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I. INTRODUCTION

The Second Amendment is not for everyone. For the uninitiated, like myself, a foray into its analysis is fraught with potential pitfalls. There is an intensity of feeling on all sides of the debate that screams "This is personal!" between the lines discussing statutory construction, case analysis, and original intent. Does the Second Amendment to the United States Constitution recognize a right to bear arms? If so, is that right held by each individual who enjoys the protections of the Constitution or is it held by the "people" in some collective fashion? Is that right fundamental, such that any governmental edicts affecting it in any way are immediately suspect? Or, is it merely so much esoterica in the twentieth century when we are a free people and have evolved from our rough and ready pioneer ancestors for whom weapons were as essential as food, water, and oxygen? Whatever side of the issues people fall on, their positions have been carefully forged and are deeply entrenched.

The debate, however, is largely an academic one. As a legal matter, the Second Amendment hardly resembles a controversy. Not a single case decided in this country has struck down statutes regulating the use or possession of firearms based on the Second Amendment. An early Supreme Court case set the stage,[1] and all subsequent cases have obediently fallen neatly into line.[2] Even recent cases in which the Supreme Court has

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1. *See generally* United States v. Miller, 307 U.S. 174, 178 (1939) (finding no Second Amendment protection against regulation of possession of a sawed-off shotgun in the absence of evidence that the possession of the weapon "has some reasonable relationship to the preservation or efficiency of a well regulated militia").

2. *See, e.g.*, United States v. Rybar, 103 F.3d 273, 286 (3rd Cir. 1996); Hickman

invalidated gun-control legislation cannot be claimed as victories by those who believe the Second Amendment codifies a fundamental right because the Court did not rely on the Second Amendment to reach its conclusion. For example, in *United States v. Lopez*,[3] the Supreme Court invalidated the Gun Safe School Zone Act as beyond the scope of the Commerce Clause through which Congress had claimed the authority to promulgate the legislation. Similarly, the Supreme Court's recent evisceration of the Brady Bill was not based on the Second Amendment. Rather, it was based on notions of federalism.[4]

So why does the debate yet rage on and why is this yet another entry in the Second Amendment library? As a descendant of both slaves and forcefully dispossessed Native Americans, I can personally acknowledge that unanimity of legal opinion in no way guarantees its accuracy. But most importantly, whether you believe that cases addressing the Second Amendment have been decided rightly or wrongly, there is a distinct sense that they have not been decided *well*. The so-called settled case law raises more questions than answers.

One conclusion apparently "settled" by the courts is that the protections of the Second Amendment (whatever they may be) are not implicated unless the arms at issue or the manner in which those arms are being stored, carried, or used bear some reasonable relationship to a well-regulated militia.[5] If neither the arms nor the individual have that relationship—and so far none have been found to do so—the individual has been afforded no Second Amendment protection. In essence, courts have been able to punt[6] on the issue of *whether* there is a fundamental right to bear arms and what the scope of that right might be. Assuming such a right, arguendo, courts have handily concluded

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v. Block, 81 F.3d 98, 101 (9th Cir. 1996); Love v. Pepersack, 47 F.3d 120 (4th Cir. 1995); United States v. Hale, 978 F.2d 1016 (8th Cir. 1992); Thompson v. Dereta, 549 F. Supp. 297 (D. Utah 1982).

3. 514 U.S. 549 (1995).

4. *See* Printz v. United States, 117 S. Ct. 2365 (1997) (finding that various background check provisions impermissibly burdened states).

5. *See, e.g., Rybar*, 103 F.3d at 286; *Hickman*, 81 F.3d at 101; *Love*, 47 F.3d at 124; *Hale*, 978 F.2d at 1019-20; *Thompson*, 549 F. Supp. at 299.

6. Although I characterize the failure to directly address the existence and the scope of a right to bear arms as "punting," this is not at all meant pejoratively. After all, there is no reason to reach lofty issues of constitutional magnitude if the question can be settled on more mundane terms. In fact, courts often explicitly decline to reach constitutional issues on just that basis.

that no right is implicated under the facts of the individual case because the militia is not affected.

These "settled" holdings thereby raise an important question: What is a militia? If my right to bear arms, or at the very least my right to force a court to decide whether I have such a right, is contingent on my being in a militia, it is imperative that I know the meaning of "militia." And the courts are not saying, although when confronted they do tell us what it is not. Like obscenity, the courts have adopted an "I know it when I see it" approach.[7]

Unlike obscenity, however, the term militia does not defy legally cognizable (and legally enforceable) description. It is upon this narrow issue that this Article focuses. Part II looks at the origin and historical composition of American militias. It particularly examines the rights and obligations of militia members and the sources for militia authority. Based on this analysis, this Part concludes by arriving at a working definition of militia.

Part III then examines the existence of militias in our current society. Many commentators assert that the National Guard is the modern-day equivalent to the eighteenth-century militia.[8] This Part analyzes the accuracy of that assertion. It also examines neo-militia groups, and analyzes the status of these groups with respect to the working definition of militia. This Part concludes by asserting that, for various reasons, neither the National Guard nor any of the self-anointed neo-militia groups may lay legitimate claim to the historical title—either as the militia of the United States or of some smaller locality. Part

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7. In *Jacobellis v. Ohio*, 378 U.S. 184 (1964), the Supreme Court wrestled with defining obscenity. The difficulty in pronouncing a clear, workable standard was not lost on Justice Stewart who said, "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . . ." *Id.* at 197 (Stewart, J., concurring). Although in the case of militias, the more apt tag line would be "I *will* know it when I see it" because no court has yet accepted any petitioner's (defendant's) membership in any group to which the description "militia" has been attached as sufficient to invoke power of the Second Amendment to invalidate a statute or prevent other government interference.

8. *See, e.g.*, JIM DAN HILL, THE MINUTE MAN IN PEACE AND WAR: A HISTORY OF THE NATIONAL GUARD xi, 10-11 (1964); JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS 163 (1994); Joyce Lee Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 HASTINGS CONST. L.Q. 285, 288-89 (1983).

IV forecasts the impact of this analysis on the ongoing Second Amendment debate.

II. A WELL REGULATED MILITIA

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.[9]

In recent years, people wishing to avail themselves of the protections of the Second Amendment have formed, joined, or otherwise aligned themselves with groups self-described in some way as militias.[10] Given *Miller* and its progeny, it is not difficult to comprehend their reasoning. After all, the *Miller* line of cases has made a connection to a well-regulated militia an explicit, necessary condition of Second Amendment protection.[11] What is difficult to comprehend, however, is why that stratagem has failed utterly. The language of the Second Amendment is not a model of clarity, but if the keeping and bearing of arms is protected for anyone, it would be for the militia.

And therein lies the difficulty. What is *the* militia of the Second Amendment? Despite language in the United States Code stating that the militia of the United States is "all able-bodied males at least 17 years of age,"[12] possession of the appropriate years and reproductive organs has not entitled their owner to Second Amendment protection.[13] Perhaps the difficulty arises from attempting to graft a twentieth-century definition onto words of eighteenth century origin, yet it is a difficulty that

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9. U.S. CONST. amend. II.

10. It is not my assertion that the sole purpose or function of these groups is to use the Second Amendment as a shield against government interference with their use of firearms. These groups, as shall be discussed *infra*, have diverse goals and purposes. Rather, it is my intent to illustrate that with increasing frequency, members of these groups have made recourse to the historical concept of militia membership in an attempt to use the Second Amendment as a defense to prosecution under various firearms regulations or in challenging the validity of those regulations ab initio.

11. *See, e.g.*, United States v. Miller, 307 U.S. 174 (1939); United States v. Rybar, 103 F.3d 273, 286 (3rd Cir. 1996); Hickman v. Block, 81 F.3d 98, 101 (9th Cir. 1996); Love v. Pepersack, 47 F.3d 120 (4th Cir. 1995); United States v. Hale, 978 F.2d 1016 (8th Cir. 1992); Thompson v. Dereta, 549 F. Supp. 297 (D. Utah 1982).

12. 10 U.S.C. § 311(a) (1994).

13. *See, e.g., Hale*, 978 F.2d at 1020 (holding that the Second Amendment does not protect members of unorganized militia).

must be addressed if the Second Amendment is to have any meaning.

