

THE RISE OF PRIVATE MILITIA: A FIRST AND SECOND AMENDMENT ANALYSIS OF THE RIGHT TO ORGANIZE AND THE RIGHT TO TRAIN

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INTRODUCTION

Copious news coverage of Ruby Ridge,¹ Waco,² and the Oklahoma City bombing³ has prompted a growing concern with the proliferation of paramilitary organizations and paramilitary activity.⁴ The public's anxiety is fueled by the belief that private militia pose a threat to society. Private militia are commonly misunderstood and mischaracterized as organizations comprised solely of right-wing militants adhering to Aryan, racist ideology. Although many militia members subscribe to these views, allegiance to the far right is not a prerequisite to membership in a private militia.⁵ Instead, ardent belief in the need to protect individual

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¹ In 1992, federal agents raided the Ruby Ridge, Idaho residence of Randy Weaver, a white separatist. During the ensuing standoff, a United States marshal and Weaver's wife and son were killed. See *Idaho Supremacist Says He's Wounded*, ST. LOUIS POST-DISPATCH, Aug. 30, 1992, at A10; see also *Over 200 Militias and Support Groups Operated Nationwide: Oklahoma Bombing Suspects Linked to Michigan Militia*, KLANWATCH INTELLIGENCE REP., June 1995, at 1, 3 [hereinafter *Over 200 Militias*].

² During the 1993 siege on the Branch Davidian compound in Waco, Texas, four federal agents were killed, and 78 Branch Davidians died in the fire that destroyed the compound. See *Over 200 Militias*, *supra* note 1, at 3.

³ On April 19, 1995, a federal building in Oklahoma City was bombed, killing 168 people. The main suspects in the case are believed to be affiliated with a militia group in Michigan. See *id.* at 2; Ellen Wulffhorst, *Second Oklahoma Bomb Suspect Arrested*, Reuters World Service, Apr. 23, 1995, available in LEXIS, News Library, Wires File (reporting on the bombing before all the details and casualties had been determined).

⁴ This Comment will alternately refer to private militia groups as paramilitary organizations or simply militia. The words "militia" or "paramilitary organizations" should be understood to mean privately sanctioned military groups that convene to promote their views and to train with arms. They do not refer to any form of government (federal or state) funded, or government organized, military entity.

⁵ See Glen Justice, *Today's Militia Units Fighting Mad at U.S.*, PHILA. INQUIRER, Jan. 1, 1995, at B1, B4 ("Some units are tied to white supremacy groups, and some are

rights from encroachment by the federal government is the predominant attribute of paramilitary organizations.⁶ This belief appears to be a simple exercise of the First Amendment guarantees of the freedom of speech and the freedom of association.⁷ Moreover, a textual reading of the Second Amendment seemingly confers upon individuals the right to organize and right to train as a militia.⁸

Despite what may at first appear to be a constitutional right to operate as a militia, numerous states have statutes prohibiting the existence of private militia and/or their training activities. To assess the constitutionality of these state statutes, this Comment examines some of the First and Second Amendment issues involved in regulating private militia.⁹

Part I of this Comment provides an abbreviated historical account of the militia movement, starting with its origins in England and its subsequent evolution in the United States. It also explores characteristics common to today's paramilitary organizations. Part II introduces the two types of state statutes—those that prohibit paramilitary organization altogether and those that proscribe only paramilitary training. Part III provides a First Amendment analysis, elaborating on the significance of political speech and association with respect to paramilitary organizations and discussing the fundamental distinction between speech and conduct with respect to paramilitary training. Part IV will conclude that states have the

not It's not fair to paint the [entire] movement with that kind of character." (alteration in original)). However, the existence of racist sentiment among many militia groups cannot be discounted. Approximately one-fifth of the over 200 militia groups that exist have affiliations with neo-Nazi and white supremacist organizations. See *Over 200 Militias*, *supra* note 1, at 1.

⁶ "Interviews with militia organizers reveal that there is no shared set of political philosophies other than a dogged belief in gun owners' rights and a deep distrust of government." Justice, *supra* note 5, at B4.

⁷ The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I (emphasis added).

⁸ The Second Amendment provides that "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." U.S. CONST. amend. II (emphasis added). But see *infra* part IV.C.1 (noting that the state governments have the power to regulate the possession of arms as part of their power to regulate the militia).

⁹ This Comment merely addresses some of the potential First Amendment issues that could be raised to challenge these statutes. Similarly, the Second Amendment discussion focuses on the right to bear arms only as it relates to the Militia Clause.

constitutional authority to regulate private militia activity because the Second Amendment, as interpreted, grants states the power to regulate both the militia and the possession of arms as it relates to the militia.

The creation of private militia is a politically expressive means of exercising the First Amendment rights to freedom of speech and association, as paramilitary organization¹⁰ constitutes a pointed expression of anguish about alleged government infringement on individual rights and about the manner in which these rights can be protected.¹¹ Statutes completely banning the creation of private militia violate the First Amendment because the prohibition directly attacks the message militia members aim to convey.¹²

Paramilitary training is also intended to impart a message about the manner in which individual rights can be protected and government abuses allayed. Nonetheless, expressive conduct can be constitutionally proscribed if there is some valid purpose and the regulation is not aimed at stifling the expressive element. Thus, anti-paramilitary training statutes should pass constitutional muster because their purpose in regulating militia activity is unrelated to the suppression of expression.

Judicial precedent clearly demonstrates that paramilitary organizations cannot rely on the Second Amendment to justify either their existence or their activity.¹³ The Second Amendment right to a "well regulated militia" does not encompass an unbridled license for individuals to organize as a private militia independent of the state. Rather, the state is empowered to determine what constitutes a militia¹⁴ and whether the possession of arms is necessary to the maintenance of that which the state deems a militia.¹⁵

Although the actual creation of paramilitary organizations is not protected by the Second Amendment, per se, militia members can seek constitutional refuge in the First Amendment rights to freedom of speech and association. Paramilitary training, however, can be constitutionally proscribed under both the First and Second Amendments. Hence, although anti-paramilitary *organization*

¹⁰ See *infra* part III.A.1-2.

¹¹ See *infra* notes 42-48 and accompanying text.

¹² See *infra* part III.A.1.c, III.A.2.c.

¹³ See *infra* part IV.

¹⁴ See *infra* part IV.B.2.

¹⁵ See *United States v. Miller*, 307 U.S. 174, 178 (1939); see also *infra* part IV.C.1.

statutes are an unconstitutional limitation on individual rights, anti-paramilitary *training* statutes survive constitutional scrutiny.

I. HISTORY OF THE MILITIA

The militia first existed to prevent the rise of tyrannical government.¹⁶ Over time, however, the significance of the militia to free society diminished considerably, primarily because of the "emerging . . . belief that the interests of the people . . . could be protected effectively by the establishment of democratic governments, offering legal guarantees of individual rights."¹⁷

Militia members today believe that modern government has failed to achieve or sustain this democratic ideal.¹⁸ The fundamental purpose of current paramilitary organizations, therefore, corresponds with the historical justification for maintaining a militia—militia members consider their existence necessary to protect society from the federal government.¹⁹ What was once a viable means of supplying protection against the federal government, however, may no longer be a realistic alternative. The militia may have been an efficient means of protection when the country was small and when only a select portion of society contributed to the democratic process; but modern society simply does not foster an environment conducive to the existence of private, armed groups protecting the citizenry.²⁰

¹⁶ See 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) ("The colonists' English heritage had taught them 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.")

¹⁷ William S. Fields & David T. Hardy, *The Militia and the Constitution: A Legal History*, 136 MIL. L. REV. 1, 30-31 (1992).

¹⁸ See *infra* part I.B.

¹⁹ In a militia field manual, under the section entitled "Principles Justifying the Arming and Organizing of a Militia," it is asserted that, "[i]f our leaders are corrupted to the extent of imposing tyranny upon the people, then they should be forcefully overthrown and replaced by a legitimate government." MILITIA FIELD MANUAL § 1.1.4: *Principles of a Just War—Capital Punishment* (Free Militia 1994) [hereinafter FIELD MANUAL].

²⁰ See WARREN FREEDMAN, *THE PRIVILEGE TO KEEP AND BEAR ARMS* 20 (1989) (arguing that "[i]n the urban industrial society of today a general right to bear efficient arms so as to be enabled to resist oppression by the government would mean that gangs could exercise an extra-legal rule which could defeat the whole Bill of Rights" (quoting Roscoe Pound)); see also *id.* ("It would be inane to accept the view that an armed citizenry of men and women using guns could take up the armed cudgel purely for their individual political whim and political fancy. Only anarchy

A. *Roots of the Militia and an American Metamorphosis*

The militia grew out of an old English custom that was adopted by the colonies, altered to conform to the American experience, and eventually incorporated into the Second Amendment.²¹ The citizens' militia developed in England to serve as an effective means of national defense and to counterbalance the strength of a professional army.²² The English also perceived the militia as a "critical element in their development of 'government under law'"²³ and as a means of tempering the strength of the monarchy.²⁴ Although the view of the militia as a necessary force to balance the strength of the army gradually changed,²⁵ it continued

would result."); EARL R. KRUSCHKE, *THE RIGHT TO KEEP AND BEAR ARMS* 30 (1985) ("[T]he right to bear arms is becoming anachronistic. As the policing of society becomes more efficient, the need for arms for personal self-defense becomes more irrelevant . . ."); Chuck Dougherty, Note, *The Minutemen, the National Guard and the Private Militia Movement: Will the Real Militia Please Stand Up?*, 28 J. MARSHALL L. REV. 959, 979 (1995) (observing that "the dramatic technological changes over the past two hundred years made the eighteenth-century militia system unfeasible").

²¹ See generally JOYCE L. MALCOLM, *TO KEEP AND BEAR ARMS* (1994) (providing a detailed history of the evolution of the citizens' militia, starting with its inception in England and concluding with its incorporation into the United States Constitution); Fields & Hardy, *supra* note 17 (same); Thomas M. Moncure, Jr., *Who Is the Militia—The Virginia Ratification Convention and the Right to Bear Arms*, 19 LINCOLN L. REV. 1 (1990) (detailing the legal history of the militia and the right to bear arms).

²² See Fields & Hardy, *supra* note 17, at 6 ("The experience of the Middle Ages instilled in the English people a deep aversion to the professional army Conversely, it fostered a corresponding fondness for the traditional institution of the militia, which was perceived as an inexpensive and non-threatening means of national defense."). Abusive treatment of civilians, as well as confiscation of arms from militia members was often attributed to professional armies. See *id.* at 10.

For a list of the traits differentiating a standing army from a militia, see Moncure, *supra* note 21, at 18.

²³ See Fields & Hardy, *supra* note 17, at 9. For instance,

Blackstone was firmly convinced that subjects needed to be armed to defend themselves and to avoid dependence on professional armies, but he also expanded the role of an armed citizenry beyond the individual's own preservation to the preservation of the entire constitutional structure. He dubbed the right of the people to be armed an "auxiliary" right of the subject that served "to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property."

MALCOLM, *supra* note 21, at 142-43.

²⁴ Fields & Hardy, *supra* note 17, at 8 (asserting that the militia was an "institution that exercised a moderating influence on monarchical rule and aided in the development of the Anglo-American concept of individual liberties").

²⁵ For a detailed historical discussion of the evolution of this justification for the militia during the seventeenth century, see *id.* at 9-22.

to be regarded as a politically essential method of regulating the government. During the Enlightenment, the perception that maintaining a citizens' militia was an individual *duty* was transformed into a belief that militia membership constituted an individual *right*.²⁶

Colonial acceptance of a militia was compelled by the same concern that led to its existence in England: fear of a standing army.²⁷ The colonists diverged somewhat from English custom, however, by expanding the right to bear arms to encompass both militia members and individual citizens.²⁸ In time, as individual constitutions and bills of rights were formulated, a schism over this issue developed among the colonies themselves.²⁹ The ensuing debate centered on whether to provide solely for a citizens' militia or whether to also provide for an individual right to bear arms.³⁰

²⁶ See Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 YALE L.J. 995, 1006-16 (1995) (reviewing Joyce L. Malcolm's book, *To Keep and Bear Arms*, *supra* note 21, and recounting the evolution of the militia from a general duty to an individual right); Fields & Hardy, *supra* note 17, at 22 (noting that "the common law would recognize an individual right to keep and bear arms that was separate and distinct from the related concept that a militia was an especially appropriate way of defending a free republic").

²⁷ "Americans' belief in the virtues of the militia for military defence and their distrust of standing armies mirrored English opinion. Any attempt to impose a professional army upon the colonies was bound to be seen as the preface to tyranny." MALCOLM, *supra* note 21, at 143.

"Provisions relating to standing armies also were included in the declarations or constitutions adopted by a number of the colonies. The provisions found in about half of those documents reflected the view that the standing army problem was a political issue resulting from a lack of legislative control." Fields & Hardy, *supra* note 17, at 26; see also KRUSCHKE, *supra* note 20, at 17 ("The state constitutions framed during the War for Independence reflected the fears of a standing army. . . . The framers felt that such an army would create an overbearing force at the disposal of the state governments." (quoting JOHN LEVIN, *The Right to Bear Arms: The Development of the American Experience*, 48 CHI.-KENT L. REV. 148 (1971))).

²⁸ See MALCOLM, *supra* note 21, at 139 ("The dangers all the colonies faced . . . were so great that not only militia members but all householders were ordered to be armed.").

²⁹ This divergence of views has permeated the modern debate regarding the right to bear arms. See, e.g., KRUSCHKE, *supra* note 20, at 13-45 (discussing both the individualist and the collectivist interpretations of the right to bear arms); see also *infra* part IV.C.

³⁰ See Fields & Hardy, *supra* note 17, at 28 (elaborating on the difference between the two ideals, stating that "[c]onstitutions that maintained the Classical Republican link between land ownership and electoral participation also stressed the ideal of a citizen militia . . . [while] constitutions that accepted the Enlightenment concept of near-universal manhood suffrage largely ignored the militia ideal and instead stressed an individual right to arms"); see also MALCOLM, *supra* note 21, at 146-47 (noting that the separate constitutions "were careful to indicate their preference for a militia over

Shortly after American independence, the need for a militia was reevaluated. The institution of the new constitutional system of checks and balances, and the provisions for individual rights, prompted Americans to question if a militia was a necessary restraint on a potentially tyrannical government.³¹ The significance of the militia waned, and its function changed considerably. In 1792, the first congressional legislation regarding the militia was passed, which emphasized the structured nature that the militia was to assume.³² The next two centuries witnessed a drastic transformation of the militia's role and general characteristics.³³ Today, the National Guard and similar highly structured and managed military organizations are commonly considered the "militia."³⁴

Modern paramilitary organizations seek to reinvigorate the historical role and function of the militia. In addition to the legal obstacles they may face, their endeavor is complicated by two factors that physically inhibit the reinstatement of a traditional

a standing army and either specifically stated that the people had a right to be armed, or made it necessary by insisting upon a citizen militia that was a general, not a select, militia").

