Thursday the 12th of January*, 1764, *in Laws of Virginia*, Volume 8, at 9 ("several companies of the militia * * * drawn out into actual service"); CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § IV, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November*[,] 1766, *in Laws of Virginia*, Volume 8, at 247-248 ("the militia * * * shall be drawn out into actual service"); CHAP. I, *An act to embody militia for the relief of South Carolina, and for other purposes*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the first day of* May, *one thousand seven hundred and eighty*, *in Laws of Virginia*, Volume 10, at 225 ("when ordered into actual service"); CHAP. VIII, *An act to amend the act for regulating and disciplining the militia, and for other purposes*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the seventh day of* May, *one thousand seven hundred and eighty-one*, *in Laws of Virginia*, Volume 10, at 416 ("every militia-man ordered into actual service"), 418 ("any militia-man deserting while in actual service"); CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, §§ VII and XI, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four*, *in Laws of Virginia*, Volume 11, at 487-488 ("called forth

into actual service", "be in actual service", "discharge from actual service"), 492 ("to send into actual service any militia"); CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, §§ VI and XI, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five, in Laws of Virginia*, Volume 12, at 18-19 ("called forth into actual service", "be in actual service", "discharge from actual service"), 22 ("send into actual service any militia"); CHAP. II, *An act to amend the act for regulating and disciplining the militia, and for other purposes*, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the sixteenth day of October*[,] *one thousand seven hundred and eighty-six, in Laws of Virginia*, Volume 12, at 234 ("when called into actual service"); CHAP. II, *An act to amend the several acts respecting the militia*, § V, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the fifteenth day of October*[,] *one thousand seven hundred and eighty-seven, in Laws of Virginia*, Volume 12, at 433 ("to order out into actual service").

RHODE ISLAND: *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at East Greenwich, on Tuesday, the 10th day of December,* 1776, *in Rhode Island Records,* Volume 8, at 66 ("in actual service"); At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island* and *Providence Plantations,* begun and holden, by Adjournment, at *Providence,* within and for the said State, on Monday the Twenty-third Day of *December*, One Thousand, Seven Hundred and Seventy-Six, *in Rhode Island Acts and Resolves*, Volume 8 [9], at {16} ("in actual Service"); An Act in addition to an act, entituled "An act for the relief of persons of tender consciences; and for preventing their being burthened with military duty", *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at South Kingstown, on Thursday, the 17th day of April*, 1777, *in Rhode Island Records*, Volume 8, at 207 ("detached for actual service"); At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden (in Consequence of *Warrants* issued by his Excellency the Governor) at *Providence*, within and for the State aforesaid, on *Friday* the Nineteenth Day of *December,* One Thousand Seven Hundred and Seventy-seven, *in Rhode Island Acts and Resolves*, Volume 9 [10], at {11} ("called into actual Service"); *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at Providence, on Thursday, the 28th day of May,* 1778, *in Rhode Island Records,* Volume 8, at 417 ("in actual service"); AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden (in Consequence of Warrants issued by his Excellency the Governor) at *Providence*, within and for the State aforesaid, on *Tuesday*, the Third Day of *July*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {3} ("held in actual Service"). *See also* At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations,* begun and holden (in Consequence of Warrants issued by his Excellency the Governor) at *Providence,* within and for the State aforesaid, on *Monday* the Seventh Day of *July,* One Thousand Seven Hundred and Seventy-seven, *in Rhode Island Acts and Resolves,* Volume 9 [10], at {6} ("on actual Duty").

EN-1963 — **VIRGINIA:** ACT VII, *An Act for the better defence of the Country*, ATT A GENERALL ASSEMBLY, BEGUN AT JAMES CITTY THE SIXTEENTH DAY OF APRILL, ONE THOUSAND SIX HUNDRED EIGHTY-FOUR, *in Laws of Virginia*, Volume 3, at 20 ("in any actual engagement against the enemie"); CHAP. XXII, *An Act, to prevent the Inhabitants of the Borough of* Norfolk, *from being compelled to serve in the Militia of the County of* Norfolk; *and to exempt Sailors or Seamen, in actual pay on board any Ship or Vessel, from serving in the Militia*, § VI, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 82 ("during the time he is in actual pay"); CHAP. I, *An act for raising Volunteers to join the Grand Army*, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fourth day of May, one thousand seven hundred and seventy eight, in Laws of Virginia*, Volume 9, at 446 ("an actual invasion of this commonwealth"); CHAP. XII, *An act for speedily recruiting the quota of this state for the continental army*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the first day of* May, *one thousand seven hundred and eighty, in Laws of Virginia*, Volume 10, at 259 ("except in case of actual invasion"); CHAP. I, *An act to raise two legions for the defence of the state*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Thursday *the first day of* March, *one thousand seven hundred and eighty-one, in Laws of Virginia*, Volume 10, at 391 ("in cases of actual or threatened invasion"); CHAP. X, *An act to amend and reduce the several acts of assembly for the inspection of tobacco, into one act*, § XLVII, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the fifth day of May, one thousand seven hundred and eighty-three, in Laws of Virginia*, Volume 11, at 246 ("except in case of actual invasion or insurrection").

RHODE ISLAND: An ACT for putting this Colony in a Posture of Defence, and for rend'ring the *Militia* in the several Towns thereof, more Useful in Time of an *Actual Invasion*, LAWS, Made and pass'd by the General Assembly of His Majesty's Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*; held by Adjournment, at *Newport*, the Twenty Second Day of *May*, 1744, *in Public Laws of Rhode Island, 1744*, at 288 ("*in the Time of an Actual Invasion*"); At the General Assembly of the Governor and Company of the State

of *Rhode-Island* and *Providence Plantations*, begun and holden (in Consequence of Warrants issued by his Excellency the Governor) at *Providence*, within and for the State aforesaid, on *Monday* the Seventh Day of *July*, One Thousand Seven Hundred and Seventy-seven, *in Rhode Island Acts and Resolves*, Volume 9 [10], at {5} ("called upon actual Duty"); An ACT for the confiscating the Estates of certain Persons therein described, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {24} ("during the actual Invasion of Enemies").

EN-1964 — CHAP. II, *An Act to explain an act, intituled, An act for raising the sum of twenty thousand pounds, for the protection of his majesty's subjects, against the insults and encroachments of the French; and for other purposes therein mentioned*, § IX, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Thursday the first day of May, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 465 (emphasis supplied).

EN-1965 — **VIRGINIA:** ACT II, *An act prohibiting trade with Indians*, AT A GRAND ASSEMBLIE HELD ATT JAMES CITTIE BY PROROGATION FROM THE ONE AND TWENTIETH DAY OF SEPTEMBER, 1674, TO THE SEAVENTH DAY OF MARCH, 1676, *in Laws of Virginia*, Volume 2, at 337 ("actually tradeing, trucking, bartering, selling or uttering to or with the Indians"); CHAP. II, *An Act for the better regulating and training the Militia*, § IV, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 531 ("an overseer over four servants or slaves, and actually residing on the plantation where they work"); CHAP. XIII, *An Act for granting protection to certain persons, and for other purposes therein mentioned*, § I, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *in Laws of Virginia*, Volume 7, at 58 ("persons, who shall actually go into the service and defence of the country * * * shall * * * be exempted from being drafted in the militia"); CHAP. III, *An Act for the better regulating and disciplining the Militia*, § III, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday, the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 93 ("an overseer over four servants or slaves * * * and actually residing on the plantation where they work"); CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § II, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the* 26th of May, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 534 ("all persons bred to and actually practising physick or surgery"); CHAP. I, *An Act for speedily recruiting the Virginia Regiments on the continental establishment, and for raising additional troops of Volunteers*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the twentieth day of October, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 340 ("those who enlist * * * , shall after such service be exempted from all other draughts for the regular service, for so long a time after their discharge as they shall have actually served"); CHAP. IV, *An act to exempt artificers employed at iron works from militia duty*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Thursday *the first day of* March, *one thousand seven hundred and eighty-one, in Laws of Virginia*, Volume 10, at 397 ("every artificer actually and necessarily employed at any iron works * * * shall be exempted from all military duty"); CHAP. XV, *An act to indemnify certain persons in suppressing a conspiracy against this state*, § I, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the twenty-first day of October, one thousand seven hundred and eighty-two, in Laws of Virginia,* Volume 11, at 134 ("divers evil disposed persons * * * formed a conspiracy and did actually attempt to levy war against the commonwealth").

RHODE ISLAND: THE CHARTER Granted by His MAJESTY King *CHARLES* The Second TO THE COLONY OF Rhode-Island, AND Providence-Plantations, In *AMERICA*, July 8, 1663, *in Public Laws of Rhode Island, 1730*, Charter, at 2 ("do not Actually disturb the Civil Peace").

EN-1966 — *Proceedings of a Meetinge of the Generall Assembly, May the fowerth*, 1664, *at Newport, in Rhode Island Records*, Volume 2, at 51.

EN-1967 — *Acts and Orders of the Generall Assembly, sitting at Newport, May the* 3, 1665, *in Rhode Island Records*, Volume 2, at 114.

EN-1968 — *Proceedings of the Generall Assembly held for the Collony of Rhode Island and Providence Plantations at Newport, the 4th of September*, 1666, *in Rhode Island Records*, Volume 2, at 171.

EN-1969 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Newport, the 14th day of June*, 1726, *in Rhode Island Records*, Volume 4, at 377.

EN-1970 — An ACT in Addition to the several Acts regulating the Militia in this Colony, At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, in AMERICA; begun and held by Adjournment at *Providence*, on the first Monday of *February*, One Thousand Seven Hundred and Fifty-five, *in Rhode Island Acts and Resolves*, Volume 2, at {71}.

EN-1971 — CHAP. II, *An Act, for the better Regulation of the Militia*, § I, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 16. *Accord,* CHAP. II, *An Act for the better regulating and training the Militia*, § I, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 530.

EN-1972 — CHAP. I, *A* DECLARATION *of* RIGHTS *made by the representatives of the good people of* Virginia, *assembled in full and free Convention; which rights do pertain to them, and their posterity, as the basis and foundation of government*, Article 13, *At a General Convention of Delegates and Representatives, from the several counties and corporations of Virginia, held at the Capitol in the City of Williamsburg, on Monday the 6th of May,* 1776, *in Laws of Virginia*, Volume 9, at 111.

EN-1973 — An ACT for the better forming, regulating and conducting the military Force of this State, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {32}.

EN-1974 — CHAP. II, *An Act, for the better Regulation of the Militia*, §§ II and III, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 16-17 (emphasis supplied).

EN-1975 — CHAP. II, *An Act, for the better Regulation of the Militia*, §§ III and IV, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 16-17.

EN-1976 — CHAP. II, *An Act, for the better Regulation of the Militia*, § V, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 17.

EN-1977 — CHAP. II, *An Act, for the better Regulation of the Militia*, § VI, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 17.

EN-1978 — CHAP. II, *An Act, for the better Regulation of the Militia*, § X, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 21.

EN-1979 — At a Council held at the Capitol the 10th day of June 1731, *in Executive Journals of Virginia*, Volume 4, at 249.

EN-1980 — At a Council held at the Governors House November 4th 1742, *in Executive Journals of Virginia*, Volume 5, at 105.

EN-1981 — CHAP. II, *An Act, for the better Regulation of the Militia*, § VI, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 17.

CHAP. II, *An Act for the better regulating and training the Militia*, § VII, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 533.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § VII, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 95. *Continued*, CHAP. IV, *An Act for continuing an Act, intituled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia, At a General Assembly,*

begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 534; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 241; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty- nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1982 — CHAP. III, *An act to oblige the free white male inhabitants of this state above a certain age to give assurance of Allegiance to the same, and for other purposes*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 282.

