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CONSTITUTIONAL LIMITS ON REGULATING PRIVATE MILITIA GROUPS

Thomas B. McAfee*

I. INTRODUCTION

Any discussion of constitutional limits on regulating militias includes its share of ironies, particularly for those who take the historical Constitution seriously. First, the private militia movement can be seen as a response, at least in part, to an extremely revisionist reading of the Second Amendment. The revisionist reading is that the Second Amendment guarantees arms only to a "collective group" called the militia and offers no protection to a "personal" right to have firearms.¹ This collective (or states) right(s) view is a twentieth century invention; or, as one prominent scholar put it, such an understanding was the best kept secret of the eighteenth century.² The irony is that the most frightening invocation of the Second Amendment can thus be traced to the Second Amendment's worst skeptics. The second irony of the modern debate concerns the tendency to forget that the founding generation believed individuals had a personal and natural right of self-defense including the means of defense, i.e., firearms.³ The right of self-defense was not only the ultimate reason the right to keep and bear arms was secured in both the federal Bill of Rights and the constitutions of the several states in the early American republic, but was also the philosophical underpinning of the English right to arms⁴ and the collective

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1. For a typical statement of this reading of the Second Amendment, see *Love v. Pepersack*, 47 F.3d 120, 123-24 (4th Cir.), cert. denied, 116 S. Ct. 64 (1995). For the observation that the militia movement is partly a response to this misreading of the amendment, see Randy E. Barnett, *Foreword: Guns, Militias, and Oklahoma City*, 62 TENN. L. REV. 443, 452 (1995) (arguing that "the growth of the militia movement is an unintended consequence of antigun arguments that the Second Amendment only protects the right to belong to a militia—for that movement has its roots in individuals who organized their militias in response to just this argument") (citation omitted).

2. STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* 83 (1984).

3. See generally Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENTARY 87, 90-93 (1992); JOYCE L. MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* 162 (1994) (arguing that self-defense was one of two goals of the Second Amendment).

4. See, e.g., 1 WILLIAM BLACKSTONE, *COMMENTARIES* *141-44 (describing the right of "having" arms guaranteed by the English Bill of Rights as among the "auxiliary subordinate rights" that serve "to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private proper-

right of resistance in the days leading to revolution.⁵ These rights to have arms, which included the right to defend one's life and liberty and to resist tyranny, received prominent mention in the declarations of rights adopted by the states in the wake of America's Declaration of Independence.⁶

In contrast to the modern tendency to think in terms of a collective interest in having arms, the more difficult issue during the period in which the Second Amendment was framed was whether private citizen-based groups, other than the general militia, had rights to organize, arm, and train themselves. Such a claim of a collective right would have presented risks of faction and potential rebellion against valid civil order.⁷ If the issue of the rights of private groups to gun ownership had squarely arisen in the eighteenth century, Americans would have been compelled to address the difference between individual and group

ty"); MALCOLM, *supra* note 3, at 145 (citing American colonists relying on Blackstone in support of the right of all Americans to hold arms for their defense).

5. See generally HALBROOK, *supra* note 2 (discussing that the assumption underlying American revolutionary philosophy was that collective defense, including collective resistance to tyranny, is merely individual defense of life, liberty, and property).

6. On the right to arms, see MASS. CONST. Pt. I, art. XVII (1780), *reprinted in* 3 FRANCIS N. THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATE, TERRITORIES, AND COLONIES 1892 (1909); N.C. CONST. art. XVII (1776), *reprinted in* 5 THORPE, *supra*, at 2788; PA. CONST. art. XIII (1776), *reprinted in* 5 THORPE, *supra*, at 3083 (1909); VT. CONST. ch. I, § 15 (1777), *reprinted in* 6 THORPE, *supra*, at 3741. On the general right of self-defense, see MASS. CONST. Pt. I, art. I, *reprinted in* 3 THORPE, *supra*, at 1889 (including among the people's inalienable rights the rights of "defending their lives and liberties" and "protecting property"). On the right of resistance, see, for example, MD. CONST. art. IV (1776), *reprinted in* 3 THORPE, *supra*, at 1687 (declaring that "[t]he doctrine of non-resistance, against arbitrary power and oppression, is absurd, slavish, and destructive of the good and happiness of mankind"). That support for the right of resistance had not waned by the time of the ratification of the federal Constitution is shown by the Virginia Ratifying Convention's proposal for a bill of rights that included the declaration that "the doctrine of non-resistance against arbitrary power and oppression is absurd[,] slavish, and destructive of the good and happiness of mankind." *Amendments Proposed by the Virginia Convention, June 27, 1788, Proposed Decl. of Rts. Third*, in CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 17 (Helen E. Veit et al. eds. 1991) [hereinafter CREATING THE BILL OF RIGHTS].

7. See 3 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 475 (Leonard W. Levy ed. 1971) (1797). In classic defense of American constitutions, first published on the eve of the Philadelphia Convention, Adams stated that guns should not be used according to "individual discretion, *except in private self-defence* [sic]," because it would "demolish every constitution, and lay the laws prostrate, so that liberty can be enjoyed by no man." *Id.* (emphasis added). For a discussion of the relevance of Adams's views to basic Second Amendment questions, see *infra* notes 42-49 and accompanying text.

rights to be armed. They likely would have determined that the individual right deserved protection more than the collective right for groups who might present a threat to the safety and security of the community. The irony here is that while modern thinkers debate whether the Second Amendment included an individual right to arms, founding-era Americans would have seen that question as the easy one, and the question of protection to private groups as the hard question.

Read in a historical context, the Second Amendment provides clear answers to only a few of the questions regarding the appropriate limits of state regulatory power to restrict organizing and training private militia groups. Moreover, a basic analysis of the original materials yields conclusions that may be disappointing to both critics and sympathizers of the private militia movement. Critics may be unhappy with the conclusion that the individual right to bear arms offers important protection to at least some activities of private militia members. Sympathizers may be equally disappointed with the conclusion that activities which include full-scale preparation for a military confrontation with the government are not protected by the Second Amendment.

A less obvious irony of the militia debate is that the First Amendment may provide the most effective means to protect militias against intrusive state regulation. Consider that many of those who join private militia groups object to constitutional innovation, especially in the area of expanding civil liberties for individuals and minorities. There is some irony in the fact that the First Amendment doctrines that seem likely to offer significant protection to private militia groups are among those that might be contested as exceeding the degree of protection contemplated by those who adopted the First Amendment.⁸ Ironies

8. Modern Americans have a difficult time understanding how it is that the concept of natural-law-based limits on the exercise of natural rights, including those rights made part of the positive fundamental law of constitutions, enabled founding-period Americans to be equally committed to both the idea of natural rights and the notion of a popular authority to limit the scope of those rights in the public interest. See, e.g., Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 944-55 (1993) (treating the very limited scope most Americans in the founding era gave to the natural, as well as constitutional, rights of free speech and free press based on perceived natural law limits on the valid exercise of those freedoms). If the framers of the First Amendment intended to insulate from legal censure public political discourse, and even criticism of government, it also seems likely that they would have viewed advocacy of resistance to democratically enacted laws, as in the tax-resistance movement, or the advocacy of rejection of the jurisdiction of courts established by constitutionally prescribed methods, as with the Freemen in Montana, as examples of unprotected "license" rather than protected

aside, difficult questions raised by the activities of some private militia groups may also provide the Supreme Court with an opportunity to think more carefully about the limits previously established concerning the freedom granted to potentially dangerous advocacy groups under the First Amendment. This Article will present in Part II how the Second Amendment may limit regulation of private militias, and in Part III how the First Amendment may also limit regulation of private militias. This Article offers a suggestive rather than exhaustive approach to how these constitutional amendments limit the extent to which the state may regulate militia activities. The Article concludes in Part IV that carefully applying constitutional tenets can simultaneously protect individual rights and the safety of the community at large.

II. MILITIAS AND THE SECOND AMENDMENT

A. *The Militia Clause of the Second Amendment*

First, it is important to clarify that the clause of the Second Amendment that might appear most relevant to the current debate about constitutional protections for private militia groups, the so-called Militia Clause,⁹ is not directly relevant at all. Some would tell us that this is because today's private militia groups do not constitute the "militia" contemplated by the Militia Clause.¹⁰ They may well be right. The Second Amendment refers to a militia which was not a small, private group of concerned citizens, but one which, in theory, was comprised of the whole people (meaning at that time basically all adult males).¹¹

"speech."

9. The Militia Clause of the Second Amendment states: "A well-regulated Militia, being necessary to the security of a free state" U.S. CONST. amend. II.

10. See, e.g., Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5 (1989).

11. For example, in a classic statement of militia ideology, a pseudonymous defender of the proposed federal Constitution explained that Americans need not fear the authority it granted to Congress to call out the militia because the militia "comprehends all the male inhabitants from sixteen to sixty years of age" and "includes the knowledge and strength of the nation." *A Letter from a Gentleman in a Neighboring State to a Gentleman in this City*, in 3 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 380, 389 (Merrill Jensen ed., 1978) (1787) [hereinafter *Letter from a Gentleman*]. He concluded:

Against whom will they turn their swords? Against themselves!—to execute laws which are unconstitutional, unreasonable, and oppressive upon themselves! Absurdity itself could never have thought of raising an objection on this ground. . . . That when Congress resort to the militia, which is the

In theory and in practice the militia represented the community as a whole.¹² By contrast, today's private militias are tiny minority factions that exist on the fringes of the American community. Far from embodying the community, these groups mistrust the state and federal governments, which are elected and supported by most voting Americans.¹³ Despite their weaknesses, these governments enjoy perhaps stronger overall democratic legitimacy than any governments in history.¹⁴ While private

body of the people, for the support and execution of the laws of the Union, it is done in confidence that the laws are just and good, and worthy of the support of the people, otherwise Congress can have no reason to expect support from that quarter.

Id.

