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# PRIVATE ACTORS & STRUCTURAL BALANCE: MILITIA & THE FREE RIDER PROBLEM IN PRIVATE PROVISION OF LAW

Andrew P. Morriss\*

Miners in Montana in the 1860s created "common law," non-governmental legal institutions which dispensed millions of dollars of public resources to private individuals. Armed Vigilantes rode across the territory administering private justice. They hung twenty-two men, including an elected sheriff and his deputies. Even as Montana finally became a territory in May 1864, "it nevertheless chose still to regard itself as back of beyond, as a remote, independent, and untouchable empire. It resented and continually obstructed, ungratefully, the federal controls which accompanied the blessings of territorial recognition."<sup>1</sup> Such activities were not limited to the early days of the Montana Territory: cattlemen led by Granville Stuart in Montana pursued and hung rustlers in the 1890s, to widespread popular approval.

Today the State of Montana and many Montanans celebrate and honor these men and their activities. Montana's state capitol building includes what is almost a shrine to the 1863-64 Vigilantes; the state highway patrol includes the Vigilante symbol on its shoulder patches;<sup>2</sup> Helena's main street, still called Last Chance Gulch, follows the site of mining activity and celebrates as heroic

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1. JOSEPH KINSEY HOWARD, MONTANA: HIGH, WIDE AND HANDSOME 39 (1959).

2. The Montana Vigilantes used "3-7-77" as a symbol. Explanations for the meaning of these numbers are limited only by the imagination. Among the theories I have come across are (1) the targets of vigilante action were given 3 hours, 7 minutes, and 77 seconds to leave the area; (2) the targets would be buried in graves 3 feet by 7 feet by 77 inches; (3) the vigilantes used numbers to identify themselves and numbers, 3, 7, and 77 were particularly important members; and most likely, (4) the vigilantes formation was related to three gatherings of Masons for the funeral of a member, and at those gatherings there were, respectively, 3, 7, and 77 Masons present.

the miners' exploitation of the public domain; guided tours of Bannack State Park glorify the Vigilantes; and cattlemen such as Granville Stuart appear as heroes in most modern Montana history books.

Today's Militias<sup>3</sup> bear a striking resemblance to these pioneers. Like the Vigilantes, the Militias are attempting to reorder society through private means. Like the gold seekers and cattlemen, they assert their right to create and enforce property rights. Yet the modern Militias and their sympathizers find themselves reviled<sup>4</sup> and, sometimes, as in Montana, subject to

3. The term 'Militia' encompasses a wide range of organizations and is freely available for use by anyone who chooses to do so. It is likely that some of the groups self-identified as 'Militia' are indeed their detractors' worst nightmares: violent, racist nuts.

4. Polling data is surprisingly sparse. All but two national polls conducted on the Militia image were done just after the Oklahoma City bombing and so probably overstate the hostility. I identified national polls by asking the Roper Center for Public Opinion Research in Storrs, Connecticut to conduct a search of their database for polling data on Militias on September 3, 1996 (hereinafter Roper Center Polls) (on file with author). The Roper Center Polls identified questions from Time/CNN polls conducted on April 27, 1995 and July 10, 1996, a CBS News poll conducted on April 25, 1995, ABC News/Washington Post polls conducted on May 10-14, 1995, Los Angeles Times polls conducted on April 26 and 27, 1995 and April 13-16, 1996, and an NBC News/Wall Street Journal poll conducted June 2-6, 1995.

Three polls asked multiple Militia-related questions, all in 1995: the Los Angeles Times poll, the Time/CNN poll, and the ABC News/Washington Post poll. In Question 10, the Los Angeles Times poll asked about an "armed citizen militia" and found 46% believed the Militia had a "great deal/good amount" of responsibility for the Oklahoma City bombing compared to 31% which believed they had "not too much/none" of the responsibility. In Question 12, 59% thought an "armed citizen militia" posed a "grave danger to American society" while only 24% thought they were "mostly just groups of citizens lawfully exercising their rights to assemble and bear arms." (According to Question 27, more people had an opinion about Militias than the 68% who responded that they had heard or read "anything" about "armed citizen militia groups . . . which strongly oppose the federal government and gun control in particular." Perhaps most remarkably, Question 18 indicated that 17% named "citizen anti-government militia groups, right wing militia groups" as responsible for the Oklahoma City bombing (and this only a week after the bombing), ahead even of suspect Timothy McVeigh and his friends (14%) and "mentally ill/nuts/whackos" (9%) and behind only "Don't Know" (28%).

A short while later, Question 27E of the Yankelovich, Inc. Time/CNN poll revealed that only 30% described "militia groups . . . that have organized themselves because they believe the federal government has too much power" as "well-intentioned" while 58% would not so describe them. More dramatically, according to Questions 27D, 27C, 27B, and 27C, 63% described them as "[a] threat to our way of life" (26% did not), 55% described them as "crazy" (33% did not), 80% described them as "dangerous" (11% did not), and only 21% described them as "patriots" (65% did not).

Finally, a May 1995 ABC News/Washington Post poll asked about "armed private militia groups," and Question 21 revealed that 68% agreed the militias were the "greater threat to your own personal rights and freedoms" while 22% agreed that the federal government was the greater threat. Answers to Questions 14, 15, 16, 17,

prosecution under a "criminal syndicalism" statute,<sup>5</sup> although their actions are far less extreme than that of their ideological forefathers.

Times have changed and celebrating a vigilante past need not mean we want to live in a vigilante present. However, there are striking similarities between the Militias' complaints about the balance between the State<sup>6</sup> and private society and the problems faced by Westerners in the nineteenth century. These links between our past and our present ought to make us hesitate before rejecting the Militias' contributions to political dialogue, even as we recognize the significant flaws in their ideologies.

The Militias are a response to changes in the structure of our society. Although these changes have many diverse impacts, one of the most crucial is the increasing reliance on State legal institutions rather than on private, customary legal institutions to solve societal problems. While the Militias are not the only response possible, they are a response well within the traditions of United States political discourse. In Section I, I provide some definitions and describe the free rider problems inherent in private solutions to public problems. In Section II, I discuss the role of different types of law in our society's structure and the

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and 30J: 44% were "afraid" of "armed private militia groups" and 53% were not; 10% trusted them and 83% did not; 24% saw them as a "major threat to your personal rights and freedoms," 25% as a minor threat, and 48% as not a threat; 13% supported the "overall goals and activities" of the militia either somewhat or strongly, while 82% opposed them somewhat or strongly; and 11% had a somewhat or very favorable impression of the groups (77% somewhat or very unfavorable).

Some of the negative results of these polls are undoubtedly due to the phrasings of the questions and timing of the polls. Even if those factors cut support for militia in half, however, their overall image is still quite negative.

5. See MONT. CODE ANN. § 45-8-105 (1995). Some have called for a response from the state or federal governments to restrain Militias. For example, the Anti-Defamation League of the B'nai B'rith has proposed a model "Paramilitary Training Statute" to control Militias. We must be wary of those who use the Militias as an excuse to limit our civil liberties. For example, Congressman Charles Rangel writes in his introduction to *The Limits of Dissent* that "[n]othing in our Constitution protects those who cross the line into violence, and we must deal sternly with those who do." THOMAS HALPERN & BRIAN LEVIN, *THE LIMITS OF DISSSENT* xii (1996). Everything in our constitution protects those who "cross the line into violence," or any other line for that matter. The government may not, for example, use torture to obtain confessions from those it apprehends or deny them jury trials. Rhetorical excess from Militia opponents like Rangel are, ironically, the mirror image of the extremist rhetoric of some of the Militias' members which so concern Militia opponents. See also MORRIS DEES & JAMES CORCORAN, *GATHERING STORM* 224-28 (1996) (calling for state and federal laws to prohibit Militia activities, prohibition on Militia members serving in the military or National Guard, and policy data gathering).

6. I will use the capitalized word "State" to distinguish the government in general from the fifty state governments.

Militias' views on these issues, which I compare to historical examples from the nineteenth century American West. I then suggest ways in which the Militias can contribute to solving the problems identified earlier. Finally, I conclude with a brief analysis of the Militias' potential to play a constructive societal role.

## I. AUTHORITARIAN LAW, CUSTOMARY LAW, AND THE FREE RIDER PROBLEM

Legal professionals' focus on the State often leads us to forget that the formal legal system is only a small part of the web of relationships that structure our society and function as law. For the rest of society, however, formal legal rules are frequently not central, and sometimes are irrelevant. Robert Ellickson, for example, has documented how small a role the formal legal rules and courts play in Shasta County, California.<sup>7</sup> "Law" must be defined more broadly than the formal legal rules issued by legislatures and courts.

Law can be divided into two categories according to its source: authoritarian and customary.<sup>8</sup> Authoritarian law is distinguished by its reliance on the State's monopoly on the use of force for enforcement. Customary law, on the other hand, generally relies on consent, and so physical force, or the potential for physical force, generally plays a less important role in its enforcement.<sup>9</sup> Under customary law, compliance with rules is often voluntary and typically induced by reputational sanctions.

Both types of law can serve purposes in addition to dispute resolution.<sup>10</sup> An important, but neglected, function of customary law is its role as part of the regulatory mechanism between the various centers of power in our society. For this reason, Lon Fuller argued that privately produced customary law is a "branch of constitutional law, largely and properly develop[ed] outside the framework of our written constitutions."<sup>11</sup> Because

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7. See ROBERT C. ELLICKSON, *ORDER WITHOUT LAW* (1991).

8. See BRUCE BENSON, *THE ENTERPRISE OF LAW* 12 (1990).

9. See BENSON, *supra* note 8, at 14.

10. Individuals can resolve disputes by seeking resolution in a customary law tribunal just as they can through a lawsuit in the State courts. Some, and only some, customary law tribunals rely on the existence of State-backed enforcement mechanisms. For example, one can seek enforcement of an agreement to arbitrate in court under certain circumstances. Other customary law institutions do not. See BENSON, *supra* note 8, at 30-35.

11. LON L. FULLER, *THE MORALITY OF LAW* 128 (1964). Positivists like John Austin, however, define law as a command of the sovereign, see JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (Wilfrid E. Rumble ed., 1995), and so

Americans are accustomed to thinking of "constitutional law" as only the authoritarian law surrounding the interpretation of our written Constitution, I will refer to the mix of private and authoritarian law governing the relationships between centers of power in our society as "structural law."<sup>12</sup>

Structural law requires a minimum of authoritarian law: defining the relationships between the various levels and branches of the State, for example, could hardly be done without some degree of State involvement.<sup>13</sup> Because structural law encompasses more than intra-State relations, however, a component of customary law is necessary as well.<sup>14</sup> The mix of customary and authoritarian law can vary, and changes in the balance between the two will have significant impacts on individuals' lives and the structure of our society. Because we do not live in a minimal, Nozickian State,<sup>15</sup> we have a great deal more authoritarian law than needed to define the boundaries of the State.

One explanation for this reliance on more than the minimum of authoritarian law is that law has significant public good aspects and hence is underprovided (compared to the social optimum) by private interests.<sup>16</sup> Underprovision of a good often occurs when producers are unable to secure the full benefits of their actions. In the case of law, William Landes and Richard Posner have argued that neither the parties to disputes nor the decision-makers resolving disputes can secure the benefits of the production of precedent.<sup>17</sup> Because of this gap between the public and private benefits of precedent the State must provide

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would not accept the notion of privately created law.

12. Readers may thank, or not, Professor Melvin Durchslag for pointing out to me how confusing my articulation of these ideas was before I applied a separate term to this law. I certainly thank him.

13. It need not, of course, be done through a written constitution or through a constitution treated as Americans treat theirs, as the examples of Great Britain and Mexico demonstrate.

14. Even in an totalitarian state, the body of authoritarian law is likely to be incomplete since even the most ambitious totalitarians find it difficult to fully occupy the field of interpersonal relationships.

15. See ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* (1974). Indeed, we have a lot of governments—more than 80,000, 60,000 of which have the power to tax. See ROBERT HIGGS, *CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT* 6 (1987). Our relationships with them are governed by both authoritarian and customary law. Our statutes and written constitutions only begin to describe these relationships.

16. See William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 *J. LEGAL STUD.* 235 (1979). See BENSON *supra* note 8, at 278-81 for a discussion of flaws in this argument.

17. See Landes & Posner, *supra* note 16, at 238.

law.<sup>18</sup> Faced with law's significant public good aspects, private individuals may opt to "free ride" on the efforts of others to produce law to govern relationships. For example, individuals may decide to walk away from contractual relationships rather than pay the cost of creating the legal rules necessary to resolve a dispute because they cannot charge future users of those rules. By subsidizing the production of rules, therefore, the government can lower the costs of both resolving disputes in the future and of creating future private transactions.<sup>19</sup>

Goods with public aspects can be produced by either private or public means.<sup>20</sup> Governments are, in part, an important means of overcoming free rider and assurance problems in cooperatively providing such goods, but they are only one means of doing so. We ought to choose governments as a means of supplying a particular good with public aspects when the net benefits of doing so exceed the net benefits possible with a customary law situation.

When evaluating the benefits and costs of authoritarian law solutions, we must remember that governments are also actors, and just as they can help us avoid the problem of underprovision of a good, they can also create problems. Although a complete catalog of problems associated with government is beyond the scope of this article, a good illustration is the potential for overprovision of law. A government might not stop at creating a narrow class of rules, for example, but continue to expand its authority in a socially undesirable way over areas more efficiently addressed by customary legal institutions. Problems arise when the relationships among the various institutions established to avoid underprovision of law get out of balance.

An understanding of the relationship of government to private society requires a measure of the relationship. In *Crisis and Leviathan*, Robert Higgs argues that conventional quantitative measures of government, such as government spending, are inadequate.<sup>21</sup> Rather, Higgs proposed using the scope of the State's effective authority over economic decision-making to measure government: "[T]he extent to which governmental officials rather than private citizens effectively decide how resources

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18. *See id.*

19. Parties could now incorporate the rules by reference. Their costs are also reduced by the reduction in uncertainty the establishment of rules provides.

20. *See* DAVID SCHMIDTZ, *THE LIMITS OF GOVERNMENT* 81-104 (1991) (describing private solutions to public good problems).

21. *See* HIGGS, *supra* note 15, at 27.

will be allocated, employed, and enjoyed" measures both government and the extent to which a society's structural law is made of authoritarian law.<sup>22</sup> When government has extensive authority over economic decision-making, it will have to make extensive use of authoritarian law to regulate society. A government which largely leaves economic decision-making to the private sector, on the other hand, will likely have less authoritarian law.<sup>23</sup>

I believe the Militias are a response to members' perception of imbalances in the relationship between customary and authoritarian law. These imbalances raise both constitutional and political questions. Because the modern Militias fit within a well-established tradition of private action to correct such imbalances, thinking about Militias in these terms places the Militia movement in context, suggests how they can play a constructive role in our ongoing societal debate over the structure of our society, and offers a perspective which explains some aspects of their behavior.<sup>24</sup>

## II. LAW, BALANCE, AND THE STRUCTURE OF SOCIETY

The structural law of our society is a complex set of interrelationships among individuals, private institutions, and State entities governed by a mix of authoritarian and customary law. Events can, and often do, change the balance of power in these interrelationships and alter the mix of law governing them. A change in power relations alone is not necessarily bad. If, for example, the federal legislative and executive branches used their new powers to defeat totalitarian dictators bent on world conquest (as they did in World War II), even those with an extremely strong preference for individual liberty might find increasing the State's powers preferable to the alternatives.<sup>25</sup> Al-

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22. *Id.* at 27-28.

23. A society could rely on authoritarian law to govern social relationships such as marriage while leaving economic decision-making untouched.

24. The Militias' detractors' focus on the pathologies of individuals who have or claim association with a highly decentralized, heterogeneous movement obscures the Militias' role as a response to these serious imbalances.

25. Indeed, Robert Higgs argues that it is in part crises like World War II or the Great Depression which allow governments to accumulate powers by creating conditions which form a consensus in favor of collective action. See HIGGS, *supra* note 15, at 73-74. Combined with governments' tendency to adopt cost-concealing, command and control regimes to address the crises, such situations lead governments to accumulate authority over additional areas of the economy. See *id.* Through what Higgs terms "the ratchet effect," however, such powers are often not completely released when the crisis has passed and government power grows. See *id.* If governments are not entirely benign, and we seem to have fairly powerful evidence that



though determining whether such changes are a net positive or negative ultimately involves normative political questions, increasing the reliance on authoritarian law generally produces three negative effects. These effects suggest an increase in authoritarian law should be of concern regardless of how those normative questions are resolved.