EN-1983 — *See, e.g.,* CHAP. IV, *An act directing the trial of Slaves, committing capital crimes; and for the more effectual punishing conspiracies and insurrections of them; and for the better government of Negros, Mulattos, and* Indians, *bond or free*, § XIX, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 132-133; CHAP. XXXVIII, *An Act directing the trial of Slaves committing capital crimes; and for the more effectual punishing conspiracies and insurrections of them; and for the better government of negroes, mulattoes, and Indians, bond or free*, § XXIII, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *The College in Williamsburg, the twenty-seventh day of October*, 1748, *in Laws of Virginia*, Volume 6, at 111.

EN-1984 — *Quoted in Narratives of Early Virginia, 1606-1625*, Lyon G. Tyler, Editor (New York, New York: Charles Scribner's Sons, 1907), at 273. "The acts passed at the general assembly in 1619 * * * never received * * * sanction * * * in England", however, and therefore "could not have the force of laws". *Laws of Virginia*, Volume 1, at 122, note.

EN-1985 — ACT LI, A GRAND ASSEMBLY HOLDEN AT JAMES CITTY THE 21st OF ffEBRUARY, 1631-2, *in Laws of Virginia*, Volume 1, at 174. *Reënacted,* ACT XLV, A GRAND ASSEMBLY HOLDEN AT JAMES CITTY THE 4TH DAY OF SEPTEMBER, 1632, *in Laws of Virginia*, Volume 1, at 198.

EN-1986 — ACT XLI, AT A GRAND ASSEMBLIE HOLDEN AT JAMES CITTY THE SECOND DAY OF MARCH, 1642-3, *in Laws of Virginia*, Volume 1, at 263.

EN-1987 — CHAP. II, *An Act, for the better Regulation of the Militia*, §§ VIII and XIII, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 19, 22.

CHAP. II, *An Act for the better regulating and training the Militia*, § VIII, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 534.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 96. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-1988 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and*

seventy-five, *in Laws of Virginia*, Volume 9, at 29-30.

EN-1989 — *E.g.,* CHAP. II, *An Act for the settling and better Regulation of the Militia*, §§ V and VI, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg*, *the fifth day of December*, 1722, *and by writ of prorogation*, *begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 119.

CHAP. II, *An Act, for the better Regulation of the Militia*, §§ V and VI, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg*, *on the first day of August*, [1735]. *And from thence continued, by several prorogations*, *to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 17.

CHAP. II, *An Act for the better regulating and training the Militia*, §§ V, and VII, *At a General Assembly*, *begun and held at the College in the City of Williamsburg*, *on Thursday the twenty seventh day of February*, *one thousand seven hundred and fifty two. And from thence continued by several prorogations*, *to Tuesday the fifth day of August*, *one thousand seven hundred and fifty five*, *in Laws of Virginia*, Volume 6, at 531, 533.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, §§ IV, and VII, *At a General Assembly*, *begun and held at the Capitol*, *in Williamsburg*, *on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April*, *one thousand seven hundred and fifty-seven*, *in Laws of Virginia*, Volume 7, at 94, 95. *Continued*, CHAP. IV, *An Act for continuing an Act*, *intitutled*, *An Act for the better regulating and disciplining the Militia*, *At a General Assembly*, *begun and held at the Capitol*, *in Williamsburg*, *on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, §IX, *At a General Assembly*, *begun and held at the Capitol*, *in the City of Williamsburg*, *on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly*, *begun and held at the Capitol*, *in the City of Williamsburg*, *the seventh day of November*, *one thousand seven hundred and sixty-nine*, *and from thence continued by several prorogations*, *and convened by proclamation the eleventh day of July*, *one thousand seven hundred and seventy-one*, *in Laws of Virginia*, Volume 8, at 503.

EN-1990 — An ACT for the confiscating the Estates of certain Persons therein described, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves,* Volume 10 [12], at {24-25}.

EN-1991 — An ACT to organize the Militia of this State, §§ 4 and 5, At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence-Plantations*, begun and holden by Adjournment at *East-Greenwich*, within and for the State aforesaid, on the last *Monday* in *March*, One Thousand Seven Hundred and Ninety-four, *in Rhode Island Acts and Resolves,* Volume 16 [19], at 19-20.

EN-1992 — ACT XLIX, A GRAND ASSEMBLY HOLDEN AT JAMES CITTY THE 4TH DAY OF SEPTEMBER, 1632, *in Laws of Virginia*, Volume 1, at 199.

EN-1993 —An Act for the better regulating the militia, and for punishing offenders as shall not conform to the law thereunto relating, *At the Generall Assembly and Election held for the Collony at Newport, the 7th of May*, 1701, *in Rhode Island Records*, Volume 3, at 430. This statute is dated "1699" in LAWS AND ACTS OF RHODE ISLAND, AND PROVIDENCE PLANTATIONS Made from the First Settlement in 1636 to 1705, at 92, *reprinted from* J.D. Cushing, Editor, *The Earliest Acts and Laws of the Colony of Rhode Island and Providence Plantations* (Wilmington, Delaware: M. Glazier, 1977), at 107. Reprinted from a compilation dated "1705", it appears in *Military Obligation, Rhode Island*, at 37.

EN-1994 — An ACT in addition to, and amendment of, an Act entitled "An Act regulating the Militia of this Colony["], At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*; begun and holden, in Consequence of Warrants issued by his Honor the Governor, at *Providence*, within and for the said Colony, on the First Monday in *December*, One Thousand, Seven Hundred and Seventy-four, *in Rhode Island Acts and Resolves*, Volume 7, at {150}.

EN-1995 — At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island* and *Providence Plantations*, begun and holden (in Consequence of Warrants issued by his Excellency the Governor) at *Providence*, within and for the State aforesaid, on *Thursday* the Twenty-eighth Day of *May*, One Thousand Seven Hundred and Seventy-eight, *in Rhode Island Acts and Resolves*, Volume 9 [11], at {8}.

EN-1996 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on the second Monday in January*, 1776, *in Rhode Island Records*, Volume 7, at 423.

EN-1997 — An ACT for the better forming, regulating and conducting the military Force of this State, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {32}; An ACT for embodying and bringing into the Field Twelve Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and no longer Term, and not to be marched out of the same, At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden (by Adjournment) at *South-Kingstown*, within and for the State aforesaid, on the Fourth *Monday* in *February*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {8}.

EN-1998 — An ACT in Addition to, and Amendment of, an Act, passed in *October*, A.D. 1779, entituled, "An Act for the better forming, regulating and conducting, the military Force of this State", At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence-Plantations*, begun and holden, by Adjournment, at *South-Kingstown*, within and for the said State, on the Third *Monday* in *March*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {52}.

EN-1999 — *At the Generall Assembly and Election for the Collony at Newport, the 7th of May*, 1701, *in Rhode Island Records*, Volume 3, at 434; *At the Generall Assembly and Election held at Newport, the 2d of May*, 1705, *in Rhode Island Records*, Volume 3, at 526; An ACT in Addition to the several Acts regulating the Militia in this Colony, At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, in AMERICA; begun and held by Adjournment at *Providence*, on the first Monday of *February*, One Thousand Seven Hundred and Fifty-five, *in Rhode Island Acts and Resolves*, Volume 2, at {72}.

EN-2000 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on Wednesday, the 28th day of June*, 1775, *in Rhode Island Records*, Volume 7, at 358.

EN-2001 — An Act for the Repealing several Laws relating to the Militia within this Colony, and for further Regulation of the same, LAWS Made and Past by the General Assembly of His Majesties Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, begun and Held at *Newport*, the Seventh Day of *May*, 1718, and Continued by Adjournments to the Ninth Day of *September* following, *in Public Laws of Rhode Island, 1719*, at 87, *in Public Laws of Rhode Island, 1730*, at 93, *and in Public Laws of Rhode Island, 1744,* at 67; An ACT, regulating the Militia in this Colony, *in Public Laws of Rhode Island, 1767*, at 182.

EN-2002 — CHAP. XXIV, *An act for settling the Militia*, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 338; CHAP. II, *An Act for the settling and better Regulation of the Militia*, § VII, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg*, *the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 120; CHAP. II, *An Act, for the better Regulation of the Militia*, § V, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 17.

EN-2003 — CHAP. II, *An Act for the better regulating and training the Militia*, § V, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five*, *in Laws of Virginia*, Volume 6, at 532.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § XI, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven*, *in Laws of Virginia*, Volume 7, at 98. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and*

seventy-one, *in Laws of Virginia*, Volume 8, at 503.

EN-2004 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held* at Richmond town, in the county of Henrico, *on Monday the seventeenth day of July, one thousand seven hundred and seventy-five*, *in Laws of Virginia*, Volume 9, at 28.

EN-2005 — CHAP. I, *An act for regulating and disciplining the Militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven*, *in Laws of Virginia*, Volume 9, at 268-269.

EN-2006 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § II, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four*, *in Laws of Virginia*, Volume 11, at 478-479; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § III, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five*, *in Laws of Virginia*, Volume 12, at 12.

EN-2007 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, § IX, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 120; CHAP. II, *An Act, for the better Regulation of the Militia*, § XI, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 21.

EN-2008 — CHAP. II, *An Act for the better regulating and training the Militia*, § XIII, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 537-538.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § XIV, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 99. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-2009 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 31.

EN-2010 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § VI, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,]*one thousand seven hundred eighty-four*, *in Laws of Virginia*, Volume 11, at 485; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § VI, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five*, *in Laws of Virginia*, Volume 12, at 16.

EN-2011 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on the second Monday in January*, 1776, *in Rhode Island Records*, Volume 7, at 422-423.

EN-2012 — An Act for purchasing Two Thousand Arms for the Colony, &c., At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island* and *Providence Plantations*, in *New-England*, in *America*, begun and holden (in Consequence of Warrants issued by his Honor the Governor) at *East-Greenwich*, within and for the said Colony, on *Monday* the Eighteenth Day of *March*, One Thousand Seven Hundred and Seventy-six, *in Rhode Island Acts and Resolves,* Volume 8 [9], at {303, 304-305}.

EN-2013 — CHAP. V, *An Act for making more effectual provision against Invasions and Insurrections*, § XXI, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg*, *the first day of February*, 1727, *in Laws of Virginia*, Volume 4, at 203. *Continued,* CHAP. IV, *An act to continue the Act, for making more effectual provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg*, *the first day of February*, [1727]. *And from thence continued*, *by several prorogations*, *to the eighteenth day of May*, 1732, *in Laws of Virginia*, Volume 4, at 323; CHAP. IV, An Act for further continuing the Act, For making more effectual provision against Invasions and Insurrections, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg, the first day of February*, [1727]. *And from thence continued*, *by several prorogations*, *to the twenty second day of August*, 1734, *in Laws of Virginia*, Volume 4, at 395; CHAP. III, *An Act*, *for reviving the Act*, *For making more effective provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol*, *in the City of Williamsburg*, *on the first day of August*, [1735]. *And from thence continued*, *by several prorogations*, *to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 24; CHAP. VI, *An Act*, *for continuing and amending the Act*, Intituled, *An Act*, *for making more effectual Provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol*, *in the City of Williamsburg*, *on Friday the first day of August*, [1735]. *And from thence continued*, *by several prorogations, to the twenty second day of May*, 1740, *in Laws of Virginia*, Volume 5, at 99; CHAP. IV, *An Act*, *for continuing an Act*, *made in the first year of his majesty's reign*, *intituled*, *an Act for making more effectual provision against invasions and insurrections*; *and one other act*, *intituled*, *an Act*, *for continuing and amending the aforementioned Act*, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol*, *in the City of Williamsburg*, *on Thursday*, *the sixth day of May*, [1741]. *And from thence continued*, *by several prorogations*, *to Tuesday*, *the fourth day of September*, 1744, *in Laws of Virginia*, Volume 5, at 228.

