

THE MILITIA MOVEMENT AND SECOND AMENDMENT REVOLUTION: CONJURING WITH THE PEOPLE

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INTRODUCTION

On April 19, 1995, someone blew up the Murrah Federal Building in Oklahoma City, causing the largest loss of life from a terrorist attack on American soil in history. Authorities believe that one of the perpetrators of the attack is Timothy McVeigh, an ex-soldier who allegedly holds extreme right-wing views and a passionate hatred of the (pg.880) Federal Government.¹ Many commentators have speculated that McVeigh destroyed the building as revenge against the federal government,

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¹ See Evan Thomas et al., *The Manhunt: Cleverness and Luck*, NEWSWEEK, May 1, 1995, at 30.

particularly the Bureau of Alcohol, Tobacco, and Firearms, for the assault on the Branch Davidian compound at Waco, Texas, on April 19, 1993.² If these allegations are true, McVeigh's anger, while extreme, is not the ire of an isolated lunatic. A nationwide social protest movement—the so-called militia or "patriot" movement—has developed to combat what its members believe is a conspiracy by the federal government to disarm the American citizenry.³ The goal of this alleged conspiracy is to allow Jews, Blacks, the United Nations, Russia, international bankers, or socialists (there is disagreement over exactly who is behind the conspiracy) to assume control of the country.⁴ The disaster at Waco, the Brady Bill, and the ban on assault weapons are thus all part of a single plot, the tip of the conspiratorial iceberg.

McVeigh's affinity for militia ideas has thrust the militia movement into the national spotlight for the first time, and the audience has reacted with horror at the paranoia, racism, and violence that is characteristic of some of the movement's members.⁵ Yet the most articulate militia leaders deny being deranged hatemongers; rather, they claim to be the modern defenders of the U.S. Constitution in general and the Second Amendment in particular. In their minds, they are merely protecting and exercising the right of the people to make a revolution against a tyrannical government. Although the claims have met scorn and derision, militia detractors have usually rejected these ideas before examining them with any care.

This Article will seriously examine the militia movement's interpretation of the Second Amendment. It will evaluate where this interpretation is on solid ground and where it crosses into treacherous terrain. It will also consider the lessons that the Oklahoma City bombing can teach about the viability of a constitutional right to revolution in a diverse twentieth-century democracy.

Some commentators might argue that the ideas of a fringe group do not warrant serious analysis. I disagree for several reasons. First, as evidenced by the Oklahoma City tragedy, militia groups have the capacity (pg.881) for violence, and so for practical reasons it is important to understand their animating ideology. Second, their constitutional claims are not as far-fetched as they might first appear. Indeed, militia ideologists share some of their beliefs with more mainstream theorists, not only the National Rifle Association but also one school of thought on the Second Amendment within the legal academy. Third, the militia's historical interpretation of the Second Amendment, while plainly wrong on some points, is correct on others. Accordingly, careful attention to militia doctrine may cast light on mainstream Second Amendment theory, the modern significance of the historical background of the Amendment, and most importantly the continuing relevance *vel non* of a right to revolution.

Part I of this Article analyzes the ways in which the militias' interpretation of the Second Amendment faithfully reflects the thinking of the Framers. In particular, the Framers would endorse several themes that form the core of today's militia thinking. First, the people should always fear the federal government; despite its electoral accountability, it could always become corrupt, pursuing its own interests rather than those of the people. Second, to counteract the threat of a corrupt and

² See, e.g., Elizabeth Gleick, "Something Big is Going to Happen," *TIME*, May 8, 1995, at 50, 53; Russell Watson et al., *Three Strange Friends*, *NEWSWEEK*, May 1, 1995, at 32; Gordon Witkin, *Attacking the Firearm Police*, *U.S. NEWS & WORLD REPORT*, May 8, 1995, at 40.

³ See, e.g., Joseph P. Shapiro et al., *An Epidemic of Fear and Loathing*, *U.S. NEWS & WORLD REPORT*, May 8, 1995, at 37; Jill Smolowe, *Enemies of the State*, *TIME*, May 8, 1995, at 58.

⁴ See, e.g., Shapiro et al., *supra* note 3, at 38; Smolowe, *supra* note 3, at 62-63.

⁵ For example, 80% of Americans would describe militia members as "dangerous," 63% as "a threat to our way of life," and 55% as "crazy." Smolowe, *supra* note 3, at 60.

tyrannical central government, the people should be armed to overawe the government or, *in extremis*, to stage a revolution. Third, for the people to be able to make a revolution, they must be organized into militias. Finally, when government wishes to oppress the people, it begins by disarming them, so they cannot resist. Militia groups would add that the federal government has already become corrupt and tyrannical and the time for revolution is fast approaching. Hopefully they are wrong, but if so, they have simply made a factual mistake. Their Second Amendment theory is not for that reason, in and of itself, wrong.

To examine how it is in error, Part II will look more closely at the conceptual universe of the framers of the amendment, particularly the meaning of "the Body of the People." Steeped in the tradition of civic republicanism, the proponents of the Second Amendment believed that the government and the citizenry should dedicate themselves to the Common Good: a good common to all, shared by all. Of necessity, for a Common Good to exist, however, the citizenry must be sufficiently homogeneous to share common interests. In that sense, the citizenry is not a collection of independent individuals but an organic and unified entity. The constitutional right to arms belongs to this body of the people, organized into a universal militia, so that it can resist a corrupt federal government. Violence used by the government for its own selfish ends is tyranny. Violence used by a faction of the people for its own selfish ends is illegitimate rebellion. Violence ^(pg.882) used by the Body of the People for the Common Good, however, is legitimate revolution.

Many modern Americans fear the idea of a right of revolution because it embodies the potential for anarchy and civil war. These fears become irrelevant if, but only if, one presupposes the existence of a Common Good and a Body of the People: if the people really are homogeneous and unified, they will rise up as a single, organic collective and quickly restore legitimate government. This people must exist as an entity independent of government, because it must be able to revolt against government and, for however briefly, to take the place of government. Therefore, to make their interpretation of the Second Amendment plausible, the militia groups must answer the following questions: Is there in the late twentieth century a body of the people? If so, who is in it?

The principal militia response to those questions is to conjure with the People: militia writers assume that a people exists, that it is angry with the government, and that it will soon take up arms to assert its rights. While many scholars envision an America of interest groups and fractious individuals, militia groups magically conjure an image of an organic America with a citizenry so united that even in time of revolution, it will act as one entity. Militia writers, however, are not alone in this tendency. Many legal scholars who argue that the Amendment guarantees an individual right to revolt write as if the public were presently a unified entity called "the people." For these scholars, the People seem to be an element of cosmology taken on faith, a necessary piece of their analytical structure. This Article argues, by contrast, that the American people are not so united. Accordingly, a Second Amendment revolution may not be possible for today, and so we may need a reinterpretation of the Amendment. This suggestion may be wrong; it may be that as a citizenry we have unities that I do not see. But any modern Second Amendment theory must demonstrate those unities in order to demonstrate the modern viability of the historical amendment. It is insufficient just to conjure with the People.

Some militia ideologists seem to be aware that Americans as a group are too diverse to launch a revolution today. As a result, these writers offer more precise definitions of the People. These definitions differ across various groups, but all share two features. First, they all suffer from severe analytical and empirical problems. Taken together, those problems suggest that a body of the people does not exist anymore; and if it does not exist, neither can a right of revolution. Second, all of the definitions exist against the backdrop of a grand conspiracy that has captured the federal

government, against whom the People are defined. In other words, the People have their unity in (pg.883) opposition to the hypothesized "Other" (Jews, Blacks, bankers, etc.) that seeks to oppress the People. In this sense, the militia's paranoia is necessary, not incidental, to its Second Amendment theory: a revolution is possible only if a People exists, but for the militia, a people exists only in being united to resist the federal conspiracy.

For heuristic purposes, this Article divides militia thinking about conspiracies into four general themes, even though most militia groups and members hold a combination of these beliefs. First, there are the overt racists.⁶ These groups maintain that all constitutional amendments after the Bill of Rights are invalid, so that the true American people is limited to white Christians who share a particular conservative heritage. These militia groups are prepared to stage a revolution to defend that heritage against what they see as the assault of auslanders in the federal government. These groups also have a fair claim to be the direct ideological heirs of some of the American revolutionaries, who also generally excluded non-whites⁷ and sometimes non-Christians.⁸ The problem with this definition is that it is both malignantly exclusionary and implausible as a matter of contemporary constitutional law. And yet, if no one is excluded from the citizenry, the central problem with a right of revolution emerges: can all of these diverse persons with their diverse values and views share a common good? Can they constitute a people? This Article calls this difficulty the Demographic Problem in constituting a people.

Second, there are the anti-internationalists.⁹ These writers believe that a foreign cabal led by the United Nations but including Russia, Israel, the Trilateral Commission, and third world countries, has taken over the federal government to subjugate the American people. Anti-internationalists offer elaborate outlines of the alleged conspiracy and see signs of it all around them. They believe that Americans who do not share their belief in a conspiracy are deluded. As a result, they claim to be acting in the interests of all Americans except the traitorous few in league with the foreign enemy. The problem with this view is that it seems out of touch with empirical reality. In a sense, however, the anti-internationalists are acting consistently with the spirit of the Second Amendment: the People are supposed to be ever suspicious of the federal government; the People alone may judge when the government has become corrupt, and sometimes only a small vanguard remains awake to the danger, while the masses fall (pg.884) asleep. Cast thus, the militias' argument causes the central problem to emerge again: is it plausible that the American citizenry, in all its magnificent diversity, deplorable ignorance, and distance from the seat of power, will ever perceive empirical reality in the same way? Will they ever agree if or when the federal government has become so corrupt that revolution is the only answer? This Article calls this difficulty the Epistemological Problem in constituting a people.

Third, there are the anti-socialists.¹⁰ This group believes that a cadre of socialists, led by President Clinton and Sarah Brady, has captured the federal government and intends to destroy the liberties of American citizens. In particular, these writers believe that the income tax, land use regulation, and, above all, gun control violate the Constitution. The Brady Bill and the ban on assault

⁶ See *infra* part III.A.

⁷ See Sylvia R. Frey, *Liberty, Equality, and Slavery: The Paradox of the American Revolution*, in *THE AMERICAN REVOLUTION: ITS CHARACTER AND LIMITS* 230, 230-32 (Jack P. Greene ed., 1987).

⁸ See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 427-28 (1969).

⁹ See *infra* part III.B.

¹⁰ See *infra* part III.C.

weapons are only the first stages in a plot by the "Clintonistas" to disarm the public so that they can then dig up the Constitution root and branch. This group believes that the American people are committed to the Constitution (as the militia interprets it), or at least only those who are committed to the Constitution (as the militia interprets it) are part of the American people, because loyalty to the Constitution is the principal component of American peoplehood. Therefore, the argument goes, President Clinton and the other socialists in Washington are enemies of the American citizenry.

The views of this group suffer from two serious difficulties. The first is the Interpretive Problem: even if the Constitution constitutes us as a people, there has been no consensus on the meaning of that document for a long time, if ever. If this criticism is sound, how can there be a revolution made by and for the people as a body when there is no agreement on the text that creates the People as a body? The second difficulty is the Political Problem: anti-socialists are extreme individualists; they resent any intrusion on their absolute freedom of action. But how can citizens become a people if they are independent individuals with nothing in common but abstract freedom? To put the point another way: these groups feel contempt for politics, but only by coming together in political space may citizens constitute themselves a people. The anti-socialists' view of politics therefore virtually precludes the possibility of Second Amendment revolution. Such a revolution would be possible only if, by happenstance, millions of different people living under different circumstances with different values, beliefs, and perceptions, were suddenly seized by the same spirit of resistance at the same moment. This political problem is not a difficulty only for militias: millions of Americans (pg.885) share their contempt for politics and thus would have difficulty finding political space for a people.

Finally, there are the anti-secular humanists.¹¹ These groups believe that the government's conspiracy has targeted conservative Christianity, which is the inspiration and fundament of the Constitution. This group summarizes most of the problems detailed above. Constituting a people around conservative Christianity poses demographic problems (not all American citizens are conservative Christians), epistemological problems (in the minds of many, there is no conscious conspiracy to de-Christianize America), and interpretive problems (by most official accounts, the Constitution does not privilege conservative Christianity).

Any theory of Second Amendment revolution, therefore, must squarely face the demographic, epistemological, interpretive, and political problems outlined above. In the conclusion, this Article suggests that these problems render "peoplehood" impossible in modern America and, as a consequence, revolution may no longer be a viable option for us. In a sense, the Second Amendment is a fragment of a language that we no longer speak: it depends on the notion of a civic republican People, but we have become too liberal and individualistic to support such a concept. As American beliefs, demographics, and epistemology change, certain forms of sociopolitical organization close as options. A Second Amendment revolution is one that has closed; it is a part of the American heritage that can have no more lived meaning. Armed resistance today would be a civil war, not a revolution. In my view, it is time to accept that fact; it is time to stop conjuring with the idea of an organic American people, because that idea leads us in the direction of the militias' thinking—to the creation of an alien Other against whom we could all be united.

As some options close, however, others open. The revolutionaries of 1776 went to war partly because they were not represented in Parliament. As soon as the American Revolution was complete, however, the idea of revolution became less savory, because the people had representation. If

¹¹ See *infra* part III.D.

modern citizens sensibly fear an oppressive government and if there cannot be a true revolution, there are only two options. Citizens may seek to foment factional rebellion, as do the militias, or they may pour the same energies into politics and civil society. Even if citizens cannot thereby create a People, they may build a public life that is healthy, sane, and rational so that no one feels the need to invent treasonous Others who deserve to die.^(pg.886)

I

WHAT THE MILITIA HAS RIGHT—ARMED REVOLUTION

The Militia of Montana (MOM) markets a T-shirt bearing an image of an eighteenth-century militia member and the legend: "The Second Amendment isn't about hunting or target shooting ... It's about FREEDOM!"¹² Although simplistic, the slogan captures the essence of the historical Second Amendment; it guaranteed that armed citizens could stage a revolution against a corrupt government.¹³ Indeed, the militia's theory of the Amendment is better supported by the historical record than the more popular view that characterizes the Amendment primarily as a right of self-defense.

The militias themselves insist that they alone have faithfully reflected the Framers' views, as the nation around them has fallen away. This self-conceptualization is pervasive and manifest in their writings. Militia materials, for example, rely extensively on quotes from early patriots about the meaning of the Second Amendment.¹⁴ M. Samuel Sherwood, an influential militia organizer, dedicates his book, *The Guarantee of the Second Amendment*, to Samuel Adams, John Hancock, George Washington, George Mason, and Nathanael Greene, because they created colonial militias to resist British tyranny.¹⁵ The Militia of Montana and Linda Thompson, self-appointed Acting-Adjutant General of the Unorganized Militia of the USA, both issued declarations of independence from the Federal Government, modelled on Jefferson's ^(pg.887) declaration.¹⁶ MOM's

¹² Militia of Montana, *Militia of Montana Catalogue*, Nov. 21, 1994, at 11 (Noxon, Montana) (on file with the author).

¹³ In arguing that the amendment guarantees the right to make a revolution, I mean more precisely that the amendment guarantees to citizens the right to own arms, so as to be ready to make a revolution. The amendment therefore overtly protects only the right to own arms, but it implicitly acknowledges the legitimacy of such a revolution: the point in the amendment, after all, is to make revolution possible. The right actually to conduct a revolution, however, might arise from natural law, rather than the constitution, simply because during many revolutions, the constitution by definition may have been suspended. I will consider the complexities of this problem in a forthcoming paper. See David C. Williams, *The Constitutional Right to "Conservative" Revolution* (Sept. 1, 1996) (unpublished manuscript, on file with the author). For present purposes, however, I wish only to be clear about my meaning: when I refer to the constitutional right to revolution, I mean more particularly (1) the constitutional right to own arms to make a revolution and (2) the implicit constitutional acknowledgment of the legitimacy of revolution against a tyrannical government.

¹⁴ See *infra* text accompanying notes 55, 62-70; see also John Grady, *The Right to Bear Arms*, MILITIA NEWS, Collector's Edition 1994, at 5 (quoting Thomas Jefferson and Patrick Henry), reprinted in KENNETH STERN, THE AMERICAN JEWISH COMMITTEE, MILITIAS: A GROWING DANGER, Vol. 5, Pub. No. 1, app. 104 (1995); Bernadine Smith, *Interpreting the Meaning and Purpose of the Second Amendment* (Second Amendment Committee, Hanford, CA.) (widely distributed at militia meetings) (on file with the author); *Second Amendment Militia Application* (Second Amendment Committee, Hanford, CA.) [hereinafter *Application*] (on file with the author).

¹⁵ See M. SAMUEL SHERWOOD, THE GUARANTEE OF THE SECOND AMENDMENT, at dedication page (1994) (self-published photocopied book, on file with the author).

¹⁶ See *Militia of Montana Declaration* (flyer) (on file with the author); LINDA THOMPSON, AMERICAN JUSTICE FOUNDATION, DECLARATION OF INDEPENDENCE OF 1994 1-3 (on file with the author), reprinted in STERN, *supra* note 14, app. 102.

version makes the analogy to the Framers' actions explicit: "Just as our Founding Fathers of this Country shook off their shackles of bondage, so must we."¹⁷

Because of the militias' paranoia, racism, and violence, many Americans are instinctively inclined to repudiate their theory of the Second Amendment. This Part, by contrast, will attempt to consider the extent to which militia thinking mirrors the Framers' view of the Amendment.¹⁸ In particular, the militias and the Framers would agree on four central ideas: fear of government, the right to revolution, the importance of militias, and the danger of disarmament. Together, these ideas comprise a theory not only of the right to bear arms, but also of the general relationship between the government and the governed. Later Parts of this Article argue that the militias also disagree with the Framers on important points. That disagreement, however, should not obscure the broad areas of consensus.

A. Fear of the Government

Both the Framers and the militias would assert that citizens should fear the government in general, and the federal government in particular, because the interests of office-holders may diverge from the interests of the citizenry. Belief in the political importance of a citizen militia emerged in Anglo-American political thought of the seventeenth century as part of a collection of ideas now loosely labelled "civic republicanism."¹⁹ Civic republicans thought that both citizens and governments should promote the common good of the people, rather than their own selfish interests; in the jargon of the day, they should act virtuously. Both citizens and governments, however, tended to pursue their private interests at the expense of the common good; in the jargon of the day, they tended to become corrupt. The central task for politics, therefore, was to find a way to cause political actors to behave with virtue.²⁰

Because the Crown plotted to expand its own power at the expense of the citizenry, government virtue was a scarce commodity in eighteenth century London. The monarch's chief strategy was to bribe citizens, causing them to sell their virtue for preference. Thus, (pg.888) the king subverted Parliament by giving places and pensions in the royal service to compliant Members of Parliament.²¹ He taxed and borrowed, so that men of finance would have an interest in the economic well-being of the monarchy.²² Finally, he promoted a standing army that depended on him for its livelihood and therefore would enforce his will through armed might.²³ The common danger in all of these devices was that the king created a class of citizens whose personal interests departed from the common good.

¹⁷ See *Militia of Montana Declaration*, *supra* note 16, at 5.

¹⁸ In the following parts, I summarize my analysis of the Framers' intent from David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 *YALE L.J.* 551, 563-86 (1991).

¹⁹ See *id.* at 572-84.

²⁰ See J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT* 66-75, 204-05 (1975); WOOD, *supra* note 8, at 53-57, 118-19; Williams, *supra* note 18, at 563-67.

²¹ See LANCE BANNING, *THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY* 42-43, 49-51 (1978); POCOCK, *supra* note 20, at 406-08; WOOD, *supra* note 8, at 32-34.

²² See BANNING, *supra* note 21, at 65-66.

²³ See LAWRENCE D. CRESS, *CITIZENS IN ARMS: THE ARMY AND MILITIA IN AMERICAN SOCIETY TO THE WAR OF 1812*, at 23-25 (1982); POCOCK, *supra* note 20, at 413; W.A. SPECK, *RELUCTANT REVOLUTIONARIES* 155 (1988); Williams, *supra* note 18, at 572.

Although republican fears of royal conspiracy were born under the Stuart monarchs,²⁴ the American revolutionaries believed that the House of Hanover bred tyrants as well. In the actions of George III, they saw a reprise of the plotting of James II,²⁵ just as the militias today believe the actions of the Clinton Administration are a reprise of the government of George III. After the revolution, many of the Framers believed that citizens should fear even a popularly elected government, because the interests of governors could always stray from the interests of the governed, just as the interests of the king's dependents had strayed from the interests of the British people.²⁶ In addition, some of the Framers feared the new central government above all, because of its distance from the people. These men became the chief sponsors of a federal bill of rights to control the monster.²⁷

Indeed, modern theorists of the Second Amendment would probably agree on only one point: fear of the central government largely inspired the Amendment. For the last several decades, opinion about the meaning of the Amendment has fallen into two general camps. The first camp, the "collective rights" view, reads the provision narrowly by focusing on its first clause: "A well regulated Militia, being (pg.889) necessary to the security of a free State"²⁸ According to proponents of this view, the amendment protects arms-bearing only within a state militia in order to counter the great power of the Federal Government.²⁹ The second camp, the "individual rights" view, reads the provision more broadly by focusing on its second clause: "the right of the people to keep and bear Arms, shall not be infringed."³⁰ According to proponents of this view, the Amendment guarantees an individual right to own arms to "the people," meaning all of the people, not just militia members, in order to resist federal tyranny among other reasons.³¹ While these two views differ over who possesses the right, militia members or all citizens, they nonetheless agree that the impetus behind the right was a concern about federal corruption.³²

²⁴ See Andrew Fletcher, *A Discourse of Government with Relation to Militias*, in SELECTED POLITICAL WRITINGS AND SPEECHES 1, 10 (David Daiches ed., 1979); John Trenchard & Thomas Gordon, *Cato's Letters No. 94*, reprinted in THE ENGLISH LIBERTARIAN HERITAGE 222-23 (David L. Jacobson ed., 1965); SPECK, *supra* note 23, at 145-46, 154-56 (documenting the suspicion caused by the support of a standing army and royal influence on judges).

²⁵ See BANNING, *supra* note 21, at 78-80 (discussing the impact on colonists of the decaying control of the monarchy); WOOD, *supra* note 8, at 32-34 (discussing the King's power to destroy the constitutional balance in England).

²⁶ According to Akhil R. Amar, this divergence is an example of "agency costs": the interests of the agent (government) departing from the interests of the principal (the people). Amar argues that these costs formed the core concern of the Framers. Their desire, in his view, was less to create private individual liberties and more to empower the citizenry to control a dangerous government. See Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1133 (1991).

²⁷ See Williams, *supra* note 18, at 575-77.

²⁸ U.S. CONST. amend. II.

²⁹ See, e.g., Carl T. Bogus, *Race, Riots, and Guns*, 66 S. CAL. L. REV. 1365, 1372-74 (1993); 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, 31-34 (1989); Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 VAL. U. L. REV. 107, 108 (1991).