³¹ See FREEDMAN, *supra* note 20, at 21 ("[T]he framers of the Constitution had no need to create a 'right to revolution' against the excesses of any and all government nor a license to band together in paramilitary organizations; the checks and balances system within the Constitution itself precluded excesses of any and all government.").

³² "The First Militia Act of 1792 defined the militia as a formal military force The formal nature of 'militia' was substantiated almost 200 years later in United States v. Oakes" FREEDMAN, *supra* note 20, at 22 (footnote omitted). For an assertion that the organized nature of the militia was not statutorily prescribed until the 1903 Dick Act, see Garry Wills, *To Keep and Bear Arms*, N.Y. REV., Sept. 21, 1995, at 62, 71.

³³ See Ehrman & Henigan, *supra* note 16, at 34-40 (providing a history of the militia in the United States since 1789). After the United States gained independence,

state militias first faded out of existence and then later reemerged as more organized, semi-professional military units. The state provided the arms and the equipment of the militia members, and these were stored centrally in armories. With the passage of the Dick Act in 1903, the state militias were organized into the national guard structure, which remains in place today.

United States v. Hale, 978 F.2d 1016, 1019 (8th Cir. 1992) (citing Ehrman & Henigan, *supra*, note 16).

³⁴ See Dougherty, *supra* note 20, at 975 (stating that "the Federal Courts of Appeals have narrowed the Supreme Court's definition of militia to include only the National Guard" and referring to three seminal cases to illustrate this development). *But see* Moncure, *supra* note 21, at 24 (asserting that "[t]he National Guard of the United States is not the militia consisting of the whole people, but a select militia which is exclusive of the people").

militia: (1) the sheer expanse of the United States, and (2) the diverse and disorganized nature of today's militia movement.

B. *An Inside Look at Today's Militia*

The thrust of the new grassroots movement for a state militia has its roots in the original thirteen colonies and their need to ban together for the common protection of God-given natural Rights. The government then, was becoming too oppressive and tyrannical. The tolerance level was breached. Could we be witnessing history repeating itself?³⁵

Members of private militia groups come from various sectors of society³⁶ and are spread throughout the United States. Over half the states are believed to have active militia groups and estimates of membership numbers range anywhere from 1000 to 12,000 supporters.³⁷ Paramilitary organizations engage in a vast spectrum of

³⁵ Frank Isbell, *The Rebirth of the State Militia*, JUBILEE NEWS REVIEWS, Mar./Apr. 1994, at 7, 7.

³⁶ See Mack Tanner, *Extreme Prejudice: How the Media Misrepresent the Militia Movement*, REASON, July 1995, at 42, 45 (reporting that he "met computer programmers, owners of small businesses, professionals, writers and artists, salaried employees, and lots of retired military officers, all well established in America's middle class" while researching the militia movement); see also Christopher J. Farley, *Patriot Games*, TIME, Dec. 19, 1994, at 48, 48.

In dozens of states, loosely organized paramilitary groups composed primarily of white men are signing up new members, stockpiling weapons and preparing for the worst. The groups, all privately run, tend to classify themselves as "citizen militias." They are the armed, militarized edge of a broader group of disgruntled citizenry The members . . . are usually family men and women who feel strangled by the economy, abandoned by the government and have a distrust for those in power that goes well beyond that of the typical angry voter.

Id.

³⁷ Klanwatch, a project of the Southern Poverty Law Center in Montgomery, Alabama, publishes a bimonthly report entitled *Klanwatch Intelligence Report* [hereinafter *Klanwatch*], which chronicles the findings of the Klanwatch's Militia Task Force. Several of the *Klanwatch* publications contain a comprehensive analysis and study of various militia activity throughout the United States. The June 1995 issue reports that "[a]t least 224 militias and their support groups . . . are active in 39 states." *Over 200 Militias*, *supra* note 1, at 1 (explaining the scope and character of militia organizations); see also Dan Billin, *Citizen Militia Followers Invade the Mainstream*, LEBANON VALLEY NEWS, Aug. 31, 1994, at A1, A5 ("Chip Berlet, who monitors right-wing movements for a Cambridge, Mass., think-tank called Political Research Associates, estimates there are 1000 core militia members and an additional 10,000 supporters nationwide. The movement is rather anarchic, with no formal structure, and is active in at least 25 states . . ."); Ben Macintyre, *Rambo Gets Religion*, THE TIMES (London), Dec. 10, 1994, (Magazine), at 18, 20 (reporting that the Michigan Militia claims a membership of 12,000 and discussing how the militia

activities and maintain a variety of structures. Although paramilitary tactics are the focus of most private militia,³⁸ militia members also engage in other forms of government protest and participate in community programs.³⁹ With respect to militia structure and operation, some groups prefer a clandestine approach to their activities, while others are more vocal.⁴⁰ Possibly the only element common to the operation of paramilitary organizations is their reliance on computers as a means of communication.⁴¹

movement has become a national phenomenon through the use of computer networks, fax, shortwave radio, home-produced video, and desk-top publishing). A recently published book estimates that there "are hundreds of groups with a membership . . . between 10,000 and 40,000 . . . [and] their sympathizers . . . number in the hundreds of thousands." Patsy Sims, *Armed and Dangerous*, N.Y. TIMES, Jan. 28, 1996, § 7 (Book Review), at 13, 14 (reviewing KENNETH S. STERN, *A FORCE UPON THE PLAIN: THE AMERICAN MILITIA MOVEMENT AND THE POLITICS OF HATE* (1996)).

³⁸ For the purposes of this Comment, all paramilitary organizations are presumed to engage in paramilitary training, even if they also participate in other activities.

³⁹ With respect to the variation in militia activities, it has been reported that militias are involved in a wide variety of activities. Some members don camouflage uniforms to practice counterinsurgency techniques in isolated areas. Others wear warm-up suits and jeans while they plink at targets in local rifle ranges. Still others engage in voter registration drives, or assist local enforcement agencies in flood-relief efforts, search and rescue operations or other types of emergency response.

Bill Wallace, *A Call to Arms*, S.F. CHRON., Mar. 12, 1995, at Z1; see also Tanner, *supra* note 36, at 43-44 (separating the groups of "armed citizens who have grievances against the government" into four categories).

⁴⁰ "Each militia is different in its organizational structure, leadership and rules of operation. Some meet in private and use military-style security measures to keep their plans secret. Others . . . have open public meetings, with a formal agenda and published minutes." Wallace, *supra* note 39, at Z1.

Some militia members are instructed to "[t]rain only with what you need for training. . . . Train only with the people you need to at the time. . . . Train in the privacy of your own home. . . . [And i]f you need to train outside, do so in private or remote places. Shoot where people can't see the style of weapon you are shooting." FIELD MANUAL, *supra* note 19, § 2.4.2: *Low Profiles and Closed Mouths—Training with Your Cell*. They are also directed to make certain that "[t]raining is done within each individual cell with a view toward fostering its ability to survive, grow and fight even in the even [sic] it is separated from the rest of the organization." *Id.* § 2.4.3: *Decentralization and Transience—Decentralization Among the Cells*.

⁴¹ Private militia rely predominantly on the Internet to communicate their message.

When it comes to organization . . . the troops go high tech. The militia movement . . . "is probably the first national movement organized and directed on the information highway." Patriot talk shows . . . spread the word that American values are under attack from within and without. Militias also communicate via the Patriot Network, a system of linked computer bulletin boards, and through postings in news groups on the Internet.

Two predominant complaints about the government provide the rallying cry for private militia groups. First, the militia are infuriated by rampant "government abuse, specifically in the areas of law enforcement and taxation."⁴² Belief that the government increasingly subjugates individual rights—an impression fueled by the Ruby Ridge and Waco incidents⁴³—compels militia to train ardently in anticipation of a future battle with the government. This belief leads to the militia's second fundamental complaint about the government: It is undermining their Second Amendment rights to bear arms and form militia.⁴⁴

Despite the aggressive antigovernment position promoted by today's private militia, their paramount goal is *not* to overthrow violently the government. Rather, they strive to protect the citizenry from the federal government. In essence, they aim to bring a renewed justice to the United States,⁴⁵ and, to date, in spite

Farley, *supra* note 36, at 49; see also Jan Vertefeulle, *Boy Scouts or Paramilitary Group?*, ROANOKE TIMES & WORLD NEWS, Feb. 26, 1995, at C1 ("[Most militia groups] are connected through shared propaganda and speakers. The Internet contains computer bulletin boards full of militia discussion groups.").

⁴² MONTANA HUMAN RIGHTS NETWORK, *A SEASON OF DISCONTENT: MILITIAS, CONSTITUTIONALISTS, AND THE FAR RIGHT IN MONTANA, JANUARY THROUGH MAY, 1994*, at 2 (1994) [hereinafter *DISCONTENT*] (chronicling the expansion of far right organizing in early 1994 and reviewing both groups and individuals who have become active during that time).

⁴³ See Farley, *supra* note 36, at 49 (asserting that the militia movement "was galvanized by two events: the bloody face-off in rural Idaho between white separatist Randy Weaver and law-enforcement officials in 1992 and the fiery siege of the Waco, Texas, compound of cult leader David Koresh in 1993").

⁴⁴ See *id.* "The militias believe that the Brady bill and President Clinton's crime bill banning certain types of assault weapons . . . are aimed at disarming the American people." Vertefeulle, *supra* note 41, at C1.

⁴⁵ One commentator suggests the antigovernment position supported by private militia is based on the Constitution:

From Michigan to Florida, the militias' claim is the same: the Constitution—guaranteeing a feeble federal government and reserving most power to the 50 states—has been abandoned. In argument with echoes of our own Euro-skepticism, militia-types fear a once proud nation is about to come under the boot of an arrogant, remote superstate.

Jonathan Freedland, *Adolf's US Army*, THE GUARDIAN, Dec. 15, 1994, at T6. In accordance with these views, therefore, private militia seek to restore the Constitution, as they understand it.

"Think of ourselves as a spider, spinning of [sic] web to catch some flies. In this case, the flies are corrupt or abusive officials or other criminals. Our objective is to gather and distribute evidence, protect witnesses, investigators, and other innocent persons, and bring the perpetrators to justice."

Internet Newsgroup Posting from the Constitution Society, *Militia Training: Operation WitWeb*, (Mar. 24, 1995) (on file with author) [hereinafter *Militia*

of "their alarmist rhetoric, most militia groups stay within the law, advancing their ideas through the usual political process[es]."⁴⁶

Militia members assert that they will defend their ideals to the extent necessary. An examination of a sample militia oath and Militia Declaration of Independence exhibits the earnestness of militia members' convictions: "I _____ promise to defend and observe the Constitutional liberties embodied in the Bill of Rights for all American citizens by example, persuasion, and force of arms if necessary. To that end, I intend to arm myself, I voluntarily join the Free Militia, and I agree to obey its commanders"⁴⁷ A Militia Declaration of Independence provides that

whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.⁴⁸

Militia members adhere to, and are motivated by, the general tenets central to these declarations.

The response of private militia to perceived (or perhaps real) threats imposed by the federal government further demonstrates the interrelation of their convictions with their actions. In May 1994, a group of militia members convened in a public park, dressed in military fatigues, with war paint on their faces, and carrying guns.⁴⁹ The meeting's purpose was to make their presence publicly known and to promote the message that they exist to protect against an increasingly tyrannical federal government.⁵⁰

Training].

⁴⁶ David Foster, *Confrontations Spread As Gun-Packing Militias Flourish in Montana*, Associated Press, Mar. 24, 1995, available in LEXIS, News Library, AP File (focusing on the Montana militia, particularly Calvin Greenup, a member of the Montana militia who refuses to pay federal income taxes); see also Tanner, *supra* note 36, at 45 (reporting a militia training leader as stating that "[w]e are not looking for an armed confrontation if we can avoid it. Every week, we pick a political issue based on what the media is reporting, and we crank out a letter on that issue which each member sends to his congressman or senator").

⁴⁷ FIELD MANUAL, *supra* note 19, § 2.4.4.

⁴⁸ AMERICAN JUSTICE FED'N, DECLARATION OF INDEPENDENCE 1994, at 1 (1994). The Declaration further asserts that "as Free and Independent Sovereign Citizens, each has the full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which an Independent Sovereign may of right do." *Id.* at 3.

⁴⁹ See Beth Hawkins, *Patriot Games*, DET. METRO TIMES, Oct. 12-18, 1994, at 13 (discussing the growth of the Michigan Militia Corps and explaining the motivations, interests, and tactics of its membership).

⁵⁰ See *id.*

In February 1995, an Idaho National Guard helicopter flew over the ranch of Calvin Greenup, a tax protestor. Greenup summoned twenty others, all sporting guns and planning to shoot down the helicopter in the event that it flew over his land again.⁵¹ Militia activists recognized that “[w]hat some call paranoia, Greenup calls patriotism. He’s at the volatile fringe of a burgeoning militia movement that believes an armed citizenry is the only way to defend America from a government gone corrupt.”⁵²

In March 1995, the Texas militia, predicting mass arrests of militia leaders, as well as government-staged bombings that would be blamed on militia groups, called for

militia leaders to keep weapons nearby, but not on their persons, to avoid providing a pretext for gunning them down. On the other hand, it may also be a good idea if other militiamen remain nearby, armed, with the main events in view If innocents . . . are to be killed anyway, we need to be able to protect them⁵³

Although these are but a few examples of the response illicited from militia members, they exemplify the strength of their convictions and the motive for their organization.

The existence of private militia is often viewed as destructive and anarchistic because they are founded on a fear and distrust of

The militia’s belief that the government is out to get them also motivates them to make themselves better known as protectors of society. For example, in response to the allegations of government initiated actions against militia groups, it was asserted that “[i]t is time for the militias to come out of the shadows and go public. There is no security in obscurity. Our adversaries know who you are. You are only hiding from other militias who may need to contact you.” Internet Newsgroup Posting from Jon Roland, Texas Militia Correspondence Committee, *Militia: Rumored March 25 Arrests* (Mar. 24, 1995) (on file with author).

⁵¹ Officials maintained that the helicopter was on a training mission. See Patricia Sullivan, *Guard Chopper Stirs Up Bitterroot ‘Militia’*, MISSOULIAN, Feb. 7, 1995, at A1, A8.

