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# THE MINUTEMEN, THE NATIONAL GUARD AND THE PRIVATE MILITIA MOVEMENT: WILL THE REAL MILITIA PLEASE STAND UP?

## INTRODUCTION

As a response to the passage of the Brady Act,<sup>1</sup> which imposes a waiting period on handgun purchases, private "citizen" militias have arisen in several states across the country. By March 1994, residents in several Eastern Montana counties had formed such organizations.<sup>2</sup> At least sixty-two of Michigan's eighty-three counties have militia brigades that make up the Michigan Militia.<sup>3</sup> In the Florida panhandle, commissioners in three counties have passed militia resolutions and have distributed membership cards to interested residents.<sup>4</sup> Some supporters of the movement, citing the militia clause in the Second Amendment,<sup>5</sup> assert that membership in a militia exempts them from federal firearms restrictions.<sup>6</sup> Other supporters describe the

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1. Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536-37 (1993).

2. Thomas B. Edsall & Dan Balz, *Gun-Packing Montanans Target Brady-Backing Baucus's Job*, WASH. POST, Mar. 27, 1994, at A16. The organizers of these groups cite as the goals of their movement the protection of their right to bear arms and the removal of Senator Max Baucus, who voted for the Brady Act. *Id.*

3. Rogers Worthington, *Private Militias March to Beat of Deep Distrust*, CHI. TRIB., Sept. 25, 1994, § 1, at 19. One Michigan militia leader expressed his hopes that the movement will continue to grow to the point where "the government will sit down and talk to us." *Id.*

4. Larry Rohter, *Florida County Forms Militia to Protest Gun Control*, DALLAS MORNING NEWS, May 29, 1994, at A13. The Santa Rosa County resolution, for example, declares that "[t]he Santa Rosa County Militia shall consist of all able-bodied inhabitants of Santa Rosa County who are or have declared their intention to become citizens of the United States." Santa Rosa County Res. No. 94-09 (Apr. 14, 1994) (available from the office of the Board of County Commissioners, Santa Rosa County, Florida). The commissioners based the resolution on a provision in the Florida Constitution which provides that "[t]he militia shall be composed of all able-bodied inhabitants of the state who are or have declared their intention to become citizens of the United States. . . ." FLA. CONST. art. X, § 2(a).

5. The Second Amendment states, "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.

6. Jim Barnett, owner of a sporting goods store in Escambia County, Florida, claims, "[t]hey should not be affected by the [assault gun] ban because they are

citizen militias as a means of protesting regulations that they view as unconstitutional *per se*.<sup>7</sup> With the passage of the assault gun ban,<sup>8</sup> the citizen militia movement continued to gain strength. The terrorist attack on the Alfred P. Murrah Federal Building in Oklahoma City has exposed these previously little-known groups to intense public scrutiny.<sup>9</sup>

The meaning of the term "militia" has been the focus of considerable public debate as expanding federal regulation of firearms has angered many gun owners.<sup>10</sup> Gun-rights advocates such as the National Rifle Association (NRA) point to the Second Amendment guarantee of a right "to keep and bear Arms" as constitutional support for their position.<sup>11</sup> Yet the language of the Second Amendment connects the term "militia" with the exercise of this right.<sup>12</sup> Thus a preliminary question to any Second Amendment analysis must be to determine what is meant by the word "militia."

The militia system existing at the time of the Second Amendment's ratification has disappeared.<sup>13</sup> Instead, the United States now has an organized militia system, the National Guard;<sup>14</sup> a federal unorganized militia as well as an unorganized

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members of the militia. . . . As members of the militia, they should be able to . . . buy military-type assault weapons." Rohter, *supra* note 4, at A13.

7. One Florida county commissioner describes the resolutions as "feel good" measures enacted to "send a message that residents of [the Florida panhandle] support their right to keep and bear arms." Telephone Interview with W.A. "Buck" Lee, County Commissioner, Escambia County, Florida (Aug. 18, 1994).

8. Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, sec. 110102, § 922(v)(1), 108 Stat. 1796 (1994). With certain enumerated exceptions, the act prohibits the manufacture, transfer, or possession of semiautomatic assault weapons. *Id.*

9. See, e.g., Robert D. McFadden, *Links in Blast: Armed 'Militia' and a Key Date*, N.Y. TIMES, Apr. 22, 1995, at A1 (noting that the date of the bombing, April 19, is significant to many citizen militia proponents as the date of the destruction of the Branch Davidian compound near Waco, Texas); Todd S. Purdum, *Officials Suspect Links to Armed Rightists Based in Michigan*, N.Y. TIMES, Apr. 22, 1995, at A1 (describing links between the initial suspects in the investigation and the Michigan Militia).

10. See, e.g., *Poll on Weapons Proves Emotion Rules Even Today*, PALM BEACH POST, Apr. 7, 1989, at E2 (arguing that the militia includes the general citizenry); *Taming the Gun Monster: Is It Constitutional?*, L.A. TIMES, Nov. 1, 1993, at B6 (arguing that the National Guard is the only constitutional militia today); *Why Granny Packs a Pistol*, ST. LOUIS POST DISPATCH, Jan. 1, 1994, at B7 (proposing a militia similar to that which existed in the eighteenth century).

11. See Katharine Q. Seelye, *House Approves Bill to Prohibit 19 Assault Arms*, N.Y. TIMES, May 6, 1994, at A1 (noting the National Rifle Association argument that federal firearms restrictions "tread on" Second Amendment rights).

12. See U.S. CONST. amend. II.

13. See *infra* notes 78-79 and accompanying text for a discussion of the decline of the colonial militia system.

14. See *infra* notes 80-85 and accompanying text for a discussion of the develop-

militia in most states;<sup>15</sup> and various police and law enforcement agencies. Some proponents of the private militias claim that their organizations fit within the scope of Second Amendment protections as well.<sup>16</sup> However, recent federal decisions have limited the militia to include only the National Guard.<sup>17</sup> The breadth of the Second Amendment thus depends upon which, if any of these groups, meets the constitutional definition of militia.<sup>18</sup>

This Note will demonstrate that no group exists today that is

ment of the National Guard.

15. For the federal unorganized militia statute, see 10 U.S.C. § 311 (1993). The statute provides that "The militia of the United States consists of all able-bodied males at least 17 years of age and . . . under 45 years of age . . . and of female citizens of the United States who are members of the National Guard." § 311(a). The statute then defines the unorganized militia as "members of the militia who are not members of the National Guard or the Naval Militia." § 311(b)(2).

Similar constitutional provisions or statutes exist in most states. *See, e.g.*, ARIZ. CONST. art. 16, § 1; ARK. CONST. art. 11, § 1; COLO. CONST. art. 17, § 1; IND. CONST. art. 12, § 1; IOWA CONST. art. 6, § 1; KAN. CONST. art. 8, § 1; KY. CONST. § 219; ME. CONST. art. 7, § 5; MISS. CONST. art. 9, § 214; MONT. CONST. art. VI, § 13, cl. 2; N.M. CONST. art. 18, § 1; S.D. CONST. art. 15, § 1; WYO. CONST. art. 17, § 1; ALA. CODE § 31-2-2 (1975); ALASKA STAT. § 26-05-010 (1962); CAL. MIL. & VET. CODE § 121 (West 1982); CONN. GEN. STAT. § 27-1 (1958); DEL. CODE ANN. tit. 20, § 121 (1974); FLA. STAT. ch. 250.02(1) (1941); GA. CODE ANN. § 38-2-3(d) (1981); HAW. REV. STAT. § 121-1(4) (1976); IDAHO CODE § 46-102 (1932); ILL. COMP. STAT. ANN. 1805/1 § 1 (Smith-Hurd 1993); LA. REV. STAT. ANN. § 29:3 (West 1950); MD. ANN. CODE art. 65, § 1 (1973); MASS. GEN. L. ch. 33, § 2 (1932); MICH. COMP. LAWS § 32.509 (1992); MINN. STAT. § 190.06 (1946); MO. REV. STAT. § 41.050 (1985); NEB. REV. STAT. § 55-106 (1943); NEV. REV. STAT. § 412.026 (1991); N.H. REV. STAT. ANN. § 110-B:1(IV) (1983); N.J. REV. STAT. § 38A:1-2 (1987); N.Y. MIL. LAW § 2(2) (McKinney 1988); N.C. GEN. STAT. § 127A-1 (1986); N.D. CENT. CODE § 37-02-01 (1943); OHIO REV. CODE ANN. § 5923.01 (1953); OKLA. STAT. tit. 44, § 41 (1987); OR. REV. STAT. § 396.105(3) (1983); 51 PA. STAT. ANN. § 301(a)(1) (1984); R.I. GEN. LAWS § 30-1-2 (1989); S.C. CODE ANN. § 25-1-60 (Law. Co-op. 1976); TENN. CODE ANN. § 58-1-104(d) (1956); UTAH CODE ANN. § 39-1-1(1) (1953); VT. STAT. ANN. tit. 20, § 1151 (1987); VA. CODE ANN. § 44-1 (Michie 1950); WASH. REV. CODE § 38.04.030 (1961); WIS. STAT. § 15-5-19 (1986). A Texas statute provides for a Texas State Guard which, unlike the unorganized militias in most states, consists entirely of volunteers. TEX. GOV'T CODE ANN. § 431.052 (West 1989). The Wisconsin Constitution mentions an unorganized militia, but leaves its membership undefined. WIS. CONST. art. IV, § 29.

16. *Supra* note 5.