First, increased reliance on authoritarian law creates additional opportunities for rent-seeking.<sup>26</sup> Three decades of public choice scholarship has firmly established the potential for earning large economic rents through manipulation of the instruments of government.<sup>27</sup> For example, an industry may use government regulatory agencies to raise barriers to entry, thus limiting competition. Because rent-seeking is wasteful and often leads to other increased social costs, authoritarian law solutions can cause significant social problems.<sup>28</sup>

Second, shifting from customary legal regimes to authoritarian law increases the cost of exiting from undesirable aspects of particular legal regimes. Exit from a customary law regime is rarely costless, but it is generally cheaper than exit from an authoritarian law regime for several reasons. Authoritarian law is usually imposed based upon physical boundaries and so exit requires physically moving to a different jurisdiction. On the other hand, customary law requires consent and is therefore less frequently based on physical location. Members of trade associations, for example, may be geographically dispersed yet still governed by the same rules. Additionally, when customary law regimes involve market providers of legal services, they must attract participants to survive. This in turn creates an incentive to ease both entrance and hence exit from other customary regimes.<sup>29</sup> Moreover, because participants in a customary legal in-

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they are not, we have created opportunities for rent-seeking or worse. *See infra* note 26 and accompanying text.

26. Rent-seeking is the expenditure of resources to capture economic rents, which are payments "to a factor [of production] in excess of what is necessary to keep it to its present employment." *THE MIT DICTIONARY OF MODERN ECONOMICS* 120 (David W. Pearce ed., 3d ed. 1986). The classic example is the expenditure of resources to capture a monopoly position. *See also* JEAN TIROLE, *THE THEORY OF INDUSTRIAL ORGANIZATION*, 76-78 (1988) (discussing monopoly as rent-seeking).

27. *See generally* TOWARD A THEORY OF THE RENT-SEEKING SOCIETY (James M. Buchanan et al. eds., 1980).

28. For example, using government regulation to create barriers to entry can reduce competition, leading to supra-competitive prices, misallocation of resources, and reduced technological innovation.

29. Consider, for example, the market for individual long distance telephone service in the United States. Carriers seeking to attract customers often offer to pay

stitution can anticipate the possibility of exit *ex ante*, they have an incentive to negotiate exit provisions before committing resources. Increased exit costs raise the costs of errors in authoritarian law solutions because fewer people can afford to escape the errors by switching regimes. Increased exit costs also raise the probability of errors occurring because they reduce competitive pressure to avoid them.

Third, areas governed by authoritarian law require a social consensus on the rules, which is often costlier to achieve than agreement among the smaller groups subject to customary law regimes. There are reasons why we are sometimes willing to pay those costs, of course. Uniformity and predictability, for example, can lower transaction costs and may be cheaper to procure through the government legal system. However, social consensus on substantive rules can be costly and difficult.<sup>30</sup>

In addition to substantive social consensus, authoritarian law also requires a social consensus to select governance rules. Selecting decision-makers, for example, in the State legal system is neither simple nor costless. Judges can be elected or appointed, subjected to retention procedures or granted life tenure, paid well or poorly, and so forth. Deciding how to do these things not only requires resources, but creates a class of losers whose preferences are not satisfied by the chosen rule. Compare this to the selection of arbitrators by the American Arbitration Association ("AAA") or private judges by firms like Judicial Arbitration and Mediation Services ("JAMS"). If I object to Ohio's rather unusual combination of partisan primaries and nonpartisan general election of judges, I must leave the state to find an alternative. If I object to AAA or JAMS procedures, I simply negotiate for a dif-

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the transaction costs of transferring service.

30. Consider the "problem" of gun control. As even some gun control advocates concede, "[g]uns are part of the way of life in many areas of the country, and . . . the controversy over gun control reflects the complexity and range of lifestyles in our country." THOMAS HALPERN, *The Militia Movement*, in *THE LIMITS OF DISSENT*, *supra* note 5, at 1, 29. Handling the issue of concealed carry by authoritarian law requires one rule for an entire jurisdiction; handling it by allowing private property owners to deny access to their property to those carrying (or, presumably, not carrying) weapons allows individuals to express their preferences in the marketplace. I could choose, for example, to patronize only restaurants that do or do not allow patrons to carry weapons. This is not an entirely fanciful example. Suzanne Gretia, whose parents were among twenty-two people killed by a gunman in a Luby's cafeteria in Killeen, Texas in 1991, later testified in favor of allowing the concealed carrying of weapons because the Texas prohibition on concealed weapons had prompted her to leave her gun in her car while dining. Had she been armed, she might have stopped the gunman before he killed her parents and others. See Paul Craig Roberts, *Without Guns to Go to a Victim's Defense*, WASH. TIMES, July 24, 1994, at B3.

ferent "brand" of arbitrator in my contract negotiations.

Finally, the displacement of customary law and institutions by authoritarian law is related to a decline in social capital. Social capital matters because

[f]or a variety of reasons, life is easier in a community blessed with a substantial stock of social capital. In the first place, networks of civic engagement foster sturdy norms of generalized reciprocity and encourage the emergence of social trust. Such networks facilitate coordination and communication, amplify reputations, and thus allow dilemmas of collective action to be resolved. When economic and political negotiation is embedded in dense networks of social interaction, incentives for opportunism are reduced. At the same time, networks of civic engagement embody past success at collaboration, which can serve as a cultural template for future collaboration. Finally, dense networks of interaction probably broaden the participants' sense of self, developing the "I" in the "we," or (in the language of rational-choice theorists) enhancing the participants' "taste" for collective benefits.<sup>31</sup>

Social capital is also important because of the deep penetration of voluntary customary law into our society. Bruce Benson, for example, has shown how far private legal systems and private law enforcement have penetrated our society. His research indicates that at least three-quarters of business disputes are settled through private arbitration and mediation based on business custom rather than state or federal law, and private police outnumber public police by more than two to one.<sup>32</sup>

A society out of balance risks damaging these vital private relationships. At the same time, keeping the mixture of authoritarian and customary law in balance is subject to a serious free rider problem. To an even greater extent than the case of providing precedent, the benefits of a balance in structural law are hard to capture. Contributing further to the problem is the correct perception that the efforts of any individual are unlikely to determine the success in creating or maintaining any particular balance.

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31. Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, 6 J. DEMOC. 65, 67 (1995).

32. See BENSON, *supra* note 8, at 2.

### A. Views of Imbalances

Militias discuss changes in American society in terms of structural balance between citizens and the State. For example, the Militia of Montana quotes James Madison and others to support their claim that “[t]he best defense against the usurpation of these freedoms by the tyranny of a run-away, out of control government is a well informed and well prepared Unorganized Militia of Citizens of the State of Montana and of the other States of the Federal Union.”<sup>33</sup> Militia of Montana leader John Trochmann spoke in similar terms, telling a Yale University audience, “Folks, we don’t want a revolution. We want the nation back in order.”<sup>34</sup>

Defending freedom can cover a wide variety of actions; therefore, we need to look more closely at the Militias’ intentions. My own reading of the Militias’ statements suggests that they have three major concerns with the State’s role in society today: (1) government is “too weak”; (2) government is “too far away”; and (3) government is “too large.”<sup>35</sup> There are significant parallels between the Militias’ concerns today and the problems of structural balance faced by the residents of nineteenth century Montana and the American West more generally.

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33. *The Militia of Montana* (visited June 18, 1996) <<http://www.nidlink.com/~bobhard/mom.html>> (on file with the *Montana Law Review*).

34. Yen Cheong, *Militia Chief Assails Federal Stewardship* (visited Feb. 17, 1997) <<http://www.yale.edu/ydn/paper/10.27/10.27.95storyno.CE.html>> (on file with the *Montana Law Review*). Similarly, the Stark County Unit of the Ohio Unorganized Militia’s charter sets forth three purposes:

[(1)] to uphold, guard, and defend the Constitution of the United States of America (as amended), the Bill of Rights, and the Constitution of the Ohio Republic (as amended) against all enemies, both foreign and domestic; [(2)] to provide a vigilant group to guard against attempts to diminish the meaning, worth or value [of those constitutions; and (3)] to provide a well-trained, locally-available group of persons to serve in case of local, state or national emergency.

*Stark County Unit of the Ohio “Unorganized” Militia—Unit Charter Summary* (visited July 1, 1996) <<http://members.aol.com/starkmil/charter.html>> (on file with the *Montana Law Review*).

35. The Militias offer a variety of explanations for why these changes have occurred. Some of these explanations rest on historical and legal theories which can, at best, be described as unusual. Regardless of the accuracy of their descriptions of causation, however, the Militias have identified important problems.

## 1. *Too Weak*

A government which appears frighteningly strong when it confronts individuals can also appear too weak when it is unable to shield individuals from the effects of external forces. One example of this is the disappearance or weakening of programs which previously shielded Americans from international market forces, such as agricultural subsidies and tariff barriers.<sup>36</sup> This exposure to world market forces creates a perception of a weakened government among many Americans. This perception is shared by many Militia members.

### a. *The Militias*

The increasing globalization of the American economy has caused widespread dislocation, particularly in rural areas.<sup>37</sup> This dislocation creates a perception of State weakness, which in turn feeds the more conspiratorial aspects of the Militias' ideologies.<sup>38</sup> One function of conspiracy theories is to explain incomprehensible events, reducing feelings of helplessness by identifying a cause for a problem.<sup>39</sup>

36. See *Hearings Before the Subcomm. On Terrorism, Technology and Government Information of the Senate Comm. on Judiciary*, 104th Cong., (1995) (hereinafter *Hearings*) (statement of John E. Trochman, Militia of Montana) available in LEXIS, Legis Library, Curnws File (stating that "the average citizen must work for half of each year just to pay their taxes, while billions of our tax dollars are . . . sent to bail out the banking elite; while our fellow Americans are homeless, starving, and without jobs").

37. See, e.g., SEYMOUR M. LIPSET & EARL RAAB, *THE POLITICS OF UNREASON* 428-29 (1978) (arguing that extremist movements are largely filled with ordinary people caught in the stress of losing their position in the world).

Even opponents of the Militias see a connection. For example, an anti-Militia article on the Internet argues:

With banks foreclosing on farms and federal marshals evicting farm families, with jobs heading south of the border under the NAFTA trans-national economic regime, and with police forces routinely trampling the Bill of Rights to enforce unjust drug and gun laws, Americans have legitimate reasons to be angry at their government.

Manny Goldstein, *The Militia Movement: Enemy or Pawn of the State?* (visited Sept. 4, 1996) <<http://mediafilter.org/MFF/S36/S36.MILITIA.html>> (on file with the *Montana Law Review*). Similarly, Brian Levin argues that "[p]eople's expectations about their security and their future have changed over the last twenty years . . . . The security that used to exist in the agrarian and manufacturing sectors is not there today." LEVIN, *Militias and the Constitution*, in *THE LIMITS OF DISSENT*, *supra* note 5, at 53.

38. See JOHN GEORGE & LAIRD WILCOX, *AMERICAN EXTREMISTS* 80 (1996) (explaining the function of conspiracy theories in extremist movements generally).

39. The Militias' explanation for the apparent acquiescence of the federal government to these changes is that it is the result of individual's betrayal rather than the result of global economic trends beyond the control of any individual. The United

Even success in the global arena has created an appearance of weakness. In "winning" the Cold War, we lost the organizing principle which defined American interests in the world for more than four decades.<sup>40</sup> The loss of a monolithic enemy brought with it confusing conflicts in which American interests are unclear: without the overriding American-Soviet conflict to frame our national interests, American interests in Somalia's feuding warlords or Balkan disputes are hard to understand. Confusing explanations from our national leaders (when they bother to explain at all) combined with our growing reliance on multilateral mechanisms for handling such conflicts is more evidence for the Militias of a weakened government unable to protect Americans against an increasingly hostile world.<sup>41</sup>

### b. *Historical Precedent*

Similarly, government was too weak to protect miners from a well-organized criminal gang during Montana's gold rush.<sup>42</sup>

States' ratification of agreements to enter the World Trade Organization and NAFTA are frequently cited by the Militias as examples of federal officials' betrayals.

40. Mainstream conservative writer Joseph Sobran went so far as to argue that "the U.S. government has, in a sense, succeeded too well. It has outlived its foreign enemies, and can no longer count on feeling needed to protect us from evil abroad." Joseph Sobran, *The Crisis of Statism*, FREE MARKET NEWSLETTER (July 1994), reprinted in 4 ANTI-SHYSTER 4 (1994). The AntiShyster, a far-right anti-lawyer publication, editorialized that Sobran's column was "evidence of a *shift* in the mainstream media's attitudes. Ideas and attitudes of the sort espoused by 'fringe' publications like the AntiShyster are beginning to be recognized, understood, and repeated in the mainstream media. Middle America is sure to follow." *Id.* at 3.

41. See, e.g., *Trochmann testimony at Senate Hearing*, *supra* note 36 (citing U.S. troops "ordered and controlled" by the U.N.); see HALPERN, *supra* note 30, at 8-9 (Gulf War produced "a vision of the subordination of the United States to an international collective, resulting in the surrender of its national sovereignty and the stripping away of freedoms that Americans enjoy. . . . It really stands the American victory in the Cold War on its head.").

42. For a more detailed discussion of the Montana Vigilantes, as well as other vigilante groups in this context, see Andrew P. Morriss, *Miners, Vigilantes, & Cattlemen: Overcoming the Free Rider Problem in the Private Provision of Law* (work in progress on file with the author). The history of the vigilantes is set out in a number of sources. The best contemporary sources are NATHANIEL P. LANGFORD, *VIGILANTE DAYS AND WAYS* (1996), and THOMAS J. DIMSDALE, *THE VIGILANTES OF MONTANA* (1953) (originally published as a series in the *Montana Post* beginning in 1865). For a revisionist approach, arguing the vigilantes were actually motivated by jealousy and sectional prejudice, see R. E. MATHER & F. E. BOSWELL, *VIGILANTE VICTIMS: MONTANA'S 1864 HANGING SPREE* (1991) and R. E. MATHER, *HANGING THE SHERIFF* (1987). Although Mather and Boswell have done an impressive job of uncovering previously unknown facts about Plummer and the other road agents, I find their theory unconvincing because it ultimately rests on the lack of evidence rather than on positive evidence. See Morriss, *supra*, for a more detailed discussion of their analyses.

Led by Henry Plummer,<sup>43</sup> the Bannack road agents won control of the elected sheriff's office<sup>44</sup> and created a sophisticated communications network. This "system of horseback telegraphy as unailing as electricity"<sup>45</sup> used spies in local businesses to relay information about targets, signal robbers when to attack, avoid capture, intimidate witnesses, and delay targets to allow time for an attack.<sup>46</sup> Plummer's road agents killed over a hundred men during the time they controlled the roads near Bannack and Virginia City.<sup>47</sup> In sum, Plummer's road agents were a successful, highly organized, and brutal criminal syndicate which had more available armed force than any other organization in southwestern Montana in 1863.

The road agents exploited the free rider problem in provision of law in two ways. First, because they controlled the sheriff's office, authoritarian law posed no problem. Second, as vigilante Nicholas Langford's description of conditions makes clear, the road agents ensured there was no individual incentive to resist:

When appealed to for combination and resistance to the fearful power now growing into an absolute and bloody dictatorship, [people] . . . based their refusal upon selfish and personal considerations. They could not act without endangering their lives.

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43. Plummer had previously operated in Idaho in 1861. After his gang "murdered a jovial saloon owner named Hildebrandt, there was a meeting at Lewiston to discuss possible action, but the plausible Plummer talked so strongly on the horrors of anarchy that nothing was done." WILLIAM S. GREEVER, *THE BONANZA WEST: THE STORY OF THE WESTERN MINING RUSHES 1848-1890* 261-62 (1963); see also LANGFORD, *supra* note 42, at 20; HOFFMAN BIRNEY, *VIGILANTES* 68-69 (1929).

44. The Sheriff was the "official" government of the area, although the office seems to have been solely a creation of local control. Plummer almost became deputy U.S. Marshal for the area as well. See LANGFORD, *supra* note 42, at 138-39.