12. As a conceptual matter, republican theory perceived the militia as an intermediate institution, standing between the citizens or subjects and the governmental regime, in much the same way as the jury was seen as a continuous popular check on government. *See, e.g.,* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1170-71 (1992) (describing the militia in contrast to standing armies inasmuch as it implied "[m]en serving alongside their families, friends, neighbors, classmates, and fellow parishioners," suggesting that "civilian control over the military would be beautifully internalized"; further describing the militia as "a local institution, bringing together representative Citizens to preserve popular values of their society"); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 647 (1989) (citing sources describing the militia as consisting of "the whole people"); *id.* at 650 (militia reflected a republican theory that stressed "the value of participation in government, as contrasted to mere representation by a distant leadership"); David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551, 554 (1991); (stating that the militia in republican theory "constituted a forum in which state and society met and melded" and in which "the line between state and people ideally disappeared," and stating further that this feature is what enabled the militia to resist equally both "demagogic rebellion" and the despotism of a corrupt state). In colonial America, the militia was generally organized at the local level by cities, towns, and political districts; the members of the militia usually elected their own officers; and there was often little in the way of an effective command structure from above. *See* James Biser Whisker, *The Citizen-Soldier Under Federal and State Law*, 94 W. VA. L. REV. 947, 955 (1992). Local militias were sufficiently organized from the "ground up," as opposed to from the "top down," that the same institutions that colonists viewed as local militias acting to defend the rights of the colonists were viewed as unauthorized, and illegal, forms of organized resistance by the English. *See, e.g.,* Thomas B. McAfee & Michael P. Quinlan, *Bringing Forward the Right to Keep and Bear Arms: Do Text, History, or Precedent Stand in the Way?*, 75 N.C. L. REV. 781, 842 & n.200 (1997).

13. In January of 1996, it was estimated that more than 15,000 people were connected to private militias in the United States. *See* Kenneth S. Stern, *Militia Mania: a Growing Danger*, U.S.A. TODAY, Jan. 1, 1996, at 13. While some see such figures as evidence of a growing threat, it is equally clear that the movement remains a fringe element of the American political scene.

14. During the course of more than 200 years of American democracy, the steady course of development has been toward an ever-expanding franchise. Imperfect as they seem, American governments embody the will of the people at least as much as any framers recognize as legitimate.

militia members see themselves as friends of liberty, the overwhelming majority of Americans would deny that these groups represent, or speak with, the voice of "the people."

On a related note, some commentators contend that the National Guard (as an entity of state government) is today the functional equivalent of the militia contemplated by the Second Amendment.¹⁵ These commentators have read too much into the text of the Second Amendment, fearing that a broad interpretation of the language would protect private militias.¹⁶ In fact, both clauses of the Second Amendment have direct antecedents in the state constitutions of the early American republic,¹⁷ and the Militia Clause provides a general statement of civic republican political theory that reflects a centuries-old preference for citizen-based defense systems over standing armies.¹⁸ No evidence supports the view that the purpose of the Second Amendment was to ensure the means by which the state governments could protect themselves against a federal leviathan. Nor is it clear that the framers of the Second Amendment thought of the militia as simply an arm of the state instead of as a creature of the people as participants in local and state government.¹⁹

15. See, e.g., Ehrman & Henigan, *supra* note 10, at 40. Indeed, it has been contended that only an institution formed by state governments could constitute the "militia" referred to in the Second Amendment because the central purpose of the Amendment was to preserve the power of states to maintain their own militias and to preclude federal abuse or neglect of the militia system of the states. See *id.* at 30 (contending that the sole purpose of the Second Amendment was to guarantee "the ability of the states to maintain an effective militia").

16. For a thorough critique of the modern argument that the Second Amendment is a product of the debate over the powers given the nation over the state militias, see McAfee & Quinlan, *supra* note 12, at 824-29.

17. See *supra* note 6 (citing provisions guaranteeing the right to keep and bear arms). See also VA. CONST. art. 13 (1776), reprinted in 7 THORPE, *supra* note 6, at 3814 (providing that "[a] well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free State"); MD. CONST., Decl. of Rts. XXV (1776), reprinted in 3 THORPE, *supra* note 6, at 1688 (similarly worded provision); N.H. CONST. XXIV (1784), reprinted in 4 THORPE, *supra* note 6, at 2456 (similarly worded provision).

18. For a general overview of the early American commitment to the tradition of viewing militias as a bulwark of liberty, see MALCOLM, *supra* note 3, at 141-43, 150, 155-56, 159. For treatments of the relationship between the declarations favoring militias and the right to keep and bear arms, in the state constitutions of the early American republic as well as in the federal Constitution, see David T. Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J.L. & POL'Y 1, 33-55 (1987); McAfee & Quinlan, *supra* note 12, at 852-65.

19. See McAfee & Quinlan, *supra* note 12, at 824-29. The existence of the state militias was viewed as a potential check of national power, but this check ran in favor of popular liberty more than in favor of the state governments. Indeed, the potential of state governments to serve as organizers of resistance to federal en-

There is an even more fundamental reason why the Militia Clause does not offer significant protection to modern private militias. The Militia Clause was a purely declaratory statement, used to proffer a central reason to support the right guaranteed in the Right to Arms Clause of the same amendment.²⁰ It does not command or prohibit anything. It does not mandate that there be a militia at all.²¹ The Clause simply restates a fundamental principle of civic republican constitutional thought: a strong preference for citizen-based militias over standing armies as the liberty-enhancing means of collective defense.²² The basic language of the Militia Clause had appeared in the declarations of rights of several state constitutions.²³ Advocates for a federal bill of rights proposed to include similar language.²⁴ The drafting history of the federal Bill of Rights suggests that Madison placed the Militia Clause first because it was a declaration of principle. In so doing he avoided compromising his general approach, that of focussing on specific commands and prohibitions that would fit within a Constitution of enforceable limits.²⁵ In

croachment was seen as an added safeguard for the people.

20. See *id.* at 864-65.

21. As David C. Williams has noted, "[t]he militia is so central to republican thinking that it is surprising that the proponents of the Amendment did not secure a constitutional mandate for one." Williams, *supra* note 12, at 594. He observes that Elbridge Gerry proposed that the Second Amendment proposal be revised "to mandate a federal duty to assemble a militia, but his motion failed without a second and without discussion." *Id.* (citing 1 ANNALS OF CONG. 750-51 (Joseph Gales ed., 1789)).

22. See McAfee & Quinlan, *supra* note 12, at 852-53.

23. See VA. CONST. art. 13 (1776), reprinted in 6 THORPE, *supra* note 7, at 3814; N.H. CONST. art. XXIV (1784), reprinted in 5 THORPE, *supra* note 7, at 2456; MD. CONST. art. XXV (1776), reprinted in, 3 THORPE, *supra* note 6, at 1688.

24. See, e.g., McAfee & Quinlan, *supra* note 12, at 860-62 (treating Virginia's proposed militia provision).

25. Madison is widely, and correctly, praised for developing an important innovation in the statement of rights as legal commands and prohibitions in the federal Bill of Rights, as contrasted with the general declarations of widely-shared principles as found in the state declarations of rights. See, e.g., Robert C. Palmer, *Liberties as Constitutional Provisions 1776-1791*, in CONSTITUTIONS AND RIGHTS IN THE EARLY AMERICAN REPUBLIC 55, 116 (1987); Bernard Schwartz, *Madison Introduces His Amendments, May-June, 1789*, in 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1008-09 (Bernard Schwartz ed. 1971). Donald S. Lutz has observed that the state declarations of rights pervasively used "language of obligation rather than command—'ought,' 'should,' etc.," and that this language sharply contrasted with language of command found in the same constitutions' "frames of government" that established the allocation of powers within state government). DONALD S. LUTZ, POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS 65-66 (1980). Madison's shift to the language of command, even as contrasted with the amendments proposed by the state ratifying conventions, went together with his decision to propose inclusion of the amendments into the body of the Constitution rather than in a "declaration of rights" that would precede

short, the Militia Clause is not a command or prohibition, but is instead a declaration of principle that reflects the tradition of stating agreed upon principles in foundational documents, as in the states' declaration of rights.²⁶ However, the real punch of the Second Amendment is found in the second clause, which directly prohibits the government from infringing on the people's right to keep and bear arms.²⁷

B. The Right to Arms Clause of the Second Amendment

The legal guarantee of the Second Amendment is a popular right to have and use firearms. The right to arms facilitated personal self-defense, as well as defense of others, and was viewed as something of a duty in an era that lacked professional law enforcement agencies.²⁸ The right to arms also insured that

the body of the Constitution; it also reflects his expectation that his amendments would be understood as limiting provisions that could be enforced by courts. See Thomas B. McAfee, *The Bill of Rights, Social Contract Theory, and the Rights "Retained" by the People*, 16 SO. ILL. U. L.J. 267, 303-04 (1992) (describing Madison's new emphasis on judicial review as one of the fruits of legal limitations included in the Bill of Rights and describing statements of principle, derived from the Virginia Declaration of Rights, that Madison proposed to add to the preamble to the Constitution rather than among the individual rights limitations to be inserted in the body of the Constitution).

26. Indeed, this tendency to restate fundamental principles in the declarations of rights was ridiculed by the hard-edged Alexander Hamilton. In defending the omission of a bill of rights from the proposed Constitution, Hamilton suggested such documents were filled with "aphorisms" that "would sound much better in a treatise of ethics than in a constitution of government." THE FEDERALIST NO. 84, at 536 (Alexander Hamilton) (Henry Cabot Lodge ed., 1888).