CHAP. XXXIX, *An Act for making provision against Invasions and Insurrections*, § XII, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *The College in Williamsburg*, *the twenty-seventh day of October*, 1748, *in Laws of Virginia*, Volume 6, at 118. *Continued,* CHAP. II, *An Act for continuing an act*, *intituled*, *An Act for making provision against invasions and insurrections*, *At a General Assembly*, *begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February*, 1751. *And from thence continued by several prorogations*, *to Thursday the first day of November*, 1753, *in Laws of Virginia*, Volume 6, at 350.

CHAP. IV, *An Act for reducing the several acts for making provision against invasions and insurrections into one act*, § XV, *At a General Assembly*, *begun and held at the Capitol*, *in Williamsburg*, *on Thursday*, *the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April*, *one thousand seven hundred and fifty-seven*, *in Laws of Virginia*, Volume 7, at 113. *Continued*, CHAP. IV, *An Act for continuing an act*, *intituled*, *An Act for reducing the several acts for making provision against invasions and insurrections into one act*, *At a General Assembly*, *begun and held at the Capitol*, *in Williamsburg*, *on Thursday the fourteenth day of September*,1758, *in Laws of Virginia*, Volume 7, at 237; CHAP. V, *An Act for further continuing an Act*, *intituled*, *An Act for reducing the several Acts for making provision against Invasions and Insurrections*, *into one Act*, *At a General Assembly*, *begun and held at the Capitol*, *in Williamsburg*, *on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 275; CHAP. II, *An Act for further continuing an act*, *entituled*, *An Act for reducing the several acts for making provision against invasions and insurrections into one act*, *At a General Assembly*, *begun and held at the Capitol*, *in Williamsburg*, *on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the fifth of March*, 1761, *in Laws of Virginia*, Volume 7, at 384; CHAP. IV, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act*, *At a General Assembly*, *begun and held at the Capitol*, *in the City of Williamsburg*, *on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 539; CHAP. I, *An act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act*, *At a General Assembly*, *begun and held at the Capitol*, *in the City of Williamsburg*, *on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 30th of October*, 1764, *in Laws of Virginia*, Volume 8, at 37; CHAP. I, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act*, *At a General Assembly*, *begun and held at the Capitol in Williamsburg*, *on Thursday the sixth day of November*, 1766, *in Laws of Virginia*, Volume 8, at 189; CHAP. V, *An Act for further continuing the Act*, *inituled an Act for reducing the several acts of Assembly for making provision against invasions and insurrections into one act*, *At a General Assembly*, *begun and held at the Capitol in the City of Williamsburg*, *on Tuesday*, *in the seventh day of November*, 1769, *in Laws of Virginia*, Volume 8, at 334; CHAP. III, *An act for further continuing the act*, *intituled An act for reducing the several acts of assembly*, *for making provision against invasions and insurrections*, *into one act*, *At a General Assembly*, *begun and held at the Capitol*, *in the City of*

Williamsburg, *on Monday the tenth day of February*, *one thousand seven hundred and seventy-two*, *in Laws of Virginia*, Volume 8, at 514.

EN-2014 — CHAP. I, *An Ordinance for raising an additional number of forces for the defence and protection of this colony, and for other purposes therein mentioned, At a Convention of Delegates held at the town of Richmond, in the colony of Virginia, on Friday the first of December, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 90.

EN-2015 — CHAP. VII, *An act for providing against Invasions and Insurrections*, § II, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol*, *in the City of Williamsburg*, *on Monday the fifth day of May*, *one thousand seven hundred and seventy seven*, *in Laws of Virginia*, Volume 9, at 292.

EN-2016 — *Acts and Orders of the Generall Assembly, sitting at Newport, May the* 3, 1665, *in Rhode Island Records*, Volume 2, at 115 (emphasis supplied).

EN-2017 — *At the Generall Assembly and Election held for the Collony at Newport, the 7th of May*, 1701, *in Rhode Island Records*, Volume 3, at 433 (emphasis supplied).

EN-2018 — An ACT in Addition to the several Acts regulating the Militia in this Colony, At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*, in AMERICA; begun and held by Adjournment at *Providence*, on the first Monday of *February*, One Thousand Seven Hundred and Fifty-five, *in Rhode Island Acts and Resolves*, Volume 2, at {72} (emphasis supplied).

EN-2019 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on Wednesday, the 28th day of June*, 1775, *in Rhode Island Records*, Volume 7, at 358 (emphasis supplied).

EN-2020 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on the second Monday in January*, 1776, *in Rhode Island Records*, Volume 7, at 423 (emphasis supplied).

EN-2021 — An ACT for the better forming, regulating and conducting the military Force of this State, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {31-32}.

EN-2022 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, § IX, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg*, *the fifth day of December*, 1722, *and by writ of prorogation*, *begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 120 (emphasis supplied); CHAP. II, *An Act*, *for the better Regulation of the Militia*, § XI, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol*, *in the City of Williamsburg*, *on the first day of August*, [1735]. *And from thence continued*, *by several prorogations*, *to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 21 (emphasis supplied).

EN-2023 — CHAP. II, *An Act for the better regulating and training the Militia*, § XIII, *At a General Assembly*, *begun and held at the College in the City of Williamsburg*, *on Thursday the twenty seventh day of February*, *one thousand seven hundred and fifty two. And from thence continued by several prorogations*, *to Tuesday the fifth day of August*, *one thousand seven hundred and fifty five*, *in Laws of Virginia*, Volume 6, at 538 (emphasis supplied).

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § XIV, *At a General Assembly*, *begun and held at the Capitol*, *in Williamsburg*, *on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April*, *one thousand seven hundred and fifty-seven*, *in Laws of Virginia*, Volume 7, at 99 (emphasis supplied). *Continued*, CHAP. IV, *An Act for continuing an Act*, *intitutled*, *An Act for the better regulating and disciplining the Militia*, *At a General Assembly*, *begun and held at the Capitol*, *in Williamsburg*, *on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly*, *begun and held at the Capitol*, *in the City of Williamsburg*, *on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-2024 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 28 (emphasis supplied).

EN-2025 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 31 (emphasis supplied).

EN-2026 — An ACT in Addition to, and Amendment of, an Act, passed in *October*, A.D. 1779, entituled, "An Act for the better forming, regulating and conducting, the military Force of this State", At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence-Plantations*, begun and holden, by Adjournment, at *South-Kingstown*, within and for the said State, on the Third *Monday* in *March*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {52} (emphasis supplied).

EN-2027 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § VI, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four, in Laws of Virginia*, Volume 11, at 485 (emphasis supplied); CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § VI, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five, in Laws of Virginia*, Volume 12, at 16 (emphasis supplied).

EN-2028 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held* at Richmond town, in the county of Henrico, *on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 27.

EN-2029 — CHAP. II, *An Act for the settling and better Regulation of the Militia*, § IX, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 120.

CHAP. II, *An Act, for the better Regulation of the Militia*, § XI, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August*, [1735]. *And from thence continued, by several prorogations, to the first day of November*, 1738, *in Laws of Virginia*, Volume 5, at 21.

CHAP. II, *An Act for the better regulating and training the Militia*, § XIII, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 538.

CHAP. III, *An Act for the better regulating and disciplining the Militia*, § XIV, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 99. *Continued*, CHAP. IV, *An Act for continuing an Act, intitutled, An Act for the better regulating and disciplining the Militia, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September*, 1758; *and from thence continued by several prorogations to Thursday the twenty-second of February*, 1759, *in Laws of Virginia*, Volume 7, at 274; CHAP. III, *An Act for amending and further continuing the act for the better regulating and disciplining the Militia*, § IX, *At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May*, 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia*, Volume 7, at 538; CHAP. XXXI, *An act to continue and amend the act for the better regulating and disciplining the militia,* § X, *At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia*, Volume 8, at 245; CHAP. II, *An act for further continuing the act, intituled An act for the better regulating and disciplining the militia, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, the seventh day of November, one thousand seven hundred and sixty-nine, and from thence continued by several prorogations, and convened by proclamation the eleventh day of July, one thousand seven hundred and seventy-one, in Laws of Virginia*, Volume 8, at 503.

EN-2030 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia*, Volume 9, at 31.

EN-2031 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § VI, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four*, *in Laws of Virginia*, Volume 11, at 485; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, § VI, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five*, *in Laws of Virginia*, Volume 12, at 16.

EN-2032 — *E.g.*, *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, the 14th day of March,* 1757, *in Rhode Island Records*, Volume 6, at 35; An Act for raising one-sixth part of the militia in this colony, to proceed immediately to Albany, to join the forces which have marched, to oppose the French, near Lake George, *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Newport, on the 10th day of August*, 1757, *in Rhode Island Records*, Volume 6, at 76; An ACT for embodying, supplying and paying, the Army of Observation ordered to be raised for the Defence of the Colony, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in *America*, begun and holden at *Providence*, within and for the said Colony, on the First *Wednesday* in *May*, One Thousand Seven Hundred and Seventy-five, *in Rhode Island Acts and Resolves*, Volume 7 [8], at {8}; *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on the second Monday in January*, 1776, *in Rhode Island Records*, Volume 7, at 431, 432; An Act for raising, embodying, supplying and paying, two regiments of infantry, each consisting of seven hundred and fifty men; and a regiment or train of artillery, consisting of three hundred men, for the defence of the United States, in general, and of this state, in particular, *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at East Greenwich, on Tuesday, the 10th day of December*, 1776, *in Rhode Island Records*, Volume 8, at 62; *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at Providence, on the first Wednesday in May*, 1777, *in Rhode Island Records*, Volume 8, at 226; An ACT for the better forming, regulating and conducting the military Force of this State, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Seventy-nine, *in Rhode Island Acts and Resolves*, Volume 10 [12], at {31, 32}; At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence Plantations*, begun and holden (by Adjournment) at *Providence*, within and for the State aforesaid, on the first *Monday* in *July*, One Thousand Seven Hundred and Eighty, *in Rhode Island Acts and Resolves*, Volume 10 [13], at {6, 9}; An ACT for raising Six Hundred and Thirty able-bodied effective Men, At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden (by Adjournment) at *Newport*, within and for the State aforesaid, on the Third *Monday* in *July*, One Thousand Seven Hundred and Eighty, *in Rhode Island Acts and Resolves*, Volume 10 [13], at {28, 30, 33}; An ACT for filling up and completing this State's Quota of the Continental Army, At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden by Adjournment, at *East-Greenwich*, within and for the State aforesaid, on the last *Monday* in *November*, One Thousand Seven Hundred and Eighty, *in Rhode Island Acts and Resolves*, Volume 10 [13], at {35, 37, 38, 40}; An ACT for embodying and bringing into the Field Twelve Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and no longer Term, and not to be marched out of the same, At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden (by Adjournment) at *South-Kingstown*, within and for the State aforesaid, on the Fourth *Monday* in *February*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {5}; An ACT for incorporating and bringing into the Field Five Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and no longer, and not to be marched out of the same, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden, by Adjournment, at *Providence*, within and for the State aforesaid, on the Fourth *Monday* in *May*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {11}; An ACT for incorporating and bringing into the Field Five Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and for no longer Term, and not to be marched out of the same, At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden by Adjournment at *Newport*, within and for the said State, on the Third *Monday* in *August*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {39, 40}.