Today, the word "militia" evokes many images. In addition to memories of the venerated minutemen indispensable in attaining American independence, the images include those of income tax protesters and firearms enthusiasts, white supremacist groups, various levels of anti-government extremists, and domestic terrorists. The proliferation of groups co-opting the title of militia (or another equally honored historical construct) for their modern organizations necessarily invites comparisons to those historical entities. This Part looks at the composition of the historical militias to provide a framework for that comparison.

A. Contemporaneous Meaning of Militia in Great Britain

A brief introduction to the contemporaneous English usage of the term militia provides an interesting prologue to a discussion of the meaning of that word as understood by those who grafted it into the United States Constitution. English understanding was at the same time both quite general and quite specific. At its most general, "militia" meant, simply, "being a soldier."[14] Yet, militia *service* was quite specifically described based on one's lands or wealth. For example, in the middle of the eighteenth century in Great Britain, a person worth £600 in personal property or who had an estate of £50 per year in lands was required to provide a man in the foot service.[15] Below that income level, militia service was not required. A person with an estate of £500 per year in lands or with personal property of £6000 had to provide a man and a horse.[16]

Militia service was considered a duty of every man with sufficient wealth or property,[17] but it was not a duty that had to be

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14. *See* GILES JACOB, A NEW LAW DICTIONARY (8th ed. 1762) (defining *militia*).

15. *See id.* (quoting 13 & 14 Car. 2 cap. 3 (Eng.)).

16. *See id.* The estate holder also had to provide the soldier's furnishings, including riding gear, weapons, and ammunition. *See id.*

17. In peacetime, the militia would be mustered for the purpose of training and discipline. The whole militia could muster no more than once a year and the encampment could last no longer than four days without special instruction or permission. Individual companies could be mustered up to four times a year. Any who failed to appear could be imprisoned for up to five days or fined according to a schedule based on their status. *See id.* Jacob notes in his summary of the laws that the King had the ultimate right to control the militia. Jacob published his dictionary less than twenty years prior to the American Revolution; the colonists could hardly have been unaware of the status of the militia in Great Britain.

personally discharged. A person whose estate obligated him to militia service could simply hire someone to represent his estate and make provisions for the proxy's accouterments.[18] This is quite interesting considering Britain's disdain, obviously carried over to the Americas, for standing armies or professional soldiers. It was thought that a citizen militia was always superior to a standing army for the protection of individual liberties because a standing army of military professionals could be coopted on the promise of spoils.[19]

A citizen militia, it was supposed, would serve out of "civic virtue, a commitment to the greater public good, not an insistence on individual prerogative."[20] The primary prerequisite for the assumed virtue of the citizen militia, however, was property. It was believed that "property assured the independence of mind and action that allowed the militia to serve the common good."[21] The best soldier would thus be the man who did not depend upon soldiering for his livelihood.

Thus, it is no surprise that militia obligations in Great Britain would be based on net worth. It is ironic, however, that one's responsibility for militia service could be satisfied by hiring someone—in essence, a mercenary—to serve in the property owner's stead. Nevertheless, even a militia partially composed of men who owe their loyalty, if to anyone, to the man who hired them would be accepted as a greater guarantor of personal liberties than a cadre of mercenaries serving at the discretion of the sovereign. The *leaders* of the citizen militia, after all, were men in the country of wealth and education—those with a vested interest in the preservation of their personal liberties.

B. The Militia in Late Eighteenth-Century America

The British view of militias was a part of the American colonists in two important ways. First, the Americans adopted the

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18. In fact, militia laws dated from the mid-1600s had specifically established that no one had to serve in person. *See id.*; J.R. WESTERN, THE ENGLISH MILITIA IN THE EIGHTEENTH CENTURY 25 (1965). Those provisions allowing "substitution" were still in place a hundred years later. *See* IAN F.W. BECKETT, THE AMATEUR MILITARY TRADITION 63, 66 (1991).

19. *See* Lawrence Delbert Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. AM. HIST. 22 (1971).

20. *Id.* at 24; *see also* JOHN K. MAHON, HISTORY OF THE MILITIA AND THE NATIONAL GUARD 13 (1983) (quoting William Blackstone's *Commentaries on the Laws of England*).

21. Cress, *supra* note 19, at 25.

view that a standing army was an occasional necessary evil, but that in the absence of exigent circumstances, a citizen militia was vastly to be preferred. Such was the distrust of a standing army[22] that Alexander Hamilton had to dedicate several passages to the explanation of, and the need for, post-revolution professional soldiers under the direction of the federal government within United States borders.[23] The second important similarity was in the reverence for the citizen militia as a bulwark to keep the federal government from using its forces to erode the civil liberties of the population.[24] An important aspect of the militia's ability to thwart possible federal incursions was local government to which the people were directly attached and by which the militia officers were appointed.[25] From their experience and from this historical backdrop, five main characteristics of the eighteenth-century citizen militia can be gleaned.

1. Membership is State-established and -defined

The first important characteristic is that legitimate militias were organized by the State.[26] Being a member of a militia was not something an individual conferred upon himself. Member-

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22. *See, e.g.*, Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5, 15 (1989) (asserting that American colonists learned that "standing armies were the instruments of tyranny and were acceptable only under extraordinary circumstances; the *militia* was the proper body to provide for the defense and safety of the people in a free society").

23. *See* THE FEDERALIST NOS. 24-26, 28-29 (Alexander Hamilton). Jay argued that the strength of Britain's army derived from central control of the military:

> What would the militia of Britain be, if the English militia obeyed the Government of England, if the Scotch militia obeyed the Government of Scotland, and if the Welch militia obeyed the Government of Wales! Suppose an invasion—would those three Governments (if they agreed at all) be able with all their respective forces, to operate against the enemy so effectually as the single Government of Great Britain would?

THE FEDERALIST NO. 4, at 21 (John Jay) (Jacob E. Cooke ed., 1961).

24. *See* THE FEDERALIST NO. 46, *supra* note 23, at 321 (James Madison) (arguing that a small standing army would be greatly outnumbered by the armed citizen militia, fighting for their liberties). Madison asserted that "[i]t may well be doubted whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops." *Id.*

25. *See id.*

26. *See id.* I am using State in this context in the classical sense to encompass whatever shape the government may have taken. The point is that legitimate militias were organized by the legitimate government, whether it be the county or territory, the state, or the federal government or king.

ship was something that was rooted in citizenship in a body. The United States Constitution gave the federal government the power to make use of the militia to execute the laws, suppress insurrections, and repel invasions.[27] And although the federal government was granted the power to provide for the organization, arming, and discipline of the militia, it was only granted the power to govern the militia (or that part of it) actually employed in the service of the United States.[28] To the states was reserved the training, appointment of officers, and the day-to-day management of the militia.[29] By 1775, all of the colonies had enacted laws creating militia systems.[30] The obvious implication is that the citizens did not organize themselves.

An important side note is that even in colonial America, the militia was not the only fighting force. In addition to the militia, there were various volunteer units composed of meu on and off the muster rolls who uniformed themselves and drilled separately.[31] Some of these volunteer units obtained legislative permission to exist independent of the militia, although most were part of the militia system.[32]

2. *Membership is composed of lay citizenry—no professional soldiers*

The colonists maintained a distrust of professional soldiers and of a standing army. Their "English heritage had taught them that standing armies were the instruments of tyranny and were acceptable only under extraordinary circumstances."[33] One such exigent circumstance was the security of the nascent colonies. When the colonists first arrived, they were accompanied by professional soldiers, hired by the colonizing agencies in England, to instruct the colonists in military matters.[34] The number of professional officers was always small because it was expected

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27. *See* U.S. CONST. art. I, § 8.
28. *See id.*
29. *See id.*
30. *See* MAHON, *supra* note 20, at 14.
31. *See id.* at 17-18.
32. *See id.* at 18.
33. Ehrman & Henigan, *supra* note 22, at 15.
34. *See* MAHON, *supra* note 20, at 15.

that the colonists would serve as soldiers should the need arise.[35]

Like their British cousins, the American colonists saw the value of ties to the community—a solid stake in its welfare—not only as an obligation of citizenship, but also as a hedge against corruption. Unlike their British cousins, however, this distrust did not manifest itself in wealth or property requirements for general militia service.[36] Also, neither wealth nor position operated as an exemption from service.[37] The colonists did maintain some vestiges of class distinction in the selection of their officers, however. Most states did have requirements that resulted in their officers being drawn from some form of elite class.[38] South Carolina, for example, required the officers to own specified amounts of land,[39] and several New England colonies required their officers to be members of the "congregation."[40] Each requirement, in some way, operated to insure the officer's loyalty to his community, and thus to insure the militia members he commanded would operate in the best interests of that community.

