

THE SECOND AMENDMENT AND THE SPIRIT OF THE PEOPLE

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Of all the rights in the U.S. Constitution, the right to keep and bear arms most reflects the spirit of a free people. It is the spirit of resisting oppression. That oppression can come in different forms: oppression by the government, and oppression by private thugs. As we'll see, the United States is not the only place where that spirit exists. It's growing in other places around the world.

Jordan Peterson reminds us—if we needed reminding—that some persons are genuinely malevolent.¹ They wish us harm. We must say “no,” early in the cycle of oppression, and mean what we say. To do that, he says, takes aggression.²

That is true, but a better word for the quality that's needed is “spirit” or “spiritedness.” This is the quality that the ancient Greeks called *thumos*.³ Good *thumos* is the emotion that drives virtue. It is indispensable to having and keeping virtue. It is the spirit that resists oppression, that causes one to stand up for oneself, one's family, and one's community. It is the spirit of courage. And it is the spirit of self-reliance.

Self-reliance was famously a classic characteristic of the American people. The American people settled a continent in the face of staggering dangers. There are many great accounts of this. One of the best, in my opinion, is Laura Ingalls Wilder's *Little House* books. Wilder has a long description of Pa carefully

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1. JORDAN B. PETERSON, 12 RULES FOR LIFE: AN ANTIDOTE TO CHAOS 24 (2018).

2. *Id.* at 23–24.

3. THE REPUBLIC OF PLATO 119–22 (Allan Bloom trans., 2nd ed. 1991) (439d–442c). Bloom translates *thumos* as “spirit” or “spirited part.”

cleaning his rifle.⁴ She helped him, as a six-year-old girl. She also describes Pa at the hearth in their log cabin, casting bullets. And again, she helped him. She even helped him load the rifle. That rifle, she makes clear, was absolutely essential to feeding the family, because of hunting, and to protecting the family. When Pa wasn't carrying it, they kept it, fully loaded, on hooks on the wall of their cabin⁵—a cabin that was full of young children. There is never a hint, in Wilder's books, that there was the least danger of accidental use. The past tells us a lot about the present.

In certain circles these days, self-reliance is not a popular virtue. The argument goes, we no longer live on the frontier. We have a specialized police force. It will keep us safe.

Really? Violent crime has not disappeared. But in America, it is localized.

The fear of violent crime doesn't affect me personally much at all. I don't live in a high-crime neighborhood. I never have. Most other suburban soccer moms haven't either. I grew up, and I currently live in, McLean, Virginia. A place that I sometimes call "the mean streets of McLean." (My family roll their eyes.)

But mean streets, and mean places, are not a joke for many persons. A friend of mine became interested in carrying a gun for self-defense because of a new job. That job was being a clerk on the graveyard shift at a motel on Route 1 in Howard County, Maryland. After my friend had quit his previous job and started work at the motel, he found out the reason for the job opening. The previous night clerk had been shot dead by a person robbing the motel. A police officer who stopped by from time to time suggested that he get a permit and a gun. Such permits were very hard to get. The police approved his application, though, maybe because they felt bad about never solving the murder at the hotel. He got a gun right away after that and carried it.

4. LAURA INGALLS WILDER, *LITTLE HOUSE IN THE BIG WOODS* 45–53 (Harper Trophy 1971) (1932).

5. *Id.* at 51 ("The gun was always loaded, and always above the door so that Pa could get it quickly and easily, any time he needed a gun.").

Of course for persons who live in high-crime neighborhoods, these sorts of problems are routine. There's a considerable risk, if you're walking alone at night, that you will be robbed. That is something it's easy to forget when you're a suburban soccer mom, or otherwise upper-middle class. Suburban soccer moms are not likely to hear much about the many times that firearms are used in self-defense—over 67,000 times per year, according to a study by a pro-gun-control group using data compiled by the FBI.⁶ That's considered a low estimate.⁷

But what a suburban soccer mom is likely to hear about, a great deal, are mass shootings. These mass shootings play on the fears of an already quivering and anxious society. And so the call goes out: Do something about it! And here's where complete irrationality sets in. Because the shooter used this particular gun or this particular part, we must ban them.⁸

What really creates the danger is not the legality of this or that part. What really creates the danger is so-called "gun-free zones." Every major recent mass shooting was in a "gun-free zone."⁹ Gun-free zones are death traps. Mass shooters know it. We sometimes think of mass shooters as totally crazy, but they're not. They are rational, in that they deliberately target gun-free zones, because they know the persons in them are sitting ducks. They can't fire back. They can't defend themselves. Mass shooters know they'll be able to kill a lot more persons that way.