27. The thesis about the relationship between the clauses of the Second Amendment developed in text above is more comprehensively developed in McAfee & Quinlan, *supra* note 12, at 852-66. The cited article demonstrates not only Madison's unique approach to drafting the federal Bill of Rights, as described above, but, more specifically, the manner in which Madison shifts the Right to Arms Clause from a mere declaration of a right to a specific prohibition on government while proffering no similar transformation of the Militia Clause. See *id.* At the same time, the order of clauses is reversed from the Virginia proposal from which Madison drafted, so that the Militia Clause is actually de-emphasized and rendered as a subordinate clause (consistent with its status as a mere declaration of principle rather than an enforceable guarantee). See *id.*

28. That the amendment was understood to refer to a private right is confirmed by the contemporaneous statement of Trench Coxe, a prominent supporter of the federal Constitution who was closely connected to James Madison. In June of 1789, just one week after Madison introduced his proposed amendments in Congress, Coxe wrote in praise of the proposed right to keep and bear arms, which, he said, "confirmed" the people's right "to keep and bear their private arms." Philadelphia Federal Gazette, June 18, 1789, reprinted in THE ORIGIN OF THE SECOND AMENDMENT 670-71 (David E. Young ed., 1991). In a single statement, Coxe clarifies that the guarantee "confirmed" a preexisting individual right, rather than establishing a new state right

the populace from which a citizen-based militia could be drawn would have access to arms.²⁹ Finally, an armed citizenry would serve as a check on government tyranny and would reinforce the right of resistance that the people possess against a government that becomes abusive of the people's rights.³⁰ Accordingly, the right to have and use arms for lawful purposes extended to every adult individual, qualified only by the universally recognized power of the state to keep firearms from convicted felons and other clearly untrustworthy individuals.³¹

to maintain militias, and that it referred to the traditional right to keep "private arms" for the purposes that individuals had traditionally kept them. For the insight that among the legitimate uses of private arms during this period was the duty of citizens to aid in law enforcement, either individually or as part of a *posse comitatus*, see Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 LAW & CONTEMP. PROBS. 143, 145 (1986) (observing that the citizen gun ownership involved "a system under which virtually every male of military age was legally required to possess his own arms for personal defense, crime prevention, and community defense"); Joyce Lee Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 HASTINGS CONST. L.Q. 285, 291-92 (1983) (offering insights into rights and duties relating to firearms in the seventeenth and eighteenth centuries).

29. See William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1244 (1994) [hereinafter *The Second Amendment*] (observing that the Second Amendment refers to the security of a "free state" rather than "the security of THE STATE," in contrast to "certain national constitutions that put a privileged emphasis on the security of 'the state,'" such provisions do not appear in a bill of rights nor include language suggesting any right to arms "apart from state service" because such a recognition "might well pose a threat to the security of 'the state'").

30. See, e.g., 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 746 (1833) (contending that "[t]he right of citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic" because "it offers a strong moral check against the usurpation and arbitrary power of rulers"); Levinson, *supra* note 12, at 647-50 (describing what he labels the "civic republican" purpose of the Second Amendment to provide an armed citizenry as a check on tyrannous government).

31. It remains true today that a number of lower federal courts have construed the Second Amendment as guaranteeing a right only to militiamen, or under circumstances in which the private possession of arms directly facilitated the establishment of a militia (circumstances that no longer exist in any state). See, e.g., *Love v. Pepersack*, 47 F.3d 120 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 64 (1995); *United States v. Nelson*, 859 F.2d 1318 (8th Cir. 1988); *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983); *United States v. Oakes*, 564 F.2d 384 (10th Cir. 1977), *cert. denied*, 435 U.S. 926 (1978); *United States v. Johnson*, 497 F.2d 548 (4th Cir. 1974). See also *Fresno Rifle & Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723, 730 (9th Cir. 1992) (relying on *Cruikshank* and *Presser*, the Court refused to examine the scope of the Second Amendment, stating that "it is for the Supreme Court, not us, to revisit the reach of the Second Amendment."). Considering, however, that these cases appear to misread controlling Supreme Court precedent, and to do a grave disservice to the original materials, there is growing scholarly consensus that such decisions are ripe for reconsideration. See, e.g., Michael P. Quinlan, *Is There a Neutral Justification for Refusing to Implement the Second Amendment or is the Supreme Court Just "Gun Shy"?*, 22 CAP. U. L. REV.

Implicit in this right to "keep and bear" arms, and consistent with the purposes for which it is granted, is the right to make use of them and to become skilled in their use. For example, from the individual right to own and use firearms, it should follow that privately operated gun clubs are protected in the same way that birth control and abortion clinics receive constitutional protection from modern Supreme Court precedent concerning the right of privacy.³² Firing ranges and gun clubs should receive constitutional protection precisely because they have standing to assert the Second Amendment rights of their members.³³ To the extent that private militia groups amount to glorified private gun clubs, by encouraging their members to become proficient in the use of small arms and by providing property or facilities to accomplish this, these groups also would be constitutionally protected. The underlying constitutional right belongs to individual citizens who happen to join private militia groups, but the groups would have the power to invoke the personal rights of its members to engage in constitutionally protected activity. Of course there would be limits on the constitutional protection offered to all citizens would. The use of firearms to violate criminal laws, or to participate in a conspiracy to do so, would obviously be unprotected, as would violations of valid

641, 682-88 (1993) (examining the deficiencies and weaknesses of lower federal court decisions relating to the Second Amendment); Van Alstyne, *supra* note 29, at 1254-55 (suggesting that it is time to reconsider the Second Amendment in light of modern historical research). It may also be questioned whether the Second Amendment would bear on the constitutionality of state laws restricting the right to arms, inasmuch as the Second Amendment has not yet been incorporated within the Fourteenth Amendment. See, e.g., *Love*, 47 F.3d at 123-34. The only Supreme Court cases considering the matter, however, were decided at a time prior to the Court's beginning a process of selective incorporation, and there is every reason to think that the Court's application of its own selective incorporation criteria would properly yield the incorporation of the Second Amendment as well. See Quinlan, *supra* at 663-71. Incorporation doctrine aside, moreover, many states, including Montana, have state constitutional guarantees of the same basic right to arms; indeed, Montana's guarantee explicitly recognizes the right of individuals to firearms. See MONT. CONST. art. II, § 12 (recognizing the "right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of civil authority when thereto legally summoned").

32. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965) (holding that physicians and clinics have standing to raise constitutional claims of married couples that they serve).

33. Interestingly, the Montana statute that was drafted to prohibit "training activities in furtherance of unlawful acts of violence," MONT. CODE ANN. § 45-8-107 (1995), specifically exempts from its strictures "an activity intended to teach or practice self-defense or self-defense techniques," MONT. CODE ANN. § 45-8-109(3)(f) (1995), or "a facility, program, or lawful activity related to firearms instruction or training intended to teach the safe handling and use of firearms." MONT. CODE ANN. § 45-8-109(3)(g) (1995).

firearms regulations (state or federal).

Some might question whether the rights of individuals to arms might, in general terms, be diminished somewhat in a group context, especially where the group is a political organization that is ideologically charged and advocates extremist views that many involve the threat of violence.³⁴ However, if political groups, including the private militias, were singled out for unique regulatory restrictions or were completely prohibited from gun possession in connection with group activities based purely on their political or ideological context, such laws would almost certainly be viewed as unconstitutional conditions on the exercise of First Amendment freedoms of speech and association. This would be unconstitutional quite apart from any Second Amendment question.³⁵ Moreover, even if legislation extended to all political parties and all organizations, a general prohibition on possession of firearms in connection with the activities of such groups would still be invasive of rights to associate and bear firearms secured by the First and Second Amendments.³⁶

The more significant question concerns whether there is a point at which the activities of private militia organizations, beyond their facilitation of personal small firearms training, would pose the sort of threat to public safety that would justify regulations limiting a group's activities relating to firearms notwithstanding the Second Amendment rights of their members. At least thirty-eight states have answered this question in the affirmative and thus have laws that prohibit the formation of private military units or, in other cases, various activities associated with them.³⁷ To the extent that these restrictions have

34. See, e.g., Morris Dees, *Militias Still "A Recipe for Disaster,"* USA WEEKEND, April 14, 1996, at 4 (describing various unlawful acts by militia members and evidence of stockpiling of homemade explosives, etc., by individuals or groups, associated with the militia movement).

35. Cf. *Frost v. Railroad Comm'n of State of Cal.*, 271 U.S. 583, 593-94 (1926) (holding that government may not manipulate constitutional rights out of existence by withholding a valuable privilege if the right is not surrendered). In such a case, the state imposes an unconstitutional condition by in effect telling an individual that she may exercise her freedom of political association only so far as she is willing to give up her Second Amendment rights. Individuals should not be seen as sacrificing a fundamental right to the means of self-defense merely by joining a political organization, and such a law would place all politically active individuals at risk. See also *infra* Part III.

36. See U.S. CONST. amend. I & II; William Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); see also *infra* Part III.

37. See R. J. Larizza, Comment, *Paranoia, Patriotism, and the Citizen Militia Movement: Constitutional Right or Criminal Conduct?*, 47 MERCER L. REV. 581, 583

been defended on the grounds that the Second Amendment secures a right only to the states or to state militiamen, or that the Second Amendment does not apply to the states, we have already discovered that those arguments stand on dubious footing.³⁸

At the other end of the spectrum, it has been contended that the Second Amendment should be read not only as securing "an individual right to keep and bear arms," but also, given its "underlying purpose . . . to provide citizens with the ability to defend against government oppression," as establishing "a collateral right of the people to form citizen militias."³⁹ Because the Second Amendment is designed to facilitate a hypothetically necessary insurrection against tyranny, the people's right to arms should, according to this argument, extend to any organized use of weapons that does not itself constitute a valid crime against the state (apart from the state defining firearms possession as a crime). On this view, short of unlawful use of firearms and criminal conspiracies, there would be no valid limits on the use of firearms by political groups. Thus the argument goes too far. While it is true that one purpose of providing for the right to arms is to facilitate mass insurrection if it proves necessary, this purpose does not define the scope of the Second Amendment guarantee. For example, the legal right does not extend all the way to conducting such an insurrection.⁴⁰ Such a move is neces-

n.6 (1996). In Montana, there is no prohibition on the formation of a private militia, but the law does prohibit assembly "for the purpose of training in, instructing in the use of, or practicing with any technique or means capable of causing property damage, bodily injury, or death, with the purpose of employing the training instruction, or practice in a civil disorder." MONT. CODE ANN. § 45-8-109(1) (1995).

38. They have been defended in precisely these terms. See, e.g., *Vietnamese Fishermen's Assoc. v. Knights of the Ku Klux Klan*, 543 F. Supp. 198, 210, 216-17 (S.D. Tex. 1982); Joelle E. Polesky, Comment, *The Rise of Private Militia: A First and Second Amendment Analysis of the Right to Organize and the Right to Train*, 144 U. PA. L. REV. 1593, 1630-40 (1996).