The militia must be contrasted with various bands of professional soldiers existing at the time. When circumstances required standing forces, for example, to patrol boundaries that were consistently considered susceptible to Indian attack, the colonies would raise alternative troops. Special officers were appointed with orders to raise a force of a specified size through volunteers or through conscription of anyone not exempt from impressment.[41] The members of these groups were generally poor and landless, and young and single.[42] Thus they would volunteer to obtain the salary and other inducements offered.[43] These men would most likely have been on the militia rolls, but

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35. *See id.*

36. All free, white, male settlers were presumed to have an obligation for military service. *See id.* at 14.

37. *See id.* at 16.

38. *See id.*

39. *See id.*

40. *See id.*

41. *See id.* at 21.

42. *See id.*

43. Inducements could include receiving wages in advance, freedom from conscription for a specified time, or if the purpose of the band was waging war against the Indians, a share of the plunder. *See id.*

these groups were not considered part of the militia, and according to some, were largely not acknowledged.[44]

Thus, although other bands of duly constituted, arguably professional fighting forces existed, the legitimate militia was still general rather than select. The more the militia was separated from the community in their skills, training, and status, the more dangerous the group obviously could become. If those ties to the community at large did not exist throughout the ranks, the group was neither considered nor treated as the militia.

3. Operations are State supported

Although there were, at times, statutes passed in the various states *requiring* that men maintain arms for their defense and the defense of the community,[45] the militia was government supported[46] rather than privately funded. Thus, although rarely were the supplies adequate, all of the colonies kept public arms.[47] After all, a privately funded militia would be nothing but a private band of mercenaries, owing their allegiance to the one who held the purse. It was important that the citizen militia be attached to the government entity that supported it—and that the militia supported. This criteria expands upon the rationale for a militia composed of the lay citizenry: loyalty to the local community.

4. Militia is independent of federal government

The fourth important characteristic of a legitimate militia under eighteenth-century standards is that it must be independent of the sovereign's control except when actually called to its service.[48] Thus, unless there were a foreign invasion or some large-scale domestic insurrection, the militia was not subject to use (or abuse) by the federal government. This was partially due to accidents of composition. Most citizens were farmers. They

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44. *See id.*

45. *See* MALCOLM, *supra* note 8, at 290-92.

46. *See* MAHON, *supra* note 20, at 16-17. The colonies maintained public arms for the common support. Initially, arms would have been provided by the colonizing agencies, and later, the armories would have been supported by taxes. This was in addition to requirements that colonists arm themselves. *See id.*

47. *See id.* at 17.

48. *See* U.S. CONST. art. I, § 8.

could not be away from their land for substantial periods of time.[49] Thus, they were not able to serve protracted duty at the behest of the sovereign. Also, colonial militias were generally stopped at their respective borders and had no authority to act beyond them.[50]

Also, although they resembled each other as a function of being created by those of similar background and experiences, the colonial militias were completely unrelated.[51] They were not a single fighting force. Rather, they were several local fighting forces who could work together during a (sufficiently large) common emergency, but they generally resisted attempts to consolidate them into a single power.[52]

Even the Articles of Confederation, entered into in 1781, when the Revolutionary War was nearly over, kept control of the militia firmly in state hands. Congress had the exclusive power "to declare war, to determine the size of the military forces, to appoint generals, and to set quotas of men and money for the several states."[53] But Congress could only control what the states provided and had no power even to enforce the quotas.[54] Federal control was so lacking that the colonies did not even include a prohibition against a peacetime standing army in the Articles. The central government could hardly maintain a standing army if the states did not provide the manpower—which they were extremely unlikely to do when there was no threat of war.[55]

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49. *See* MAHON, *supra* note 20, at 19.

50. *See id.* Because of proximity, a few colonies permitted their colonial militias to cross the colonial boundaries, but this was the exception, not the rule. *See id.*

51. *See* JOHN K. MAHON, THE AMERICAN MILITIA: DECADE OF DECISION, 1789-1800, at 2 (1960).

52. *See id.*

53. *Id.* at 14.

54. *See id.* Worse, Congress had no say in *how* the quotas were to be met. Thus, states could set their own eligibility requirements, set their own pay scales, set their own tours of duty which the federal government could only watch. *See id.*

55. *See id.* What is interesting is that the Articles did prohibit the states from maintaining peacetime standing armies, but the prohibition did *not* apply to the militia. Each state was required to maintain a militia and sufficient accoutrements for its use. *See id.*

5. *Motivated by civic virtue: the public vs. the private or individual good*

The final characteristic involves a dedication to serve the common good. Militia forces were rallied and employed by the governing authority for the welfare of the community at large. When locals—even those who were members of the militia—took arms for their own reasons and without authority, the regular militia was called out to stop them.[56] Those who took to arms for their own purposes or to redress their individual grievances were rebels and insurrectionists. The militia could act only for the common good.

What constituted the "common good" in the eighteenth century was as much a matter of interpretation as the composition of the "common good" in the twentieth. Generally speaking, with respect to legitimate use of the militia, the "common good" was whatever the appropriate authority deemed it to be.[57] Thus, when mustered in accordance with state laws providing for regular training and exercises, or when mustered by the appropriate authority in response to a threat to the common good, the militia acted legitimately.

Historically, the legitimacy of militia action did not require the unanimity of purpose that has been argued for by some modern commentators. For example, David Williams argues that the legitimate militia, the only militia that could engage in a righteous revolution, must consist of *all* the people, united in the struggle, as it were.[58] Thus, no militia could be a legitimate militia unless it includes *all* citizens and those citizens are all united in its goals and purposes, an eventuality that Williams argues is impossible in our current pluralistic society.[59] However, legitimacy did not require that level of unanimity in the eighteenth century and should not require it now. After all, the Framers were certainly not possessed of such unity of mind and spirit. Until it was actually happening, they were not at all

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56. Consider Shays Rebellion in 1786 and the Whiskey Rebellion of 1794, discussed *infra* text accompanying notes 65-70.

57. In times of danger, the senior militia officer in the area had authority to muster the militia. *See* MAHON, *supra* note 20, at 32. Otherwise, the militia was under the control of the colonial, and later the state, government.

58. *See* David C. Williams, *The Militia Movement and Second Amendment Revolution: Conjuring with the People*, 81 CORNELL L. REV. 879, 911 (1996).

59. *See id.*

unanimous in their desire for a revolution. Even when they were agreed on a revolutionary course, they differed quite sharply on many core values and goals for their nascent republic.[60] And let us not forget the rest of the colonists. Certainly, not all of the colonists were united behind the idea of revolution—even after the war was over.

In addition, no eighteenth-century American militia has been defined as "all the people" or even all of the residents of the country or state. Across the states, the eighteenth-century militias generally excluded all Negroes (slave and free alike were not considered citizens), all Native Americans (also not considered citizens),[61] all people below sixteen, all people above sixty, and all women.[62] Some states excluded anyone not fitting the description "able-bodied."[63] And many states excluded the clergy and those who, by today's terminology, would be classified as conscientious objectors.[64]

This hardly paints a picture of the sort of universality upon which David Williams would condition legitimacy of revolution. By Williams' analysis, the American Revolution itself would have been illegitimate. I believe Williams is exactly right in requiring commonality of purpose, but that a standard of complete homogeneity is too high, and most importantly, is not constitutionally required. Rather, I assert that the final characteristic of a legitimate militia is a dedication of service to the common good and a clear, population-wide consensus of what the common good is. Without it, what you perceive (or portray) as a glorious revolution is really just a seditious rebellion.