6. VIOLENCE POLICY CTR., FIREARM JUSTIFIABLE HOMICIDES AND NON-FATAL SELF-DEFENSE GUN USE: AN ANALYSIS OF FEDERAL BUREAU OF INVESTIGATION AND NATIONAL CRIME VICTIMIZATION SURVEY DATA 6 (2015), <http://vpc.org/studies/justifiable15.pdf> [https://perma.cc/9UKR-TWXP].

7. Mark W. Smith, *More People Use a Gun in Self-Defense Each Year Than Die in Car Accidents*, FEE (July 12, 2018), <https://fee.org/articles/more-people-use-a-gun-in-self-defense-each-year-than-die-in-car-accidents/> [https://perma.cc/LW6R-D3XP] (noting 67,740 is a "very conservative" estimate and some studies estimate up to 2.5 million defensive firearm uses per year).

8. See, e.g., Martin Kaste, *The Politics Of Bump Stocks, 1 Year After Las Vegas Shooting*, NPR (Sept. 26, 2018, 5:14 AM), <https://www.npr.org/2018/09/26/650454299/the-politics-of-bump-stocks-one-year-after-las-vegas-shooting> [https://perma.cc/Q7LK-UETL].

9. NELSON LUND, THE RIGHT TO ARMS AND THE AMERICAN PHILOSOPHY OF FREEDOM 16–17 (Heritage Found., First Principles No. 62, 2016), <http://thf-reports.s3.amazonaws.com/2016/FP-62.pdf> [https://perma.cc/B3JZ-XDPB]; see also CRIME PREVENTION RESEARCH CTR., THE MYTHS ABOUT MASS PUBLIC SHOOTINGS: ANALYSIS 10–11 (2014), <https://crimeresearch.org/wp-content/uploads/2014/10/CPRC-Mass-Shooting-Analysis-Bloomberg2.pdf> [https://perma.cc/5H3G-PGSW].

But instead of realizing that “gun-free zones” are the danger, politicians rush to say that they want to ban this or that device that was used.¹⁰ How effective is that? Let’s take a look. In 1764, the Italian enlightenment criminologist Cesare Beccaria had something to say about gun control.¹¹ He is much beloved of Progressives these days because he opposed the death penalty.¹² In his own time, he was famous throughout Europe, and also influential with the Founders of this country.¹³ Let’s hear what he wrote about gun control:

False is the idea of utility that sacrifices a thousand real advantages for one imaginary or trifling inconvenience; that would take fire from men because it burns, and water because one may drown in it; that has no remedy for evils, except destruction. *The laws that forbid the carrying of arms are of such a nature.* They disarm those only who are neither inclined nor determined to commit crimes.¹⁴

He goes on to say that anyone who’s prepared to violate laws against robbery and murder would also violate laws against carrying arms. And he says that a ban on carrying arms “would put an end to personal liberty.”¹⁵

Two and a half centuries ago, Beccaria nailed it. With gun control laws, criminals find a way to get firearms, while law-abiding citizens are disabled. The best example of this is the United Kingdom. The U.K. government boasts that it has some of the strictest gun control laws in the world.¹⁶ Since 1997, following a mass shooting at a school, handguns were confiscated.¹⁷ It’s virtually impossible to get a license to keep or carry a

10. See, e.g., Kaste, *supra* note 8.

11. CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 87–88 (Henry Paolucci trans., Bobbs-Merrill Educ. Publ’g 1963) (1764).

12. *Id.* at 45–52.

13. JOHN D. BESSLER, THE CELEBRATED MARQUIS: AN ITALIAN NOBLE AND THE MAKING OF THE MODERN WORLD (2018).

14. BECCARIA, *supra* note 11, at 87–88 (emphasis added).

15. *Id.* at 88.