17. *See* *United States v. Oakes*, 564 F.2d 384 (10th Cir. 1977) (holding membership in the Kansas militia irrelevant to possession of an unregistered machine gun), *cert. denied*, 435 U.S. 926 (1978); *United States v. Warin*, 530 F.2d 103 (6th Cir. 1975) (holding that membership in the Ohio militia did not confer a right to design and construct a prototype for a new submachine gun), *cert. denied*, 426 U.S. 948 (1976).

18. In addition to the Second Amendment, the term "militia" is also used within the body of the Constitution. *See* U.S. CONST. art. I, § 8, cl. 15-16 (granting Congressional power over the militia); U.S. CONST. art. II, § 2, cl. 1 (giving the President command of the militia).

exactly analogous to the militia known to the Constitution's drafters. However, since the National Guard, the unorganized militia and many law enforcement agencies retain certain elements of the eighteenth-century militia, the Second Amendment should extend some protection to each of these groups. This Note further argues that the private "citizen" militias, being outside of the control of state or federal government, have no basis for Second Amendment protection. Part I of this Note presents the history of the militia in the United States, focusing on the militia's transformation in the twentieth century. Part II explores previous interpretations of the militia clauses, including those used by political lobbyists on both sides of the gun control issue. Part II then presents the few instances where the federal courts have struggled to define the militia. Part III discusses which groups should receive Second Amendment protection, based on the extent to which those groups fulfill the purposes of the eighteenth-century militia.

## I. THE HISTORY OF THE MILITIA IN THE UNITED STATES

The well-known minutemen<sup>19</sup> of the American revolution were typical members of the eighteenth-century militia.<sup>20</sup> Many today consider the National Guard, the modern organized militia, to be the minutemen's complete twentieth-century counterpart.<sup>21</sup> However, those eighteenth-century militiamen bear little resemblance to the federally-equipped, highly-trained members of today's National Guard.<sup>22</sup> This Part will trace the changes that have taken place in the militia since colonial times.

### A. The Colonial Militias

The great majority of colonists arriving in America during the seventeenth century had no experience as soldiers.<sup>23</sup> Yet owing to the small British military presence of the time, the colonists soon found the need to establish a military force.<sup>24</sup> They

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19. "A member of a group of armed men pledged to take the field at a minute's notice during and immediately before the American Revolution." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 757 (1984).

20. See James B. Whisker, *The Citizen-Soldier Under Federal and State Law*, 94 W. VA. L. REV. 947, 954-56 (1992) (describing the militia system that existed in the colonies prior to and during the revolution).

21. See generally WILLIAM H. RIKER, *SOLDIERS OF THE STATES* (1979) (describing how Congress created the National Guard to replace the previous state militia systems).

22. RIKER, *supra* note 21, at 10.

23. *Id.* at 11. The British Army often sent a single officer along with a group of colonists departing for the New World. Whisker, *supra* note 20, at 954. This officer's role was to train the colonists in the use of arms. *Id.*

24. Whisker, *supra* note 20, at 956. The colonies used their militias primarily to combat Indians along the frontier, but they also supplemented the regular British

drew from their knowledge of the militia system in England to develop their own military forces.<sup>25</sup> The resulting colonial militia laws required every able-bodied male citizen to participate and to provide his own arms.<sup>26</sup> Militia control was very localized, often with individual towns having autonomous command systems.<sup>27</sup> Additionally, the colonies placed relatively short training requirements upon their militiamen: as little as four days of training per year.<sup>28</sup>

The colonies did little to change their militias until just prior to the Revolutionary War.<sup>29</sup> When the British attempted to disarm the American populace during 1774-75,<sup>30</sup> citizens formed private militias that were independent of the royal governors' control.<sup>31</sup> With the outbreak of war, the colonial militias composed the bulk of the armies that eventually won independence.<sup>32</sup> The experiences of the Revolutionary War had instilled

army during their North American conflicts with the French and Spanish. *Id.*

25. *Id.* at 952-54. As early as the seventh century, England had developed a militia system, requiring even the lowest class of freemen to maintain arms and be subject to a call for military duty. *Id.* Henry II enacted the first formal declaration of this principle with the "Assize of Arms" of 1181. 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, 8 (1989). The "Assize of Arms" required that every freeman provide his own arms, train periodically, and defend his country when called upon. *Id.* This system had in turn developed from the Roman use of citizen-soldiers during the period of the early Republic. *Id.*

26. Whisker, *supra* note 20, at 954-55. If a militiaman could not afford an appropriate weapon for service, some colonies provided a credit system such that the government would furnish a weapon with a forgiving debt repayment plan. *Id.* at 955 n.32. The basic equipment the colonies expected militiamen to provide depended upon their service: infantrymen brought muskets with powder and shot, while cavalrymen brought their own horses and sabers. RIKER, *supra* note 21, at 12.

27. Whisker, *supra* note 20, at 955. The reluctance of militiamen or their officers to serve for extended periods of time outside of their own town or area is further evidence of the localization of the militia. *Id.*

28. RIKER, *supra* note 21, at 12. Such service usually consisted of a spring and autumn parade, combined with basic training in skirmishing techniques. *Id.*

29. Whisker, *supra* note 20, at 956-57.

30. General Gage undertook the most elaborate such effort during his occupation of Boston in 1775. STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED* 58-59 (1984). Gage did not allow any citizen to enter or leave the city unless he first turned over his arms to British soldiers. *Id.* The British attempt to seize the militia arms cached at Lexington was the final incident that sparked the outbreak of war. *Id.*

31. *Id.* at 60. George Washington, who following the war criticized the performance of the militias, together with fellow Virginian George Mason, organized the Fairfax County Militia Association. *Id.* The members of this organization pledged "we will, each of us, constantly keep by us [a rifle, powder, and shot]." *Id.*

32. Whisker, *supra* note 20, at 957; HALBROOK, *supra* note 30, at 63. Robert E. Lee's father, Lieutenant Colonel Henry "Light Horse" Lee, reported that it was "chiefly undisciplined militia" that defeated General Burgoyne's British regulars in 1777. *Id.* However, the militias' performance during the war was not without criti-

most Americans with great confidence toward their militias and distrust of standing armies.<sup>33</sup> Many concluded that a standing army was the tool of an absolutist government and that the militia was the proper means for a free people to defend against such a regime.<sup>34</sup> This belief heavily influenced the debates surrounding the drafting and ratification of the United States Constitution.<sup>35</sup>

### B. The Constitutional Debates

Following the war, the United States reduced its standing army to only a handful of men, entrusting the state militias with the nation's defense.<sup>36</sup> The Articles of Confederation, which served as the plan of the United States government prior to the Constitution's ratification, required each state to maintain a well-armed militia.<sup>37</sup> The Articles allowed Congress to form a standing army only with the consent of nine of the thirteen states.<sup>38</sup> Such weaknesses in the federal government led to the Constitutional Convention of 1787, at which delegates sought to form a more effective governmental system.<sup>39</sup> Two major camps arose among the delegates at the Convention: Federalists and Anti-Federalists.<sup>40</sup> The Federalists, who argued for a powerful federal government, wanted nearly complete federal control of the mili-

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cism. George Washington expressed his dissatisfaction with the discipline and dedication of the citizen militiamen, in particular their reluctance to stay in the field for long periods of time. RIKER, *supra* note 21, at 12; Whisker, *supra* note 20, at 958. To circumvent the problems of the colonial militias, Washington enlisted the help of Baron Friedrich von Steuben to form the Continental Army. *Id.*

33. Whisker, *supra* note 20, at 958. The general populace held this view notwithstanding the eventual success of General George Washington's Continental Army. *Id.* Earl Warren, former Chief Justice of the United States Supreme Court, found that "[o]ur War of the Revolution was, in good measure, fought as a protest against standing armies." Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 184 (1962).

34. Ehrman & Henigan, *supra* note 25, at 15.

35. See Whisker, *supra* note 20, at 958-63 (describing the debates between Federalists and Anti-Federalists concerning the proper degree of federal control over the militia).

36. Patrick T. Mullins, Note, *The Militia Clauses, The National Guard, and Federalism: A Constitutional Tug of War*, 57 GEO. WASH. L. REV. 328, 332 (1988). The few professional soldiers remaining guarded the military posts of Fort Duquesne and West Point. *Id.* See also Ehrman & Henigan, *supra* note 25, at 15 (describing the colonial view that standing armies were acceptable only under extraordinary circumstances).

37. ARTICLES OF CONFEDERATION art. VI (1777) "[E]very State shall always keep up a well regulated and disciplined militia. . . ." *Id.*

38. *Id.* "The United States in Congress assembled shall never engage in a war . . . unless nine States assent to the same." *Id.*

39. Ehrman & Henigan, *supra* note 25, at 18-19.

40. *Id.* at 19.

tia.<sup>41</sup> The Anti-Federalists, who strove to maintain substantial power in the state governments, feared any federal control over their state militias.<sup>42</sup>

The Anti-Federalists opposed federal control of the militia for three reasons.<sup>43</sup> First, they feared that the national government would turn the militia into an instrument of oppression toward the states.<sup>44</sup> Second, they were concerned that if the federal government neglected its militia duties, the militia would cease to be an effective force for the states.<sup>45</sup> Third, they feared that if the Constitution gave the federal government the power to arm the militia, it might prohibit the states from doing the same.<sup>46</sup>

These concerns over control of the militia were tied to the militia's perceived purposes; both factions understood the term "militia" to mean more than just a military force for national defense.<sup>47</sup> Rather, the drafters believed the militia served three purposes.<sup>48</sup> First, the militia served in place of a standing army to resist foreign aggression.<sup>49</sup> Second, the militia served as an internal police force for the states.<sup>50</sup> Third, following the establishment of the federal government, the militia served to resist or deter the use of a federal standing army against the states.<sup>51</sup> The eighteenth-century militia was well structured and equipped to fulfill each of these three purposes.<sup>52</sup>

The Constitution's drafters hoped that the militia would

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41. Whisker, *supra* note 20, at 958-59. Alexander Hamilton cited General Washington's experiences during the war as support for the Federalist position. *Id.* Washington complained that militiamen were unreliable in time of crisis and served for only short periods. *Id.* Many Anti-Federalists argued that, despite the Federalists claims that they wished to preserve the militia system, their true goal was the militia's abrogation in favor of a federal standing army. *Id.* at 960.

