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## GUNS, WORDS, AND CONSTITUTIONAL INTERPRETATION

L.A. POWE, JR.\*

In the aftermath of the Oklahoma City bombings, Linda Thompson, the self-appointed Acting Adjutant General of the Unorganized Militia of the United States, proclaimed that the Second Amendment "isn't about hunting ducks; it's about hunting politicians."<sup>1</sup> She might as well have added that we ought to shoot a few politicians right now as a message to the rest to wake up and stop stealing our rights.<sup>2</sup>

Thompson's statement represents the interesting, and not infrequent, constitutional blend of a First Amendment exercise to promote Second Amendment rights. She readily can be distin-

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\* Anne Green Regents Chair, The University of Texas. Many thanks to Philip Bobbitt, Tom Krattenmaker, Doug Laycock, Sandy Levinson, Richard Markovits, Glenn Reynolds, and Eugene Volokh for their extraordinarily thoughtful comments and suggestions on earlier drafts of this article.

This is an expanded version of the Cutler Lecture at the William & Mary School of Law, delivered on October 22, 1996.

1. David C. Williams, *The Militia Movement and the Second Amendment Revolution: Conjuring with the People*, 81 CORNELL L. REV. 879, 894 (1996) (quoting Linda Thompson).

2. Waco and Ruby Ridge easily could be offered as examples of rights being stolen. See Randy E. Barnett, *Foreword: Guns, Militias and Oklahoma City*, 62 TENN. L. REV. 443, 453-57 (1995) (discussing the Waco and Ruby Ridge incidents as extraordinary uses of paramilitary force to suppress dissidents).

guished from mainstream constitutional law scholars both by profession and by example. Civil libertarians with strong First Amendment affinities traditionally have had even less use for the Second Amendment than gun advocates have had for the civil liberties of others.<sup>3</sup> In general, First Amendment scholars view the rights protected by the Second Amendment as deserving less protection than does thought.<sup>4</sup> They agree with the prevailing constitutional interpretation, which holds that the First Amendment guarantees strong individual rights to freedom of expression while the Second Amendment guarantees no individual rights at all, only a collective right to have a very well regulated militia.<sup>5</sup> In the words of the American Civil Liberties Union (ACLU), "[e]xcept for lawful police and military purposes, the possession of weapons by individuals is not constitutionally protected."<sup>6</sup>

A small but growing, yet increasingly frustrated, group of constitutional scholars is arguing that the Second Amendment offers strong protection for an individual right to possess guns.<sup>7</sup> Wishing parity with the First Amendment, they often place a nice wistful sentence or two about the First Amendment in their

3. See Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

4. See *id.* at 639-40. The notable exception to conventional scholarship is William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236 (1994).

5. Cf. Levinson, *supra* note 3, at 639-40 (presenting scholars' statements regarding whether the Second Amendment provides individual rights or simply the collective right to have a militia).

6. ACLU, *The ACLU on Gun Control* (last modified Oct. 2, 1996) <<http://www.aclu.org/library.aaguns.html>> (quoting the ACLU Policy on Gun Control #47). The Southern California chapter of the ACLU has created an Internet website to discuss its "Bill of Rights" (Amendments 1-10, 13-15, and 19). See ACLU of Southern California, *Bill of Rights* (visited Oct. 21, 1996) <[http://www.aclu-sc.org/bill\\_of\\_rights.html](http://www.aclu-sc.org/bill_of_rights.html)>. Individual Amendments are discussed in a question-and-answer format. One of the questions is, "Does the Second Amendment in any way guarantee gun rights to individuals?" The answer is "No. The weight of historical and legal scholarship clearly shows that the second Amendment was intended to guarantee that states could maintain armed forces to resist the federal government." ACLU of Southern California, *Second Amendment* (visited Oct. 21, 1996) <<http://www.aclu-sc.org/2nd-2.html>>.

7. The literature is collected in Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 465 n.18 (1995).

articles.<sup>8</sup> Their “conversion” rate, however, is incremental and slow—one person at a time every so often. In the meantime, most scholars reject the individual rights claim without seriously considering the merits of the scholarship on both sides of the issue. One reason is that the Supreme Court supposedly settled the issue, rejecting an individual rights claim, more than fifty years ago.<sup>9</sup> Another reason may be that the new Second Amendment scholarship conflicts with the hoped-for converts’ political views.<sup>10</sup> Yet another reason may be that it analyzes the amendment in terms of text and history.<sup>11</sup> The former is unconvincing (save for those who wish to be convinced), while the latter rests on a claim that the dead hand of the past should rule the present. The debate, on its present terms, seems stagnant because it has become repetitious and stylized.