³⁰ U.S. CONST. amend. II.

³¹ See Stephen P. Halbrook, *The Right of the People or the Power of the State: Bearing Arms, Arming Militias, and the Second Amendment*, 26 VAL. U. L. REV. 131 (1991); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989); Nelson Lund, *The Second Amendment, Political Liberty, and the Right of Self-Preservation*, 39 ALA. L. REV. 103 (1987); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236 (1994).

³² See Bogus, *supra* note 29, at 1373-74; Ehrman & Henigan, *supra* note 29, at 33-34; Henigan, *supra* note 29, at 116-19; Kates, *supra* note 31, at 221-25; Levinson, *supra* note 31, at 646-50; Lund, *supra* note 31, at 107-08; Van Alstyne, *supra* note 31, at 1244-46.

In their fear of the federal government, the rhetoric of the modern private militias closely tracks the rhetoric of the Framers. Like early civic republicans, the militia groups fear that the interests of government officials have dangerously diverged from the interests of the citizenry, and that office-holders are conspiring to empower themselves at the expense of the American people. Thus, Linda Thompson declaims: "The federal judicial offices and congress have set themselves wholly apart from and above the people, immune even from suit for their transgressions, answerable to none, and responsive to none except those who further their private interests."³³ MOM urges citizens not to "leave our fate in the hands of corrupted, self serving, foreign mercenaries [in the federal government]" or to "trust our fate to their decisions, which are fostered by agencies of our government and private corporations in it's [sic] employ."³⁴ Warning of martial law to come, *Federal Lands Update* explains: "Most of the citizens keep saying; 'Aren't those people we sent back to Washington (pg.890) representing our interests?' Frankly no, they are not! Most have literally isolated themselves from their constituents"³⁵ In a similar manner, the Free Militia predicts: "The fact that officials are infringing gun rights on every front is simply a manifestation of their inner tendency to empower themselves. Left unchecked, this tendency will lead to genuine tyranny."³⁶

Echoing the rhetoric of civic republicanism, the militia groups also fear that the federal government will use a standing army to enforce its will against an unsuspecting citizenry. Thus, Linda Thompson lists as one of the "Train of Abuses": "The federal government has kept among us, in Times of Peace, Standing Armies, without the consent of our [state] Legislatures, or through the seduction or coercion of the state legislatures through the mechanism of 'federal tax monies'"³⁷ Militia writers worry particularly that members of the military might participate in federal schemes to disarm the American public.³⁸

The militia's fear of government's armed might focuses not only on the U.S. military, but also on federal law enforcement agencies, particularly the Bureau of Alcohol, Tobacco, and Firearms (ATF). In the militia's view, the paramilitary equipment and training of federal agencies make them resemble more a standing army than conventional police: "Jack-booted, helmeted, armor-vested 'law enforcement' S.W.A.T. teams now conduct KGB-type raids by kicking down doors in the middle

³³ *Declaration of Independence of 1994*, reprinted in STERN, *supra* note 14, app. 102.

³⁴ MILITIA OF MONTANA, THE MILITIA 8 (pamphlet from MOM in Noxon, Montana) (on file with the author).

³⁵ Jim Faulkner, *Martial Law and Emergency Powers*, FEDERAL LANDS UPDATE, Nov. 1994, at 5. As its title suggests, *Federal Lands Update* sees the threat of tyranny particularly evident in federal land policy and environmental regulation.

³⁶ THE FREE MILITIA, FIELD MANUAL SECTION § 1 at 47 (1994) (on file with the author). A particularly malignant expression of this idea comes from the neo-Nazi National Alliance. A flyer explains that "FREE MONEY CAN BE YOURS—if you are an 80-IQ welfare mother," an illegal alien, a "member of Jewish organized crime gangs" or a "homosexual 'performance artist.'" On the other hand, "all this free money is *not* available to you if you are an ordinary straight White American, a descendant of the men and women of Europe who discovered, pioneered, and built America." Instead, "*your* job is to work hard to provide all the free money and free goodies that the criminals—uh, I mean the politicians—like to give away to buy the votes of the minority and the special interest voting blocs." FREE MONEY (National Alliance) (on file with the author).

³⁷ THOMPSON, *supra* note 16, app. 102. Note the implicit analogy to the actions of the British crown in the seventeenth century. See *supra* notes 21-26 and accompanying text.

³⁸ For example:

U.S. Marines were asked if they would be willing to KILL American civilians who resisted confiscation of privately owned firearms. The sad commentary on that question was that the U.S. Marine Corp [sic]; in which we all have a son, daughter, grandchild, relative, or an acquaintance just down the street, in that tightly regimented organization; the overwhelming answer was YES! Sad, but true.

Faulkner, *supra* note 35, at 6.

of the night."³⁹ Observers believe that two recent (pg.891) ATF actions, the assault on the Branch Davidian Compound and the siege of white-supremacist Randy Weaver at Ruby Ridge, contributed significantly to the recent dramatic rise in militia membership.⁴⁰ Indeed, McVeigh's principal target in the Murrah Building might have been the ATF office. The bombing occurred on April 19, 1995, two years to the day after the Waco assault, and militia members were very aware of the importance of that date.⁴¹ MOM, for example, announced in its newsletter:

1. APRIL 19, 1775: Lexington burned; 2. APRIL 19, 1943: Warsaw burned; 3. APRIL 19, 1992: The feds attempted to raid Randy Weaver, but had their plans thwarted when concerned citizens arrived on the scene with supplies for the Weaver family totally unaware of what was to take place; 4. APRIL 19, 1993: The Branch Davidians burned; 5. APRIL 19, 1995: Richard Snell will be executed—UNLESS WE ACT NOW!!!⁴²

Like the Framers of the Second Amendment, militia writers focus on corruption primarily in the federal government, rather than in local legislatures. To be sure, the militias do not trust any government. For example, Samuel Sherwood reportedly instructed militia members to "look [state] legislators in the face because some day you may be forced to blow it off."⁴³ Linda Thompson attributes corruption in the state legislature to federal bribes.⁴⁴ One element of the militia movement, the Posse Comitatus, active primarily during the 1980s (pg.892) maintains that government above the county level is illegitimate.⁴⁵ The overwhelming bulk of militia attention, however, focuses on the federal government. As Part III explains, the militias believe that the central government is the locus of a conspiracy to destroy America. Accordingly, the revolution will involve a battle between federal

³⁹ John Grady, *U.S. Government initiates Open Warfare Against American People*, MILITIA NEWS, Collector's Edition 1994, at 2, reprinted in STERN, *supra* note 14, app. 104.

⁴⁰ See, e.g., Beth Hawkins, *Patriot Games*, DETROIT METRO TIMES, Oct. 12-18, 1994, at 14; *Hate Movement Shifts Tactics in 1994*, KLANWATCH INTELLIGENCE REPORT (Southern Poverty Law Center, Montgomery, Alabama), Mar. 1995, at 9, 11; Philip Weiss, *Off the Grid*, N.Y. TIMES, Jan. 8, 1995, § 6, at 24, 29-30, 44-52.

⁴¹ See, e.g., Thomas, *supra* note 1, at 32-34.

⁴² *Richard Snell Update*, TAKING AIM (MOM, Noxon, MT), Mar. 1995, at 7. Snell was a convicted murderer with ties to the militia movement. See *id.* at 8; Jo Thomas & Ronald Smothers, *Oklahoma City Bombing Was Target of Plot as Early as '83, Official Says*, N.Y. TIMES, May 20, 1995, at A6. References to Waco and Ruby Ridge abound in the militia materials. *The Militia News*, for example, opines:

The recent 51 day siege and massacre of nearly one hundred men, women and children in Waco, Texas, was a crime of the greatest magnitude. It was a cruel, sadistic, brutal crime. It was a crime which violated nearly every article of the Bill of Rights It resembled the burning and obliteration of Christian cities and the annihilation of their inhabitants by Mogul hordes in earlier centuries.

Grady, *supra* note 39, at 2-3. About Ruby Ridge, *The Free Militia* recounts: "The BATF attempted to entrap Randy Weaver in Idaho. When he refused to become one of their henchmen, his cabin was put under 24-hour BATF surveillance, leading to a surprise confrontation that left Weaver's son and wife dead and Weaver acquitted of any wrongdoing." THE FREE MILITIA, *supra* note 36, at 43.

⁴³ Chris Bouneff, *Leader: Militia Misunderstood*, IDAHO PRESS-TRIB., Apr. 9, 1995, at 4A. Sherwood has denied the statement. *Id.*

⁴⁴ THOMPSON, *supra* note 16, app. 102.

⁴⁵ See JAMES CORCORAN, BITTER HARVEST 27 (1990) (noting that the Posse Comitatus takes its name from the Latin for "power of the country").

forces and the citizenry. In this Manichean formulation, states are not a principal actor—for good or ill.⁴⁶

Although they share a fear of federal conspiracy, modern militias and the Framers of the Second Amendment would not share a common view of the villains behind the conspiracy. Eighteenth-century revolutionaries did not fear that socialists, the United Nations, secular humanists,⁴⁷ or Jews were likely to dominate the governments in Whitehall or Washington.⁴⁸ However, those differences⁴⁹ should not obscure the common ground. The Framers of the Second Amendment warned citizens to be alert to the danger of corruption in the federal government, and the militias believe that they, alone among Americans, have heeded that warning.

B. The Revolutionary Second Amendment

The Framers and the modern militias would also agree that a purpose of the Second Amendment was to allow the people, organized into militias, to make a revolution against a corrupt federal government, not to allow private individuals to defend themselves against other private individuals.⁵⁰ Concern about revolution permeated the discussion over the proposed right-to-arms provision. By contrast, (pg.893) none of the central actors even mentioned a right of self-defense. After all, the Framers had just successfully revolted against one imperial government, and they were concerned that they might need to make a repeat performance.⁵¹

The right of the people to bear arms prevented oppression by a new imperial government in three ways. First, an armed popular militia made it less likely that the government would adopt a standing army. Second, it would give the government pause before oppressing the people. Most importantly, the Second Amendment gave the people the power to overthrow a corrupt government.⁵² Consider the Virginia legislature's draft proposal for the amendment, which was penned by George Mason and provided the foundation for Madison's draft of the Second Amendment.⁵³ It reads:

⁴⁶ See Bouneff, *supra* note 43, at 4A. Samuel Sherwood, for example, issued his threat against state legislators because he believes that they might side with the central government in the coming civil war.

⁴⁷ Some Framers believed that religious establishment was necessary to maintain a virtuous state, but others were rationalist Deists who believed that traditional religion could only benight the government. See David C. Williams & Susan H. Williams, *Volitionalism and Religious Liberty*, 76 CORNELL L. REV. 769, 853-58 (1991) (considering the views of James Madison and Thomas Jefferson). In any event, modern secular humanism did not even exist in the eighteenth century for the Framers to worry about. The drafters of the Bill of Rights worried that some particular religious denomination, not humanists, might take over the federal government. THE FEDERALIST No. 10, at 124-26 (James Madison) (I. Kramnick ed., 1986). As a result, they adopted the Establishment and Free Exercise clauses along with the Second Amendment.

⁴⁸ On the other hand, shorn of its anti-semitism, the militia writers' worry about a conspiracy by international financiers has some resonance in the civic republican concern about banking, taxes, and credit as instruments of governmental corruption of the citizenry. See *supra* text accompanying notes 21-22.

⁴⁹ Indeed, those differences explain why the militias mistake themselves for the Body of the People: Militia writers construct a traitorous Other composed of whoever disagrees with them. See *infra* part II.B.2.

⁵⁰ See Williams, *supra* note 18, at 586-88.

⁵¹ U.S. CONST. art. I, § 8, cl. 16. Proponents of the amendment were especially worried that Congress might abuse its new powers of "organizing, arming, and disciplining, the Militia" by disarming popular militias and thus removing the main potential source of resistance to a federal army. See Ehrman & Henigan, *supra* note 29, at 29.

⁵² See Williams, *supra* note 18, at 572-86.

⁵³ See STEPHEN HALBROOK, THAT EVERY MAN BE ARMED 75 (1984).

That the people have a right to keep and bear arms; that a well-regulated militia, composed of the body of the people trained to arms, is the proper, natural, and safe defence of a free state; that standing armies, in time of peace, are dangerous to liberty, and therefore ought to be avoided⁵⁴

Similarly, Elbridge Gerry offered the only explanation of the meaning of the amendment during the Congressional debates:

This declaration of rights, I take it, is intended to secure the people against the mal-administration of the Government; if we could suppose that, in all cases, the rights of the people would be attended to, the occasion for guards of this kind would be removed.... What, sir, is the use of the militia? It is to prevent the establishment of a standing army, the bane of liberty.⁵⁵

Virtually all modern Second Amendment theorists agree that one purpose of the provision was to make resistance to the federal government possible.⁵⁶ Again, the two camps disagree over who possesses the right, state militias or the mass of individuals.⁵⁷ The individual (pg.894) rights view accepts that revolution was the main reason for the amendment but argues that self-defense was a secondary aim. Proponents sometimes admit that the historical materials contain few references to such a purpose,⁵⁸ but nonetheless argue that such a goal was implicit.⁵⁹ Again, such disagreements should not obscure the underlying consensus: the Second Amendment ensures the possibility of revolution against the central government by someone under some circumstances.

The militias are thus correct that the right of revolution has a more secure home in the Second Amendment than does a right of self-defense. The MOM T-shirt that announces, "The Second

⁵⁴ *Id.*; 2 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 842 (1971).

⁵⁵ 1 ANNALS OF CONGRESS 749-50 (Joseph Gales ed., 1789). These two examples are illustrative of many similar statements. For interested readers, most Second Amendment scholarship bristles with similar quotations.

⁵⁶ *See* sources cited *supra* note 31.

⁵⁷ Compare Bogus, *supra* note 29, at 1372-73 (arguing that the notion of a constitutionally guaranteed individual right to bear arms is a myth) and Ehrman & Henigan, *supra* note 29, at 21-34 (arguing that the Second Amendment is aimed at a military-related right to bear arms) and Henigan, *supra* note 29, at 114-15 (arguing that the Framers viewed the militia as an instrument of governmental authority) with Kates, *supra* note 31, at 214-20 (arguing that the Second Amendment guarantees the people's right to possess arms) and Lund, *supra* note 31, at 111-12 (arguing that the Second Amendment protects an individual's right to keep and bear arms) and Van Alstyne, *supra* note 31, at 1241-44 (noting that the right belongs to the common citizen rather than a standing army).

⁵⁸ *See, e.g.*, Lund, *supra* note 31, at 111-12, 118.

Nicholas Johnson has argued that the Ninth Amendment offers a firmer basis for a constitutional right of self-defense than the Second Amendment. Nicholas Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment*, 24 RUTGERS L.J. 1, 1-16 (1992). Robert Shalhope argues that there is direct historical support for the idea that the Second Amendment protects a right of self-defense. Robert Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599, 604-12 (1982). His sources, however, do not support this claim. *See* Williams, *supra* note 18, at 587 n.198.

⁵⁹ Nelson Lund, for example, has argued that general liberal theory guarantees a right to self-defense, and the Second Amendment should be interpreted broadly in light of liberal theory. Lund, *supra* note 31, at 117-23.

Don Kates has argued that the Framers believed that the right of revolution originates from a more basic Lockean right of self-defense, so that in protecting the specific right of revolution, they really meant to protect the more general right of self-defense. Kates, *supra* note 31, at 244. As Part Two of this Article will explain, the individualism inherent in these arguments is not consistent with the civic republicanism that produced the Second Amendment. Accordingly, a personal right of self-defense is a poor candidate for inclusion in the range of implicit Second Amendment rights, whatever they may be.

Amendment isn't about hunting or target-shooting ... It's about FREEDOM!",⁶⁰ captures militia sentiment. Similarly, Linda Thompson announced: "The militia is what the Second Amendment is about, because it isn't about hunting ducks; it's about hunting politicians."⁶¹ MOM further explains:

The majority of American's [sic] today, believe the reason that our fore fathers [sic] wanted the people to have the right to keep and bear arms was for the purpose of self defense against criminals, hunting, etc. This is *NOT* the primary reason for the enactment of the 2nd Amendment. Let's let Thomas Jefferson explain it for us: "*The strongest reason for the people to retain the right to keep and bear arms is, as a last resort, to protect themselves against tyranny in government.*"⁶² (pg.895)

Like the Framers, then, the militia believe in a general right to revolution. Militia writers also extol all three specific benefits of the right to arms espoused by the Framers. First, as the last section illustrates, they fear a standing army,⁶³ and as the next section explains, they trust a popular militia.⁶⁴ Second, they believe that an armed populace can check an oppressive central government from becoming oppressive. Often, militia writers make this point by examining the dynamics of fear between a government and its citizens: it is inevitable that one will fear the other, and it is important that fear flow from the government toward the citizens, rather than the other way. Thus, MOM attributes to Thomas Jefferson the statement: "When governments fear the people there is liberty. When the people fear the government there is tyranny."⁶⁵ At another point, MOM explains: "If the militia is independent and viable, then only laws which are right and just will come forth from the government...."⁶⁶ Similarly, in issuing its "CALL TO ARMS!", the Free Militia exhorted that "[y]our right and duty is to arm and organize yourself" because "[t]he more citizens that own guns, the less willing the government will be to threaten us."⁶⁷

Finally, if the government does become oppressive, an armed population can make a revolution and take control. *Federal Lands Update* makes the point directly: "IF THE GOVERNMENT USES ITS FORCE AGAINST THE CITIZENS, THE PEOPLE CAN RESPOND WITH A SUPERIOR AMOUNT OF ARMS, AND APPROPRIATELY DEFEND THEIR RIGHTS!"⁶⁸ Many militia writers rely directly (and more or less accurately) on the writing of the Framers for this proposition. Thomas Jefferson and Patrick Henry are favorites. The Free Militia instructs its members to "MEMORIZE: "That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it, and to institute a new Government."⁶⁹ The Second Amendment Militia also quotes Jefferson in urging prospective members to join: "The Spirit of Resistance to Government is so valuable on certain occasions that

⁶⁰ See *supra* text accompanying notes 12-49.

⁶¹ *Six O'Clock Newscast* (Indianapolis Eyewitness News, May 1, 1995).

⁶² THE MILITIA, *supra* note 34, at 3.

⁶³ See *supra* text accompanying notes 37-42.

⁶⁴ See *infra* part II.B.

⁶⁵ *Militia of Montana Declaration*, *supra* note 16, at 5.

⁶⁶ *The Militia*, *supra* note 34, at 8.

⁶⁷ THE FREE MILITIA, *supra* note 36, at 47.

⁶⁸ Jim Faulkner, *Why There is a Need For the Militia in America*, FEDERAL LANDS UPDATE, Oct. 1994, at 6.

⁶⁹ THE FREE MILITIA, *supra* note 36, at 39 (quoting from the Declaration of Independence).

I wish it to be always kept alive."⁷⁰ Henry's famous "liberty or death" speech makes regular appearances in the militia literature:^(pg.896)

We are not weak if we make a proper use of those means which the God of nature has placed in our power. Millions of people armed in the holy cause of liberty, and in such a country as that which we possess, are invincible.... Is life so dear, or peace so sweet, as to be purchased at the price of chains and slavery? forbid [sic] it, Almighty God! I know not what course others may take; but as for me, give me liberty or give me death!⁷¹

C. The Importance of the Militia

Like the Framers, modern militia writers believe that the right to bear arms belongs in the hands of an organized militia, not just private individuals who happen to own guns. That claim lands them in the middle of the pivotal controversy in Second Amendment scholarship, so a description of the parameters of that debate is in order. In some sense, every participant in the Second Amendment debate agrees that the Framers gave the right to arms to a militia, but we disagree over the exact makeup of that militia. In my view, the Framers believed that the militia must be organized so as to be universal and virtuous. In the militias' view, the militia should be organized, so that it will be effective; it may be universal, but it need not. The militia writers are thus correct that the militia must be organized, but are wrong about the reasons for that organization—effectiveness rather than universality and virtue.

This error leads to a more fundamental mistake: I believe that militia writers are wrong in believing that a Second Amendment militia may legitimately be less than universal. On this point the militias agree with both the states' right and individual rights positions. The individual rights view holds that the Amendment gives every private individual the right to own arms necessary to stage a revolution. In the language of the Amendment, the right belongs to "the people," and in the eighteenth century the militia included all citizens capable of bearing arms.⁷² In this view, therefore, the militia need be neither organized, universal, nor virtuous, because the militia is only another name for all private gun-owners. The states' rights view holds that the Second Amendment gives a right to bear arms only to state militias, because the purpose of the Second Amendment was to safeguard a "well-regulated militia." Because the modern incarnation of the militia is the National Guard, the Amendment is nothing more than a ^(pg.897) protection of a state's right to maintain a National Guard.⁷³ Thus, in the states' rights view, the militia must be organized as part of the National Guard, but the National Guard need not be universal.

As Part II will elaborate,⁷⁴ neither of these views are correct. Contrary to the states' rights view, the militia of the eighteenth century included every citizen; it had to include every citizen

⁷⁰ *Application*, *supra* note 14.

⁷¹ Grady, *supra* note 39, at 4. Other militia writers rely on another familiar imprecation by Henry: "Guard with jealous attention the public liberty. Suspect every one who approaches that jewel. Unfortunately, nothing will preserve it but downright force. Whenever you give up that force, you are ruined." SHERWOOD, *supra* note 15, at 60.

⁷² *See, e.g.*, HALBROOK, *supra* note 53, at 84-87; Kates, *supra* note 31, at 211-20; Levinson, *supra* note 31, at 646-47.

⁷³ *See, e.g.*, JOHN H. ELY, *DEMOCRACY AND DISTRUST* 95, 227 n.76 (1980); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 299 n.6 (2d ed. 1988); John Levin, *The Right to Bear Arms: The Development of the American Experience*, 48 CHI.-KENT L. REV. 148, 158-59 (1971); Roy G. Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 HASTINGS CONST. L.Q. 961, 999 (1975).

⁷⁴ For more detailed exposition of this argument, see Williams, *supra* note 18, at 588-94.

because with the right to bear arms came the right to revolution. Any lesser body was, in the language of the Framers, a "select militia"—a mere slice or segment of society, and a revolution by such a faction would benefit the faction, not the People as a whole. The modern National Guard is not a universal militia. Thus, protection for the Guard will not satisfy the demands of the Second Amendment.⁷⁵

The individual rights view suffers similar problems. Contrary to that view, the militia of the eighteenth century was not just a random collection of private individuals who owned arms and who spontaneously turned out on the same day to resist the government. The state raised the militia (although the militia might later resist the state) to ensure its universality and virtue, because only the state is a universal body. Like the National Guard, private gun-owners are not a universal body; they are less than the whole and demographically skewed.⁷⁶

A universal militia, then, is a very particular and, for the Framers, a very important concept. It is the same as neither the National Guard nor the totality of private gun-owners. For the Framers, only a universal militia could reliably protect the common good by force of arms, because only a universal militia encompasses the People as a body. Neither the states' rights, nor the individual rights view takes this requirement of universality seriously enough: *force must reside in the hands of the whole*. Without a universal militia, the Second Amendment is hollow. A modern militia *must* include all of the citizenry; any smaller group will not qualify.