And thus does history speak of Shays' rebellion. Daniel Shays, a Revolutionary War veteran, led a group to armed revolt against the government of Massachusetts.[65] During the depression that followed the war (at the end of 1786 and beginning of 1787), Shays and his followers targeted the courts to prevent actions against debtors.[66] State troops managed to suppress the

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60. *See* Kevin J. Worthen, *The Right to Keep and Bear Arms in Light of* Thornton: *The People and the Essential Attributes of Sovereignty*, 1998 BYU L. REV. 137.

61. *See* MALCOLM, *supra* note 8, at 141.

62. *See* MAHON, *supra* note 20, at 14.

63. *Id.*

64. *See* MALCOLM, *supra* note 8, at 139.

65. *See* NEIL A. HAMILTON, MILITIAS IN AMERICA 62 (1996); *see also* MAHON, *supra* note 20, at 47.

66. *See* HAMILTON, *supra* note 65, at 49.

insurrection by February, 1787.[67] Shays was motivated by a personal desire to prevent the government from initiating debtors' actions against him. He convinced others in similar circumstances to join him. Their rebellion, however, lacked the universality of interest necessary to legitimize their actions. The majority of people felt honor-bound to discharge their honest debts and did not view the intervention of the courts to protect creditors' interests as one of the impending shackles of tyranny.[68]

Similarly, the militia was called out in response to the Whiskey Rebellion of 1794. A group of people in western Pennsylvania believed that the whiskey tax was discriminatory and they resisted it.[69] The national government called out the militia (composed of companies from Pennsylvania, New Jersey, Virginia, and Maryland) to respond to the insurrection and to force compliance with the law.[70]

III. THE MILITIA IN PRESENT-DAY AMERICA

This Part applies the criteria above defining what would constitute a legitimate militia in eighteenth-century America to present-day groups that are either generally accepted as the militia (the National Guard) or who have chosen to apply the title to themselves (the neo-militia groups).[71]

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67. *See id.*

68. It is interesting that there are direct modern analogs to Shays and his rebellion. Members of the Posse Comitatus, for example, believe that there is no legitimate form of government above the county level and thus refuse to pay any federal or state taxes. *See id.* at 22. Some members have also refused to submit when tax liens resulted in court-ordered foreclosure on, or confiscation of, their property. Dispossessed farmers have been prey to recruitment by the Aryan Nations' preaching that the despotic government has no authority to enforce their debts. *See id.* at 22-23.

69. *See* MAHON, *supra* note 20, at 54.

70. *See id.*

71. By neo-militia groups I mean modern, self-appointed citizen groups that train and drill or otherwise carry on military exercises, and who purport to be the modern-day equivalent of the historical militia. I include within this definition groups like the Freemen, located in Montana, who claim to have established an independent territory within the territorial borders of the United States. *See* HAMILTON, *supra* note 65, at 53-54. Even though members of these groups might disclaim United States citizenship, they would acknowledge citizenship in the independent territory they claim to have established.

A. Legitimate Exercise of Militia Functions

It is commonly accepted that the militia, as it existed in the eighteenth century, no longer exists. We have modern entities to fulfill their functions. Most notably, it is argued, and not without good cause, that the National Guard is the militia today.[72] Indeed, the federal militia statute specifically defines the Guard as a component of the militia of the United States.[73]

Yet, it is clear under the five characteristics identified above[74] that the National Guard, however officially and legitimately constituted, is not a legitimate militia as that term was understood by our Framers. The individual guard units are state established,[75] so the guard does not fail under that criteria. Similarly, the guard survives the second criteria—barely—because it is primarily composed of lay citizens who do not make soldiering their livelihood.[76] Of course, there are a number of members who do work for the Guard full-time, but the primary fighting forces, in whom would lie the threat of overthrowing a legitimate government, are lay personnel who have not lost their ties to community at large.

The National Guard is supported by the government, but it is directly supported by the federal government instead of the states.[77] Although this may bring its independence into question, the source of the funding is the government as opposed to private pockets, so the Guard satisfies the third criteria as well. And there can be no question but that the National Guard satisfies the fifth criteria regarding civic virtue motivation.

But the National Guard does not satisfy the fourth criteria. It is not independent of the federal government. The federal government controls its weapons and supplies. Courts have simply accepted Congress' authority to do so, and indeed, they have no reason to do otherwise.[78] But the federal government

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72. *See supra* note 8.

73. *See* 10 U.S.C. § 311(b)(1) (1994). Along with the naval militia, the National Guard comprises the organized militia of the United States. *See id.*

74. *See supra* notes 26-70 and accompanying text.

75. *See* 32 U.S.C. § 304.

76. *See id.*

77. *See id.*

78. *See* Peel v. Florida Dep't of Transp., 443 F. Supp. 451 (N.D. Fla. 1977), *aff'd*, 600 F.2d 1070 (11th Cir. 1977) (holding that the constitutional provision vesting Congress with the power to provide for organizing, arming, and disciplining the militia bestows upon Congress the authority to regulate the National Guard as an essential

control transforms the National Guard into a tool that could be used and abused by a tyrannical government to usurp illegitimate control of the populace and/or to fortify its positions. Yes, the National Guard performs many of the functions and duties that would have fallen to the militia in the eighteenth century, yet it could not serve the main function—protector of liberties—for which the militia was most desired.[79]

B. Neo-Militias

Ruby Ridge. Waco. These are rather quiet, even obscure places that would have remained in obscurity but for citizens in those cities who chose to declare themselves separate from their sovereign, to defy the authority of their government, and to take up arms to make their stand. Even so, most Americans might have made only a passing notice of these places if decisions by all those involved had not ultimately led to tragedy. Occurring as they did in the latter part of the twentieth century, these events fill us with shock and fear, perhaps even outrage and loathing. The events in these cities have become the war cry of many groups calling themselves militias or patriots to take up arms against the federal government, which has, as evidenced by these tragedies, become a tyrant.

Our Founders believed that one of the functions of the militia was to be *the* safeguard against tyranny.[80] Citizen militias existed in colonial America out of necessity. The land was new, raw, and dangerous. The government was far away and, in any event, not entirely to be trusted. The militias then were the vanguard of our safety, security, and liberty. They rallied to arms to secure our independence from Great Britain when our Founders revolted against what we have all learned to accept as the King's tyranny. We recall the history with pride and honor, even awe.

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reserve component of the armed forces).

79. It has also been argued, although neither statutorily established nor judicially accepted, that the state police could be the modern-day equivalent of the militia. The state police officers are not members of a legitimately constituted militia because they are professionals, dependent upon their functions for their livelihood. Since the state police are totally controlled at the intra-state level, considering them the modern-day militia would be less problematic than conceding that function to the National Guard.

80. *See* THE FEDERALIST NO. 46, *supra* note 23, at 321 (James Madison).

These emotions are quite unlike our emotional responses to stories detailing activities and orthodoxies of groups using the name patriots or militia today. The citizen militia of the eighteenth century has literally become extinct. As early as 1871, one jurist wrote:

> [W]hat was once deemed a stable and essential bulwark of freedom, "a well-regulated militia," though the clause still remains in our Constitutions, both State and Federal, has, as an organization, passed away in almost every State of the Union, and only remains to us as a memory of the past, probably never to be revived.[81]

Yet the latter half of the twentieth century has seen a resurgence of groups calling themselves by that venerable name and expecting, even demanding, the veneration of what is, after all, a revolutionary society. They acquire and stockpile weapons.[82] They hold military drilling and training exercises.[83] They claim to espouse traditional American ideals, one of which of course is not just the right to revolution against a tyrannical government, but the inevitability and imminence of such a revolution.[84] They recruit.[85] And their proliferation has been astounding:

> Between 1994 and 1996, there were at least 441 militia units across the country. Every state had at least one within its borders. Some units have only a few members; others have more than a thousand. In addition to the hundreds of militias that span the country, 368 allied Patriot groups promoted the formation of militias, provided information and materials to them, or espoused ideas, including Identity doctrines, that are common in militia circles.[86]

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81. Andrews v. State, 50 Tenn. 165, 184 (1871), *quoted in* EARL R. KRUSCHKE, THE RIGHT TO KEEP AND BEAR ARMS 157 (1985).

82. *See, e.g.*, MORRIS DEES & JAMES CORCORAN, GATHERING STORM 82-83 (1996) (stating a handbook provided to members of the Militia of Montana includes directives to arm oneself with "a combat knife, an AR-15 semiautomatic rifle, and six hundred rounds of .223 ammunition").