16. See LUND, *supra* note 9, at 15.

17. *Id.*; see also Richard Williams, *Why Britain’s shooters should stop whinging about pistol ban*, GUARDIAN (Jan. 16, 2006, 9:53 PM), <https://www.theguardian.com/sport/2006/jan/17/comment.gdnsport3> [<https://perma.cc/774D-2JEH>].

handgun. The U.K. international pistol shooting team has to go to Switzerland to practice.¹⁸

What happened next? Crimes involving handguns increased by nearly 40 percent in the next two years, and had doubled by 2009.¹⁹ Just in late December 2018 there was an article in the *Guardian* about how floods of illegal firearms are entering the United Kingdom, smuggled by organized crime rings.²⁰ The U.K. police have made seizing illegal firearms a top priority, but they admit they can't keep up. Among the most popular of these illegal firearms? Handguns.²¹ And that's exactly the sort of ban that gun control advocates in the United States desire.

Conversely, what do we see when the population is—legally—armed? In 1987, Florida became the first state with major urban populations to ensure that almost all law-abiding adults can get a concealed carry permit.²² Gun control advocates hysterically predicted murder and mayhem on Florida streets. In fact, violent crime went down. License holders almost never misused their weapons.²³ Florida's successful law prompted other states to do the same. Social scientists have yet to find any adverse effect on public safety.²⁴

The evidence is overwhelming that gun control not only does not promote public safety, it affirmatively endangers us. So why does this impulse persist? In part, it's the usual human irrationality and foolishness. But there is also another component that is deeper. That is, distrust of the people and the desire to make the people dependent on the government. Ultimately, this leads to the end of government by the people.

To see that, we need to take a look at the rationales and history of the right to keep and bear arms. The best exploration of the liberal philosophic basis of the right to keep and bear arms

18. Williams, *supra* note 17.

19. LUND, *supra* note 9, at 15.

20. Vikram Dodd, *Police struggle to stop flood of firearms into UK*, GUARDIAN (Dec. 27, 2018, 1:00 PM), <https://www.theguardian.com/world/2018/dec/27/police-struggle-to-stop-flood-of-firearms-into-uk> [<https://perma.cc/2TCT-E56Q>].

21. *Id.*

22. LUND, *supra* note 9, at 3.

23. *See id.*

24. *See id.*; *see also* JOHN R. LOTT, JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-CONTROL LAWS (3d ed. 2010).

that I know of is in an article by Nelson Lund.²⁵ Liberal thinkers such as John Locke, William Blackstone, Beccaria, and Adam Smith all linked freedom from political oppression with self-defense and personal safety.²⁶ The right to bear arms, they said, was necessary for both.

Blackstone was central to the U.S. Founders' understanding of law. He wrote that the right to keep and bear arms was indispensable to protect what he called "the three great and primary rights, of personal security, personal liberty, and private property."²⁷ He wrote that this right is the "right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression."²⁸

And so it was for the Framers of the U.S. Constitution. The Second Amendment has a preface about the militia because the new Constitution gave the federal government power over the state militias.²⁹ The militia in those days consisted of all able-bodied men. Some Americans were concerned that the federal government would use this power over the militia to disarm the people.

That was the origin of the right: to protect personal security, personal liberty, and private property. Unfortunately, ruling classes over time have taken away the right to keep and bear arms from disfavored groups. The English did this right away, when Parliament passed the English Bill of Rights in 1689.³⁰ The right to arms in the English Bill of Rights was limited to Protestants only.³¹ Catholics, a suspect and disfavored group, could be disarmed.

The English decided they needed control over not only Catholics, but over the lower orders. The so-called "Game Laws" restricted ownership and use of weapons by servants and

25. See LUND, *supra* note 9.

26. *Id.* at 4, 8–10, 13.

27. 1 WILLIAM BLACKSTONE, COMMENTARIES *136.

28. *Id.* at *139.

29. LUND, *supra* note 9, at 4–5.

30. An Act declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown, 1689, 1 W. & M. 2 c. 2, 143, para. 14 ("That the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions and as allowed by Law.").