45. *Id.* at 143. Even after the organization of the Vigilantes, the system continued to function because the Vigilantes were unaware for some time of the identity of the messengers. See DIMSDALE, *supra* note 42, at 126. In carrying word of the Vigilantes' formation, a messenger to the road agents was "traveling with such rapidity as to kill two horses." *Id.* at 127.

46. See LANGFORD, *supra* note 42, at 142 (describing the road agents' placement as spies in businesses); see *id.* at 140 (describing how a road agent worked as a clerk at a ranch where horses were kept and would inform the gang of merchant's movements); see *id.* at 143 (describing the system for marking vehicles); see *id.* 144-48 (describing operation of the system in one robbery); see *id.* 161 (describing how Plummer gave one intended victim a colored scarf to mark him); see BIRNEY, *supra* note 43, at 169-70 (describing scarf story); DIMSDALE, *supra* note 42, at 70 ("road agents had a private mark on the coach when it carried money").

47. See LANGFORD, *supra* note 42, at 12-15 (102 killed); DIMSDALE, *supra* note 42, at 15 (more than 100 killed); BIRNEY, *supra* note 43, at 162 (102 killed). In general, the road agents chose their victims well. They did not attack in the mines, for example, where the miners' courts would have quickly rallied against them, but attacked individuals on the highway.

They intended to leave the country as soon as their claims were worked out. They would be driven from their claims, and robbed of all they had taken from them, if they engaged in any active opposition to the roughs; whereas, if they remained passive, and attended to their own business, there was a chance for them to take their money back to their families. It was impossible to assemble a meeting for the purpose of considering and discussing with safety, the condition and exposure of the people.<sup>48</sup>

Despite the road agents' superior organization and weather conditions which hampered movement, the Vigilantes ultimately defeated the road agents. The Vigilance Committee hung twenty-two members of Plummer's gang (including Plummer and his principal deputies) between December 21, 1863 and February 3, 1864, and other members fled the Territory.<sup>49</sup> Perhaps most remarkably, the Vigilance Committee ceased its operations after eliminating the road agents without conducting a general purge of either suspected wrongdoers or political opponents<sup>50</sup> and is generally acknowledged to have made only one "mistake."<sup>51</sup>

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48. LANGFORD, *supra* note 42, at 107-08.

49. See DIMSDALE, *supra* note 42, at 23-24. Callaway estimates there may easily have been at least 50 in the "inner circle" with a hundred more allies. LEW. L. CALLAWAY, MONTANA'S RIGHTEOUS HANGMEN: THE VIGILANTES IN ACTION 20 (1982); Birney lists 38 names and estimates membership in the gang was more than 50. See BIRNEY, *supra* note 43, at 127.

50. Since the Committee operated during a time of deep political passions in Montana over the Civil War (Montana had many Southern sympathizers), its self-restraint is even more remarkable.

51. The one "mistake" made by the Vigilance Committee was their execution of "Captain" Joseph A. Slade. Slade had been a famous and tyrannical stage company agent. For example, he cut off another man's ears and carried them with him. See CALLAWAY, *supra* note 49, at 102. See also DIMSDALE, *supra* note 42, at 201-04; BIRNEY, *supra* note 43, at 309-19. He eventually moved to the Virginia City, Montana area, where he lived with his wife. When in town, Slade often drank to excess, occasionally riding his horse into a store or up and down the street firing off his revolver. See Callaway, *supra* note 49, at 102-03; DIMSDALE, *supra* note 42, at 196-98. On March 8-9, 1864, Slade engaged in a lengthy drunk and engaged in a variety of antisocial behavior in Virginia City, ranging from dumping a pail of milk onto a milkman to threatening several men with his gun. See BIRNEY, *supra* note 43, at 329-30; CALLAWAY, *supra* note 49, at 104-05; DIMSDALE, *supra* note 42, at 197-98; LANGFORD, *supra* note 42, at 286-87. He ignored several warnings from Vigilantes to go home before there was more trouble. See BIRNEY, *supra* note 43, at 331-32; CALLAWAY, *supra* note 49, at 106; DIMSDALE, *supra* note 42, at 198; LANGFORD, *supra* note 42, at 287. After Slade challenged several Vigilantes directly, the group met and decided to execute Slade. See CALLAWAY, *supra* note 49, at 106-07; DIMSDALE, *supra* note 42, at 198-99; LANGFORD, *supra* note 42, at 287-88. "Save for this execution, the Vigilantes of Montana have been well-nigh universally commended. For this act they have been fiercely condemned and as vigorously commended." CALLAWAY, *supra* note 49, at 109. Dimsdale took the part of the Vigilantes, summing up their work by



Chance contributed to the success of the Vigilantes. The mutual discovery of a large number of Masons in Bannack gave the group a nucleus around which to organize.<sup>52</sup> The Vigilantes were also fortunate to have some remarkable men as leaders, such as Wilbur F. Sanders, Nathaniel Langford, and X. Biedler.

However, the Montana Vigilantes needed more than the good fortune of a nucleus of Masons and natural leaders upon which to build their organization. The Vigilantes succeeded in Montana because they fought to protect well-defined rights that met the population's expectations of a just system of rights, including private property rights. Faced with the enormity of the road agents' assault on the community, overcoming the free rider problem became easier for the Vigilantes. As Langford describes, "The people bore with crime until punishment became a duty and neglect a crime."<sup>53</sup> Moreover, because the rights the Vigilantes defended were widely accepted rights, they were able to rally public support for their efforts.

A great deal of the Vigilantes' success came from their organizational structure. Although they made some attempts at secrecy, the membership of Montana Vigilantes was widely known at the time. Their public commitment to the effort ensured their continued participation because each member was aware that the road agents would take revenge on any individual involved. The process of making public decisions about hanging individual road agents, for example, prompted reinforced commitment by identifying the targets of potential revenge.

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saying "there is nothing on their record for which an apology is either necessary or expedient." DIMSDALE, *supra* note 42, at 267; see BIRNEY, *supra* note 43, at 223. (Slade is a "possible exception" to the idea that Vigilantes hanged only men who had "earned every inch of the rope").

52. Brought together after the "first natural death" in the area when the dying man signaled his desire for a Masonic funeral, the Masons were surprised at the size of the group which gathered. See LANGFORD, *supra* note 42, at 112-13. Dimsdale does not mention the Masonic connection, although he was a Mason, perhaps because he was and did not want to reveal information about the group so soon after its activities. JAMES M. HAMILTON, HISTORY OF MONTANA: FROM WILDERNESS TO STATEHOOD 513 (Merrill G. Burlingame ed., 1957). Birney notes that Dimsdale "refrains sedulously from mentioning more than one or two names" and suspected him of "being deliberately inaccurate as to dates." BIRNEY, *supra* note 43, at 11-12. Not only did the Masons discover each other but the road agents discovered in the Masons, in Langford's words, "an association . . . that would stand by and protect all its members in the hour of danger." LANGFORD, *supra* note 42, at 113. The road agents left the Masons alone: "Of the one hundred and two persons murdered by Henry Plummer's gang, not one was a Mason." *Id.*

53. LANGFORD, *supra* note 42, at 9.

c. *Lessons from History*

Just as vigilante organizations were a prominent feature of the nineteenth century American West, the Militias are becoming a common feature of the twentieth century, and perhaps the twenty-first. Militia behavior significantly parallels that of the Vigilantes. For example, the Vigilantes' behavior was set by groups of private citizens who "took the law into their own hands" and administered their own form of justice in hundreds of instances.<sup>54</sup> The Vigilantes' records are mixed. Some vigilance committees, like Montana's 1863-64 committee, came about in response to serious problems and were largely successful in solving problems without injuring innocent people. Others, like the Johnson County, Wyoming "Invaders" of 1892 described below, were essentially terrorist gangs.

The experience of the vigilance committees is relevant for the Militias in two ways. First, the vigilance committees' mixed historical images mirror the dueling images of the Militias today. The "good" vigilantes, like Montana's, embody a tradition of private action to resolve structural imbalances, while the "bad" vigilantes, like the Invaders, represent an alternative tradition of terror which the Militias must avoid. In the public mind, the Militias' placement within these traditions will have an important impact on their influence today, regardless of the actual character of their actions. Second, the "good" vigilantes differ from the "bad" vigilantes in ways other than their goals. Movements like the Montana Vigilantes were decentralized responses to broad societal problems. Their actions, although violent, were rooted in an ideological justification which involved limits on the scope of their actions. Groups like the Johnson County Invaders, on the other hand, merely used terror to rob others. Their very methods reveal their lack of moral legitimacy, because their actions required both hired gunmen and a national press campaign. These differences suggest ways in which the Militias can act to enhance their chances of success in overcoming free rider problems.

Vigilantism had three main ideological elements which distinguished it from mob violence: self-preservation, popular sovereignty, and the right of revolution.<sup>55</sup> Actions of self-preservation

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54. Richard Maxwell Brown, *Violence*, in THE OXFORD HISTORY OF THE AMERICAN WEST 393, 395-96 (Clyde A. Milner II et al. eds., 1994).

55. See *id.* at 395. Like the Militias, vigilantism was not an organized movement on a national scale. See *id.* There are, however, sufficient similarities among

can be justified only when a threat is actually present. Popular sovereignty allows extra-legal action but requires appeal to a broad enough section of the public to sustain it. Finally, the right of revolution can be invoked to justify action against tyranny, but revolutions that fail usually carry a heavy price for the unsuccessful revolutionaries. All three elements are present to varying degrees within the modern Militia movement. These elements limited the scope of the vigilantes' actions, although not always successfully.

The Montana Vigilantes justified their actions in terms of self-preservation. Thomas Dimsdale, for example, a sympathetic contemporary of the Montana Vigilantes, called for the Vigilantes "to stand ready to back the law; and to bulwark the Territory against all disturbers of its peace, when too strong for legal repression, and when it fails or is unable to meet the emergency of the hour."<sup>56</sup> Similarly, Militias today consistently cite self-preservation as a motive for their organization.<sup>57</sup> While the validity of Militia members' fears is debatable, there is no doubt that the State's killings in Waco and Ruby Ridge have deeply frightened many Americans.

Popular sovereignty plays an important role for both groups as well. Again, Dimsdale is explicit:

Peace and justice we must have, and it is what the citizens will have in this community; through the courts, if possible; but peace and justice are rights, and courts are only means to an end, admittedly the very best and most desirable means; and if they fail, the people, the republic that created them, can do their work for them.<sup>58</sup>

Dimsdale's statements would not appear out of character in many Militias' statements of purpose.<sup>59</sup> For example, the Militia of Montana argues:

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the various vigilante groups that it is fair to describe an ideology of vigilantism. See *id.*

56. DIMSDALE, *supra* note 42, at 266.

57. See, e.g., *Hearings*, *supra* note 36 (statement of Norman Olson, Michigan Militia) (stating that Militias are the "primary defense" of nation).

58. See DIMSDALE, *supra* note 42, at 266-67.

59. See JAMES RIDGEWAY, *BLOOD IN THE FACE* 12 (1995 ed.) Ridgeway writes: In [Militia members'] view, the right of the people to own weapons and organize themselves into private militias should be exercised not only to defend the security of the state, but to defend the security of individuals against a federal government bent upon destroying their freedom and even their lives.

[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.

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 the rights of the people.<sup>60</sup>

Finally, Militias explicitly seek to link themselves to the right of revolution. For example, the Militia of Montana's handbook argues:

To balance the military power of the nation with the might of the militia will put at odds any scheme by government officials to use the force of government against the people. Therefore, when 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.<sup>61</sup>

The ideological elements of both the Vigilantes and the Militias are a response to each groups' perceptions of a weakened government. In turn, the weakening of government is a reflection of the inadequacy of authoritarian law solutions.<sup>62</sup> Robert Putnam captured the transition from a society with resilient social capital built of voluntary organizations to one without by noting that Americans now largely bowl alone rather than in

60. See KENNETH S. STERN, *A FORCE UPON THE PLAIN: THE AMERICAN MILITIA MOVEMENT AND THE POLITICS OF HATE* 76 (1996) (quoting the Militia of Montana).

61. See *Militia of Montana* (visited Feb. 13, 1997) <<http://www.nidlink.com/~bobhard/mom.html>> (on file with the *Montana Law Review*).

62. Some Militias see this weakness as manifest in an inability to prevent a coming collapse of authority. For example, the Pennsylvania Citizen's Militia Manual advises members that:

the biggest threat is not the Federal Government, but the teeming multitudes of displaced civilians that will move across the land when the cities begin burning. . . . Your militia will be a safe haven for thousands who are running from the carnage in the cities when the collapse of the Federal Government system occurs.

Pennsylvania Citizen's Militia Manual (visited Mar. 6, 1995) <<http://www.users.fast.net/~klh/pa.patriot/manual.html>> (on file with the *Montana Law Review*). The long decline of urban America since World War II, despite repeated government programs aimed at reversing it, reinforces such views.

leagues.<sup>63</sup> Putnam explained how this captures our social problems in a recent interview:

Well, let's take the toughest case, which is my claim, partly but not entirely tongue-in-cheek, that the fate of the republic hangs on the fact that Americans are no longer engaging in league bowling.

First, when you participate in a bowling league, interacting regularly with the same people week after week, you learn and practice what de Tocqueville called "habits of hearts." You learn the personal virtues and skills that are the prerequisites for a democracy. Listening, for example. Taking notes. Keeping minutes. Taking responsibility for your views. That's what is different about league bowling versus bowling alone.

Second, bowling leagues . . . and sports clubs and town bands, whatever . . . provide settings in which people can talk about their shared interests. These are settings quite different from, say, a talk show, where Ted from Toledo calls in and shares his prejudices with a nationwide audience. In that scenario, the rest of us don't know Ted, we don't know how to interpret what he says. But if Ted were in my bowling league, I'd understand him better, because I would interact with him regularly, and so I'd hold him accountable for his views.<sup>64</sup>

Without the public's possession of the virtues and skills developed from such participation, government is weakened because it becomes ever more like the model of competing interests used by public choice theorists. The more accurately the public choice model describes a government, the weaker government becomes because it loses its moral legitimacy.<sup>65</sup> The rise of the Militias is partly a response to this social decay.

Weak governments produce a vacuum which private organizations may fill. As I argued earlier, this may be a generally desirable development, because the customary legal institutions that arise in these circumstances are often superior to their authoritarian law alternatives. To the extent that Militias play a role akin to Putnam's bowling leagues, their contributions ought to be valued. The key difference between Militias and nineteenth century vigilantes, however, is the Militias failure, thus far, to identify widely accepted rights for which they can offer plausible

63. See Putnam, *supra* note 31, at 70.

64. "Bowling Alone." *An Interview With Robert Putnam About America's Collapsing Civic Life* (visited Sept. 6, 1996) <[http://muse.jhu.edu/demo/journal\\_of\\_democracy/v006/putnam.interview.html](http://muse.jhu.edu/demo/journal_of_democracy/v006/putnam.interview.html)> (on file with the *Montana Law Review*).

65. See discussion of rent-seeking *supra* notes 26-27 and accompanying text.

protection. Montana's Vigilantes are seen as heroes because they risked their own lives to protect widely accepted rights to life and property. The opening of our economy today, however, has produced winners as well as losers, and the violated "rights" of the losers are not nearly as widely accepted.

## 2. *Too Far Away*

Government is distant when it makes decisions at the state, national, or even international level rather than at the local level. Complaints about this distance are thus often expressed as a preference for returning decision-making power to the local and state levels.

### a. *The Militias*

Problems resulting from the shift of government away from the local level are one of the recurring themes of the Militia movement. For example, Norman Olson, founder of the Michigan Militia, voiced a typical Militia sentiment when he argued:

When you turn over state law to federal law, you also turn over the power to enforce that law. You give up your sovereignty and get more and more intrusion by the Environmental Protection Agency, the Bureau of Forestry and other government agencies. We are gradually losing our state sovereignty.<sup>66</sup>

The shift of decision-making authority farther away from local communities produces what Militia critic Morris Dees describes as "[t]he fear of, and anger at, a government that is insensitive, uncaring and callous to the needs of its people."<sup>67</sup> Many of the Militias' complaints concern "signs that the federal government is increasingly imposing its will on the population—for example, in areas of the environment, education, and in some cases, abortion."<sup>68</sup> The increasing shift of decisions away from federal agencies with a significant local presence, like the U.S. Department of Agriculture, to those without much of a domestic pres-

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66. DEES & CORCORAN, *supra* note 5, at 84-85 (1996). See LEVIN, *supra* note 37, at 41 (increasing federal action since the New Deal behind Militias' view that there is too much government).