42. See HALBROOK, *supra* note 30, at 69. This position was held by such prominent Anti-Federalists as Elbridge Gerry and John Dewitt. *Id.*

43. Ehrman & Henigan, *supra* note 25, at 22.

44. 3 J. ELLIOT, *THE DEBATES IN THE SEVERAL STATES CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 384-88 (1901).

45. *Id.* at 379. During the Virginia Ratification Convention, Patrick Henry asked, "Have we the means of resisting disciplined armies, when our only defence, the militia, is put into the hands of Congress?" *Id.* at 385.

46. *Id.* at 379.

47. Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 267-68 (1983).

48. *Id.* at 268.

49. See, e.g., Ehrman & Henigan, *supra* note 25, at 35; Kates, *supra* note 47, at 268; Whisker, *supra* note 20, at 954.

50. See, e.g., Ehrman & Henigan, *supra* note 25, at 35; Kates, *supra* note 47, at 268.

51. See, e.g., Kates, *supra* note 47, at 268, 270-72; Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L. J. 637, 656-57 (1989).

52. See generally Whisker, *supra* note 20, at 954-56 (describing the eighteenth-century militia's unique suitability to all types of operations in the wilderness of North America).



remain the nation's primary means of defense against foreign aggression.<sup>53</sup> Considering the development of military tactics and technology of the time, the state militias were able to adequately fill this role.<sup>54</sup> Moreover, the Constitution specifically gave Congress the power to call forth the militia to repel foreign invaders.<sup>55</sup> Many of the Constitution's drafters hoped that the militia clauses would thus preclude the need for a federal standing army,<sup>56</sup> which they viewed as the enemy of a democratic government.<sup>57</sup>

In the eighteenth century, before the rise of national military conscription, the term "army" meant mercenaries.<sup>58</sup> The public viewed professional soldiers as having few of the scruples of civilized society.<sup>59</sup> Thus, the Constitution's drafters hoped to maintain a militia system that would obviate the need for a standing army.

The states also used their militias as an internal police force, since eighteenth-century America lacked the professional police of today.<sup>60</sup> The government expected citizens, acting both individually and jointly in the form of a *posse comitatus*,<sup>61</sup> to prevent

53. RIKER, *supra* note 21, at 11. In fact, the militia system became even more decentralized following the Revolutionary War, since the militiamen lost the services of their British officers. *Id.*

54. *Id.*

55. U.S. CONST. art. I, § 8, cl. 15 ("[t]o provide for calling forth the Militia to . . . repel Invasions . . .").

56. JAMES MADISON, JOURNAL OF THE CONSTITUTIONAL CONVENTION 592 (E.H. Scott ed., 1893). Madison used this argument to solicit support from the Anti-Federalists for some degree of federal control over the state militias. *See id.*

57. *See* Ralph J. Rohner, *The Right to Bear Arms: A Phenomenon of Constitutional History*, 16 CATH. U. L. REV. 53, 56-57 (1966) (noting that the drafters of the Constitution would be unlikely to vote for any provisions likely to create a large professional army).

58. Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1168 (1991).

59. *Id.* at 1168-69. Even before the revolution, colonists took a dim view of the behavior of British regulars. FRANCIS JENNINGS, *EMPIRE OF FORTUNE* 206 (1988). Upon the arrival of General Braddock's army in 1755, Benjamin Franklin commented, "In their first march . . . they had plundered and stripped the inhabitants . . . besides insulting, abusing, and confining the people if they remonstrated." *Id.* The British officers evidently viewed their soldiers with the same contempt, as punishments such as three hundred lashes with a cat-o-nine-tails for even minor infractions were common. *Id.* at 208.

60. Robert Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 OKLA. L. REV. 65, 69 (1983). The Constitution's drafters did not extensively discuss this reason for the existence of the militia. Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103, 117 (1987). However, the reason for this lack of emphasis may have been that, given the frontier nature of the country, no one would ever expect a democratically elected government to deny its citizens the ability to defend themselves from criminal conduct. *Id.*

61. "The entire population of a county above the age of fifteen, which a sheriff

crime and pursue fleeing criminals.<sup>62</sup> The government also expected citizens to protect themselves against crimes against their person or property.<sup>63</sup> The states were no more able to provide a large professional police force than they were a full-time professional military.<sup>64</sup>

The possibility of a federal standing army overthrowing the state governments further concerned the Constitution's drafters.<sup>65</sup> No one at the Constitutional Convention felt that this threat was illusory; rather, the various factions debated only which militia system would best protect the integrity of the state governments.<sup>66</sup> The Federalists argued that the militia clauses enabled the states to adequately protect themselves from the federal government.<sup>67</sup> James Madison believed that the armed citizenry, officered by men from their own states, could resist any federal army.<sup>68</sup> The Anti-Federalists, however, opposed any federal control over the state militias.<sup>69</sup> George Mason and Patrick Henry feared that the federal government's right to arm the militia<sup>70</sup> implied a right to disarm it.<sup>71</sup> Madison maintained that the states had a concurrent right to arm the militia and, therefore, could prevent disarmament.<sup>72</sup>

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may summon to his assistance in certain cases, as to aid him in keeping the peace, in pursuing and arresting felons, etc." BLACK'S LAW DICTIONARY 1162 (6th ed. 1990).

62. Dowlut, *supra* note 60, at 93.

63. *Id.*

64. See Kates, *supra* note 47, at 214 (noting that the colonies were unable to afford a standing army or free up the manpower to make it possible).

65. Alan Hirsch, *The Militia Clauses of the Constitution and the National Guard*, 56 U. CIN. L. REV. 919, 927 (1988).

66. *Id.* at 927-30.

67. *Id.* at 928.

68. THE FEDERALIST NO. 46, 321 (James Madison). Madison also feared that once the states formed into a union, they might neglect their militias without some limited degree of federal cooperation. MADISON, *supra* note 56, at 590-91. History proved that his fear was well founded, see *supra* notes 78-79 and accompanying text.

69. MADISON, *supra* note 56, at 590. The strongest opposition to the militia clauses was not until the state ratification conventions, particularly the Virginia Convention. 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, 1423 (1992).

70. U.S. CONST. art. I, § 8, cl. 16 (giving Congress the power "[t]o provide for . . . arming . . . the Militia. . .").

71. HALBROOK, *supra* note 30, at 73-74; Wagner, *supra* note 69, at 1425-26. Patrick Henry asked, "Have we the means of resisting disciplined armies, when our only defence, the militia, is put into the hands of Congress?" 3 J. ELLIOT, *supra* note 44, at 48. George Mason commented that "it was the best and most effectual way to enslave [the people] by totally disusing and neglecting the militia." *Id.* at 380.

72. See 3 J. ELLIOT, *supra* note 44, at 381. The power to arm did not mean that

The eventual compromise between the factions was an intricate division of federal and state control over the militia. The two militia clauses in Article I of the Constitution grant the federal government considerable power but leave appointment of officers to the states.<sup>73</sup> The drafters intended the state power over officer appointments to allay the Anti-Federalist fears that the Constitution would leave the state governments powerless against a federal army.<sup>74</sup> While these same Constitutional provisions still govern the militia today, the militia's structure has radically changed.

### C. The Modern Militia System

Congress has shaped the modern militia's structure by exercising its Article I militia powers through a series of statutes. The first such legislation was the Militia Act of 1792.<sup>75</sup> This act codified the traditional view of the militia as consisting of all able-bodied citizens.<sup>76</sup> It also required each militiaman to supply his own arms.<sup>77</sup> However, since the federal government provided no funding, the states gradually allowed their militias to deteriorate.<sup>78</sup> By the 1870s, the militias in most states were little more than social clubs centered on a yearly parade.<sup>79</sup>

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the federal government would directly supply arms to individual militiamen. Wagner, *supra* note 69, at 1425 n.94. Instead, it indicated either the power to specify the size, kind, and caliber of militia weapons used or the power to regulate the way in which arms would be furnished: by the citizenry, the state governments, or the national treasury. *Id.*

73. U.S. CONST. art. I, § 8. Congress has the power to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." *Id.* cl. 15. Congress also may "provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States." *Id.* cl. 16. The Constitution leaves the states with the power of "the Appointment of Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." *Id.*

74. Hirsch, *supra* note 65, at 925-26 (describing the drafters' belief that officers appointed by their friends in state government would have ultimate loyalty to their state rather than to the federal government).