EN-2033 — CHAPTER DCCCXLIII, A FURTHER SUPPLEMENT TO THE ACT, ENTITLED "AN ACT TO REGULATE THE MILITIA OF THE COMMONWEALTH OF PENNSYLVANIA" (5 April 1779), *in Pennsylvania Statutes*, Volume 9, at 381-382.

EN-2034 — CHAPTER DCCCLXV, AN ACT TO EMPOWER THE SUPREME EXECUTIVE COUNCIL AND JUSTICES OF THE SUPREME COURT TO APPREHEND SUSPECTED PERSONS, AND TO INCREASE THE FINES TO WHICH PERSONS ARE LIABLE, FOR NEGLECTING TO PERFORM THEIR TOUR OF MILITIA DUTY (10 October 1779), *in Pennsylvania Statutes*, Volume 9, at 441-442. *Continued*, CHAPTER DCCCLXXII, AN ACT TO REPEAL PART OF AN ACT, ENTITLED "AN ACT FOR MAKING MORE EQUAL THE BURDEN OF THE PUBLIC DEFENSE AND FOR FILLING THE QUOTA OF TROOPS TO BE RAISED IN THIS STATE," AND TO CONTINUE FOR A LONGER TIME THE ACT, ENTITLED "AN ACT TO EMPOWER THE SUPREME EXECUTIVE COUNCIL AND JUSTICES OF THE SUPREME COURT TO APPREHEND SUSPECTED PERSONS, AND TO INCREASE THE FINES TO WHICH PERSONS ARE LIABLE FOR NEGLECTING TO PERFORM THEIR TOUR OF MILITIA DUTY" (27 November 1779), *in Pennsylvania Statutes*, Volume 10, at 31-32.

EN-2035 — An ACT to incorporate certain Persons into a military Body or Company of Cavalry, by the Name of the *Washington Cavalry*, in the County of *Washington*, in this State, At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence-Plantations*, begun and holden by Adjournment at *Newport*, within and for the State aforesaid, on the Third *Monday* of *June*, One Thousand Seven Hundred and Ninety-two, *in Rhode Island Acts and Resolves*, Volume 16 [19], at {11-13}; *id.* at {22-24} (*Johnston Rangers*); *id.* at {24-27} (*Glocester Grenadiers*).

At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden, in Consequence of Warrants issued by his Excellency the Governor, at *Newport*, within and for the State aforesaid, on the Second Wednesday in *August*, One Thousand Seven Hundred and Ninety-two, *in Rhode Island Acts and Resolves*, Volume 16 [19], at {6-7} (Artillery Company in the Town of *Newport*); *id.* at {13-15} (*Kentish Troop*).

An ACT establishing a Troop of Horse by the Name of *The Providence Independent Light Dragoons for the County of Providence*, At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden, at *Providence*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Ninety-two, *in Rhode Island Acts and Resolves*, Volume 16 [19], at {7-9}; *id.* at {13-15} (*The North Kingstown Rangers*); *id.* at {15-17} (*The Washington Independent Company*).

At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden, by Adjournment, at *East-Greenwich*, within and for the State aforesaid, on the last *Monday* in *February*, One Thousand Seven Hundred and Ninety-three, *in Rhode Island Acts* and Resolves, Volume 16 [19], at {14-16} (*The Newport Guards*).

An ACT establishing a military Company, by the Name of *The Governor's Independent Company of Volunteers*, At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden, by Adjournment, at *Newport*, within and for the State aforesaid, on the Second *Monday* in *June*, One Thousand Seven Hundred and Ninety-four, *in Rhode Island Acts and Resolves*, Volume 16 [19], at {29-31}; An ACT establishing a military Independent Company, by the Name of *The Train of Artillery*, in the Town and County of *Bristol*, *in id.* at {31-33}.

An ACT incorporating sundry Persons Inhabitants of the Town of *Smithfield*, in the County of *Providence*, by the Name of *The Smithfield Grenadiers*, At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden, at *Providence*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Ninety-four, *in Rhode Island Acts and Resolves*, Volume 16 [19], at {21-23}; An ACT incorporating sundry Persons Inhabitants of the Town of *Cumberland*, in the County of *Providence*, by the Name of *The Cumberland Light Infantry*, *in id.* at {30-32}.

An Act establishing a Company of Horse, by the Name of *The Independent Light Dragoons* of the Second Regiment of Militia in the County of *Newport*, At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden, by Adjournment, at *East-Greenwich*, within and for the State aforesaid, on the last *Monday* in *January*, One Thousand Seven Hundred and Ninety-five, *in Rhode Island Acts and Resolves*, Volume 17 [19], at {33-35}.

An ACT establishing a Troop of Horse in the County of *Bristol*, by the Name of *The Ready Volunteers*, At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Ninety-five, *in Rhode Island Acts and Resolves*, Volume 17 [19], at {16-18}.

An ACT in Addition to and Amendment of the several Acts establishing the independent Companies herein after named, At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden, at *Newport*, within and for the State aforesaid, on the First *Wednesday* in *May*, One Thousand Seven Hundred and Ninety-seven, *in Rhode Island Acts and Resolves*, Volume 17 [20], at {18-19} (amendments of the charters of four Independent Companies); An ACT reviving the Charter of *The Kentish Guards*, *in id.* at {24-26}.

An ACT establishing an independent Company in the County of *Kent*, by the Name of *The Kentish Light Infantry*, At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden, at *South-Kingstown*, within and for the State aforesaid, on the last

Wednesday in *October*, One Thousand Seven Hundred and Ninety-seven, *in Rhode Island Acts and Resolves*, Volume 17 [20], at {15-17}.

An Act to incorporate the Federal Blues in the Town of Warren, At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence-Plantations*, begun and holden at *Providence*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Ninety-eight, *in Rhode Island Acts and Resolves*, Volume 18 [20], at {12-14}.

An Act to incorporate the Portsmouth Light Infantry, At the General Assembly of the State of *Rhode-Island* and *Providence Plantations*, begun and holden at Newport, within and for the State aforesaid, on the first Wednesday in May, One Thousand Seven Hundred and Ninety-nine, *in Rhode Island Acts and Resolves*, Volume 18 [20], at {19-20}.

An Act to incorporate a Company in Foster, by the name of the Foster Safeguards, At the General Assembly of the State of *Rhode-Island* and *Providence Plantations*, begun and holden at South-Kingstown, within and for the State aforesaid, on the last Monday in October, One Thousand Seven Hundred and Ninety-nine, *in Rhode Island Acts and Resolves*, Volume 18 [20], at {16-18}; An Act for incorporating the Tiverton and Little-Compton Dragoons, *in id*. at {20-21}; An Act to incorporate the Bristol Grenadiers, *in id*. at {23-25}.

EN-2036 — At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden, at *South-Kingstown*, within and for the State aforesaid, on the last *Monday* in *October*, One Thousand Seven Hundred and Ninety-five, *in Rhode Island Acts and Resolves*, Volume 17 [19], at 18-19.

EN-2037 — An Act to incorporate the Bristol Grenadiers, At the General Assembly of the State of *Rhode-Island* and *Providence Plantations*, begun and holden at South-Kingstown, within and for the State aforesaid, on the last Monday in October, One Thousand Seven Hundred and Ninety-nine, *in Rhode Island Acts and Resolves*, Volume 18 [20], at {23-25}.

EN-2038 — CHAP. IV, *An act for regulating the militia of this Commonwealth*, §§ 12 through 14, AT A GENERAL ASSEMBLY, *Begun and held at the Capitol in the city of Richmond, on Monday, the first day of October, one thousand seven hundred and ninety-two, in Laws of Virginia,* Volume 13, at 345. *Basically continued,* C. 35, *An act, to reduce into one, all acts and parts of acts, for regulating the Militia of this Commonwealth*, § 39, The Revised Code OF THE LAWS OF VIRGINIA: BEING *A COLLECTION OF ALL SUCH ACTS* OF THE GENERAL ASSEMBLY, OF A PUBLIC AND PERMANENT NATURE, AS ARE NOW IN FORCE; WITH A GENERAL INDEX (Richmond, Virginia: Thomas Ritchie, 1819), Volume I, at 105.

EN-2039 — CHAP. XX, An act providing for the encouragement of volunteer companies in this commonwealth (Passed March 21st, 1832), Preamble and §§ 1, 3, 5, and 6, ACTS PASSED AT A GENERAL ASSEMBLY OF THE COMMONWEALTH OF VIRGINIA, BEGUN AND HELD AT THE CAPITOL, IN THE CITY OF RICHMOND, ON MONDAY, THE FIFTH DAY OF DECEMBER, ONE THOUSAND EIGHT HUNDRED AND THIRTY-ONE (Richmond, Virginia: Thomas Ritchie, 1832), at 17-18.

EN-2040 — Chap. 22, An ACT for the better organization of the militia [Passed March 8, 1834], §§ 51 and 60, ACTS PASSED AT A GENERAL ASSEMBLY OF THE COMMONWEALTH OF VIRGINIA, BEGUN AND HELD AT THE CAPITOL, IN THE CITY OF RICHMOND, ON MONDAY, THE SECOND DAY OF DECEMBER, ONE THOUSAND EIGHT HUNDRED AND THIRTY-THREE (Richmond, Virginia: Thomas Ritchie, 1834), at 38, 39.

EN-2041 — CHAP. 22, An ACT to provide for the collection of fines in volunteer companies [Passed February 10, 1846], §§ 2 and 3, ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, PASSED AT THE SESSION COMMENCING DECEMBER 1, 1845, AND ENDING MARCH 6, 1846 (Richmond, Virginia: Samuel Shepherd, 1846), at 22.

EN-2042 — CHAP. 21, An ACT concerning the Militia [Passed March 29, 1851], § 15, ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, PASSED AT THE SESSION of 1850-51 (Richmond, Virginia: William F. Ritchie, 1851), at 17.

EN-2043 — An ACT to amend an act passed the 29th day of March 1851, concerning volunteers [Passed May 19, 1852], ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, PASSED IN 1852 (Richmond, Virginia: William F. Ritchie, 1852); CHAP. 20, An ACT providing for the enrollment of the militia by the commissioners of the revenue, the abolition of musters, and a reorganization of the volunteer corps [Passed April 1, 1853], §§ 15, 16, 19 through 30, and 34, ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, PASSED IN 1852-3 (Richmond, Virginia: William F. Ritchie, 1853), at 35-37; CHAP. 6, §§ 13 through 30 and 52, An ACT for the Better Organization of the Militia of the Commonwealth [Passed March 30, 1860], ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF VIRGINIA, PASSED IN 1859-60 (Richmond, Virginia: William F. Ritchie, 1860), at 91-95, 102.

EN-2044 — *Chap.* 92, An ACT in addition to the several Acts concerning the Militia [*Approved by the* Governor, *March* 24, 1840], §§ 1, 5, 11, 12, and 13, ACTS AND RESOLVES PASSED BY THE Legislature of Massachusetts, IN THE YEAR 1840 (Boston, Massachusetts: Dutton and Wentworth, 1840), at 233, 234, 235.

EN-2045 — CHAP. XXVIII, *An act for amending the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, §§ III and IV, AT A GENERAL ASSEMBLY *Begun and held at the Public Buildings in the City of Richmond, on Monday the eighteenth day of October*[,] *one thousand seven hundred eighty-four*, *in Laws of Virginia*, Volume 11, at 483-484; CHAP. I, *An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, §§ III and IV, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five*, *in Laws of Virginia*, Volume 12, at 14-15.

EN-2046 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia,* Volume 9, at 24.