⁵² Internet Newsgroup Posting from Charles Zeps, *ALERT! MILITIAS TARGETED 24/03/95*, (Mar. 24, 1995) (on file with author) (including a copy of wire report from Darby, Montana detailing the story of Calvin Greenup).

Militia groups have also called for all militia units to convene “armed and in uniform, to . . . enforce the ultimatum. The militia will arrest Congressmen who have failed to uphold their oaths of office, who then will be tried for Treason by Citizens’ Courts.” Memorandum from Linda Thompson, American Justice Federation, to the Federation Membership (Apr. 21, 1994).

⁵³ Internet Newsgroup Posting from Jon Roland, Texas Militia Correspondence Committee, *Militia: Potential Threats and Security Therefor* (Mar. 3, 1995) (on file with author).

the federal government. Private militia are perceived as paranoid, and many find the combination of paranoia and weapons a dangerous prospect.⁵⁴ Militia members are, indeed, motivated by their disenchantment with the government. Nonetheless, negative portrayal of this sentiment as a virulent loathing and near obsession has often led to the creation of a self-fulfilling prophesy. People perceive militia members as fringe elements of society, and the information projected by private militia facilitate the perpetuation of this view. This perception, in turn, harbors continued fear and misunderstanding of militia objectives. The secretive nature of private militia, their training activity, and the proclamations that they will go to extreme ends to fight a tyrannical government further exacerbate the negative public image. The threat, however, if one exists at all, is certainly not imminent.⁵⁵ Rather, it appears to be more rhetoric than reality.

Combining the militia's ardent beliefs with an evaluation of militia philosophies and activities can easily lead to the conclusion that paramilitary organizations breed *potentially* explosive elements in society.⁵⁶ The question now arises whether states can justify legislation in an attempt to quell the existence and activities of these potentially persuasive, and possibly threatening, groups or whether any such attempts will infringe on coveted constitutional rights.

⁵⁴ See Macintyre, *supra* note 37, at 22 ("In our view this mixture of armed groups and those who hate is a recipe for disaster." (quoting Morris Dees, Director of the Southern Poverty Law Ctr.)); Sam Stanton, *On Guard*, SACRAMENTO BEE, Jan. 29, 1995, at A1 ("[W]hat we're seeing in these militia groups is that some of them are extremely paranoid, they're extremely well-armed. Their fax messages, their computer board messages are just aiming for a violent confrontation, which will happen sooner or later if the paranoia stays up like this." (quoting Mike Reynolds of Klanwatch)).

⁵⁵ See *infra* part III.B.2.a.

⁵⁶ It has been stated that:

The philosophy espoused by many of these groups is one which tells people that society is out to get them; that the system has been taken over; and that there is no way people can get justice through the processes currently in place. These groups urge people to take immediate action and arm themselves. History has demonstrated that individuals who subscribe to this ideology are capable of acting in a violent manner.

DISCONTENT, *supra* note 42, at 19.

II. ANTI-PARAMILITARY STATUTES

Two types of statutes proscribe private militia activity. The first type prohibits paramilitary organization altogether, and the second proscribes paramilitary training. Although anti-paramilitary organization laws are an outright ban on the creation of private militia, anti-paramilitary training statutes require proof of intent to commit a proscribed act.⁵⁷ Seventeen states have currently adopted anti-paramilitary organization laws,⁵⁸ seventeen states have anti-paramilitary training statutes,⁵⁹ and seven states have adopted both anti-organization and anti-training statutes.⁶⁰

⁵⁷ For further explanation of the differences between the statutes, see *State Lawsuits Can Shut Down Militias*, KLANWATCH INTELLIGENCE REP., June 1995, at 1 [hereinafter *State Lawsuits*]:

The two types of state laws operate somewhat differently. Anti-paramilitary training laws ban groups whose members know or intend that a civil disorder will result from their activities. Anti-militia laws, on the other hand, ban *all* unauthorized militias, regardless of whether the participants have any specific criminal intent or knowledge. Anti-militia laws generally require a showing that a group of people associated together in a formal military-type organization. Anti-paramilitary training statutes, by contrast, can be used against groups as small as two or three people.

Id. at 14.

⁵⁸ See ALA. CODE § 31-2-125 (1989); ARIZ. REV. STAT. ANN. § 26-123 (1991); IOWA CODE ANN. § 29A.31 (West 1995); KAN. STAT. ANN. § 48-203 (1994); KY. REV. STAT. ANN. § 38.440 (Michie/Bobbs-Merrill 1992); ME. REV. STAT. ANN. tit. 37-B, § 342.2 (West 1989); MD. ANN. CODE art. 65, § 35 (1995); MASS. GEN. LAWS ANN. ch. 33, § 129 (West 1993); MINN. STAT. ANN. § 624.61 (West 1987); MISS. CODE ANN. § 33-1-31 (1990); NEV. REV. STAT. ANN. § 203.080 (Michie 1992); N.H. REV. STAT. ANN. § 111:15 (1990); N.D. CENT. CODE § 37-01-21 (1987); TEX. GOV'T CODE ANN. § 431.010 (West 1988); WASH. REV. CODE ANN. § 38.40.120 (West 1961); W. VA. CODE § 15-1F-7 (1995); WYO. STAT. § 19-1-106 (1977).

⁵⁹ See ARK. CODE ANN. § 5-71-301 to -303 (Michie 1993); CAL. PENAL CODE § 11460 (West 1992); COLO. REV. STAT. ANN. § 18-9-120 (West 1986); CONN. GEN. STAT. ANN. § 53-206b(b) (West 1994); LA. REV. STAT. ANN. § 14:117.1 (West 1986); MICH. COMP. LAWS ANN. § 750.528a (West 1991); MO. ANN. STAT. § 574.070(2) (Vernon 1995); MONT. CODE ANN. § 45-8-109 (1995); NEB. REV. STAT. § 28-1480 to -1482 (1989); N.J. STAT. ANN. § 2C:39-14 (West 1995); N.M. STAT. ANN. § 30-20A-1 to -20A-4 (Michie 1994); OKLA. STAT. ANN. tit. 21, § 1321.10 (West 1983); OR. REV. STAT. § 166.660 (1990); 18 PA. CONS. STAT. ANN. § 5515 (1994); S.C. CODE ANN. § 16-8-10 to -8-30 (Law. Co-op. Supp. 1995); TENN. CODE ANN. § 39-17-314 (1991); VA. CODE ANN. § 18.2-433.1 to -433.3 (Michie 1994).

⁶⁰ See FLA. STAT. ANN. chs. 790.29 & 870.06 (West 1994); GA. CODE ANN. §§ 38-2-277 & 16-11-150 to -152 (1994); IDAHO CODE §§ 46-802 & 18-8101 to -8105 (1987); ILL. ANN. STAT. ch. 20, para. 1805/94-95 (Smith-Hurd 1995); N.Y. MIL. LAW § 240 (McKinney 1990); N.C. GEN. STAT. §§ 127A-151 & 14-288.20 (1993); R.I. GEN. LAWS § 30-12-7 & 11-55-1 to -3 (1994). For a comprehensive list of all of the statutes, both anti-organizational and anti-paramilitary training, see *State Anti-Militia and Anti-*

A typical anti-paramilitary organization statute prohibits a group of private individuals from convening under the guise of a military entity without permission from the state. For example, the Alabama anti-paramilitary organization statute states, in relevant part:

Any two or more persons, whether with or without uniform, who associate, assemble or congregate together by or under any name in a military capacity for the purpose of drilling, parading or marching at any time or place or otherwise take up or bear arms in any such capacity without authority of the governor, must, on conviction, be fined⁶¹

Similarly, the Maryland anti-paramilitary organization statute states that

[n]o body of men other than the units of the organized militia and the troops of the United States, except such military organizations as are now in existence, shall associate themselves together as a military company or organization or parade in public as a military company or organization without the permission of the Governor.⁶²

Standard anti-paramilitary training statutes prohibit the use of specific military techniques with the intent to instigate social disorder. Michigan's anti-paramilitary training law proclaims that

Paramilitary Training Laws, KLANWATCH INTELLIGENCE REP., June 1995, at 15, 15.

For more discussion of the effectiveness of these state laws in monitoring unlawful militia activity, see *State Lawsuits*, *supra* note 57, at 15 ("The anti-militia and anti-paramilitary training laws give police and prosecutors potent tools to prohibit dangerous militia activity. States can enforce the laws by investigating military-styled groups to determine if they are 'military organizations' under the anti-militia statutes or are engaged in 'paramilitary training' under the paramilitary laws.")

For a list of proposed alternatives to anti-paramilitary statutes as a means of prosecuting militia members, see John R. Moore, Note, *Oregon's Paramilitary Activities Statute: A Sneak Attack on the First Amendment*, 20 WILLAMETTE L. REV. 335, 346-48 (1984) (critiquing the ACLU's proposed use of existing criminal statutes against conspiracy, aiding and abetting, in an attempt to prosecute paramilitary activity). See also ANTI-DEFAMATION LEAGUE, THE ADL ANTI-PARAMILITARY TRAINING STATUTE: A RESPONSE TO DOMESTIC TERRORISM 1-3 (1995) (law report) (arguing that private militia pose a threat to society and proposing the enactment of a general federal statute prohibiting paramilitary activity); ANDREA KLAUSNER, AMERICAN JEWISH COMM'N, MEMORANDUM IN SUPPORT OF PROPOSED FEDERAL LEGISLATION TO BAR UNAUTHORIZED MILITARY OR PARAMILITARY ORGANIZATIONS 1 (1995) (supporting a federal statute outlawing paramilitary organizations and asserting that "[t]he threat of militia violence and the encouragement of lawlessness and intimidation by these paramilitary groups underscore the pressing need for more effective regulation of militia groups").

⁶¹ ALA. CODE § 31-2-125 (1989).

⁶² MD. ANN. CODE art. 65, § 35 (1988).

it is unlawful to "teach or demonstrate to another person the use, application, or construction of any firearm, or any explosive or incendiary device, if that person knows, has reason to know, or intends that what is taught or demonstrated will be used in, or in furtherance of, a civil disorder."⁶³ Connecticut's anti-paramilitary training statute, which is more comprehensive, states:

No person shall (1) teach or demonstrate to any person the use, application or making of any firearm, explosive or incendiary device, or technique capable of causing injury or death to a person, knowing or intending that such firearm, explosive, incendiary device or technique will be unlawfully employed for use in, or in furtherance of, a civil disorder; or (2) assemble with one or more persons for the purpose of training with, practicing with or being instructed in the use of any firearm, explosive or incendiary device, or technique capable of causing injury or death to a person, intending to employ unlawfully such firearm, explosive, incendiary device or technique for use in, or in furtherance of, a civil disorder.⁶⁴

The definition of "paramilitary organization" varies by state. However, each permutation constitutes a functional definition incorporating elements typical of either the anti-organization or the anti-training statutes. California defines a paramilitary organization as:

[A]n organization which is not an agency of the United States government or of the State . . . but which engages in instruction or training in guerilla warfare or sabotage, or which, as an organization, engages in rioting or the violent disruption of, or the violent interference with, school activities.⁶⁵

This definition focuses on the lack of agency ties, thereby paralleling the state authorization criteria common to anti-paramilitary organization statutes. The criteria that the group is not an agency of the federal or state governments and that it engages in the stated types of training are of particular import with respect to today's paramilitary organizations because they are not endorsed by a government and they may conduct the types of activities specifically enumerated. Louisiana defines a paramilitary organization as:

[A] group organized in a military or paramilitary structure, consisting of two or more persons who knowingly possess firearms or

⁶³ MICH. COMP. LAWS ANN. § 750.528a(2) (West 1991).

⁶⁴ CONN. GEN. STAT. ANN. § 53-206b(b) (West 1994).

⁶⁵ CAL. PENAL CODE § 11460(a) (West 1992).

other weapons and who train in the use of such firearms or weapons, or knowingly teach or offer the use of such firearms or weapons to others, for the purpose of committing an offense⁶⁶

Louisiana's definition contains the same structure and intent requirements found in anti-paramilitary training legislation. The criminal purpose of the activities is significant because it is not necessarily applicable to current militia as there is not yet evidence to substantiate the claim that they fulfill the intent requirement.

New York's anti-paramilitary statute, addressing both organization and training, declares:

[A]ny person who assembles or conspires to assemble with one or more persons as a paramilitary organization and has knowledge of its purpose is guilty of a . . . felony when he, with one or more other members of such organization, practices with a military weapon in order to further the purpose of such organization.⁶⁷

Under New York law, a "paramilitary organization" means an organization of two or more persons who engage or conspire to engage in military instruction or training in warfare or sabotage for the purpose of unlawfully causing physical injury to any person or unlawfully damaging the property of any person."⁶⁸

States promulgated anti-organization and anti-training statutes presumably because of the alleged threat to society posed by the proliferation of private militia. The Montana state legislature, for example, found that "conspiracies and training activities in the furtherance of unlawful acts of violence against persons or property are not constitutionally protected [and] pose a threat to public order and safety."⁶⁹ Although the state goal of preserving the peace would seem compelling, it may not be enough to justify both anti-paramilitary organization and training statutes. In order to determine whether this interest can survive constitutional scrutiny, the statutes must be examined to ascertain whether they contravene the First and Second Amendments to the United States Constitution.⁷⁰

⁶⁶ LA. REV. STAT. ANN. § 14:117.1.C(1) (West 1986).

⁶⁷ N.Y. MIL. LAW § 240(6)(a) (McKinney 1990).

⁶⁸ *Id.* § 240(6)(b).

⁶⁹ MONT. CODE ANN. § 45-8-107 (1995).

⁷⁰ Before proceeding to an analysis of the constitutionality of these statutes, it is worth noting that the Civil Obedience Act of 1968, 18 U.S.C. § 231(a)(1) (1994), the federal statute upon which many of these state statutes were based, *see* Freeman, *supra* note 60, at 3, has been upheld as constitutional. *See* United States v. Featherston, 461 F.2d 1119 (5th Cir. 1972), *cert. denied*, 409 U.S. 991 (1976); National Mobilization

III. THE FIRST AMENDMENT: POLITICS, ASSOCIATION, AND CONDUCT

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."⁷¹ Statutes proscribing paramilitary organization and activity implicate the First Amendment because militia members engage in expression that may merit constitutional protection. An evaluation of these statutes necessitates drawing a distinction between anti-*organization* statutes and anti-*training* statutes, as these different types of statutes warrant separate First Amendment analyses. Prevailing First Amendment jurisprudence leads to the conclusion that, while the anti-training regulations

Comm'n v. Foran, 411 F.2d 934 (7th Cir. 1969).