67. Wayne Laugesen, *Terrorism From Within: Colorado Birthplace of Radical Groups* (visited Feb. 13, 1997) <<http://www.boulderweekly.com/040496/cover.html>> (on file with the *Montana Law Review*) (quoting Dees).

68. HALPERN, *supra* note 30, at 12; see *id.* at 31 (characterizing Militias' views of environmental regulations as "one more aspect of a runaway federal train destined for totalitarian rule").

ence outside Washington, like the Office of the U.S. Trade Representative, intensifies this effect.<sup>69</sup>

There are many reasons decisions are moving to more distant levels of government. Making a decision locally is no guarantee that it is a good decision, of course,<sup>70</sup> and decisions may be shifted to the national level precisely to remove them from local pressure and to ensure consideration of national interests. Forcing state officials to stop de jure segregation, for example, required national action.<sup>71</sup> A related cause of the increased distance is the shift away from a closed, protected economy to an open economy. As trade barriers fall, the impact of world economic forces change domestic policies. Another reason for the shift away from local decision-making is the government's attempt to deal with what is at least perceived generally to be large scale common problems: Controlling the emission of ozone depleting chemicals, for example, requires national or even international action.<sup>72</sup> Although the foregoing may be reasons to move away from local decision-making, there are important reasons to take the Militias' complaints seriously.

First, the increasing distance of government decision-makers from individuals reduces accountability. When a local official makes a decision, she confronts its effect on her neighbors directly; even state officials are rarely more than a day's drive from those affected by their decisions. Federal officials, on the other hand, are often far from those whose lives they affect, and the scale of their decisions tends to dwarf individuals. However, this government distance is more than physical. As Robert Higgs pointed out, governments have an incentive to adopt means of

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69. There are countervailing tendencies as well—modern communications, for example, may make physically distant decision-makers easier to reach. These tendencies do not, however, eliminate the problem of a lack of connection that comes from physical distance: a decision-maker who lives in my town is part of my community; one who lives in Washington, D.C. is much less likely to be part of my community.

70. See generally CLINT BOLICK, *GRASSROOTS TYRANNY: THE LIMITS OF FEDERALISM* (1993) (describing causes of power and violations of individual rights by local governments).

71. See, e.g., RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 91-129 (1992).

72. Because environmental problems are likely to fall into this category, environmental regulation has sparked considerable hostility from some Militia groups. See *supra* note 68 and accompanying text; Dan Yurman, *Blood Oaths and Fish Stories Swim in Political Waters* (visited January 13, 1996), [gopher://gopher.igc.apc.org:70/00/environment/forests/wisdom.lands/library151](http://gopher://gopher.igc.apc.org:70/00/environment/forests/wisdom.lands/library151) (collecting articles describing militia groups' opposition to environmental legislation) (on file with the *Montana Law Review*).

carrying out policies which conceal the policies' true costs.<sup>73</sup> As government action becomes more complex and indirect, it also becomes more distant from individuals: paying a five percent sales tax on a purchase is an obvious cost of government while paying a five percent higher price because of unknown mandates on the manufacturer is not.

Second, government becomes farther away as it increasingly relies upon authoritarian law solutions which restrict the opportunities for participation in both government and the economy.<sup>74</sup> Such solutions tend to be imposed from higher levels of government, in part because they are often prompted by concerns that lower levels of government and the market have "failed" to resolve a problem. Authoritarian law solutions also tend to be imposed from higher, more distant levels of government because the problems many such solutions are intended to solve involve protection of interests of individuals who are located far from the area where the decision is implemented.<sup>75</sup>

73. Creating a wedge between perceived costs and actual costs can be done in a number of ways: fiscal illusion, substitution of a command economy for a market economy, adoption of indirect means of regulation like tax incentives, and mandating compliance with costly regulations without compensation. See HIGGS, *supra* note 15, at 65, 28-29. There are moral or efficiency arguments about whether, for example, a polluter should be compensated for the costs of treating wastes discharged into Lake Erie or simply told to treat the wastes. Compensating the polluter for the costs of compliance with payments out of tax revenues would make the cost of the policy clearer than shifting the costs to consumers through increased prices. See *id.* at 64-65.

74. In his discussion of the application of the frontier myth in the early 20th century to the exercise of American power in Asia, Richard Slotkin describes how "the new frontier" of imperial rule in Asia was an incomplete substitute for the original frontier. The shift signaled "the final abandonment of the democratic political principles that had been so prominent a feature of the original frontier . . . [which] appears most strikingly in [Theodore] Roosevelt's sarcastic dismissal of 'liberty' and 'consent of the governed' as concepts applicable in the contemporary situation." RICHARD SLOTKIN, *GUNFIGHTER NATION* 53 (1992). More importantly, however, it revealed: an equally undemocratic assertion of class privilege is implicit in Roosevelt's polemic and in the policies he supported. For the new imperial frontier could not, by definition, be a recreation of the old egalitarian frontier of Boone and Crockett. The opportunities for advancement it offered could only be seized by those with capital to invest, or with the skills and training to act as proconsuls managing the affairs and ruling the destinies of an alien population. These elites act as surrogates for the mass of the American public, who can only participate vicariously in the new frontier.

*Id.* The substitution of vicarious participation for actual participation extends far beyond the American occupation of the Philippines. What else but vicarious participation is offered the citizen who can watch C-SPAN but not influence his or her congressional representatives? Or to the middle-aged manufacturing worker whose job is eliminated due to the political rent-seeking which we incorrectly call "free trade?"

75. Thirty years ago, for example, timber harvests on public lands in the West



Perhaps most importantly, the increased distance between governed and government leads to increased disconnection between citizen and government. Particularly in rural areas and small towns, politics is centered around personal relationships between officials and the electorate. People often have—and use—the home phone numbers of their elected officials. The national government, by contrast, is largely becoming the province of professional political operatives, lobbyists, and those who control large amounts of money.<sup>76</sup> Politicians sell “access” and spend their time raising money rather than interacting with ordinary constituents. In these circumstances, individual disenfranchisement is quite real.

*b. Historical precedent*

The discovery of gold in California in 1848 sparked the beginning of several decades of placer<sup>77</sup> mineral rushes throughout the American West.<sup>78</sup> In California, Alaska, Colorado, Dako-

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were the concern of the local logging industry. Today, Japanese industries seeking raw materials compete with Eastern environmentalists, competing groups of public land managers, and multinational logging concerns to control timber resources. Local interests must share these resources with people they have never met. Even though formal title to Western public lands has not changed, local interests which previously had unchallenged de facto rights to the control of that land are now being challenged.

Not only have individuals lost the de facto control they once exerted, but the battle for control is now fought in unfamiliar terrain. Instead of bureaucratic allocation of land use rights, generally based upon customary allocations associated with land ownership of nonpublic lands, those who seek to assert control over these lands find themselves battling in courts over the habitats of species they did not know existed and in Washington over the details of legislation like the Endangered Species Act. Thus, not only are individuals often confronted with disputes over control of what they have historically regarded as theirs, even if they lacked title, even the terms and location of the debate are intellectually and physically distant from their lives.

76. See, e.g., Fred Wertheimer, *The Dirtiest Election Ever*, WASHINGTON POST, Nov. 3, 1996, at C1 (stating that the 1996 election “will go down as worst in modern times” with respect to campaign contributions; “the most powerful people in the country have proved in the 1996 political season that they do not believe the law applies to them”).

77. “Placer gold” is gold which has been eroded from rock and deposited on sandbars, in gravel banks, or holes in streambeds. See RODMAN W. PAUL, *MINING FRONTIERS OF THE FAR WEST 1848-1880* 6 (1963). “[I]n most cases it is manifestly easier to extract gold from placers than from veins or replacement deposits.” *Id.*

78. For a more detailed discussion of the mining camps in this context, see Andrew P. Morriss, *Miners, Vigilantes, & Cattlemen: Overcoming the Free Rider Problem in the Private Provision of Law* (1997) (work in progress on file with the author). In the interests of limiting the size of the footnotes in this section, I will rely on examples from the California, Montana, and Black Hills (Dakota Territory) placer

ta, Idaho, Montana, and Nevada, tens of thousands of placer miners literally rushed into empty, remote areas<sup>79</sup> to claim mineral wealth. As they did so, the miners created their own institutions for defining and assigning property rights, preventing and punishing crime, and resolving disputes.

At the time that the miners established their communities, the State was physically too far away. Government made decisions thousands of miles from the mining camps and communications were, at best, slow and unreliable. Moreover, because conditions in the early mining camps were unlike anything the American State had previously confronted, legislators viewed miners' problems through a lens distorted by Eastern issues.<sup>80</sup> In Montana, the political differences between the federally appointed officials and the population they sought to rule exacerbated this distortion: "Thousands of the prospectors who streamed into the Alder Gulch-Virginia diggings were either actively hostile to federalism or indifferent, and they had nothing

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rushes. The classic references on mining camps are JOHN R. UMBECK, *A THEORY OF PROPERTY RIGHTS* (1981) and CHARLES HOWARD SHINN, *LAND LAWS OF MINING DISTRICTS* (John Hopkins University 1884).

79. In Rodman Paul's words, "A more unpromising region for rapid settlement could hardly be conceived." RODMAN W. PAUL, *THE FAR WEST AND THE GREAT PLAINS IN TRANSITION 1859-1900* 24 (1988).

California was a remote, sparsely populated and obscure Mexican province that had just become part of the United States when news of the discovery of gold reached "the States" in 1848. Reachable from the east coast only by a cross-continental trek, a combined sea-land route across Panama, or an all water route through the Straits of Magellan, it had "an ox-cart economy based on hides and tallow" before the influx of miners. See J.S. HOLLIDAY, *THE WORLD RUSHED IN* 26 (1981).

The first major placer rush in Montana was in the summer of 1862 on Grasshopper Creek (Bannack), the second was at Alder Gulch (Virginia City) in the spring of 1863, and the third at Last Chance Gulch (Helena) in July 1864. All three occurred in areas which were virtually empty of population and economic infrastructure. The Montana rushes were *less* isolated than the earlier California rushes, since steamers could bring supplies within 200 miles of Bannack and regular stage runs were soon established to Utah. See DAVID DARY, *ENTREPRENEURS OF THE OLD WEST* 190 (1986). Isolation was relative, of course, and Salt Lake City was 475 miles away. See BIRNEY, *supra* note 43, at 46-47; LANGFORD, *supra* note 42, at 142.

The Black Hills rush in 1874-79 occurred in an area almost as remote as the California mining regions had been. The center of mining activity, Deadwood Creek, was 240 miles from the nearest railroad and a week's stage ride from the territorial capitol in Yankton. See T. H. WATKINS, *GOLD AND SILVER IN THE WEST* 115 (1971).

80. One of the best examples of this is the delay in organizing a civilian government for California due to national disputes over slavery. While tens of thousands of miners and others headed for California in 1849, Congress adjourned without organizing a territorial government because it could not agree on whether California would permit slavery. See *infra* note 83 and accompanying text. This debate ignored the reality that, in gold rush California, slavery was simply impracticable.

to say about it."<sup>81</sup> The distance was thus both physical and intellectual.

Frequently the only representatives of the government available to the miners were military posts, but these were unable or unwilling to provide law. For example, troops rarely left forts in gold rush California because the military authorities were too fearful of troop desertions to risk exerting their authority in the gold fields.<sup>82</sup> No civil authority existed in California in 1849 because Congress could not agree on whether California would be a free or slave territory.<sup>83</sup> When the lack of clear legal authority combined with the legal chaos produced by the need to integrate Mexican land titles into an American-style legal system, miners in California were forced to develop their own solutions.<sup>84</sup> Similarly, miners in Montana,<sup>85</sup> the Black Hills<sup>86</sup> and elsewhere

81. HOWARD, *supra* note 1, at 41.

82. Commodore Thomas A. Catesby Jones reported to the Secretary of the Navy in 1848:

For the present, and I fear for years to come, it will be impossible for the United States to maintain any naval or military establishment in California, as at the present no hope of reward or fear of punishment is sufficient to make binding any contract between man and man upon the soil of California. To send troops out here would be needless, for they would immediately desert.

HOLLIDAY, *supra* note 79, at 35-36. See also UMBECK, *supra* note 78, at 4 (U.S. military force in California reduced by desertion to about 600 men); WATSON PARKER, GOLD IN THE BLACK HILLS 70 (1966) ("soldiers compared their meager wages with the golden hopes which mining offered and deserted in droves"); EDWARD LAZARUS, BLACK HILLS, WHITE JUSTICE 79 (1991) ("A number of soldiers deserted Fort Abraham Lincoln to try their hands at prospecting").

83. See WILLIAM HENRY ELLISON, A SELF-GOVERNING DOMINION: CALIFORNIA, 1849-1860 17 (1950).

84. The United States was obligated to recognize legitimate Mexican land grants under the Treaty of Guadalupe Hidalgo. Distinguishing valid from invalid grants proved difficult and led to extensive litigation. (For a general description of the problems of Mexican land titles, see DOYCE B. NUNIS, *Historical Introduction to JAMES R. MARSHALL & EDWARD J. BUFFIN, FROM MEXICAN DAYS TO THE GOLD RUSH xxxi-lviii* (1993)). See ELLISON, *supra* note 83, at 12. Because the Mexican land titles were in Spanish, in documents frequently missing from California, and based on a civilian property law scheme, Americans found them difficult to decipher. Moreover, because Mexican mining law required costly and time-consuming steps to gain title, not many mineral grant holders had completed all the steps. As a result, few Mexican mineral land grants were upheld after the United States took control of California. See UMBECK, *supra* note 78, at 68-69.

85. Montana Territory had not yet been organized when gold was found in southwestern Montana, and the gold rush area was still part of Idaho Territory (which itself was organized out of Washington Territory only in 1863). An early observer noted that there was only one copy of the Idaho Territorial Statutes in all of present day Montana when Montana Territory was created. See Jesse B. Roote, *The Courts and Lawyers of Montana*, in I HELEN F. SANDERS, A HISTORY OF MONTANA 579, 582 (1913).

86. The gold rush in the Black Hills began before the Hills were "ceded" by the

faced conditions in which government was simply not present.

The social capital of the mining camps was thus even less than our present, severely eroded stock:

In a world of strangers, in a place without evidence of government, religion or law, goldseekers felt free to grasp for fortune. Like soldiers in a foreign land, it would be easy for many of them to slough off the social codes and moral precepts that had been enforced by family, friends and the influence of the church.<sup>87</sup>

Because the placer mineral rushes occurred in remote locations and because of the sudden population surges which followed discovery of gold, miners had to develop institutions together with thousands of neighbors with whom they had little or no previous contact.<sup>88</sup> As most miners did not plan to settle in the gold fields but only wanted to get rich and return to "the States,"<sup>89</sup> miners had to contend with a future which cast barely any shadow over the present. Miners' interest in investing in social capital was therefore extremely low.

Miners needed social institutions to secure possession of potentially valuable claims to mining rights<sup>90</sup> and to protect their gold, hard-to-replace equipment, and supplies.<sup>91</sup> Mining

Sioux and the presence of miners there was technically illegal. Although by 1875 the military was frequently looking the other way when it discovered miners in the Hills (the Sioux were not as accommodating), miners had no rights cognizable in a formal legal system. See PARKER, *supra* note 82, at 71. Confronted with this problem later, the Dakota Territorial Supreme Court decided that first appropriators' rights could be enforced against later appropriators, even if they were themselves technically invalid. See *id.* at 188.

87. See HOLLIDAY, *supra* note 79, at 300.

88. California attracted 400 settlers in 1848, 90,000 in 1849, and grew to a total population of over 220,000 by the end of 1852. See HOLLIDAY, *supra* note 79, at 26; see also WATKINS, *supra* note 79, at 40. The area around Virginia City in Montana grew from empty to over 10,000 in a matter of months. See LANGFORD, *supra* note 42, at 137. The Black Hills went from virtually no permanent population before they were taken from the Sioux to over 15,000 by December 1875, more than had lived in the entire Dakota Territory in 1870. See HOWARDS ROBERT LAMAR, DAKOTA TERRITORY 1861-1889 148, 150 (1956).

89. LANGFORD, *supra* note 42, at 42 ("There is nothing permanent in the life of a gold miner—and beyond the moment, nothing strong or abiding in his associations."); see also HOLLIDAY, *supra* note 79, at 356 (for miners, "the return home was the pressing purpose of all their work").