75. Militia Act of 1792, Ch. 33, 1 Stat. 271.

76. *Id.* Specifically, the United States militia, drawn from the militias of the several states, included all able-bodied white males from the age of 18 to 45. *Id.*

77. *Id.* The act provided that "[e]very citizen shall . . . provide himself with a good musket or firelock, a sufficient bayonet and belt, . . . a box therein to contain not less than twenty-four cartridges, . . . and he shall appear, so armed, accoutered, and provided when called out to exercise. . . ." *Id.*

78. See generally RIKER, *supra* note 21, at 21-40 (describing the disintegration of the state militias).

79. Ehrman & Henigan, *supra* note 25, at 36. The states not only stopped fining persons who did not attend training, but also expanded the exemptions from service. *Id.* This practice created resentment in non-exempt persons who were financially burdened by participation. *Id.* The resulting disdain for militia service fur-

In 1903, Congress attempted to restore the usefulness of the state militias with the Dick Act.<sup>80</sup> This act marked the beginning of the federalization of the militia.<sup>81</sup> The Dick Act also split the militia into two branches: the organized militia, which became known as the National Guard, and the unorganized militia.<sup>82</sup> The act provided federal funds for equipment and training, required drill a specified number of days each year, and gave federal inspectors the right to review state militia practices.<sup>83</sup> Congress continued the federalization of the National Guard through numerous subsequent acts.<sup>84</sup> The result today is that the National Guard is a reserve force of the United States Army under significant federal control.<sup>85</sup>

Though the division of the militia into organized and unorganized branches still exists today, Congress has not explicitly defined the role of the unorganized militia.<sup>86</sup> Nevertheless, federal statutes do provide for civilian firearms training as part of the Civilian Marksmanship Program.<sup>87</sup> Although legislators have attacked the program as being outdated,<sup>88</sup> it has survived Congress-

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thered the atrophy of the militia system. *Id.*

80. Dick Act, ch. 196, 32 Stat. 775 (1903).

81. RIKER, *supra* note 21, at 67. Federalization, or nationalization as some authors have referred to it, describes the process whereby the federal government gained greater control over the state organized militias in exchange for increased federal funding. *Id.* at 67-68.

82. Dick Act, ch. 196, 32 Stat. 775; Ehrman & Henigan, *supra* note 25, at 37. See *supra* note 15 for federal and state provisions calling for the existence of an unorganized militia.

83. Dick Act, ch. 196, 32 Stat. 775; Mullins, *supra* note 36, at 334.

84. See, e.g., National Defense Act of 1916, ch. 134, 39 Stat. 166 (requiring guardsmen to take an oath of loyalty to the United States as well as to their state). The National Defense Act Amendment integrated the National Guard units into the federal army. National Defense Act of 1933, ch. 87, 48 Stat. 153, 153. Under the amendment, guardsmen were simultaneously enrolled in the National Guard of their state as well as the National Guard of the United States. *Id.* This allowed the federal government to call up whole National Guard units for military service, rather than drafting individual members separately. Whisker, *supra* note 20, at 969. The Armed Forces Reserve Act allowed the federal government to impose standardized training methods upon all of the state militias. *Id.* (discussing The Armed Forces Reserve Act of 1952, ch. 608, 66 Stat. 481).

85. Whisker, *supra* note 20, at 968-69.

86. See Ehrman & Henigan, *supra* note 25, at 37 n.242. See *supra* note 15 for federal and state provisions calling for the existence of an unorganized militia.

87. 10 U.S.C. § 4311 (1993). The statute provides that "[t]he Secretary of the Army may provide for the issue of a reasonable number of standard military rifles, and the sale of such quantities of ammunition as are available, for use in conducting rifle practice." *Id.* In addition, this program provides for the operation of rifle ranges, employment of instructors, and competitions for certain youth groups, as well as adults who are members of a gun club affiliated with the program. 10 U.S.C. § 4308 (1993). The youth groups include the Boy Scouts of America, 4-H Clubs and Future Farmers of America. *Id.*

88. 139 CONG. REC. S14122-01, S14132 (daily ed. Oct. 21, 1993) (statements of

sional debates as recently as June 1994.<sup>89</sup> At least one senator has argued that the program continues to add to the nation's defense capability.<sup>90</sup> Additionally, a United States Army study found that individuals who received training in the program were significantly more effective in combat than those without such training.<sup>91</sup> However, although Congress explicitly created a dual-militia system, the unorganized militias of the various states have remained largely dormant.<sup>92</sup>

## II. PREVIOUS INTERPRETATIONS OF THE MILITIA CLAUSES

Since the eighteenth-century militia system no longer exists, interpretation of the Constitution's militia clauses is more complex in the twentieth century. This Part will describe how political lobbyists, commentators, and the federal judiciary have struggled with the interpretation of the militia clauses, in particular the militia clause in the Second Amendment.

### A. A Collective or Individual Right?

The militia clause in the Second Amendment, which states "A well regulated Militia, being necessary to the security of a free State . . .," is a primary focus for both gun-control and gun-rights groups.<sup>93</sup> Much of the debate centers on whether the clause establishes Second Amendment protection as a collective or an individual right.<sup>94</sup> The collective-right supporters view the clause as limiting the Second Amendment right to only the state militias.<sup>95</sup> They contend that the clause is an express limitation on the right

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Sen. Domenici). Congress enacted the program following the Spanish-American War to heighten preparedness for combat among potential army inductees. *Id.*

89. 139 CONG. REC. H5435-36 (daily ed. June 29, 1994) (statement of Rep. Mahoney). Congress authorized \$2.5 million to be used in fiscal year 1994 for the Civilian Marksmanship Program. 139 CONG. REC. S14122-01, S14132 (daily ed. Oct. 21, 1993) (statement of Rep. Schatz).

90. 139 CONG. REC. S14122-01, S14133 (daily ed. Oct. 21, 1993) (statements of Sen. Craig). "[T]he talent of well-trained men and women for purposes of marksmanship as it relates to the defense of this country really has not changed and it will not change, only ebb and flow with our times and with our history." *Id.*

91. See Whisker, *supra* note 20, at 969-70 (summarizing the Arthur D. Little Report to the U.S. Army, 1966). Individuals engaged in combat who had previous firearms training suffered fewer casualties, maintained their weapons better, and fired more often and with greater accuracy than those without such prior training. *Id.*

92. See *infra* notes 185, 188 and accompanying text for a discussion of the few times that a state has called its unorganized militia into service.

93. See, e.g., HALBROOK, *supra* note 30; Ehrman & Henigan, *supra* note 25.

94. See, e.g., Levinson, *supra* note 51, at 639 n.13 (arguing that some degree of individual right to keep and bear arms does exist).

95. David T. Hardy & John Stompoly, *Of Arms and the Law*, 51 CHI.-KENT L. REV. 62, 70 (1974).

Congress granted in the remainder of the amendment.<sup>96</sup> Individual-right supporters, however, do not view the amendment's militia clause as a limitation on the right "to keep and bear arms."<sup>97</sup> They contend that the right literally extends to all citizens, regardless of militia membership.<sup>98</sup>

Most gun-control advocates, adopting the collective-right view, argue that today the term "militia" in the Second Amendment means the National Guard.<sup>99</sup> Therefore, they conclude that the Second Amendment confers no rights whatsoever upon individual citizens.<sup>100</sup> However, if one interprets "militia" as including the unorganized militia as well, the collective or individual right argument may become moot; the unorganized militia itself comprises a large segment of the population.<sup>101</sup> However, while commentators debate the type of right secured by the Second Amendment, the federal courts have not expressly adopted either the individual-right or collective-right view.<sup>102</sup>

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96. *Id.* at 70. See Ehrman & Henigan, *supra* note 25, at 32-33 (explaining that collective-right supporters believe Madison proposed the amendment only to appease Anti-Federalist fears that the federal government would disarm the militia). At the Virginia Ratifying Convention, Patrick Henry and George Mason presented the strongest arguments against federal control of the militia. Ronald B. Levine & David B. Saxe, *The Second Amendment: The Right to Bear Arms*, 7 HOUS. L. REV. 1, 4-5 (1969). Since Madison was present at the Virginia Convention, he was well aware of their fears, and took most of his proposed Bill of Rights from the recommendations of the Virginia Convention. *Id.*

97. Hardy & Stompoly, *supra* note 95, at 70.

98. *Id.* Madison originally intended Congress to include his Bill of Rights provisions within the main body of the Constitution, rather than add them at the end. Kates, *supra* note 47, at 223. Proponents of the individual-right interpretation point out that Madison wished to include the Second Amendment in Article I, Section 9, following the right against bills of attainder and the ex post facto clause. *Id.* They argue that had Madison meant the Second Amendment to relate solely to the militia, he would have put it in Article I, Section 8 with the other two militia clauses. *Id.*

99. See, e.g., Ehrman & Henigan, *supra* note 25, at 39-40 (arguing that the federal government is responsible for arming and equipping the state militia); Levinson, *supra* note 51, at 644 (quoting ACLU Policy #47).

100. Ehrman & Henigan, *supra* note 25, at 39-40.

101. See 10 U.S.C. § 311 (1993) (defining the unorganized militia of the United States as all able-bodied males from the age of 17 to 44 inclusive who are or have made a declaration of intent to become citizens of the United States). But see Ehrman & Henigan, *supra* note 25, at 49-50 (criticizing this interpretation of the Second Amendment by pointing out that the unorganized militia excludes women). See also *United States v. Miller*, 307 U.S. 174, 179 (1939) (demonstrating that the United States Supreme Court may endorse this Congressional viewpoint, since the Court interpreted the Second Amendment militia as including only able-bodied adult males). However, one commentator concluded that the Court disregarded the discrepancy between citizenship and militia membership as moot. See Kates, *supra* note 47, at 249 n.193. Since the defendants in *Miller* were within the traditional definition of militia membership, the Court did not need to address the expanded definition of citizenship in modern times. *Id.*

102. Mark Uduluch, Note, *The Constitutional Implications of Gun Control and*

### B. The Judicial Definition of Militia

Although the militia has dramatically changed since colonial times, the federal courts have failed to fully address these changes. This Section first presents the United States Supreme Court's holding in *United States v. Miller*,<sup>103</sup> the leading Second Amendment case. Next, this Section examines subsequent lower court decisions relying on *Miller*. This Section will demonstrate that the lower courts have deviated substantially from the *Miller* definition of militia.