31. *Id.*; see also JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 122–23 (1994).

laborers.³² Ostensibly, the laws limited hunting, which the upper classes wanted to keep as their own preserve. But Blackstone and American commentators wrote that in fact this was a means of political control.³³

Americans had their own disfavored groups. After the Civil War, these included African-American freedmen.³⁴ In the former Confederate states, groups were going around confiscating the firearms of freedmen.³⁵ Thanks to Stephen Halbrook for highlighting this history. In response to these confiscations, Congress passed the Civil Rights Act of 1866, guaranteeing to freedmen the right to keep and bear arms. The Fourteenth Amendment, ratified two years later, is widely understood to have, at a minimum, constitutionalized the Civil Rights Act of 1866.³⁶

In the twentieth century, along with the expansion of regulatory government generally, the regulation of firearms expanded.³⁷ State and federal governments imposed heavy taxes. They prohibited or limited sale of certain types of firearms. And yes, they created “gun-free zones.” Some of them imposed complete bans on possession of handguns. And made it almost impossible for law-abiding citizens to carry a gun for self-protection.³⁸

These regulations affected primarily ordinary persons. Not persons who are upper-middle class. This was—and is—so for two reasons. First, upper-middle-class persons are usually safe. They live in safe neighborhoods, work in safe offices, and have safe means of transport.³⁹ They are insulated from the types of dangers that many ordinary persons have to face. Gun control regulations don’t make much difference in their lives.

32. C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 719–23 (2009).

33. *Id.* at 719–28.

34. STEPHEN P. HALBROOK, *FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866–1876*, at 27, 146 (1998).

35. *Id.*

36. *Id.* at 33–38.

37. LUND, *supra* note 9, at 5.

38. *Id.*

39. *Id.* at 14.

And, if such regulations ever do begin to bite, the upper-middle class and above can create exceptions. It was telling that William F. Buckley, Laurence Rockefeller, and Arthur Ochs (“Punch”) Sulzberger, the publisher of the gun-control-crusading *New York Times*, all had a permit to carry a firearm in New York City.⁴⁰ Bernie Goetz, after he had been assaulted and beaten on the subway, was denied one.⁴¹

This brings us to an interesting point about gun control advocates. They are not exclusively progressive Democrats. They include prominent conservatives, such as George Will, the late Charles Krauthammer, and George W. Bush.⁴² What do these persons have in common? They are or were upper-middle class at least, and they are or were safe.

It’s appropriate to analogize gun control today with the English game laws. In other words, it’s designed by the ruling class to keep control of ordinary persons.

Judges and lawyers are very much members of this ruling class, the upper-middle class. They are safe. Not only that, judges are well-protected in their workplaces. Threats against judges are taken very seriously by law enforcement. That might help explain why—apart from the slim majorities and limited holdings of *District of Columbia v. Heller*⁴³ and *McDonald v. City of Chicago*⁴⁴—judges have been reluctant to enforce rights to firearms. *They don’t see the need*. Justice Thomas has highlighted the point about judges being safe and not understanding the situation of ordinary persons.⁴⁵ He is one of the few justices who has lived in a poor and high-crime neighborhood.

40. Clayton E. Cramer & David B. Kopel, “Shall Issue”: *The New Wave of Concealed Handgun Permit Laws*, 62 TENN. L. REV. 679, 684 (1995).

41. Richard Stengel, *A Troubled and Troubling Life*, TIME (Apr. 8, 1985), <https://web.archive.org/web/20130602033237/http://www.time.com/time/magazine/article/0,9171,965495,00.html?iid=chix-sphere> [<https://perma.cc/8N35-U4N6>].

42. LUND, *supra* note 9, at 2, 14.

43. 554 U.S. 570, 635 (2008).

44. 561 U.S. 742, 791 (2010).

45. *Peruta v. California*, 137 S. Ct. 1995, 1999–2000 (2017) (Thomas, J., dissenting from the denial of certiorari) (“For those of us who work in marbled halls, guarded constantly by a vigilant and dedicated police force, the guarantees of the Second Amendment might seem antiquated and superfluous. But the Framers made a clear choice: They reserved to all Americans the right to bear arms for self-defense. I do not think we should stand by idly while a State denies its citizens that right, particularly when their very lives may depend on it. I respectfully dissent.”).