As Part III will explain, modern militia writers also fail to appreciate the importance of universality. They believe that their private and highly partial militia groups constitute Second Amendment militias. They tend to confuse their own interests with the common good and their own organizations with the American people. Despite that confusion, they do understand two important features of a Second (pg.898) Amendment militia. Unlike the states' rights theorists, militia writers acknowledge that the eighteenth-century militia included the whole citizenry; and unlike the individual rights theorists, they believe that the militia must be organized. Their only error is their failure to grasp that the reason for organization was to ensure universality.

To demonstrate that the revolutionary militia included the whole citizenry, militia writers again rely on the Framers. *The Militia News* quotes George Mason stating, "I ask sir, what is the militia? It is the whole people, except for a few public officials."⁷⁷ Samuel Sherwood roughly quotes Richard Henry Lee: "A militia, when properly formed, are in fact the people themselves.... [T]he constitution ought to secure a genuine force and guard against a select [i.e. less than universal] militia, by providing that the militia shall always be kept well organized, armed, and disciplined, and include ... all men capable of bearing arms."⁷⁸ More succinctly, *Federal Lands Update* claims: "Our Founding Fathers defined WE THE PEOPLE as the militia"⁷⁹ Similarly, MOM maintains that "[i]t was not the army, or the bureaucratic officials, members of parliament or Governors who made

⁷⁵ See *id.* at 589.

⁷⁶ See *id.* at 590-93.

⁷⁷ Grady, *supra* note 14, at 5.

⁷⁸ SHERWOOD, *supra* note 15, at 58.

Lee actually wrote: "[T]he constitution ought to secure a genuine and guard against a select militia...." RICHARD H. LEE, AN ADDITIONAL NUMBER OF LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN 169 (1788). By this assertion, he meant that the Constitution should secure a genuine (i.e., universal) militia and forbid a select (i.e., less than universal) militia. See Williams, *supra* note 18, at 594.

⁷⁹ Faulkner, *supra* note 68, at 6.

up the Revolutionary militia It was John Q. Public—the common man."⁸⁰ Militia writers further explain that under current law, U.S. armed forces are divided into the National Guard and the organized militia on the one hand and the unorganized militia on the other. According to these writers, the latter consists of the bulk of the citizenry and constitutes the militia contemplated by the Second Amendment.⁸¹ (pg.899)

Like the individual rights theorists, militia writers maintain that the militia must be comprised of the people as a whole unorganized by the government. Unlike the individual rights theorists, however, they emphasize that the Second Amendment contemplates that the people should organize themselves into militias, in order effectively to combat government. Indeed, this aspect of militia thinking is really what sets these movements apart, what most attracts members,⁸² and what most alarms fellow citizens. Many Americans believe that the Second Amendment protects their private right to own guns, but militia members go further. The militias are organizing and arming themselves as intentional political activity. Thus, MOM argues:

Many feel that it is too much to have a militia, that we need to just settle for the possession of arms.... [But] [t]he militia, under the second amendment, is to be able to bare [sic] arms, meaning to use them in a military confrontation. Not just pack them around the house, yard or forest. To stand on the second amendment means that you are willing, able, and have desires of belonging to a militia, to whom the right of keeping and bearing arms is guaranteed.⁸³

Similarly, *Federal Lands Update* maintains: "The security of a free state is not found in the citizens having guns in the closet. It is found in the citizenry being trained, organized, equipped and led properly...."⁸⁴ *The Free Militia* exhorts: "You need to be organized, equipped, trained, and coordinated with other like-minded men to effectively stand up to the growing arrogance of the federal government. It was said during the American Revolution that 'United we stand, divided we

⁸⁰ THE MILITIA, *supra* note 34, at 7. The Second Amendment Committee purports to derive this conclusion from a linguistic analysis of the Amendment itself. According to A.C. Brocki, teacher of Advanced English, a foremost expert in grammar, former Senior Editor for Houghton Mifflin, the sentence means that *the people* are the militia. Smith, *supra* note 14.

⁸¹ Definitions of the unorganized militia vary. *Federal Lands Update* asserts that the unorganized militia consists of every "able bodied male between 18 and 65." This definition is "a true vestige of the intent of the Founding Fathers and a heritage of the Guarantee of the Second Amendment." See Faulkner, *supra* note 68, at 6. MOM explains that the unorganized militia includes "all able-bodied citizen's [sic] of this state" and "therefor [sic], the unorganized militia conforms with 'Militia' as provided for in the second amendment." THE MILITIA, *supra* note 34, at 6.

In fact, current law defines the unorganized militia as all males between the ages of 17 and 45 and all female officers of the national guard. 10 U.S.C. § 311 (1994). At present, that definition has no functional significance. The Code does not provide for the arming, equipping, organizing, training, or funding of the unorganized militia. In fact, § 311 seems to do only one thing: it allows those citizens who fit the statutory definition to proclaim that they are members of the militia, as militia writers are eager to do. For example, Linda Thompson, who does not appear to fit the definition, has proclaimed herself "Acting Adjutant General" of the Unorganized Militia of the United States "[p]ursuant to 10 U.S.C. § 311 and Articles I and II of the Bill of Rights." Linda Thompson, *Ultimatum to Each Member of the United States House of Representatives and United States Senate* (Apr. 19, 1994) (on file with author).

⁸² Ray Southwell, co-founder of the Michigan Militia, explained the appeal: "What I've found is that people are so angry they're loose cannons.... They come into the militia and their anger level drops. Now we have a common goal, a common good. He's realized he's not alone." Beth Hawkins, *Conspiratorial Views*, DETROIT METRO-TIMES, Oct. 12-18, 1994, at 13.

⁸³ THE MILITIA, *supra* note 34, at 7.

⁸⁴ Faulkner, *supra* note 68, at 6.

fall.' This is still true today."⁸⁵ The Second Amendment Committee explains the meaning of the provision: "By putting the militia at the forefront of the sentence which composes the Second Amendment of the Bill of Rights, [the Framers] stressed the importance of the *collective* use of the right to arms."⁸⁶ (pg.900)

As the last quotation illustrates, there is a certain irony in the militias' focus on the collective rights aspect of the Second Amendment. Militia groups, who are more pro-gun and anti-government than the National Rifle Association, agree with the states' rights theorists—who are generally anti-gun—that the militia clause is crucial to the provision's meaning. By contrast, some proponents of the individual rights view who share the militia's enthusiasm for guns have sought to de-emphasize the importance of the introductory clause of the Amendment, because they believe that the right belongs to the "people," not to a formal militia.⁸⁷

The irony, however, is more apparent than real, because the states' rights theorists and the militia groups mean very different things when they refer to the militia. The former group views the militia as the National Guard, a public body firmly under governmental control. Militia writers, by contrast, believe that the right to arms belongs to private, voluntary militias recruited and organized independent of the government. As one writer explains, "[a]t no time in our history since the colonies declared their independence from the long train of abuses of King George, has our country needed a network of active militias across America to protect us from the monster we have allowed our federal government to become."⁸⁸ To the militia writer, the right to bear arms is essentially individual: private citizens with private arms should individually agree to band together, pooling their resources to make them more effective.

In other words, although the militia writers are right that the revolutionary militia included the whole citizenry and that the militia must be organized, they fail to reach the logical conclusion: a modern Second Amendment militia *must* be organized by the state to be universal; it may not rest on the private decisions of individuals to enlist.⁸⁹ For militia writers, militia membership is the highest form of Second Amendment patriotism for purely practical reasons. A gun in the closet or the woods does the resistance movement no good at all; only if individuals unite can they hope to resist the behemoth in Washington. Significantly absent from this analysis, however, are the political and moral concerns held by the Framers: for civic republicans, only if the militia literally encompasses the whole will it safeguard the interests of the whole, the Common Good. In other words, the Framers were suspicious of everyone who held power, militias as (pg.901) well as the government. As Part III will argue, the private militias presently organizing in this country are select, not universal, and the Framers would fear them as much as they would fear the Bureau of Alcohol, Tobacco, and Firearms. The militias do not worry that they might be partial; instead, they blithely assume that, however few their numbers, they are the People.⁹⁰ For them, the reason to have more

⁸⁵ THE FREE MILITIA, *supra* note 36, at 47.

⁸⁶ Smith, *supra* note 14.

⁸⁷ Notoriously, that clause does not appear in most of the NRA's promotional material. See OSHA GRAY DAVIDSON, UNDER FIRE 134-35 (1993).

⁸⁸ Faulkner, *supra* note 68, at 6.

⁸⁹ In this sense, it is not enough that American citizens have a universal right to own arms or to join a militia; the militia must in fact be universal. Otherwise, whenever there is a revolution, it will be made in the interests of the faction that actually holds the arms. See Williams, *supra* note 18, at 593-94.

⁹⁰ See *infra* part II.B.2.

members is not to guard against partiality. The reason to have more members is simply to have more guns.

D. The Danger of Disarmament

To summarize, the Framers and the militia writers would agree that the federal government is continually at risk of becoming corrupt and using a standing army against the people, that the People have a right to resist tyranny by force of arms, but that the only effective safeguard against oppression is universal, armed militia membership. The final proposition inevitably follows: before the government attempts to impose an oppressive regime, it always seeks first to disarm the citizenry so as to make it helpless. The populace should therefore always fear gun control as a sign of despotic designs afoot.

The immediate (though perhaps not the only) concern prompting the Second Amendment was a fear that the federal government might use its Article I powers to disarm the militia and pave the way for tyranny. Antifederalist John DeWitt, for example, warned: "[Members of Congress] at their pleasure may arm or disarm all or any part of the freemen of the United States, so that when their army is sufficiently numerous, they may put it out of the power of the freemen militia of America to assert and defend their liberties"⁹¹ Elbridge Gerry, in the floor debate of the amendment also cautioned: "Whenever Governments mean to invade the rights and liberties of the people, they always attempt to destroy the militia, in order to raise an army upon their ruins."⁹²

Militia writers agree; indeed, they think that the conspiracy has already begun. *Federal Lands Update* explains:

Why is the federal government in such a hurry to take away the guns of honest, law abiding citizens? Because once we are disarmed, we become as sheep! And, the federal government, which has never been a friend of those who insist upon enforcing their Second Amendment rights, will come down hard upon it's [sic] people.⁹³

The Militia News warns: "The state must first try to break our will to resist, and then it must confiscate private firearms so that even with (pg.902) the desire and the will we will be unable to resist what is planned for us. This is what gun control is all about."⁹⁴ Another commentator apocalyptically predicts:

In the coming confrontation between the public and the government to disarm the citizenry, they may kill, arrest, imprison, and seize assets from tens or even hundreds of thousands of Americans; but they are unlikely to ever completely disarm the millions of Americans who understand the Second Amendment to the Constitution and the warnings of our founding fathers to never let the government disarm them.⁹⁵

⁹¹ THE ANTIFEDERALIST PAPERS 75 (Morton Borden ed., 1965).

⁹² 1 ANNALS OF CONGRESS, *supra* note 55, at 750.

⁹³ Faulkner, *supra* note 35, at 3.

⁹⁴ Grady, *supra* note 14, at 3.

⁹⁵ MCALVANY INTELLIGENCE ADVISOR, March 1994, at 20.

The Militia Of Montana attributes such a view to Jefferson, claiming that: "Thomas Jefferson also understood that those who would attempt to take away the liberty of the citizen's [sic] of this nation must first disarm them."⁹⁶

According to militia writers, recent gun control statutes are part of a general conspiracy to oppress the American people. Many militia groups avow that Sarah Brady testified in support of the Brady Bill: "Our task of creating a socialist America can only succeed when those who will resist us have been TOTALLY DISARMED!"⁹⁷ They argue that the same plot is behind the ban on assault weapons: "[A]ssault rifles are the teeth of the Second Amendment. Without their bite, there is nothing to prevent a draconian state from devouring all of our precious liberties."⁹⁸ Indeed, "[t]he really subversive thing about these two bills is that they are aimed at limiting militias more than at limiting crime."⁹⁹ MOM agrees: "Our government by passing these Crime Bills and the Brady Bill have shown us that they are attempting to disarm the militias of the several states."¹⁰⁰ Militia writers fear even more dangerous federal action: "There are SEVEN (7) SEIZURE EXECUTIVE ORDERS which can be enacted with the stroke of a bureaucratic (pg.903) pen and the nation will be plunged into an absolute dictatorial, martial law mode of repression."¹⁰¹

In the militias' view, this moment in history is critical for the American people. As militias see it, if the country proceeds much further down the road of disarmament, citizens will lose the ability to resist, and freedom will have flown from this land forever. Militia groups view recent gun control legislation as a warning: an oppressive government gains power by disarming the populace. The comparison to Hitler's Germany is common. *Federal Lands Update* for example, lists a series of analogies which begins: "1. In 1935, Adolph Hitler licensed all handguns. 2. In 1993, Bill Clinton licensed all handguns."¹⁰² Similarly, the Free Militia asserts: "The U.S. 1968 Gun Control Act is a word-for-word translation of Adolf Hitler's German gun control laws of 1938 Nazi Germany."¹⁰³ Furthermore, a flyer distributed at militia meetings bears an image of Hitler in stiff-armed salute with the caption: "All in favor of 'gun control' raise your right hand."¹⁰⁴ More broadly, MOM argues that

⁹⁶ THE MILITIA, *supra* note 34, at 3.

⁹⁷ See Faulkner, *supra* note 35, at 1; Faulkner, *supra* note 68, at 2; THE MILITIA, *supra* note 34, at 7. A single-page flyer distributed at militia meetings also bears the quoted language and an attribution to Sarah Brady ("in *HER OWN WORDS*"), all in very large letters so as to fill the whole page. BRADY FLYER (on file with the author).

⁹⁸ THE FREE MILITIA, *supra* note 36, at 47. According to the *Detroit Metro Times*, Michigan Militia Leaders agree, saying that "semi-automatic weapons are militia-style arms. Therefore, the only reason to ban them is to lay the groundwork for enslaving the populace." Beth Hawkins, *Guns and Glory*, DETROIT METRO TIMES, Oct. 12-18, 1994, at 12.

⁹⁹ THE FREE MILITIA, *supra* note 36, at 42a. The description of these bills as "subversive" seems ironic, coming from a group committed to subversion and regarding bills that enjoyed popular support. As Part Three explains, however, this usage is consistent with militia ideology: they see themselves as the true American people and individuals who oppose them are traitors or foreigners. Accordingly, the bills are subversive of the real America.

¹⁰⁰ THE MILITIA, *supra* note 34, at 7-8.

¹⁰¹ Faulkner, *supra* note 68, at 2.

¹⁰² Faulkner, *supra* note 35, at 5.

¹⁰³ THE FREE MILITIA, *supra* note 36, at 42 (footnote omitted).

¹⁰⁴ HITLER FLYER (on file with the author). To reinforce the message, the document goes on: "Political prisoners and Death Camps can't exist without 'Gun Control'. [sic] Some Americans still feel 'Gun Control' is a good idea. To save America from these Nazi-lovers, we must destroy 'Gun Control'!! [sic]" *Id.*

disarmament and suppression of the militia were responsible for oppression in East Timor, Poland, Czechoslovakia, Hungary, Romania, Yugoslavia, Italy, and Germany.¹⁰⁵

Many observers agree that along with the Waco and Ruby Ridge incidents, gun control statutes are responsible for the dramatic increase in militia membership.¹⁰⁶ For militia groups, such statutes are not mere technical violations of the Second Amendment; they directly attack the relationship between citizens and their government. In this sense, militia groups maintain that the Second Amendment is the very heart of the Constitution, because when Second Amendment rights disappear, our other rights will quickly follow as there will be no armed citizenry to defend them.¹⁰⁷ The groups believe that modern America is in the times that the Framers predicted: We can become like Russia or Nazi Germany, or we can hold fast to the American way of life, but only if we hold fast to our guns.^(pg.904)

II

WHAT THE MILITIA HAS WRONG—THE BODY OF THE PEOPLE

The militia movement, in short, offers a surprisingly sophisticated and elaborate theory of the Second Amendment that tracks much of the thinking of the Framers. Yet modern Americans, horrified by the activity and rhetoric of many militia groups have reacted to this theory with dismissal. The reason for these emotions is not hard to guess: many Americans fear that a broad-based right to revolution will result in anarchy and civil war. They doubt that citizens will all rise up together in a unified movement, sharing values and perceptions, against a universally reviled government. Instead, if citizens each have an individual right to own arms so as to be ready for revolution, outrages like Oklahoma City seem inevitable.¹⁰⁸ In his own mind, Timothy McVeigh was probably only exercising his Second Amendment rights; the fear is that there may be many more like him.

The Framers of the Second Amendment, however, also feared rebellion and civil war. In their view, the Second Amendment gave the right only to make a unified, organic revolution, and it gave the right only to a unified, organic people. For the amendment to apply in its own terms, in other words, citizens must be a People capable of united revolutionary action. In their formal, substantive analysis, modern theorists of the amendment ignore this requirement: they simply assert that the right belongs to the National Guard, individuals, or private militia groups without examining whether those bodies constitute a People. In their rhetoric, however, both individual rights theorists and modern militia groups implicitly claim that Americans are a People: they assert that in time of revolution, the People will strike down the current government and make a new one, in a spontaneous, decentralized but unified and organic revolutionary movement. In this sense, these writers conjure with the concept of a People, by causing us to imagine that such an entity exists without ever demonstrating or even arguing that one does.

¹⁰⁵ THE MILITIA, *supra* note 34, at 6-7.

¹⁰⁶ See, e.g., Beth Hawkins, *Patriot Games*, DETROIT METRO TIMES, Oct. 12-18, 1994, at 13.

¹⁰⁷ See Grady, *supra* note 14, at 6; *Application*, *supra* note 14; THE FREE MILITIA, *supra* note 36, at 47; SHERWOOD, *supra* note 15, at xv.

¹⁰⁸ One interviewer expressed this worry to Norman Olson, co-founder of the Michigan Militia, before the bombing: "But if you establish 83 militias in every county in the state, who's to say that they'll all agree on what the government does? What's to prevent another Bosnia here?" Robert Downes, *On the Front Lines with Northern Michigan's Militia*, NORTHERN EXPRESS, Aug. 22, 1994, at 4. Olson's response is discussed *infra* note 296.

A. The Framers' View of the People

The Framers probably would have shared the modern fear of factional rebellion and the revulsion at the Oklahoma City bombing. Indeed, no sooner had they completed a revolution against Great Britain than they proceeded to repress rebellions at home, such as the (pg.905) Whiskey Rebellion and Shay's Rebellion.¹⁰⁹ The new rebels themselves claimed the mantle of 1776; in their own minds, they were holding to the faith of Washington and Jefferson by making a popular revolution against a distant and tyrannical government. Throughout the Republic's later history, similar groups, usually disempowered, rural and traditional, have continued to resist modernizing and centralizing forces through violence. In defense of these rebellions, many such groups have relied on the traditional republican belief in a right of popular revolution.¹¹⁰ Nonetheless, all of these resistance campaigns met defeat, and the federal government has denied that the groups ever had such a right to revolt. Timothy McVeigh's rebellion thus reflects a long tradition, as does the manhunt by the FBI and the BATF. This American dynamic suggests a certain hypocrisy: how did a government born in revolution so quickly become intolerant of armed resistance? How did a people born in revolution so quickly become suspicious of revolutionary change?

Civic republicanism answers this charge of hypocrisy. Civic republicans see a profound difference between a revolution, which is protected by the Second Amendment, and a rebellion, which is not. To them, a revolution is resistance to government made by the Body of the People for the good of the whole. A rebellion, on the other hand, is resistance by a faction for its own interests. In this sense, a rebellion and a tyrannical government are similar; each represents an act of aggression against the People on behalf of partial groups.¹¹¹

The difference between a revolution, a rebellion, and a tyranny, thus lies in who initiates each. The People make a revolution for the common good; a faction makes a rebellion for its own ends; and officeholders make a tyranny for their own ends. The Second Amendment protects only the first—the right of the People to make a revolution. The People, correspondingly, have the right to keep and bear arms. The People in this formulation, however, are not merely a collection of factions, each with different interests. If the People were that fragmented, popular uprising could only be multiple rebellions—civil war, in other words. Instead, the People must have sufficient homogeneity to share a common good, so that when the government becomes tyrannical, citizens will rise up and make a new government together. Therefore, a Second Amendment People is not a set of random individuals who happen to reside in the same territorial jurisdiction. (pg.906) Rather, it is an organic entity, with enough commonality and self-awareness to engage in united revolutionary action.

In the colonial and revolutionary periods, the militia was the organized manifestation of the People Armed. Eighteenth century militias were universal, and the states took pains to train members to virtue, so that they would place the common good ahead of their own. These two qualities—universality and virtue—were absolutely central to the definition of the militia, and for

¹⁰⁹ See E. Wayne Carp, *The Problem of National Defense in the Early American Republic*, in *THE AMERICAN REVOLUTION: ITS CHARACTER AND LIMITS* 14, 32 (Jack P. Greene ed., 1987); THOMAS P. SLAUGHTER, *THE WHISKEY REBELLION* 44-45, 48 (1986).

¹¹⁰ See, e.g., RICHARD M. BROWN, *STRAIN OF VIOLENCE* 4-7, 63-66 (1975) (describing the ideological impetus for rural rebellion); SLAUGHTER, *supra* note 109, at 31-34, 39, 47-48, 54, 127-30.

¹¹¹ See Williams, *supra* note 18, at 582-83.

good reason: only such a body could be trusted with the means of violence to defend the common good. Therefore, only the universal militia, the People itself, had the right to stage a revolution against government.¹¹² As Tench Coxe explained: "THE POWERS OF THE SWORD ARE IN THE HANDS OF THE YEOMANRY OF AMERICA FROM SIXTEEN TO SIXTY Who are the militia? *Are they not ourselves*. Is it feared, then, that we shall turn our arms *each man against his own bosom*."¹¹³ Similarly, Samuel Adams propounded: "The militia is composed of free citizens. There is therefore no danger of their making use of their Power to the destruction of their own Rights, or suffering other to invade them."¹¹⁴ Finally, Richard Henry Lee urged: "[T]o preserve liberty, it is essential that the whole body of the people always possess arms"¹¹⁵ Thus, without universality or virtue, the militia would become a "select" militia or a standing army—a body that would pursue its own aims, rather than the good of the whole.¹¹⁶

In the rhetoric of the Framers, then, "the People" is a political actor, i.e., it can act as a unit and with a will. It has a common good, and it can recognize threats to that good. It has rights, and all of its members have the same rights and value them in the same way. When threatened, it will respond, and it is unwise to awaken such a giant. Thus, in justifying the American Revolution, Jefferson described it as an affair between peoples, not loose collections of individuals:

When in the course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth the separate & equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires (pg.907) that they should declare the causes which impel them to the separation.¹¹⁷

Similarly, many of the states' recommendations for a Bill of Rights reveal this organic conception of the people by asserting that the right to arms belongs to "the Body of the People." The New York convention, for example, delivered the following language to Congress: "That the people have a right to keep and bear arms; that a well regulated militia, including the body of the people capable of bearing arms, is the proper, natural, and safe defence of a free state."¹¹⁸ Virginia's proposal was almost identical: "That the people have a right to keep and bear arms; that a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence

¹¹² See *id.* at 577-82, 585-86.