#### 1. The Miller Decision

Prior to this century, the United States Supreme Court had little opportunity to explore the scope of the Second Amendment, since no federal firearms restrictions existed.<sup>104</sup> This changed when, due to Prohibition-era lawlessness, the public began to associate certain types of firearms with gangsters.<sup>105</sup> To limit access to these weapons and thereby curb gangster activity, Congress passed the National Firearms Act of 1934.<sup>106</sup> This act made it unlawful for an individual to move certain weapons over state lines without proper registration.<sup>107</sup>

The National Firearms Act led to the only thorough United States Supreme Court analysis of the Second Amendment: *United*

*Several Realistic Gun Control Proposals*, 17 AM. J. CRIM. L. 19, 30 (1989).

103. *Miller*, 307 U.S. 174 (1939).

104. Hardy & Stompolo, *supra* note 95, at 63. However, the Court did entertain litigants wishing to invoke Second Amendment protection in cases contesting state firearms regulations. *See, e.g.*, *Miller v. Texas*, 153 U.S. 535 (1894) (contesting a state statute prohibiting the carrying of a dangerous weapon on a public street); *Presser v. Illinois*, 116 U.S. 252 (1886) (contesting a state statute requiring a gun license); *United States v. Cruikshank*, 92 U.S. 542 (1875) (alleging an intent to hinder the exercise of Second Amendment rights). Federal courts continue to maintain that the Second Amendment is not applicable to the states. *See, e.g.*, *Fresno Rifle and Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723 (9th Cir. 1992) (holding that the Second Amendment only limits federal action); *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982) (holding that a village gun control ordinance did not violate the Second Amendment), *cert. denied*, 464 U.S. 863 (1983). *But see* *Kates*, *supra* note 47, at 252-57 (arguing that the Supreme Court should apply the Second Amendment to the states); *Rohner*, *supra* note 57, at 67 (discussing the doctrine of incorporation under the Fourteenth Amendment). Since this Note concludes that the Second Amendment protects states' rights rather than the rights of individuals, the amendment should place no restrictions on state regulations. *See* *Levinson*, *supra* note 51, at 653 (finding that if the Second Amendment guarantees only a federalist protection of the states, then no individual right remains to incorporate).

105. Lund, *supra* note 60, at 109.

106. National Firearms Act, ch. 757, 48 Stat. 1236 (1934).

107. *Id.* The restricted weapons included sawed-off shotguns and submachine guns. *Id.* For each such weapon, the statute required its purchaser to pay a \$200 transfer tax. *Id.*

*States v. Miller*.<sup>108</sup> In *Miller*, the government charged two men with transporting an unregistered sawed-off shotgun from Oklahoma into Arkansas.<sup>109</sup> In finding that the National Firearms Act did not violate the Second Amendment, the Court formulated the following test: whether the weapon in question bore "some reasonable relationship to the preservation or efficiency of a well regulated militia."<sup>110</sup> The Court found that it was not within judicial notice that a sawed-off shotgun met this test.<sup>111</sup>

The *Miller* Court defined the militia exactly as it existed in colonial days. The Court described the militia's membership as all able-bodied adult males and noted that the government had expected militiamen to supply their own arms.<sup>112</sup> Thus, the Court implicitly determined the civilian defendants in *Miller* to be members of the militia.<sup>113</sup>

The Court found the "obvious purpose" of the Second Amendment to be the guarantee of the continuation and effectiveness of the state militias.<sup>114</sup> Collective-right proponents often point to this language as supporting subsequent lower court decisions that no individual right to bear arms exists.<sup>115</sup> However, the Court in *Miller* went on to find that the militia existed in part due to fear of a powerful federal standing army, and that all able-bodied adult males are members of the militia.<sup>116</sup> Taken together, these characteristics and concerns precisely describe the militia existing in the eighteenth-century.<sup>117</sup> The Court's extensive citation to seventeenth- and eighteenth-century authority strengthens this interpretation

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108. *United States v. Miller*, 307 U.S. 174 (1939).

109. *Id.* at 175. The trial court had dismissed the charges against the defendants, finding that the National Firearms Act violated the Second Amendment. *United States v. Miller*, 26 F. Supp. 1002, 1003 (W.D. Ark.), *rev'd*, 307 U.S. 174 (1939).

110. *Miller*, 307 U.S. at 178.

111. *Id.* The defendants did not appear before the Court by brief or oral argument, and thus could not have presented any evidence concerning the weapon in question. See Hardy & Stompoly, *supra* note 95, at 65. However, soldiers have used short-barreled shotguns effectively in combat at least since the Civil War. See CALVIN L. COLLIER, *THE WAR CHILD'S CHILDREN* 2 (1965) (finding the Third Arkansas Cavalry's success partially attributable to the use of short-barreled shotguns and pistols rather than cavalry sabers).

112. *Miller*, 307 U.S. at 179.

113. See *id.*

114. *Id.* at 178.

115. See, e.g., Ehrman & Henigan, *supra* note 25, at 41-42. The assumption made in such a discussion is that today's National Guard is the equivalent of the colonial militia. See *id.*

116. *Miller*, 307 U.S. at 179. In reaching this conclusion, the court relies on "debates in the [Constitutional] Convention, the history and legislation of Colonies and States, and the writings of approved commentators." *Id.*

117. For a discussion of the eighteenth-century militia's structure, see *supra* notes 23-35 and accompanying text.



of its holding.<sup>118</sup> However, the Court overlooked the fact that this militia system was nonexistent in 1939, when the Court decided *Miller*; the federalization of the militia was by then substantially underway.<sup>119</sup>

Furthermore, the "reasonable relationship" test proposed by the Court in *Miller* supports the conclusion that its definition of the militia is antiquated. The Court adopted essentially the same test as applied by the Tennessee Supreme Court in the 1840 case of *Aymette v. State*.<sup>120</sup> This test, that a weapon have a "reasonable relationship to militia use," is wholly inadequate to cope with the current level of military technology. If one takes the test literally, individuals have the right to own all of the weapons today's military commonly uses.<sup>121</sup> While perhaps this was feasible in 1840, its results in the nuclear age are unthinkable.<sup>122</sup> Because the Supreme Court has accepted no Second Amendment case since *Miller*,<sup>123</sup> the lower courts continue to struggle with the *Miller*

118. See *Kates*, *supra* note 47, at 251. The *Miller* Court quotes Blackstone, Adam Smith, and seventeenth-century militia statutes from Massachusetts, New York, and Virginia. *Miller*, 307 U.S. at 179-83.

119. See *RIKER*, *supra* note 21, at 68 (describing the development of the National Guard). Recently, the Court of Appeals for the Eighth Circuit noted that the *Miller* court recognized only the "historical residue" of the militia system. *United States v. Hale*, 978 F.2d 1016, 1019 (8th Cir. 1992), *cert. denied*, 113 S.Ct. 1614 (1993). However, the court went on to adopt the same test as used in *Miller* to determine if firearms regulations are unconstitutional. See *id.* at 1019-20.

120. See *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 158-59 (1840).

121. *Wagner*, *supra* note 69, at 1447; see also *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942) (holding that the intent of Congress was not to equip individuals with weapons of mass destruction), *cert. denied sub. nom.*, *Velazquez v. United States*, 319 U.S. 770 (1943); *Levinson*, *supra* note 51, at 654-55 (expressing similar concerns).

122. One could argue that the Supreme Court misinterpreted the *Aymette* test. In *Aymette*, the defendant appealed his conviction for carrying a concealed Bowie knife contrary to state law. *Aymette*, 21 Tenn. (2 Hum.) at 155. The defendant claimed the statute violated the Tennessee Constitution's guarantee of a right to keep and bear arms. *Id.* at 156. The court reasoned that since the purpose of the provision was to protect the public liberty and defend the state's laws and constitution, only those weapons that were part of the ordinary military equipment were protected. *Id.* at 158. The court then limited this right to the keeping of weapons that were not "dangerous to the peace and safety of the citizens." *Id.* at 159. The United States Supreme Court in *Miller* made no such express limitation on the Second Amendment right to keep and bear arms. *Miller*, 307 U.S. at 174 (1939).

123. *Kates*, *supra* note 47, at 250. The Supreme Court has turned away every Second Amendment case since the *Miller* decision, including several important cases concerning gun control. See, e.g., *Quilici v. Village of Morton Grove*, 694 F.2d 261 (7th Cir. 1982) (upholding a village ordinance prohibiting the possession of handguns), *cert. denied*, 464 U.S. 863 (1983). A number of gun-rights advocates have expressed their exasperation with the Court's reluctance to address Second Amendment questions. See, e.g., *Lund*, *supra* note 60, at 104 ("Although the Supreme Court finds time to busy itself with case after case involving . . . criminal procedure and . . . restrictions on speech, the Second Amendment is simply ig-

definition of the militia.