83. *See id.* (relating that Militia of Montana members are also encouraged to study *The Art of War, Guerilla Warfare and Special Forces Ops, Sniper Training and Employment*, and *Unconventional Warfare Devices and Techniques*).

84. *See* Williams, *supra* note 58, at 882.

85. *See id.* at 942-43 (explaining that militia Internet sites are full of ideas on attracting members, including targeting individuals "at gun shows and gun stores").

86. DEES & CORCORAN, *supra* note 82, at 199.

This Article does not seek to analyze *why* there has been such a proliferation of militia groups at this time. Nor does it seek to completely identify these groups or outline or explain their various agendas or orthodoxies. Rather, this Part analyzes whether any of these groups can legitimately claim the title of militia. It will survey only so much of these neo-militias' operating ideologies as is necessary and convenient to that purpose.

1. An orthodoxy of intolerance

Tyranny? Revolution? Safe in the United States, generally speaking, most of us have come to view these as quaint, historical concepts. While acknowledging tyranny and civil unrest abroad, we view those who advocate armed revolt against our own government with fear and derision.[87] We must admit that the notion of using force to repel or to tame a government run amok is a venerable one. Yet, we are uncomfortable with any but ideological revolutions—and even those we would prefer in the most metaphorical sense.[88] And we are certainly uncomfortable with bodies of armed separatists denying the authority of the federal government, preparing for its military overthrow, and citing the Constitution simultaneously as both the reason and the authority for their actions.

Perhaps this discomfort with the revolutionary ideas of neo-militias is a reflection of the degree to which the Founding Fathers succeeded in creating a tyranny-proof government. Perhaps we have grown too soft to risk the danger, too fearful of change, or simply too oblivious to what our Founders would have decried as tyranny.[89] Another, and I believe most probable,

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87. For example, 55% of Americans view members of neo-militias as "crazy," 63% believe they are "a threat to our way of life," and 80% feel they are "dangerous." Jill Smolowe, *Enemies of the States*, TIME, May 8, 1995, at 60.

88. In fact, the neo-republicanism of the 1980s and 1990s and the success of Republican Party platforms like Newt Gingrich's "Contract with America" that gave Republicans a majority in both the House and Senate are viewed by some as a direct backlash against the advancement of civil rights for women and minorities in America. *See* DEES & CORCORAN, *supra* note 82, at 109-13, 122-26. If true, this is certainly a testament to human fear and dislike of change—especially change that advantages those different from themselves.

89. This is, in fact, the position of many of the neo-militias with regard to any who refuse to join their causes, let alone those who actively strive against them. For example, Morris Dees, chief trial counsel for the Southern Poverty Law Center and its Militia Task Force, received a registered letter from Louis Beam, a neo-militia activist with direct ties to the Aryan Nations, the Ku Klux Klan, David Koresh and the Branch

source for our discomfort with the neo-militia movement is a sense that these groups are illegitimate. It is not that we believe the Constitution omnisciently, omnipotently, and quite sufficiently protects us from governmental abuses and the possibility of tyranny. Rather, we intuitively sense that there is something very wrong in all (or in any) of these neo-militias claiming to be the vanguards of our personal liberties.

In fact, most of these neo-militias are viewed as explicit threats to most of America. A significant number of them are overtly racist,[90] directly advocating the removal, forceful if necessary, of all Jews and non-white people from the government, generally, and more specifically from the geographical area they have claimed for their own. Other groups are less-overtly racist, condemning the federal government and justifying resistance thereto on the basis that it has been corrupted by Jews, racial and ethnic minorities, and foreign interests.[91] Because of these corrupting influences, the federal government is taxing or otherwise disadvantaging hard-working, white (read "white male")

Davidians, Randy Weaver, the Texas Emergency Reserve, the United Citizens for Justice, and indirect ties to other militia groups, including the Militia of Montana. In this letter, Beam challenged Dees to a duel, with "[n]o seconds, no FBI agents, no judges." DEES & CORCORAN, *supra* note 82, at 33-40, 45-46, 70, 90. To Dees, Beam wrote:

> If you are the base, despicable, low-down, vile poltroon I think you are, you will of course decline, in which case my original supposition will have been proven correct, and your lack of character verified. . . . If on the other hand you agree to meet me, you will raise immeasurably the esteem others hold you in. Imagine: Acquaintances, associates, supporters, friends, family—your mother—think of her, why I can just see her now, her heart just bursting with pride as you, for the first time in your life, exhibit the qualities of a man and march off to the field of honor. (Every mother has a right to be proud of her son once.) You will be worse than a coward if you deny her most basic of rights. Think of her.

Id. at 33.

90. This group includes, inter alia, the Ku Klux Klan, the Aryan Nations, the Christian Identity, the White Aryan Resistance, the Order, and various un-aligned skinhead groups, all of which share a common ideology of white supremacy and a willingness to implement their agendas through violence and intimidation. *See* HAMILTON, *supra* note 65, at 17-20.

91. This group includes the Posse Comitatus and the Militia of Montana, among others. The Posse Comitatus "recognize[s] no governmental authority higher than the county sheriff." *Id.* at 22. Although its ideology is not overtly racist, the Posse explicitly condemns liberal social and cultural changes—like the results of the civil rights movement—and condemns federal programs that provide aid and opportunities for minorities. *See id.* The Militia of Montana, also with no overt racist dogma, was founded and is controlled by known white supremacists. *See id.* at 30.

Americans for the benefit of minorities. The government's crimes, among others, include affirmative action, welfare, and lax immigration law enforcement.

Yet even with neo-militia groups who are not overtly racist, the intolerance is there, not far beneath the surface, and not well hidden. The truth is, these groups claim to hold in common with our Founders the belief that America is (only) for men of Anglo-Saxon descent.[92] Although some argue that equating the militia movement in its entirety with white supremacists, hate groups, and violence is "nonsense,"[93] the overwhelming evidence is otherwise. Even those groups that are not overtly racist rely on an orthodoxy of intolerance. The rallying cry of these militia groups and so-called "patriot" movements involves juxtaposing a righteous, Constitution-minded "us" against a Godless, immoral, or undeserving "them."[94] The overtly racist groups deliberately target their racial enemies (and any white people who aid or comfort them).[95] The majority of "patriot" organizations target a government that has been corrupted by the same groups deliberately targeted by the overt racist groups. For example, the Christian Patriots, among other patriot organizations, believe that only the Constitution and the first ten amendments (the Bill of Rights) are valid.[96] Thus, all other amendments are illegitimate—including the Thirteenth Amendment prohibiting slavery and involuntary servitude, the Fourteenth Amendment establishing universal citizenship for persons born in the United

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92. *See, e.g.*, ROBERT CRAWFORD ET AL., THE NORTHWEST IMPERATIVE: DOCUMENTING A DECADE OF HATE (1994), *reprinted in part in* THE MILITIA MOVEMENT AND HATE GROUPS IN AMERICA 26 (Gary E. McCuen ed., 1996).

93. *See, e.g.*, David Kopel, *Clinton's Terrifying Response to Terror*, AM. ENTERPRISE, Jan.-Aug. 1995, *reprinted in* THE MILITIA MOVEMENT AND HATE GROUPS IN AMERICA 53-58 (Gary E. McCuen ed., 1996).

94. David C. Williams, in his insightful essay arguing that we have lost the ability to engage in a legitimate revolution because we have lost the universality of interest to make such a revolution the true will of the people, acknowledges that all of these militia groups cast themselves as "the people" and the government, because it has been corrupted or coopted by special interests, as the feared enemy. *See* Williams, *supra* note 58, at 879, 880, 882, 900.

95. For example, in 1981, the Texas Emergency Reserve, a Klan militia operating in Texas, mounted a campaign of terror to drive Vietnamese fisherman from Galveston Bay. Members of the Reserve made threats, sent Klan calling cards (cards with a hooded, robed Klansman astride a leaping horse), burned several fishing boats, and sailed around the harbor with a human dummy hanging in effigy, brandishing shotguns or assault rifles whenever they neared the home or boat of a Vietnamese fisherman. *See* DEES & CORCORAN, *supra* note 82, at 36-39.