The Seventh Circuit Court of Appeals in *Foran* found the Civil Obedience Act to be a reasonable exercise of congressional power to "prevent violence to persons and injury to their property, and when clear and present danger of riot appears, the power of Congress to punish is obvious." *Foran*, 411 F.2d at 939. Further, as to the vagueness claim raised in *Foran*, the court found that "[t]he requirement of intent . . . 'narrows the scope of the enactment by exempting innocent or inadvertent conduct.'" *Id.* at 937.

The Fifth Circuit Court of Appeals echoed the Seventh Circuit's holding. The factual scenario in *Featherston* is analogous to the situation in which militia members would be prosecuted under a state anti-paramilitary statute. In *Featherston*, a structured group of activists, learned in the use of explosives, was ready to attack transportation and communication facilities when the time was ripe, in anticipation of "the coming revolution." *Featherston*, 461 F.2d at 1122. The court, quoting the Supreme Court in *Dennis v. United States*, stated that if the "Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the government is required." *Id.* (quoting *Dennis v. United States*, 341 U.S. 494, 509 (1950)).

The *Dennis* Court's ruling was clarified in *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam). In *Brandenburg*, the Court held that the danger must be "imminent" in order for it to be constitutionally proscribed. *See id.* at 447 (noting that the speech must be aimed at "inciting or producing imminent lawless action and is likely to incite or produce such action"). The "clear and present danger" analysis refined by the *Brandenburg* decision is not applicable to paramilitary organizations because the threat of danger posed by militia members is abstract at best. *See infra* note 109 and accompanying text; *see also supra* notes 45-46, 55 and accompanying text.

⁷¹ U.S. CONST. amend. I. For a discussion of the First Amendment's applicability to the states, see *Palko v. Connecticut*, 302 U.S. 319, 324-25 (1937) (discussing the rights guaranteed by the First Amendment and asserting that "immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states" (footnote omitted)).

survive constitutional scrutiny, anti-organization statutes impermissibly violate the First Amendment guarantees of freedom of speech and association.

A. *Anti-Paramilitary Organization Statutes*

1. Freedom of Speech Violation

Although the First Amendment's protection of expression is not absolute,⁷² restrictions upon speech must be justifiable under an appropriate level of judicial scrutiny. In determining the proper level of scrutiny, two factors are particularly important: (1) the type of speech regulated and (2) the method in which it is regulated. For example, while political speech traditionally has been accorded the utmost protection,⁷³ obscene speech receives less judicial insulation.⁷⁴ Similarly, while a regulation directed at the content of speech must survive the strictest scrutiny,⁷⁵ a regulation targeting conduct, but only incidentally abridging expression, faces less severe judicial consideration.⁷⁶ Accordingly, anti-paramilitary organization

⁷² See, e.g., *Wisconsin v. Mitchell*, 113 S. Ct. 2194, 2199 (1993) (“[V]iolence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection.” (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984))); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982) (affirming that “[t]he First Amendment does not protect violence”); *Spence v. Washington*, 418 U.S. 405, 417 (1974) (Rehnquist, J., dissenting) (proclaiming that “[t]he right of free speech, though precious, remains subject to reasonable accommodation to other valued interests”).

⁷³ See, e.g., *McIntyre v. Ohio Elections Comm’n*, 115 S. Ct. 1511, 1519 (1995) (proclaiming that “[w]hen a law burdens core political speech . . . ‘exact[ing] scrutiny’ is applied”); *Burson v. Freeman*, 504 U.S. 191, 197 n.3 (1992) (noting that “regulation of political speech in a public forum is valid only if it can survive strict scrutiny” (citing *Carey v. Brown*, 447 U.S. 455, 461-62 (1980))).

⁷⁴ See, e.g., *Miller v. California*, 413 U.S. 15, 23 (1973) (declaring that “[t]his much had been settled by the Court, that obscene material is unprotected by the First Amendment”); *Roth v. United States*, 354 U.S. 476, 485 (1957) (“We hold that obscenity is not within the area of constitutionally protected speech or press.”).

⁷⁵ See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (emphasizing that “[c]ontent-based restrictions are presumptively invalid” (citations omitted)); *Police Dep’t v. Mosley*, 408 U.S. 92, 95 (1972) (stating that “above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content” (citations omitted)).

⁷⁶ See, e.g., *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2469 (1994) (affirming that an “intermediate level of scrutiny [is] applicable to content-neutral restrictions that impose an incidental burden on speech”); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (noting that “[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental

statutes should be subject to the strictest level of scrutiny because they conceivably abridge political speech due to its content. These statutes fail to meet the Court's heightened scrutiny standard and, therefore, constitute an unconstitutional infringement upon free speech.

a. *Political Speech Warrants Strict Constitutional Protection*

The Supreme Court has continually discouraged the suppression of political speech because such speech, although sometimes disruptive, is integral to a free and democratic society.⁷⁷ In fact, the Court has explicitly declared the value of political speech most potent when it *does* provoke a discordant element among people, stating that speech "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."⁷⁸ The Court has held that restrictions on this important speech must be scrutinized under the most stringent level of scrutiny.⁷⁹

b. *Anti-Paramilitary Organization Statutes Restrict Political Speech on the Basis of Its Content*

Proscriptions on paramilitary organization create the exact type of restrictions on political speech that the Supreme Court deems impermissible. In a sense, the majority of private militia can be compared to political factions—individuals bound together by their distrust of government and their desire to discuss and improve government.⁸⁰ Although the method that militia members choose to disseminate their message focuses on the military nature of their organization, this fact does not detract from the predominant purpose for which they convene—to condemn government abuses and to explore ways to thwart such egregious conduct.⁸¹ Assuming

effect on some speakers or messages but not others").

⁷⁷ See, e.g., *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (noting that "a function of free speech under our system of government is to invite dispute. . . . It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea").

⁷⁸ *Id.*

⁷⁹ See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 44-45 (1976) (stating that "the constitutionality of [the statute] turns on whether the governmental interests advanced in its support satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression").

⁸⁰ See *supra* notes 42-45 and accompanying text.

⁸¹ See *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 115 S. Ct. 2338,

that militia members convene for the primary purpose of expressing grievances against the government, denying private militia the right to organize is, therefore, analogous to preventing the creation of a new political party. The consequence, silencing the potentially valuable voices of militia members, is similar to stifling the outcry of members of a new political faction. The concept of stifling political organization simultaneously conflicts with the democratic ideal while accurately depicting the purpose and effect of anti-paramilitary organization statutes.⁸²

Anti-paramilitary organization statutes do not merely “incidentally” restrict political speech. Rather, they prohibit the ability to engage in such speech precisely *because* of the political message conveyed by the creation of paramilitary organizations. In other words, anti-paramilitary organization statutes target the very content of militia members’ message—militia are the means of protecting individual rights from the government⁸³—an integral element of which is the military nature of their organizations.⁸⁴ The inability to create paramilitary organizations emasculates the message their very existence is intended to convey. Presumably, legislators believe that such a content-based restriction can be justified because the substance of the message warrants suppression:⁸⁵ Paramilitary organizations are fringe elements in society, and the majority does not subscribe to the views being espoused. This reasoning, however, conflicts with the very essence of the First Amendment.⁸⁶

2344-45 (1995) (“If there were no reason for a group of people to march from here to there except to reach a destination, they could make the trip without expressing any message beyond the fact of the march itself. Some people might call such a procession a parade, but it would not be much of one. . . . Hence, we use the word ‘parade’ to indicate marchers who are making some sort of collective point, not just to each other but to bystanders along the way.”). In an analogous manner, the militia members organize themselves into military-style units not simply to conduct military maneuvers; rather, their broader goal is to alert the public about the dangers of government and the need to be assertive as a means of self-protection.

⁸² See, e.g., *NAACP v. Button*, 371 U.S. 415, 431 (1963) (plurality opinion) (recognizing that “[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents. All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups” (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250-51 (1957))).

⁸³ See *supra* part I.B.

⁸⁴ See, e.g., *infra* note 89 (referring to an unconstitutional statute that prohibited the display of certain symbols). Bans on paramilitary organizations are analogous because they deny militia members the ability to display their military attributes, a symbol central to the message they aim to convey.

⁸⁵ See *supra* note 69 and accompanying text.

⁸⁶ See *Street v. New York*, 394 U.S. 576, 592 (1969) (proclaiming that “[i]t is firmly

"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."⁸⁷ The creation of paramilitary organizations is quite obviously the expression of an idea, and, therefore, it merits First Amendment protection accorded other conventional expressions of ideas.

Speech that the majority finds offensive has often found protection in the Constitution. In *R.A.V. v. City of St. Paul*,⁸⁸ for example, an ordinance prohibiting hate speech was held unconstitutional.⁸⁹ The Court declared that, although reprehensible, hate speech was protected because "[t]he First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects"⁹⁰ simply because these particular subjects are disfavored.⁹¹ This same reasoning applies

settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers"); see also *Terminiello v. Chicago*, 337 U.S. 1, 4-5 (1949) ("There is no room under our Constitution for a more restrictive view [of the freedom of speech]. [T]he alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.").

⁸⁷ *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (citations omitted).

⁸⁸ 505 U.S. 377 (1992).

⁸⁹ The ordinance in *R.A.V.* prohibited the display of symbols which one knew or had reason to know would "arouse[] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." *Id.* at 380. Specifically, the ordinance made it illegal to

place[] on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.

ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990).

⁹⁰ *R.A.V.*, 505 U.S. at 391 (citations omitted).

⁹¹ This incident is reminiscent of the neo-Nazi march that was permitted in Skokie, Illinois, a community with numerous Holocaust survivors who vehemently protested the city's decision to allow the march. Although the Skokie neo-Nazis promoted an unpopular view and seemingly posed a threat to the public peace, their First Amendment interests were found to outweigh any ethical arguments that were posited, as well as any threat to peace that was presented. The events in Skokie "essentially ratif[ied] and reaffirm[ed] several decades of legal precedent guaranteeing unpopular groups the right to demonstrate on public property." SAMUEL WALKER, *HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY* 120 (1994). For further discussion of the decision to permit the march on Skokie and the First Amendment consequences of that decision, see generally *id.* See also *National Socialist Party v. Village of Skokie*, 432 U.S. 43, 43-44 (1977) (concluding that the Illinois Supreme Court's denial of a stay of an injunction prohibiting the National Socialist Party of

to anti-paramilitary organization statutes because, although the existence of private militia as military entities promoting anti-government sentiments does not conform to conventional notions of political expression, this fact does not provide a relevant distinction for silencing their voices.

c. *The Restriction on Political Speech Fails to Meet the Appropriate Level of Judicial Scrutiny*

Anti-paramilitary organization statutes implicate First Amendment concerns because they constitute content-based restrictions on speech. The very existence of paramilitary organizations is inextricably intertwined with, and motivated by, strong anti-government convictions and general despair about the domestic political situation.⁹² Anti-paramilitary organization statutes, which result in a restriction of the content of these messages, are not narrowly tailored to serve the compelling government interest in domestic security and, therefore, fail to satisfy the requisite level of constitutional scrutiny.⁹³

Unquestionably, the state has a valid interest in the safety of society. This interest must not, however, overwhelm the extreme desirability of protecting the right of the minority to speak out against the majority, particularly with regard to political issues.⁹⁴ Without this right, the protests of the majority could silence the voice of the minority⁹⁵—an untenable prospect within a democratic

America's parade was improper because it would deny petitioners' First Amendment rights during the period of appellate review).

⁹² See *supra* notes 42-45 and accompanying text.

⁹³ See, e.g., *McIntyre v. Ohio Elections Comm'n*, 115 S. Ct. 1511, 1519 (1995) (explaining that "[w]hen a law burdens core political speech, [the Court] appl[ies] 'exact[ing] scrutiny' and uphold[s] the restriction only if it is narrowly tailored to serve an overriding state interest" (citation omitted)).

⁹⁴ See DONALD A. DOWNS, *NAZIS IN SKOKIE: FREEDOM, COMMUNITY, AND THE FIRST AMENDMENT 2* (1985) (noting, with respect to the "fears and counter-threats of violence engendered at Skokie," that "*political speech* shall not be abridged because of its *content*, even if that content is verbally assaultive and has an emotionally painful impact" (footnotes omitted)).

⁹⁵ This phenomenon, the ability of one group to inhibit the speech of another, is commonly referred to as the "heckler's veto." See *id.* at 9 (stating that "[b]ecause of this conflict, the Supreme Court reinforced the protection of speech . . . by prohibiting the abridgement of speech due to the reaction of a 'hostile audience'" (footnotes omitted)); WALKER, *supra* note 91, at 71 ("Many of the actions of controversial groups were and are deliberately provocative. . . . The underlying question [is] whether one person's right to speak [can] be restricted because of

government.⁹⁶

In spite of these valuable concerns for democratic integrity, it is apparent that, even if the state's interest in protecting public safety were compelling, anti-paramilitary organization statutes are not narrowly tailored to this interest. An outright ban on the right of militia members to convene as military entities prevents not only discussion regarding the government but also dialogue concerning *any* topic militia members may choose to discuss. Such a prohibition singlehandedly eradicates political speech that may serve a vital role in the functions of a democratic society. Anti-paramilitary organization statutes, therefore, constitute an unconstitutional violation of the First Amendment guarantee to freedom of speech.

2. Freedom of Association Violation

The First Amendment protects the "right of the people peaceably to assemble."⁹⁷ Alexis de Tocqueville, emphasizing the importance of this right, wrote that

[t]he most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears to [be] almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society.⁹⁸

The prohibition on association fostered by anti-paramilitary organization statutes denies individuals a fundamental means of voicing their opinions and is unconstitutional under the Supreme Court's association jurisprudence.⁹⁹

threatened (or actual) violence by the audience.").

⁹⁶ In fact, our government has a vested interest in fostering the expression of minority opinions. A fundamental tenet of a democratic society is that anti-government expression has "serious . . . political . . . value." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 418 (1992) (Stevens, J., concurring) (quoting *Miller v. California*, 413 U.S. 15, 24 (1973)).

⁹⁷ U.S. CONST. amend. I.

⁹⁸ 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 203 (Vintage Books 1954) (1848).