¹¹³ A *Pennsylvanian*, PENNSYLVANIA GAZETTE, Feb. 20, 1788, reprinted in 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (Microfilm Supp.) 1778-1780 (John P. Kaminski & Gaspara J. Saladino eds., 1981).

¹¹⁴ 3 SAMUEL ADAMS, WRITINGS 251 (Henry A. Cushing ed., 1906).

¹¹⁵ LEE, *supra* note 78, at 170.

¹¹⁶ See JOEL BARLOW, ADVICE TO THE PRIVILEGED ORDERS IN THE SEVERAL STATES OF EUROPE 46 (1956); LEE, *supra* note 78, at 169; Lawrence D. Cress, *An Armed Community: the Origins and Meaning of the Right to Bear Arms*, 71 J. AM. HIST. 22, 31-32 (1984); Williams, *supra* note 18, at 578.

¹¹⁷ Thomas Jefferson, *A Declaration by the Representatives of the United States of America, in General Congress Assembled*, in THOMAS JEFFERSON: WRITINGS 19 (Merrill D. Peterson ed., 1984).

¹¹⁸ 1 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 327-28 (2d ed. 1836).

of a free state."¹¹⁹ North Carolina's version followed Virginia's word-for-word.¹²⁰ In addition, the original House version of the Second Amendment identified the militia as "the body of the people."¹²¹ Neither the Senate version nor the amendment itself includes that language, but in context, that omission seems stylistic, not substantive: "The Senate [version] more succinctly avoided repetition by deleting the well-recognized definition of the militia as 'the body of the people.'"¹²²

In late eighteenth-century America, "the Body of the People" was a phrase full of meaning and significance. The leading scholar of colonial resistance explains:

Under the terms of England's revolutionary tradition resistance, like revolution, had to emerge from the "Body of the People," the whole of political society, involving all of its social or economic subdivisions This means that more modern conceptions of revolution as class movements are inadequate for understanding the colonists' particular political concerns [S]ince the people as a whole had to contract into government, similarly the dissolution of established authority—even in a limited sphere, such as pertained to the Stamp Act—had to be based upon a broad popular agreement.¹²³

Another historian explains:^(pg.908)

The close tie between the nascent idea of popular sovereignty and revolutionary events appears in Boston. G.B. Warden has written that "the growing unity" in revolutionary Boston "among ... various groups" was connected to an "entity called the 'Body of the People.'" Patriots and their opponents all came to use the term "Body of the People" as a synonym for "a majority of the people" or the "greater part of the people." Soon the "Body of the People" referred to "the united will of the people" in symbolic substitution for "the Crown," and both legal and extralegal gatherings alike were characterized as the "Body of the People." In 1773 it was a meeting of the "Body"—justified as "representing all the people in the province"—that led to the Boston Tea Party.¹²⁴

Jonathan Mayhew expressed the idea most vividly: the citizenry may make a revolution only when "the whole Body of the People ... unite and determine as one Man."¹²⁵

Thus, when the Framers discussed revolution, they imagined the People acting as a body, an organic entity with a single will. One searches in vain through their writings for any recognition that American citizens might: 1) have systematically different perceptions of empirical reality; 2) have systematically different values or interests; and 3) have systematically different conceptions of justice and the social contract, so that a unified future revolution might be problematic. Indeed, the Framers' theory of revolution ostensibly had only one way to deal with difference among citizens: treat it as a deviation from the norm of peoplehood by ostracizing the dissenters. That tendency is

¹¹⁹ 9 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 440 (John P. Kaminski & Gaspara J. Saladino eds., 1990).

¹²⁰ See 1 ELLIOT, *supra* note 118, at 244.

¹²¹ See Halbroot, *supra* note 31, at 179.

¹²² *Id.* at 187.

¹²³ PAULINE MAIER, FROM RESISTANCE TO REVOLUTION 87-88 (1972).

¹²⁴ BROWN, *supra* note 110, at 61-62 (citations omitted).

¹²⁵ MAIER, *supra* note 123, at 64 (citation omitted).

most evident in the military response to Shay's Rebellion and the Whiskey Rebellion, but it actually began with the exile and suppression of loyalists during the Revolutionary War.¹²⁶ Rebels, loyalists, and tyrants were all hypothesized as aberrant groups, outsiders acting against the interests of the People, not Americans with different views of the world.¹²⁷

The Second Amendment, in other words, conjures with the idea of a People: it simply presumes that a People exists, because that presumption is necessary for the provision to make sense in its own terms. It does not, however, seriously examine whether a People actually (pg.909) does exist in America. Given the ideological conflicts at the time of the founding, that silence is not entirely surprising. Some political thinkers of that time recognized that the American people were dividing into what we would today call interest groups. These thinkers insisted that any political order must acknowledge the existence of factionalism and seek to control its effects, rather than to eliminate the phenomenon.¹²⁸ Civic republicanism, by contrast, nostalgically maintained that a just government was possible only if the people were sufficiently homogeneous to possess a common good. As a result, republicanism feared specialization, because specialized citizens would have separate and rival interests; the conflict of those interests would transform politics from the disinterested search for the public good into a selfish pursuit of individual appetite. One form of specialization was a standing army, but the greatest threat came from the developing market economy: if citizens have different economic concerns, then the regulation of the economy can be nothing more than a struggle for individual advantage.¹²⁹ The possibility of a republic, in other words, depended on the existence of a People, which civic republicans were resolved to create or preserve.¹³⁰ For that reason, civic republicans had to conjure with the concept of a People, because it occupied a critical place in their political analysis and program. If there were no People, there could be no common good, only interest-group politics. If there were no People, there could also be no revolution, only rebellions and civil war.

B. Conjuring with the People

At the level of formal analysis, few modern theorists of the Second Amendment have acknowledged that the Second Amendment right to revolution depends on the existence of a People. States' rights theorists argue that the right to bear arms belongs only to the National Guard as the modern successors of the state militias. The National Guard, however, is not a revolutionary People,

¹²⁶ See, e.g., Robert M. Calhoon, *The Reintegration of the Loyalists and the Disaffected*, in *THE AMERICAN REVOLUTION: ITS CHARACTER AND LIMITS*, *supra* note 109, at 51; EDWARD COUNTRYMAN, *A PEOPLE IN REVOLUTION* 170-75, 186, 214-15, 235-36, 284-85 (1981).

¹²⁷ In this sense, the theory of the existence of a body of the people never presupposed absolute unanimity among the citizenry. Rather, it assumed that the bulk of the people formed a core group that could act on shared values and customs, outside of the normal channels of political authority. Dissenters from this core could not be part of the revolutionary movement. As this Article will argue, there is good reason to wonder whether the bulk of the modern American citizenry still form such a revolutionary core.

¹²⁸ See, e.g., BANNING, *supra* note 21, at 97-102; POCOCK, *supra* note 20, at 517-21; WOOD, *supra* note 8, at 544-47; Williams, *supra* note 18, at 569-71. See generally ISAAC KRAMNICK, *REPUBLICANISM AND BOURGEOIS RADICALISM* (1990). Madison's Federalist 10 is the *locus classicus* of this approach. *THE FEDERALIST* No. 10 (James Madison).

¹²⁹ See *supra* text accompanying note 108; Williams, *supra* note 18, at 568-69.

¹³⁰ See Williams, *supra* note 18, at 564-65.

because it is not universal and exhibits some of the characteristics of a distinct interest group.¹³¹ Individual rights theorists, by contrast, argue that the people possess a right to own arms so as to make a revolution or at least to mount resistance to an oppressive government.¹³² Indeed, a (pg.910) central part of their case rests on the fact that the text of the amendment refers to the "right of the *people* to keep and bear arms."¹³³ In referring to the right of the people, however, these theorists mean that individual American citizens who happen to own guns may make a revolution. They emphatically do not mean that only as a collectivity do the American People possess a right to make a revolution; indeed, they are quick to deny that the amendment protects collective rights.¹³⁴ As a result, they never examine whether Americans constitute a unified people, because that question is irrelevant to their interpretation of the provision. Consequently, these theorists are not concerned that, like the National Guard, individual gun-owners do not make a people because they are not universal, have not been trained to virtue, and are demographically skewed.

The militia movement also fails to recognize the necessity of a revolutionary People for a right to revolution. Like individual rights theorists, militia writers stress that the Amendment protects the right of "the people" and that the militia of the 1780s included all American citizens—"John Q. Public."¹³⁵ Militia writers conclude that the right to revolution belongs to private militias composed of random volunteers. A collection of private militias, however, does not comprise a universal militia any more than a collection of private gun-owners do, because they are not universal, have not been trained to virtue, and are demographically skewed.¹³⁶ As many observers have suggested, the militia draws its membership from groups of people who feel unjustly disempowered by recent events, including angry white males, conservative Christians, and rural residents.¹³⁷ Militias prepare for revolution when they feel neglected by the electoral process, and they dream of a time when people like them will again have power and receive their rightful due. That story, however, is a fantasy of rebellion rooted in the interests of a social faction, not of revolution by the People as a whole.

This failure to recognize the dependence of a right to revolution on the existence of a People creates analytical and practical problems for modern theorists of the Second Amendment. States' rights theorists ignore the problems: because in their view the right to arms belongs only to the Guard, the constitution of a revolutionary people is irrelevant. For individual rights theorists and militia writers, however, the problem is more pressing, because they believe that the mass of private individuals has the right to make a revolution against government. (pg.911) That analysis raises troubling questions: How will this revolution, made by large numbers of private individuals or groups, work? When is a revolution warranted? Who should lead it? And how will there be agreement on those issues? In short, how shall we act as a People? *Can* we act as a People?

As explained above, at the level of explicit analysis, theorists in the militia movement and individual rights school largely ignore these questions. However, they seem troubled by the questions, because close inspection of their writing reveals an implicit, very different attitude toward the existence of a People: at the level of rhetoric, like the Framers before them, such writers respond

¹³¹ See *supra* text accompanying note 89.

¹³² See, e.g., Kates, *supra* note 31, at 267-68; Levinson, *supra* note 31, at 646-51; Lund, *supra* note 31, at 111-16.

¹³³ See, e.g., HALBROOK, *supra* note 53, at 84-87; Kates, *supra* note 31, at 218; Van Alstyne, *supra* note 31, at 1236-37.

¹³⁴ See, e.g., Kates, *supra* note 31, at 223-25.

¹³⁵ See *supra* text accompanying notes 113-22.

¹³⁶ See *infra* text accompanying notes 155-62.

¹³⁷ See *infra* text accompanying notes 259-61.

by conjuring with the People. They argue that as the People have the right to arms, the People will decide when and how to act. That argument, however, presupposes (and implicitly asserts by presupposing) that American citizens constitute a People. It assumes that, revolting spontaneously and independently, all of the individuals and groups in America will act as a body. Virtually no militia writers or individual rights theorists confront the alternative scenario that a unified revolution is virtually impossible today and that civil war is a more likely result.¹³⁸

1. *Individual Rights Theorists*

This Part will illustrate the claim that individual rights theorists conjure with the People by analyzing three significant articles in that school of thought.¹³⁹ In his very thoughtful and influential *The Embarrassing (pg.912) Second Amendment*,¹⁴⁰ Sanford Levinson rejects the view that "the substantive right [to arms] is one pertaining to a collective body— 'the people'—rather than to individuals."¹⁴¹ In republican thought, according to Levinson, individuals have the right to engage in armed resistance against the government: "Consider the possibility, though, that the ultimate 'checking value' in a republican polity is the ability of an armed populace, presumptively motivated by a shared commitment to the common good, to resist governmental tyranny."¹⁴² At this point, however, Levinson has already begun to conjure with the people, or, rather, to repeat the Framers' conjuring: he assumes that the armed populace is "presumptively motivated by a shared commitment to the common good."

Is the populace actually so motivated, so that it constitutes a People? Levinson apparently believes so, because he argues that the revolutionary Second Amendment has important contemporary relevance:

¹³⁸ See *infra* text accompanying notes 182-90. As this Article notes below, see *infra* text accompanying notes 151-54, Don Kates recognizes the possibility of civil war, but he fails to recognize the significance of that fact.

¹³⁹ The selection of these articles was based on their scholarly excellence, even though this author disagrees with parts of their analysis. These pieces, in other words, represent the individual rights view at its best, yet they still conjure with the People. One could amass similar conjurings in many other articles, but that task would be more tedious than useful.

Only Akhil R. Amar has seriously addressed how historical changes in the relationship of the individual to the People might affect the meaning of the Second Amendment. In his view, most of the original Bill of Rights were political (popular), not individual (civil), rights; they were designed to allow the people to express its will. By contrast, the Framers of the Fourteenth Amendment, through which the right to arms may be incorporated against the States, were primarily concerned about individual rights. Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1262-66 (1992). Although he does not offer a precise explanation of the modern meaning of the right to arms under the Fourteenth Amendment, Amar plainly believes that it differs from the original right to arms under the Second Amendment:

[T]he core applications and central meanings of the right to keep and bear arms and other key rights were very different in 1866 than in 1789.... [W]hen we 'apply' the Bill of Rights against the states today, we must first and foremost reflect on the meaning and the spirit of the Amendment of 1866, not the Bill of 1789.

Id. at 1266. Because the popular right to revolution does not translate very well into an individual right, Amar presumably believes that it does not apply to the states through the Fourteenth Amendment at all. Regrettably, however, Amar does not address the modern meaning of the Second Amendment itself, so it is unclear whether he believes that the American citizenry still has a right of revolution against the federal government.

¹⁴⁰ See Levinson, *supra* note 31. This Article is probably responsible for much of the recent scholarly interest in the Second Amendment, the so-called "Second Amendment Renaissance." It has influenced political commentators, see, e.g., George F. Will, *America's Crisis of Gunfire*, WASH. POST, Mar. 21, 1991, at A21, politicians, and even popular novelists; see STEPHEN HUNTER, POINT OF IMPACT 9 (1993). It is, in short, a central document in modern individual rights theory.

¹⁴¹ Levinson, *supra* note 31, at 645.

¹⁴² *Id.* at 648 (citing Lund, *supra* note 31, at 111-16).

[I]t seems foolhardy to assume that the armed state will necessarily be benevolent.... The development of widespread suffrage and greater majoritarianism in our polity is itself no sure protection, at least within republican theory. The republican theory is predicated on the stark contrast between mere democracy, where people are motivated by selfish personal interest, and a republic, where civic virtue, both in citizens and leadership, tames selfishness on behalf of the common good.¹⁴³

In short, the people have a right to bear arms because they share a commitment to the common good and will presumptively act only on that commitment. It would be unwise, however, to blithely accept that scenario as a description of modern reality. The Framers hoped to achieve commitment to a common good through membership in a universal militia and the preservation of homogeneity. Because those conditions no longer exist, one must wonder what the common good could be under conditions of radical diversity and whether citizens are committed to that common good.^(pg.913)

Nelson Lund, too, conjures with the People.¹⁴⁴ Like Levinson, he believes that the right to bear arms is individual: "The language of the Second Amendment protects an individual's right to keep and bear arms."¹⁴⁵ But then he continues: "The language also indicates, however, that this private right is protected for the sake of a public good.... The primary purpose of the people's right to keep and bear arms ... is to allow them to act as a credible *counterweight* to the government's military forces."¹⁴⁶ Lund here conjures with the People to explain how the right to revolution will work: in the first sentence, he describes the right as "an individual's," but by the second sentence those individuals have somehow unified into a "people" (he calls them "*the* people") to counterweight the armed services. The conjured image contains two simple elements: the government as a mass on one side, and the People as a bloc on the other.

Lund is, however, aware that Americans do not constitute a single bloc and that civil war seems more likely than revolution. Perhaps for that reason, his analysis at this point becomes somewhat ambivalent, as he both welcomes and fears a right of revolution. On the one hand, he argues that government oppression remains a possibility in this country so that citizens must retain the right to resistance.¹⁴⁷ On the other hand, Lund would not allow private citizens to maintain "a stock of armaments and expertise sufficient to defeat either the armed forces of the United States, or even a state's National Guard, in battle."¹⁴⁸ Any attempt to arm the citizenry in this manner would be "impossible" and "foolhardy," but, more importantly, the Constitution gives the federal government the power to "suppress Insurrections."¹⁴⁹ In the end, the only point in the revolutionary Second Amendment for Lund is its psychological impact on the government: our governors will hesitate long before assaulting a (lightly) armed citizenry because "[a]ny use of military force ...

¹⁴³ *Id.* at 656.

¹⁴⁴ See Lund, *supra* note 31. Like Levinson's and Kates's articles, this article has attracted widespread, respectful attention from other individual rights theorists, perhaps because it is uncommonly intellectually sophisticated and careful. Unfortunately, most writers have ignored what may be the most interesting and original part of the piece: a proposal to control gun ownership through mandatory insurance requirements. *Id.* at 127-30.

¹⁴⁵ *Id.* at 111.

¹⁴⁶ *Id.* at 111, 113-14.

¹⁴⁷ *Id.* at 116.

¹⁴⁸ *Id.* at 115.

¹⁴⁹ *Id.*

depends upon a calculation of both the benefits and the costs of its use.... [A]ny factor increasing the anticipated cost of a military operation makes the conduct of that operation incrementally more unlikely."¹⁵⁰ In other words, the likelihood of government oppression is reduced to the extent that the population (pg.914) is armed. Thus, having praised a popular right to revolution, Lund then drastically curtails it: the People may resist but not win, and the government may oppress but must pay the cost.

Lund might be driven to this equivocation because of his ambivalent attitudes toward the American citizenry. He is tempted to conjure with the People, but he also feels a sensible discomfort with that temptation. On the one hand, in defending the right to bear arms, he assumes that Americans are a united people that must have arms in order to resist the government. No sooner has he made that case, however, than he realizes that some private individuals might use the right to resist for selfish ends. As a result, he quickly affirms the government's right to put down rebellions and dramatically limits the citizenry's right to arms. By the end, without the image of a united revolutionary people before him, Lund has virtually dismantled the right to revolution.

In contrast, Don Kates acknowledges the likelihood of civil war in the event of armed resistance, but fails to understand the constitutional significance of that probability. In his pathbreaking work *Handgun Prohibition and the Original Meaning of the Second Amendment*,¹⁵¹ Kates maintains: "The second amendment's language and historical and philosophical background demonstrate that it was designed to guarantee individuals the possession of certain kinds of arms for three purposes: (1) crime prevention ... (2) national defense ... (3) preservation of individual liberty and popular institutions against domestic despotism."¹⁵² He advocates the continued importance of this third purpose, even in the face of new arms technology. Kates rejects the argument that "an armed citizenry cannot hope to overthrow a modern military machine" because it is wrong to assume "that a handgun-armed citizenry will eschew [effective] guerrilla tactics in favor of [ineffectively] throwing themselves headlong under the tracks of advancing tanks."¹⁵³ At this point, Kates has begun to conjure with the People: he speaks of the citizenry as a united body choosing whether and how to resist.

Kates continues his analysis with an uncommonly realistic description:

[T]he issue is not really *overthrowing* a tyranny but *detering* its institution in the first place. To persuade his officers and men to support a coup, a potential military despot must convince them that his rule (pg.915) will succeed where our current civilian leadership and policies are failing. In a country whose widely divergent citizenry possesses upwards of 160 million firearms, however, the most likely outcome of usurpation (no matter how initially successful) is not benevolent dictatorship, but prolonged, internecine civil war.¹⁵⁴

One might read this passage in one of two ways. First, Kates's projected scenario might be that the "widely divergent people" unite together with their "160 million firearms" to resist a usurper. In that

¹⁵⁰ *Id.*

¹⁵¹ See Kates, *supra* note 31, at 268. Like Levinson's, Kates's article is a seminal piece in the development of the individual rights theory. For many years, it was the only article on the Second Amendment published in a "top-ten" law review; its documentation is prodigious; and it has been very widely cited.

¹⁵² *Id.* at 267-68.

¹⁵³ *Id.* at 270.

¹⁵⁴ *Id.* at 270-71.

situation and only in that situation, the people have the right to resist. No usurper in his right mind, however, would risk such resistance. Therefore, deterrence by a united people will always be successful. In this reading, Kates is still conjuring with the People: if the population really is so "widely divergent," it seems unlikely that American citizens would ever agree that a given President is in fact a tyrant—or at least, so Oklahoma City would suggest.

Alternatively, Kates may believe that the people will not unite, and armed resistance will result not in revolution but in vicious domestic infighting. Despite that prediction, however, he still believes that the Second Amendment guarantees a right to arms, apparently on the grounds that the amendment protects a right to conduct "prolonged, internecine civil war." As argued above, I believe that the Framers would disagree: the Second Amendment guarantees the right of the Body of the People to make a united revolution for the common good, not the right of factions to make a rebellion.

2. *Militia Writers*

Similarly, militia writers conjure with the People in describing how armed resistance by private groups will result in unified revolution: like the individual rights theorists, they just assume that such a People exists and owns arms. Militia writers also make a second and perhaps more important claim: they insist that the militia movement represents the People and that the federal government stands in opposition to the People. *The Militia News* summarizes this view: "THE U.S. GOVERNMENT HAS DECLARED OPEN WARFARE ON THE AMERICAN PEOPLE."¹⁵⁵ *Federal Lands Update* asks, "Who are the individuals and organizations that continually demand and insist that you do certain things which run contrary to; [sic] not only your beliefs and convictions, but to the convictions of *the vast majority of the citizens*. Our old friends; [sic] the federal government, of course."¹⁵⁶ In time of crisis, "the militias will be the main defense against tyranny. At this present time, the people are warning federal government; [sic] let us (pg.916) alone or face the consequences."¹⁵⁷ Samuel Sherwood demands: "We must look at the reality of the situation and say, who is master, and who is the slave. Who is the servant, and who is the sovereign. In America, the people are the sovereign, then why are we subject to slave laws [i.e. gun control laws] with which we do not agree."¹⁵⁸ The Militia of Montana adds to the refrain:

[W]hen the codes and statutes are unjust for the majority of the people, the people will rightly revolt, and the government will have to acquiesce without a shot being fired, because the militia stands vigilant in carrying out the will of the people in defense of rights, liberty and freedom.¹⁵⁹

These passages contain the elements of a powerful myth. In the place of a nation of contentious and disunified individuals, most of whom disagree with the militia's substantive views, the militias envision the People, or at least the "vast majority of the people," arrayed in militant unity

¹⁵⁵ Grady, *supra* note 39, at 3.