96. *See* CRAWFORD, *supra* note 92, at 23.

States and protecting many of the rights previously enumerated in the Bill of Rights against state encroachment, and the Fifteenth and Nineteenth Amendments establishing the right to vote regardless of race or gender, respectively. The existence of a few militia groups that fear the government for the government's sake alone does not alter the validity of the overall correlation between the contemporary militia movement and such intolerant or openly racist views.

Consequently, these groups, rather than the guardians of "our" civil liberties, are instead a direct threat to the civil liberties of the majority of the American population. Men comprise less than half (48.7%) of the U.S. population.[97] If you remove from those men all who are members of racial minorities,[98] that group is reduced to less than 37% of the United States population. And, of course, not every white male in America would rally to the standard of these groups, no matter how attractively (or deceptively) it had been painted. Ultimately, although these militias claim to be the protectors of American liberties, they are really just proponents of their own private interests. As Williams put it:

> [T]he private militias presently organizing in this country are select, not universal, and the Framers would fear them as much as they would fear the Bureau of Alcohol, Tobacco, and Firearms. The militias do not worry that they might be partial; instead, they blithely assume that, however few their numbers, they are the People. For them, the reason to have more members is not to guard against partiality. The reason to have more members is simply to have more guns.[99]

2. *A matter of semantics*

All of the neo-militias discussed herein fail the legitimate militia test on the first criteria: state establishment and delineation of membership. Colonial militias operated legitimately with the imprimatur of the government sponsoring them. These neo-

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97. *See* Evelyn J. Cleveland, *United States Information* (last modified Aug. 27, 1996) <http://OSEDA.Missouri.edu/usinfo.html> (reporting 1990 U.S. Census).

98. According to U.S. Census statistics, 12.0% of the United States population is Black, 8.8% is Latino, 2.9% is Asian or Pacific Islander, and .8% is Native American. *See id.* Thus, a total of 24.5% of the U.S. population is non-white.

99. Williams, *supra* note 58, at 901 (footnote omitted).

militias have organized themselves and appointed themselves. They are not connected to the local government or through that government to society as a whole. They are today's Daniel Shays, illegitimately taking up arms because they cannot pay their debts.[100]

The second criteria of the legitimate militia is that it should be composed of the lay citizenry and be relatively devoid of professional soldiering. Most militia groups would fail the second criteria as well as the first. It is not that there is much monetary remuneration in paramilitary exercises.[101] Rather, the militias would fail this criteria because their separatism and elite training transforms them into select militias. They are not composed of the general citizenry and, in fact, are many steps removed from it. They train, and often live, in secluded compounds, separate from the community of which their location is a part.[102] The neo-militias do not just lack, they actively shun, the ties to the community that our Framers viewed as necessary to prevent the militia from being co-opted against the interests of the people.

The third criteria of a legitimate militia is that it be state supported. All of the modern militia groups fail the third criteria because they are privately funded and operated rather than state supported. There is no intimation, except in left-wing extremists' conspiracy musings, that any of the neo-militia groups is state funded or state managed. Thus, as with private mercenary forces, the loyalty of the modern militias is not to the state or the people represented therein, but to their benefactors.

The fourth criteria of a legitimate militia is that it be independent of the federal government. Although all of the militia groups are clearly independent from federal government control, they nevertheless arguably fail to meet this criteria as well. The

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100. Although this is meant metaphorically, and in full realization that the various neo-militia groups claim diverse grievances against the federal government, it is certainly ironic that Shays' complaint of 1786 is precisely the complaint of the founders of the Posse Comitatus: an inability to pay the mortgage resulting in foreclosure. *See* HAMILTON, *supra* note 65, at 22-23.

101. I am assuming for the sake of argument that the militia groups are merely engaged in lawful military drilling and training exercises. There is no question of the group's illegitimacy if it is using its members' honed military skills to rob banks, for instance, as did the Washington Militia. *See Militia Watchdog* (last modified July 21, 1997) <http://www.militia-watchdog.org/calendar.html>.

102. Examples of this include the Weaver Compound at Ruby Ridge and the religious compound at Waco established by the Branch Davidians. *See* DEES & CORCORAN, *supra* note 82, at 49-77.

full requirement is not just independence, but independence unless the militia is lawfully called into federal service. One of the militia's primary functions was to defend the federal government against invasion or insurrection. None of the neo-militias can be called upon (or would answer the call if they were) to come to the aid of the country in this manner.[103] Many of the groups cheerily anticipate the instigation of armed revolt as it will leave the legitimate government in disarray and allow them to sweep in and usurp power in the vacuum.[104] This category of neo-militia groups is so stridently independent that members of these groups are even farther away from legitimately claiming the title "militia."

Lack of availability or inclination to serve the country also contributes to the neo-militia groups' failure to satisfy the fifth and final criteria: civic virtue motivation. The neo-militia groups are *ostensibly* community-minded, claiming to be the only true defenders of the Constitution and the liberties it protects. But the community they truly represent is, in reality, so small as to barely camouflage their dedication to their personal interests.[105]

IV. THE SCARCITY OF MILITIAS AND THE SECOND AMENDMENT

Having concluded that neither the National Guard nor any of the neo-militia groups constitute militias as that term was understood in the eighteenth century, the question that remains is what affect this conclusion will have on Second Amendment analysis or the ongoing right to bear arms debate. The best way to answer this question is to analyze the potential impact on the various affected parties: (1) neo-militia groups seeking to capitalize on the militia name; (2) those arguing that the Second Amendment protects an individual's rights; (3) those maintaining that the Second Amendment protects rights collectively; (4)

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103. The neo-militia groups cannot be called upon because they have no authorized existence and the federal government does not have the power to conscript their membership. This would not prevent individual members, some of whom are active-duty members of the military or members of National Guard or the various Reserve organizations, from serving should they be ordered to do so. Of course, members of the groups that do not recognize the legitimacy of the federal government would hardly report if their Reserve unit were called up and are unlikely to have maintained their ties to organizations that are arms of a government they have chosen not to recognize.

104. *See, e.g.*, DEES & CORCORAN, *supra* note 82, at 98, 137-39.

105. *See supra* notes 97-100 and accompanying text.

the courts deciding Second Amendment cases; and (5) the general public.

A. Neo-Militias

Through one of his more famous protagonists, Shakespeare asked rhetorically, "What's a name?"[106] Is it not simply a label we humans attach to people, places, or things for the ease of communication? If as Shakespeare posited, a "rose by any other name would smell as sweet,"[107] then why quibble about a label? A simple response to the Bard's question is that if you called a cesspool a rose—or by any other name—it would still stink, but you would have to be close enough to smell it. Once close enough to smell it, you are also close enough to risk being affected by it, if not sucked into it and totally engulfed—and all because of the promise of a rose.

Labels have meaning and they are chosen precisely for that reason. Those adopting a label, either for themselves or to designate some other group, do so in full appreciation and expectation of the affect that label will have on those who hear it.[108] The name militia has meaning, conjuring images of brave, self-sacrificing patriots who risked all, and sometimes gave all so that you and I and everyone else in this country could live free. The choice of that name is a choice to capitalize on that history and on the imagery that it evokes.

Neo-militia groups have done precisely that. Given the venerated image that "militia" and other labels for similar historical constructs evoke, who would fear to attend a public assembly billed as "meet your local militia" day or Minute Man March? Yet how many would flock to the event if it were advertised as a "racist rally" or as "insurrection training" instead? It is advantageous for extremist groups functioning at the fringes of our soci-

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106. WILLIAM SHAKESPEARE, ROMEO AND JULIET act 2, sc. 2.