EN-2047 — CHAP. IV, *An Act for disarming Papists, and reputed Papists, refusing to take the oaths to the government*, §§ I, III, IV, and VII, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March*, 1756, *in Laws of Virginia*, Volume 7, at 35-36, 36-37, 38.

EN-2048 — ACT X, ATT A GRAND ASSEMBLY 6TH JANUARY, 1639, *in Laws of Virginia*, Volume 1, at 226.

EN-2049 — ACT X, *An act for preventing Negroes Insurrections*, AT A GENERALL ASSEMBLIE, BEGUNNE AT JAMES CITTIE THE EIGHTH DAY OF JUNE, 1680, *in Laws of Virginia*, Volume 2, at 481.

EN-2050 — CHAP. XLIX, *An act concerning Servants and Slaves*, § XXXV, AT A GENERAL ASSEMBLY, BEGUN AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, THE TWENTY-THIRD DAY OF OCTOBER, 1705, *in Laws of Virginia*, Volume 3, at 459.

EN-2051 — CHAP. IV, *An act directing the trial of Slaves, committing capital crimes; and for the more effectual punishing conspiracies and insurrections of them; and for the better government of Negros, Mulattos, and* Indians, *bond or free*, §§ XIV and XV, AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *Williamsburg, the fifth day of December*, 1722, *and by writ of prorogation, begun and holden on the ninth day of May*, 1723, *in Laws of Virginia*, Volume 4, at 131.

EN-2052 — CHAP. XXXVIII, *An Act directing the trial of Slaves committing capital crimes; and for the more effectual punishing conspiracies and insurrections of them; and for the better government of negroes, mulattoes, and Indians, bond or free*, §§ XVIII and XIX, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *The College in Williamsburg, the twenty-seventh day of October*, 1748, *in Laws of Virginia*, Volume 6, at 109-110.

EN-2053 — CHAP. LXXVII, *An act concerning slaves*, § IV, AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Public Buildings in the City of Richmond, on Monday the seventeenth day of October*[,] *one thousand seven hundred and eighty-five*, *in Laws of Virginia*, Volume 12, at 182.

EN-2054 — An ACT to organize the Militia of this State, § 10, At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence-Plantations*, begun and holden by Adjournment at *East-Greenwich*, within and for the State aforesaid, in the last *Monday* in *March*, One Thousand Seven Hundred and Ninety-Four, *in Rhode Island Acts and Resolves,* Volume 16 [19], at 21-22; CHAP. IV, *An Act for regulating the militia of this Commonwealth,* §§ 35-37, AT A GENERAL ASSEMBLY, *Begun and held at the Capitol in the city of Richmond, on Monday, the first day of October, one thousand seven hundred and ninety-two, in Laws of Virginia,* Volume 13, at 353-355.

EN-2055 — At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations,* begun and holden (in Consequence of *Warrants* issued by his Excellency the Governor) at *Providence*, within and for the State aforesaid, on *Friday* the Nineteenth Day of *December,* One Thousand Seven Hundred and Seventy-seven, *in Rhode Island Acts and Resolves,* Volume 9 [10], at {10}.

EN-2056 — At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations,* begun and holden (in Consequence of *Warrants* issued by his Excellency the Governor) at *Providence*, within and for the State aforesaid, on *Friday* the Nineteenth Day of *December,* One Thousand Seven Hundred and Seventy-seven, *in Rhode Island Acts and Resolves,* Volume 9 [10], at {7}.

EN-2057 — CHAP. II, *An Act for continuing and amending an act, intituled, An Act for preventing mutiny and desertion*, §§ II and III, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursady the twenty-fifth day of March,* 1756, *and from thence continued by several prorogations to Thursday the thirtieth of March*, 1758, *in Laws of Virginia,* Volume 7, at 170.

EN-2058 — *Proceedings of the General Assembly of the State of Rhode Island and Providence Plantations, at Providence, on Tuesday, July 3d,* 1781, *in Rhode Island Records,* Volume 9, at 442-443.

EN-2059 — An ACT for inlisting One Fourth Part of the Militia of the Colony, as Minute-Men, At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England* in *America*; begun and holden, (in Consequence of Warrants issued by his Honor the Deputy-Governor) at *Providence*, within and for the Colony aforesaid, on *Wednesday*, the Twenty-eighth Day of *June*, One Thousand Seven Hundred and Seventy-five, *in Rhode Island Acts and Resolves*, Volume 7 [8], at {80}.

EN-2060 — At the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island* and *Providence Plantations,* begun and holden, by Adjournment, at *Providence,* within and for the said State, on Monday the Twenty-third Day of *December*, One Thousand, Seven Hundred and Seventy-Six, *in Rhode Island Acts and Resolves*, Volume 8 [9], at {15-16}.

EN-2061 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at South Kingstown, on Thursday, the 17th day of April*, 1777, *in Rhode Island Records*, Volume 8, at 197-198.

EN-2062 — At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations,* begun and holden (in Consequence of Warrants issued by his Excellency the Governor) at *Providence,* within and for the State aforesaid, on *Monday* the Seventh Day of *July,* One Thousand Seven Hundred and Seventy-seven, *in Rhode Island Acts and Resolves,* Volume 9 [10], at {5-6}.

EN-2063 — AT the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island* and *Providence Plantations*, begun and holden, by Adjournment, at *South-Kingstown*, within and for the State aforesaid, on Monday the Twenty-second Day of *September*, One Thousand Seven Hundred and Seventy-seven, *in Rhode Island Acts and Resolves*, Volume 9 [10], at {8}.

EN-2064 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at Providence, on Monday, the 22d day of September*, 1777, *in Rhode Island Records*, Volume 8, at 317-318.

EN-2065 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at East Greenwich, on Monday, the 1st day of December,* 1777, *in Rhode Island Records,* Volume 8, at 333-334.

EN-2066 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at Providence, on Friday, the 19th day of December,* 1777, *in Rhode Island Records,* Volume 8, at 350.

EN-2067 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at Providence, on Thursday, the 28th day of May,* 1778, *in Rhode Island Records,* Volume 8, at 417.

EN-2068 — An ACT for embodying and bringing into the Field Twelve Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and no longer Term, and not to be marched out of the same, At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence Plantations*, begun and holden (by Adjournment) at *South-Kingstown*, within and for the State aforesaid, on the Fourth *Monday* in *February*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {5-7}. *Accord*, An ACT for incorporating and bringing into the Field Five Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and no longer, and not to be marched out of the same, AT the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden, by Adjournment, at *Providence*, within and for the State aforesaid, on the Fourth *Monday* in *May*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {11-13}; *and* An ACT for incorporating and bringing into the Field Five Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and for no longer Term, and not to be marched out of the same, At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden by Adjournment at *Newport*, within and for the said State, on the Third *Monday* in *August*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {39-41}.

EN-2069 — *Proceedings of the General Assembly of the State of Rhode Island and Providence Plantations, at Providence, on the fourth Monday in May,* 1781, *in Rhode Island Records,* Volume 9, at 417.

EN-2070 — CHAP. V, *An Act for making more effectual provision against Invasions and Insurrections*, § II, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg*, *the first day of February*, 1727, *in Laws of Virginia*, Volume 4, at 197. *Continued*, CHAP. IV, *An act to continue the Act, for making more effectual provision against Invasions and Insurrections*, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *Williamsburg*, *the first day of February*, [1727]. *And from thence continued, by several prorogations, to the eighteenth day of May*, 1732, *in Laws of Virginia*, Volume 4, at 323; CHAP. IV, An Act for further continuing the Act, For making more effectual provision against Invasions and Insurrections, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT

Williamsburg, the first day of February, [1727]. *And from thence continued, by several prorogations, to the twenty second day of August,* 1734, *in Laws of Virginia,* Volume 4, at 395; CHAP. III, *An Act, for reviving the Act, For making more effective provision against Invasions and Insurrections,* AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on the first day of August,* [1735]. *And from thence continued, by several prorogations, to the first day of November,* 1738, *in Laws of Virginia,* Volume 5, at 24; CHAP. VI, *An Act, for continuing and amending the Act,* Intituled, *An Act, for making more effectual Provision against Invasions and Insurrections,* AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on Friday the first day of August,* [1735]. *And from thence continued, by several prorogations, to the twenty second day of May,* 1740, *in Laws of Virginia,* Volume 5, at 99; CHAP. IV, *An Act, for continuing an Act, made in the first year of his majesty's reign, intituled, an Act for making more effectual provision against invasions and insurrections; and one other act, intituled, an Act, for continuing and amending the aforementioned Act,* AT A GENERAL ASSEMBLY, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on Thursday, the sixth day of May,* [1741]. *And from thence continued, by several prorogations, to Tuesday, the fourth day of September,* 1744, *in Laws of Virginia,* Volume 5, at 228.

CHAP. IX, *An Act for making provision against Invasions and Insurrections,* § II, AT A GENERAL ASSEMBLY, BEGUN AND HELD AT *The College in Williamsburg, the twenty-seventh day of October,* 1748, *in Laws of Virginia,* Volume 6, at 113. *Continued,* CHAP. II, *An Act for continuing an act, intituled, An Act for making provision against invasions and insurrections, At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February,* 1752. *And from thence continued by several prorogations, to Thursday the first day of November,* 1753, *in Laws of Virginia,* Volume 6, at 350.

EN-2071 — CHAP. IV, *An Act for reducing the several acts for making provision against invasions and insurrections into one act,* §§ I and XIV, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday, the twenty-fifth day of March,* 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia,* Volume 7, at 106-107, 113. *Continued,* CHAP. IV, *An Act for continuing an act, intituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September,* 1758, *in Laws of Virginia,* Volume 7, at 237; CHAP. V, *An Act for further continuing an Act, intituled, An Act for reducing the several Acts for making provision against Invasions and Insurrections, into one Act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September,* 1758*; and from thence continued by several prorogations to Thursday the twenty-second of February,* 1759, *in Laws of Virginia,* Volume 7, at 275; CHAP. II, *An Act for further continuing an act, entituled, An Act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the fourteenth day of September,* 1758*; and from thence continued by several prorogations to Thursday the fifth of March,* 1761, *in Laws of Virginia,* Volume 7, at 384; CHAP. IV, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May,* 1761, *and from thence continued by several prorogations to Tuesday the 2d of November*[,] 1762, *in Laws of Virginia,* Volume 7, at 539; CHAP. I, *An act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Tuesday the 26th of May,* 1761, *and from thence continued by several prorogations to Tuesday the 30th of October,* 1764, *in Laws of Virginia,* Volume 8, at 37; CHAP. I, *An Act for further continuing the act for reducing the several acts for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in Williamsburg, on Thursday the sixth day of November,* 1766, *in Laws of Virginia,* Volume 8, at 189; CHAP. V, *An Act for further continuing the Act, intituled an Act for reducing the several acts of Assembly for making provision against invasions and insurrections into one act, At a General Assembly, begun and held at the Capitol in the City of Williamsburg, on Tuesday, in the seventh day of November,* 1769, *in Laws of Virginia,* Volume 8, at 334; CHAP. III, *An act for further continuing the act, intituled An act for reducing the several acts of assembly, for making provision against invasions and insurrections, into one act, At a General Assembly, begun and held at the Capitol, in the City of Williamsburg, on Monday the tenth day of February, one thousand seven hundred and seventy-two, in Laws of Virginia,* Volume 8, at 514.

EN-2072 — At a Council held August the 1st 1763, *in Executive Journals of Virginia,* Volume 6, at 267.

EN-2073 — CHAP. I, *An Ordinance for raising an additional number of forces for the defence and protection of this colony, and for other purposes therein mentioned, At a Convention of Delegates held at the town of Richmond, in the colony of Virginia, on Friday the first of December, one thousand seven hundred and seventy-five, in Laws of Virginia,* Volume 9, at 89-90.