¹⁵⁶ Faulkner, *supra* note 68, at 4 (emphasis added).

¹⁵⁷ *Id.*

¹⁵⁸ UNITED STATES MILITIA ASSOC., OFFICIAL POLICY AND ANNOUNCEMENT, MEMBER BEHAVIOR TOWARD LAW ENFORCEMENT PERSONNEL 7 (1995) [*USMA pamphlet*].

¹⁵⁹ THE MILITIA, *supra* note 34, at 8.

against a tyrannical government. Most importantly, "the people" allegedly agree with the militia writer's substantive views, whatever they happen to be, so that the government must "let us alone or face the consequences." The apotheosis of this style of analysis is the common militia condemnation of officeholders as traitors. For example, the North American Volunteer Militia sent out letters that warn:

Each of you have [sic] taken an Oath to uphold the Constitution for the United States. The Oath is your contract with the people. When you violate your Oath of office you become renegade to the Constitution and guilty of treason. I am sure you know what the penalty is for treason.¹⁶⁰

Linda Thompson issued an "Ultimatum" to each member of Congress demanding the repeal of the Brady Bill and the Fourteenth, Sixteenth, and Seventeenth Amendments, as well as a declaration that Congress has no criminal jurisdiction on the "soil of any sovereign state."¹⁶¹ The document concludes: "If you do not personally and publicly attend to these demands, you will be identified as a Traitor, and you will be brought up on charges for Treason before a Court of the Citizens of this Country."¹⁶²

The allegations of treason in these passages depend on the rhetorical supposition of a united people. On this view, America is not a (pg.917) place of rival, discordant factions, each of which sends leaders to Congress, where the squabbling—unseemly but legitimate—continues. Instead, there is a single American People that embraces, and is defined by, the political views of the militia groups. Politicians who disagree with those views are therefore not loyal Americans, representing other loyal American citizens; they are instead traitors to the People, scheming Others in a land of consensus.

3. *Commonality Between Militia Writers and Individual Rights Theorists*

The foregoing analysis argues that militia writers and individual rights theorists agree on certain propositions. Following the Oklahoma City tragedy, there has been so much finger-pointing¹⁶³ that it is important to be clear about where this commonality exists between the two groups and where it does not. Most importantly, in my view, individual rights theorists are in no sense responsible for the militia movement, nor do I believe that they are sympathetic to it. Every individual rights theorist that I know is a responsible, serious scholar. They do not believe that the federal government is tyrannical, nor do they share the militia's extreme political values, nor do they believe that violence is an appropriate response to political disagreement. They have not given aid and comfort, aided and abetted, or encouraged the movement.

Nonetheless, they share two important ideas with the militia writers. First, individuals have a right to own arms to make a revolution. Second, the people, meaning the totality of private citizens, will decide when and where a revolution is warranted. As a result, given the structure of the argument, individual rights theorists may reject Timothy McVeigh's particular actions, but they

¹⁶⁰ See, e.g., Letter from North American Volunteer Militia to Judge Jeff Langton (Dec. 30, 1994) (copy on file with the author).

¹⁶¹ Ultimatum by Linda Thompson (April 19, 1994) (on file with the author).

¹⁶² *Id.*

¹⁶³ Rush Limbaugh felt so vulnerable to criticism that he wrote an editorial for a major magazine arguing that he is not to blame for the bombing. Rush Limbaugh, *Blame the Bombers—Only*, NEWSWEEK, May 8, 1995, at 39.

cannot categorically reject the class of such actions. The militia movement is wrong, in other words, not because it believes that private individuals have a right to mount a revolution, but because it believes that present circumstances justify such a revolution. In the end, however, the people—meaning the mass of private individuals like Timothy McVeigh, Samuel Sherwood, Linda Thompson, Pat Buchanan, Bill Clinton, Jesse Jackson, David Williams, and each reader of this Article—must decide when the time is right. In this sense, individual rights theorists might disagree with the militia writers on their application of the private right to revolution, but not on the existence of the right itself.

Or so it would seem. As suggested above, individual rights theorists have been quite vague about the actual mechanics of any projected (pg.918) revolution; they simply assert that when the time comes, the People will act. That assertion hides all of the important questions by conjuring with the People, but the bombing in Oklahoma City forces those questions into the open. As a result, in the months to come, individual rights theorists may clarify their earlier writing by qualifying the right to own arms to make a revolution. It remains to be seen, after all of the qualification gets done, how much remains of that right.

Glenn Harlan Reynolds's recent work offers an illustration. That work is important for two reasons: he is the earliest individual rights theorist to discuss the militia movement; and among those theorists, his writing is particularly thoughtful, probing, and balanced. For all of those considerable virtues, however, his work also illustrates the difficulties facing the individual rights position after the Oklahoma City bombing.

Reynolds is solidly in the individual rights camp. He endorses what he calls the "'Standard Model' of Second Amendment interpretation,"¹⁶⁴ the view that the Amendment guarantees "an individual right to keep and bear arms."¹⁶⁵ The purpose of that right is to place "a check on government tyranny and on the power of a standing army."¹⁶⁶ Like other individual rights theorists, he argues that the "well-regulated militia" refers to the entire citizenry, and he pointedly rejects the idea that the purpose of the Amendment was to guarantee the states' right to maintain militias, rather than the people's right to own arms.¹⁶⁷

Reynolds argues that the Second Amendment not only guaranteed an individual right to arms in 1792, but continues to guarantee such a right today, despite the absence of a universal militia. In his sensitive discussion of my own earlier work, Reynolds concedes that the Second Amendment might have presupposed a universal militia, but he responds that "there is a solution to that problem, too: If gun ownership is essential to give the Second Amendment meaning, then simply require everyone to own a gun (and to go through the necessary training to use it responsibly)."¹⁶⁸ He adds that he does not actually recommend the creation of such a body; he merely believes that it would answer my argument.¹⁶⁹ That response, however, does not actually clear up the problem. First, arming the populace is not the same as recreating a universal militia. The universal militia was raised (pg.919) and trained by the state to virtue, and it rested on the commonality of peoplehood; general

¹⁶⁴ Glenn H. Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 464 (1995).

¹⁶⁵ *Id.* at 466.

¹⁶⁶ *Id.* at 467.

¹⁶⁷ *See id.* at 472-74.

¹⁶⁸ *Id.* at 487.

¹⁶⁹ *See id.* at 488.

private arms-possession will not recreate those conditions. Second, as Reynolds recognizes,¹⁷⁰ the universal militia is a "condition precedent" for the Amendment. If a universal militia exists, the Amendment might have its original meaning. If it does not, it cannot. As a result, if Reynolds believes in a modern constitutional right to bear arms, he must also believe in a modern universal militia; he cannot be indifferent to the idea, as he claims to be.

Nonetheless, Reynolds concludes that the Amendment presently protects an individual right to arms. Even at the time of his writing this article (before the bombing), however, Reynolds was concerned about the militia movement: "[T]here are news reports that large numbers of Americans ... have organized themselves into militia companies whose stated purpose is to resist a tyrannical government."¹⁷¹ At this point in his analysis, Reynolds apparently believes that the militia movement is incorrect, not for believing that private individuals have a right to band together to make a revolution, but for believing that the time for revolution is now. He perceptively points out that the individual rights theory is distressingly vague about the grounds for revolution:

Standard Model scholars have paid almost no attention to the question of when such a revolt would be justified.... If we have the right to keep and bear arms in no small part so that, in the last resort, we can rise up and overthrow a tyrannical government, then one important aspect of the right would seem to be some basis for agreeing on whether the government is tyrannical or not.¹⁷²

According to Reynolds, individual rights theorists must remedy that deficiency in order to counter the militia movement's analysis:

Many of these individuals are very familiar with the Second Amendment, and with Standard Model scholarship, but most are sadly lacking in understanding about what the Framers would have considered a tyrannical government.... But without a proper grounding in this subject, there are twin risks. One is that some citizens will think it time to revolt when it is not ... The other (perhaps less likely in light of that streak of anarchy that seems part of our American culture) is that many citizens will not think that it is time to revolt when it is.¹⁷³

To this stage in his article, Reynolds has analyzed the militia theory of the amendment as this Article has suggested an individual rights theorist would before the bombing: the militias are right in (pg.920) thinking that "we"—i.e. private American citizens outside of a universal militia—have a right to revolt against a tyrannical government, but wrong in thinking that present conditions justify such a revolt. So "we" need to talk about what would justify a revolution; otherwise, some citizens will revolt too early and some too late.¹⁷⁴ Hence, the dynamic of Reynolds's proposed revolution

¹⁷⁰ *Id.* at 485-86.

¹⁷¹ *Id.* at 506.

¹⁷² *Id.* at 505-06.

¹⁷³ *Id.* at 506.

¹⁷⁴ Professor Reynolds offers one principal limit: resistance to an electoral government is definitionally illegitimate because recourse in a democracy must be to the ballot box, not the bullet box. *Cf.* Reynolds, *supra* note 164, at 507; Glenn H. Reynolds, *Up in Arms About a Revolting Movement*, CHI. TRI., Jan. 30, 1995, at N11. (To protect Professor Reynolds's good name, it is important to add that the atrocious "revolting movement" pun was his editors' idea, not his. *See* Reynolds, *supra* note 164, at 506 n.212.) One wonders whether he intends this limit to be absolute. If so, other individual rights theorists would disagree with him. Sanford Levinson, for example, argues that even elected governments can engage in such tyrannous acts as to justify revolution. *See* Levinson, *supra* note 31, at 657.

follows the decentralized model of the individual rights theorist: we individuals have a right to revolt, but we need to consult each other to ensure that the revolution occurs at the right time. There is no mention of the necessity of a universal militia, a People, or a common good.

The Oklahoma City bombing occurred after Reynolds completed his original article but before it went to press. To consider the significance of that event, Reynolds wrote an Addendum with a different focus.¹⁷⁵ Although he still rejects the demands of the militia movement for an imminent revolution, he does so on a different and more fundamental basis. The problem is not just that the militia movement thinks that the present government is tyrannical when it is not; the problem is that only the Body of the People may stage a revolution. Quoting my earlier work, he explains: "Republicans did not intend to leave the universality of the militia to the chance decision of every citizen to arm herself. The state was supposed to erect the necessary scaffolding on which the militia could build itself, to muster the militia, and oblige every citizen to own a gun."¹⁷⁶ Later, relying on the same article, he distinguishes between a revolution and a rebellion: a revolution "must be a product of the 'body' of the people, i.e., the great majority acting by consensus; it must be a course of last resort; its inspiration must be a commitment to the common good; and its object must be a true tyrant, committed to large-scale abuse."¹⁷⁷

After reflecting on the significance of Oklahoma City, Professor Reynolds seems to have further restricted the conditions under which a Second Amendment revolution may occur: only a body (such as the universal militia) committed to the common good and comprising a People may make such a revolution. If, however, Professor Reynolds accepts that analysis, then he must also agree that if there is no such (pg.921) body, then there is no right to revolution. And if there is no right to revolution, then there can be no right to bear arms to stage a revolution. The historical, revolutionary Second Amendment cannot have any contemporary meaning if it presupposes historical conditions that have disappeared.¹⁷⁸

In short, Professor Reynolds's work illustrates the challenge that the militia movement offers the individual rights position.¹⁷⁹ He begins his analysis with a strong assertion of the private right to arms to check the government, but by the end he has tied the fulfillment of the right to a body (the universal militia, the Body of the People) that arguably no longer exists. Even before the bombing, Reynolds was presciently concerned about the militia. Among individual rights theorists, he alone

¹⁷⁵ Reynolds, *supra* note 164, at 508-12.

¹⁷⁶ *Id.* at 509 (quoting Williams, *supra* note 18, at 593).

¹⁷⁷ *Id.* at 510 (quoting Williams, *supra* note 18, at 582).

¹⁷⁸ See Williams, *supra* note 18, at 588-96.

¹⁷⁹ Unfortunately, Reynolds argues that the states' rights theory is to blame for the militia movement: [S]ome gun-control proponents have promulgated the notion that the Second Amendment protects only a militia; many pro-gun activists have responded by forming militias in the hopes that doing so would somehow expand their constitutional rights.... Be careful what you advocate in terms of constitutional principles, because people may listen to you.

Reynolds, *supra* note 164, at 511.

That claim, however, is plainly mistaken. The militia movement has not "responded" to *any* Second Amendment scholarship, properly interpreted, and scholars cannot be responsible for the willful distortion of their scholarship by political movements. In addition, militia members share at least as much philosophical ground with the individual rights theory as with the states' rights theory. Like states' rights theorists, militia members believe that it is important to organize into militias, and that organization may make them more dangerous. They would not be dangerous at all, however, if they did not believe in a private right to own arms to make a revolution, a position that they share with the individual rights theorists.

recognized the need for standards to measure the legitimacy of particular revolutions.¹⁸⁰ Following the bombing, perhaps other scholars will attempt to explain why the individual rights theory does not really sanction an individual right to take up arms against the government. After that writing, it remains to be seen how much will remain of the individual right to own arms as a checking function on government.¹⁸¹ Under this Article's thesis, in the absence of a universal (pg.922) militia or some other basis for Peoplehood, virtually nothing can remain of the right.

C. A Twentieth Century American People?

The Framers identified the universal militia with the People, not with the National Guard, individual gun-owners, or private groups. No one can win the debate among individual rights theorists, states' rights theorists, and militia writers, because all sides in that debate are trying to draw precise historical parallels where none exists. The only modern analogue for a universal militia would be some other manifestation of revolutionary Peoplehood. To determine whether such an analogue exists, one must look seriously at modern America. It is no longer wise to assume that Americans constitute a united People with a right to revolution; the Oklahoma City bombing is sufficient evidence, if any were needed, of the foolishness of that proposition. Any revolutionary theory of the Second Amendment must therefore answer the question: who comprise the Body of the People that could make a revolution? The eighteenth century offered an institutional answer: the People are the universal militia, raised by the state and trained to be virtuous. Whether that answer was satisfactory at the time, it will no longer serve, because America no longer has a universal militia or even a dim prospect of one. So to preserve a revolutionary Second Amendment, it is necessary to find a People somewhere else.

That task is daunting in light of the changes in American society over the last two hundred years. Even in 1776, the People might not have been unified; Americans disagreed viciously over

¹⁸⁰ *Id.* at 504-07.

¹⁸¹ There is one argument available to individual rights theory. On the one hand, only a formal state militia may make a revolution, but on the other hand, there exists a universal right to own private arms so that the states will have an armed populace from which to summon their militia. Indeed, in seeking to reconcile the introductory clause of the Amendment (about the importance of a militia) with the main clause (about the right of the people), some scholars have already suggested that one purpose of the provision is to ensure an armed citizenry as a foundation for state militias:

[O]ne purpose of the Founders having been to guarantee the arms of the militia, they accomplished that purpose by guaranteeing the arms of the individuals who made up the militia.... [B]elieving that a militia (composed of the entire people possessed of their individually owned arms) was necessary for the protection of a free state, they guaranteed the people's right to possess those arms.

Kates, *supra* note 31, at 217-18; *see also* Reynolds, *supra* note 164, at 472-73; Van Alstyne, *supra* note 31, at 1243-44.

From an individual rights perspective, however, this path is treacherous. First, most individual rights theorists might accept the idea that one purpose of the Amendment was to ensure an armed citizenry to make up the militia. They would emphatically deny, however, that only a formally organized militia has the right to revolution. *See* Kates, *supra* note 31, at 217-18. Even in the passage above, Kates identifies the militia with "the entire people possessed of their individually owned arms." *Id.* From the point of view of these theorists, there is good reason for this denial. If the state declines to raise a militia, the people (private American citizens) have no right to revolution. If the state systematically abjures reliance on a militia, there would appear to be no need for an armed populace to supply the militia, thus eliminating the private right to arms. Finally, if the Amendment is to provide a population base for state militias, it would appear to be a protection for the *states*, not individuals. States could choose to disband the militia and disarm the citizenry if they so chose; or they could choose to keep the militia, arm them at public expense, and disarm everyone else. Only the federal government would be barred from disarming the general population, because that would interfere with the states' right to raise its militia from an armed populace, if they should see fit. Such a position seems to have more in common with the states' rights theory than the individual rights theory.

the wisdom of the War for Independence itself, that great icon of American unity.¹⁸² (pg.923) If Americans were ever a People, however, there is reason to doubt that they remain one today. This country has expanded the voting citizenry to include women,¹⁸³ persons of color,¹⁸⁴ and propertyless men. Massive immigration has brought values, cultures, languages, and religions that have enriched the country but also made it less homogenous.¹⁸⁵ The social world, especially the economy, has become more complex, bringing with it great specialization, just as the republicans feared.¹⁸⁶ In the popular imagination¹⁸⁷ and some schools of political science,¹⁸⁸ politics has become simply the pursuit of advantage by interest groups. Finally, to an extent unimagined in the 1780s, Americans have embraced the central tenet of mainstream liberalism: the individual has the right to chart his own life-course, free of community pressure to conform to a communal identity that might form the basis for peoplehood.¹⁸⁹

These difficulties might not definitely prove that no American People exists, but they certainly demonstrate that it is a serious question whether any such People can possibly exist. Accordingly, any complete theory of Second Amendment revolution must offer a careful explanation of how, despite the diversity of the United States, the citizenry can constitute itself as a People in the moment of revolution.¹⁹⁰ Unfortunately, neither the individual rights theory nor the (pg.924) states' right theory offers such an explanation. Instead, the latter denies that the amendment gives a right of revolution to the people; the former recognizes such a right but merely conjures with the concept of the People.

III

THEME AND VARIATIONS—MILITIA VISIONS OF THE PEOPLE

¹⁸² See Calhoun, *supra* note 126, at 59-62.

¹⁸³ U.S. CONST. amend. XIX.

¹⁸⁴ U.S. CONST. amend. XIV.

¹⁸⁵ See, e.g., JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925 (1988); KENNETH L. KARST, BELONGING TO AMERICA (1989).

¹⁸⁶ See, e.g., THE COUNTRYSIDE IN THE AGE OF CAPITALIST TRANSFORMATION: ESSAYS IN THE SOCIAL HISTORY OF RURAL AMERICA (Steven Hahn & Jonathan Prude eds., 1985).

¹⁸⁷ See E.J. DIONNE, JR., WHY AMERICANS HATE POLITICS (1991).

¹⁸⁸ See JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGM'T. SCI. 3 (1971).

¹⁸⁹ See Williams & Williams, *supra* note 47, at 776-89, 880-81.

¹⁹⁰ Perhaps the most plausible explanation might run along the following lines: there does not exist a people now, and under normal circumstances they never may become one. Nonetheless, in the event of true, severe, and large-scale oppression, a people might emerge, rallying together to drive off the tyrant. This argument has the advantage of at least being an *explanation* of how a people might arise; it does not, in other words, merely conjure with the concept of a people. It suffers, however, from at least two important problems. First, without more analysis, it is entirely speculative; the people might come together under provocation, but they might not. As the next Part will suggest, under present circumstances, there is reason to believe that citizens will not all perceive, evaluate, or respond to a crisis of oppression in the same way. See *infra* part III. Second, this explanation of self-constitution is at least somewhat inconsistent with the Framers' theory of self-constitution. The Framers believed that the American people already were a people, committed to the common good, unified, and organized in the militia. See Williams, *supra* note 18, at 569, 577-85. As a result, they could reliably predict that a right of revolution would actually result in revolution, rather than endemic civil war. That prediction was part of their larger belief that republican measures, like a right of revolution, were appropriate for a republican citizenry, but might be inappropriate for an alienated, atomistic, and self-interested citizenry. See *id.* at 564-65, 605.

The militia movement, on the other hand, does not just conjure with the People; it also offers some more specific explanations of the basis of peoplehood. All of these explanations concur on some basic propositions, a central theme. First, there is an American People, unified in all important ways and represented by the militia movement. Second, federal officeholders that disagree with the movement are therefore traitors to the people. Third, electoral politics will no longer serve to tame this beast, because the traitors are not loyal Americans with different views; rather, they are people plotting to harm the American citizenry and subvert the American scheme of government. Accordingly, resistance to these officeholders is not rebellion or civil war; it is legitimate revolution. In this sense, the militia's theory of revolution depends on the creation of an "Other." This creation of an Other through conspiracy theories is thus necessary, not contingent, to the militia theory of the Second Amendment: citizens may revolt against "Them" precisely because "They" are not "Us." Indeed, any revolutionary theory of the Second Amendment seems to depend on the existence of such an Other. As long as citizens are a part of the same political enterprise, they interact politically; only when the system breaks down, when "it becomes necessary for one people to dissolve the political bands which have connected them with another," must they interact militarily.

While all militia groups construct an Other, however, they disagree on the precise identity of the Other. Correlatively, while all militia groups assert that there is an American People, they disagree on its exact character as well. This Part will describe and analyze four such visions of the American people and the Other that defines each. It will suggest that all four visions fall on moral or empirical grounds. Each one of these visions illustrates a major difficulty in defining or constituting an American people under modern circumstances. Any theory that posits the existence of such a People must address these difficulties; in toto, they pose an enormous obstacle for a revolutionary theory of the Second Amendment.

To facilitate that analysis the following Parts divide militia thinking into four themes: overt racism, anti-internationalism, anti-socialism, and anti-secular humanism. These clusters of ideas are analytically distinguishable in the militia materials, and each cluster (pg.925) presents different problems. Most militia groups, however, espouse more than one of these themes, and some espouse all, believing that an international conspiracy of socialistic secular humanists, dominated by Jews and third world peoples in the United Nations, is trying to disarm, secularize, and socialize the United States. Accordingly, although this Article distinguishes the four visions for heuristic purposes, this division should not obscure their overlap in the real world.

A. The Overt Racists

Probably the best publicized and most malign militia theme is overt racism. In recent years, Christian Identity theology has provided a shared set of core beliefs for many, from the Aryan Nations groups in Idaho,¹⁹¹ to the Covenant, the Sword, and the Arm of the Lord in Arkansas,¹⁹² to the Posse Comitatus in the plains states.¹⁹³ The most famous Christian Identity group is probably the Order, led by Robert Matthews, whose career of violence made headlines in the 1980s.¹⁹⁴ The Order

¹⁹¹ See JAMES A. AHO, *THE POLITICS OF RIGHTEOUSNESS* 93 (1990).

¹⁹² See CORCORAN, *supra* note 45, at 238.

¹⁹³ See *id.* at 29.