39. Larizza, *supra* note 37, at 609.

40. Thus, a common fallacy of critics of the individual right construction of the Second Amendment is that the argument implies a constitutional right to commit insurrection against government. See, e.g., Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 VAL. U.L. REV. 107, 110 (1991) (claiming that the view that the Second Amendment was intended to provide a check against state and federal tyranny "amounts to the startling assertion of a generalized constitutional right of all citizens to engage in armed insurrection against their government;" characterizing this "insurrectionist theory" as a "profoundly dangerous doctrine of unrestrained individual rights" that would "threaten the rule of law itself"). However, the recognition that armed revolt might prove to be a necessity in reasserting popular sovereignty over a government bent on imposing tyranny does not amount to a claim of constitutional right to insurrection, let alone to all the means necessary to accom-

sarily an extra-legal act, not to mention a step of last resort. Similarly, the logic of the text read in historical context establishes that the right to "bear" arms necessarily is limited to weapons that an individual can carry, thus precluding use of heavy military weapons, even if essential to a modern armed revolt.⁴¹ The right to arms does not translate into a right of revolution, or to a right to *everything* that might be essential to successfully launching one.

Moreover, there is a tradition that suggests a group right to bear arms which dates back to John Adams, who drafted the Massachusetts State Constitution's guarantee of a right to keep and bear arms. This tradition recognizes that a private group's use of firearms at some point presents a different question from the personal use of firearms in self-defense. The provision drafted by Adams stated that "[t]he people have a right to keep and bear arms for the common defense."⁴² While some objected that the focus on "common defense" failed to clarify that the right was also intended for self-defense,⁴³ the historical evidence suggests that Adams drafted the provision to foreclose the invocation of a right to employ arms by factional groups within society and yet provide for the right to keep private arms for self-defense.⁴⁴ In one of his most important constitutional works, Adams stated the view that firearms should not be used according to "individual discretion, except in private self-defense," because it would

plish it.

41. See Don B. Kates, *The Second Amendment: A Dialogue*, 49 LAW & CONTEMP. PROBS. 143, 146-48 (1986).

42. MASS. CONST. Pt. I, art. XVII (1780), reprinted in 3 THORPE, *supra* note 6, at 1892.

43. See Robert E. Shalhope, *The Armed Citizen in the Early Republic*, 49 LAW & CONTEMP. PROBS. 125, 134-35 (1986) (emphasizing that communities objected that the arms provision "is not expressed with that ample and manly openness and latitude which the importance of the right merits" and demanded the inclusion of language reflecting that it is "an essential privilege to keep Arms in Our Houses for Our own Defence"). While these communities correctly observed that the arms guarantee could have more clearly indicated that the right extended to private uses such as self-defense, Halbrook points out that the right to keep arms in private homes seems clearly contemplated by the right "to keep and bear arms." See HALBROOK, *supra* note 2, at 197.

44. For one thing, Adams was a strong supporter of the individual right to have arms as a means of self-defense. See HALBROOK, *supra* note 2, at 58 (reviewing Adams' record as an attorney and a revolutionary leader supporting the established English right to have firearms for self-defense). For another thing, Adams was equally the draftsman of the guarantee of the people's right of "defending their lives and liberties" and "protecting property," a guarantee that hardly suggests a lack of interest in securing the private right of self-defense. MASS. CONST. Pt. I, art. I (1780), reprinted in 3 THORPE, *supra* note 6, at 1889.

"demolish every constitution, and lay the laws prostrate, so that liberty can be enjoyed by no man."⁴⁵ Adams apparently feared the potential for illicit collective employment of arms by private armies, which presented the dangers of unlawful mob actions and illegitimate insurrections.⁴⁶

Instead, a more plausible and logical argument for recognizing a right of groups to "keep and bear" arms would be that the right of self-defense belongs to groups as much as it does to individuals. Arguably, if an advocacy group has a constitutionally protected right to exist under the First Amendment, such a group ought to be able to have and use arms for the same legitimate, defensive purpose for which individuals possess a right to arms.⁴⁷ It is difficult to be certain that Adams' views in opposition to a private group's rights to use firearms were necessarily predominant at the time of the adoption of the Second Amendment. While the differences in language can easily be overstated, the text of the Second Amendment, unlike that of the Massachusetts Constitution defended by Adams, does not limit the purpose of the right to arms to that of "collective defense" (of the people as a whole or of the state).⁴⁸ The omission of this

45. 3 JOHN ADAMS, A DEFENSE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 475 (reprint of 3d ed., 1797); *see also*, Application of Cassidy, 51 N.Y.S.2d 202, 205 (N.Y. App. Div. 1944), *aff'd*, 73 N.E.2d 41 (N.Y. 1947) (existence of "organized private militia" poses threat of "prevent[ing] a democratic form of government, such as ours, from functioning freely, without coercion, and in accordance with the constitutional mandates"); Vietnamese Fishermen's Assoc. v. Knights of the Ku Klux Klan, 543 F. Supp. 198, 209 (1982) (citing *Cassidy*).

46. Adams thus wrote that the militia is "created, directed and commanded by the laws, and ever for the support of the laws." 3 ADAMS, *supra* note 45, at 475. Notice, however, that Adams' concern about the potential for lawless mob action, and his insistence that the militia exists to support the laws, does not preclude the possibility of the general militia, or an armed populace, serving to check tyranny. The idea of a right to resistance presumed an aroused populace, not a mere faction, acting against a fundamentally lawless government, a regime bent on usurping constitutional and legal authority and on destroying the constitutional order itself.

47. *See, e.g.*, JOHN FALTER & DON B. KATES, JR., THE NECESSITY OF ACCESS TO FIREARMS BY DISSENTERS AND MINORITIES WHOM GOVERNMENT IS UNWILLING OR UNABLE TO PROTECT, IN *RESTRICTING HANDGUNS: THE LIBERAL SKEPTICS SPEAK OUT* 185, 186-87 (Don B. Kates ed., 1979) (recounting instances of the necessary use of arms for self-defense during the American Civil Rights Movement). In fact, there is room for doubt whether in general there is any need to distinguish between a group and individual right of arms for self-defense; presumably the individual right would protect the legitimate self-defense interests of all the members of an advocacy group. The real question is whether various sorts of group activities, including the formation of military units and training in military tactics falls within, or might be viewed as exceeding, the right to have firearms for self-defense guaranteed by the right to keep and bear arms.

48. Compare MASS. CONST. Pt. I, art. XVII (1780), *reprinted in* 3 THORPE, *supra*

qualifying language could merely reflect the preference to avoid any inference against a right to private arms for self-defense. However, it is at least possible that this absence reflects support for the broadest sort of right to keep and bear arms provided to individuals and groups, subject only to the customary limits on those who were unfit to have arms and other regulations essential to prevent the abuse of firearms.⁴⁹

Perhaps the more fundamental point is that there is no reason to think that the Second Amendment was intended to recognize an absolute right to the employment of firearms—for an individual *or* group—beyond the right of self-defense and defending the community as a whole.⁵⁰ However, while history is hardly decisive for purposes of analyzing state regulatory authority, good reason exists for distinguishing between an individual and a group right to keep and bear arms. An armed and trained group or faction, especially one that is fairly characterized as a private army, is far more likely to pose a serious threat to public peace and safety than an individual who owns and is trained in the use of a gun.⁵¹ For example, state laws that have

note 7, at 1892 (“The people have a right to keep and to bear arms for the common defense”), *with* U.S. CONST. amend. II (“the right of the people to keep and bear arms shall not be infringed”).

49. It might also be contended that, given the demise of the formal militia structure, as well as the rise of the modern professional army, the right to arms guarantee should be given an especially broad construction in our modern era. It is true that Madison and others predicted that the armed citizen militias of the states could easily overwhelm the assumedly small national military force if the national government ever were to overstep its bounds. *See, e.g.,* THE FEDERALIST NO. 46, at 297-98 (Henry Cabot Lodge ed., 1888); *Letter from a Gentleman, supra* note 11, at 389. Arguably the only hope a citizens’ revolt might have in the modern era, and thus the only meaningful check on government the right to arms is likely to supply, would not exist unless the Second Amendment is construed to give broad power to private militias to prepare for such a day. Some would, of course, question the idea of an armed citizenry as an important check on government in the modern era, however much protection is offered to private groups by the Second Amendment. *See, e.g.,* Charles J. Dunlop, Jr., *Revolt of the Masses: Armed Civilians and the Insurrectionary Theory of the Second Amendment*, 62 TENN. L. REV. 643 (1995). A more effective point may be that, original meaning aside, the contemplated political check to be supplied by an armed citizenry is only likely to be effective in a political era in which distrust of government leads to popular insistence on broad legislative protections for the use of guns by private groups or the establishment of a bona fide citizen militia. But don’t hold your breath.

50. *See, e.g.,* Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 315 (1991); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 257-84 (1983); Van Alstyne, *supra* note 29, at 1253-54.

51. *See* *Presser v. Illinois*, 116 U.S. 252, 267-68 (1886) (the state’s exercise of the power “to control and regulate the organization, drilling, and parading of military bodies and associations” is “necessary to the public peace, safety and good order”).

historically prohibited private groups from parading under arms⁵² seem reasonably designed to preserve peace and to prevent violence. After all, even the First Amendment guarantee of clearest relevance safeguards only the right "*peaceably* to assemble."⁵³ This description hardly fits the picture of an armed group parading down main street. While courts have upheld the power of states to forbid individuals from carrying firearms without a permit (especially when concealed),⁵⁴ the case in favor of upholding such limits on groups seems far more compelling.

Surely, governmental regulations should constitutionally be required to focus on questions of substance rather than on nomenclature. To the extent that a political advocacy group styles itself a "militia," but functions essentially as an ideologically driven "gun club," the Second Amendment rights of its members should give the group constitutional protection for gun-related activities. It is not reasonable to think that the constitutional rights of such a group's members would go by the boards because they all wear army fatigues while they practice or receive instruction in the use firearms. Members of political groups do not sacrifice their individual right of self-defense by virtue of their political association. As will develop subsequently, private militia groups may also receive protection from the First Amendment.⁵⁵

On the other hand, such groups could in some instances become genuine private armies, characterized by a meaningful military command structure, stockpiling of significant stores of weapons, and systematic military training and drilling in the tactics of warfare (which are likely to include techniques of terrorism associated with guerrilla warfare that citizen armies almost inevitably must employ). Under such circumstances, legislation prohibiting the creation of private armies, or the training of private military units, should be held applicable and constitutionally valid.⁵⁶ The lines between the individual's constitution-

52. See, e.g., *id.* at 262 (referring to challenged Illinois statute making it unlawful "to drill or parade with arms").