⁹⁹ See *infra* part III.A.2.c.

a. *Freedom of Association Warrants Protection Similar to That Awarded Freedom of Speech*

The Supreme Court, recognizing the right to freedom of association¹⁰⁰ as a concomitant extension of other First Amendment rights, has proclaimed that “[a]n individual’s freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State, unless a correlative freedom to engage in group effort toward those ends was not also guaranteed.”¹⁰¹ By providing individuals with an additional means of expressing their views, freedom of association assumes the same fundamental role as freedom of speech in a democratic society. “The freedom to associate applies to the beliefs we share and to those we consider reprehensible. It tends to produce the diversity of opinion that oils the machinery of democratic government and insures peaceful, orderly change.”¹⁰²

b. *Anti-Paramilitary Organization Statutes Infringe upon the Right of Militia Members to Assemble*

A prohibition against paramilitary organization implicates the First Amendment’s grant of free association, as the liberty to convene and address concerns regarding the government is a necessary complement to militia members’ right to engage in political discourse.¹⁰³ The Court, acknowledging the significance that freedom of association assumes in society, has proclaimed that “the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process. . . . [And] by collective effort individuals can make their views known, when, individually, their voices would be faint or lost.”¹⁰⁴ Militia members join together in an effort to convincingly

¹⁰⁰ The Supreme Court has identified two prongs of the right to free association: freedom of intimate association, which implicates due process concerns, and freedom of expressive association. *See Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984) (noting that the two prongs coincide in cases in which the state interferes with an individual’s ability to select those with whom they wish to join in a common endeavor). This Comment is solely concerned with the freedom of expressive association.

¹⁰¹ *Id.* at 622 (citation omitted).

¹⁰² *Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974).

¹⁰³ *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) (stating that “[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association”).

¹⁰⁴ *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*,

and forcefully promote their opinions. Denying them the liberty to convene as a group, therefore, effectively deprives them of the ability to disseminate these views.

Proponents of anti-paramilitary organization statutes may justify their position on the basis that the motivations underlying militia association—mistrust and fear of the government—are unorthodox. Yet, as in the realm of free speech, the freedom of association analysis renders unconstitutional statutes that proscribe organization based solely on majority dislike or distrust.¹⁰⁵ Thus, the inquiry turns to whether these statutes can be justified on any other grounds in light of the Supreme Court's freedom of association jurisprudence.

c. The Restrictions Imposed on Association Cannot Survive Judicial Scrutiny

The freedom to associate is not absolute. Groups who gather to engage in violent acts, for example, do not warrant constitutional protection.¹⁰⁶ On the other hand, "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence[] is not the same as preparing a group for violent action and steeling it to such action."¹⁰⁷ In fact, the Court has noted that "a blanket prohibition of association with a group having both legal and illegal aims' would present 'a real danger that legitimate political expression or association would be impaired."¹⁰⁸

454 U.S. 290, 294 (1981).

¹⁰⁵ See *Roberts*, 468 U.S. at 622 (proclaiming that "[a]ccording to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority" (citations omitted)); see also *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (noting that "[t]he First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed" (citations omitted)).

¹⁰⁶ See *Roberts*, 468 U.S. at 628 (stating that "violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection" (citing *Runyon v. McCrary*, 427 U.S. 160, 175-76 (1976)); see also *Samuels v. Mackell*, 401 U.S. 66, 75 (1971) (Douglas, J., concurring) (noting that "violence has no sanctuary in the First Amendment, and the use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of 'advocacy'").

¹⁰⁷ *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982) (quoting *Noto v. United States*, 367 U.S. 290, 297-98 (1961)).

¹⁰⁸ *Claiborne*, 458 U.S. at 919 (quoting *Scales v. United States*, 367 U.S. 203, 229 (1961)). The *Claiborne* Court expanded upon this point:

The inconclusive manner in which militia members discuss the *potential* use of force to fulfill their goals should be characterized as “abstract teaching.”¹⁰⁹ Moreover, while the use of such force may be illegal, militia promote other legal goals, such as publicizing government abuse and advocating the preservation of state and

“[I]f the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge.”

Claiborne, 458 U.S. at 908-09 (quoting *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937)). *But see* Application of Cassidy, 51 N.Y.S.2d 202, 205 (App. Div. 1944), *aff'd*, 73 N.E.2d 41 (1947). *Cassidy* concerned the denial of a Bar application on the account of the applicant’s membership in a group that advocated the overthrow of government. The court proclaimed:

The applicant has the right, of course, to advocate that the Constitution be changed and that those charged with the administration of the government be removed from office But this right contemplates only the advocacy of legal and constitutional means of change [and] [i]t is lost when it is abused by urging the use of illegal and unconstitutional methods

. . . .

. . . [T]he very fact that he advocated the creation of such a private army demonstrates his unfitness to become a member of the Bar of this State. There can be no justification for the organization of such an armed force. Its existence would be incompatible with the fundamental concept of our form of government . . . [and] would be sufficient, without more, to prevent a democratic form of government, such as ours, from functioning freely, without coercion, and in accordance with the constitutional mandates.

Id.

¹⁰⁹ For example:

[T]he prospect of fighting some day play[s] a prominent part in the group’s strategy and rhetoric.

. . . .

Militia members stress[], however, that their armament is strictly for defensive purposes. “We are not a subversive group. We are not intent on overthrowing the American government. . . . We believe that everything we are doing is completely lawful and we intend to stay that way just as long as possible.”

Billin, *supra* note 37, at A5. The concept of “abstract teaching” was initially referred to by the Court to draw a distinction between advocacy and “preparing a group for violent action and steeling it to such action.” *Noto v. United States*, 367 U.S. 290, 298 (1961); *see also* *Cole v. Richardson*, 405 U.S. 676, 688 (1972) (“Advocacy of basic fundamental changes in government . . . is within the protection of the First Amendment even when it is restrictively construed.”) (Douglas, J., dissenting). Modern militia do not currently appear to be preparing for violent action against the government. Rather, they prepare for the undecided day in the future when force may, or may not, become a necessity. *See supra* notes 45-46 and accompanying text.

individual rights.¹¹⁰ By prohibiting militia members from associating, anti-paramilitary organization statutes, therefore, pose a "real danger" of stifling valuable legal expression.¹¹¹ This suppression can only be justified if the statutes are narrowly tailored to serve a compelling governmental interest.¹¹²

The government's interest in the preservation of peace as a justification for prohibiting paramilitary association initially appears to serve a compelling interest. However, the prohibition divests militia members of a crucial means of group expression, thereby completely suppressing an unpopular view. Again, as the expression of divergent views is fundamental to, and beneficial for, a democratic society,¹¹³ a ban on groups organized to express such views simply cannot be said to serve a "compelling" governmental interest.

Even if the prohibition of private militia association served a compelling interest, anti-paramilitary organization statutes would still be unconstitutional because they fail to satisfy the narrowly tailored prong of the Court's association test.¹¹⁴ A complete ban on the creation of private militia clearly represents an overbroad means of addressing any "compelling" threat. This total prohibition, therefore, prevents militia members from convening to promote *any* views, whether or not they are directed at the government. Such an outright prohibition is completely at odds with our democratic society¹¹⁵ and cannot be said to be the "narrowest" means of serving *any* compelling governmental interest. Anti-paramilitary organization statutes, therefore, violate the First Amendment's right to freedom of association.

¹¹⁰ See *supra* notes 42-45 and accompanying text.

¹¹¹ See *Claiborne*, 458 U.S. at 928 (noting that the speeches under review called for Blacks to unify, but that as long as no lawless action was incited, this activity was protected).

¹¹² See, e.g., *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (declaring that "[i]nfringements on [the right to associate] may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas that cannot be achieved through means significantly less restrictive of associational freedoms"); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958) (noting that governmental "action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny").

¹¹³ See *supra* note 105 (emphasizing the importance of minority expression).

¹¹⁴ See, e.g., *Roberts*, 468 U.S. at 623 (noting that restrictions on association are only permissible when a compelling state interest cannot be achieved through less restrictive means).

¹¹⁵ See, e.g., *supra* notes 82-86, 105 (emphasizing the importance of unpopular views in a democratic society).

B. *Anti-Paramilitary Training Statutes*

1. Traditional Free Speech and Free Association Tests Do Not Apply

Traditional freedom of speech and freedom of association concerns are not applicable to anti-paramilitary training statutes. Although the ability to train constitutes an essential function of private militia's existence, their training activity does not fall under the purview of free speech analysis because it is not pure speech. Rather, paramilitary training constitutes expressive *conduct* that potentially merits First Amendment protection.¹¹⁶ Similarly, freedom of association tests do not apply to anti-paramilitary training statutes because these statutes are not aimed at paramilitary organization *per se*, rather they target the *activities* of militia members who have already exercised their right to associate by creating a specific organization.

2. Speech v. Conduct: Protected Expression?

a. *Paramilitary Training May Not Even Be Protected "Expressive Conduct"*

Although, paramilitary training is not pure speech, it cannot be denied that militia intend their training to impart a message: namely, that the federal government has overstepped its bounds and is infringing upon individual rights.¹¹⁷ In evaluating whether such

¹¹⁶ See *infra* part III.B.2.

¹¹⁷ Many militia members perceive the federal government as tyrannical, and they believe that the threat of armed resistance is the way to reestablish an equilibrium between the people and the government. Militia members believe that a free state

is found in the citizenry being trained, organized, equipped and led properly so that IF THE GOVERNMENT USES ITS FORCE AGAINST THE CITIZENS, THE PEOPLE CAN RESPOND WITH A SUPERIOR AMOUNT OF ARMS, AND APPROPRIATELY DEFEND THEIR RIGHTS!

One of the prime reasons for an alert and vigilant militia is that when the federal government is instituted among men for the purpose of protecting their rights and liberties, and they turn against the people who empower them . . . it is the DUTY of man to put on the cloak of liberty for the sake of protecting mankind from the federal government that is out of control and that has transformed itself into a tyrant.

Jim Faulkner, *Why There Is a Need for the Militia in America*, FEDERAL LANDS UPDATE, Oct. 1994, at 1, 6; see also *supra* notes 47-48 and accompanying text.

implied expression warrants First Amendment protection, the first issue to consider is whether the Supreme Court will even recognize training as expression. In determining whether conduct is expressive, the Court asks "whether '[a]n intent to convey a particularized message [is] present, and [whether] the likelihood [is] great that the message [will] be understood by those who view[] it.'"¹¹⁸

Paramilitary organizations clearly intend to convey a message by their training activity—such training reveals militia's allegiance to the ideal that society needs to be protected from the federal government and that a trained militia is the proper means of providing this protection. Militia members believe that further erosion of individual rights can be stymied by an organization prepared to defend constitutional principles.¹¹⁹ They train, therefore, as an expression of their willingness to engage in a confrontation with the government, should such confrontation become necessary to defend their beliefs.

Militia training is, therefore, directed at imparting a message. It is doubtful, however, that paramilitary training is understood to convey militia ideas. Instead, it is clear that private militia, and their training activities, are misperceived and mischaracterized by the general public. For the most part, militia adherents are seen as threatening and destructive gun-bearing members of society.¹²⁰ It is apparent, therefore, that militia members are failing to convey the message intended by their training activity. Hence, paramilitary training activity probably does not merit any First Amendment protection, as the likelihood is great that the Court would *not* consider such training to be protected expression.¹²¹

¹¹⁸ *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 410-11 (1974)).

¹¹⁹ See *supra* note 117.

¹²⁰ See *supra* notes 54-56 and accompanying text (noting that the public perceives militia as paranoid, violent groups).

¹²¹ *Johnson*, 491 U.S. at 404 (noting that if society fails to grasp the expressive elements of conduct, such conduct should not be granted First Amendment protection).

b. *Paramilitary Training Can Be Constitutionally Proscribed By Statute Even If It Is Considered Expression*

Even if paramilitary training contains elements of protected expression,¹²² this right to expression is not absolute.¹²³ In *United States v. O'Brien*,¹²⁴ the Supreme Court established a four-prong test for evaluating statutes that regulate activity that contains "speech and non-speech elements."¹²⁵ The Court held that

¹²² The message militia members aspire to convey by training—training which necessitates being armed and prepared to fight—is that of disenchantment with the federal government and belief in the restoration of individual rights. In this respect, paramilitary training may encompass elements of expressive conduct.

For an opposing view, see *Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan*, 543 F. Supp. 198 (S.D. Tex. 1982). *Vietnamese Fishermen's* involved a clash between the Ku Klux Klan and a group of immigrant Vietnamese fisherman in Texas. The Ku Klux Klan operated a military arm called the Texas Emergency Reserve ("TER"), a structured group trained in combat techniques, the use of sophisticated weaponry, and other military procedures. *See id.* at 203-04. On March 15, 1981, TER members rode in a boat through an area where the Vietnamese were located. *See id.* at 206-07. During the ride, TER members openly exhibited their weapons and prominently displayed an effigy of a Vietnamese fisherman. *See id.* The Ku Klux Klan was charged with violating Texas's anti-paramilitary statute, and the court was faced with the issue of whether it could enjoin the Ku Klux Klan and the TER from operating their military training camps.

The *Vietnamese Fishermen's* court asserted that the Ku Klux Klan's activities could appropriately be curtailed under the *O'Brien* speech-conduct analysis. For an explanation of the *O'Brien* analysis, see *infra* notes 124-26 and accompanying text. The court held that "[d]efendants' conduct of military operations involves such grave interferences with the public peace and such minimal elements of communication, that, the Court views these activities as impermissible 'conduct' not 'speech.'" *Id.* at 208. The court further held that the state

pursuant to its police power, may enact and enforce laws to provide for the public safety and to protect its citizens from the threat of violence. . . . [and] to further the governmental interest of protecting citizens from the threat of violence posed by private military organizations. This is a vital governmental interest because the proliferation of private military organizations threatens to result in lawlessness and destructive chaos.

Id. at 216 (citations omitted).

For a detailed description of the incident, see *id.* at 203-07. *See also* MORRIS DEES & STEVE FIFFER, A SEASON FOR JUSTICE 22-50 (1991) (Morris Dees, co-founder of the Southern Poverty Law Center and Klanwatch, was one of the attorneys that prosecuted the case on behalf of the Vietnamese fishermen); BILL STANTON, KLANWATCH: BRINGING THE KU KLUX KLAN TO JUSTICE 88-108 (1991).

¹²³ *See supra* note 72.

¹²⁴ 391 U.S. 367 (1968).

¹²⁵ *Id.* at 376 (asserting that "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea").

[a] government regulation [on such activity] is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.¹²⁶

Based on these criteria, anti-paramilitary training statutes are a valid limitation on First Amendment freedoms.

Anti-paramilitary training statutes satisfy each of the *O'Brien* criteria. First, the state is constitutionally empowered to promulgate laws directed at regulating the militia.¹²⁷ Second, these laws presumably further the important and substantial governmental interest¹²⁸ of preserving domestic security.¹²⁹ Anti-paramilitary training statutes, which target the use of firearms or explosive devices with the intent to cause civil disorder, serve the viable state interest of maintaining public peace and safety.¹³⁰

The third prong of the *O'Brien* test is similarly satisfied, as the purpose underlying anti-paramilitary training statutes is unrelated to the suppression of free expression.¹³¹ This factor merits further explanation because it is particularly important with respect to comprehending why anti-training statutes do not unconstitutionally infringe on First Amendment rights.