## 2. Lower Court Decisions Following *Miller*

In a line of cases following *Miller*, the Federal Courts of Appeals have narrowed the Supreme Court's definition of militia to include only the National Guard.<sup>124</sup> The first of these decisions was *Cases v. United States*,<sup>125</sup> which was another appeal from a conviction under the Federal Firearms Act.<sup>126</sup> In *Cases*, the court recited the "reasonable relationship" test from *Miller*.<sup>127</sup> However, the court dismissed this test by finding that the Supreme Court did not intend to formulate a general rule.<sup>128</sup> The court feared that strict application of the *Miller* test would result in private citizens owning modern weapons of mass destruction.<sup>129</sup> The *Cases* court concluded that federal courts should decide each Second Amendment case on its own facts.<sup>130</sup>

The Federal Courts of Appeals have twice addressed cases in which defendants claimed Second Amendment protection due to their membership in the unorganized militia of their state. In *United States v. Warin*,<sup>131</sup> the Court of Appeals for the First Circuit did not dispute that the weapon in question was of a type common to the military, and, therefore, met the *Miller* test.<sup>132</sup> However, the court reiterated the concern in *Cases* for unrestricted access to modern weaponry.<sup>133</sup> The court held that, although all adult males in Ohio were citizens of that state's unorganized militia, this conferred no special rights upon the defendant.<sup>134</sup>

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nored.").

124. See, e.g., *United States v. Hale*, 978 F.2d 1016, 1019 (8th Cir.) (concluding that the second amendment does not protect "individual possession of military weapons"), cert. denied, 113 S.Ct. 1614 (1992); *Farmer v. Higgins*, 907 F.2d 1041, 1044 (5th Cir. 1990) (holding, without mentioning *Miller*, that the Firearms Protection Act may prohibit private possession of machine guns to certain individuals based on dates of lawful possession), cert. denied, 498 U.S. 1047 (1991); *Quilici*, 695 F.2d 261, 270 (concluding that "the right to keep and bear handguns is not guaranteed by the second amendment"); *United States v. Tot*, 131 F.2d 261 (3d Cir. 1942) (affirming defendant's conviction because he did not meet the *Miller* "reasonable relationship" burden), rev'd on other grounds, 319 U.S. 463 (1943).

125. *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942), cert. denied sub. nom., *Velazquez v. United States*, 319 U.S. 770 (1943).

126. *Id.* at 919.

127. *Id.* at 922.

128. *Id.*

129. *Id.*

130. *Cases*, 131 F.2d at 922.

131. *United States v. Warin*, 530 F.2d 103 (6th Cir. 1975), cert. denied, 426 U.S. 948 (1976).

132. *Id.* at 104. The defendant, who was an engineer for a firearms manufacturer, had designed and constructed a prototype submachine gun. *Id.*

133. *Id.* at 106.

134. *Id.* at 106-07.

Therefore, the court recognized no personal right to firearms ownership whatsoever.<sup>135</sup>

The Court of Appeals for the Tenth Circuit dealt similarly with the unorganized militia defense in *United States v. Oakes*.<sup>136</sup> In *Oakes*, the defendant claimed membership in the Kansas state militia to invoke Second Amendment protection.<sup>137</sup> The court conceded that the defendant was technically a member of the Kansas state militia, which included all able-bodied male citizens between the ages of twenty-one and forty-five.<sup>138</sup> In addressing the *Miller* decision, the court noted that the Second Amendment existed to preserve the state militias.<sup>139</sup> However, the court failed to adopt the *Miller* definition of militia; instead, the court reasoned that membership in a military organization other than the organized militia of the state entitled the defendant to no constitutional protection.<sup>140</sup> The court ruled that to grant the defendant Second Amendment protection would be unsound logically or as a matter of public policy.<sup>141</sup> Thus, by extending Second Amendment protection to only the members of a state's organized militia or National Guard, the Federal Courts of Appeals have abandoned the Supreme Court's definition of militia.<sup>142</sup>

### III. AN INTERPRETATION OF THE MILITIA CLAUSES FOR THE TWENTIETH-CENTURY MILITIA

Today's militia system has few common threads with the militia known to the Constitution's drafters. Modern warfare made changes necessary in order for the militia to emerge in the twentieth century as a viable military force.<sup>143</sup> However, most courts and commentators have failed to consider these changes when interpreting the militia clauses.<sup>144</sup>

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135. See *id.* at 106.

136. *United States v. Oakes*, 564 F.2d 384 (10th Cir. 1977), *cert. denied*, 435 U.S. 926 (1978).

137. *Id.* at 387.

138. *Id.* (quoting KAN. CONST. art. VIII, § 1).

139. *Id.*

140. See *id.* The particularly inflammatory facts of this case may be relevant to the court's conclusion. The defendant was a member of the Posse Comitatus organization. See *id.* The Posse Comitatus membership consists of tax protesters and white supremacists who advocate the violent overthrow of the United States government. MICHAEL BARKUM, RELIGION AND THE RACIST RIGHT: THE ORIGINS OF THE CHRISTIAN IDENTITY MOVEMENT (1994).

141. *Oakes*, 564 F.2d at 387.

142. See *United States v. Miller*, 307 U.S. 174, 178 (1939).

143. See generally RIKER, *supra* note 21, at 21-41 (describing the military impotency of the militia during much of the nineteenth century).

144. See, e.g., Ehrman & Henigan, *supra* note 25 (arguing that the militia consists only of the National Guard); Lund, *supra* note 60 (finding the colonial militia

First, this Part examines the Second Amendment in light of the eighteenth-century militia. This Part demonstrates that the meaning of the Second Amendment is clear with respect to that militia system. Next, this Part examines various groups that have some claim to militia status in the twentieth century; the focus of this discussion is to determine whether or not these groups are entitled to any Second Amendment protection. This Part will show that both the organized and unorganized militia, as well as modern police forces, retain elements of the eighteenth-century militia and thus should receive Second Amendment protection to the extent that they have replaced the previous militia system.

*A. Application of the Second Amendment to the Eighteenth-Century Militia*

Unlike today's National Guard, the eighteenth-century militia generally consisted of all able-bodied adult male citizens.<sup>145</sup> Furthermore, the government not only allowed these citizens to keep their own weapons, but required them to do so.<sup>146</sup> The colonial governments could not have afforded to arm each militiaman even if they had so wished.<sup>147</sup> Therefore, this arrangement was necessary to maintain an effective fighting force. The Militia Act of 1792<sup>148</sup> is entirely consistent with this view of the militia. This act defines militia as the armed citizenry, indicating that Congress still accepted this definition at the time they passed the Second Amendment.<sup>149</sup>

The wording of the Second Amendment becomes clear once one adopts the eighteenth-century militia definition. Since the drafters wished to avoid a federal standing army, maintenance of the militia was necessary for the country's protection.<sup>150</sup> Thus the Second Amendment begins, "A well regulated Militia, being necessary to the security of a free State. . . ."<sup>151</sup> Since the militia's very existence required individual ownership of arms, the

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to be analogous to today's unorganized militia).

145. Kates, *supra* note 47, at 214.

146. *Id.* This obligation extended even to households that did not house a citizen eligible for militia service. *Id.* at 215.

147. See generally JENNINGS, *supra* note 59 (describing the struggles of the colonies to pay for equipping even the smallest expeditions against the French and their Indian allies during the Seven Years War). As one example, Governor Dinwiddie of Virginia used "great Persuasions, many Argum'ts and much difficulty" in persuading the legislature to appropriate ten thousand pounds for Major George Washington's 1754 campaign. *Id.* at 65-66.

148. Militia Act of 1792, Ch. 33, 1 Stat. 271.

149. For further discussion of the Militia Act's provisions, see *supra* notes 75-77 and accompanying text.

150. Kates, *supra* note 47, at 217-18.

151. U.S. CONST. amend. II.

federal government could not deny the citizenry that right.<sup>152</sup> This was precisely the concern of the Anti-Federalists, that the Constitution left the federal government with the power to disarm the state militias at will.<sup>153</sup> Therefore, the Second Amendment provides that "the right of the people to keep and bear Arms, shall not be infringed."<sup>154</sup> Congress did not tie this right of "the people" directly to militia membership because the militia was understood to consist of the general citizenry.<sup>155</sup> The collective-right view of the Second Amendment is thus essentially correct: the exercise of any Second Amendment protection is contingent upon membership in the militia.<sup>156</sup>

Congress's inclusion of the phrase "well regulated" within the Second Amendment has caused many gun-control proponents to conclude that the amendment protects only an organized militia, such as today's National Guard.<sup>157</sup> At least one state supreme court shares this view.<sup>158</sup> However, both historical and linguistic analyses demonstrate that the phrase is consistent with a militia composed of the general citizenry. Historically, the colonies organized their militiamen into units based on their locality; however, they used this organizational scheme for training only, not combat.<sup>159</sup> The colonial militia consisted of a pool of trained men that the government could call upon to fill whatever positions the situation required.<sup>160</sup> Therefore, an interpretation of "well regulated" to mean organized would be inconsistent with the militias existing in the colonies for two centuries.

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152. See Kates, *supra* note 47, at 217-18.

153. See *supra* note 46 and accompanying text for a discussion of this Anti-Federalist concern and the response provided by Federalists such as James Madison.

154. U.S. CONST. amend. II.

155. Cf. Kates, *supra* note 47, at 217-18 (presenting a similar argument, but not limiting the Second Amendment right to the purpose of militia membership). But see Lund, *supra* note 60, at 107 (finding that the use of the phrase "the people," rather than "the states," indicates that the right is individual rather than collective). Individual-right supporters point out that the phrase "the people" is also used in the First and Fourth Amendments. *E.g.*, *id.* Thus, finding the phrase to mean an individual right in one part of the Bill of Rights, and a collective right in another part, is inconsistent. *Id.*

156. For a discussion of the collective-right view and the opposing individual-right view, see *supra* notes 93-102 and accompanying text.