90. Claims were often quite valuable. A California '49er noted in his diary being offered (and declining) \$10,000 for a claim in 1851. See THE DIARY OF A FORTY-NINER 40 (Chauncey L. Canfield, ed. 1906).

91. Because most mining districts were located far from established centers of supplies, prices of food and mining equipment were high. See WATKINS, *supra* note 79, at 37. "No characteristic of gold rush California is so well known as the astro-

institutions needed to be flexible due to the rapidly changing mining technology.<sup>92</sup> The solutions had to economize on miners' time in participation because the opportunity cost of participating in governance was time lost in the mines. Losing time in the mines meant that miners sacrificed not only the gold they would find but possibly meant they would miss the big strike the miners all hoped they would make.<sup>93</sup> Finally, the solutions had to be acceptable not only to those miners present when the solution was adopted, but also to the thousands of newcomers who would arrive in coming weeks and would soon outnumber the existing population.<sup>94</sup>

The miners successfully developed their own customary law solutions. Although there were differences which reflected local conditions, miners' law was remarkably uniform in several respects. First, the miners established a new principle of mineral ownership which separated the mineral rights from the surface rights and awarded the mineral rights to the finder.<sup>95</sup> Second,

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nominal prices at which everything seemed to sell." JOSEPH R. CONLIN, BACON, BEANS, AND GALANTINES 90 (1986).

92. Technological change required constant increases in the size of claims. Early placer claims were mined with simple methods such as panning. When panning, a relatively inefficient technique, no longer was profitable, miners began using sluices and other somewhat more advanced equipment. Relatively quickly, however, most placer claims were worked out (by 1852 in California and 1876 in the Black Hills), and miners turned to more capital intensive techniques, such as hydraulic engineering. This method used vast amounts of water under high pressure to wash tons of sand, gravel, and gold off hillsides into massive sluices. See OTIS E. YOUNG, JR., WESTERN MINING 127-29 (1970). Each change in technology changed the optimal claim size and led to regular readjustment of mining district rules governing claim size.

Technological change also necessitated regular development of new property rights to water and timber. As mining technology evolved to require ever-increasing amounts of water, access to water became increasingly important. Water supply differed significantly between mining areas; in California, for example, the northern mining areas had abundant water year-round, while the southern areas lacked water for much of the summer. See HOLLIDAY, *supra* note 79, at 304. Timber became important for constructing sluices and water delivery systems.

93. See HOLLIDAY, *supra* note 79, at 297 ("Miners shared an indifference toward California and its future"); see also LANGFORD, *supra* note 42, at 107-08.

94. The only record of difficulty between newcomers and first appropriators I have found despite extensive searching are two descriptions of a dispute in the Black Hills and one in California. In the Black Hills, claims were established larger than the traditional claim (300 feet in length), and the narrowness of the valleys made ridge to ridge claims possible. Faced with newcomers' demands for division of claims, the first appropriators successfully resisted. See PARKER, *supra* note 82, at 61; GREEVER, *supra* note 43, at 303 (1963). In the California dispute, the newcomers outnumbered the original group and voted to reduce the claim size, allowing choice of claims in the order of arrival. See UMBECK, *supra* note 78, at 93-94.

95. See UMBECK, *supra* note 78, at 69-73; SHINN, *supra* note 78, at 9. Prior to

the miners established a mechanism for recording and maintaining claims.<sup>96</sup> Third, the miners established a private adjudicatory system which resolved disputes.<sup>97</sup> Fourth, the miners created rules of conduct which forbade and successfully deterred<sup>98</sup> tort-based crimes (e.g., theft, assault, murder) but that did not include non-tort based crimes (e.g., prostitution, weapons possession, political crimes) and which relied on a limited set of sanctions.<sup>99</sup>

the California gold rush, the United States had generally followed the European model of mineral rights law, granting mineral rights to the State. See LAMAR, *supra* note 88, at 158; UMBECK, *supra* note 78, at 4, 69-70.

96. Claimants were generally required to post notices and register claims with an elected district recorder, who was authorized to charge a small fee for the service. To maintain a claim typically required regular work on the claim. See JOHN D. LESHY, *THE MINING LAW 379-80* (1987) (outlining the typical rules); UMBECK, *supra* note 78, at 92-96 (outlining the usual provisions); SHINN, *supra* note 78, at 11-12.

97. Langford gives a good general description of these "courts":

It is now the general custom among the property holders of a mining camp, as a first step towards organization, to elect a president or judge, who is to act as the judicial officer of the district. He has both civil and criminal jurisdiction. All questions affecting the rights of property, and all infractions of the peace, are tried before him. When complaint is made to him, it is his duty to appoint the time and place of trial in written notices which contain a brief statement of the matter in controversy, and are posted in conspicuous places throughout the camp. The miners assemble in force to attend the trial. The witnesses are examined, either by attorneys or by the parties interested, and when the evidence is closed the judge states the question at issue, desiring all in favor of the plaintiff to separate from the crowd in attendance until they can be counted, or to signify by a vote of "aye" their approval of his claim. The same forms are observed in the decision of a criminal case. . . . The court is composed of the entire population. To guard against mistakes, the party in defect, in all cases, has the right to demand a second vote.

LANGFORD, *supra* note 42, at 85. See also UMBECK, *supra* note 78, at 92-96; SHINN, *supra* note 78, at 14-15, 31-33.

98. See UMBECK, *supra* note 78, at 87 ("little violence was reported" in California mining districts); see SHINN, *supra* note 78, at 6 (noting continuing use of mining districts in California in 1878-79), 38-39 (continued as long as "surface diggings" lasted); see, e.g., HOLLIDAY, *supra* note 79, at 323 (quoting miner's letter:

December 26. The people here refrain from—from I hardly know what, unless it is common, vulgar stealing. I think there is less of what is ordinarily called stealing here than any place I was ever in; and yet there can be little difficulty in stealing to almost any extent. A vast amount of property, easily movable, is daily and nightly exposed without a watch, or even a lock.);

see also DIARY, *supra* note 90, at 51.

It is a queer thing how well we got along without any courts or law. . . . Outside of a few cutting and shooting scrapes among the gamblers there have been no serious crimes, and it is a fact that we are more orderly and better behaved as a rule than the eastern towns from which we came.

*Id.*

99. Flogging, banishment, and hanging were the primary sanctions. See HAMIL-

Miners' law continued for a time even after the arrival of the State.<sup>100</sup> Although the arrival of the government courts ultimately meant the demise of the miners' informal legal institutions, these institutions significantly influenced the authoritarian legal institutions which followed. Indeed, the success of the government courts was due in part to their explicit recognition of many of the rules created in the miners' courts.<sup>101</sup>

### c. *Lessons from History*

The miners' rapid creation of flexible, reasonably fair, and sturdy institutions suggests that when the stakes are high enough, individuals can overcome the free rider problems inherent in the private provision of law. The success of the miners' institutions in surviving the arrival of the State and influencing authoritarian legal institutions also demonstrates that customary law institutions can have an impact even when the future casts a vanishingly small shadow over the participants.

The miners' experience points to a principle for minimizing the potential for a "ratcheting up" of authoritarian law: individuals will not compete for control within the State when the costs of doing so are too high. Because the miners' opportunity costs of participating in government were so high, they had little interest in "mining" the State. Only when the saturation of the mining districts was sufficiently great to lower the opportunity costs did it become worthwhile for individuals to compete for control of the

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TON, *supra* note 52, at 221.

100. For example, the intersection of mining and competition for jurisdiction over the mines gave Denver in 1860 four sets of courts. A newspaperman visiting Denver at that time reported that the four sets of courts managed to operate together:

The miners' courts, the people's courts, and "provisional government" (a new name for [the attempted territory of] 'Jefferson') divided jurisdiction in the mountains; while Kansas and the provisional government ran concurrent in Denver and the valley. Such as felt friendly to either jurisdiction patronized it with their business. Appeals were taken from one to the other, papers certified up or down and over, and recognized, criminals delivered and judgments accepted from one court by another, with a happy informality which it is pleasant to read of. And here we are confronted by an awkward fact: there was undoubtedly much less crime in the two years this arrangement lasted than in the two which followed the territorial organization and regular government.

J. H. BEADLE, *WESTERN WILDS AND THE MEN WHO REDEEM THEM* 477 (1877).

101. The first, post-1848 federal law on mining, passed in 1866, explicitly incorporated the customs and rules of mining camps. See LESHY, *supra* note 96, at 17; PAUL, *supra* note 79, at 172-73. Federal, state, and territorial courts all relied heavily on mining district "laws." See SHINN, *supra* note 78, at 51.

State. Known sites where large quantities of gold are available to those with a pick or a pan are, of course, rare today. Paradoxically, some of the events which have brought economic distress in the short run and prompted some of the Militias' discontent—such as falling trade barriers—hold the promise of an economy in which equivalent opportunities are more generally available. As increased economic openness creates new economic opportunities, the opportunity cost of “mining” the State will again rise. As it does, the structural balance may shift back toward customary law. To the extent these opportunities arise in relatively unregulated areas (for example, the Internet), there is an opportunity to evade State action. Rather than oppose measures such as trade liberalization, the Militias may more effectively achieve their goal of a limited State by seeking even more change in these areas.

Miners' courts consistently made three structural mistakes, and these mistakes offer negative lessons for the Militias of today. First, the miners' courts often failed to create objective and unbiased decision-makers. By reserving trials to entire camps, for example, decisions were too easily manipulated.<sup>102</sup> When miners did delegate, they sometimes failed to shield the decision-makers from blatant physical threats.<sup>103</sup> The “common-law court” movement, which often accompanies Militia activity, seems particularly susceptible to this problem because of their focus on delegitimizing State courts.<sup>104</sup>

The miners' second structural mistake was to define their communities too narrowly. Remembering that their prejudices were widely shared in nineteenth century America explains but does not excuse the miners' racism against Chileans, Mexicans, and especially the Chinese.<sup>105</sup> Nativism may have been a pow-

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102. For example, tearful letters to mothers were read, and men sentenced to hang were instead released. See, e.g., DIMSDALE, *supra* note 42, at 81-82. Friends of the accused were allowed to pack meetings, vote repeatedly, and otherwise manipulate outcomes. See *id.* at 81.

103. HAMILTON, *supra* note 52, at 221 (stating that “[c]riminals preferred jury trials, because their friends could, by threats, intimidate the jury but could not stampede the whole community”).

104. DEVIN BURGHART & ROBERT CRAWFORD, *GUNS AND GAVELS* 1-7 (1996) (describing common-law court movement and claiming a link to militias).

105. The narrowness of the mining community's self-definition went beyond race, however. Placer miners saw themselves as a separate community, defined as atomistic individuals each searching for his own big strike. As mining became more industrial, placer miners were unsuccessful in joining together in unions. See RICHARD E. LINGENFELTER, *THE HARDROCK MINERS* 105 (1974). More importantly for the survival of the miners' courts, they were unsuccessful at convincing outside investors, needed



erful organizing tool for miners—American gold for Americans was a convenient slogan for putting together a group to dispossess foreign miners from their claims—but it carried a high cost. When mining shifted from placer mines to hard rock mines, “American” miners found themselves at a significant disadvantage to more experienced Cornish miners, cheaper Chinese miners, and other groups.<sup>106</sup> Anti-foreigner sentiment significantly impeded miners in pursuing class goals.<sup>107</sup> “American” hard rock miners had more in common with their Cornish and Chinese colleagues than they did with the “American” mine owners like George Hearst. Similarly, the Militias are often accused of having connections to modern racist and anti-Semitic organizations.<sup>108</sup> While many Militia organizations attempt to disavow such sentiments, firmer steps to disassociate themselves from such organizations are necessary if the Militias are to avoid the miners’ mistakes.<sup>109</sup>

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to provide the capital necessary for advanced mining technology, that there was an alternative to extension of State courts and law. Some outsiders, of course, would have preferred the State courts because they sought control of the courts themselves, but others might have been open to alternatives built on the experience of the miners’ courts.

106. See *id.* at 5-6 (noting that the Chinese were paid less and the Cornish were “the miner’s miner”).

107. *Id.* at 103 (“hostility toward the Cornish by Irish and American miners and the community at large destroyed the solidarity among the miners”).

108. See, e.g., Lance Williams & Scott Winokur, *Militia Extremists Defend Their Views* (visited April 23, 1995) <<http://www.sfgate.com/cgi-bin/examiner/ar...995&month-04&day-23&article-NEWS12487.dtl>> (on file with the *Montana Law Review*) (quoting Brian Levin of Klanwatch that “I believe there is a significant amount of racism and anti-Semitism in these groups”); DEES & CORCORAN, *supra* note 5, at 87 (“the links between the [Militia] movement as a whole and the haters and racists of America were strong”).

109. The Montana Constitutional Militia, for example, includes in its list of its adversaries “Members of Hate Groups” which it defines as the Klan and other hate groups. Montana Constitutional Militia (visited Sept. 3, 1996) <[http://www.constitution.org/mil/mt/mil\\_usmt.html](http://www.constitution.org/mil/mt/mil_usmt.html)> (on file with the *Montana Law Review*) (“Those who have committed crimes need to be brought to justice, and the others counseled to try to redeem them as good citizens.”). The Pennsylvania Citizen’s Militia Manual counsels those interested in forming units to “[o]pen your militias to all races, creeds, and religions.” Pennsylvania Citizen’s Militia Manual, *supra* note 62. Similarly, the Michigan Militia Corps opens its Web page with the statement: “We believe wholeheartedly in the values enshrined in the Constitution for the United States of America, the Declaration of Independence, the Bill of Rights, and the Constitution of Michigan, and the application of these values to ALL. If you do not agree, please take your beliefs elsewhere.” Michigan Militia Corps Resources (visited Feb. 17, 1997) <<http://mmc.cns.net/michiganmilitia.html>> (on file with the *Montana Law Review*). The founder of the United States Militia Association (in Idaho) argues that racists and anti-Semites have attempted to “jump on the bandwagon” but that Militias have repeatedly told them to “get out of here.” David Hoffman, *America’s*

The miners' third structural error was the short time horizon under which they operated. Most miners, particularly in the placer rushes, did not intend to remain in the gold fields any longer than the few months they thought necessary to dig up their fortune. Miners had little interest in events next year, or even next month. That the miners were able to cooperate at all in these conditions is remarkable. Because the future cast such a short shadow, however, the private law structures miners built were equally temporary. When faced with competition from men who saw greater opportunity in "mining" government than in mining gold, and who therefore had an interest in displacing the miners' courts, the miners' courts disappeared.<sup>110</sup> To create a lasting presence, the Militias need to strive to lengthen the future's shadow.

The increasing physical and intellectual distance of government from the people partially explains the Militia's growth. The Militias can learn valuable lessons from the miners' approach to the same problem in the nineteenth century. The most important lesson of the mining camps is that avoiding authoritarian law requires better opportunities outside government. The transition from a relatively closed economy to a more or less open one is difficult, of course, but it is in the opportunities offered by a freer market that freedom lies. The ability to shift transactions across borders to avoid domestic legal restrictions will free Americans escaping economic regulation as much as it frees those who wish to avoid other societies' restrictions on political discourse.

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*Militias—Angry White Guys or Defenders of Liberty?* (visited Sept. 4, 1996) <[http://www.webcom.com/~haight/backissues/7\\_95/white.html](http://www.webcom.com/~haight/backissues/7_95/white.html)> (on file with the *Montana Law Review*). George and Wilcox also point out that it was a Militia group, the Gadsden Minutemen, who exposed the "Good Old Boys Roundup" held annually by law enforcement officers, including agents of the FBI and Bureau of Alcohol, Tobacco and Firearms, at which signs such as "Nigger Check Point" and racist comments were made. GEORGE & WILCOX, *supra* note 38, at 264.

Such disavowals, however, are not enough for their critics. An Anti-Defamation League spokesperson, for example, argued that "[t]he militias aren't set up as racist institutions, but that's where racists find a home." Wayne Laugesen, *Terrorism From Within: Colorado Birthplace of Radical Groups* (visited April 4, 1996), <<http://www.boulderweekly.com/040496/cover.html>> (on file with the *Montana Law Review*).