107. *Id.*

108. Nowhere is this more evident than in the highly charged abortion debate. Those advocating government restriction of abortion call themselves pro-life. "Pro" is a positive term, as is "life." The combination is a designation that should attract universal popularity. Those advocating the abolition of government restrictions on abortion call themselves pro-choice. Again, a set of positives combining to form another designation that should attract universal popularity. In contrast, the former group is called by the latter, among other things, "anti-abortionists" and "anti-choice." The latter group is called by the former "abortionists" and "anti-life." In each case, tha "anti" is the operative negative designation.

ety to conceal their true agendas and mask their true beliefs in order to gain popular support or to garner public sympathy within mainstream America. The strategy can be highly effective.[109]

Modern so-called neo-militias have no legitimate claim to that historical title. They may be composed of the lay citizenry, but they are not, nor do they thereby become, the sanctioned defenders of our constitutional communities and liberties. Rather, they are frequently armed (and frequently dangerous) fringe groups advocating armed resistance to legitimate authority, ostensibly because the government has become illegitimate, or definitely will become so if current trends do not change.[110] They wave the Constitution like a flag in front of the American people,[111] the vast majority of which I believe honestly revere it, but I have also come to believe have never read it, and are in no position to evaluate the legitimacy of the groups' claims or plans in relation to it.

By adopting the title militia, or by using the phrase to explain the groups' positions and goals, these neo-militias cloak themselves with a mantle of legitimacy. The label is nonthreatening, even attractive, appealing to Americans at the core of their civic consciousness. And in that context, it is utterly deceptive. But by the time we have figured out that the rose is a cesspool, it may be too late to escape its environs unaffected.

Ultimately, the choice of a name is a personal matter and cannot be interfered with (outside the context of trademark infringement). No one will be able to force groups inappropriately capitalizing on the historic militia cachet to choose another designation. Yet the knowledge that the title of militia and the eighteenth-century images it evokes cannot accurately be ap-

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109. Consider, for example, the political career of David Duke. A former Imperial Wizard of the Knights of the Ku Klux Klan and subsequent founder of the National Association for the Advancement of White People, Duke is probably "the most widely known white supremacist in the country." DEES & CORCORAN, *supra* note 82, at 59. In the late 1980s, Duke claimed to have undergone a religious conversion and decided to run for president. *See id.* Duke characterized himself as a white civil rights activist rather than a white supremacist, *see id.*, and was thereafter able to garner a solid majority of white voters in Louisiana's presidential primary. *See id.* at 60. For all intents and purposes, it appears that Duke never changed his goals or his agenda. He simply changed their names.

110. *See supra* notes 80-106 and accompanying text.

111. *See, e.g.*, HAMILTON, *supra* note 65, at 135-40.

plied to these neo-militia groups may prevent the uninitiated from falling heedless into their snare.

B. Individual Rights Proponents

The fact that we apparently lack a modern analog to the eighteenth-century militia is likely to be of little import to proponents of the theory that the Second Amendment codifies (or confers) an individual right to arms. For example, it may be of passing interest to those who assert that the Second Amendment concerns two separate rights—the right to *keep* arms and the distinct right to *bear* them—because these theorists grant constitutional significance to the Militia Clause.[112] But in their view, the Militia Clause does not possess overriding significance.[113] Thus, if the need for a militia has disappeared, if the concept of militia has changed over the years, or if there is no group that can call itself the militia, that will have no affect on an individual's Second Amendment right to maintain arms.

Similarly, the lack of a modern militia analog to those eighteenth-century militias will be of little import to those who construe the introductory clause regarding a well-regulated militia as irrelevant to the affirmative declaration that follows. These theorists consider the language a preamble with little or no interpretive merit to the statement that follows. This introductory language is, perhaps, a commentary on the times, a statement of some sort of independent import or independent intent but not interdependent with the subsequent clause. A well-regulated militia may be necessary to the security of a free state, but regardless, the individual right of the people to keep and bear arms *shall not be infringed.* If the militia has fallen into obsolescence, that fact will have no affect on whether a particular statute or regulation violates an individual's right to bear arms.[114]

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112. *See, e.g.*, Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599, 610 (1982) (arguing that the Second Amendment concerns "two distinct, yet related rights—the individual possession of arms and the need for a militia made up of ordinary citizens").

113. *See id.*

114. *See, e.g.*, MALCOLM, *supra* note 8, at 163. Malcolm argues that "[w]hatever the future composition of the militia, therefore, however well or ill armed, was not crucial because the people's right to have weapons was to be sacrosanct." *Id.*

C. Collective Rights Proponents

The absence of legitimate modern militias has greater implications for collective rights proponents. For these theorists, the introductory Militia Clause is qualifying, thus defining the scope of the right that follows.[115] The result, generally, is that these theorists believe that the Second Amendment affirms the right of the states to maintain militias, protected against any federal government attempts to neutralize them by confiscating their weapons. If the states, by inaction, or even by direct action, have allowed the legitimate militia to fade into nonexistence, the implication is that, whatever the nature of the right protected in the Second Amendment, there is nobody left constituted to assert that right. Thus, the Second Amendment becomes meaningless.

Given the changes to our society, some collective rights proponents argue that the current National Guard is the modern analog of the eighteenth-century militia.[116] By implication, the Second Amendment thus protects the right of the states to maintain organized guard units.[117] To assert that the National Guard is not the militia protected by the Second Amendment is to assert, again, that there is no collection of citizens that can enforce the Second Amendment. In reality, however, arguing that the National Guard would not have been viewed as the militia so revered and sought to be protected by the Founders is likely to have little affect on this group of theorists. After all, this is not a unique position, nor am I the first to propose it.[118] In all likelihood, this group will continue to argue that the Second Amendment protects the arms of the militia, but that the meaning of militia is not limited to our Founders' understanding of the term. Thus, we are free to consider the National Guard the legit-

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115. *See, e.g.*, Williams, *supra* note 58, at 897.

116. For a discussion of why the National Guard cannot be the militia as understood by the Founders, *see supra* notes 72-79 and accompanying text.

117. *See, e.g.*, JOHN H. ELY, DEMOCRACY AND DISTRUST 95, 227 n.76 (1980); LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-2, at 299 n.6 (2d ed. 1988); John Levin, *The Right to Bear Arms: The Development of the American Experience*, 48 CHI.-KENT L. REV. 148, 158-59 (1971); Roy G. Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 HASTINGS CONST. L.Q. 961 (1975); *see also* Williams, *supra* note 58, at 897 (acknowledging that these collective rights proponents, what he calls the state's rights view, maintain this interpretation, but then explaining why that interpretation is incorrect).

118. *See, e.g.*, EARL R. KRUSCHKE, THE RIGHT TO KEEP AND BEAR ARMS 45 (1985).

imate militia and protect it accordingly. In fact, the Federal government explicitly included the National Guard within its definition of the organized militia of the United States.[119]

The problem with maintaining this fiction is who controls the dictionary. If the government can give, the government can take away. If we accept that the National Guard is the militia because the government has defined it as such, are we not also accepting the risk that the government could chose to define our Second Amendment rights away? All the government would have to do is define the militia in terms so select that none of us would qualify.

D. The Courts

The courts, generally, have been consistent in two important ways. First, state and federal courts have held that the Second Amendment applies only as against the federal government. It was not made applicable to the states via the Fourteenth Amendment as were many of the other rights enumerated in the Bill of Rights.[120] Second, the courts have implicitly adopted a collective rights view of the Second Amendment.[121] It is in this second point that the lack of a modern analog to the eighteenth-century militia may be of moment.

The courts ruling on the Second Amendment make direct recourse to the introductory clause, treating it as defining rather than additive. Thus, the right in the second clause is explained and limited by the language in the first. That the militia in the first clause does not include any of the neo-militia groups will not change anything. Courts have refused to recognize membership in any of these groups as determinative of Second Amendment protection.[122]

However, that the militia in the first clause does not literally include the National Guard or any other presently constituted

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119. *See* 10 U.S.C. § 311(b)(1) (1994). The relevant portion reads, "The classes of the militia are . . . the organized militia, which consists of the National Guard and the Naval Militia . . . ." *Id.*

120. *See, e.g.*, Miller v. Texas, 153 U.S. 535 (1894); Presser v. Illinois, 116 U.S. 252 (1886); United States v. Cruikshank, 92 U.S. 542 (1876); Fresno Rifle & Pistol Club, Inc. v. Van de Kamp, 965 F.2d 723 (9th Cir. 1992); Quilici v. Village of Morton Grove, 695 F.2d 261 (7th Cir. 1982); Hamilton v. Accu-Tek, 935 F. Supp. 1307 (E.D.N.Y. 1996).

121. *See supra* notes 116-20 and accompanying text.