EN-2074 — CHAP. XII, *An ordinance for amending an ordinance for raising and embodying a sufficient force for the defence and protection of this colony, and for other purposes therein mentioned, At a General Convention of Delegates and Representatives, from the several counties and corporations of Virginia, held at the Capitol in the City*

of Williamsburg, on Monday the 6th of May, 1776, *in Laws of Virginia,* Volume 9, at 139-140.

EN-2075 — CHAP. VII, *An act for providing against Invasions and Insurrections*, §§ I and II, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol*, *in the City of Williamsburg*, *on Monday the fifth day of May*, *one thousand seven hundred and seventy seven*, *in Laws of Virginia*, Volume 9, at 291-292.

EN-2076 — CHAP. XXVII, *An act for putting the eastern frontier of this commonwealth into a posture of defence,* AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the first day of* May, *one thousand seven hundred and eighty, in Laws of Virginia,* Volume 10, at 296-297.

EN-2077 — An Act for raising a regiment, to serve for three months, *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at East Greenwich, on Thursday, the 21st day of November,* 1776, *in Rhode Island Records,* Volume 8, at 42-43.

EN-2078 — An Act for raising and enlisting a number of soldiers, to be transported to the West Indies for His Majesty's service, *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Newport, the first Wednesday of May,* 1740, *in Rhode Island Records,* Volume 4, at 573-574.

EN-2079 — An Act for raising four companies in this colony, of one hundred men each, officers included, to be employed on a secret expedition, in case other governments shall join and carry on the proposed enterprise, *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, the 6th day of March*, 1755, *in Rhode Island Records,* Volume 5, at 418-420.

EN-2080 — An Act for raising, clothing and paying four hundred and fifty able bodied, effective men, for the ensuing campaign against His Majesty's enemies in North America, *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, the 1st day in February,* 1757, *in Rhode Island Records*, Volume 6, at 22-23, 25.

EN-2081 — An Act for enlisting anew, two hundred and fifty of the soldiers now in the pay of this colony, *Proceedings of the General Assembly held for the Colony of Rhode Island and Providence Plantations, at South Kingstown, the last Wednesday in October,* 1757, *in Rhode Island Records*, Volume 6, at 106.

EN-2082 — An Act for raising and paying one thousand able bodied and effective men, for the ensuing campaign, against His Majesty's enemies, in North America, *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at South Kingstown, the 13th day of March,* 1758, *in Rhode Island Records,* Volume 6, at 129, 130.

EN-2083 — An Act for augmenting the troops, now in the pay of this government, to the number of one thousand men, including officers, and forming the whole into one regiment, for His Majesty's service, *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, the 26th day February,* 1759, *in Rhode Island Records,* Volume 6, at 191-192.

EN-2084 — An Act for completing the regiment ordered by this government to be raised for the King's service, against His Majesty's enemies in North America, *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Newport, the first Wednesday of May,* 1759, *in Rhode Island Records,* Volume 6, at 207.

EN-2085 — An Act for raising one hundred and fifteen men, in order to complete the number of soldiers by the General Assembly ordered for the campaign of the current year, *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Newport, on Monday, the 11th day of June,* 1759, *in Rhode Island Records,* Volume 6, at 213-214.

EN-2086 — An ACT for raising One Thousand able-bodied effective Men, to proceed on an Expedition against His Majesty's Enemies still remaining in *Canada,* and supplying the Treasury for the necessary Charges thereof, At the General Assembly of the GOVERNOR and COMPANY of the *English* Colony of *Rhode-Island,* and *Providence Plantations,* in *New-England,* in AMERICA; begun and holden by Adjournment at *South-Kingstown*, within and for the said Colony, on Monday the Twenty-fifth of *Februar*y, One Thousand Seven Hundred and Sixty, *in Rhode Island Acts and Resolves,* Volume 3, at {10-11}.

EN-2087 — *Secretary William Pitt to the Governors of Rhode Island, Massachusetts Bay, New Hampshire, Connecticut, New York and New Jersey,* [9 December 1758,] *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, the 18th day of December,* 1758, *in Rhode Island Records,* Volume 6, at 178-179.

EN-2088 — *General Amherst to Governor Hopkins,* [14 February 1760,] *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at South Kingstown, the 25th day of February,* 1760, *in Rhode Island Records*, Volume 6, at 243.

EN-2089 — *General Amherst to the Governor of Rhode Island,* [21 February 1760,] *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at South Kingstown, the 25th day of February,* 1760, *in Rhode Island Records*, Volume 6, at 245.

EN-2090 — An Act for embodying, supplying and paying, the army of observation ordered to be raised for the defence of the colony, *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, the first Wednesday of May,* 1775, *in Rhode Island Records,* Volume 7, at 317, 318-319.

EN-2091 — An Act for embodying, supplying and paying a regiment, consisting of five hundred men, for the defence of the United Colonies in general, and of this colony, in particular, *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on Tuesday, the 31st day of October,* 1775, *in Rhode Island Records,* Volume 7, at 384-385.

An Act for raising an additional regiment, for the defence of the United Colonies in general, and this colony in particular, and for embodying the same; and the regiment ordered to be raised at the last session of Assembly, into one brigade, *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on the second Monday in January,* 1776, *in Rhode Island Records,* Volume 7, at 432-434.

EN-2092 — An Act for raising, embodying, supplying and paying, two regiments of infantry, each consisting of seven hundred and fifty men; and a regiment or train of artillery, consisting of three hundred men, for the defence of the United States, in general, and of this state, in particular, *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at East Greenwich, on Tuesday, the 10th day of December,* 1776, *in Rhode Island Records,* Volume 8, at 61-63.

EN-2093 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at South Kingstown, on Thursday, the 17th day of April*, 1777, *in Rhode Island Records*, Volume 8, at 200, 201, 202.

EN-2094 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at South Kingstown, on Monday, the 19th day of May,* 1777, *in Rhode Island Records*, Volume 8, at 247, 248-249.

EN-2095 — An Act for raising and equipping fifteen hundred men, *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at Providence, on Friday, the 19th day of December,* 1777, *in Rhode Island Records,* Volume 8, at 345-347.

EN-2096 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at Providence, on Thursday, the 28th day of May*, 1778, *in Rhode Island Records,* Volume 8, at 409-411.

EN-2097 — *An ACT for raising and equipping Fifteen Hundred Men*, AT the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island* and *Providence Plantations*, begun and holden (by Adjournment) at *East-Greenwich*, within and for the State aforesaid, on the last *Monday* in *February*, One Thousand Seven Hundred and Seventy-Nine, *in Rhode Island Acts and Resolves,* Volume 10 [12], at {14-16}.

EN-2098 — An ACT for raising Two Hundred and Twenty effective Men, for Three Years or during the War, to complete the Quota of this State, of the Army proposed to be raised by Congress, for the Defence of the United States, At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence-Plantations,* begun and holden at *Providence*, within and for the State aforesaid, on the Fourth *Monday* in *October,* One Thousand Seven Hundred and Eighty, *in Rhode Island Acts and Resolves,* Volume 10 [13], at {13}.

EN-2099 — An ACT for filling up and completing this State's Quota of the Continental Army, At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations,* begun and holden by Adjournment, at *East-Greenwich,* within and for the State aforesaid, on the last *Monday* in *November*, One Thousand Seven Hundred and Eighty, *in Rhode Island Acts and Resolves,* Volume 10 [13], at {35-37}.

EN-2100 — At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations,* begun and holden at *South-Kingstown,* within and for the State aforesaid, on the last *Monday* in *October,* One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves,* Volume 11 [14], at {14}.

EN-2101 — *Proceedings of the General Assembly of the State of Rhode Island and Providence Plantations, at Providence, on the last Monday in January,* 1782, *in Rhode Island Records,* Volume 9, at 518.

EN-2102 — *Proceedings of the General Assembly of the State of Rhode Island and Providence Plantations, at South Kingstown, on the third Monday in August,* 1782, *in Rhode Island Records*, Volume 9, at 586.

EN-2103 — *Proceedings of the General Assembly of the State of Rhode Island and Providence Plantations, at South Kingstown, on the third Monday in August,* 1782, *in Rhode Island Records*, Volume 9, at 594.

EN-2104 — An Act for raising one hundred and twenty men, *Proceedings of the General Assembly of the State of Rhode Island and Providence Plantations, at Providence, on the last Monday in October,* 1786, *in Rhode Island Records*, Volume 10, at 221.

EN-2105 — *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, on the second Monday in January,* 1776, *in Rhode Island Records,* Volume 7, at 438.

EN-2106 — At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations,* begun and holden (in Consequence of Warrants issues by his Excellency the Governor) at *Providence,* within and for the State aforesaid, on *Monday* the Seventh Day of *July*, One Thousand Seven Hundred and Seventy-seven, *in Rhode Island Acts and Resolves,* Volume 9 [10], at {5}.

EN-2107 — CHAP. I, *An act, for giving a sum of money, not exceeding four thousand pounds, towards defraying the expence of inlisting, arming, cloathing, victualling, and transporting the Soldiers raised in this colony, on an intended expedition against Canada,* §§ I, II, and VIII, AT A GENERAL ASSEMBLY, SUMMONED TO THE HELD AT *The Capitol, in the city of Williamsburg, on Thursday the sixth day of May,* [1741,] *And from thence continued, by several prorogations, to Friday the eleventh day of July,* 1746, *in Laws of Virginia,* Volume 5, at 401-402, 404.

EN-2108 — CHAP. II, *An Act to explain an act, intituled, An act for raising the sum of twenty thousand pounds, for the protection of his majesty's subjects, against the insults and encroachments of the French; and for other purposes therein mentioned,* § IX, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Thursday the first day of May, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 465.

EN-2109 — CHAP. I, *An Act for raising the sum of forty thousand pounds, for the protection of his majesty's subjects on the frontiers of this colony*, § VII, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 524-525.

EN-2110 — CHAP. I, *An Act for raising the Sum of Twenty-five Thousand Pounds, for the better protection of the Inhabitants on the Frontiers of this Colony, and for other purposes therein mentioned*, §§ X, XI, XII, and XV, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March,* 1756, *in Laws of Virginia*, Volume 7, at 14, 16, 17.

EN-2111 — CHAP. I, *An Act for augmenting the forces in the pay of this Colony to two thousand men; and for other purposes therein mentioned,* §§ I and II, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March,* 1756, *and from thence continued by several prorogations to Thursday the thirtieth of March,* 1758, *in Laws of Virginia,* Volume 7, at 163-164.

EN-2112 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia,* Volume 9, at 9-10, 12, 15-16.

EN-2113 — CHAP. I, *An Ordinance for raising an additional number of forces for the defence and protection of this colony, and for other purposes therein mentioned, At a Convention of Delegates held at the town of Richmond, in the colony of Virginia, on Friday the first of December, one thousand seven hundred and seventy-five, in Laws of Virginia,* Volume 9, at 75-76, 78, 81, 85.

EN-2114 — *See* CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia,* Volume 9, at 9-16, 24-27 (regular soldiers); 16-27 (Minutemen); 26-35 (regular Militia).

CHAP. I, *An Ordinance for raising an additional number of forces for the defence and protection of this colony, and for other purposes therein mentioned, At a Convention of Delegates held at the town of Richmond, in the colony of Virginia, on Friday the first of December, one thousand seven hundred and seventy-five, in Laws of Virginia,* Volume 9, at 75-88, 90-92 (regular soldiers); 82, 86-92 (Minutemen); 89-92 (regular Militia).