110. Most miners were, of course, anarcho-capitalists by experience rather than by philosophy. They had no objection to the State legal system back home in "the States." Their objection was that the State had neither the resources or the inclination to provide them with the means to get rich in the diggings. I am, therefore, reluctant to be too critical of them for failing to build a classical liberal society in the diggings.

### 3. *Too Large*

Governments can undertake large projects and spend massive amounts of resources. Being "large" means more than this, however. As Robert Higgs stated, "What distinguishes the capital letter leviathan is the wide scope of its effective authority over economic decision-making, that is, the great extent to which government officials rather than private citizens effectively decide how resources will be allocated, employed, and enjoyed."<sup>111</sup> Government becomes "too large" when its exercise of this much authority over the allocation of resources crowds out customary legal institutions with authoritarian law.

#### a. *The Militias*

The most common sign of structural imbalance cited by the Militias is that government is too large in relation to individuals.<sup>112</sup> Ruby Ridge and Waco, which feature prominently in most Militias' statements about the federal government,<sup>113</sup> are only the more extreme examples of the imbalance between individuals and the State. Militia critic Morris Dees summarizes this type of complaint as "the fear of, and anger at, a government that over-regulates, overtaxes and at times murders its own citizens."<sup>114</sup> The "too large" complaint expresses a preference for voluntary solutions to public goods problems.<sup>115</sup>

The belief that the government is "too large" is also connect-

111. HIGGS, *supra* note 15, at 27-28.

112. Just exactly where the line between "too large" and "just right" lies is the subject of much debate even within the Militia movement, although what is "too large" includes what Militia members see as too many restrictions on gun ownership and overly high tax rates. See GEORGE & WILCOX, *supra* note 38, at 249; RIDGEWAY, *supra* note 59, at 16 (noting the natural alliance between militia leaders and the attack on big government); HALPERN & LEVIN, *supra* note 5, at 2-3 (opposition to the Brady Bill and assault weapon ban common to Militias). "Too large" also covers a wide range of complaints that "the government has become increasingly involved in every aspect of a normal person's life". *Id.* at 12. Looking at history, the Militias see a past in which individuals' lives were relatively unencumbered by government controls. See *id.* at 12-13.

113. See, e.g., HALPERN, *supra* note 30, at 2-3 (describing a common concern among Militia groups over Ruby Ridge and Waco).

114. Laugesen, *supra* note 109 (quoting Dees).

115. Militia organizations almost uniformly cite assisting in national defense and disaster relief as two of their aims, for example, and both are often considered public goods. See, e.g., GEORGE & WILCOX, *supra* note 38, at 260 (quoting news report that "organizers say emergency public service has long been part of the militia mission, right up there with defending the Second Amendment and keeping an eye on the government").

ed to the Militias' view of the relationship between citizen and State as a social contract.<sup>116</sup> For Militias, the social contract is the Constitution, read in the light of the other Founding documents.<sup>117</sup> Since many Militia groups cite prevention of State tyranny as a (if not *the*) central feature of the American social contract, attempts by the State to exercise powers not included in that contract are not merely breaches of an agreement, but a return to the tyranny from which we escaped in 1776.<sup>118</sup>

### b. Historical Precedent

It might seem peculiar to think of government in the nineteenth century West as "too large." A comparison of the experiences of the free range cattle industry in Wyoming and Montana shows that government was too large as defined by Higgs. Wyoming, Montana, and the western parts of the Dakotas developed an extensive free range cattle industry during the 1870s and 1880s.<sup>119</sup> By the mid-1880s, the cattle kings dominated the industry, particularly in Wyoming, where huge herds grazed openly across public and private land alike, unrestricted by fences.<sup>120</sup>

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116. In this view, the citizen exists as a rights bearing entity prior to the State and the State receives only that which the citizen delegates to the State.

117. See, e.g., *Hearings*, *supra* note 36 (statement of Norman Olson, Michigan Militia).

118. The Pennsylvania Citizen's Militia Manual, for example, argues "the only reason a civilian, or 'unorganized,' militia exists is in order to keep the government in check in order that the government may remain in the hands of the people." Pennsylvania Citizen's Militia Manual, *supra* note 62.

119. This section presents a concise summary of the free range cattle industry and the conflicts between large cattle operations and smaller ranchers and farmers. For a more complete analysis see Morriss, *supra* note 42.

120. By 1885-86, there were probably about 1.5 million cattle in Wyoming. See T.A. LARSON, HISTORY OF WYOMING 167 (2d ed. 1978). Part of the financial attraction of the free range cattle business was that thousands of cattle were routinely turned out onto the range to fend for themselves in the winter at no cost to the owners. See HELENA HUNTINGTON SMITH, THE WAR ON POWDER RIVER 34 (1966). No herd management existed. See *id.* Ranchers did not feed herds, drive them to sheltered spots, or segregate bulls to prevent winter calving. See *id.* Open range grazing was necessary because cattle required 40 acres each in Wyoming, and the 160-acre units available by homesteading were therefore useless for ranching. See LARSON, *supra*, at 177. Open range grazing also saved on costs: fences were unnecessary and labor requirements were minimal during the winter. *Id.* at 177. Cowboys then rounded up the cattle in the spring. Bad weather caused problems, however. 1886-87 was a terrible year for the cattle business in Wyoming. See SMITH, *supra*, at 35-36. The summer of 1886 was a severe drought, "more cattle than ever before had been piled onto the range" and still more cattle were being brought into Wyoming. See *id.* When the

Three problems arose during the 1880s which reduced the enormous profitability of the cattle kings' empires. First, the size of the herds rapidly increased as ranchers shipped in thousands of cattle to grow fat on the "free" grass.<sup>121</sup> Second, the range was growing smaller and more crowded as homesteaders began to take up claims and to run cattle of their own.<sup>122</sup> Third, the attractions of the free range were drawing more small operators into the cattle business, creating coordination and free rider problems in the round-ups and allocation of unbranded cattle, known as "mavericks."<sup>123</sup>

The social institutions the cattle kings created were adequate to regulate division of the public range by a small, relatively homogeneous set of interests. When Wyoming was more or less a large, unfenced, unpopulated field, the cattle kings were able to settle disputes amicably amid the splendor of the Cheyenne Club.<sup>124</sup> They jointly managed round-ups and allocated mavericks under the "law of accustomed range."<sup>125</sup> However, these institutions were hopelessly inadequate to deal with the

severe winter hit, more than 90% of some herds died. *See id.* at 36-37. The result of the combination of such things as bad weather, mismanagement, and overstocking was "the most appalling mass slaughter of animals the West had ever seen or would see again, second only to the slaughter of the buffalo." *Id.* at 38. The average loss in Wyoming was probably about 50%. *See id.* at 46.

121. *See* LEWIS ATHERTON, *THE CATTLE KINGS* 165 (1961).

122. *See* SMITH *supra* note 120, at 25. The arrival of small stock raisers caused new problems. "Soon the have-nots, the little fellows with fifty or a hundred or two hundred head, were proposing their own rule of thumb to the effect that any man who had cattle on the range was entitled to brand mavericks." *Id.* at 58.

123. Mavericks were calves which were missed during a roundup or which were orphans. *See id.* at 51. They also included unbranded mature cattle. *See id.* at 52. The huge roundups conducted each year contributed to the maverick problem because the size and speed of the roundups meant cowboys missed more cattle, and so more unbranded calves grew up on the range. *See id.* at 33-34.

Smith calls the problem of allocating mavericks "the most confused, embittered, explosive question ever to bedevil the cattle range." *Id.* at 25. Under the "law of accustomed range," a maverick belonged to whoever's range it was found upon. *See id.* at 57. When ranchers cooperated in a joint round-up, they often divided the mavericks in proportion to the relative herd sizes of the participants. *See* LARSON, *supra* note 120, at 183.

124. Smith describes the Cheyenne Club as:

[T]hat wonderful institution . . . No other cow-country capital had anything like it. It boasted of having the best steward and the best chef of any club in the United States . . . and servants imported from Ottawa where, under the British flag, men were taught to be servants instead of retorting curtly: "Do it yourself!" when requested to shine a pair of shoes.

SMITH, *supra* note 120, at 12-13.

125. *See id.* at 57 (explaining that, according to the "law of accustomed range," a maverick belonged to the man on whose land it was found).

competing interests presented by a more heterogeneous society of small holders, small cattle operations, and cattle kings. The solutions to the maverick problem, for example, broke down as control of the range splintered and as individuals discovered means of creating mavericks they could claim. On the open range, the ease of searching a neighbor's land for untended cows or by driving off or killing a calf's mother meant that stronger solutions were necessary.<sup>126</sup>

Unlike Montana or the Dakotas, which had relatively diverse economies, the cattle industry dominated Wyoming economically and politically and controlled the territorial and state governments.<sup>127</sup> The cattle kings' first response to the growing conflicts on the range was to use their control of the territorial and state governments to impose solutions to the maverick problem. By using the power of the State, the cattle kings came close to eliminating their competitors. Through the State and the powers of the State to delegate to the Association, the cattle kings prevented their employees from owning any cattle, seized control of all mavericks, and restricted small holders' abilities to sell their cattle.<sup>128</sup> Helen Huntington Smith summed up the ef-

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126. See *id.* at 54-55. Because small ranchers did not participate in the joint roundups (being neither welcome nor anxious to contribute weeks of labor to rounding up others' cattle), most of the mavericks went to the large operations. See LARSON, *supra* note 120, at 185.

127. For example, in 1890, 8 of 12 members of the upper house of the legislature, including all five members of the livestock committee, were members of the Wyoming Stock Growers' Association. See SMITH, *supra* note 120, at 85. See generally W. Turrentine Jackson, *The Wyoming Stock Growers' Association Political Power in Wyoming Territory, 1873-1890*, 33 MISS. VALLEY HIST. REV. (1947).

128. In 1884, the cattle kings' organization, the Wyoming Stock Growers' Association, persuaded the Territorial legislature to pass the Maverick Law, which placed full control over roundups in their hands and allocated all mavericks to the Association. See 1884 Wyo. Sess. Laws 87; see also SMITH, *supra* note 120, at 59-60; LARSON, *supra* note 120, at 184. "Small cattlemen who were not members of the association despised the Maverick Law." *Id.* Neither Colorado nor Montana turned control of the maverick issues over to the big cattle growers. See SMITH, *supra* note 120, at 59, 63 ("Not only was authority over livestock matters vested in the government of the state or territory, instead of in a stock-growers' association, but the authority was decentralized and democratic. There was no fuss over maverick sales because they were left in local hands.").

In Smith's words, "The maverick law of 1884 lit the powder train which led to the Johnson County explosion." *Id.* at 59. The Maverick Law had a number of provisions which assured mavericks would end up only in the herds of the cattle kings. See *id.* at 60-63. First, all mavericks found were to be held on behalf of the Association. See *id.* at 60. Second, no cattle were to be branded between February 15 and the beginning of the spring roundup (approximately three months later), preventing small holders from branding any cattle from their own herds which had strayed. See *id.* at 61. Third, only those posting a bond of \$3,000 to the Association could bid on

fect of the Wyoming approach: "It was a system guaranteed to make outlaws even out of angels, and there were very few angels on Powder River."<sup>129</sup>

The cattle kings believed there was widespread theft of their cattle but that the courts were unreliable in punishing rustlers because juries, the only part of the legal system the cattle kings could not control, were made up of rustlers and their sympathizers.<sup>130</sup> Failure to secure convictions led the Association's leaders to "the dangerous conviction that everybody was out of step but themselves—the press, the public, the juries, [and] the judges . . ."<sup>131</sup> Convinced that only extra-legal action could resolve the problem, the Wyoming cattlemen arranged an invasion of Johnson County, a county of small holdings where they believed rustlers held sway. In a military-style operation, a heavily armed force of more than forty Wyoming cattlemen and hired Texas gunmen literally invaded Johnson County, Wyoming in 1892 aboard a specially chartered train.<sup>132</sup> The "Invasion" ended in a humiliating rescue of the Invaders by the U.S. Army's caval-

mavericks, which rarely sold for more than \$10. *See id.* at 62. Finally, the funds from sales were turned over to the Association for "the payment of cattle inspectors and other like purposes." *Id.* at 60. The effect of the law was to prevent anyone from purchasing a maverick except the cattle kings.

129. SMITH, *supra* note 120, at 113.

130. *See* LARSON, *supra* note 120, at 187-90. In 1888, the Secretary of the Association wrote:

while I would be sorry to see the return of the old days, when it was necessary to defend your property at the expense of human life I am inclined to believe that we shall come to this unless the community insist upon the punishment of cattle thieves through the regular channels of the courts of law.

*Id.* at 190 (quoting Thomas B. Adams). The cattle kings were right that jury sympathy sometimes made it difficult to convict rustlers, although they exaggerated the extent of the conviction problem: "Outside of periods when feeling ran high there were convictions in cattle cases; while as for horse thieves, they were sent up time and again. SMITH, *supra* note 120, at 71, 116 (detailing claims of acquittals). The reason for this feeling was not that juries were made up of rustlers, however, but that most settlers believed

that the Association operated on the principle of one rule for me and another rule for thee. The average citizen believed that stock-law violations were winked at when committed by a favored member, while the same 'mistake' if made by an ordinary fellow would lead to his arrest.

*Id.* at 71.

Smith recounts a number of incidents in which prominent Association members violated the law with impunity. *See id.* at 71-75. A lack of credibility on the part of Association's stock detectives among the general public also made convictions hard to secure—one juror reportedly told a prosecutor after a trial that he would not convict a dog on the basis of the testimony of such liars. *See id.* at 81.

131. SMITH, *supra* note 120, at 81.

132. *See id.* at 196.

ry.<sup>133</sup> If the Invaders' military leadership had not been so inept the results might have been even more disastrous.<sup>134</sup>

The Montana cattle kings took a different approach to the problem of dividing the open range. They had to share control of the territorial political apparatus with the mining interests of the western part of the Territory and the farming interests. Without the Wyoming cattle kings' complete political dominance, Montana's cattle kings were more frequently forced to accommodate others' interests. (They may have also been smarter.) Whatever the reason, Montana's cattle kings approached range conflicts in a different manner. Granville Stuart, for example, advocated encouraging employees to own cattle to give them an interest in the range.<sup>135</sup> As his son-in-law later stated, "This would

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133. Acting Governor Amos Barber learned of the events and, rather than calling out the national guard unit at Buffalo, wired President William Henry Harrison in Washington, D.C. that "an insurrection exists in Johnson County in the state of Wyoming . . . against the government of said state. . . . Open hostilities exist and large bodies of armed men are engaged in battle." *Id.* at 224; see LARSON, *supra* note 120, at 278. Barber asked Harrison to send federal troops from Fort McKinney (near Buffalo) to suppress the insurrection claiming the state militia was unavailable. See LARSON, *supra* note 120, at 278. Wyoming's two Senators, Joseph M. Carey and F.E. Warren, both allied with the cattle kings, joined Barber's appeals in person, reportedly getting President Harrison out of bed. See *id.*; SMITH, *supra* note 120, at 224. A detachment of cavalry was sent out at 2:00 a.m. The federal troops took the Invaders into custody at Fort McKinney, both to protect them from the citizens and for the murders they had committed during the first stage of the Invasion. See LARSON, *supra* note 120, at 278; SMITH, *supra* note 121, at 225-26. The cavalry and the maneuverings of the Invaders' powerful backers kept them from legal sanctions, and the Invaders and their friends secured removal of the trial to Cheyenne, an area of Invader sympathy. See SMITH, *supra* note 120, at 263. Johnson County remained, however, responsible for the costs of holding the Invaders and when it was unable to pay those costs, all were released on bond. See LARSON, *supra* note 120, at 279. Witnesses were kidnapped, and other unscrupulous methods were used to ensure acquittals. See SMITH, *supra* note 120, at 245-51. After extensive delay, the trial began with an attempt to seat a jury. After examination of more than a thousand veniremen, only 11 jurors qualified. With all 23 defendants still to exercise their 12 preemptory challenges each, and the prosecution yet to use any of its 138 preemptory challenges, Johnson County gave up and the defendants were released. The defense objected to the dismissal on grounds that jeopardy had not attached and the defendants might be tried in the future. So, a spectator was sworn as the twelfth juror and the prosecution again moved to dismiss. This left the defendants immune from future prosecution. See SMITH, *supra* note 120, at 281-82. The Invaders have largely lost the historical battle over the legitimacy of their actions. Most twentieth century authors have condemned the Invaders. See LEWIS L. GOULD, WYOMING: A POLITICAL HISTORY, 1868-1896 137-58 (1968).