The *O'Brien* Court held that burning Selective Service registration certificates in an effort to convince others to adopt anti-war sentiments was not expression worthy of First Amendment protection.¹³² Importantly, the Court concluded that the government interest in criminalizing the destruction of draft cards was "limited to preventing harm to the smooth and efficient functioning of the Selective Service System"¹³³ and did "not punish only destruction

¹²⁶ *Id.* at 377.

¹²⁷ *See infra* part IV (discussing the state's power in this regard).

¹²⁸ *See O'Brien*, 391 U.S. at 377 (setting out the "substantial governmental interest" test).

¹²⁹ *See supra* text accompanying note 69 (stating that domestic security is the primary reason for promulgating these statutes).

¹³⁰ *See supra* text accompanying note 69.

¹³¹ *See O'Brien*, 391 U.S. at 377 (pointing out that the governmental purpose must be unrelated to the suppression of free expression).

¹³² *See id.* at 376-82 (rejecting the view that "an apparently limitless variety of conduct can be labelled 'speech' whenever the person engaging in the conduct intends thereby to express an idea").

¹³³ *Id.* at 382; *see also id.* at 377-80 (concluding that "[t]he issuance of certificates indicating the registration and eligibility classification of individuals is a legitimate

engaged in for the purpose of expressing views."¹³⁴ Rather, the law targeted conduct that specifically resulted in harm to the Selective Service. The statute, in other words, was not aimed at the suppression of free expression.

The *O'Brien* analysis initially appears to clash with the Court's more recent decision in *Texas v. Johnson*.¹³⁵ In *Johnson*, the Court held that burning an American flag as an act of protest against the government was constitutionally protected expression. The Court proclaimed that "[t]he expressive, overtly political nature of this act was both intentional and overwhelmingly apparent."¹³⁶ The anti-flag burning statute was deemed unconstitutional because the protestor was "prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values."¹³⁷

A critical distinction exists between *Johnson's* flag burning and *O'Brien's* burning of draft cards, a distinction that explains why only the former conduct merited constitutional protection. In *Johnson*, the asserted government interest directly implicated the expression, whereas in *O'Brien*, the government interest was unrelated to the expression.¹³⁸ Permitting destruction of draft cards would effectively eliminate the very reason for their creation—institution of a systematic form of administration, identification, and notification. In contrast, flag burning was criminalized because of the state's interest in "preserving the flag as a symbol of nationhood and national unity."¹³⁹ Punishing draft card burning to protest the government, in violation of a statute promulgated to promote efficient government administration, differs significantly from punishing flag burning as an act of political protest in contravention of a statute designed to preserve a political symbol. The interest

and substantial administrative aid in the functioning of [the registration] system" and listing the purposes "in addition to initial notification . . . [that] would be defeated by the certificates' destruction or mutilation").

¹³⁴ *Id.* at 375.

¹³⁵ 491 U.S. 397 (1989).

¹³⁶ *Id.* at 406. In an earlier case, the Court held that flag burning "was not an act of mindless nihilism. Rather, it was a pointed expression of anguish by appellant about the then-current domestic and foreign affairs of his government." Spence v. Washington, 418 U.S. 405, 410 (1974).

¹³⁷ *Johnson*, 491 U.S. at 411.

¹³⁸ See *O'Brien*, 391 U.S. at 381-82 (emphasizing that the governmental interest must be unrelated to expression).

¹³⁹ *Johnson*, 491 U.S. at 407 (citing national unity as one of two government interests allegedly justifying the anti-flag burning statute).

asserted in the latter directly implicates the specific conduct proscribed.¹⁴⁰

The Supreme Court has proclaimed that "nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses."¹⁴¹ Hence, the *O'Brien* statute passed constitutional muster precisely because the law strove to prevent harm to the Selective Service system that would result from draft cards being destroyed. Likewise, the *Johnson* statute was struck down on the grounds that the harm it aimed to prevent by prohibiting flag burning, the expression of anti-government sentiment, directly implicated the political message conveyed by the activity.

In light of *O'Brien* and *Johnson* it becomes evident that the government's interests in anti-paramilitary training statutes are unrelated to the suppression of free expression. If these statutes specifically outlawed the use of firearms for a disruption *aimed at the government*, constitutional questions would arise.¹⁴² Yet these statutes prohibit conduct intended to incite civil disorder for whatever purpose and do not specify the object of the intended civil disorder.¹⁴³ The state's desire to prevent violence and harm to the

¹⁴⁰ Thus, the Court in *Johnson* stated:

The State, apparently, is concerned that such conduct will lead people to believe either that the flag does not stand for nationhood and national unity, but instead reflects other, less positive concepts, or that the concepts reflected in the flag do not in fact exist, that is, that we do not enjoy unity as a Nation. These concerns blossom only when a person's treatment of the flag communicates some message, and thus are related "to the suppression of free expression" within the meaning of *O'Brien*.

Id. at 410.

¹⁴¹ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 385 (1992). The Court stated that "burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not." *Id.* at 385. Applying this logic to the present scenario, banning arms training to uphold an ordinance which prohibits shooting in unauthorized areas would be allowed, while banning arms training because it violates a law against protesting the government in a potentially threatening manner would presumably be unconstitutional.

¹⁴² Specifically, the specter of a prohibition on political expression because of the *content* of that expression would be raised. For a discussion of content-based restrictions on expression, see *supra* part III.A.1.a.

¹⁴³ The *O'Brien* Court distinguished draft card burning from a case

where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful. . . . [F]or example, this Court struck down a statutory phrase which punished people who expressed their 'opposition to organized government' by displaying 'any flag, badge, banner, or device.' Since the statute there was aimed at suppressing communication it could

community is certainly unrelated to the *message* that paramilitary organizations hope to convey. The statutes instead address solely the *means* by which these messages are communicated.¹⁴⁴ For this reason, anti-paramilitary training statutes satisfy the third prong of the *O'Brien* test.

In accordance with the fourth criteria of *O'Brien*, anti-paramilitary training statutes do not infringe First Amendment rights to any greater extent than is necessary.¹⁴⁵ Because these statutes address the techniques upon which militia members rely to express their views, as opposed to the substance of these views, any infringement on the freedoms of speech and association is negligible.¹⁴⁶ Militia members are not prevented from verbalizing their disenchantment with the federal government; they are merely prohibited from expressing it in a specific manner. There are numerous other ways in which militia members can band together as military entities to espouse their views legally, without resorting to weapons training and military maneuvers intended to create civil disturbances.¹⁴⁷

In summary, anti-paramilitary training statutes target conduct, not expression, and are, therefore, a constitutional limitation on militia members' First Amendment rights.¹⁴⁸ Thus, if, under the

not be sustained as a regulation of noncommunicative conduct.

O'Brien, 391 U.S. at 382 (citing *Stromberg v. State of California*, 283 U.S. 359, 361 (1931)).

Similarly, anti-paramilitary training statutes do not specifically outlaw the use of firearms for the purpose of disrupting the government. Rather, they generally prohibit conduct intended to incite disorder, regardless of the target of the conduct. If the statutes instead criminalized behavior specifically directed towards the government, the First Amendment would likely be violated.

¹⁴⁴ See, e.g., *supra* text accompanying notes 63-64 (providing examples of anti-paramilitary training statutes).

¹⁴⁵ See *O'Brien*, 391 U.S. at 377 (illustrating the final First Amendment concern that incidental restrictions be "no greater than is essential" to further the state interest).

¹⁴⁶ The Court allows such negligible infringement upon First Amendment freedoms when the state's interest is particularly important. For example, the Court has allowed restrictions on free speech in obscenity cases due to the numerous critical state interests involved. See, e.g., *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57-58 (1973) ("[T]here are legitimate state interests at stake in stemming the tide of commercialized obscenity. . . . These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself.").

¹⁴⁷ For examples of non-dangerous militia activity, see *supra* notes 49-53 and accompanying text. See also *supra* note 41 (discussing the increasing use of computer discussion among militia members).

¹⁴⁸ The Court has stated that "[w]here the government does not target conduct on

Second Amendment, state governments possess the power to proscribe paramilitary training activity, anti-paramilitary training statutes are not unconstitutional.

IV. A WELL REGULATED MILITIA

The Second Amendment states that "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."¹⁴⁹ The meaning of the Second Amendment is one of the most contested issues in constitutional law.¹⁵⁰ This Part will analyze the constitutionality of prohibiting militia training under prevailing Second Amendment jurisprudence in order to determine whether the states can rely on judicial doctrine to regulate this conduct lawfully.

Paramilitary organizations naturally believe in their right to assemble and operate as a private militia and, hence, in their right to bear arms. Paramilitary organizations rely on the Second Amendment not only to justify their existence, but also to demonstrate the possible government subjugation of individual rights. Because these organizations believe that the Second Amendment affords them a constitutional right to train as a "militia," attempts to stifle this activity exemplify the oppressive government that gave rise to their existence.¹⁵¹

the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992).

¹⁴⁹ U.S. CONST. amend. II.

¹⁵⁰ "According to an American Bar Association report of 1975, there is less agreement, more misinformation, and less understanding of the right of citizens to keep and bear arms than on any other current controversial constitutional issue." MALCOLM, *supra* note 21, at 135; *see also id.* at 136 ("Two hundred years after [the Militia Clause's] passage there is no agreement why it is there or what it means. Was it meant to restrict the right to have arms to militia members; to indicate *the* most pressing reason for an armed citizenry; or simply to proclaim the need for a free people to have a conscript, rather than a professional, army? And what sort of militia did the framers have in mind . . . ?").

¹⁵¹ *See* FIELD MANUAL, *supra* note 19, § 1.1.4 ("If you do what is Constitutionally right by forming a militia and the government accuses you of wrongdoing, then in fact they have lost all authority because they have turned away from the very thing which legitimizes them [the Constitution].").

A. *Who Constitutes the Militia?*

Any meaningful discussion of the regulation of paramilitary activity must begin with a determination of the scope of the Militia Clause. The question of who constitutes the militia has spawned considerable debate. Although a literal interpretation appears to lend credence to the position that private militia have a constitutional right to train, a legal analysis of who is vested with the power to control the militia leads to the opposite conclusion.

The militia was originally conceived as a citizens' army.¹⁵² At the time the Second Amendment was ratified, the militia was believed to comprise the whole people of the United States.¹⁵³ Subsequent interpretation and legislation have adhered to this original belief. A federal statute states that the militia "consists of all able-bodied males at least 17 years of age and . . . under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States."¹⁵⁴ Additionally, the Supreme Court has proclaimed that the militia is "comprised of all males physically capable of acting in concert for the common defense."¹⁵⁵ Literally, therefore, the male members of today's paramilitary organizations *do* comprise the militia. The fact that the militia is literally composed of the whole people, however, does not mean that it is free from governmental regulation.

¹⁵² See *supra* notes 21-28 (discussing the development of the militia from England's citizen's army).

¹⁵³ George Mason, a renowned Anti-Federalist and drafter of the Virginia Declaration of Rights, at the Virginia Constitution ratification convention of 1788 proclaimed: "[W]ho are the militia, if they not be the people of this country . . . ? Who are the militia? They consist now of the whole people Under the present government, all ranks of people are subject to militia duty." CLAYTON E. CRAMER, FOR THE DEFENSE OF THEMSELVES AND THE STATE: THE ORIGINAL INTENT AND JUDICIAL INTERPRETATION OF THE RIGHT TO KEEP AND BEAR ARMS 9 (1994).

For an argument that "an individual cannot merely identify himself as a member of an inactive state militia or as a member of a private paramilitary organization which calls itself a 'militia' in order to invoke the Second Amendment guarantee," see KLAUSNER, *supra* note 60, at 6.

¹⁵⁴ 10 U.S.C. § 311(a) (1994).

¹⁵⁵ *United States v. Miller*, 307 U.S. 174, 179 (1939) (holding that the National Firearms Act, which prohibited transportation of a 12-gauge shotgun with a barrel less than 18 inches long, did not violate the Second Amendment).

B. Regulation of the Militia

1. Power to Regulate the Militia Is Beyond the Reach of the Federal Government

In order to comprehend the Militia Clause of the Second Amendment, it is necessary to understand the context in which it was adopted and the reasons for its incorporation into the Constitution. During the Constitutional Convention and the ratification debates, the question of the need for a militia exemplified the divisive discussion over the allocation of power between the federal and state governments.¹⁵⁶ Federalists and Anti-Federalists argued over the anticipated effectiveness of a militia as a balance to governmental power.¹⁵⁷ The Federalists contended that a citizens' militia would be large enough to counter a standing army, while the Anti-Federalists argued that the federal government was granted too much control over the militia.¹⁵⁸ Dialogue also began to take shape as to whether the right to bear arms was an individual right, with the Federalists asserting that an individual right would act to further quell concern about an overbearing army run by the federal government.¹⁵⁹ In the end, the Second Amendment reflected a compromise between Federalist and Anti-Federalist concerns about a militia as a check on the federal government.¹⁶⁰ The Militia

¹⁵⁶ See MALCOLM, *supra* note 21, at 155-59 (elaborating on the dissension over the militia issue during the ratification debates); see also Jay R. Wagner, Comment, *Gun Control Legislation and the Intent of the Second Amendment: To What Extent Is There an Individual Right to Keep and Bear Arms?*, 37 VILL. L. REV. 1407, 1421-22 (1992) (providing a general legislative history of the Second Amendment and a look at the particular debates at the Constitutional Convention).

¹⁵⁷ See Fields & Hardy, *supra* note 17, at 33 (elaborating on the difference between the Federalists and the Anti-Federalists in their positions on this issue).

¹⁵⁸ See, e.g., THE FEDERALIST No. 29, at 182-87 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing the Federalist position that, "[i]f standing armies are dangerous to liberty, an efficacious power over the militia in the same body ought, as far as possible, to take away the inducement and the pretext to such unfriendly institutions" and that "if circumstances should at any time oblige the government to form an army of any magnitude that army can never be formidable to the liberties of the people while there is a large body of citizens . . . who stand ready to defend their own rights and those of their fellow citizens"); Dougherty, *supra* note 20, at 964-65 ("The Federalists, who argued for a powerful federal government, wanted nearly complete federal control of the militia. The Anti-Federalists, who strove to maintain substantial power in the state governments, feared any federal control over their state militias." (footnotes omitted)).

¹⁵⁹ See Fields & Hardy, *supra* note 17, at 35 (observing the Federalist argument that an armed populace would prevent the "enforce[ment of] unjust laws by the sword").