53. U.S. CONST. amend. I, cl. 5.

54. See, e.g., *Nunn v. Georgia*, 1 Ga. 243 (1846) (upholding law prohibiting concealed carrying of various weapons); *Aymette v. State*, 2 Tenn. (1 Hum.) 154 (1840) (upholding law prohibiting the concealed carrying of bowie knives).

55. See *infra* Part III.

56. In fact, a number of the statutes prohibiting the formation or training of private armies are limited by a requirement of unlawful purpose to which the organization or training is directed. See Polesky, *supra* note 38, at 1609 (citing statutes). While this article does not contend that such limiting language is required by the Second Amendment, such an approach may well strike an appropriate balance between public security needs and the interest such groups have in freedom to advo-

ally protected right to own and use firearms and to associate with like-minded others and the creation of private armies that the state is empowered to prohibit may not always be easy to draw. Yet even without the aid of text or history, line-drawing here need not prove any more difficult than line-drawing in many other areas of constitutional law.⁵⁷

III. THE FIRST AMENDMENT

The First Amendment bears on the authority to regulate private militias not only because of the free speech rights of militia members, but also because the Amendment guarantees a right of political association.⁵⁸ While the rights of speech and association are closely related to each other, potential militia regulations may raise questions concerning each of these First Amendment freedoms.

A. *Protected Speech and Association: Some Fundamentals*

The right to free speech provides militia groups with a constitutional right basis to advocate radical political ideas,⁵⁹ preach government conspiracy theories, advocate preparation for some doomsday scenario, and even choose to spread messages of hate and prejudice.⁶⁰ They can also parade and demonstrate on

cate vigilance and to prepare for feared governmental abuses.

57. It has been contended, moreover, that some statutory prohibitions on the formation of private militias might be void because of their vagueness in failing to provide adequate notice of what constitutes a proscribed "militia" or "military organization." See Larizza, *supra* note 37, at 600. The point is well taken, provided it is also understood that "such a broad and unconstitutional reading of the associational ban could be avoided if its prohibitions were narrowly construed to accommodate constitutionally protected activities." *Id.* For treatment of the analogous First Amendment overbreadth issue, see *infra* notes 89-93 and accompanying text.

58. See, e.g., *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) (noting that an individual's right to speak, worship, and petition government "could not be vigorously protected from interference by the State, unless a correlative freedom to engage in group effort toward those ends were not also guaranteed").

59. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

60. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (stating that the First Amendment does not permit the state "to impose special prohibitions on those speakers who express views on disfavored subjects"); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (stating that "a bedrock principle underlying the First Amendment" is "that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"); *Collin v. Smith*, 578 F.2d 1197

behalf of these views.⁶¹ These rights have been extended to many unpopular groups before the militias. First Amendment standards reflect deep skepticism as to government's capacity to deal fairly in policing the content of speech.⁶² Thus, over time it has become fundamental hornbook law that content-based regulations of expression are subjected to the strictest scrutiny and are presumptively unconstitutional.⁶³

Applied to the activities of the militia, the First Amendment clearly protects certain types of speech and expression. Private militias have the right to call themselves "militias" and to march in military-style uniforms. This right to name oneself is almost certainly protected from state laws which prohibit the formation of private militias, at least to the extent that such laws are applied to these groups simply because of their adoption of that name. While there is no case law directly on point, it seems likely that the right of political association extends to naming an organization, and the right to name an organization also falls within a right to free speech. The name of an organization is speech, for it "convey[s] a particularized message" to be "understood by those who view it."⁶⁴ The whole idea of a militia movement embodies these major themes and concepts, including the threat posed by big government and the need for citizen vigilance in preparing to defend freedom. Thus, the First Amendment protects a group when that group identifies with the militia movement by naming itself a "militia."

In addition to naming an organization, the use of uniforms as symbols of readiness, preparation, solidarity, and even intense opposition to particular policies or to government in general will likely be treated as protected speech. This is symbolic speech in that uniforms help spread the message of the organization by identifying those who wear them as supporters of a particular cause. The medium of uniform is as much the message as the black arm bands worn by students to protest the Vietnam War in *Tinker v. Des Moines Independent Community School District*.⁶⁵ The courts would likely find that militia uniforms have

(7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978) (holding that a ban on demonstration by American Nazis in Jewish community deeply affected by holocaust violates the First Amendment).

61. See, e.g., *Cox v. New Hampshire*, 312 U.S. 569 (1941).

62. See, e.g., FREDERICK F. SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 80-86 (1982).

63. See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 790-92 (2d ed., 1988).

64. *Spence v. Washington*, 418 U.S. 405, 410-11 (1974).

65. 393 U.S. 503 (1969) (upholding students' free speech rights by allowing

both the intent and effect of conveying a message to those who look on, just as uniforms worn by other organizations (e.g., the American Nazis and the Ku Klux Klan) have been recognized as methods of communication, in and of themselves.⁶⁶

First Amendment law also offers protection to the actual creation of such militia organizations so that they function as political advocacy groups rather than as tightly organized and well-trained private armies.⁶⁷ It is difficult to perceive a state interest to stop the creation of militia organizations as such that would be great enough to override rights to free speech and association. It has been suggested that a statutory prohibition on private militias serves the neutral purpose of preventing the public from being misled as to the true identity of the militia of the state.⁶⁸ This stated purpose could be treated as a neutral and incidental regulation of speech-related acts rather than as a law targeted at the content of the views being expressed. However, it seems unlikely that the law would be upheld under the Supreme Court's free speech test for such regulations set out in *United States v. O'Brien*.⁶⁹ In *O'Brien*, the Court upheld a prohibition on draft card burning which was based on the non-speech purposes viewed by the prohibition. In so doing, the Court set a test requiring that the state not burden free speech more than is essential to advance an important state interest.⁷⁰ It is doubtful that a regulation based on the concern that the name "militia" is misleading would satisfy the *O'Brien* requirements in light of the specific factors to be addressed. First, the concern of preventing public confusion is not an especially important state interest compared to the speech rights of those claiming a status as a "militia." Second, it is highly doubtful that confusion by the public as to the unofficial status of militia groups (even if they use the name of the state in their title) is a serious problem. The public is well aware that private citizens have so organized and named themselves. Furthermore, the state could deal with this confusion by means short of prohibiting groups from calling

them to wear black arm bands to protest the war in Vietnam).

66. See, e.g., *Texas v. Johnson*, 491 U.S. 397 (1989) (treating flag burning as a form of symbolic speech).

67. See, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 919 (1982).

68. See, e.g., *Is Government Overstepping its Power in Regulating Militias?*, DETROIT NEWS, May 6, 1996, at A6. State Representatives contend that such a proposed prohibition reflects the policy "that nobody may mislead a person into believing that they are connected with the only organized militia in this state."

69. 391 U.S. 367, 376-77 (1968).

70. See *id.* at 377.

themselves a legal militia, including a prohibition on acts or statements representing that the private militia's activities have an official or authoritative status.

B. Actions Not Protected by the First Amendment: Beyond Association and Advocacy

Although the First Amendment offers protection to the act of naming a group a "militia," whether the First Amendment's protections extend to the formation of a fully functioning private army is another issue.⁷¹ At least one commentator has suggested that the First Amendment prevents the state from prohibiting the formation of a private army, but allows the state to proscribe particular paramilitary activities which have the intent of causing civil disorder.⁷² Ironically, the same commentator found that the Second Amendment offered no protection of any kind to private individuals or groups.⁷³ But to the extent that an organiza-

71. See *supra* notes 50-57 and accompanying text.

72. See Polesky, *supra* note 38, at 1612-20 (arguing that the prohibition of formation of private militias would violate speech and association rights); see *id.* at 1621-28 (arguing that anti-paramilitary training statutes do not infringe First Amendment freedoms); *id.* at 1627 (explaining that anti-training laws do not violate First Amendment because "militia members are not prevented from verbalizing their disenchantment" but only from "expressing it in a specific manner" that poses a threat to public health and safety). It is possible that the author of this Comment intended only to suggest that states may not prohibit organizations from describing themselves in military terms, but may prohibit them from actually becoming an effective military machine. See *id.* at 1616 (characterizing anti-organization statutes as denying individuals "a fundamental means of voicing their opinions"); *id.* at 1618 (emphasizing that such laws deny militia members "liberty to convene as a group" and thus "effectively deprives them of the ability to disseminate these views"). But see *id.* at 1606 (emphasizing that anti-organization statutes create "an outright ban on the creation of private militia" while "anti-paramilitary training statutes require proof of intent to commit a proscribed act"); *id.* at 1627 (emphasizing that "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"). The difficulty created by drawing the distinction between an "organization" that is protected and "training" that may be prohibited is that an already existing private military organization may pose at least as much of a threat as any that may be posed by military training. The freedom being asserted by such a group goes beyond expressive association, and the very distinction between regulations of speech content and regulations of activities that threaten societal interests (apart from the content of any advocacy involved) applies in the context of anti-organization statutes as much as it does in the context of statutes prohibiting certain kinds of training activities.

73. See *id.* at 1628-40. But cf., Larizza, *supra* note 37, at 600-18 (contending that the First Amendment right of association secures the right of citizens' militias to organize based in part on the perceived Second Amendment right of private citizens to form themselves into militias).

tion possesses all the characteristics of a private army, it becomes distinguishable from a mere advocacy organization.⁷⁴ This occurs because a fully trained military unit presents a greater threat to society's peace and safety than does a group that merely advocates doctrines that are considered dangerous. When a fully trained and ready military unit advocates and prepares for the necessity of violent overthrow of the government, it poses a threat to civil order in the same way as specific harmful, violent, or intimidating acts that are universally proscribed by law.⁷⁵ Accordingly, while the state may not be able to directly prohibit a group of people from forming an association which meets, advocates, and promotes political reform, it may prohibit the formation of a private army and require that the political advocacy organization eliminate the elements by which it functions as a full-fledged military unit.⁷⁶

A similar question arises concerning whether freedom of speech and assembly apply to marching with loaded or unloaded arms. It seems especially clear that a military-style parade with loaded weapons could be prohibited despite the First Amendment's freedom of speech.⁷⁷ It would be difficult to argue

74. A ban on a bona fide private army is thus analogous to a prohibition on "teaching the techniques of sabotage, the assassination of the President, the filching of documents from public files, the planting of bombs, the art of street warfare, and the like." *Dennis v. United States*, 341 U.S. 494, 581 (1951) (Douglas, J., dissenting). Thus one of the nation's foremost defenders of free speech values, Justice Douglas, recognized that even though "free speech is the rule, not the exception," there is a valid distinction between the communication of ideas, such as teaching the tenets of communist philosophy, including its abstract commitment to revolution, and the providing of training in "the techniques of terror to destroy the Government." *Id.* at 582, 585. As Professor Greenawalt has observed, even though training individuals in how to perform violent or illegal acts may require "communicative acts" that involve speech in an ordinary sense, they "may be treated as outside the reach of the First Amendment because their 'action element' heavily dominates any expressive value." KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* 244 (1989). By the same token, an organization that is established, structured, equipped, and trained so as to function as a genuine military unit has, without more, gone beyond the right of expressive association guaranteed by the First Amendment.