¹⁹⁴ See JAMES W. GIBSON, *WARRIOR DREAMS* 220-30 (1994).

is not the only such group, however, with a criminal history.¹⁹⁵ Indeed, some evidence suggests that McVeigh himself had ties to Christian Identity groups.¹⁹⁶

Christian Identity is a bizarre, byzantine, and elaborate thought system. The interested reader may find detailed expositions elsewhere;¹⁹⁷ this Article offers only the broad outlines. Some Christian Identity groups are not made up of overt racists, but many are.¹⁹⁸ Those in the latter category offer a lengthy re-telling of Biblical history. According to these groups, the union of Adam and Eve produced Abel, and Abel's progeny gave rise to the nations of Israel, who were not, it turns out, Jews. Eve, however, also coupled with Satan to produce Cain. After fleeing Eden, Cain mated with animals to produce (pg.926) the "mud people," i.e., nonwhites. In 721 B.C., Sennacherib took the northern tribes of Israel (who were not Jews) prisoner to Assyria, where they became lost to history. According to Christian Identity proponents, these lost tribes of Israel crossed the Caucasus into Europe and became the ancestors of modern Europeans. One tribe, Manasseh, eventually migrated to America to produce the Founding Fathers and to enter into a new covenant with God, the Declaration of Independence and the United States Constitution.

Meanwhile, in 586 B.C., Nebuchadnezzar took the southern tribe of Judah into captivity to Babylonia. There, the tribe deteriorated by converting to Satanism and breeding with the children of Cain. The progeny of that union eventually became the people today known as Jews. The true Jews, however—the Chosen People, the Davidic line to whom God made the promises of both the Old and New Testaments—are Europeans and the descendants of Europeans in America. For centuries, the people called Jews have been trying to subvert Christianity in general and the American way of life in particular. Lately, they have succeeded in taking over the United States Government, known to believers as "ZOG," an acronym for "Zionist Occupational Government."¹⁹⁹

To date, Christian Identity and other white supremacist groups are fairly small, but they have been attempting to co-opt the recent explosive membership growth in the militia movement.²⁰⁰ Some non-racist (or less racist) militia leaders are aware of this danger and have tried to combat it.²⁰¹ Yet, although only a few militia members may espouse Christian Identity in its extreme form, anti-semitic

¹⁹⁵ As just one example, members of the Covenant, the Sword, and the Arm of the Lord firebombed a Jewish community center here in Bloomington, Indiana. *See* United States v. Ellison, 793 F.2d 942 (8th Cir.), *cert. denied*, 479 U.S. 937 (1986); Laura Lane, *Neo-Nazis Admit Setting '83 Fire at Jewish Center*, BLOOMINGTON HERALD-TELEPHONE, July 18, 1985, at 1.

¹⁹⁶ Shortly before the bombing, McVeigh telephoned Elohim City, a Christian Identity compound. Furthermore, the timing of the bombing may also be significant. Aside from occurring on the anniversary of the assault on Waco, it also coincided with the scheduled execution date for Richard Snell, a white supremacist who holds Christian Identity beliefs and who plotted a similar bombing against the same building in 1983. *See* Jo Thomas & Ronald Smothers, *Oklahoma City Building Was Target of Plot as Early as '83*, *Official Says*, N.Y. TIMES, May 20, 1995, at A6.

¹⁹⁷ *See, e.g.*, AHO, *supra* note 191, at 83-113; JAMES COATES, ARMED AND DANGEROUS 77-103 (1987).

¹⁹⁸ *See* AHO, *supra* note 191, at 93-94.

¹⁹⁹ This summary is drawn from, inter alia, AHO, *supra* note 191, at 92-104 and GIBSON, *supra* note 194, at 216-17.

²⁰⁰ *See* CHIP BERLET, POLITICAL RESEARCH ASSOCIATES, ARMED MILITIAS, RIGHT WING POPULISM, AND SCAPEGOATING 4 (Apr. 27, 1995) (copy on file with the author); *Hate Movement Shifts Tactics in 1994*, KLANWATCH INTELLIGENCE REP. #77, Mar. 1995, at 9, 10-11; MONTANA HUMAN RIGHTS NETWORK, A SEASON OF DISCONTENT: MILITIAS, CONSTITUTIONALISTS, AND THE FAR RIGHT IN MONTANA 2, 8 (May 1994); Hawkins, *supra* note 40, at 13.

²⁰¹ *See, e.g.*, Hawkins, *supra* note 40, at 13. For example, the Texas Militia urges: "Open your militia to all races, creeds, religions. This is what America is really all about. This is why they came...." Johnny Johnson, *Texas Militia—Statement 3* (Feb. 11, 1995), *reprinted in* STERN, *supra* note 14, app. 15. Similarly, the USMA does not "participate, sanction, or support" racist groups such as "the Nazis, Skin-heads, fascists, KKK," and it "allow[s] all men the full freedom and exercise of their conscience to worship." *USMA pamphlet*, *supra* note 158, at 3.

conspiracy theories are fairly common. In particular, a significant number of militia groups²⁰² believe that Jewish bankers have been controlling the American government for a long time in order to line their own pockets.²⁰³ (pg.927) Anti-semitic elements often combine with anti-internationalist and anti-socialist convictions to conclude that Jewish agents in the United Nations have taken over the federal government.²⁰⁴

For example, the *Militia News* explains that in the early years of the republic, "with their rights and liberties insured [sic], and their opportunities almost unlimited, and with their Christian heritage, devotion to God, and splendid work ethic, the nation grew and prospered."²⁰⁵ Soon, however, the worm emerged in the apple: "Most honest historians now know that the Civil War was created in order to split and destroy the nation."²⁰⁶ This plot continues today:

[F]ollowing the turn of the 20th century, Communism (the Judeo-Bolsheviks of Russia) and other diabolical movements and philosophies—Fabian socialism, materialism, atheism, and secular humanism—would, like malignant parasites, establish themselves in America.... The majority of the American people still have not awakened to the fact that every war in this century has been contrived and created, and the people have been deceived into providing the resources and children to fight these wars for the benefit of the international conspiracy which planned them.²⁰⁷

Gordon Kahl of the Posse Comitatus and Robert Mathews of the Order are martyrs for the racist militia. They were both killed in confrontations with federal law enforcement, and both penned final letters as death approached them. In wide circulation, these letters offer a valuable insight into their view of the People. Kahl explained that his troubles began:

[A]fter I discovered that our nation had fallen into the hands of alien people, who are referred to as a nation within the other nations. As one of our founding fathers stated, "They are vampires, and vampires cannot live on vampires, they must live on Christians." He tried to get a provision written into the U.S. Constitution that would have prevented Jews from living inside the U.S. He warned his brethren that if this was not done their children would curse them in their graves, and that within 200 years their people (the Jews) would be sitting in their counting houses rubbing their hands, while our people would be slaving in the fields to support them. This has happened exactly as was predicted.... We are a conquered and occupied nation, conquered and occupied by the Jews and (pg.928) their hundreds or maybe thousands of front organizations doing their unGodly work.²⁰⁸

Combining equal measures of white supremacy and anti-semitism, Robert Matthews recounts the same kind of awakening as Kahl:

²⁰² This conspiracy theory has also been a staple of other right-wing extremists. See BERLET, *supra* note 200, at 5.

²⁰³ For example, some militia members believe that eight Jewish families control the Federal Reserve System. See, e.g., Beth Hawkins, *Conspiratorial Views*, DETROIT METRO TIMES, Oct. 12-18, 1994, at 13; Roger Tatarian, *Rationale for Citizen Militias is Frightening*, THE FRESNO BEE, Nov. 20, 1994, at B7.

²⁰⁴ See *infra* part III.B.

²⁰⁵ Grady, *supra* note 39, at 1.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ AHO, *supra* note 191, at 246.

The stronger my love for my people grew, the deeper became my hatred for those who would destroy my race, my heritage and darken the future of my children.... By the time my son had arrived I realized that white America, indeed my entire race, was headed for oblivion unless white men rose and turned the tide.... I came to learn that this was not by accident, that there is a small, cohesive alien group within this nation working day and night to make this happen. I learned that these culture disorders have an iron grip on both major political parties, on Congress, on the media, on the publishing houses, and on most of the major Christian denominations in this nation, even though these aliens subscribe to a religion which is diametrically opposed to Christianity.... [T]o be an FBI agent is to be nothing more than a mercenary for the ADL and Tel Aviv.²⁰⁹

An article in the Aryan Nations's publication *Calling Our People* encapsulates these themes of white supremacy, anti-semitism, and militia resistance.²¹⁰ The unidentified author warns that the federal government has become oppressive, as evidenced by Waco and Ruby Ridge, among other atrocities.²¹¹ The guiding strategy for this oppression is the destruction of race-identity: "Since the 1930s, govt. psychologists have attempted to alienate us from our [own] kind, to make us hate ourselves and to foster the defeatist idea of Every Man for Himself."²¹² To complete the enslavement, "[o]ur enemy has announced, via draconian new laws, that the [Second] Amendment and therefore the entire Bill of Rights is dead."²¹³ These nefarious schemes will not, however, succeed because "We are the militia and we are on the move," and "We will not be disarmed."²¹⁴ Relying on the definition of the militia in the 1792 Militia Act, the author explains that the militia includes "'all [w]hite men between the ages of 18 and 45.' Since we live longer today, this must be modified to include all [w]hite men who do not work for the government."²¹⁵ This militia can handle any Zionist treachery that the government can dish out: "We therefore are prepared for government to unleash its dogs of war against us for no lawful purpose—for no reason at all other (pg.929) than as an act of [J]ewish terrorism designed to cow our fellow countrymen into submission."²¹⁶

The vision of the American People for these militia groups is clear: it includes white conservative Christians. In line with this vision, militia writers have developed a constitutional theory that limits full citizenship to such persons. This theory distinguishes between those groups made citizens by the Fourteenth Amendment and those made citizens by the original Constitution and the Bill of Rights. The former, so-called "Fourteenth Amendment citizens," have a status inferior to the latter, so-called "sovereign" or "organic citizens." The exact legal details of this inferiority vary among the theorists. Some believe that all amendments after the Bill of Rights are currently void, because they are the illegal products of a Jewish conspiracy;²¹⁷ accordingly, Fourteenth Amendment citizens are not really citizens at all. Others believe that the Constitution and the Bill

²⁰⁹ *Id.* at 247-49.

²¹⁰ *The Militia*, CALLING OUR NATION, No. 73, at 30.

²¹¹ *Id.*

²¹² *Id.* at 31.

²¹³ *Id.* at 30.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ See CORCORAN, *supra* note 45, at 28.

of Rights are God's law and as such may not be changed, but later amendments reflect only the will of men and as such may be repealed. Accordingly, Fourteenth Amendment citizens could lose their citizenship and rights through constitutional amendment.²¹⁸ Finally, still others believe that Fourteenth Amendment citizens "do not have unalienable rights, only limited statutory 'civil rights' that Congress has seen fit to grant them."²¹⁹ As a result, Congress could strip these citizens of all their rights at any time.

To remove any doubt about the status of these inferior citizens, James Pace has proposed an amendment to the Constitution. The Pace Amendment has gathered many adherents, especially among Christian Identity believers.²²⁰ The amendment would first repeal the Fourteenth and Fifteenth Amendments.²²¹ In their place, the new provision would stipulate:

No person shall be a citizen of United States unless he is a non-Hispanic white of the European race, in whom there is no ascertainable trace of Negro blood, nor more than one-eighth Mongolian, Asian, Asia Minor, Middle Eastern, Semitic, Near Eastern, American Indian, Malay or other non-European or nonwhite blood, provided that Hispanic whites, defined as anyone with an Hispanic ancestor, may be citizens if, in addition to meeting the aforesaid ascertainable trace and percentage tests, they are in appearance indistinguishable (pg.930) from Americans whose ancestral home is in the British Isles or Northwestern Europe. Only citizens shall have the right and privilege to reside permanently in the United States.²²²

The overt racists thus have adopted an incisive strategy for constituting a people in late twentieth-century America: the militia writers solve the problem of diversity among the citizens by defining the citizenry to include only those like them. That strategy has a certain historical resonance: eighteenth century civic republicanism could posit the existence of a common good because it restrictively defined the citizenry.²²³ And if it were normatively defensible, that strategy might still work; white conservative Christians, even today, might have enough commonality to constitute a people and to possess a common good.

The strategy, however, is not normatively defensible. The overt racists among the militia groups are, ultimately, recommending a species of fascism or at least ethnonationalism. According to the overt racists, Americans are a people because they share ethnic roots, and these ethnic roots produce a spirit that brings sublime unity.²²⁴ Recent history chronicles in horrifying detail the moral bankruptcy of aggressive ethnonationalism. Indeed, the central proposition of modern democratic political philosophy is that individuals have equal moral worth regardless of race or religious

²¹⁸ See Gun Rights Were Meant to Be Beyond the Reach of Government Officials (distribution of the Second Amendment Committee) (on file with the author); SEASON OF DISCONTENT, *supra* note 200, at 11.

²¹⁹ *Which Constitution?*, THE PATRIOT, Jan. 1990, at 1.

²²⁰ See AHO, *supra* note 191, at 261.

²²¹ Pace Amendment, Art. of Amend. XXVII § 1 (on file with author).

²²² Article of Amendment XXVII (on file with the author).

²²³ See Williams, *supra* note 18, at 602-03.

²²⁴ See Jost Delbruck, *Global Migration—Immigration—Multiethnicity: Challenges to the Concept of the Nation-State*, 2 IND. J. GLOB. L. STUD. 45, 48-51, 57-58 (1994); David Williams, *European and U.S. Perspectives on Civic Republicanism*, 2 IND. J. GLOB. L. STUD. 71, 74-75 (1994).

affiliation.²²⁵ Twentieth-century America portrays itself as the nation that values all races and cultures, and rejects ethnicity as a basis for nationhood.²²⁶ Over the decades, many white separatists have fought the growing pluralization of the American citizenry, but they have lost the demographic and moral race. To deal with growing diversity, Americans have celebrated the importance of individual rights, to allow us each to go his own way, even at the cost of unity.²²⁷

The overt racists among the militia groups thus demonstrate the first great problem in constituting a people: the demographic problem. Like the overt racists, other revolutionary movements have commonly found their unity in a shared sense of racial, religious, ethnic, or class identity. Modern Americans, however, share no such identity, and any defensible definition of the American people must include all (pg.931) citizens, regardless of race, religion, ethnicity, gender, or class. The demographic problem of creating peoplehood among highly diverse persons is therefore a formidable task for any twentieth-century theory of a revolutionary Second Amendment because the racist route to peoplehood is closed to modern Americans.

B. The Anti-Internationalists

A second group believes that the New World Order, variously identified as the United Nations, Jewish bankers, the Trilateral Commission, and others, is subverting the American government. The details of the alleged conspiracy are endless, variable, and notoriously subject to ridicule. Bill Clinton²²⁸ and George Bush²²⁹ are both members of this New World Order, as are many other government leaders.²³⁰ The conspiracy began when the United States entered the United Nations in 1945 and thereby forfeited its sovereignty.²³¹ Since then, the United Nations has been attempting to disarm the armed forces and citizens of its member countries to pave the way for global domination.²³² Recently, the United States armed services have begun to train foreign troops

²²⁵ See, e.g., JOHN RAWLS, *POLITICAL LIBERALISM* 18-19 (1993).

²²⁶ See KENNETH KARST, *BELONGING TO AMERICA* (1989); Delbruck, *supra* note 224, at 51-53.

²²⁷ See, e.g., HERBERT J. GANS, *MIDDLE AMERICAN INDIVIDUALISM: THE FUTURE OF LIBERAL DEMOCRACY* (1988).

²²⁸ See *infra* note 277 and accompanying text.

²²⁹ See *Police/Military Alert: United Nations Treachery Exposed*, AID & ABET POLICE NEWSLETTER at 1, 1 (Special Edition No. 12).

²³⁰ One uncommonly complete list includes not only the predictable members of the Clinton administration—Bruce Babbitt, Henry Cisneros, and Donna Shalala—but some less likely candidates as well: Newt Gingrich, Larry Pressler, Sandra Day O'Connor, and Laurence Silberman. See Fund to Restore an Educated Electorate, *The CFR/Trilateral/New World Order Connection* (paid advertisement), PRESCOTT SUN, Dec. 1, 1993, at 11.

²³¹ "Though not realized at the time, the UN Charter, ratified as a *treaty* by the Senate and signed by the President, was an instrument of surrender." Louis Stradling, *The Constitution vs. The UN Charter*, AID & ABET POLICE NEWSLETTER at 5 (Special Issue Number 12). By the 1950s, "the plans for the dissolution of the nation, the surrender of our sovereignty, and the merger of the U.S. into a one world government under the United Nations was well underway." Grady, *supra* note 39, at 1.

²³² The plot seeks "the emasculation of our national security and the transfer of all our military forces to a United Nations command in preparation for the New World government." Grady, *supra* note 39, at 2. The conspirators will "[e]stablish an [i]nternational [a]rmy under the United Nations to control the people of the world.... All independent national military forces will be dissolved." The Central Yavapai Center for Action, *The Hidden Agenda* (paid advertisement), PRESCOTT SUN, Dec. 1, 1993, at 11. They will "[d]isarm citizens; transfer US military to the UN." Stradling, *supra* note 231, at 2.

on United States soil in preparation for the subjugation of the U.S. population.²³³ The signs of invasion are (pg.932) everywhere:²³⁴ black helicopters have begun to appear;²³⁵ money and even human beings have been implanted with computer chips to keep track of them;²³⁶ the government is constructing holding camps for resisters;²³⁷ road signs have been marked to guide the invading forces.²³⁸ On an appointed day, the government will attack and disarm all of the militias.²³⁹ Afterwards, the real purpose of FEMA will be revealed: to impose and administer martial law after the suppression.²⁴⁰ The government perpetrated the bombing in Oklahoma City in order to discredit the militia movement.²⁴¹ The evidence of conspiracy is available on endless videotapes from militia catalogues.²⁴²

In these theories, militia writers have created a foreign, powerful Other in the New World Order, and they have correlatively constituted an embattled People. Indeed, if the theories were empirically accurate, the projected conspiracy might, in fact, call forth an American People. The object of the plot is nothing less than the violent destruction of the United States as a nation-state, and the American leaders of the plot are literally traitors, in league with foreign bodies. One publication explains:

No person can be loyal to the Constitution for the United States *and* uphold the Charter of the United Nations. They are as opposite as light and dark, good and evil, freedom and slavery, God and Satan. *No man can serve two masters*. Support of the United Nations by government officials and employees is a violation of their oath. Wittingly or unwittingly, it is treasonous.²⁴³ (pg.933)

²³³ "There are presently over one million (1,000,000) foreign troops in these United States." Faulkner, *supra* note 35, at 6. "The federal government, at this Time, is transporting large Armies of foreign Mercenaries to complete the work of Death, Desolation, and Tyranny, already begun, often under the color of the law of the United Nations." THOMPSON, *supra* note 16, at 3.

²³⁴ For those with the interest, MOM's publication *Taking Aim* offers the most detailed and complete conspiracy theories. See, e.g., MILITIA OF MONTANA, *TAKING AIM* (February 1995); MILITIA OF MONTANA, *TAKING AIM* (Special Edition 1994).

²³⁵ "[M]ysterious military operations with 'black helicopters' [are] being conducted all across the United States." Faulkner, *supra* note 35, at 6.

²³⁶ "All people will be required to maintain a federal identity card, ultimately a computer chip under the skin of your hand will be the technique used to identify you and all pertinent information about you." *The Hidden Agenda*, *supra* note 232, at 11.

²³⁷ "Why have tons of barbed wire and over 5,000 mattresses been off-loaded at Ft. Chaffee, Arkansas?" Faulkner, *supra* note 35, at 6.

²³⁸ "Troop movement markers (bright colored reflective stickers on the backs of road signs) and U.N. Troops are already in place in this country...." THOMPSON, *supra* note 16, at 5.

²³⁹ See Charles Zeps, *ALERT! Militias Targeted 24/03/95*, Talk. Politics. Guns, Mar. 24, 1995.

²⁴⁰ "When the federal government decides to enact martial law; and they will; the [d]irector of FEMA becomes a virtual DICTATOR." Faulkner, *supra* note 35, at 5.

²⁴¹ See Alex Heard, *The Road to Oklahoma City*, THE NEW REPUBLIC, May 15, 1995, at 15.

²⁴² The Militia of Montana Catalogue, for example, lists the following videotapes, among others: "America in Peril," "Equipping for the New World Order," "New World Order Land and Farm Confiscation," "New World Order Seminar," "New World Order—Take Over of America," "Enroute to Global Occupation." *Militia of Montana Catalogue*, *supra* note 12, at 2-5.

²⁴³ Stradling, *supra* note 231, at 2.

Another writer asserts: "The time is at hand when men and women must decide whether they are on the side of freedom and justice, the American republic, and Almighty God; or if they are on the side of tyranny and oppression, the New World Order, and Satan."²⁴⁴

The problem with this vision of the People is that most Americans believe that the conspiracy is a fantasy, a fabrication of the over-heated imaginations of right-wing paranoiacs.²⁴⁵ Militia writers have an answer to that charge: the New World Order has already taken over the establishment media and made it a propaganda machine.²⁴⁶ Most American citizens naively trust the media, but they have been made dupes.²⁴⁷ Since the militias trust only information obtained through the militia network, they alone know the truth. These informed agents are a revolutionary vanguard, a twentieth-century Paul Revere calling the people to awaken before time runs out.²⁴⁸

That confident self-image is consistent with the historical Second Amendment. The Anglo-American revolutionary tradition is saturated with suspicion, even paranoia: the citizenry should always watch for signs of a governmental plot to subvert liberty.²⁴⁹ The future leaders of the revolution will see the signs of governmental plotting first, and they have an obligation to alert the rest of the citizenry. Indeed, the leaders of the American Revolution embraced exactly that self-image: they perceived themselves as awakening first to imperial corruption and then seeking to open the eyes of others.²⁵⁰ In Second Amendment theory, then, widespread disbelief in a conspiracy is irrelevant to its reality. For the Second Amendment, there is no authoritative exponent of the truth: neither the king, Congress, the Supreme (pg.934) Court, nor the media can dictate to us. The People alone can decide the truth, but because the truth is often hidden, shadowy, and twisting, the people need guidance from a small band of enlightened patriots.²⁵¹

Again, however, the militias ignore a critical constraint in Second Amendment thinking: because only a People can make a revolution, the whole People must be convinced of the plot before the revolution can occur. Indeed, while the leaders of the American Revolution wished to convince

²⁴⁴ Grady, *supra* note 39, at 3.

²⁴⁵ See *supra* note 5 and accompanying text.

²⁴⁶ Step Three in the "Hidden Agenda" is to "[e]stablish a national propaganda machine.... All national T.V. networks, national newspapers, and radio networks are currently controlled by those that would destroy us." *The Hidden Agenda*, *supra* note 232, at 11. "Our national media has become nothing but the official mouthpiece of the government, putting forth false 'polls' and outright propaganda to sway the public opinion...." THOMPSON, *supra* note 16, at 5.

²⁴⁷ "The majority of the 240 million residents of the U.S. are non-thinking sheep, easily led and programmed." Grady, *supra* note 39, at 3. "To trusting Americans, it is unbelievable, but veteran readers know that the NEW WORLD ORDER is to be a socialist dictatorship. That popular media and high officials ignore or deny and ridicule it, confuses people and thwarts organized opposition." Stradling, *supra* note 231, at 2. "The trust people put in the media is beyond reason. As babes at the breast of Mother Media, they suck their daily sustenance of managed 'news.'" *Id.* at 9.