134. A combination of their own mistakes and their rescue by federal troops kept the death toll relatively low. The Johnson County sheriff, Red Angus, one of the local officials marked for death by the Invaders, played a crucial role in rallying the population against the Invaders. See SMITH, *supra* note 120, at 214-17.

135. See *id.* at 28-29.



do more than anything else to stop rustling."<sup>136</sup> This and other similar measures made control over mavericks "decentralized and democratic."<sup>137</sup> As a result, when the Montana cattlemen did turn to extra-legal action against rustlers, as they did in the mid-1880s, they did so with widespread popular support.<sup>138</sup>

*c. Lessons from History*

There is a resemblance between the actions of the Johnson County Invaders and the views of Waco and Ruby Ridge that is common among the Militias. A government that has grown too large in relation to individuals is not merely an inconvenience or the source of irritants, it is a danger to the lives and property of its citizens. The Johnson County War suggests two ways to avoid such disastrous events.

First, the key difference between Wyoming and the other free range cattle states was the monopoly on political power the Invaders and their supporters held in Wyoming. This difference led to the Invasion because the Wyoming cattle kings were never forced to compromise with the settlers or to see them as possessing legitimate rights. The cattle kings were able to envision mass slaughter as both permissible and moral. Where there was a political need for compromise, as in Montana, the ranchers followed more open policies which allowed recognition and protection of settler rights. As Helen Huntington Smith observed: "Funny how much less trouble with rustling they had in Montana."<sup>139</sup> Preventing concentrated power, one of the Militias' potential roles, thus serves as an important structural function.

Second, the residents of Johnson County avoided their planned "extermination" because they were a well-armed militia. Indeed, the Invaders took many steps to prevent the Johnson County residents from mobilizing as a militia, such as cutting telegraph wires, amending the militia statutes, and planning to seize the armories. Nonetheless, the armed citizenry successfully resisted tyranny. The story of the Invasion supports the Militias' call for a citizenry prepared to resist tyranny. Indeed, the Invasion suggests that the proper question is not "can tyranny deserving of armed resistance arise in the United States?" but "will

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136. *Id.* at 29.

137. *Id.* at 63.

138. See Oscar O. Mueller, *The Central Montana Vigilante Raids of 1884*, THE MONTANA MAGAZINE OF HISTORY, Jan. 1951, at 23, 34-35.

139. SMITH, *supra* note 120, at 29.

it do so again?"

### B. Correcting Structural Imbalances

Whether or not the Militias have identified the causes of structural imbalance, they have identified serious problems which are well within the scope of more conventional political discourse. However, the solutions are not straightforward. Many of these problems are difficult or impossible to reverse and require a means of restoring balance other than turning back the clock.<sup>140</sup> The solutions must accommodate a complex world in which there are common global problems and economic interdependencies within the framework of a limited government.

One way to restore the balance would be through conventional political action, such as by seeking constitutional amendments or electing sympathizers to public office.<sup>141</sup> Critics frequently ask why the Militias do not confine themselves to such conventional tacts. The implicit answer seems to be that the loss of balance is too severe to be corrected by such means. Moreover, one of the functions of constitutions is to establish and maintain that balance; when a constitutional order malfunctions, correcting it with conventional intraconstitutional political means is difficult if not impossible.<sup>142</sup>

140. Robert Higgs, for example, concludes *CRISIS AND LEVIATHAN* by saying that while we know little about the future we do know that

other great crises will come. Whether they will be occasioned by foreign wars, economic collapse, or rampant terrorism, no one can predict with assurance. Yet in one form or another, great crises will surely come again, as they have from time to time throughout all human history. When they do, governments almost certainly will gain new powers over economic and social affairs.

HIGGS, *supra* note 15, at 262.

141. They have had some limited success in electing sympathetic members of Congress. Representatives Helen Chenoweth, Linda Smith, and Steve Stockman have been identified as sympathetic to Militias. See RIDGEWAY, *supra* note 59, at 22.

142. The constitution is hard to change through the amendment process. That is part of the point of having a constitution. As Don Boudreaux and A. C. Pritchard point out, the requirement of approval of three-fourths of the state legislatures "effectively bars proposed amendments which, if enacted, would directly transfer wealth from society at large to a concentrated interest group." Donald J. Boudreaux & A. C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 *FORDHAM L. REV.* 111, 129 (1993). Because the constitution can be amended solely by agents of the people, however, the obstacles created by Article V cannot prevent shirking. Shirking can take two forms: enacting amendments that are opposed by a majority (or large minority) of the people or failing to enact amendments that are supported by a supermajority of the people. See *id.* at 130.

At the same time, the constitution is relatively easy to change by changing the

As noted earlier, the written constitution is only part of the broader fabric of allocations of power which perform structural functions in our system. There is no Article V for our frayed social capital, however, and no action will reverse the trends so aptly captured by Putnam's image of "Bowling Alone."<sup>143</sup> Once decentralized, voluntary organizations have weakened or vanished, and recreating them poses almost insurmountable problems.<sup>144</sup> The Militias are capable of playing a role in rebuilding

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Supreme Court's interpretation of it. The "switch in time that saved nine" is only the most famous and abrupt shift; the Court has significantly changed the meaning of the Constitution on a number of occasions, such as *Roe v. Wade's* constitutionalization of the abortion debate. These changes are not random in direction, however. Although we have no analysis of the judicial branch equivalent to public choice analysis of the political branches, the structure of constitutional litigation imposes a bias on the types of changes the judiciary is able to impose.

Constitutional questions arise only when they are presented to the courts in response to an action by the legislative or executive branches. The courts' analyses of those actions are then shaped by legal doctrines which limit the courts' powers, like the presumption of constitutionality. The courts must also work within the confines of weak tools for confronting the other branches: the rational relationship test, for example. The ineffectualness of the Supreme Court to change behavior was made clear by Professor Gerald Rosenberg. See GERALD N. ROSENBERG, *THE HOLLOW HOPE* (1991). Professor Rosenberg traced how the Supreme Court's decision in *Brown v. Board of Education*, 349 U.S. 294 (1955), led to little change in the experience of an integrated environment by school children; it was only when Congress conditioned federal funds on desegregation that meaningful change occurred. See *id.* at 42-54; see, e.g., *THE FEDERALIST* NO. 78, at 484 (Alexander Hamilton) (Henry Cabot Lodge ed. 1888) ("The judiciary is beyond comparison the weakest of the three departments of power."). Courts thus confront legislation and executive action on terms largely set by the legislative and executive branches. They confront those actions with weak powers and moral authority, not, as Andrew Jackson famously noted, with the means to enforce their decisions. See 2 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 219 (1922). Those confrontations tend, therefore, to lead to a gradual expansion of legislative and executive power and, most importantly, of federal power. The combination of the difficulties in changing the constitution by amendment and the relative ease in changing it through judicial means that restricting federal power within the constitutional system is difficult. It is not impossible, as the *United States v. Lopez* decision, 115 S.Ct. 1624 (1995), demonstrates. However, the reaction to that limited shift away from federalization suggests the rarity of such changes. See, e.g., Linda Greenhouse, *Focus on Federal Power*, N.Y. TIMES, May 24, 1995, at A1 (quoting Laurence Tribe saying "[i]t is hard to overstate the importance of how close . . . [the Supreme Court] came to something radically different from the modern understanding of the Constitution"). In general, we cannot rely on the federal government to voluntarily limit its own authority.

143. "Bowling Alone." *An Interview With Robert Putnam About America's Collapsing Civic Life* (visited Sept. 6, 1996) <[http://muse.jhu.edu/demo/journal\\_of\\_democracy/v006/putnam.interview.html](http://muse.jhu.edu/demo/journal_of_democracy/v006/putnam.interview.html)> (on file with the *Montana Law Review*).

144. One major problem is the extent to which State-based solutions "crowd out" voluntary action. If we insist on the existence of a full scale private solution to all problems before withdrawing the State, we can never act; yet if we withdraw the State before a solution exists, we risk serious consequences for those who fall between the gaps while private solutions develop.

social capital because they are decentralized, voluntary organizations. The appearance of such groups should, therefore, be cause for optimism rather than hysteria.

The Militias' commitment to disaster relief is a good example of concrete actions that rebuild social capital.<sup>145</sup> Federal disaster relief is a solution to a national free rider problem,<sup>146</sup> which can be articulated as follows: we are all better off if we can rely on others to help us in times of need, but we are each presented with significant personal incentives to free ride in the production of disaster relief services. As one solution to solve the free rider problem, we allow the government to take our money to fund the services in return for the assurance that the services will be available when we (or others we care for) need them. Federalization has its costs, however, because once the pool of federal resources is available, we also create an incentive to secure those resources even if there is no natural disaster.<sup>147</sup> A group which credibly committed to provide future disaster relief services on a local level would reduce the need for outside assistance.<sup>148</sup> The key to such developments is the creation of a credible commitment to provide resources when they are necessary. If Militias are to contribute in this area, they will need to develop means of credibly committing to continue their efforts into the future.

Another positive role the Militias can play is to participate in the general political discourse.<sup>149</sup> Dialogue with those hold-

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145. See, e.g., *supra* note 31.

146. Many people do not free ride in those areas, of course, and provide impressive disaster relief services through voluntary organizations such as the American Red Cross.

147. Hence the federal government bureaucratizes the process by designing rules to separate the "real" disasters from merely opportunistic resource grabs. See, e.g., 44 C.F.R. § 206.46 (1995) (describing "declaration process" for certifying a "major disaster or emergency" has taken place). We also create an incentive to engage in risky behavior, such as building in flood-prone areas, since the federal disaster relief program partially insures losses.

148. Increasing the ability of local officials to cope with disasters could then reduce, but probably not eliminate, the need for a federal relief program. Reducing the size of the federal program would then reduce the incentives for rent-seeking.

149. The Militia of Montana defines itself as "an educational organization dedicated to the preservation of the freedoms of all citizens of the State of Montana and of the United States of America." The Militia of Montana (visited June 18, 1996) <<http://www.nidlink.com/~bobhard/mom.html>> (on file with the *Montana Law Review*). See also Wayne Laugesen, *Terrorism From Within: Colorado Birthplace of Radical Groups* (visited Feb. 23, 1997) <<http://www.boulderweekly.com/040496/cover.html>> (on file with the *Montana Law Review*) (quoting Ed Dosh of the Militia of Montana: "We are not a paramilitary organization. We exist to provide information and education. We don't carry machine guns and we don't wear camouflage.").

ing "fringe" positions is not solely for the benefit of those with odd beliefs.<sup>150</sup> Laird Wilcox, one of the preeminent scholars of American extremism, argues that:

Extremists sometimes fulfill a "watchdog" function in society in that they're especially sensitive to issues concerning their particular interests. They often deal with the "hot" issues, the controversial issues many people choose to avoid. Many social problems were first identified by extremists, whose agitating and propagandizing forced society to take a closer look and then apply more moderate and realistic solutions. In point of fact, extremists are sometimes correct.<sup>151</sup>

Before they can play a constructive political role, however, the Militias must overcome a serious image problem. Only eight percent of respondents in a national poll conducted in July 1996, for example, said participating in a "citizens militia" was a "good way to be involved" in their communities,<sup>152</sup> and only sixteen percent in a national poll conducted in April 1996 were either "somewhat" or "very sympathetic" to "the goals and concerns of armed citizen militia groups."<sup>153</sup> So long as such large percentages of the public view the Militias negatively, the ability of the Militias to influence our political dialogue is seriously compromised.

The vigilante experience suggests a third role for the Militias: individuals can overcome free rider problems in privately providing law even under adverse circumstances. In doing so, however, the Militias must remember another lesson of the vigilance committees: The successful vigilante movement privately provided law that protected individual rights which were widely recognized and accepted as just. When the vehicle of a vigilance committee was used as a means of thinly disguised theft and murder, as in Johnson County, it not only failed morally but was

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150. Some Militia members have what can charitably be described as odd views of the U.S. Constitution and history. Some hold repulsive political views. Neither disqualifies them from participating in political dialogue. Focusing on engaging in that dialogue rather than on demonizing the Militias is harder and not nearly as much fun, but necessary.

151. GEORGE & WILCOX, *What Is Extremism? Style and Tactics Matter More Than Goals*, in AMERICAN EXTREMISTS, *supra* note 38, at 61-62.

152. See Roper Center Polls, *supra* note 4 (citing Question 24D of the Yankelovich Partners, Inc., Time/CNN Poll).

153. 1996 Los Angeles Times polls revealed that this was a slight increase over the previous year, when (just after the Oklahoma City bombing) only thirteen percent identified themselves as sympathetic. See Roper Center Polls, *supra* note 4 (citing Question 77 of the 1996 poll and Question 11 of the 1995 poll).

also less successful in achieving its goals.

Regardless of their role in the twentieth and twenty-first centuries, the Militias fit within the customary law traditions of the nineteenth century West.<sup>154</sup> The extension of these traditions to modern times is not surprising, given their deep connection to our national self-image.<sup>155</sup> However, these traditions did not merely justify extra-legal actions, they also restricted the domain of extra-legal action. The right of revolution, for example, does not mean each of us is free to rise up as individuals and reject any constraints on our behavior, but only that when enough of us are unjustly constrained, we can rise up together to remove those constraints. Militia opponents often dismiss the Militias' claims regarding the right of revolution.<sup>156</sup> However, as Professor Clark McCauley has pointed out:

If you think these [militia] people are crazy, you have to ask [if]

154. The Militias also seek to situate themselves within the traditions of citizen resistance of the Revolutionary War, as does the larger "Patriot" movement of ultra-conservative activists. See, e.g., HALPERN, *supra* note 30, at 9 (stating: "The choice on their part of the term Patriot, for many of them, reflects a view of themselves, or an image that they wish to project to the public, that they are the inheritors of the tradition of the Revolutionary War patriots.").

155. Richard Slotkin explored how many of the icons of the 19th century West became part of our national consciousness. See generally SLOTKIN, *supra* note 74.

156. For example, Brian Levin of the Southern Poverty Law Center argues there is no such right and that "it is an illegitimate claim." LEVIN, *supra* note 37, at 104. Similarly, U.S. Senator Carl Levin argued:

[I]f our elected officials, at the local, state, or federal level violate the constitutional rights of individual citizens, we have an independent judiciary to protect those rights. . . . We don't need private armies to protect us from the government. We are blessed with having a free ballot and an independent judiciary.

Carl Levin, *Private Militias: Who Are They, And Who Do They Represent?* (visited Sept. 4, 1996) <<http://enhtech.com/veterans/vjvln4/vj4.html>> (on file with the *Montana Law Review*). (Levin's article embodies some of the worst characteristics of the anti-Militia literature; it is filled with statements like this one: "In the course of an ATF investigation in a Detroit suburb, a former militia member told agents that another militia member had said in September 1994, 'I found out where the ATF office is, and I'm going to find a way to take them all out.'" If this is the best evidence that a U.S. Senator can find to condemn the Militia, the anti-Militia case is pretty weak.) See also HALPERN, *supra* note 30, at 9-10 (The checks and balances that are built into this system of government, and the rights of the citizenry to free speech, to a free press, and to freely elect our representatives, provide us with the oversight to ensure that the government does not become a tyranny.).

Conservative writer Karen MacNutt makes a similar argument: "The Constitution is a marvelous document which institutionalized revolution. Within its pages, it provides for the peaceful overthrow of the government every two to six years through the electoral process." Karen L. MacNutt, *Legally Speaking: Militias* (visited Feb. 13, 1997), <<http://www.shadeslanding.com/firearms/macnutt.militia.html>> (on file with the *Montana Law Review*).

there [is] anything the federal government could do that would make you willing to take up arms against it. If you can answer no, then you're entitled to think these people are crazy. But if you say yes, then you'd better hazard a thought that [militia members] are human beings just like you.<sup>157</sup>

Overcoming the collective action problems in actually implementing a revolution is sufficiently daunting that the problem is likely to be too little revolution rather than too much.

Of course, the Militias today face a different set of problems than those faced in the nineteenth century American West. Most importantly, the miners and the Vigilantes largely confronted an absent State, and their actions filled a vacuum. The problem today is in many respects the opposite; the State is omnipresent, filling spaces in which it arguably does not belong. The goal is thus to constrain the State to its proper boundaries rather than to create a substitute for it. Although this is an important difference, it also suggests that Militias face a less substantial collective action problem than did either the miners or the Vigilantes. The Militias need not provide a complete substitute for the State, they need only provide a check to constrain it within its legitimate bounds.<sup>158</sup> The Militias offer several types of actions that, even if they cannot fully restore the balance they seek, may at least arrest any further imbalance.