EN-2115 — CHAP. XIII, *An Act for making a farther provision for the internal security and defence of this country,* AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol in the City of Williamsburg, on Monday the seventh day of October, one thousand seven hundred and seventy six, in Laws of Virginia,* Volume 9, at 192.

EN-2116 — CHAP. I, *An Act for speedily recruiting the Virginia Regiments on the continental establishment, and for raising additional troops of Volunteers,* AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the twentieth day of October, one thousand seven hundred and seventy seven, in Laws of Virginia,* Volume 9, at 338, 342-343, 345-347.

EN-2117 — CHAP. I, *An act for raising Volunteers to join the Grand Army,* AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fourth day of May, one thousand seven hundred and seventy eight, in Laws of Virginia,* Volume 9, at 445-448.

EN-2118 — CHAP. III, *An act for raising a Battalion of Infantry for garrison duty, and for other purposes,* AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fourth day of May, one thousand seven hundred and seventy eight, in Laws of Virginia,* Volume 9, at 452, 453.

EN-2119 — CHAP. IV, *An act for recruiting the continental army, and other purposes therein mentioned,* AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fourth day of May, one thousand seven hundred and seventy eight, in Laws of Virginia,* Volume 9, at 454, 455-456.

EN-2120 — CHAP. IV, *An Act for raising a body of Volunteers for the defence of the commonwealth,* AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of* Williamsburg, *on* Monday *the third day of* May, *one thousand seven hundred and seventy-nine, in Laws of Virginia,* Volume 10, at 18-19, 20-21.

EN-2121 — CHAP. XXXVIII, *An act to recruit the Virginia line on the continental establishment,* §§ I, II, and III, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the fifth day of* November, *one thousand seven hundred and eighty-one, in Laws of Virginia,* Volume 10, at 499-500.

EN-2122 — *See, e.g.,* CHAP. VI, *An Act concerning officers, soldiers, sailors, and marines,* AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of* Williamsburg, *on* Monday *the third day of* May, *one thousand seven hundred and seventy-nine, in Laws of Virginia,* Volume 10, at 23.

EN-2123 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia,* Volume 9, at 10.

EN-2124 — CHAP. IV, *An act for recruiting the continental army, and other purposes therein mentioned,* AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fourth day of May, one thousand seven hundred and seventy eight, in Laws of Virginia,* Volume 9, at 454.

EN-2125 — CHAP. I, *An Ordinance for raising an additional number of forces for the defence and protection of this colony, and for other purposes therein mentioned, At a Convention of Delegates held at the town of Richmond, in the colony of Virginia, on Friday the first of December, one thousand seven hundred and seventy-five, in Laws of Virginia,* Volume 9, at 81.

EN-2126 — CHAP. XXXVIII, *An act to recruit the Virginia line on the continental establishment,* § I, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the fifth day of* November, *one thousand seven hundred and eighty-one, in Laws of Virginia,* Volume 10, at 499.

EN-2127 — CHAP. IV, *An Act for raising a body of Volunteers for the defence of the commonwealth,* AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of* Williamsburg, *on* Monday *the third day of* May, *one thousand seven hundred and seventy-nine, in Laws of Virginia,* Volume 10, at 18.

EN-2128 — *See* CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia,* Volume 9, at 9-16, 24-27 (regular soldiers); 16-27 (Minutemen); 26-35 (regular Militia).

CHAP. I, *An Ordinance for raising an additional number of forces for the defence and protection of this colony, and for other purposes therein mentioned, At a Convention of Delegates held at the town of Richmond, in the colony of Virginia, on Friday the first of December, one thousand seven hundred and seventy-five, in Laws of Virginia,* Volume 9, at 75-88, 90-92 (regular soldiers); 82, 86-92 (Minutemen); 89-92 (regular Militia).

EN-2129 — CHAP. I, *An Ordinance for raising an additional number of forces for the defence and protection of this colony, and for other purposes therein mentioned, At a Convention of Delegates held at the town of Richmond, in the colony of Virginia, on Friday the first of December, one thousand seven hundred and seventy-five, in Laws of Virginia,* Volume 9, at 83.

EN-2130 — CHAP. XIII, *An Act for making a farther provision for the internal security and defence of this country,* AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol in the City of Williamsburg, on Monday the seventh day of October, one thousand seven hundred and seventy six, in Laws of Virginia,* Volume 9, at 196-197.

EN-2131 — CHAP. XXVII, *An act for putting the eastern frontier of this commonwealth into a posture of defence,* AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the first day of* May, *one thousand seven hundred and eighty, in Laws of Virginia,* Volume 10, at 297-299.

EN-2132 — An ACT for putting this Colony in a Posture of Defence, and for rend'ring the *Militia* in the several Towns thereof, more Useful in Time of an *Actual Invasion*, LAWS, Made and pass'd by the General Assembly of His Majesty's Colony of *Rhode-Island*, and *Providence-Plantations*, in *New-England*; held by Adjournment, at *Newport*, the Twenty Second Day of *May*, 1744, *in Public Laws of Rhode Island, 1744*, at 289.

An ACT, regulating the Militia in this Colony, *part of* An ACT, establishing the Revisement of the Laws of this Colony, and for the putting the same in Force, *in* A LAW, Made and passed at the General Assembly of the Colony of *Rhode-Island* and *Providence Plantations*, held at *Providence* on the First Monday in *December,* 1766, *in Public Laws of Rhode Island, 1767*, at 186.

EN-2133 — An Act for impressing such and so many men as shall be wanted, after the returns made to the several field officers, to complete and make up the four hundred and fifty men, by the General Assembly, at their last session, ordered to be raised in this colony for the ensuing campaign, *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, the* 14*th day of March,* 1757, *in Rhode Island Records*, Volume 6, at 34-35.

EN-2134 — An Act for raising one-sixth part of the militia in this colony, to proceed immediately to Albany, to join the forces which have marched, to oppose the French, near Lake George, *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Newport, on the* 10*th day of August*, 1757, *in Rhode Island Records*, Volume 6, at 75-76.

EN-2135 — Further Time allowed to the delinquent Towns for raising their Quotas of the State's Brigade, AT the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island* and *Providence Plantations,* begun and holden by Adjournment, at *East-Greenwich,* on the last *Monday* in *June*, One Thousand Seven Hundred and Seventy-eight, *in Rhode Island Acts and Resolves*, Volume 9 [11], at {10}.

EN-2136 — An Act obliging persons delinquent in military duty, in the late expedition against the enemy upon Rhode Island, to pay a fine, or perform a tour of duty in lieu thereof; and for punishing persons who left the service in said expedition, without a proper discharge, *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at East Greenwich, on Wednesday, the* 2*d day of September,* 1778, *in Rhode Island Records,* Volume 8, at 452-454. *Enforced, AN Act for enforcing an Act, entituled, "An Act obliging Persons delinquent in military Duty, in the late Expedition against the Enemy upon* Rhode-Island, *to pay a Fine, or perform a Tour of Duty in Lieu thereof, and for punishing the Persons who left the Service in said Expedition, without a proper Discharge"*, AT the GENERAL ASSEMBLY of the GOVERNOR and COMPANY of the STATE of *Rhode-Island* and *Providence Plantations*, begun and holden (by Adjournment) at *East-Greenwich*, within and for the State aforesaid, on the last *Monday* in *February*, One Thousand Seven Hundred and Seventy-Nine, *in Rhode Island Acts and Resolves,* Volume 10 [12], at {12}.

EN-2137 — Additional Act for filling up the Continental Battalions, At the General Assembly of the Governor and Company of the State of *Rhode-Island,* and *Providence-Plantations,* begun and holden (by Adjournment) at *Newport*, within and for the State aforesaid, on the Third *Monday* in *July*, One Thousand Seven Hundred and Eighty, *in Rhode Island Acts and Resolves,* Volume 10 [13], at {27}. *Also in Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at Newport, on the third Monday in July,* 1780, *in Rhode Island Records,* Volume 9, at 176-177.

EN-2138 — An ACT for raising Two Hundred and Twenty effective Men, for Three Years or during the War, to complete the Quota of this State, of the Army proposed to be raised by Congress, for the Defence of the United States, At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence-Plantations,* begun and holden at *Providence*, within and for the State aforesaid, on the Fourth *Monday* in *October,* One Thousand Seven Hundred and Eighty, *in Rhode Island Acts and Resolves,* Volume 10 [13], at {13}.

EN-2139 — An ACT for filling up and completing this State's Quota of the Continental Army, At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations,* begun and holden by Adjournment, at *East-Greenwich,* within and for the State aforesaid, on the last *Monday* in *November*, One Thousand Seven Hundred and Eighty, *in Rhode Island Acts and Resolves,* Volume 10 [13], at {35, 40-41}.

EN-2140 — At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden (by Adjournment) at *Providence*, within and for the State aforesaid, on the first *Monday* in *July*, One Thousand Seven Hundred and Eighty, *in Rhode Island Acts and Resolves*, Volume 10 [13], at {9-10}. *Accord,* An ACT for raising Six Hundred and Thirty able-bodied effective Men, At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden (by Adjournment) at *Newport*, within and for the State aforesaid, on the Third *Monday* in *July*, One Thousand Seven Hundred and Eighty, *in Rhode Island Acts and Resolves*, Volume 10 [13], at {33}.

EN-2141 — An ACT for embodying and bringing into the Field Twelve Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and no longer Term, and not to be marched out of the same, At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden (by Adjournment) at *South-Kingstown*, within and for the State aforesaid, on the Fourth *Monday* in *Februar*y, Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {8}. *Accord*, An ACT for incorporating and bringing into the Field Five Hundred able-bodied effective Men, of the Militia, to serve within this State for One Month, from the Time of their Rendezvous, and no longer, and not to be marched out of the same, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island*, and *Providence-Plantations*, begun and holden, by Adjournment, at *Providence*, within and for the State aforesaid, on the Fourth *Monday* in *May*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {15}.

EN-2142 — An ACT for mitigating of Penalties on Delinquents, heretofore called forth to do military Duty, and for directing Fines to be paid into the General-Treasury, in Lieu of the Town-Treasuries, At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden by Adjournment at *Newport*, within and for the said State, on the Third *Monday* in *August*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves*, Volume 11 [14], at {31-32}.

EN-2143 — CHAP. II, *An Act to explain an act, intituled, An act for raising the sum of twenty thousand pounds, for the protection of his majesty's subjects, against the insults and encroachments of the French; and for other purposes therein mentioned,* § IX, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Thursday the first day of May, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 465.

EN-2144 — CHAP. I, *An Act for raising the sum of forty thousand pounds, for the protection of his majesty's subjects on the frontiers of this colony,* § X, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February, one thousand seven hundred and fifty two. And from thence continued by several prorogations, to Tuesday the fifth day of August, one thousand seven hundred and fifty five, in Laws of Virginia*, Volume 6, at 527.

EN-2145 — CHAP. I, *An Act for raising the Sum of Twenty-five Thousand Pounds, for the better protection of the Inhabitants on the Frontiers of this Colony, and for other purposes therein mentioned,* § X, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday the twenty-fifth day of March,* 1756, *in Laws of Virginia*, Volume 7, at 14-15.

EN-2146 — CHAP. I, *An Act for granting an aid to his majesty for the better protection of this colony, and for other purposes therein mentioned,* §§ I and IV, *At a General Assembly, begun and held at the Capitol, in Williamsburg, on Thursday, the twenty-fifth day of March,* 1756, *and from thence continued by several prorogations to Thursday the fourteenth of April, one thousand seven hundred and fifty-seven, in Laws of Virginia*, Volume 7, at 70-71, 72.