²⁴⁸ "[T]here are millions who have not fallen for the propaganda and conditioning, and of these millions, hundreds of thousands will physically resist.... These are our hope." Grady, *supra* note 39, at 3.

²⁴⁹ See RICHARD ASHCRAFT, REVOLUTIONARY POLITICS AND LOCKE'S TWO TREATISES OF GOVERNMENT 22-28 (1986); MAIER, *supra* note 123, at 42, 183-97; Williams, *supra* note 18, at 565, 581-86.

²⁵⁰ See MAIER, *supra* note 123, at 224-27.

²⁵¹ The Militia News relies on Patrick Henry for its inspiration:

It is natural to man to indulge in the illusions of hope. We are apt to shut our eyes against a painful truth. Is this the part of wise men, engaged in a great and arduous struggle for liberty? ... For my part, whatever anguish of spirit it may cost, I am willing to know the whole truth; to know the worst and to provide for it.

Grady, *supra* note 39, at 3. "What is needed is millions of Paul Reveres, shouting the message, 'The enemy is here.'" Stradling, *supra* note 231, at 9.

the People, they also believed that they could not act until the People became convinced.²⁵² It is important to understand that this limit is not merely prudential (it takes a lot of people to make a revolution) but moral (only a revolution made by the whole for the whole is legitimate).²⁵³ The militias, then, must persuade the rest of the citizenry of the existence of the need for revolution before they commence resistance.

That obligation of universal persuasion highlights the next problem in constituting a People, the epistemological difficulty. For a revolutionary People to exist, all citizens must see reality in the same way; all citizens must perceive that the government has become so corrupt that only armed resistance will suffice. For that state of affairs to exist, two conditions must obtain. First, there must be an objective reality independent of the observer. Recent epistemological work casts doubt on that condition, perhaps in the sciences but certainly in human affairs.²⁵⁴ Second, we must all—despite our radical differences in situation, values, life-history, cognitive frameworks—perceive that objective reality in the same way.²⁵⁵ A diverse, late twentieth-century citizenry is much less likely to share such a unifying perspective than the eighteenth-century citizenry who had far more similar life circumstances, cultural inheritance, and mental landscape.^(pg.935)

The epistemology of militia groups illustrates this difficulty. They reject the mainstream media; others accept the mainstream media. Whom are we to believe and why? According to the militia, we should believe them because they help make sense of recent history: the country has fallen into such a terrible state that there must be a conspiracy afoot. Thus, one group explains: "The obvious deterioration of the United States since the end of World War Two is really not a mystery, it is the result of a hidden agenda initiated by the world socialists starting in the early part of this century."²⁵⁶ As previously noted, both Gordon Kahl and Robert Matthews describe their recognition of the conspiracy as an epiphanous experience, a clarification of conditions that they had seen but not understood.²⁵⁷ According to one close observer, the Posse Comitatus followed a similar line of reasoning: Farmers in the plains states were committed individualists, believing that individuals prospered or failed by their own work. By the mid-1980s, however, many farmers—good men, responsible citizens—were failing. How to explain this deplorable state? It must be the product of a conspiracy by international Jewish bankers to enslave true Americans.²⁵⁸ In short, according to the militia, we can know that they are right because they can explain why the country has declined. There is, however, a problem with that epistemological argument: only those who already believe that the country has declined will find it convincing. Those whose condition has improved over the last several decades—racial and religious minorities, autonomous women, gays and lesbians—will disagree. American citizens do not all perceive recent trends in the same way.

²⁵² See MAIER, *supra* note 123, at 224-27.

²⁵³ *Id.*

²⁵⁴ See Susan Williams, *Feminist Legal Epistemology*, 8 BERKELEY WOMEN'S L.J. 63, 68-72 (1993). See generally RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979) (describing traditional epistemology as holding that human knowledge reflects such an objective reality and criticizing that approach).

²⁵⁵ For criticisms of the possibility of such a "universal" perspective, see SANDRA HARDING, *WHOSE SCIENCE? WHOSE KNOWLEDGE?* (1991); Naomi Scheman, *Individualism and the Objects of Psychology*, in *DISCOVERING REALITY: FEMINIST PERSPECTIVES ON EPISTEMOLOGY AND METAPHYSICS* 255 (Sandra Harding & Merrill B. Hintikka eds., 1983).

²⁵⁶ *The Hidden Agenda*, *supra* note 232, at 11.

²⁵⁷ See *supra* notes 208-09 and accompanying text.

²⁵⁸ See CORCORAN, *supra* note 45, at 24-29.

Outside explanations of militia epistemology reflect the same phenomenon. These observers offer varying explanations of the appeal of the militia's conspiracy theories. Some commentators maintain that right-wing movements like the militia reflect a human proclivity to political paranoia, only barely contained in liberal democracies;²⁵⁹ in particular, militia groups have appealed to groups that feel unjustly disempowered.²⁶⁰ Others contend that militias gain members much the same way as other associations: people make friends with current members in church, at gun shops, in community gatherings. They start to attend meetings and become drawn into the social world of the militia. They soon stop listening to the mainstream (pg.936) media and believe only things heard through their new friends. Before long, they are epistemologically isolated.²⁶¹ Whatever the real explanation, all of these accounts of militia epistemology agree on one point: conspiracy theories make sense to people with a particular background and a particular perspective, who feel powerless and come into contact with militias by frequenting places where militia members gather. For these people, epistemology depends on ideology and biography.

This dependence does not mean that militia members are psychotic. Indeed, observers agree that the militia movement is a genuine grass-roots phenomenon.²⁶² On the whole, militia members are ordinary people who believe in a conspiracy because that belief helps them make sense of their world, given their values and personal histories.²⁶³ In that sense, the militia's epistemology is like much of the rest of America's political culture. Liberals believe in right-wing conspiracies; conservatives believe in left-wing conspiracies; blacks believe in white conspiracies; whites believe in black conspiracies; women believe in patriarchal conspiracies; and men believe in feminist conspiracies. This fracturing of American politics stems in part from the disappearance of a shared epistemology. As the country reaches a crisis of armed resistance, different groups will see different enemies everywhere, and America will enter not revolution but civil war.

A revolution, then, depends on a People; a People depends on a consensual epistemology; and there is reason to believe that Americans lack such a shared epistemology. Presumably, citizens might be able to construct a shared perception of reality through intense interaction, shared institutions, and common life circumstances. Paradoxically, however, militia epistemology reduces the likelihood of such an achievement, because of its inclination to paranoia. To construct a shared point of view, citizens must accept the legitimacy of each other's perceptions and find a way to bridge them. Militias reject this course. If Paul Revere and Thomas Gage did not see the world in the same way, the reason was deception, not good faith disagreement, and the answer was revolution, not reconciliation. In a world of plots and suspicions, citizens are driven ever more apart, relying on personal sources for information and seeing other groups as potential enemies. In short, this mentality discourages the epistemological creation of a People where one does not already exist. It thereby discourages the creation of conditions necessary for the Second Amendment's relevance.(pg.937)

C. The Anti-Socialists

²⁵⁹ See Richard Hofstadter, *The Paranoid Style in American Politics*, in *THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS* 23-40 (1965); ELI SAGAN, *THE HONEY AND THE HEMLOCK: DEMOCRACY AND PARANOIA IN ANCIENT ATHENS AND MODERN AMERICA* 13-34 (1991).

²⁶⁰ See BERLET, *supra* note 200, at 6.

²⁶¹ See AHO, *supra* note 191, at 162-63, 185-211.

²⁶² See, e.g., Hawkins, *supra* note 40, at 13-14.

²⁶³ See AHO, *supra* note 191, at 135-63, 185-211.

Another segment of militia thinking asserts that socialists control the conspiracy in Washington. A "socialist" for these thinkers is anyone who wishes to subvert American constitutional liberties. A revolution against a socialist plot is therefore a revolution to protect the Constitution, or at least the Constitution as the revolutionaries understand it. In making war on the Constitution, federal officeholders have declared war on the American people, because it is the Constitution that makes us a people.

This theme is common to many militia groups. For example, the Texas Constitutional Militia describes as its "MISSION": "To defend the constitutions of the REPUBLIC OF TEXAS and of the UNITED STATES OF AMERICA. To uphold and to defend the Bill of Rights, seen as unalienable, given by God to free men that they may remain free."²⁶⁴ The Bill of Rights is under assault, and the people must respond: "[I]t is to us, the inheritors of the task begun more than two centuries ago, to seek and to secure these same ideals in the face of the same threats expressed by Patrick Henry."²⁶⁵ Similarly, the North American Militia warns treasonous officials: "We are prepared ... to defend, with our life, our Rights to Life, Liberty, and the Pursuit of Happiness. We number in the thousands in your area and everywhere else. How many of your agents will be sent home in body bags before you hear the pleas of the people?"²⁶⁶ *Federal Lands Update* offered a similar warning:

They (the feds) are going to continue to chip away at our Constitutionally protected rights, until they wear us down, and we say, "they've taken everything. I don't have anything left." Which is what they are hoping for. Or, we (you) can say "HOLD! Enough! You have no Constitutional authority to do these things and if you insist, you will face armed and angry citizens." Why do you think the militia are growing at such a substantial rate? Because the people are mad²⁶⁷

As a final example, MOM offers the people a clear choice:

The purpose of government is in the protection of the rights of the people, when it does not accomplish this, the militia is the crusader who steps forward, and upon it rests the mantle of defense of the rights of the people.... We can leave our fate in the hands of corrupted, self serving, foreign mercenaries ... or we can return to the original intent of our founding fathers (who bled and died for (pg.938) this country), in the defense of our God given unalienable rights²⁶⁸

Militia writers describe "us" or "the people" in opposition to the governmental tyrants: "we" will make a revolution to defend "our" constitutional rights unless "they" stop their oppression. What makes an American people, then, is the possession of constitutional rights, the shared resolution to defend them, and the anger at their perceived violation.

This vision of the People, however, becomes more difficult to maintain when examined in light of the militia writers' vision of particular constitutional rights. First, as Part I has already

²⁶⁴ Texas Militia—Statement, *supra* note 201, at 6.

²⁶⁵ *Id.*

²⁶⁶ Letter from North American Volunteer Militia to Judge Jeff Langton, *supra* note 160.

²⁶⁷ Faulkner, *supra* note 35, at 2.

²⁶⁸ THE MILITIA, *supra* note 34, at 8.

explained, the Second Amendment is the cornerstone of the militia's interpretation of the Bill of Rights. Militias condemn the Brady Bill and the assault rifle ban as not only unconstitutional, but also as part of a conspiracy to subvert the Second Amendment, without which other amendments and American liberty cannot stand. Similarly, the incidents at Waco and Ruby Ridge were not merely bungled attempts to serve arrest warrants; they were part of a conspiracy to disarm the public and eliminate citizens who stand in the government's way.

Second, many militia thinkers argue that the mandatory income tax is unconstitutional; indeed the tax resistance movement, at times, substantially overlaps the militia movement. Many tax resisters couch their positions in elaborate legal arguments; such arguments, rather than violence, may be their most characteristic activity.²⁶⁹ Tax resisters make a variety of arguments, but courts have adopted none of them. For example, many tax resisters believe that the Sixteenth Amendment was never properly ratified: "The 16th Amendment, which permits federal income taxes, WAS NOT ratified in the same language by three fourths of United States as required by Article V of the Constitution and is therefore invalid."²⁷⁰ Others maintain that a citizen need not complete tax returns because the Fifth Amendment protects him from giving the government incriminating information against himself.²⁷¹ Still others believe that the progressive income tax violates the Just Compensation Clause because "[h]igh wage earners are taxed to fund welfare and other entitlements."²⁷² (pg.939)

Third, anti-socialists claim that much federal regulation of private and federal land is unconstitutional. The so-called "Wise Use" movement also overlaps with the militia movement and has its own detailed ideology.²⁷³ Wise Use supporters advance two main contentions. First, the Fifth Amendment prohibits the government from telling a citizen what to do with his own property. This restriction would bar virtually all regulation. For example, the Free Militia denounces property restrictions as Fifth Amendment violations:

The use of your property can and is restricted by municipal zoning codes, state and federal environmental laws, and other governmental regulations for the "public good", even if the use of the property that is forbidden does not harm the lives or property of others. All of these regulations somehow limit the personal use of the property and many limit or reduce the property's commercial productivity or value on the real estate market.²⁷⁴

Second, the Constitution bars the government from limiting the access of private citizens to public lands and resources. According to some, the "Equal Footing" doctrine grants to every state all federal lands located within that state, so that the state, but not the federal government, may limit access.²⁷⁵

²⁶⁹ See, e.g., AHO, *supra* note 191, at 37-42.

²⁷⁰ THE FREE MILITIA, *supra* note 36, at 44. See CORCORAN, *supra* note 45, at 51. For example, Linda Thompson explains: "The Federal Government, under the Constitution, never had the legal authority to pass a national tax on income and the 16th Amendment (the law that enacted the income tax) was never ratified, as required by law." THOMPSON, *supra* note 16, at 5.

²⁷¹ See AHO, *supra* note 191, at 39.

²⁷² THE FREE MILITIA, *supra* note 36, at 45.

²⁷³ See, e.g., Elizabeth Larson, *Secessionism in the West*, THE DEFENDER, Nov. 1994, at 1, 9.

²⁷⁴ THE FREE MILITIA, *supra* note 36, at 44.

²⁷⁵ See Larson, *supra* note 273, at 1.

According to others, however, even states cannot limit access because public resources belong to the people.²⁷⁶

In short, according to the militia writers, the Constitution mandates an extreme libertarian scheme. Anything more centrist (in the present political spectrum) is "socialism," a term militia writers use as an epithet to ostracize those who disagree with them. The prophecy attributed to Sarah Brady sums up this attitude: "Our task of creating a socialist America can only succeed when those who would resist us have been totally disarmed." One publication calls supporters of the Clinton administration "Clintonistas," ostensibly to associate them with South American communist movements.²⁷⁷ *Federal Lands Update* warns:

[T]he belief that private property makes us unequal still has millions of adherents here in America. These true believers normally do not use the S word (socialist) to describe themselves. They know well that most Americans are too politically illiterate to recognize (pg.940) socialism even as it bites them in the paycheck every Friday in the form of income taxes, FICA, et cetera.²⁷⁸

Finally, in answer to the question "Does the USMA have any political agenda?", the group answers: "No. We are not Democrats, Republicans, Independents, etc. Except that we are also not Socialists and Communists and allow none such to belong."²⁷⁹ Socialists, in short, are beyond the pale, not a legitimate part of the militia or the American People.

There are two difficulties with constituting an American People in this way. First is the interpretive difficulty: the meaning of the Constitution is itself the subject of enormous controversy—witness the furor over bussing, abortion, affirmative action, gay rights, women's rights, prayer in public schools, flag burning. For the Constitution to make us a People, there must be something approaching consensus on the meaning of that document. In recent years, however, the Constitution has generated as much dissension as agreement. An insurrection begun in the name of the Constitution would therefore in fact be a rebellion made for a particular interpretation of the Constitution, not for the People as a whole. The militia's own interpretation of the Constitution illustrates this danger. The militias claim to be speaking for the people, but they speak in fact only for a minority. Large majorities supported the Brady Bill and the assault weapons ban, and very few believe the income tax or federal land regulation are unconstitutional.²⁸⁰

The militias answer this difficulty by declaring everyone else wrong. They argue that if only everyone were to use the correct interpretive technique, there would be agreement. Not surprisingly, militia writers' version of the technique, preferred by many right-wing theorists, is that citizens should passively heed the text of the Constitution and the Framers' original intent. *The Militia News*, for example, asserts that the text is self-interpreting:

²⁷⁶ For example, the North American Militia warns state officeholders: "You have state agents who are threatening to take wildlife from an individual. The individual is not a corporation and has certain unalienable rights. The state of Montana does not own the wildlife. The regulations do not pertain to the human being inhabitants of Montana." Letter from North American Volunteer Militia to Judge Jeff Langton, *supra* note 160.

²⁷⁷ For example: "The bad news is that the Clintonistas want your property and are serious about stealing it." MCALVANY INTELLIGENCE ADVISOR, *supra* note 95, at 18.

²⁷⁸ James Catron, *Watch Out!*, FEDERAL LANDS UPDATE, Oct. 1994, at 3.

²⁷⁹ *USMA pamphlet*, *supra* note 158, at 3.

²⁸⁰ According to one poll, only 33% of white males and 22% of all others believe that "citizens have the right to arms themselves in order to oppose the power of the Federal Government." Smolowe, *supra* note 3, at 68.

[T]he vast majority of U.S. citizens are reasonably intelligent and can read, and the Constitution and Bill of Rights are written in plain language (the same English we read and write today) and are not difficult to understand.... The Second Amendment ... consists of 27 plainly-written words.... This declaration of the absolute, unequivocal, inalienable right of the people to be armed, needs no interpretation.²⁸¹ (pg.941)

MOM also emphasizes the importance of the Framers' intent, attributing to Madison the imprecation: "[D]o not separate text from historical background. If you do, you will have perverted and subverted the constitution, which can only end in a distorted, bastardized form of illegitimate government."²⁸²

These simple recommendations, however, underestimate the difficulty in reaching consensus on the meaning of the text. From the moment of its adoption, the Constitution has generated multiple schools of interpretation.²⁸³ Constitutional scholars generally agree that the broad phrases of the Constitution, including "due process," "equal protection," and "privileges and immunities," are too open-ended to generate determinate, consensual interpretations.²⁸⁴ Indeed, much constitutional theory argues that language can have meaning only within an interpretive community that shares a framework of usage and analysis.²⁸⁵ As the militias demonstrate, America is not one, unified interpretive community with reference to the Constitution. Even the justices of the Supreme Court, despite sharing a legal culture, often cannot agree. Consequently, many important cases result in split decisions, hindering the coherent development of the law. The frequency of such cases might be accelerating.²⁸⁶

In the face of such interpretive disagreement, militia writers reach for their inevitable trump card: those who disagree with them on the meaning of the Constitution must be parties to or dupes of the conspiracy. Thus, *The Militia News* describes those who differ with the militia's reading of the Constitution: "[T]he authors of those documents [the Bill of Rights and the Constitution] anticipated this very problem with those who would usurp the people's rights, and those weak and unprincipled souls who would foolishly compromise or surrender their rights."²⁸⁷ To disagree with the militia, in other words, is ipso facto to be cast outside of the volk. In fact, however, it is not (pg.942) traitorous to the American people to believe that the income tax and environmental protection are constitutional; it is merely to differ in good faith. Again, the mentality of suspicion actually subverts the possibility of a true revolution. If each group believes that disagreement can only be the product of treason and deceit, then a people sufficiently unified to make a revolution will never come into being.

²⁸¹ Grady, *supra* note 14, at 5-6.

²⁸² THE MILITIA, *supra* note 34, at 3-4.

²⁸³ See TRIBE, *supra* note 73, at 301.

²⁸⁴ See, e.g., ELY, *supra* note 73, at 1341; LAURENCE H. TRIBE, GOD SAVE THIS HONORABLE COURT 42-43 (1985); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 38-39 (2d ed. 1991). Some deny that language can ever produce determinate meaning, even under the best circumstances, but I need not go that far for present purposes.

²⁸⁵ See RONALD DWORKIN, LAW'S EMPIRE (1986); STANLEY FISH, IS THERE A TEXT IN THIS CLASS? (1980); Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); William M. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609 (1990); William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541 (1988).

²⁸⁶ See, e.g., *United States v. Lopez*, 115 S. Ct. 1624 (1995) (six opinions); *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S. Ct. 2481 (1994) (six opinions); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) (five opinions).

²⁸⁷ Grady, *supra* note 14 at 5-6. Sadly, such accusations of bad faith are also common in the scholarly debate over the Second Amendment. See Andrew Jay McClurg, *The Rhetoric of Gun Control*, 42 AM. U. L. REV. 53 (1992).

The second difficulty with the anti-socialist position is the political problem: to become a people, individuals must find ways to interact. That process usually involves institutions that bring together people from different backgrounds and allow/teach them to form a common venture. In ancient politics, the Athenian Assembly is a classic example. In American history, the universal militia was supposed to serve that function.²⁸⁸ Because of their extreme libertarianism, however, anti-socialist militias leave little space for such interactive, universal institutions.

Militia writers are very suspicious of the authority of any government, even democratic ones. In their view, individuals do not have rights only within a political system. Instead, individuals have the right to declare themselves entirely outside any political system, possessing all the powers normally associated with government. Thus, Linda Thompson concludes her Declaration of Independence:

We, therefore the sovereign citizens of the several states of the united states ... Declare, that each of the sovereign citizens undersigned are, and of Right ought to be, Free and Independent Sovereign Citizens ... each has the full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which an Independent Sovereign may of right do.²⁸⁹

By contrast, Jefferson's Declaration of Independence spoke not of individuals, but of a people severing its bonds with another.

The militias make no claim to bind the individual. The choice to join is entirely voluntary, the product of spontaneous individual volition rather than of universal institutions. As the Texas Volunteer Militia puts it: "START YOUR MILITIA AND PATRIOTS WILL COME."²⁹⁰ The militia internet sites are full of advice on how to attract members. Significantly, the militias intentionally recruit from a (pg.943) relatively restricted pool of citizens. One posting advises: "Try to find like-minded persons in your area. Ask around. Try patriotic organizations, such as the VFW and the American Legion. Sound out people at gun shows and gun stores."²⁹¹

Within the militia, majority votes have no authority for the dissenting minority because withdrawal is always an option. Thus, MOM provides that it may "not be called into service without the sustaining vote of the Unit."²⁹² A "sustaining vote" requires unanimity: "At the time of the 'call to arms,' each man shall verbally sustain such call, to his immediate Officer, and in the roll call, 'all voices present' shall be presented to the Unit Commander as unanimous for the impending action and service."²⁹³ At the revolution, militia members may depart at any time: "No member of the Unit

²⁸⁸ See Williams, *supra* note 18, at 603-04, 607-09.

²⁸⁹ THOMPSON, *supra* note 16, at 3. Similarly, Calvin Greenup and others published an open letter in a local newspaper declaring: "I ... solemnly Publish and Declare my American National Status and Rights to emancipate absolute my 'res' in trust from the foreign jurisdiction known as the municipal corporation of the District of Columbia.... By this emancipation I return to an estate of primary sovereignty and freedom that pre-exists all government(s)." *Letter to the Editor*, RAVALLI REPUBLIC, Sept. 28, 1993, reprinted in STERN, *supra* note 14, app. 7.

²⁹⁰ Texas Militia—Statement, *supra* note 201, at 3.

²⁹¹ How to Activate the Constitutional Militia in Your Area, *posted* TALK. POLITICS. GUNS, March 24, 1995. Similarly, another posting urges: "The [recruiting] team should visit likely places and persons who might refer them to prospective recruits. Gun shops, American Legion and VFW halls, civic organizations, sheriff and fire departments." Jon Roland, Militia Organizing—Advance Teams, *posted* TALK. POLITICS. GUNS, March 24, 1995.