¹⁶⁰ "A compromise was reached whereby the federal government would maintain

Clause was intended to provide a balance to the potential threat of tyranny posed by granting the federal government power to maintain a standing army under Article I, Section 8, Clauses 15 and 16 of the Constitution.¹⁶¹ Thus, the limitation imposed on the government's power over militia was intended to restrict the *federal government*, not state governments.¹⁶²

2. State Governments Retain the Power to Regulate the Militia

Even though it is apparent that regulation of the militia falls outside the scope of the federal government's power, it has not always been clear whether the state governments retained the power to regulate the militia or whether the militia was reserved exclusively to the people of the state, free from *any* governmental regulation.

The question now appears to be largely settled. Power to control and regulate the militia is reserved to state governments. This power has not been delegated to the individual. The Second Amendment right to a well regulated militia, therefore, is not an individual right.¹⁶³ The state, not the

a standing army plus have the authority to regulate and call out the militia, and the states would have the authority over the militia except when it was called into federal service." John Levin, *The Right to Bear Arms: The Development of the American Experience*, 48 CHI-KENT L. REV. 148, 156 (1971), reprinted in KRUSCHKE, *supra* note 20, at 17.

¹⁶¹ See Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 211-12 (1983) ("Proponents of the exclusively state's right view see the amendment as responding to article I, section 8, clauses 15 and 16, of the original Constitution.").

¹⁶² See *Presser v. Illinois*, 116 U.S. 252, 265 (1886) (stating that the Second Amendment "is a limitation only upon the power of Congress and the national government, and not upon that of the state"). The *Presser* Court reaffirmed its earlier holding in *United States v. Cruikshank*, 92 U.S. 542, 553 (1875), that the Second Amendment "means no more than that [the right to bear arms] shall not be infringed by Congress . . . [and] that [it] has no other effect than to restrict the powers of the national government." *Id.*; see also KRUSCHKE, *supra* note 20, at 154 (arguing that "[t]he Court asserted that the Second Amendment limited the powers of the Congress, not the power of the states").

¹⁶³ Hence, although the definition of who constitutes the militia sweeps broadly, the militia are constrained by the state's power to establish who, among those eligible by definition, will act as a militia when required:

[I]n the context of the Constitution, the militia was viewed as a state-organized, state run body; it was not simply a term for the citizenry at large. Indeed, even though the militias were composed of a large body of male citizens, the militias were seen as state units which could be armed by the

individual, organizes and maintains a militia comprised of the citizenry.

As early as 1886, in *Presser v. Illinois*,¹⁶⁴ the Supreme Court held that state enactment of legislation prohibiting private military organizations was constitutional.¹⁶⁵ The Court proclaimed:

The right voluntarily to associate together as a military company or organization . . . without, and independent of, an act of congress or law of the state authorizing the same, is not an attribute of national citizenship. Military organization and military drill and parade under arms are subjects especially under the control of the government of every country. They cannot be claimed as a right independent of law. Under our political system *they are subject to the regulation and control of the state and federal governments . . .*¹⁶⁶

Thus, *Presser* stands for the crucial proposition that power to regulate the militia is conferred upon the state governments and that individuals associating as a private military organization, in contravention of a state statute proscribing such association, can be successfully and constitutionally prosecuted.

Both prior to and after the *Presser* opinion, the Supreme Court has proclaimed that the Second Amendment grants the state power to institute any obligations or restrictions it desires on militia.¹⁶⁷

government, and which could be called out by the states to quash rebellions, enforce laws, and defend the state from invasion.

Ehrman & Henigan, *supra* note 16, at 24; *see also id.* at 56 (proclaiming that an "historical account [of the Second Amendment] shows [that] the amendment was intended to protect state interests against federal power, not individual rights against state power").

¹⁶⁴ 116 U.S. 252 (1886).

¹⁶⁵ *See id.* at 267.

¹⁶⁶ *Id.* (emphasis added). The plaintiff in *Presser*, who was marching with an armed group that presented itself as a military organization independent of the state's organized militia, was charged with violating a state statute that made it unlawful for "any body of men whatever, other than the regular organized volunteer militia of this state, and the troops of the United States, to associate themselves together as a military company or organization, or to drill or parade with arms." *Id.* at 253. The Court proclaimed that, in the interest of maintaining "public peace, safety, and good order," *id.* at 268, the State possessed the power to regulate military associations. *See id.* at 267-68.

¹⁶⁷ *See* *United States v. Cruikshank*, 92 U.S. 542, 553 (1875) (arguing that the Second Amendment only restricts federal governmental power, but is silent as to the states); *see also* *United States v. Miller*, 307 U.S. 174, 178-79 (1939) (contrasting the state's military responsibility with that of the federal government's, stating that "[t]he Militia which the States were expected to maintain and train is set in contrast with the Troops which they were forbidden to keep without the consent of Congress"); KRUSCHKE, *supra* note 20, at 27 ("The central point of the opinion, however, was to

In 1934, the Court proclaimed that “[u]ndoubtedly every state has authority to train its able-bodied male citizens of suitable age appropriately to develop fitness, should any such duty be laid upon them, to serve . . . in state militia.”¹⁶⁸ The Court further asserted that the “State is the *sole* judge of the means to be employed and the amount of training to be exacted for the effective accomplishment of these ends.”¹⁶⁹

It is clear, therefore, that the state has the power to regulate private militia. Thus, private individuals banding together under the guise of forming a militia and legally coexisting with the state-regulated militia can be lawfully proscribed. It would be logical to conclude, therefore, that today’s paramilitary organizations, which maintain absolutely no affiliation with the state, can be constitutionally regulated. Paramilitary organizations will certainly assert, however, that their right to exist as a militia independent of the “state” militia, and free from government regulation, stems from their general right to bear arms granted by the Second Amendment.

state [that] the Second Amendment did not apply to state governments, and [that] such governments could pass whatever legislation they desired without fear of federal sanction.”).

Although detailed discussion about the debate on whether the Second Amendment is incorporated into the Due Process Clause of the Fourteenth Amendment exceeds the scope of this Comment, it merits some note. Modern jurisprudence appears to reject the view that the Second Amendment has been incorporated so as to apply against the states. This view comports with the judicial position that the Second Amendment does not confer an individual right to keep and bear arms. *See, e.g., Kates, supra* note 161, at 257 (“[T]he only viable justification for denying incorporation of the second amendment against the states today is the exclusively state’s right view that the amendment does not confer an individual right. If the amendment only guaranteed a right of the states it would be self contradictory to incorporate it into the fourteenth amendment.”). On the other hand, the incorporation question has generated academic debate to the contrary which would imply that the Second Amendment is a grant of an individual right. *See, e.g., Sanford Levinson, The Embarrassing Second Amendment*, 99 YALE L.J. 637, 652 (1989) (“[T]he opponents of gun control appear to take a ‘full incorporationist’ view of that Amendment.”). The Supreme Court’s position on the matter is noticeably absent. *See, e.g., Wendy Brown, Guns, Cowboys, Philadelphia Mayors, and Civic Republicanism: On Sanford Levinson’s The Embarrassing Second Amendment*, 99 YALE L.J. 661, 662 (1989) (“The preambled Second Amendment is ambiguous about whether it grants citizens the right to bear arms for protection of the state *against* the state, or *against one another*.” (footnotes omitted)); Levinson, *supra*, at 640 (writing that “[t]he Supreme Court has not determined, at least not with any clarity, whether the amendment protects only a right of state governments against federal interference with state militia . . . or a right of individuals against the federal and state government[s]” (quoting J. NOWAK ET AL., CONSTITUTIONAL LAW 316 n.4 (3d ed. 1986))).

¹⁶⁸ *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245, 260 (1934).

¹⁶⁹ *Id.* (emphasis added).

The Court has ruled otherwise, however, proclaiming that, with regard to the militia, the state maintains the power to regulate the possession of arms.

C. *The Reasonable Relationship Test*

1. Power to Regulate the Militia Grants State Governments the Power to Determine When Possession of Arms May Be Proscribed

A new controversy developed after the Second Amendment's adoption. The fledgling amendment was ambiguous as to whether "people" referred to every individual as a part of the people, or whether it meant the "people" in a collective sense. This question has dominated subsequent interpretation of the Militia Clause. Some interpret the Second Amendment as conferring two distinct, yet related rights: the right to a "well regulated militia" *and* the right to "keep and bear arms." Others view this provision as a single right: the right to bear arms constituting a necessary element of the right to form a militia.¹⁷⁰

Even if the original intent of the Second Amendment was to create two distinct rights, judicial interpretation of the Militia Clause promptly established that the two clauses are integrally related.¹⁷¹ Perhaps this was the result of the judiciary reacting to

¹⁷⁰ Compare Stuart R. Hays, *The Right to Bear Arms, a Study in Judicial Misinterpretation*, 2 WM. & MARY L. REV. 381, 396-406 (1960) (discussing the question of whether the right to bear arms is an individual right and concluding that, without the individual right to bear arms, the Militia Clause is devoid of all meaning) and William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1243 (1994) (noting that "the Second Amendment adheres to the guarantee of the right of the people to keep and bear arms as the predicate for the other provision to which it speaks, i.e., the provision respecting a militia") with FREEDMAN, *supra* note 20, at 20 (asserting that "[t]he 'right' was a collective or corporate right, not an individual right, to insure that the balance between liberty and authority, within the newly formed union, would be maintained") and MALCOLM, *supra* note 21, at 163 (arguing that "[t]he clause concerning the militia was not intended to limit ownership of arms to militia members, or return control of the militia to the states, but rather to express the preference for a militia over a standing army"). As noted by one scholar, the "Second Amendment has never been a 'marvel of clarity.'" Moncure, *supra* note 21, at 9.

¹⁷¹ There is academic authority to support the proposition that the two rights are indeed separate. This question, however, is one of the most contested issues in constitutional law and is well beyond the scope of this Comment. It is enough to state that the Supreme Court has followed the proposition that the right to bear arms is conditioned upon the state's ability to regulate the militia.

the changing character of the United States,¹⁷² as well as to the adoption of a political system which, it was anticipated, would maintain a sufficient check on any abuse committed by the federal government.¹⁷³ The Supreme Court, itself, has never clarified the debate over the Second Amendment.¹⁷⁴ Not surprisingly, the

The Second Amendment right to keep and bear arms has consistently been interpreted by judicial bodies as referring to a collective, not an individual, right. *See, e.g.,* *United States v. Hale*, 978 F.2d 1016, 1019 (8th Cir. 1992) (stating that "we cannot conclude that the Second Amendment protects the individual possession of military weapons"), *cert. denied*, 113 S. Ct. 1614 (1993); *Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan*, 543 F. Supp. 198, 210 (S.D. Tex. 1982) (concluding that the Second Amendment does not imply an individual right to establish private armies and to bear arms).

For sample discussions of the various interpretations of the Second Amendment right to bear arms, see CRAMER, *supra* note 153, at 9; KRUSCHKE, *supra* note 20, at 12 (asserting that "[t]hose who embrace the collective view also assert that . . . the 'people' referred to are . . . to be considered those who were intended to serve in the militias" while "[t]he proponents of the individual view, on the other hand, argue that the Amendment does not create a state right but instead protects a preexisting individual right"); Van Alstyne, *supra* note 170, at 1242-44 ("The very assumption of the clause [well regulated militia], moreover, is that ordinary citizens . . . may themselves possess arms, for it is from these ordinary citizens who as citizens have a right to keep and bear arms . . . that such well regulated militia as a state may provide for, is itself to be drawn. . . . The Second Amendment adheres to the guarantee of the right of the people to keep and bear arms as the predicate for the other provision to which it speaks, i.e., the provision respecting a militia The militia to be well-regulated is a militia to be drawn from just such people (i.e., people with a right to keep and bear arms) rather than from some other source (i.e., from people without rights to keep and bear arms).").

¹⁷² After the adoption of the Second Amendment, the role of militia declined in the United States. *See Hale*, 978 F.2d at 1019. Perhaps this can be attributed to less concern about the federal government assuming total control of the citizenry, as a result of the growing distance between the experience of the colonies and the reality of the new system of government in the United States.

¹⁷³ *See supra* note 31 and accompanying text.

¹⁷⁴ *See Van Alstyne, supra* note 170, at 1239-40 ("[T]he useful case law of the Second Amendment . . . is mostly just missing in action. . . . The main reason there is such a vacuum of useful Second Amendment understanding . . . is the arrested jurisprudence of the subject as such, a condition due substantially to the Supreme Court's own inertia"); *see also Cottrol & Diamond, supra* note 26, at 999-1000 ("The Second Amendment also continues to be an arena of jurisprudence from which the nation's highest Court has largely been absent. The nation's highest tribunal has seriously addressed the issue in only three cases, and the most recent of these, *United States v. Miller*, is over fifty years old." (footnote omitted)). Scholarly debate over the right to bear arms and how this right relates to the Militia Clause ensues:

Emphasis on the militia clause has been proffered as evidence that the right to have arms was only a 'collective right' to defend the state, not an individual right to defend oneself. Emphasis on the main clause with its assertion of the inviolability of the people's right to have weapons has been cited as proof of an individual right to have arms.

schism between advocates of both the collective and the individual interpretations remains, and understanding it is vital to comprehending *why* private militia believe they should be accorded Second Amendment protection. Militia members adhere to the individual interpretation, contending that their right to engage in weapons training is derived from the Second Amendment, regardless of who is vested with the power to maintain a militia. This position, however, fails to survive constitutional scrutiny, as the prevailing judicial standard linking the right to bear arms to the maintenance of a militia renders void their claim to Second Amendment protection.¹⁷⁵

The Supreme Court held that the state has the power to regulate the possession of arms in *United States v. Miller*.¹⁷⁶ This case is

MALCOLM, *supra* note 21, at 136. The Second Amendment has

derived an astonishing variety of meanings from its single sentence. [Scholars] argue, for example, that the purpose was only to preserve the states' powers over state militia; that the amendment merely protects the right of members of a militia—National Guard of today—to be armed; and that the language 'the right of the people to keep and bear arms' should not be interpreted to grant to any individual a right to own a weapon.

Id. at 162.

¹⁷⁵ "Whether the 'right to bear arms' for militia purposes is 'individual' or 'collective' in nature is irrelevant where . . . the individual's possession of arms is not related to the preservation or efficiency of a militia." *Hale*, 978 F.2d at 1020; *see also* *United States v. Johnson*, 497 F.2d 548, 550 (4th Cir. 1974) (concluding that "courts have consistently held that the Second Amendment only confers a *collective* right of keeping and bearing arms which must bear a 'reasonable relationship to the preservation or efficiency of a well regulated militia'" (quoting *United States v. Miller*, 307 U.S. 174, 178 (1939)) (emphasis added)); *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971) (arguing that "the Second Amendment right 'to keep and bear Arms' applies only to the right of the State to maintain a militia and not to the individual's right to bear arms").