75. See, e.g., *Vietnamese Fishermen's Assoc.*, 543 F. Supp. at 206-08 (describing specific conduct involving intimidation and threats of violence against a protected class of individuals by a private military unit).

76. See *id.* at 219-20 (order enjoining Ku Klux Klan from maintaining private military force and from various related activities; not including any implication that the organization may not otherwise continue to function as a political advocacy group).

77. Cf. *Presser v. Illinois*, 116 U.S. 252, 267-68 (1886) (state power to regulate "parading of military bodies and associations" is "necessary to the public peace, safety and good order" and denial of such power would preclude authority "to suppress armed mobs bent on riot and rapine").

that it is mere communication when a mass of people carry loaded weapons. Although the carrying of firearms as a military unit is in some sense a communication of ideas,⁷⁸ in most settings the marching of a fully armed military unit would present itself as a show of force and an implicit threat of violence.⁷⁹ The purpose of such a march is to affect others not by changing their minds or beliefs, but by influencing them to act in fear of violent consequences.

Even if armed marches were construed as symbolic speech, the state would have little problem establishing a sufficiently compelling interest to prohibit such marches when they present an immediate risk of breach of the peace and infliction of violence on others.⁸⁰ The state's interest is great because political demonstrations and parades often involve high emotions and a real risk of violence. Limits on carrying loaded weapons clearly are designed to preserve peace rather than to silence—or even to blunt—the impact of speakers and their message. A prohibition on the mass carrying of firearms constitutes an appropriate time, place, or manner restriction that narrowly advances an important state purpose.

The same basic analysis would probably also justify a prohibition on parading with unloaded firearms. Such a prohibition would be upheld because it is the only practical way to prevent loaded weapon parades. The incidental impact of such a prohibition on the content of the message to be communicated would be justified by important government purposes and the lack of reasonable alternatives to such a prohibition.

C. The Militias, Anti-Syndicalism, and the Brandenburg Test for Illegal Advocacy

The private militia movement may supply courts with the opportunity to further define the limits within which the state may constitutionally impose upon the advocacy of violent or unlawful conduct. Federal and state statutes that prohibit advocacy of "crime, sabotage, violence, or unlawful methods of terrorism" to effectuate political or industrial reform remain on the

78. See SCHAUER, *supra* note 62, at 92-93.

79. GREENAWALT, *supra* note 74, at 249 (arguing that threats are situation-altering utterances in which the "speaker" seeks to "do something rather than to say something;" hence they should come within the principle of free speech).

80. See *supra* note 53 and accompanying text (noting that First Amendment secures only the right "peaceably to assemble").

books.⁸¹ These statutes have recently been used to prosecute antigovernment individuals who are associated with the national militia movement.⁸² In *Brandenburg v. Ohio*,⁸³ the United States Supreme Court held that such statutes infringe on First Amendment freedoms if they are read as prohibiting mere advocacy of the view that unlawful acts or violent confrontation with government is necessary.⁸⁴ This type of advocacy, which does not present any clear and present danger of a serious evil, is not within the government's power to prevent.⁸⁵ However, to fully understand how courts should address such statutes aimed at anti-government groups, it is necessary to review the scope of the Supreme Court's holding in *Brandenburg*.

1. *The Brandenburg Enigma*

In *Brandenburg*, the Supreme Court stated that criminal sanctions for advocacy of law-breaking or violence will pass muster under the First Amendment only "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."⁸⁶ Consequently, a number of commentators have concluded that after *Brandenburg*, criminal syndicalism statutes are either superfluous or per se unconstitutional. Such statutes are superfluous to the extent they can be validly read as prohibiting conspiracies and incitements to commit criminal acts because these unprotected speech acts already constitute the separate offenses of conspiracy, solici-

81. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 444-45 (1969) (quoting Ohio Criminal Syndicalism statute under review in that case); MONT. CODE ANN. § 45-8-105 (1995).

82. For example, two such cases were filed in Montana in 1995. *State v. F. Joe Holland*, No. CR-95-53 (21st Dist. Ct. Mont. filed June 26, 1995); *State v. Calvin K. Greenup*, No. CR-95-52 (21st Dist. Ct. Mont. filed May 2, 1995).

83. 395 U.S. 444 (1969).

84. See *id.* at 447-48.

85. See *id.* at 447. This rejection of state power to ban the teaching of an abstract duty to break the law or to violently overthrow government is itself a significant step toward ensuring a fairly strong principle of freedom of speech. See SCHAUER, *supra* note 62, at 190 (observing that "superficially" it might appear that advocacy of violent or unlawful means to bring about change should not be protected because "speech that produces extra-legal change undermines the process of rational deliberation that is the *a priori* value of a democratic system"). While some have thus suggested that even abstract advocacy of violent and unlawful means should not be protected by the First Amendment, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20, 30-31 (1971), what follows assumes that the Supreme Court correctly weighted this general issue in favor of a robust principle of free speech.

86. *Brandenburg*, 395 U.S. at 447 (footnote omitted).

tation or incitement.⁸⁷ If they are given a broader construction based on the language purporting to prohibit mere advocacy, such statutes are unconstitutional on their faces because the constitutional test set forth in *Brandenburg* precludes liability for advocacy that falls short of direct incitement to criminal behavior.⁸⁸

However, there are reasons to be skeptical of reading *Brandenburg* as a definitive standard of constitutional limits. Primarily, the Court in *Brandenburg* implied that a questionable statute could still be valid if narrowly construed and applied to the right factual patterns.⁸⁹ The Court underscored that the statute under consideration had not been narrowly applied to fit within the Court's prior formulations of the scope of protected speech.⁹⁰ Moreover, the challenged statute had been applied to speech that was given by a single speaker on a single occasion, which presented a clear example of abstract advocacy that did not appear to be aimed at bringing about the commission of unlawful acts.⁹¹ Finally, the Court went out of its way to cite prior decisions upholding criminal syndicalism convictions, including the conviction of communist party leaders in *Dennis v. United States*,⁹² as though to reaffirm that it was not precluding the possibility that such statutes would continue to have valid applications, if narrowly construed and applied to the right factual patterns.⁹³

87. See, e.g., Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 754-55 (1975) (reading *Brandenburg* as establishing a speech-protective standard that would require criminal incitement presenting a real chance of success before speech might be limited).

88. This is the basic thesis of Lawrence F. Reger, Note, *Montana's Criminal Syndicalism Statute: An Affront to the First Amendment*, 58 MONT. L. REV. 287 (1997). For the view that such statutes *should be* unconstitutional on their face, but suggesting that *Brandenburg* does not clearly state such a conclusion, see Hans A. Linde, "Clear and Present Danger" Reexamined: Dissonance in the *Brandenburg* Concerto, 22 STAN. L. REV. 1163 (1970). See also *id.* at 1186 (suggesting that anti-syndicalism statutes previously upheld might survive *Brandenburg*, but only under "a tightly restricted interpretation").

89. See *Brandenburg*, 395 U.S. at 447 (stating that the federal statute reviewed in *Dennis v. United States*, 341 U.S. 494 (1951) was upheld, despite its text's apparent prohibition of mere advocacy, "on the theory" that it embodied a principle requiring a real danger of lawless action).

90. *Id.* at 448-49 (observing that "[n]either the indictment nor the trial judge's instructions to the jury in any way refined the statute's bald definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action").

91. See *id.* at 446-47.

92. 341 U.S. 494 (1951).

93. See HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN

It can thus be argued that an important issue is left unresolved by the terse opinion in *Brandenburg*. The issue is whether the Court's First Amendment test requiring the state to show that the speech was directed to produce "imminent" lawless action "is to apply to the group as well as the individual speaker."⁹⁴ Some would likely doubt that the question is reserved, as it appears that the Court's opinion in *Brandenburg* states the limits of regulating advocacy without clearly creating different standards for group and individual advocacy.

However, immediately after stating the standard, the Court quoted its own prior reasoning that the abstract teaching of either the propriety of the use of force or the violation of law "is not the same as preparing a group for violent action and steeling it to such action."⁹⁵ The quoted language may merely underscore the lower court's mistake in upholding a conviction that was outside the permissible boundaries of state regulatory authority under existing case law. However, at the same time the Court's language had the effect of raising the question of whether "the Court regarded *Brandenburg* as an instance of individual speech and hence preserved the group/individual distinction."⁹⁶

AMERICA 233 (1988). It is possible that the Court simply relied on prior authority to present an image of continuity rather than abrupt departure, and reduced *Dennis* to its bare facts to avoid overruling it. Kalven observes that "[o]ne can only speculate as to the reasons for the Court's unwillingness to overrule *Dennis*." *Id.*

One speculation was that "so radical a course would not have commanded a majority." *Id.* Another more insightful speculation was that the leading precedent suggested that a more speech-protective stance was in form a construction of both the *Dennis* case and the federal syndicalism statute it upheld. See *Yates v. United States*, 354 U.S. 178 (1957) (emphasizing the concreteness of the advocacy in distinguishing protected abstract advocacy from unprotected advocacy as a principle of action in the future). See KALVEN *supra*, at 211-20 (analyzing *Yates* and related post-*Dennis* developments). The preference for not appearing to make up an entirely new rule whole-cloth could have prompted the Court to retain *Dennis* simply as a vehicle of reliance upon the speech-protective decisions that purported to follow it. This interpretation is supported by the fact that the actual holding in *Dennis* seems difficult to square with the speech-protective formulation of the constitutional test set forth in the *Brandenburg* opinion. As Kalven observes, the Court in *Brandenburg* "explicitly rejects the general advocacy standard which *Dennis* implicitly endorsed." *Id.* at 232.