²⁹² *The Militia of Montana, Sanders County, Unit Alpha*, RULES AND REGULATIONS 2 (copy on file with the author).

²⁹³ *Id.* at 3.

shall be compelled to serve in a conflict which he can not morally support in his heart with all of his might and strength."²⁹⁴ Similarly, "The Unit Commander shall be chosen by unanimous voice," but if unanimity is not possible, "dissatisfied members ... may resign ... for the purpose of forming a separate and independent Unit."²⁹⁵

The militia vision of the relationship between individuals and government is thus almost a parody of classical liberalism. Individuals exist before governments, complete and whole in themselves. Each individual makes the choice to enter or leave a polity at any time for his own reasons. Accordingly, everywhere and always, supra-individual organizations exist and take action only by the actual consent of each and every member. This theory of the social contract, moreover, is not just a metaphorical explanation for the origin of governmental authority; it is a prescription for the day-to-day conduct of historical governments and citizens. If citizens come together and find that they agree, all is well and good. If not, then individuals should simply go their separate ways.²⁹⁶ (pg.944)

This propensity to endless schism, when applied to revolutionary militias, virtually ensures that any armed resistance to government will result in civil war rather than a universal revolution. Entirely absent from the anti-socialist vision of human interaction are the political commitments that might make the construction of a People possible: devotion to the citizenry as a whole and the nation as a structure; resolution to discuss differences, compromise, re-conceptualize one's own interests, enter into the perspective of others; recognition of the bonds that connect those in an ongoing political enterprise. In short, the anti-socialist mentality will lead the citizenry closer to fragmentation, not closer to Peoplehood. And that mentality is not just a problem for the militia. Significantly, the bulk of the American public shares the militia's contempt for politics, although perhaps in a less extreme form; indeed, the most noticeable trend of the 1990s is widespread alienation from the whole political system.²⁹⁷

D. The Anti-Secular Humanists

Finally, many militia members believe that the alleged conspiracy is attempting to replace God with secular humanist dogma in the hearts and minds of Americans. *The Militia News* recites a familiar litany:

We observe the systematic de-Christianization of the nation as the courts display an animosity towards every Christian symbol and every manifestation of Christian practice, teaching and belief. Bible distribution and even Bible reading is prohibited in government schools. Crosses, crucifixes and nativity scenes are banished from public property. Cross

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 1.

²⁹⁶ An interview with Norman Olson, a cofounder of the Michigan Militia, nicely brings the interpretive and political problems together. The interviewer asked Olson, "[I]f you establish 83 militias in every county in the state, who's to say that they'll all agree?" Olson responded, "You have to listen to our mission: defend the Constitution and see that all men remain free." The interviewer then pointed out the interpretive problem: "But hundreds of courts interpret the Constitution differently.... Who would decide if there were dozens of militias?" Olson's answer to that difficulty raised the political difficulty instead: "What happens if a person doesn't like the philosophy of the brigade? He just walks away—that's it." Downes, *supra* note 108, at 4. This ultimate solution—the exit option—may allay worries about the rights of the individual, but it practically guarantees the disintegration of a revolutionary people.

²⁹⁷ See STANLEY B. GREENBERG, *MIDDLE CLASS DREAMS* (1995).

shaped gravestones are being removed from military cemeteries. Public prayer is prohibited at school sponsored events. Even the Pledge of Allegiance is now forbidden in many schools because of the phrase "one nation under God."²⁹⁸

Similarly, part of the "Hidden Agenda" of the New World Order is to "[d]estroy religious faith and moral standards. The government has taken God and his morality from us and in it's [sic] stead supports abortion, gay rights, schools dispensing contraceptives, and activities void of ethics"²⁹⁹

According to militia writers, this de-Christianization is especially shameful because Christianity forms the basis of American peoplehood. In this view America has been a great nation because it was (pg.945) founded on Christianity.³⁰⁰ Indeed, the basis of the American legal system and the Constitution itself is Christian law.³⁰¹ Therefore, to de-Christianize America is to violate the Constitution and to traduce America's way of life as a people. Officials who seek to do so are traitors and oath-breakers.³⁰² At this point, anti-secular humanism often merges with anti-socialism in a belief that the government has begun a systematic assault on the liberties of American gunowners, property-holders, and Christians.³⁰³

In this strain of militia thinking, the American People contains all and only those committed to God's law, as the militia understands it; the Other consists of those committed to taking God out of our Godly republic. This vision well illustrates most of the foregoing difficulties in constituting a unified people in late twentieth century America. First, it faces the demographic difficulty: it facially excludes liberal Christians, Jews, Moslems, Buddhists, nonbelievers, and others.³⁰⁴

²⁹⁸ Grady, *supra* note 14, at 2.

²⁹⁹ *The Hidden Agenda*, *supra* note 232, at 11.

³⁰⁰ The Texas Constitutional Militia urges its chapters to [e]ducate its members in ... the Bible, which has been the greatest single guiding influence for all great nations desiring to be free.... [and to] [s]eek the protection, wisdom, and leadership of Almighty God as we submit to Him to do His will in protecting the liberty and freedom He has given to all Americans.

Texas Constitutional Militia—Statement, *supra* note 201, at 7.

³⁰¹ Gordon Kahl raged in his last letter: "These enemies of Christ have ... thrown our Constitution and our Christian Common Law (which is nothing other than the Laws of God as set forth in the Scriptures) into the garbage can." AHO, *supra* note 191, at 246. One publication explains that our constitutional rights are "the divine endowment of the Creator to each person.... Note that there is no mention of HUMAN or CIVIL rights." Stradling, *supra* note 231, at 3. Under the Constitution, "our system of justice is founded in the wisdom of God based on Bible laws preserved through centuries by Anglo-Saxons." *Id.* at 4.

³⁰² God intends the government to do you good by maintaining law, order, and justice. When the government systematically punishes the upright citizen and commends wrongdoing, it is no longer serving God's purpose If we are submitted to Jesus Christ and committed to Constitutional liberties, then our conscience demands the resistance of unconstitutional authority, which is no authority at all.

THE FREE MILITIA, *supra* note 36, at 11. In short, "WHEN ELECTED OFFICIALS BREAK THEIR OATH TO UPHOLD THE CONSTITUTION, IT IS NOT THE PATRIOTIC CITIZEN WHO IS IN REBELLION, BUT THE GOVERNING OFFICIAL." *Id.*

³⁰³ For example, the Free Militia lists as examples of "violated civil rights":

For a generation we have had legalized abortion which denies the right of the unborn child to live.... Attempts have recently been made to require state certification of private school teachers and homeschoolers.... The America 2000 education program is designed to standardize the curriculum in and centralize control of all public schools by imposing 'outcome based' education"

THE FREE MILITIA, *supra* note 36, at 40-41.

³⁰⁴ One distribution is overt (and slightly more inclusive than most) about the denominational battle lines: in the New World Order,

[a]ll congregations affiliated with the National Council of Churches and liberal Jewish councils, may continue to function . These groups are not incompatible with the aims and designs of the Alliance. However, all other fundamental, independent, Bible-centered congregations; all conservative Greek and Russian Orthodox churches;

According (pg.946) to the militia, these citizens at best deserve toleration because this country was not made for them. Second, this vision of the people faces the interpretive difficulty: many, perhaps most, Americans (including the Supreme Court) do not believe that the Constitution prohibits abortion,³⁰⁵ allows prayer in public schools,³⁰⁶ or more generally codifies the Christian Bible.³⁰⁷ Indeed, many Christians do not interpret the Bible to prohibit abortion or homosexuality or to encourage the commingling of church and state.³⁰⁸ Finally, this vision faces the epistemological difficulty: the militia believes that the de-Christianization of America is the product of a deliberate, unified conspiracy to subvert America by eliminating its fidelity to and reliance on the Almighty. Other Americans have a different view of reality: the Supreme Court banned prayer in public schools and restrictions on abortion because the justices were concerned about the rights of children and women; states have liberalized laws against homosexuality because many Americans no longer regard gays as monsters; in general, America has demoted Christianity from its privileged legal position out of a conviction that the Constitution mandates equal treatment for all religions.

Armed resistance for God's People, in short, would not be a revolution for the whole of the citizenry; it would be the start of a civil war along cultural battle lines that are all too familiar.³⁰⁹ With the exception of some killings at abortion clinics, synagogue bombings, and militia assassinations, America has waged this cultural war primarily through political and judicial channels. The militias hope to transform that metaphorical war into a real war, and they intend to be better armed and trained than their enemies. Like the other militia visions of the People, in other words, this one does not include all Americans in its revolutionary movement. Instead, the vision's real function is to categorize some citizens as True Americans and to exclude others as traitors, based on differences in values and identities. The practical meaning of the vision is plain: if the militia cannot defeat these enemies through political or judicial means, its members have the right to shoot them.(pg.947)

CONCLUSION: A MODERN CONSTITUTIONAL RIGHT OF REVOLUTION

In a large sense, the United States Constitution and the general Anglo-American political tradition contemplate two ways for the people to take collective action. Today, we are very familiar with one way: the ordinary method of government through politics and law. This system contains specific limits on the government's abuse of power: electoral accountability, separation of powers, federalism, and individual rights. If the people disagree among themselves or if the government disagrees with some of the people, authoritative methods exist for resolving those differences, including election results and court decrees. If the form of government is well-designed, these resolutions may be presumptively just.

For the Framers, however, no form of government could guarantee that powerholders would not become corrupt. The Framers therefore foresaw that the people might have to re-take power into

Orthodox Hebrew synagogues and Roman Catholic parishes with large Eastern European ethnic constituencies, will cease operation at once.

John Grady, *When Will it Happen?* (one-page handout on file with the author).

³⁰⁵ See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

³⁰⁶ See *Wallace v. Jaffree*, 472 U.S. 38 (1985).

³⁰⁷ See *Stone v. Graham*, 449 U.S. 39 (1980).

³⁰⁸ See BARRY A. KOSMIN & SEYMOUR P. LACHMAN, *ONE NATION UNDER GOD* 10-11, 230-31(1993).

³⁰⁹ See *id.* at 157-251.

their own hands through the second form of collective action: resistance and revolution. The primary textual basis for this form of action is the Second Amendment. While Articles I, II, and III give power to the people "in-doors," tamed in formal channels of government,³¹⁰ the Second Amendment, by contrast, contemplates the People "out-of-doors,"³¹¹ regnant, militant, and creating the channels for its expression.³¹² This civic republican armato popolato is the final limit on governmental power.^(pg.948)

Who, however, will limit the people? Scholars who endorse an individual rights theory of the Second Amendment might suggest that this question is illegitimate because the people, as the fountainhead of all legitimate authority, are entirely and always trustworthy. Indeed, some of these theorists accuse gun control advocates of an elitist distrust of the masses.³¹³ In the end, the people must therefore stand as their own limit; they are at the end of the regression, and there is nowhere else to turn.

That conclusion, however, is overly simple. Democracies must of course trust the people's judgment, but that claim is merely a platitude, because it leaves unspecified the meaning of "the people" and "judgment." It is one thing to trust the people's will as expressed through the institutions of a deliberative democracy; it is quite another thing to trust an enraged mob. Indeed, the Constitution itself is full of limits on simple democracy.³¹⁴ One of the most familiar roles for the Supreme Court is as a restraint on hysterical majorities, a sober second thought.³¹⁵ Furthermore, the Senate was originally intended to be a semi-aristocratic limit on the popular House of Representatives;³¹⁶ to this day, it is not strictly majoritarian.³¹⁷ James Madison himself believed that

³¹⁰ See U.S. CONST. art. I, § 2, cl. 1 (election of representatives); U.S. CONST. amend. XVII (direct election of senators); U.S. CONST. art. II, § 1 (election of president); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (describing the Supreme Court as the agent and protector of the people in exercising judicial review).

³¹¹ Gordon Wood put the phrase, "the people out-of-doors," into wide circulation to describe the people acting on their own initiative, outside the ordinary channels of government. See WOOD, *supra* note 8, at 319-28.

³¹² The "Yale School" of constitutional interpretation might appear to propose a third form of popular constitutional action, between the people tamed and the people militant. Professor Akhil Amar, for example, argues that the American citizenry has a right to amend the Constitution by a simple majority vote. Article V of the Constitution, with its requirement of a supermajority, prescribes only those procedures that the *government* must follow in initiating change. Akhil R. Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 457-58 (1994). Bruce Ackerman argues that, under special conditions, the people may engage in a process of self-conscious deliberation leading to "higher lawmaking." When this deliberation results in widespread consensus on matters of principle through the populace and the branches of government, it effectively becomes a new constitutional regime. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 266-69 (1991). For the purposes of this Article, however, Amar and Ackerman are describing actions of the people tamed, for they both assert that the people must act through formal, constrained, and peaceful channels. By contrast, in a revolution, the body of people must act as an organic unit outside of normal governmental channels because, by definition, the people are revolting *against* government. Thus, as Amar points out, a revolution "required no vote of the People themselves." Amar, *supra*, at 500. Similarly, in Ackerman's scheme, a proposed amendment must secure support through the normal channels of popular deliberation and all three branches of government, not through violent popular action. ACKERMAN, *supra*, at 266-69.

³¹³ See Nicholas J. Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment*, 24 RUTGERS L.J. 1, 37, 71-73; Kates, *supra* note 31, at 226-27; Levinson, *supra* note 31, at 658-659; Reynolds, *supra* note 164, at 466-68, 495.

³¹⁴ See U.S. CONST. amends. I-VII, XIII-XV, XIX (forbidding legislatures from limiting individual rights).

³¹⁵ See *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (describing the Court's work as representing "the balance [between order and liberty] struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke").

³¹⁶ See WOOD, *supra* note 8, at 553-62.

³¹⁷ See U.S. CONST. art. I, § 3, cl. 1 (senators represent states, not population).

direct democracy would imperil justice. He hoped that representatives would refine popular opinion, engaging in rational discourse about the aggregate interests of the community.³¹⁸ More recently, a wave of neo-republican constitutional scholarship has espoused the ideal of deliberative democracy, in which the people actively discuss their common identity. Such a system would differ profoundly from a simple majoritarian democracy, in which individuals passively vote their perceived self-interest.³¹⁹

In short, for the people to act, they must assume some particular political or cultural form such as the electorate, a jury, the universal militia, or consumers. There is no such thing as the People simpliciter (pg.949) or in the abstract. Importantly, some of these forms promote justice better than others: a deliberative democracy is a better ideal for popular action than the war of all against all. Particular resistance movements might fall anywhere on this continuum, depending on their historical details. Americans might therefore welcome some revolutions but not others, and, correlatively, they might espouse a right of revolution in certain times and places but not in others. Like almost everything else, it all depends. It is rational and not undemocratic to fear civil war, anarchy, and rebellion.

The Framers of the Second Amendment would agree with that conclusion. They were not indiscriminate proponents of revolution; indeed, they were always fearful that the revolutionary people would become nothing more than a mob.³²⁰ They felt, however, that they had two protections against such degeneration. First, the people were formed into a universal militia, raised and disciplined by the state. Second, American citizens were a republican People—homogeneous, virtuous, and committed to the common good. These qualities made it possible to trust the people in 1776, but one should not always and everywhere trust the people out-of-doors. Resistance made by an unvirtuous population—such as the laboring classes of European cities— could not be a revolution for the common good.³²¹ In short, unlike some modern proponents of a revolutionary Second Amendment, the Framers worried not only about limiting government by an armed populace but also about limiting the armed populace itself.

Even in the late eighteenth century, the Framers may have been wrong in supposing that American were a unified People; they may have been conjuring with the concept of a People, because otherwise their republican structure of thought would crumble. Militia writers might argue that if conjuring with the People was good enough for Patrick Henry, then it should be good enough for modern Americans—or, more precisely, then it is a constitutionally sanctioned form of rhetoric. In fact, however, even if conjuring with the People was once constitutionally sanctioned, the situation has changed. First, the Framers of the Second Amendment gave the People an institutional form—the universal militia—celebrated in the Second Amendment. The United States no longer maintains such a militia; the citizenry, apart from conventional politics, is merely a collection of individuals. Second, the Constitution itself has changed. The original Constitution allowed, even promoted, corporate unities of the sort that might ground peoplehood. States could and did maintain religious establishments; the citizenry was limited to white males; the Bill of Rights (pg.950) had little

³¹⁸ See THE FEDERALIST No. 10, *supra* note 47, at 126-27.

³¹⁹ See, e.g., Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

³²⁰ See MAIER, *supra* note 123, at 41-48, 68-69.

³²¹ See DREW R. MCCOY, THE ELUSIVE REPUBLIC 15-16, 23-38 (1980).

substantive reach.³²² Today, the Constitution has become a great protector of liberal individualism. American society is no longer a Christian, white, male citizenry, and citizens have individual rights to make personal life choices. In short, Americans no longer exhibit commonality in part because the Constitution protects the right not to be part of a commonality. In such a legal regime, conjuring with the People is no longer a constitutionally sanctioned form of rhetoric.

The most important change, however, is that over the last 200 years, diversity has become a permanent and accepted part of the American political landscape. In the 1790s, the Framers of the Second Amendment could still conjure with a People because even if the American citizenry did not meet that ideal, the Framers hoped to make it do so. Today, that hope is dramatically less viable; for many, it is no longer even attractive. This Article has detailed the demographic, epistemological, interpretive, and political difficulties in constituting a people today. Those difficulties strongly counsel that it is time to stop conjuring with the people. It is possible that a People does exist; if not, it is possible that a People may be created. Unless and until such conditions are demonstrated, however, the revolutionary Second Amendment by its own terms does not apply to late twentieth-century America.

That conclusion would have filled the Framers with foreboding. It certainly fills the militia movement with dread, and it probably fills many adherents of the individual rights view of the Amendment with concern. If Americans lose the constitutional right to revolution, then they have no choice but to trust ordinary politics and law to protect them from oppression. If the government ever falls into the hands of a committed tyrant, those structures may not provide sufficient protection. That threat is real, and in my view it is right to worry about it. The great strength of the individual rights theory is its realism on this point: citizens may live under a basically just system now, but there is no guarantee that it will always be so.

But the right to bear arms cannot guarantee that the American system will remain just either. Votes may not secure a just society, but neither could an armed populace. The individual rights theory is realistic about the threat of government tyranny, but it is profoundly unrealistic about the threat of revolutionary tyranny. Today, armed resistance is no less likely to bring oppression in its wake than is government. In other words, the citizenry forfeited its effective right to armed revolution some time ago, not through the decision of a court, but through historical changes. Even if the Supreme Court guaranteed each individual the right to arms tomorrow, even if Congress supplied (pg.951) each home with an assault weapon, citizens still could not exercise a right to revolution, because they are not a revolutionary people. All they could do is kill each other. It is terrifying to have to trust ordinary politics, to have to give up the ultimate sanction of armed revolt, but America has already reached that point.

In the end, individuals may always maintain a moral right to defend themselves against unjust government, regardless of circumstances. If the conspiracy theories were true, citizens might all need to beg, borrow, or steal a gun and take to the hills, fighting a guerrilla war for their liberties—and they would be right to do so. In America, it is easy to forget what people in the former Yugoslavia cannot forget: only force wins. And therefore, if the revolution comes, and if the nation collapses in virulent internecine warfare, perhaps everyone would have a right to take up arms in defense of the family, the home, or themselves. That right of self-defense could not be a constitutional right, however, because it would occur outside of all constituted authority, in the war of all against all. In such a time, it is difficult even to speak of justice and injustice; one simply does

³²² See 2 SCHWARTZ, *supra* note 54.

what one has to do. The Second Amendment does not contemplate arming citizens in preparation for such a time; it contemplates arming the populace in preparation for revolution made by an orderly and unified people according to commonly shared norms and understandings. And that sort of arming is no longer available.

As a result, America must hope that it never comes to the pass of revolution. To forestall that pass, Americans can rely only on ordinary politics. Citizens must struggle to create together a healthy and viable democracy, unified enough to prevent fatal fissures in the body politic but pluralist enough to celebrate different cultures and individuals. Unfortunately, the theoretical world of the revolutionary Second Amendment actively frustrates the creation of such a politics. In that world, citizens must always be suspicious, seeing disagreement as the product, not of good faith, but of deceit. In that world, citizens must always be ready to take up arms and abandon political means of reconciliation. And as a result, in that world, citizens must see the political landscape as populated by the People and potential Others, not by multiple, co-equal parties with different views but equal rights and legitimacy.

For that reason, paradoxically, the militia's conception of the Second Amendment poisons not only ordinary politics but revolutionary politics as well. For a revolution to occur, the people must be even more united than in a healthy democracy. Completely outside of the normal political structures, they must rise as one to smite the tyrant. If the American citizenry were already a People, the Amendment might protect the right to revolution. But when a people, as now, (pg.952) does not exist, the suspicion, hostility, and violence implicit in the militia movement's theory of the amendment would make it almost impossible to create one. Ironically, then, the movement's particular rendition of the revolutionary Second Amendment would actually ensure that a legitimate, constitutionally sanctioned Second Amendment revolution could never occur.

In short, the Second Amendment right to revolution presupposes a particular factual scenario. The People are profoundly unified with a particular and consensual notion of their own good. A small band of evildoers captures the government, departs from the general will, and uses its power for its own nefarious purposes. The People then make a revolution. Under these circumstances, the right to revolution makes sense. The right does not make sense when the people themselves are profoundly divided about the common good, when the problem is not a straying government but fissures within the citizenry itself. Under today's circumstances, the right to revolution loses its grounding, and citizens must look elsewhere for safety. Different historical circumstances call for different forms of collective action.

With the loss of the right to revolution, however, come compensating gains. Unlike the patriots of 1776, America now has a representative government and a written constitution.³²³ Throughout America's history, groups of citizens have resisted the government in the name of an abstraction called the People. On inspection, however, that abstraction always turns out to be a subset of the citizenry, united by class, language, or political viewpoint; America is now a nation of groups, not one unified people.³²⁴ The compensation is that we no longer enjoy peoplehood precisely because we now have the right to be different from each other. Because we will not suffer the

³²³ See Reynolds, *supra* note 164, at 464-71.

³²⁴ For example, Paul Gilje has carefully examined popular disorder in New York City from 1763 to 1834. He argues that such disorder came to be seen as less legitimate for two reasons. First, after the American Revolution, New York had a representative government. Second, New Yorkers came to see popular disorder less as a protest of the People and more as the opportunistic action of particular ethnic, religious, and class groups. PAUL A. GILJE, *THE ROAD TO MOBOCRACY: POPULAR DISORDER IN NEW YORK CITY, 1763-1834* (1987).

cultural orthodoxy necessary for unity, we have lost one great guarantor of freedom, the right to revolution, but we have gained the day-to-day freedom of a pluralist society. It remains to be seen whether such a society can survive, but it has no hope so long as we are prepared to kill each other in the name of a constitutional anachronism: the People.