122. *See, e.g.*, United States v. Oakes, 564 F.2d 384 (10th Cir. 1977) (finding no Second Amendment protection for member of Posse Comitatus).

and acting body has more serious implications. The first, and most troublesome, is that there are no weapons (and no users or possessors thereof) entitled to Second Amendment protection. Thus, at its whim, the federal government could completely disarm the populace and leave it without means to protect itself should the government wax tyrannical. I have located no decisions in which the courts have adopted this radical approach, but given modern society, given claims of the citizen militia's obsolescence, and given overt arguments that the Second Amendment is now meaningless,[123] that eventuality is not at all impossible.

Another possible implication is that it leads to the conclusion that the courts have been dishonest in their treatment of the Second Amendment. They have explicitly resorted to criteria that they knew could not be met to avoid directly addressing the thornier issue of whether they would recognize the right claimed. To set an impossible standard for the enforcement of a right is to refuse to acknowledge the right at all. For example, the courts could not give effect to the Fifteenth Amendment, guaranteeing the right to vote regardless of "race, color, or previous condition of servitude"[124] without invalidating, when presented with them, laws or practices that had the practical, if not overt effect of denying the franchise to anyone who was not white.[125]

I do not believe the courts have been deliberately dishonest in their interpretation of the Second Amendment. Rather, I believe they have been guilty of the sort of judicial lawmaking that Justice Scalia feared in his essay criticizing the tenet that a

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123. *See, e.g.*, Williams, *supra* note 58; David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991).

124. U.S. CONST. amend. XV. The Fifteenth Amendment was ratified on February 3, 1870.

125. For example, Texas had a law that prevented blacks from participating in the Democratic Party primary. *See* LOIS B. MORELAND, WHITE RACISM AND THE LAW 83-84 (1970). This law was struck down in *Nixon v. Condon*, 286 U.S. 73 (1932). However, a subsequent resolution that instead barred blacks from membership in the Democratic Party was upheld, *Grovey v. Townsend*, 295 U.S. 45 (1935), *overruled by* Smith v. Allwright, 321 U.S. 649, 666 (1944), even though the exclusion from the party resulted in the inability of blacks to vote in the Democratic Party. In addition to the *de jure* disenfranchisement practices, there was rampant discriminatory application of facially legitimate laws including unfair administration of literacy, comprehension, or good character tests, and poll tax administration. *See* MORELAND, *supra*, at 83.

judge's objective in interpreting a statute is to give effect to the intent of the legislature. Scalia wrote:

> In reality, however, if one accepts the principle that the object of judicial interpretation is to determine the intent of the legislature, being bound by genuine but unexpressed legislative intent rather than the law is only the *theoretical* threat. The *practical* threat is that, under the guise or even the self-delusion of pursuing the unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field.[126]

How much more serious the implications are when the language being interpreted is not the statutes but the very Constitution by which the validity of those statutes is judged. Yet it would explain much to accept that the courts have been, subconsciously or otherwise, defining the right codified in the Second Amendment based on their own values, objectives, and desires. Judges do not desire that the less-than-model citizens brought before them have an unqualified right to possess any armaments of their choosing, and do not perceive the value of random fringe members stockpiling AK-47s or Howitzers, and so interpret the Second Amendment as requiring membership in the ever-elusive militia as a precondition for the rights analysis.

Of course, in framing a definition of militia as understood by our eighteenth-century Founders, I do not assert that there *is* no militia today.[127] Rather, I assert that neither the National Guard nor the various neo-militia groups are the legitimate militia, the modern analog to our eighteenth-century model. The final implication for the courts is that they will have to deal directly with the definition. In that analysis, the inescapable conclusion is that courts have simply been wrong, on occasion, in finding no militia connection.[128] The federal law recognizes the militia to

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126. ANTONIN SCALIA, A MATTER OF INTERPRETATION 18-19 (1997).

127. There certainly is a militia in America today. It is that group consisting of all able-bodied males between 17 and 45. *See* 10 U.S.C. § 311(a) (1994).

128. It does not necessarily follow that the courts have ultimately reached the wrong result. It could certainly be the case that even if the court found the sufficient nexus to the militia, the various statutes would have passed constitutional muster, but on a different basis. For example, even our universally acknowledged fundamental rights of the First Amendment are not without limit. Our guarantee of free speech or freedom of the press does not prevent prohibition of slander or obscenity. Until the right is recognized, however, a studied analysis of the constitutionality of any

include the militias of the states. Given the legitimacy of the states' authority to define their militias, and the obvious result that their citizens will be covered by these definitions, various citizen claims of militia membership ought to engender a more thorough Second Amendment analysis. If the party is a member of the necessary militia, then the inquiry should focus on the manner in which the weapon was used or possessed and its relation to that militia. In addition, the regulation at issue should be evaluated in terms of its effect on the use or possession of the weapon with respect to that person's militia status. Thus far, no courts have embarked on this detailed an inquiry.

E. The General Public

The effect on the general public is indeterminate. Hopefully, the realization that the neo-militia groups lack any legitimate claim to the historical title will prevent name recognition abuses. No one will accidentally attend a rally of the Ku Klux Klan thinking it is a militia re-enactment. Groups wishing to participate in a legitimate militia will realize that the imprimatur of the state government is required, and the self-designation of the founding members is insufficient.

V. CONCLUSION

Ultimately, the question "What is a militia?" is a matter of statutory enactment. In drafting the Constitution, the Founding Fathers left the composition and training of the militia to the states, each entitled to describe, train, and arm its militia as it pleased. This Article clearly shows that none of the privately organized, funded, and operated neo-militia groups would be recognized as legitimately constituted under the definition commonly understood in the eighteenth century. The citizen militia was characterized not just by its dedication to the preservation of individual liberties, but by its core value of citizenship—dedication to the community and to the common good. The militia was called and constituted by the state and local governments and stood ready to *defend* the federal government—from foreign incursion and internal insurrection—as well as to defend against it should the need arise.

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governmental regulation is a futile exercise.

In 1998, however, no one seems overly concerned with our Founders' understanding of the term. Over the years and throughout the states, the composition of the various official militias has ranged from restrictive to inclusive. By statutory enactment—and in direct contradiction to our Founders' intentions, I might add—these early militias have been supplanted in their primary functions by organized fighting forces: professional police, the National Guard, and a standing army of professional soldiers. Yet the federal government and all states retain a description of the unorganized militia to which all adult men (and sometimes women) are deemed to belong. In addition, there are private groups, many of which incorporate "militia" into their names.

There are the official militias, both organized and unorganized, and there are the private armed citizen groups, ranging from the disaffected, grass roots patriot groups to the hate-laced extremists. All told, there are more than four hundred groups today who could claim the designation "militia" in some manner or another.[129] That membership in any of the designated groups has had no effect on judicial analysis of claims or defenses under the Second Amendment leads to the conclusion that the repeated, mantra-like recitation requiring a reasonable relationship to a well-regulated militia is at best erroneous, and at worst entirely pretextual.

Under current interpretations, the only action likely to be barred by the Second Amendment is, perhaps, federal confiscation of weapons in state militia armories—disarming the state police or the state National Guard units. It is not the individual's right to keep and bear arms that the Second Amendment protects; it is the militia's right. And it is not any militia that can claim that right; it is the official militia.

The Founding Fathers may have found revolution unavoidable, yet its necessity was not at all desirable. Consequently, having secured their own liberty, they set about the daunting task of establishing government in such a manner as to prevent the regrettable necessity of revolution from arising again. Certainly, our Constitution represents the herculean attempt to balance the need for a government strong enough to provide protection from threats foreign and domestic against the fear

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129. *See* DEES & CORCORAN, *supra* note 82, at 199.

that such a strong government will itself become the domestic threat.

We live in a world where instruments of mass destruction can be hidden under an overcoat, where the present threat from allowing dangerous people the freedom to arm themselves at their discretion apparently has more force with legislators (and the courts) than the hypothetical threat that our government will wax tyrannical if each individual is not permitted that discretion. Perhaps even our Framers, who advocated universal armament no more than they advocated universal suffrage or universal equality, would agree that it is appropriate and reasonable to draw the Second Amendment line where the courts have implicitly drawn it. What is clear, however, is that Framers would not look upon the proliferating neo-militia groups as the militia they intended would stand as the guardian of our liberties against encroachment by the federal government.