EN-2147 — CHAP. II, *An act for the more speedily completeing the Quota of Troops to be raised in this commonwealth for the continental army, and for other purposes,* AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fifth day of May, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 276-278.

EN-2148 — CHAP. I, *An Act for speedily recruiting the Virginia Regiments on the continental establishment, and for raising additional troops of Volunteers,* AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the twentieth day of October, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 337, 338-339, 341.

EN-2149 — CHAP. XI, *An act for raising a body of troops for the defence of the commonwealth,* AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of* Williamsburg, *on* Monday, *the third day of* May, *one thousand seven hundred and seventy-nine, in Laws of Virginia,* Volume 10, at 32-34.

EN-2150 — CHAP. XIX, *An act for obliging the several delinquent counties and divisions of militia in this commonwealth, to furnish one twenty-fifth man,* AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of* Williamsburg, *on* Monday, *the third day of* May, *one thousand seven hundred and seventy-nine, in Laws of Virginia,* Volume 10, at 82.

EN-2151 — CHAP. XX, *An act for the better regulation and discipline of the militia*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of* Williamsburg, *on* Monday, *the third day of* May, *one thousand seven hundred and seventy-nine, in Laws of Virginia,* Volume 10, at 84.

EN-2152 — CHAP. I, *An act to embody militia for the relief of South Carolina, and for other purposes*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the first day of* May, *one thousand seven hundred and eighty*, *in Laws of Virginia*, Volume 10, at 221, 225.

EN-2153 — CHAP. XII, *An act for speedily recruiting the quota of this state for the continental army*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the first day of* May, *one thousand seven hundred and eighty*, *in Laws of Virginia*, Volume 10, at 257-259. *See to like effect* CHAP. III, *An Act for recruiting this state's quota of troops to serve in the continental army*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the sixteenth day of* October, *one thousand seven hundred and eighty*, *in Laws of Virginia*, Volume 10, at 327-333, 337.

EN-2154 — CHAP. III, *An Act for recruiting this state's quota of troops to serve in the continental army*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the sixteenth day of* October, *one thousand seven hundred and eighty*, *in Laws of Virginia*, Volume 10, at 335-336.

EN-2155 — CHAP. VIII, *An act to amend the act for regulating and disciplining the militia, and for other purposes*, at a GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the seventh day of* May, *one thousand seven hundred and eighty-one*, *in Laws of Virginia*, Volume 10, at 416-417.

EN-2156 — CHAP. III, *An act for recruiting this state's quota of troops to serve in the army of the United States*, §§ I, II, and III, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the sixth day of* May, *one thousand seven hundred and eighty-two*, *in Laws of Virginia*, Volume 11, at 14-16.

EN-2157 — CHAP. XLIV, *An act to amend the act, intituled, An act for establishing and regulating the militia*, §§ IV and VI, AT A GENERAL ASSEMBLY, *Begun and held at the Public Buildings in the City of Richmond, on Monday the twenty-first day of October, one thousand seven hundred and eighty-two, in Laws of Virginia*, Volume 11, at 174.

EN-2158 — CHAP. I, *An ordinance for raising and embodying a sufficient force, for the defence and protection of this colony, AT a Convention of Delegates for the Counties and Corporations in the Colony of Virginia, held at Richmond town, in the county of Henrico, on Monday the seventeenth day of July, one thousand seven hundred and seventy-five, in Laws of Virginia,* Volume 9, at 12; CHAP. I, *An Ordinance for raising an additional number of forces for the defence and protection of this colony, and for other purposes therein mentioned, At a Convention of Delegates held at the town of Richmond, in the colony of Virginia, on Friday the first of December, one thousand seven hundred and seventy-five, in Laws of Virginia,* Volume 9, at 8l; CHAP. I, *An Act for speedily recruiting the Virginia Regiments on the continental establishment, and for raising additional troops of Volunteers*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the twentieth day of October, one thousand seven hundred and seventy seven, in Laws of Virginia*, Volume 9, at 342; CHAP. III, *An act for raising a Battalion of Infantry for garrison duty, and for other purposes,* AT A GENERAL ASSEMBLY BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fourth day of May, one thousand seven hundred and seventy eight, in Laws of Virginia,* Volume 9, at 452.

EN-2159 — *Acts, Orders and Proceedings of the Governor and Councill of His Majestys Collony of Rhode Island and Providence Plantations, held at Newport, May,* 1667, *in Rhode Island Records*, Volume 2, at 192.

EN-2160 — An ACT for raising, cloathing, and paying Four Hundred and Fifty able-bodied effective Men, for the ensuing Campaign against His Majesty's Enemies in *North-America*, At the GENERAL ASSEMBLY of the Governor and Company of the *English* Colony of *Rhode-Island*, and *Providence Plantations*, in *New-England*, in AMERICA; begun, in Consequence of Warrants issued by his Honor the Dep[uty] Governor, and holden at *Providence*, within and for the said Colony, on *Tuesday* the first of *February*, One Thousand Seven Hundred and Fifty-seven, *in Rhode Island Acts and Revolves*, Volume 2, at {13 and 15}.

EN-2161 — *See* An Act for impressing such and so many men as shall be wanted, after the returns made to the several field officers, to complete and make up the four hundred and fifty men, by the General Assembly, at their last session, ordered to be raised in this colony for the ensuing campaign, *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Providence, the* 14*th day of March*, 1757, *in Rhode Island Records*, Volume 6, at 34-35.

EN-2162 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at Providence, on Thursday, the 28th day of May,* 1778, *in Rhode Island Records,* Volume 8, at 417.

EN-2163 — At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence Plantations*, begun and holden (by Adjournment) at *Providence*, within and for the State aforesaid, on the first *Monday* in *July*, One Thousand Seven Hundred and Eighty, *in Rhode Island Acts and Resolves*, Volume 10 [13], at {6-7, 9-10}. *Accord*, Additional Act for filling up the Continental Battalions, At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence Plantations*, begun and holden (by Adjournment) at *Newport*, within and for the State aforesaid, on the Third *Monday* in *July*, One Thousand Seven Hundred and Eighty, *in Rhode Island Acts and Resolves*, Volume 10 [13], at {27}; An ACT for raising Six Hundred and Thirty able-bodied effective Men, At the General Assembly of the Governor and Company of the State of *Rhode-Island*, and *Providence Plantations*, begun and holden (by Adjournment) at *Newport*, within and for the State aforesaid, on the Third *Monday* in *July*, One Thousand Seven Hundred and Eighty, *in Rhode Island Acts and Resolves*, Volume 10 [13], at {28}.

EN-2164 — An ACT for filling up and completing this State's Quota of the Continental Army, At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations*, begun and holden by Adjournment, at *East-Greenwich*, within and for the State aforesaid, on the last *Monday* in *November*, One Thousand Seven Hundred and Eighty, *in Rhode Island Acts and Resolves*, Volume 10 [13], at {35, 37-38}. *Amended and clarified,* An ACT in Addition to and Amendment of an Act, passed at the last Session of this Assembly, for filling up and compleating this State's Quota of the Continental Army, At the General Assembly of the Governor and Company of the State of *Rhode-Island,* and *Providence-Plantations,* begun and holden (in Consequence of Warrants issued by his Excellency the Governor) at *East-Greenwich,* within and for the State aforesaid, on *Wednesday*, the Seventeenth Day of *January*, One Thousand Seven Hundred and Eighty-One, *in Rhode Island Acts and Resolves,* Volume 11 [14], at {15}. *More powers of enforcement added,* Additional Act for filling this State's Battalion, At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence-Plantations,* begun and holden, by Adjournment, at *South-Kingstown,* within and for the said State, on the Third *Monday* in *March*, One Thousand Seven Hundred and Eighty-one, *in Rhode Island Acts and Resolves,* Volume 11 [14], at {41}.

EN-2165 — An ACT for raising Two Hundred and Fifty-nine Men, to make up the full Quota of this State's Forces in the Army of the United States, AT the GENERAL ASSEMBLY of the Governor and Company of the State of *Rhode-Island* and *Providence Plantations,* begun and holden (in Consequence of Warrants issued by his Excellency the Governor) at *Providence,* within and for the said State, on *Monday,* the Twenty-fifth Day of *February*, One Thousand Seven Hundred and Eighty-two, *in Rhode Island Acts and Resolves,* Volume 12 [15], at {10-14}.

EN-2166 — CHAP. III, *An Act, for raising Levies and Recruits, to serve in the present War, against the* Spaniards, *in* America, §§ I, II, and III, AT A General Assembly, SUMMONED TO BE HELD AT *The Capitol, in the City of Williamsburg, on Friday the first day of August,* [1735]. *And from thence continued, by several prorogations to the twenty second day of May*, 1740, *in Laws of Virginia*, Volume 5, at 94-96.

EN-2167 — CHAP. II, *An Act for raising levies and recruits to serve in the present expedition against the French, on the Ohio,* §§ I, II, and III, *At a General Assembly, begun and held at the College in the City of Williamsburg, on Thursday the twenty seventh day of February*, 1752. *And from thence continued by several prorogations, to Thursday the 17th day of October*, 1754, *in Laws of Virginia*, Volume 6, at 438-439. [In the volume cited, the erroneous page number "421" is given for the actual page "439".]

EN-2168 — An Act for raising a number of seamen to help complete the manning of a squadron of the King's ships at Halifax, *Proceedings of the General Assembly, held for the Colony of Rhode Island and Providence Plantations, at Newport, the first Wednesday of May,* 1759, *in Rhode Island Records,* Volume 6, at 208.

EN-2169 — *Proceedings of the General Assembly, held for the State of Rhode Island and Providence Plantations, at Providence, on the first Wednesday in May,* 1777, *in Rhode Island Records,* Volume 8, at 230.

EN-2170 — CHAP. I, *An Act for speedily recruiting the Virginia Regiments on the continental establishment, and for raising additional troops of Volunteers*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the twentieth day of October, one thousand seven hundred and seventy seven*, *in Laws of Virginia*, Volume 9, at 337-340.

EN-2171 — *See, e.g.,* CHAP. I, *An act for raising Volunteers to join the Grand Army*, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Capitol, in the City of Williamsburg, on Monday the fourth day of May, one thousand seven hundred and seventy eight*, *in Laws of Virginia*, Volume 9, at 445; CHAP. XXXVIII, *An act to recruit the Virginia line on the continental establishment,* § I, AT A GENERAL ASSEMBLY, BEGUN AND HELD *At the Public Buildings in the Town of* Richmond, *on* Monday *the fifth day of* November, *one thousand seven hundred and eighty-one, in Laws of Virginia,* Volume 10, at 499.

EN-2172 — At the General Assembly of the Governor and Company of the State of *Rhode-Island* and *Providence-Plantations*, begun and holden by Adjournment at *East-Greenwich*, within and for the State aforesaid, on the last *Monday* in *March*, One Thousand Seven Hundred and Ninety-four, *in Rhode Island Acts and Resolves,* Volume 16 [19], at 14-25.

EN-2173 — CHAP. IV, *An act for regulating the militia of this Commonwealth*, AT A GENERAL ASSEMBLY *Begun and held at the Capitol in the city of Richmond, on Monday, the first day of October, one thousand seven hundred and ninety-two, in Laws of Virginia*, Volume 13, at 340-356.

EN-2174 — *Chap.* 92, An ACT in addition to the several Acts concerning the Militia [*Approved by the* Governor, *March* 24, 1840], §§ 1, 5, 11, 12, and 13, ACTS AND RESOLVES PASSED BY THE Legislature of Massachusetts, IN THE YEAR 1840 (Boston, Massachusetts: Dutton and Wentworth, 1840), at 233, 234, 235 (emphasis supplied).

The Sword and Sovereignty