Primarily, the mere existence of an armed group of trained individuals deters tyranny.<sup>159</sup> There is nothing unconventional

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157. GEORGE & WILCOX, *supra* note 38, at 270 (quoting McCauley.)

158. One commentator has examined Prisoner's Dilemmas in detail; changing the payoffs in a Prisoner's Dilemma is one way of changing the incentives to defect. See ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 134 (1984). Axelrod notes that "it is not necessary to go so far as to eliminate the tension between the short-run incentive to defect and the longer-run incentive to achieve mutual cooperation. It is only necessary to make the long-term incentive for mutual cooperation greater than the short-term incentive for defection." *Id.* at 134. This suggests that the problems the Militias must resolve are smaller than they appear at first.

159. The Militias have been somewhat unclear on how their deterrence function operates. To the extent they believe the existing federal government is a tyrannical one, it is, as one sympathetic observer has noted, "patently absurd" to simultaneously demand the overthrow of the government and insist on the protection of the Militias' constitutional rights. Chris Walker, *Chris Walker's Views on the Militia* (last modified July 18, 1996) <<http://uts.cc.utexas.edu/~cwalker/militia/statement.html>> (on file with the *Montana Law Review*). Walker's statement shows a great deal of sympathy for Militias' views on Second Amendment questions as well as on the potential for tyrannical behavior by the federal government. If their concern is that the government is showing tendencies toward tyranny which need to be corrected, however, their insistence on their First and Second Amendment rights can serve beneficial purposes by forcing courts to confront the Second Amendment.

about this argument; it is firmly rooted in the academic debate over the Second Amendment.<sup>160</sup> Although the Militias state it in less polished terms, they make essentially the same arguments as academics and lawyers. The argument is academically respectable; it is also true. If the government or some group in the government were planning or considering actions to seriously restrict civil liberties, the potential of armed response would certainly raise the cost of such an action and could deter it.<sup>161</sup> Moreover, even if the factual predicate for the Militias' arguments is incorrect,<sup>162</sup> the exercise of their claimed Second Amendment rights could prompt clarification of the Second Amendment's meaning. The United States Supreme Court has never directly confronted most Second Amendment issues, and actually exercising claimed rights could lead to a case clarifying its meaning.<sup>163</sup>

Having a reputation<sup>164</sup> of being willing to resist tyranny

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160. See, e.g., Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L. J. 637 (1989). Even when academics with impeccable reputations make this argument, it is not uncontroversial. For example, Brian Levin of the Southern Poverty Law Center describes Levinson's argument as "a very dangerous theory that is antithetical to the purposes of the Constitution and to our democracy. . . . And the very small handful of legal scholars and gun-rights lobbyists who are proposing the existence of a constitutional right to armed insurrection are perpetrating a dangerous fraud upon this country." LEVIN, *supra* note 37, at 79-80.

161. The existence of armed response is not proof of the existence of the threat, however, and Militias have not been convincing with generally accepted proof grounds when they discuss the specifics of the threats, which they perceive outside of the gun control area, such as the presence of black helicopters. Nonetheless, so long as they confine their activities to private property where they have permission to conduct activities or to public lands where their access is based on the same rules that govern the general population, it is difficult to see why their training exercises pose significant problems. Some people may feel threatened or offended by the mere existence of militia groups, just as others feel threatened by the existence of pornography or adulterous behavior. Senator Carl Levin, for example, objects to the statement in the Southern Michigan Regional Militia's handbook that the "militia exists in order to keep government in check." Levin, *supra* note 156. In a liberal society, such objections are not entitled to much weight, however. One response, apparently largely one of individuals operating without sanction from any of the major Militia organizations, is to threaten individuals who work for state and federal agencies. This is simply wrong and a violation of the rights of the threatened individuals. If the Militias are to play a constructive political role, they must develop a means of controlling those individuals, if any, who belong to their organizations and engage in such behavior.

162. Examples include their claims about markings on road signs or the operations of black helicopters.

163. See generally Donald W. Dowd, *The Relevance of the Second Amendment to Gun Control Legislation*, 58 MONT. L. REV. 79 (1997).

164. Reputation "is embodied in the beliefs of others about the strategy [they] will use." AXELROD, *supra* note 158, at 150. The reputation of an individual or group



can help deter tyranny. Individuals could, of course, create a similar reputation for themselves by announcing their willingness to resist particular acts.<sup>165</sup> It is difficult, however, for individuals to have a significant impact on large social forces like government. A low probability of success undermines individuals' willingness to resist, the essence of a free rider problem. Creating an organization that is capable of having a reputation is one way in which the individual is able to both meaningfully signal the reputation on a larger social scale and to enhance the chances of successfully implementing the strategy of resistance.

Participation in the military-style exercises which alarm militia critics does more than prepare the participants for resisting the armed force of the government, however. In *Gunfighter Nation*, Richard Slotkin argued that

[w]hat is distinctively American is not necessarily the amount or kind of violence that characterizes our history but the mythic significance we have assigned to the kinds of violence we have actually experienced, the forms of symbolic violence we imagine or invent, and the political uses to which we put that symbolism.<sup>166</sup>

The military-style exercises situate the Militias within the dominant myths of American culture and identify them with prior defenses of liberty. The placement of the Militias within what Slotkin terms a "common mythic language" is an important part of bringing the Militias within our ongoing constitutional and political dialogue.<sup>167</sup> As Slotkin notes, "[i]t is the existence of

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thus plays a significant role in how others interact with the individual or group, as those others consider how the individual or group will respond to their actions.

165. For example, displaying a bumper sticker which states, "they will get my gun when they pry it from my cold, dead fingers" signals a firm opposition to gun confiscation measures.

166. SLOTKIN, *supra* note 74, at 13.

167. The adherence to unconventional political and historical beliefs, some of which are simply wrong, may play a role in increasing group cohesion. *See, e.g.* HALPERN, *supra* note 30, at 26 ("Some of these conspiracy scenarios do play an important role in recruiting new members. If you believe that the government is building concentration camps, you naturally are frightened of that prospect and probably want to do something about it."). *Id.*

Such beliefs are common among extremist groups of all types. *See* GEORGE & WILCOX, *supra* note 38, at 9. The belief of some Militias members, for example, that we are living under a state of national emergency created by Franklin Roosevelt which has suspended the constitution itself serves a function despite its falseness because it motivates members to participate as well as to identify other sympathetic individuals with whom to cooperate. This theory is described in EUGENE SCHRODER, *CONSTITUTION: FACT OR FICTION* (1995) and Eugene Schroder, *Emergency War Powers*, 4 *ANTI-SHYSTER* (No. 2) 43-38 (1994). A portion of this book is available at Eugene

this common mythic language, to which all sides can appeal, that makes the conflict of progressive and populist interests a coherent political discourse—a political culture—rather than a clash of mutually uncomprehending and irreconcilable tribes.”<sup>168</sup> Unfortunately, to some nonmembers, these exercises situate the Militias within an alternative set of symbols with less positive connotations. One important task for the Militias is therefore to recapture their public images and reposition themselves as part of this dialogue rather than as part of the tradition of violence associated with, for example, the Klan. Moreover, group training also reinforces the sense of group identification. Indeed, Professor James Aho “feels that a primary function of the militias is as a social activity involving like-minded friends.”<sup>169</sup> The Militias thus can and do serve the function of rebuilding social capital.

Militia groups do more than evoke the Second Amendment; they also distribute materials, make presentations, appear in the media, and so forth. This is clearly within the mainstream of political action in the United States, and to the extent that materials they distribute or views they propound are objectionable, foolish, or inaccurate, the remedy is the traditional one of more speech to cure the problem. These activities produce a reputation for the Militias that signals to nonmembers whether the Militias offer a means for accomplishing change with which the nonmembers wish to ally themselves.<sup>170</sup> Here the public perception of

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Schroder, *Emergency War Powers* (visited Aug. 25, 1995) <[http://www.afcomm.com/fact\\_fiction/factfict.html](http://www.afcomm.com/fact_fiction/factfict.html)> (on file with the *Montana Law Review*). This particular belief is under challenge within the Militia movement. See, e.g., Jon Rolland, *Texas Militia, Letter to Eugene Schroder* (visited May 14, 1995) <<http://www.constitution.org/ltr/5514schr.html>> (on file with the *Montana Law Review*). Other far-right organizations, such as the John Birch Society, have also rejected Schroder's theory. See generally Thomas A. Burzynski, *Is the Constitution Suspended?*, THE NEW AMERICAN, Feb. 5, 1996.

Overcoming a free rider problem is not the end in itself. Despite this positive role in overcoming free rider problems, the persistence of such beliefs is disturbing for several reasons. First, promulgating or acquiescing in the promulgation of false beliefs about history is wrong. Even Militia allies like Robert Brown, publisher of *Soldier of Fortune* magazine, has noted that many of the militia leaders propounding conspiracy theories are “full of [blank].” GEORGE & WILCOX, *supra* note 38, at 266 (quoting Robert Brown) (omission in original). Second, such false beliefs accelerate the breakdown of society by distorting our common past. Third, not only do they not further our understanding of the political problems we face, but it distorts the solutions devised. Energies devoted to ending non-existent or irrelevant states of national emergency are energies not devoted to real solutions. Finally, it marginalizes the Militias, restricting their ability to accomplish their goals.

168. SLOTKIN, *supra* note 74, at 24.

169. GEORGE & WILCOX, *supra* note 38, at 249.

170. The Militia organizations offer a means of public commitment to their vision

the Militias, rather than the reality of the Militias,<sup>171</sup> is critical, and the Militias are losing the battle for control of their reputation. To the extent that the Militias' reputations are those of crazed, racist, anti-Semitic nuts, the potential for alliance with others with whom they share some common aims will be limited.<sup>172</sup> Unfortunately, such a reputation also will enhance the

of a limited government, enhancing their ability to motivate members to participate. Voluntarily assumed characteristics can act as quasi-labels. Axelrod defines labels as fixed characteristics which can be observed by others, like sex or skin color. See AXELROD, *supra* note 158, at 145-46. Although new labels cannot be created (previously unrecognized characteristics can be endowed with new meaning), people can create something similar by voluntarily assuming characteristics, such as distinctive dress or beliefs. Wearing a fraternity ring, for example, signals to others that you are a member of a group. This can have significant advantages in overcoming free rider problems because the pre-existing group relationship provides an incentive to internalize the well-being of others in the group. The role of the Masons in the Montana Vigilance Committee is such an example. See *supra* note 49 and accompanying text. Unlike sex or skin color, of course, a Militia member can shed his quasi-label by withdrawing from the Militia. The ability to shed the quasi-label is actually an advantage for it prevents the development of the bad consequences of labels identified by Axelrod. AXELROD, *supra* note 158, at 148-50 (discussing drawbacks of labels). However, the creation of the quasi-label can help overcome the free rider problems in organizing collective action.

171. Just who are the members of the Militias is hard to say and depends on how "member" and "Militia" are defined. See GEORGE & WILCOX, *supra* note 38, at 255-60. George and Wilcox, who have studied the movement as extensively as anyone and who bring to the subject a rare degree of objectivity, suggest:

The movement consists primarily of white males between thirty and sixty, although a surprising number of women are active, too. Several blacks have been identified with militias, along with a few Asians, American Indians, and even some Jews. Most militia activists appear to have roots in their communities, with families, jobs, and children in school.

*Id.* at 249. They go on to categorize the beliefs of militia members as "generally conservative in outlook, although not very ideological." *Id.*

The negative images of militia groups have even entered popular fiction. Anne Rice's latest novel, for example, opens with a recitation of how the world "seemed just a little more mad than usual," which includes mention of what is "believed" to be militia involvement in the Oklahoma City bombing: "In Oklahoma City, a Federal office building had been blown sky high—and not by alien terrorists, it was believed, but by our own Americans, members of the militia movement they were called." ANNE RICE, *SERVANT OF THE BONES* 5 (1996). Rice's narrator goes on to compare the militia unfavorably to "the hippies of years before" who, the narrator says, "had merely lain on railroad tracks and sung in ranks" while "these new crewcut militants . . . killed our own people. By the hundreds." *Id.*

172. Having a limited appeal may not prevent the Militias from having an impact. Even a small number of well trained, armed individuals could, after all, significantly raise the cost of imposing tyranny. However, to the extent that members have more ambitious goals in restoring constitutional balance, they will have to reach beyond their current membership. Militias and their leaders have also begun to play a role in mediating conflicts between law enforcement groups and others. At times Militia members play a direct role in negotiations, at times they seek to deter over-reaction by State law enforcement agencies by their presence at the scene of confron-

chances of alliances with actual crazed, racist, anti-Semitic nuts, further weakening the Militias' abilities to create positive change.<sup>173</sup>

Finally, the Militias can help to make the future more important relative to the present, which enhances cooperation because it allows the use of the threat of future retaliation to ensure cooperation today.<sup>174</sup> The future can become more important in political terms if the voters are able to commit to future action based on politicians' current actions.<sup>175</sup> By continuing to raise structural balance issues, the Militias increase the likelihood of both members and nonmembers alike paying attention to such issues at the next election. Politicians seeking votes, therefore, may become more sensitive to such issues even if Militias continue to reject direct political involvement.

### III. CONCLUSION

The complex problems facing our society and the difficulties we have in adapting our form of government to the modern world have produced the Militias. The Militia Movement is as complicated as the problems that created it, and it reflects the strengths and weaknesses of our society as a whole. While valuable themselves, the Militias' responses to societal imbalances are inadequate to secure the Militias' primary goal of restoring balance to government. What then can the Militias do?

Confronted with the problem of a government which has lost its internal structural balance, the Militias present a partial solution. Even if they cannot by themselves resolve all the prob-

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tations. Both of these functions are potentially valuable, although Militias need to be careful in choosing the circumstances of their interventions if they are to be able to engage nonmembers in dialogue.

173. Laird Wilcox argues that extremism is identified more by its style than by the content of extremists beliefs. The extremist style "hampers our understanding of important issues, muddies the waters of discourse with invective, defamation, self-righteousness, fanaticism, and hatred, and impairs our ability to make intelligent, well-informed choices." See GEORGE & WILCOX, *supra* note 38, at 55. Unfortunately, much of the publicity surrounding the Militias suggests the presence of a style that fits Wilcox's description of extremism: intolerance, disregard for the rights of others, and taking a political idea to its limits. See *id.* at 54. To the extent that the Militias are utilizing this extremist style, and much of it may be attributed to media reports, they need to move beyond it.

174. See AXELROD, *supra* note 158, at 126.

175. The Michigan Militia Corps, for example, distributes a weekly e-mail newsletter which includes political analysis. These can be found at *Weekly Update: Michigan Militia Corps Resources* (visited Feb. 13, 1997) <<http://mmc.cns.net/update/4-4-f.html>> (on file with the *Montana Law Review*).

lems we face in preserving the American experiment in limited government, they can help overcome some of the free rider problems in limiting government. The Militias have the potential to play a significant role in restoring a balance between public and private, authoritarian law and customary law, and State and individual. The realization of that potential depends in part, however, on moving beyond the contentious, conspiracy-theory-oriented world-view to which some Militia members adhere and developing their positive case for limited government. If the Militias want to see a return to a government built around their version of the vision of Washington, Jefferson, Madison, and the other Founders, they must articulate a positive case for that vision which goes beyond nostalgia.

Most importantly, however, the Militias offer a challenge to American society: if we believe in limited government, we must design ways to restore the balance of competing forces by which we have historically limited our governments' reach. Those who believe in limited government ought to welcome the Militias' involvement while we travel the same path. At the same time, we should not hesitate to condemn them when they turn to repulsive paths defined by racism or anti-Semitism.<sup>176</sup>

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176. Some critics of the Militias who share some of its distrust of the state have argued that the proper response is to "know what this movement is and criticize it rather than look for affinities with it." Janet Biehl, *Militia Fever: The Fallacy of 'Neither Left nor Right,'* 37 GREEN PERSPECTIVES 1, (visited Sept. 4, 1996) <<http://nwcitizen.com/publicgood/reports/milfev2.html>> (on file with the *Montana Law Review*).