There are signs that the ordinary people of other countries are getting fed up with being told by the safe ruling class that they can't have guns. In 2006, I wrote about the clash between the people and elites on gun control and self-defense laws in the United Kingdom and Belgium.⁴⁶ Populist movements now have made relaxing restrictions on guns a central policy.

In Italy, there's been a sharp jump in the number of persons who say gun restrictions should be relaxed.⁴⁷ This is especially true among the less educated and the elderly—the most vulnerable persons. Matteo Salvini, a powerful figure in Italy's populist government, made a campaign pledge to loosen gun control restrictions.⁴⁸ In September, the government did just that, and made it possible to own firearms such as the AR-15. A few years ago, the mayor of a town in the Piedmont, in north-west Italy, promised to pay citizens €250 toward the purchase of a firearm.⁴⁹ The mayor of Florence, who is pro-gun-control, is upset. He said, "We've simplified the way to buy yourself a gun . . . This is an idea of do-it-yourself security."⁵⁰ Exactly. And that's what he can't stand. He wants the government to have a monopoly on legitimate force. I need hardly point out that the extensive and immensely powerful crime organizations in Italy are heavily armed with automatic weapons and do not bother with licenses.⁵¹

Brazil is an even more dramatic case. Brazil is undergoing an epidemic of criminal violence.⁵² Brazil has the lowest rates of

46. Renée Lettow Lerner, *The Worldwide Popular Revolt Against Proportionality in Self-Defense Law*, 2 J.L. ECON. & POL'Y 331, 344–53 (2006).

47. *Sharp rise in Italians in favour of loosening gun control*, LOCAL (June 27, 2018, 3:52 PM), <https://www.thelocal.it/20180627/italy-gun-control-survey> [<https://perma.cc/KYN4-K38Q>].

48. Emma Johanningsmeier, *Italy Loosens Gun Laws as Matteo Salvini Polishes His Tough Guy Image*, N.Y. TIMES (Nov. 7, 2018), <https://nyti.ms/2z5EgeH> [<https://perma.cc/93EE-85DL>].

49. *Italian mayor offers 'gun bonus' to citizens*, LOCAL (Oct. 21, 2015, 11:14 AM), <https://www.thelocal.it/20151021/italian-mayor-offers-bonus-to-gun-buying-citizens> [<https://perma.cc/6TMU-JPMM>].

50. Johanningsmeier, *supra* note 48 (internal quotation marks omitted).

51. Monica Massari, *Guns in the Family: Mafia Violence in Italy*, in SMALL ARMS SURVEY 2013: EVERYDAY DANGERS 75, 75–101 (2013).

52. Shasta Darlington, *Brazil's New Leader Wants to Ease Gun Laws. Supporters Are Ready, and Training.*, N.Y. TIMES (Dec. 1, 2018), <https://nyti.ms/2zzofxA> [<https://perma.cc/3X8G-78NT>] [hereinafter *Brazil's New Leader*]; see also Shasta Darlington,

legitimate gun ownership in the region and huge numbers of firearms in the hands of criminals.⁵³ In February 2018, the Brazilian government sent the army to deal with a wave of violent crime in Rio de Janeiro.⁵⁴ Ordinary persons are wearing bullet-proof vests, and trying to bullet-proof their homes and cars.⁵⁵ School children in poor neighborhoods have become used to lying on the floor during shootouts. Rates of armed robbery are astronomical. Criminals raid courthouses, where large amounts of firearms are stored as evidence in criminal cases.⁵⁶

In 2003, Brazil's Congress enacted a gun-control law that is appropriately called the Disarmament Statute.⁵⁷ Faced with an onerous registration process, many Brazilians surrendered their firearms. It's no wonder that Jair Bolsonaro's campaign promises to relax firearms restrictions proved popular.⁵⁸ In anticipation of a change, ordinary Brazilians are training at gun ranges.⁵⁹ One of them, Natalia Ortega in São Paulo, said this: "Right now, only the criminals have guns . . . I'm not going to run around the streets with a gun in my hand, but a criminal might think twice if normal citizens could be armed."⁶⁰

Bolsonaro Signs Decree Making It Easier for Brazilians to Buy Guns, N.Y. TIMES (Jan. 15, 2019), <https://nyti.ms/2Hd8YsH> [<https://perma.cc/6866-FHGT>] [hereinafter *Bolsonaro Signs Decree*].