94. *Id.* at 233. More specifically, Kalven wonders whether the Court could have "wanted to preserve *Dennis*, so that it would be available as a precedent in the future should a case arise involving a group possessing the characteristics ascribed to the Communist Party in the 1950s." *Id.*

95. *Brandenburg*, 395 U.S. at 448 (quoting *Noto v. United States*, 367 U.S. 290, 297-98 (1961)). Moreover, the Court went on to equate the standard articulated in its own opinion with its formulation in *Noto* by stating that statutes that failed "to draw this distinction" would violate the Constitution. *Id.*

96. KALVEN, *supra* note 93, at 234. Kalven observes that the post-*Dennis* cases had attempted to formulate an "incitement" standard for defining the limits of reg-

Such a view cuts against the view that the Court recast its earlier decisions to create a general "imminence" requirement that operated to "erase any such distinction."⁹⁷

In addition to a textual basis, there is doctrinal ground for thinking that *Brandenburg* may not provide a definitive standard as to constitutional limits. In *Dennis*, especially as explicated in subsequent cases, the Court recognized the power of government to limit advocacy of future conduct by presuming that the state may be able to show that a particular advocacy group's speech acts go beyond bare advocacy and are instrumental to a criminal enterprise which gears itself to unlawful and violent acts in order to effectuate political change.⁹⁸ This possibility of seditious speech in the context of criminal enterprise may provide a realistic explanation as to why the Court in *Brandenburg* was unwilling to reconsider *Dennis*. Critics observe that the evidence about the Communist party did not warrant such a conclusion in *Dennis*.⁹⁹ Even so, the *Brandenburg* Court confronted a specific instance of advocacy by a single individual and did not purport to present a standard establishing constitutional limits of enterprise liability. For example, the opinion does not limit the circumstances under which individuals may be convicted of criminal conspiracy. Yet the traditional law of conspiracy, which generally applies to private "speech" agreements, has never required a relationship of "imminence" between the conspiracy and the unlawful act.¹⁰⁰ It seems quite unlikely that *Brandenburg*

ulation, "but incitement adjusted to meet the problem of a group that is being organized to act not immediately but in the future." *Id.* Kalven thus suggests that the legal standard during the era preceding *Brandenburg* included an "implicit" distinction between group and individual speech. *See id.*

97. *Id.* Professor Kalven accurately observed that the above quotation "resonates to the concern with the dangers of group advocacy that informed *Dennis*." *Id.*

98. As Kalven observes, because the Court in *Dennis* concluded that "the defendants are envisaged as a conspiracy to overthrow," it found no "need to look at the speech for which they were indicted." KALVEN, *supra* note 93, at 199. He concludes that "the anomaly of *Dennis* is that the defendants were charged with talking but convicted for acting." *Id.*

99. *See, e.g.,* KALVEN, *supra* note 93, at 199 (noting that "the deep suspicion is that the Government could not have satisfied anyone with its proof of a literal conspiracy to overthrow"); *id.* at 217 (observing that the proof Justice Harlan reviewed in *Yates* and found insufficient was essentially the same evidence the government put on in *Dennis* "after years of investigation"). In fact, when the distinction between abstract doctrinal advocacy and organizing for concrete action in the future was given real substance in subsequent cases the government gave up the attempt to prosecute communists as members of a criminal syndicate. *See id.* at 220.

100. With respect to "conspiracy," the element of agreement to commit a crime adds a dimension that goes beyond First Amendment expressive association and increases the likelihood that criminal acts will be performed as compared to advocacy

will be read to require "imminent lawless action" as a prerequisite to liability for conspiracy.

The ultimate question is whether there might be circumstances in which criminal syndicalism statutes could constitutionally be applied. For example, could they be used to prosecute members of an tight-knit "advocacy" group that also operates as a criminal enterprise engaged in a pervasive pattern of criminal (including violent) behavior that resists and undermines the authority of government? It can be argued that, even if it could be so read, *Brandenburg* should not be construed to support such a result for three reasons. First, these statutes were originally adopted to apply to advocacy perceived as inherently dangerous, not to criminal enterprise.¹⁰¹ Thus the statutes do not include limiting provisions or safeguards to prevent abusive prosecution. Second, there is a serious risk that individuals committed to a political cause, but not to the criminal plans or goals of others, would be found guilty by association when political groups are prosecuted as a criminal enterprise. Finally, it is not clear that syndicalism statutes would actually provide law enforcement an essential tool to combat special problems of political organizations with unlawful goals. Arguably, government does not need the tool of criminal syndicalism when it is able to adequately prevent violent and unlawful acts by prosecuting individuals who commit crimes themselves, are accomplices to crimes,¹⁰² or par-

that amounts to simple encouragement. See, e.g., GREENAWALT, *supra* note 74, at 239-40. A related point, suggestive that *Brandenburg* should not be read as presenting an all-purpose test with respect to advocacy of unlawful conduct, is that the opinion does not even consider distinctions that might plausibly be drawn between non-ideological and ideological encouragement of unlawful acts and between encouragement in private settings versus public contexts (such as political speeches). See *id.* at 261-72 (suggesting grounds for somewhat different tests for balancing free speech versus crime prevention in various contexts). The *Brandenburg* opinion's formulation of the test for limiting free speech should thus be read most confidently as addressing the sort of case that was squarely before it—public ideological advocacy by a particular individual of possible future conduct. See also *infra* note 102 (exploring the concept of "accessory" status for having specifically encouraged another individual to commit a crime; concluding that *Brandenburg* would not apply).

101. See, e.g. Linde, *supra* note 88, at 1176-78.

102. Thus, in situations involving a pattern of unlawful conduct by a close-knit group, the sort of evidence required to show "active membership," including a specific intent to further the group's unlawful goals, might well provide the basis for an inference of an individual's status as an accessory to specific crimes. Prosecutors might be trying to find a basis to prosecute an individual who has not committed a specific criminal act but is: (1) "actively involved" in a group's activities; (2) verbalizing his concurrence with its strategies and tactics; and (3) often present when unlawful acts are performed. In such a case, however, the evidence that would support the conclusion that the individual in question held a "specific intent" to further the un-

ticipate in criminal conspiracies.¹⁰³

Despite the strong policy arguments that criminal syndicalism statutes are entirely unnecessary, it remains true that in *Brandenburg* the Supreme Court did not dismiss all syndicalism statutes as constitutionally infirm, but rather suggested that such statutes could withstand First Amendment scrutiny if narrowly construed to reach only unprotected forms of criminal advocacy.¹⁰⁴ Although the statutes have no safeguards within them that prevent abusive prosecution, the Supreme Court has a history of reading relatively strict First Amendment-based limitations into the provisions that make it a crime to be a member in an organization that is engaged in prohibited "advocacy."¹⁰⁵ One such requirement prevents a conviction of "guilty by association" by requiring that a defendant be an active member who knows of the unlawful goals and has a specific intent to act in furtherance of such goals.¹⁰⁶

Perhaps the most fundamental and compelling objection to criminal syndicalism laws is that they are not necessary enough to warrant the threat they pose to free expression and association. It is especially likely that individuals of varying levels of commitment and varying beliefs will be associated with each other within these ideologically-based groups.¹⁰⁷ The "member-

lawful goals of the group could equally support an inference that his presence at the time of the commission of a crime reflected his status as an accomplice. See, e.g., WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 6.7 (2d ed. 1986) (observing that although an individual's mere presence at the time of a crime does not raise an inference of an intent to give aid as needed so as to establish the non-actor as an accomplice, "circumstantial evidence may be sufficient to permit the jury to find that such an agreement did exist" even if no act of aid was actually performed).

Another useful comment with respect to accomplice liability is that, once criminal acts are performed by members of a group, others in the group may be liable to the extent that they encouraged the commission of that specific offense. See *id.* § 6.6(c). As observed above, it seems likely that if such encouragement took place in private in the context of discussing furthering shared goals, rather than in a public forum focused on general ideology, the *Brandenburg* standard requiring that the unlawful act be "imminent" should not apply. See *supra* note 100. Indeed, taking the next step in the context of a joint enterprise as reflected in a close-knit group, evidence of such encouragement, even in a more public setting, should be admissible to aid in establishing an intent to specifically encourage specific individuals to commit particular crimes.

103. See, e.g., GREENAWALT, *supra* note 74, at 239-41.

104. See *Brandenburg*, 395 U.S. at 449.

105. See KALVEN, *supra* note 93, at 244-53 (treating this series of cases).

106. See, e.g., *Healy v. James*, 408 U.S. 169, 186 (1972) (requiring that the government show "a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims").

107. These ideologically based groups contrast with the organized crime enterprises targeted by RICO.

ship" standards set out by the courts do not eliminate the risk that individuals who share some concerns and commitment with a group with unlawful goals could be lumped with others in a criminal prosecution. Even so, it may well be that in cases involving relatively small, close-knit groups, individuals who did not perform specific criminal acts, but were actively engaged in the group's activities, may be found criminally responsible in an appropriate case.

Consideration of the scope of freedom of speech and association is important to the context of criminal syndicalism statutes because the insight and reasoning derived from this consideration might be applied to situations where there is a question of civil liability of advocacy groups. For example, in the years since *Brandenburg*, the Supreme Court has found itself engaged in the task of sorting First Amendment and competing values in order to draw a distinction between collective action involving the valid exercise of First Amendment rights and actions that pose a sufficient threat to important interests to warrant civil injunctive relief.¹⁰⁸ A related problem is the extent to which violent or unlawful activity may be attributed to the collective enterprise, its leaders, or its members in a way consistent with freedom of association. For example, the Supreme Court has ruled that scattered acts of violence or other unlawful behavior done in connection with First Amendment activities may not be attributed to the collective enterprise if these actions were not ordered by an organization's leadership.¹⁰⁹ However, at the same time, the Court has warned that pervasive violent conduct might warrant both broad injunctive relief and the attribution of such violence to the collective enterprise without regard to "the technicalities of the law of agency."¹¹⁰ One message the Court has sent by way of these decisions is that *Brandenburg's* "imminent lawless action" test should not be seen as the only test for determining

108. Compare *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (upholding First Amendment freedom to use consumer boycott as a tool for promoting civil rights goals), with *International Longshoremen's Ass'n v. Allied International*, 456 U.S. 212 (1982) (finding the union's refusal to handle cargoes arriving from the Soviet Union to protest the invasion of Afghanistan as a prohibited secondary boycott that the government may forbid).