¹⁷⁶ 307 U.S. 174 (1939).

The *Presser* Court appeared to foreshadow the Court's future view that the right to bear arms is not an individual right, but rather that it relates to the militia's larger role within society. *See Presser v. Illinois*, 116 U.S. 252, 265 (1886) (noting that "the states cannot . . . prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government"); *see also* *Commonwealth v. Murphy*, 166 Mass. 171, 172-73 (1896) ("The right to keep and bear arms for the common defence does not include the right to associate together as a military organization, or to drill and parade with arms in cities and towns, unless authorized to do so by law. This is a matter affecting the public security, quiet and good order, and it is within the police power of the Legislature to regulate the bearing of arms so as to forbid such unauthorized drills and parades" (citing *Presser*, 116 U.S. at 264-65)).

For an assertion that this holding contravened the Second Amendment, see CRAMER, *supra* note 153, at 129 (arguing that "*Presser* . . . presents an example of how

paramount because it establishes the prevailing standard linking the right to bear arms with the right to organize as a militia. The Court stated that “[i]n the absence of any evidence tending to show that possession or use of a ‘shotgun’ . . . has some *reasonable relationship* to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear” arms.¹⁷⁷

Under the reasonable relationship standard, members of private militia can argue that they have a right to bear arms only if there is a private right to maintain a militia. This is so because the lack of power to maintain a militia necessarily means the lack of power to determine whether military training is reasonably related to that militia. However, it has already been determined, under *Presser v. Illinois*, that the state governments, not private citizens, are endowed with the power to establish and regulate the militia.¹⁷⁸ Thus, it is clear that state governments have the power to determine whether private militia’s possession of arms is reasonably related to the state militia, and may constitutionally ban such possession if private militia’s conduct is not reasonably related to the state militia. Thus, if the state determines that it is necessary to regulate private militia, it is logical to conclude that private militia are therefore engaging in weapons training in contravention of constitutionally permissible state restrictions on paramilitary activity.

While militia members will certainly argue that their possession of arms *is* reasonably related to the preservation and efficiency of a militia, this view does not correspond with judicial application of the reasonable relationship standard.¹⁷⁹ The *Miller* standard has

the U.S. Supreme Court narrowly upheld the right to keep and bear arms, apparently as an individual right, based on a republican view of military obligation—while upholding a law that violated the spirit of the Second Amendment”).

¹⁷⁷ *Miller*, 307 U.S. at 178 (emphasis added). “Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.” *Id.*

For contrasting opinions of the *Miller* case, compare STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* 164-69 (Independent Inst. 1994) (1984) (arguing that “*Miller* stands for the proposition that the people, in their capacity as individuals, could keep and bear any arms appropriate to militia use”) with Ehrman & Henigan, *supra* note 16, at 41 (asserting that “[t]he Court’s analysis directly contradicts the argument that the second amendment guarantees a right to bear arms for individual self-defense, sport-shooting, or other purposes unrelated to participation in state militias”).

¹⁷⁸ See *supra* notes 164-69 (discussing *Presser*).

¹⁷⁹ See, e.g., *United States v. Johnson*, 497 F.2d 548, 550 (4th Cir. 1974) (per curiam) (denying a Second Amendment claim based on the *Miller* standard); Cody v.

been applied by courts addressing claims by members of paramilitary organizations that they have a constitutional right to organize and to keep and bear arms, and these opinions exemplify the constitutionality of statutes proscribing private militia.

In *United States v. Oakes*,¹⁸⁰ the Tenth Circuit held that affiliation with the "Posse Comitatus" (a private militia organization) did not constitute membership in the state militia, and therefore, did not afford one the right to bear arms.¹⁸¹ The *Oakes* court stated that application of "the amendment so as to guarantee appellant's right to keep an unregistered firearm which has not been shown to have any connection to the militia, merely because he is technically a member of the Kansas militia, would be unjustifiable in terms of either logic or policy."¹⁸² Applying the reasonable relationship test, the *Oakes* court held that, even though one is literally a member of the militia by virtue of being a male citizen within the age limits, this status does not confer any Second Amendment rights on an individual.¹⁸³

The Eighth Circuit, elaborating on the reasonable relationship test, argued that it is "not sufficient to prove that the weapon in question [is] susceptible to military use."¹⁸⁴ Thus, although militia members possess weapons for the purpose of defending themselves, this is not ample justification for extending Second Amendment protection to them. Rather, states can determine the extent to which weapons possession furthers the goal of a well regulated militia.¹⁸⁵

United States, 460 F.2d 34, 37 (8th Cir.) (same), *cert. denied*, 409 U.S. 1010 (1972).

¹⁸⁰ 564 F.2d 384 (10th Cir. 1977), *cert. denied*, 435 U.S. 926 (1978).

¹⁸¹ *See id.* at 387.

¹⁸² *Id.*

¹⁸³ *See id.*; *see also* United States v. Hale, 978 F.2d 1016, 1020 (8th Cir. 1992) (affirming the proposition that "technical" membership in a state militia is not sufficient to satisfy the "reasonable relationship" test), *cert. denied*, 113 S. Ct. 1614 (1993); United States v. Warin, 530 F.2d 103, 106 (6th Cir.) (stating that "there is absolutely no evidence that a submachine gun in the hands of an individual 'sedentary militia' member would have any, much less a 'reasonable relationship to the preservation or efficiency of a well regulated militia'" (quoting *Miller*, 307 U.S. at 178)), *cert. denied*, 426 U.S. 948 (1976).

¹⁸⁴ *Hale*, 978 F.2d at 1020 (denying Second Amendment protection "[w]here such a claimant presented no evidence either that he was a member of a military organization or that his use of the weapon was 'in preparation for a military career'" (quoting *Cases v. United States*, 131 F.2d 916, 923 (1st Cir. 1942), *cert. denied*, 310 U.S. 770 (1943))).

¹⁸⁵ *See Cases*, 131 F.2d at 921 (arguing that "[w]hatever rights in this respect the people may have depend upon local legislation").

2. Private Militia Are Not Well Regulated

The *Miller* Court proclaimed that the possession of arms must bear a reasonable relation to the preservation of a *well regulated* militia. Although the meaning of the term “well regulated,” as it relates to militia, has not been judicially interpreted, the Court’s use of this term further implies that militia are to be governed by state government and not private, unorganized groups. Although scholarly consensus on the meaning of “well regulated” also appears to be absent,¹⁸⁶ it is clear that private militia are not “well regulated.” The states alone are vested with the power over militia. Similarly, the right to possess arms is not arbitrarily conferred and must bear a reasonable relation to the militia.

Short of the rallying cry that the federal government is a tyrannical conglomerate that needs to be defeated, little else links together the disparate paramilitary organizations throughout the country.¹⁸⁷ Militia members from different groups do not convene to discuss a common plan, and any form of central command is clearly lacking.¹⁸⁸ In no manner can private militia be characterized as well regulated. On the contrary, their manner of organization is extremely clandestine and disjointed, and less akin to established military groups acting in concert to defend individual

¹⁸⁶ See FREEDMAN, *supra* note 20, at 21 (“‘Well-regulated,’ the adjective modifying ‘militia,’ is the very antithesis of ‘unorganized.’”). For different opinions, see MALCOLM, *supra* note 21, at 164 (arguing that “[t]he reference to a ‘well regulated’ militia was meant to encourage the federal government to keep the militia in good order”); Ehrman & Henigan, *supra* note 16, at 41 (discussing *Miller* and concluding that “the Court regarded the militia as a government directed and organized military force, not as a term synonymous with the armed citizenry at large”); Dougherty, *supra* note 20, at 978-79 (asserting that “an interpretation of ‘well regulated’ to mean organized would be inconsistent with the militias existing in the colonies for two centuries” and that “‘well regulated’ was eighteenth-century military jargon for government-trained, not government-controlled or organized”).

¹⁸⁷ “Most of these contemporary militias are nothing more than social clubs of perhaps a dozen individuals who swear to protect the constitution from enemies There have been only halting efforts to organize militias on a statewide level. No national organization exists.” Adam Parfrey & Jim Redden, *Patriot Games: Linda Thompson, A Gun-Toting Broad from Indianapolis, Wants to Know “Are You Ready for the Next American Revolution?”*, VILLAGE VOICE, Oct. 11, 1994, available in LEXIS, News Library, Curnws File.

¹⁸⁸ See Wallace, *supra* note 39, at 21 (reporting that “[c]itizen militias . . . are scattered widely and lack formal affiliation and a centralized method of communications”); David Fritze, *Patriots Vow to Fight Off “One-World Government”*, ARIZONA REPUBLIC, Feb. 5, 1995, available in LEXIS, News Library, Curnws File (noting that paramilitary organizations “are not a cohesive force” and that “[d]espite their shared audiences, [militia] leaders are far from being a unified clique”).

rights.¹⁸⁹ Militia members could potentially be characterized as filling the role of unorganized militia, as provided for by federal statute,¹⁹⁰ but they still fall short of meeting the “well regulated” requirement.¹⁹¹

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Although there is no clear consensus on the meaning of the Second Amendment, the Supreme Court’s seminal decisions and their progeny lead to the conclusion that the state has the power to regulate the militia, and that private militia are not protected under the Second Amendment. Furthermore, the right to bear arms, being integrally related to the power to regulate the militia is within the state’s prerogative. Thus, whether these paramilitary groups argue that they constitute “the militia” or argue that they have a “right to bear arms,” their activity is not protected by the Second Amendment.

CONCLUSION

The rise of paramilitary organizations is perceived by many to pose a threat to democratic society.¹⁹² Ironically, the roots of

¹⁸⁹ See Wills, *supra* note 32, at 68 (“One of the modern militia leaders who testified before Congress said . . . that the militia movement is informal, spontaneous, and without fixed leadership. No eighteenth-century defender of the militias would have spoken that way. Sensitive to the charge that militias could be mobs, they always stressed that they were talking of a *proper* militia, a *good* militia, a *correct* militia, one well-trained, well-disciplined, well-regulated.”). See generally FIELD MANUAL, *supra* note 19, § 2.4 (discussing training methods, and the manner of organization, thereby illustrating the secretive nature of these groups).

¹⁹⁰ See 10 U.S.C. § 311(a) (1994); see also Sam Walker, “Militias” Forming Across US to Protest Gun Control Laws, CHRISTIAN SCI. MONITOR, Oct. 17, 1994, at 1, 14 (“Federal code allows for both ‘organized’ and ‘unorganized’ well-regulated militias, but . . . [although] groups like these self-styled militias may be unorganized, they do not qualify as well-regulated and are therefore not entitled to constitutional protection.”).

¹⁹¹ “Militia proponents say that since the National Guard has been federalized, there is no ‘well-regulated’ state militia. That, they say, has created a sort of militia vacuum they fill with their unregulated kind.” Rogers Worthington, *Private Militias March to Beat of Deep Distrust*, CHI. TRIB., Sept. 25, 1994, at D1, D19; see also Wills, *supra* note 32, at 69 (stating that today’s “so-called militias . . . are not ‘well-regulated’ in the constitutional sense. The only militia recognized by the Second Amendment is one ‘regulated’ by the militia clauses of the Constitution—one organized, armed, and disciplined by the federal government”).

¹⁹² A June, 1995, *Wall Street Journal* poll showed that 62% of those polled felt that Congress should hold hearings on the activities of private militia groups. See Albert R. Hunt, *The Waco Hearings Are a Sop to the Gun Lobby*, WALL ST. J., July 13, 1995, at A11.

Militia groups recognize that they are perceived as a potential element of instability in society. “Unless people know we are guided and motivated by lofty

militia originate in the desire to defend society from a tyrannical government. What was once conceived of as a necessary form of protection has been transformed into a perceived element of societal instability. This perception of paramilitary organizations, however, does not properly inform an analysis of whether state statutes can proscribe paramilitary organization and training. Such analysis must rely upon constitutional interpretation.

Anti-paramilitary organization statutes violate the First Amendment rights to freedom of speech and association. Anti-paramilitary training statutes, on the other hand, do not violate the First Amendment because they intend to protect public safety, not suppress militia expression. In addition, such training cannot be protected by the Second Amendment right to a well regulated militia: the state has not conferred this distinction on paramilitary groups, and their possession of arms is, therefore, not reasonably related to the maintenance of a well regulated militia.

A court once speculated that "the proliferation of military/paramilitary organizations can only serve to sow the seeds of future domestic violence and tragedy."¹⁹³ This prediction appears to comport with the view of private militia as they are perceived by others. As of yet, however, there is no evidence that the United States government is faced with a realistic threat to its existence.¹⁹⁴ The courts will face a difficult determination if they

constitutional principles we might be misunderstood as fanatics, vigilantes, or even criminals." FIELD MANUAL, *supra* note 19, § 2.4.1: *Enemy Capabilities and Countermeasures*; see also Tanner, *supra* note 36, at 43 (arguing that militia "motivations, members, attitudes, and tactics have been grossly mischaracterized by culturally ignorant reporters more concerned with telling sensational stories than with explaining the more-complicated truth").

¹⁹³ *Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan*, 543 F. Supp. 198, 219 (S.D. Tex. 1982). "The inherent potential danger of any organized private militia . . . is obvious. Its existence would be sufficient, without more, to prevent a democratic form of government . . . from functioning freely, without coercion, and in accordance with the constitutional mandates." *Id.* at 209 (quoting *In re Cassidy*, 51 N.Y.S.2d 202, 205 (App. Div. 1944), *aff'd*, 73 N.E.2d 41 (N.Y. 1947)).

¹⁹⁴ See Charles Laurence, *Militiamen Go to War on American Gun Laws*, DAILY TELEGRAPH, Nov. 21, 1994, available in LEXIS, Int-News database ("So far, Washington has said nothing on the new militias. They are not known to be doing anything illegal: merely exercising their right to free assembly and to practice firing their weapons."); Walker, *supra* note 190, at 14 (reporting that a Department of Justice spokesman stated that "unless these groups are known to be modifying weapons or plotting violent action, federal law-enforcement officials are not concerned with them"); see also Fritze, *supra* note 188, at A1 (asserting that "[e]xactly where the militia phenomenon is heading is unclear"); Worthington, *supra* note 191, at D19 (writing that "there are questions about the constitutionality of the militias and

are forced to decide when this adversarial element crosses the delicate boundary between being a healthy opponent to a destructive enemy. In doing so, the courts themselves will walk a fine line—drawing a distinction between the preservation of public safety and the preservation of coveted constitutional rights.

about whether, if push came to shove, they would use their weapons for anything other than making symbolic statements”).