53. *Eye for an Eye: Brazil's Bolsonaro Loosens Gun Control to Limit Gun Violence*, SPUTNIK (Jan. 6, 2019, 10:09 PM), <https://sputniknews.com/latam/201901061071264030-brazil-gun-violence-control/> [<https://perma.cc/MWC3-UBB2>]; Samantha Pearson & Luciana Magalhães, *Brazil's New Leader Eases Gun Restrictions in Bid to Combat Violence*, WALL STREET J. (Jan. 15, 2019, 12:43 PM), <https://www.wsj.com/articles/brazils-new-leader-eases-gun-restrictions-in-bid-to-combat-violence-11547568308> [<https://perma.cc/V5TB-D4JZ>].

54. Ciara Nugent, *How Far-Right Presidential Candidate Jair Bolsonaro Could Transform Brazil*, TIME (Oct. 25, 2018), <https://time.com/5433379/brazil-bolsonaro-policies/> [<https://perma.cc/7R5W-S6NC>].

55. *Eye for an Eye*, *supra* note 53.

56. *Id.*

57. Darlington, *Brazil's New Leader*, *supra* note 52.

58. Darlington, *Bolsonaro Signs Decree*, *supra* note 52; Paulo Trevisani, *Bolsonaro Further Eases Brazilians' Access to Guns*, WALL STREET J. (May 8, 2019, 3:46 PM), <https://www.wsj.com/articles/bolsonaro-further-eases-brazilians-access-to-guns-11557344770> [<https://perma.cc/2S4B-K9C6>].

59. Darlington, *Bolsonaro Signs Decree*, *supra* note 52.

60. Darlington, *Brazil's New Leader*, *supra* note 52 (internal quotation marks omitted).

Sometimes these populist movements are derided as fascist. The motive to allow ordinary citizens to have firearms is not fascist. How do we know that? What fascist movements do when they come to power is to confiscate the firearms of disfavored groups and political opponents. That is exactly what the National Socialist Party did in Germany, when it seized power.⁶¹ They confiscated the guns of Jews and of Social Democrats. Again, thanks to Stephen Halbrook for writing about this. The National Socialists did not want armed resistance to their violent plans.

What we're seeing in the United States, in Italy, and in Brazil is a response to ordinary citizens' genuine concerns about safety. This movement is in the liberal tradition. This is the tradition I described of Locke, Beccaria, Blackstone, and Adam Smith.

In contrast, the gun control movement is rooted in an illiberal tradition. We've seen that it's impervious to facts. What then is driving it? Distrust of the people. And a desire to make the people totally dependent on the government. Unable to think or act for themselves.

The people—especially minorities, women, and the elderly—will increasingly be prey to criminal men.⁶² This breakdown will cause the victims to turn to the government even more. The government, in response to this “crisis” of its own making, will continue to expand its already vast powers and personnel. The people will be devoid of self-reliance. And devoid of *thumos*, spiritedness.

The problem is deep. Spiritedness is necessary for self-government. Without it, we will become a nation of meek persons dictated to by the ruling class. Fortunately, through their devotion to the right to keep and bear arms, many Americans are demonstrating that they have spirit.

61. See STEPHEN P. HALBROOK, *GUN CONTROL IN THE THIRD REICH: DISARMING THE JEWS AND “ENEMIES OF THE STATE”* (2014).

62. See MARK W. SMITH, #DUPED: HOW THE ANTI-GUN LOBBY EXPLOITS THE PARKLAND SCHOOL SHOOTING—AND HOW GUN OWNERS CAN FIGHT BACK 43–44 (2018); Robert J. Cottrol & Raymond T. Diamond, *In the Civic Republic: Crime, the Inner City, and the Democracy of Arms—Being a Disquisition on the Revival of the Militia at Large*, 45 CONN. L. REV. 1605, 1611–16 (2013).