109. See *Claiborne Hardware Co.*, 458 U.S. at 923-26.

110. *Milk Wagon Drivers Union of Chicago Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 295 (1941). The Court in that case upheld an injunction of all picketing, not merely violent picketing, based on its upholding of findings of pervasive violence in connection with the underlying strike. See *id.* at 296. *Milk Wagon Drivers* was cited with approval in *Claiborne Hardware Co.*, 458 U.S. at 923.

the boundary between protected speech and association on one side, and criminal and civil responsibility on the other.

2. Advocacy of Unlawful or Violent Conduct and the Private Militia Movement

As with most groups involved in radical political movements, the militias have engaged in political discourse, ranging from statements of pure political ideology to predictions and advocacy of violent confrontation with government.¹¹¹ However, the majority of cases concern predictions and advocacy that are exactly the sort of abstract political advocacy long protected by the First Amendment. These statements are not generally made in a context in which they appear to be intended or likely to produce imminent violence or serious unlawful conduct. While statements of abstract political advocacy may add to a climate of distrust and have some effect on the potential for anti-government violence,¹¹² the Supreme Court has properly concluded that the way to remedy or counteract ugly or dangerous ideas is political discourse.

Although abstract advocacy is protected by the First Amendment, it is clear that when members of political advocacy groups actually engage in threats and acts of violence their behavior is not civil discourse and they may be punished for criminal misconduct.¹¹³ Criminal misconduct occurs when anti-government

111. See generally Larizza, *supra* note 37, at 589-93. A militia "manual" predicts an armed conflict because government leaders have "betrayed, abused, and ignored their oath of office to protect and uphold the Constitution of the United States." *Id.* at 590 (quoting MANUAL FOR THE STANDARDIZATION OF THE MILITIA AT LARGE 2 (undated)). A leader states that "the only thing standing between some of the current legislation being contemplated and armed conflict is time." *Id.* (quoting *The Militia Movement in the United States, Hearings Before the Subcomm. on Terrorism, Technology, and Government Information of the Senate Comm. on the Judiciary*, 104th Cong. 103 (1995) (statement of J.J. Johnson, Ohio Unorganized Militia)).

112. This concern has been expressed in the case of the Oklahoma City bombing. Larizza, *supra* note 37, at 592 (quoting Senator Kohl's expression of concern that the hatred expressed by anti-government groups "is particularly disturbing in light of the escalating political violence in our country").

113. Violent acts, whether performed in attempting to further political goals or not, indisputably exceed the protection offered by the First Amendment. See, e.g., *Claiborne Hardware Co.*, 458 U.S. at 916. Some have occasionally suggested that *Brandenburg's* "imminence" requirement applied even to direct and serious threats of violence or even to solicitations of violence. See, e.g., *People v. Rubin*, 158 Cal. Rptr. 488 (1979), *cert. denied*, 449 U.S. 821 (1980) (holding that a criminal charge for solicitation in a public offer of five hundred dollars to any one who killed or maimed a member of the American Nazi Party required a showing of "imminence" pursuant to *Brandenburg*; concluding nonetheless that the standard was met in this case because

groups stalk law enforcement agents, make death threats against various government agents, and commit violence against officials who have refused to comply with their demands.¹¹⁴ Furthermore, individuals who commit criminal acts that are not expressive are not insulated from criminal or civil prosecution by the fact that they happen to be a member of a political advocacy group and conceive their criminal acts as advancing the political cause of that group.

In a few settings, most notably in Montana, *Brandenburg's* perplexing questions concerning criminal enterprise and First Amendment freedom are likely to be relevant to prosecutions under state anti-syndicalism statutes. In some cases the "incitement" standard of *Brandenburg* is not met, but there is also overwhelming evidence of a group's pervasive law-breaking, in the form of serious threats, intimidation, and resistance to legal orders.¹¹⁵ However, it may be difficult to prove that a particular group member either agreed or acted to further unlawful goals, even if that individual was physically present during the performance of criminal acts and it is possible to establish the individual's legal status as an active member of the group. In cases such as this, where the "incitement" standard of *Brandenburg* is not met, the question remains as to whether a criminal syndicalism charge could validly be substituted for charges of conspiracy or prohibitions against aiding and abetting. As summarized above,¹¹⁶ critics of such criminal prosecutions would undoubtedly raise the serious issue of whether it is appro-

of the seriousness of the crime). The better view, however, is that serious threats of violence, especially when used to coerce another party, do not constitute the sort of discourse the First Amendment was designed to protect. See GREENAWALT, *supra* note 74, at 251. The real question in cases like *Rubin*, cited above, should be whether the threat is real and serious rather than merely political hyperbole. See, e.g., *Watts v. United States*, 394 U.S. 705 (1969) (conviction for threatening the President overturned where petitioner stated as political hyperbole that, if forced to carry a rifle, President Johnson would be the first person in his sights). Thus the language employed by the defendant in *Brandenburg* might be described by some as threatening, with its vague references to potential "revengeance" that might be visited on the nation's leaders if his political message was not heeded; but the Court properly would have viewed the speech as a vague prediction of future developments rather than a true threat. See *Brandenburg*, 395 U.S. at 446-47 (1969). The *Rubin* case was challenging in this regard mainly because Mr. Rubin reiterated at least twice that he was "deadly serious" and that the offer was not "said in jest." *Rubin*, 158 Cal. Rptr. at 490.

114. See, e.g., Larizza, *supra* note 37, at 593.

115. Nick Murnion, Garfield County Attorney, Address at the James R. Browning Symposium, University of Montana School of Law (Oct. 4-5, 1996).

116. See *supra* notes 100-103 and accompanying text.

priate to use the anti-syndicalism statute in this manner.¹¹⁷ Appellate courts will struggle with these issues as such prosecutions make their way through the courts.

Regardless of how these particular anti-syndicalism statutes fare in the courts, an important warning gained from the previous discussion is that *Brandenburg* should not be used as an all-purpose test for measuring the constitutional protection offered to anti-government individuals and groups. For example, it has been plainly suggested that *Brandenburg* presents a formidable barrier to proposed legislation making it a federal offense to train in "weapons" or "techniques" with the intention of opposing government or for any unlawful purpose.¹¹⁸ While several proffered criticisms of the proposed law have considerable merit, the argument that, under *Brandenburg*, all speech acts of political association—short of criminal acts or conspiracies—are protected by the First Amendment unless they incite imminent lawless activity, is meritless.¹¹⁹ Although *Brandenburg* has come to symbolize that the depth of our national commitment to freedom of speech goes so far as to include protection of advocacy that aims to undermine the freedoms provided by our democratic system, the *Brandenburg* tests should not be used to protect politically motivated speech acts that threaten peace and social order rather than promote the ends that the First Amendment was constructed to protect.

117. A participant at the Symposium, for example, offered the suggestion that the inability to make a compelling showing of specific agreement or overt acts in support of criminal misconduct arguably raised an inference that the individual in question was simply not guilty of committing any crime beyond being associated with, and perhaps holding sympathy with, the views and goals of lawbreakers.

118. *Nature and Threat of Violent Anti-Government Groups in America: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 104 Cong. 164-66 (1995) (statement of Gregory T. Nojeim, Legislative Counsel, American Civil Liberties Union).

119. By way of illustration, Nojeim offered a hypothetical of an objectionable application of the proposed statute involving an individual being taught how to make a "molotov cocktail" in order to make a "big statement" at an anti-government rally, followed by abandonment of his plan. *Id.* at 167. Nojeim argued that, after abandonment of the plan, the violent act at the rally was no longer "imminent" and the student should not be held liable merely for receiving such training with the *intent* to perform a specific illegal act. *See id.* However, the making of a molotov cocktail (especially with a specific intent to use it in performing a violent act) is hardly a protected act under the First Amendment, and the *Brandenburg* "imminence" requirement would not (and should not) apply. *See id.*

IV. CONCLUSION

Keeping the balance between freedom and order is one of constitutional democracy's most delicate chores. As dangerous as subversive speech and advocacy may seem to many, it is a paradox of democracy that the measure of our commitment to freedom is our willingness to risk that freedom, while having faith that democracy's fundamental values will win out in the contest of ideas that results from a robust First Amendment. We have wisely measured the risks of controversial free speech against the dangers posed by government censorship and concluded that free speech should prevail over the temptation to silence those who would undermine our institutions. However, when advocates of subversion organize themselves to pose an immediate threat to peace and order, the community as a whole is entitled to act in defense of the very rights for which civil government was created to preserve. And when groups of people act in concert to flout the very laws that protect their own rights, society is permitted to draw a line in favor of the rights of all against the license of a few.

The same sort of balance is struck again and again, with both the right to arms guaranteed by the Second Amendment and the free speech values secured by the First Amendment. While today many see the right to arms as anachronistic, the framers perceived this right as fundamentally related to the preservation of the other rights civil society is designed to secure. Until the Constitution is amended, this right should be respected as to every individual, regardless of party or political creed. Again, however, there are limits to the claims that can be made on behalf of any right. The Second Amendment was not drafted to grant broad rights to armed factions inclined to oppose the very structures created by our democratic freedoms. The First Amendment's freedom of expression loses its force when the line is crossed to violence or threat of violence. So too, the Second Amendment's right to arms is limited by its purpose to facilitate the personal right to self-defense and the community's right to defend itself against outside aggression or tyranny; the Second Amendment gives no protection to private armies waiting for an opportunity to confront the larger community with force. In short, we keep the balance true by first acknowledging the force of the rights guaranteed by the Constitution, even when they give protection to those with whom we strongly disagree and may consider dangerous, and second by carefully judging the limits of individual rights when lines are crossed that threaten

the community at large.