157. See, e.g., Ehrman & Henigan, *supra* note 25, at 49 (finding that "well regulated militia" refers to the active, organized militia only).

158. See *Burton v. Sills*, 248 A.2d 521, 526 (N.J. 1968) (finding that the phrase "well regulated" limits the right to only the National Guard), *appeal dismissed*, 394 U.S. 812 (1969).

159. Whisker, *supra* note 20, at 955. Before the Revolutionary War, these units were trained by professional British officers from regular military units. *Id.*

160. *Id.* at 955-56. Most missions were performed by individual volunteers, rather than men called up as units, especially when the militia served outside of its locality. *Id.*

Furthermore, "well regulated" was eighteenth-century military jargon for government-trained, not government-controlled or organized.<sup>161</sup> This usage is entirely consistent with the colonial militias' structure: part of a government's duties was to train its militiamen.<sup>162</sup> Thus, with the adoption of the Second Amendment, Congress sought to protect the state militias as they then existed.

### *B. Second Amendment Protection for the Modern Militia System*

The courts have struggled to analogize the militia system implemented in the eighteenth century to that existing today.<sup>163</sup> Yet the dramatic technological changes over the past two hundred years made the eighteenth-century militia system unfeasible and thus led to its decline.<sup>164</sup> However, the fact that the particular militia system known to the Constitution's drafters no longer exists does not necessarily mean that no Second Amendment claim can be made today. Supreme Court justices have often pointed out that the Constitution is a living document, which is adaptable to changes in the nation's societal and organizational structures.<sup>165</sup> Furthermore, federal courts have routinely adapted constitutional powers to reflect changes in technology that the Constitution's drafters could not have foreseen.<sup>166</sup> Therefore, any

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161. Lund, *supra* note 60, at 107 n.8.

162. RIKER, *supra* note 21, at 12.

163. See, e.g., *United States v. Miller*, 307 U.S. 174 (1939); *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942), *cert. denied sub. nom.*, *Velazquez v. United States*, 319 U.S. 770 (1943).

164. See Lund, *supra* note 60, at 112 (noting that technology and political events precipitated the dramatic increase in United States military power following the Civil War).

165. See, e.g., *Gompers v. United States*, 233 U.S. 604 (1914) (containing Justice Holmes's famous quote, "[T]he provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic, living institutions. . . . Their significance . . . is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.").

166. The United States Supreme Court has previously used this approach in other areas of the law where technological developments have radically changed the implementation of a constitutional right or power. The Fourth Amendment protection against unreasonable search and seizure changed as improved technology gave the government greater ability to implement covert searches. See *Katz v. United States*, 389 U.S. 347 (1967) (finding that use of an electronic bug placed on a public telephone booth violated the defendant's Fourth Amendment protections). The test changed from one of invasion of property interests to the invasion of privacy interests. See *id.* Similarly, the Court narrowly interpreted the power of Congress to regulate interstate commerce before the rise of modern transportation systems. See *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299 (1851) (allowing state to regulate the piloting of vessels through the port of Philadelphia); *The License Cases*, 46 U.S. (5 How.) 504 (1847) (upholding state statutes requiring licenses to sell liquor, thus precluding out-of-state sellers). However, as railroads

modern organization which retains elements of the eighteenth-century militia should be entitled to some form of Second Amendment protection.<sup>167</sup> The breadth of Second Amendment protection an organization receives should reflect the degree to which it fulfills the purposes of the eighteenth-century militia.<sup>168</sup>

### 1. *The National Guard*

Most commentators have concluded that the organized militias of the states, which together comprise today's National Guard system, are the only groups that fit within the constitution-

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spanned the country, the Court increased legislative power to regulate such commerce. *See Houston, E. & W. Tex. Ry. Co. v. United States*, 234 U.S. 342 (1914) (finding that where intrastate and interstate commerce are so related that control of one is control of the other, Congress has the power to regulate such commerce). Since the 1930's, the Court has increased the power of Congress to regulate interstate commerce such that it is now practically without limit. *See Perez v. United States*, 402 U.S. 146 (1971) (allowing regulation of activities that only affect interstate commerce); *Wickard v. Filburn*, 317 U.S. 111 (1942) (discarding old distinctions between direct and indirect effects on interstate commerce). *But see United States v. Lopez*, 115 S.Ct. 1624 (1995) (finding the Gun-Free School Zones Act of 1990 to be beyond Congress's Commerce Clause power).

167. No constitutional right, even one that the United States Supreme Court deems most fundamental or cherished, is absolute. *See Wagner, supra* note 69, at 1451-52 (noting that the United States Supreme Court allows certain regulations even though they may abridge the individual First Amendment right to free speech). Justice Holmes illustrates this idea by his example of a man shouting fire in a crowded theater. *See Schenk v. United States*, 249 U.S. 47 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."). This Note only addresses the first element of a Second Amendment protection claim, that the defendant belongs to an organization that fits within the constitutional definition of "militia." The second element of such a claim, what limits exist upon the right extended to members of the militia, is beyond the scope of this Note.

168. While the need to defend against foreign aggression and to provide law enforcement are plainly still relevant today, there is much debate concerning the third militia role, that of protecting the states from the federal government. *See, e.g., Ehrman & Henigan, supra* note 25, at 40 (finding protection from the federal government irrelevant in the twentieth century); *Kates, supra* note 47, at 270-71 (finding the need relevant today); *Levinson, supra* note 51, at 656-57 (questioning the supposed lack of such a need); *Lund, supra* note 60, at 113-21 (arguing that the need still exists). Many private militia members apparently believe that the federal government is in fact a tyranny today. *See David Willman, For Far Right, Waco was Step to Armageddon*, L.A. TIMES, Apr. 24, 1995, at A1 (noting how some such persons use the Waco Branch Davidian raid as "indelible proof" that the federal government is involved in a conspiracy to strip Americans of their rights). Some commentators argue that such an occurrence in the future is not beyond the realm of possibility. *See, e.g., Levinson, supra* note 51, at 656 ("[I]t seems foolhardy to assume that the armed state will necessarily be benevolent. The American political tradition is, for good or ill, based in large measure on a healthy mistrust of the state."). This Note will consider only the militia purposes of protection from foreign aggression and law enforcement in analyzing what groups comprise today's militia.

al definition of "militia."<sup>169</sup> Regardless, the National Guard has thus far needed no constitutional protection since Congress has explicitly excluded it from all federal firearms restrictions.<sup>170</sup> However, if Congress were to restrict the states' National Guard units from possessing certain weapons, the states would likely succeed in a Second Amendment challenge since the Guard's role in today's society is much like the eighteen-century militia's role in early America.

The National Guard clearly fulfills the first purpose of the eighteenth-century militia, that of protecting the nation against foreign aggression. The Constitution's drafters hoped that the militia would preclude a federal standing army; however, technological changes in the twentieth century made that hope impractical.<sup>171</sup> Yet today the National Guard, as a reserve force for the United States Army,<sup>172</sup> provides the bulk of the nation's military personnel available for service abroad.<sup>173</sup> The National Guard has proved itself necessary and effective as recently as the Persian Gulf War.<sup>174</sup> Therefore, the Second Amendment should protect the National Guard against disarmament as long as it continues to serve effectively in this role.

The National Guard has filled the second role of the eighteenth-century militia, that of providing law enforcement, in a variety of situations.<sup>175</sup> States have often called upon their Na-

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169. See, e.g., Ehrman & Henigan, *supra* note 25, at 39.

170. See, e.g., Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, sec. 110102(a)(4)(A), § 922(v)(1), 108 Stat. 1796 (1994) (exempting military and police forces from the assault weapon ban). The federal courts have, however, entertained litigation concerning other aspects of National Guard membership. The Supreme Court has allowed the federal government to draft guardsmen directly into the United States Army. See, e.g., *Selective Draft Law Cases*, 245 U.S. 366 (1918) (finding that the militia clauses could not impede the government's ability to wage war). More recently, federal courts addressed the question of whether the president could require National Guard units to train overseas. See, e.g., *Perpich v. Dep't of Defense*, 496 U.S. 334 (1990) (finding that the president could require overseas training of the National Guard even during peacetime); *Dukakis v. Dep't of Defense*, 859 F.2d 1066 (1st Cir. 1988) (similarly upholding the constitutionality of federal requirements of overseas training for National Guard units), *cert. denied*, 490 U.S. 1020 (1989).

171. For a discussion of the drafters aversion to a federal standing army, see *supra* notes 33-35 and accompanying text.

172. For a discussion of the National Guard as a part of the United States Army's reserve force, see *supra* note 85 and accompanying text.

173. Mullins, *supra* note 36, at 339. As of 1986, 18 of the United States Army's 24 divisions are wholly or partly manned by members of the National Guard. *Id.* These units include front line offensive and defensive components of the United States military. *Id.*

174. See, e.g., Seth Owen, *Reserves, Regulars Spar for Position*, DEF. NEWS, Sept. 20, 1992, at 31 (noting that the United States Army's Total Force doctrine makes it impossible for the president to deploy large numbers of troops overseas without involving the National Guard).

175. The ability of the National Guard to act in this regard is limited by the



tional Guard to provide control during times of crisis or civil unrest.<sup>176</sup> The National Guard has also proven effective in assisting police agencies to retard the flow of illegal narcotics into the United States.<sup>177</sup> Thus, the members of the National Guard have a strong claim to Second Amendment protections based on their law enforcement roles.

## 2. State Police Agencies

A state's police force is not commonly recognized as a branch of its militia. However, the professional police organizations so familiar in twentieth-century American society did not exist in the eighteenth-century.<sup>178</sup> In their place, the militia served in the role of protecting the public from criminal activity and bringing criminals to justice.<sup>179</sup> Since modern police forces have substantially replaced the law enforcement function of the eighteenth-century militia, the Second Amendment should provide protection against federal firearms regulations to state agencies that perform law enforcement activities.<sup>180</sup> Like the National Guard, police units have thus far been exempted from federal weapons restrictions.<sup>181</sup> However, if federal firearms regulations should become more pervasive, a state police force should be able to invoke Second Amendment protection against a federal regulation that restricts its access to weapons which have utility for law enforcement.

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Posse Comitatus Act, which provides criminal penalties for using a branch of the armed forces for a law enforcement purpose without the express permission of Congress. 18 U.S.C. § 1385 (1993).

176. See Charles McCarthy, *Setting It Straight*, FRESNO BEE, Feb. 28, 1995, at B1 (noting National Guard involvement in quelling riots, providing earthquake relief and fighting wildfires).

177. See, e.g., Charles Lane, *The Newest War*, NEWSWEEK, Jan. 6, 1992, at 18 (describing how guardsmen aid United States Border Patrol personnel in discovering hidden caches of marijuana smuggled across the United States border); David C. Morrison, *Police Action*, NAT'L J., Feb. 1, 1992, at 267 (discussing the National Guard's assistance to the Customs Service in cargo inspection). The National Guard increased the percentage of inspected cargo containers crossing United States borders from 4% before their involvement to 14% afterward. *Id.*

178. See *supra* note 60.

179. For a discussion of this role of the eighteenth-century militia, see *supra* notes 60-64 and accompanying text.

180. The extent of this right, and thus the type of weapons protected for law enforcement use, is beyond the scope of this Note.

181. See, e.g., Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, sec. 110102(a)(4)(A), § 922(v)(1), 108 Stat. 1796 (1994) (exempting police forces from the assault weapon ban).

### 3. *The Unorganized Militia*

The federal government has afforded the unorganized militia no protection from federal firearms regulations.<sup>182</sup> Since the unorganized militia's membership comprises much of the general citizenry,<sup>183</sup> Congress has indirectly applied all federal firearms regulations to this group.<sup>184</sup> While the unorganized militia may be entitled to some Second Amendment protection, the small role that states have given their unorganized militias limits the extent of this right.

The unorganized militia is wholly incapable of protecting the United States from foreign aggression, and thus cannot receive Second Amendment protection for this militia purpose. The unorganized militia has been called upon to fill this role in the past: governors have deployed their unorganized militias as recently as World War II to repel foreign invasion.<sup>185</sup> However, the rapid advance of weapons technology since that time has left untrained, lightly-armed individuals unable to resist any significant foreign threat.<sup>186</sup>

Modern police forces have generally replaced the eighteenth-century militia in the role of law enforcement.<sup>187</sup> However, gov-

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182. See generally Ehrman & Henigan, *supra* note 25 (noting that federal statutes are consistent with modern Federal Courts of Appeals decisions finding that the National Guard is the only militia protected from federal firearms regulation).

183. See *supra* note 15 and accompanying text for the text of the federal unorganized militia statute.

184. Congress has not treated all persons equally with respect to firearms regulations. In particular, federal statutes entirely exclude members of several groups from ownership of firearms. See 18 U.S.C. § 922(g) (1993) (prohibiting felons, fugitives from justice, drug addicts, aliens, those dishonorably discharged from the armed services, or those who have renounced their United States citizenship from possessing firearms). The federal courts have consistently upheld the constitutionality of such restrictions. See, e.g., *Lewis v. United States*, 445 U.S. 55, 65-66 (1980) (finding that the exclusion of felons from the right to possess firearms was consistent with Fifth Amendment Due Process). Commentators have noted that the "people" Madison referred to in the Second Amendment are only those entitled to the full benefits of society. See Kates, *supra* note 47, at 266 (noting the attitude of the Constitution's drafters against granting rights to convicted felons). Delegates at the state ratification conventions made comments that directly support the view that the Second Amendment right excludes felons. *Id.* at 222. The Pennsylvania right to arms proposal read, in pertinent part, "[N]o law shall be passed for disarming the people or any of them unless for crimes committed, or real danger of public injury from individuals. . . ." *Id.* (quoting 2 B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 665 (1971)). Samuel Adams proposed that the Second Amendment right be limited to peaceable citizens. *Id.* at 224.

185. Kates, *supra* note 47, at 271-72. Following the Japanese attack of Pearl Harbor, the Governor of Hawaii called upon armed citizens to augment the islands' sparse defenses in repelling the anticipated Japanese invasion. *Id.* at 272 n.284.

186. *But cf., id.* at 271 (arguing that Congress, by failing to repeal the militia statute creating the unorganized militia, has implicitly found the unorganized militia necessary in the case of "dire military emergency.").

187. See, e.g., Levinson, *supra* note 51, at 656 (acknowledging the argument that

ernors have occasionally called out their state's unorganized militia to quell civil unrest.<sup>188</sup> Sheriff's Departments across the country still use the common law *posse comitatus* concept to augment their law enforcement capabilities.<sup>189</sup> Additionally, individuals still use personally-owned firearms to prevent criminal activity or detain criminals until the arrival of police.<sup>190</sup> Thus, the Second Amendment may extend some protection to the unorganized militia in the role of law enforcement. However, the extent to which professional police provide for law enforcement today severely limits the unorganized militia's role.

#### 4. Private "Citizen" Militias

Members of private militia organizations gain no Second Amendment rights by virtue of such membership. The debates surrounding the ratification of the Constitution make clear that the drafters' definition of "militia" did not include private armies.<sup>191</sup> The Federalists and Anti-Federalists disagreed over how militia control would be divided between the federal and state governments, but no one argued that the militia should be independent of all governmental control.<sup>192</sup> The concerns of the Anti-Federalists pertaining to the militia all involved retaining control over the militia for the state governments.<sup>193</sup> Thus, the inclusion of the Second Amendment in the Bill of Rights rose out of concerns over federalism, not the protection of individual

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professional police forces have made armed citizens irrelevant to effective law enforcement).

188. See, e.g., Whisker, *supra* note 20, at 973 (describing Virginia Governor William Mumford Tuck's use of the unorganized militia to prevent a utility worker strike).

189. See, e.g., *Street Smart*, L.A. TIMES, Aug. 8, 1994, at B1 (describing police use of the *posse comitatus* power to commandeer vehicles and solicit assistance in pursuing criminals).

190. Every month, the National Rifle Association publishes examples of individuals countering criminal activity with firearms. See, e.g., *The Armed Citizen*, AM. RIFLEMAN, Sept. 1994, at 8. But See LaFawn Oliver, *Protect Your Home Against Burglary*, LEWISTON MORNING TRIB., July 19, 1992, at D2 (noting the danger of a criminal disarming a homeowner and using the homeowner's gun against him or her).

191. See *supra* notes 36-74 for a discussion of these debates. Senator Joseph Biden finds the use of the term "well regulated" to be dispositive in determining that private organizations cannot claim Second Amendment protection. *Meet the Press* (NBC Television broadcast, Apr. 30, 1995) ("[The private militias] are not constitutionally mandated. . . . [The Second Amendment] says 'well regulated' militia, meaning a government . . . controls that militia; if they [are not government controlled], they are not a militia."). See *supra* notes 157-62 and accompanying text for a discussion of the phrase "well regulated."

192. Ehrman & Henigan, *supra* note 25, at 20.

193. See *supra* notes 43-46 for a discussion of the three principal Anti-Federalist concerns that relate to the militia.

rights.<sup>194</sup> The Second Amendment should protect the individual state militiaman in the performance of his duties; however, that protection is ancillary to the protection afforded to the state militias. Thus, once a militia member steps outside of his role as a state actor, his Second Amendment protection ceases to exist. The private "citizen" militias, which generally have no state affiliation,<sup>195</sup> can therefore receive no special Second Amendment protection.

### CONCLUSION

The definition of the term "militia" is a critical first step toward determining what protection the Second Amendment provides. This task is more complex because the eighteenth-century militia, which the drafters intended the Second Amendment to protect, no longer exists. In its place, a number of state organizations have evolved which provide comparable services in the twentieth century. Thus, the definition of the militia must involve an analysis of not only what governmental structures exist, but also what roles they play in society.

The individual-right view of the Second Amendment, that the amendment protects the right of everyone to own most any weapon for any purpose, is clearly incongruent with the intent of the Constitution's framers. However, the modern militia is not nearly so limited as recent federal court decisions have indicated. A number of organizations, including the National Guard, various law enforcement agencies, and the state unorganized militias, fulfill the eighteenth-century militia's purposes in today's society. Therefore, the Second Amendment should extend protection to members of all of these organizations while in the performance of their militia duties.

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194. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 299 n.6 (2d ed. 1988) (finding that the sole concern of the second amendment's framers was to prevent federal interferences with the state militia). Professor Tribe concludes that the Second Amendment is "merely ancillary to other constitutional guarantees of state sovereignty." *Id.*

195. A few such organizations, including the private militias in the Florida panhandle, do claim some marginal state affiliation. See, e.g., Santa Rosa County, Florida, Resolution No. 94-09 (Apr. 14, 1994) (establishing the Santa Rosa County Militia by nonbinding resolution).