Neither First Amendment nor Second Amendment scholars, nor any other constitutional law experts, have ever suggested that it might be enlightening to combine the two amendments and explore their interpretation not as a pair, but jointly nevertheless.<sup>12</sup> Putting the two amendments through the various modes of constitutional interpretation yields some interesting insights about both constitutional interpretation and preferences for certain rights. This Article explores these insights, after first placing Thompson’s comments in the context of modern constitutional doctrine.

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8. Cf. Van Alstyne, *supra* note 4, at 1239-41 (comparing the development of Second Amendment jurisprudence to that of First Amendment jurisprudence).

9. See *United States v. Miller*, 307 U.S. 174, 178 (1939) (rejecting the argument that registration of a sawed-off shotgun violated the Second Amendment, and stating that the Second Amendment protected organized military groups, not the individual “right to keep and bear” a sawed-off shotgun).

10. See Levinson, *supra* note 3, at 642 (suggesting that many libertarians may be embarrassed by the Second Amendment, because they support prohibitory regulation of guns).

11. See *id.* at 643-51 (presenting textual and historical analyses of the Second Amendment).

12. In a short op-ed piece for the *Philadelphia Inquirer’s* celebration of the bicentennial of the Bill of Rights, Sanford Levinson connected the two amendments, both by noting their function of checking government power and by suggesting that if the First Amendment fails there then may be resort to the Second. See Sanford Levinson, *The Right to Bear Arms*, PHILA. INQUIRER, May 1, 1991, at 13.

## I. THE ISSUE

If both Linda Thompson's comments and my hypothetical extension of them were placed on a Constitutional Law exam, professors would have no difficulty flunking any student who did not recognize that Thompson's speech was protected fully by the current positive law of the First Amendment. Most professors probably would approve of this result. In the first place, she was at most advocating assassination, and generalized advocacy of violence receives full protection.<sup>13</sup> Only when advocacy merges into incitement would the speaker lose constitutional protection.<sup>14</sup> Second, "right now" is ambiguous as to time. *Brandenburg v. Ohio*<sup>15</sup> as well as *Hess v. Indiana*<sup>16</sup> mandate an immediacy of action that Thompson's words, issued over broadcast television, lack. Third, there may be no basis for finding, as also required by *Brandenburg*, that the prospect of attendant assassination is high.<sup>17</sup> Thus, like Robert Watts,<sup>18</sup> Thompson was just letting off steam, an important safeguard provided by a system of freedom of expression.<sup>19</sup>

There was a time, however, when such utterances, as a matter of positive law, would have justified a jail sentence. As recently as 1927, the Court held that the government could criminalize a speech if it could have reasonably believed that the

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13. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (holding that the First Amendment's protection of free speech extends to "advocacy of the use of force or of law violation").

14. See *id.* (forbidding a state to punish advocacy of violence unless such speech "is directed to inciting or producing imminent lawless action").

15. See *id.* (holding that the incitement must be designed to produce "imminent" action).

16. 414 U.S. 105, 108 (1973) (holding that the state cannot punish speech that "amounted to nothing more than advocacy of illegal action at some indefinite future time").

17. See *Brandenburg*, 395 U.S. at 447 (holding that the advocacy must be not only directed to producing lawless action, but must also be "likely to incite or produce such action").

18. See *Watts v. United States*, 394 U.S. 705 (1969) (per curiam) (reversing a Vietnam draftee's conviction for threatening to shoot the President, and ruling that his statement was merely crude political hyperbole).

19. See *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring) (expounding upon the value and the necessity of free expression).

speech might cause harm.<sup>20</sup> It is hardly unreasonable for a legislature to believe that speech advocating political assassination, even if it is merely hyperbolic, raises the probability that killings would occur.<sup>21</sup> Therefore, the government could prohibit such speech. This, however, was a long time ago, during the First Amendment Dark Ages of *Schenck*,<sup>22</sup> *Debs*,<sup>23</sup> *Abrams*,<sup>24</sup> *Gitlow*,<sup>25</sup> and *Whitney*.<sup>26</sup>

A clever answer might note that the laws were aimed at preventing death, injury, and the destruction of property—surely a compelling state interest. They were narrowly tailored to ban the statements that implicated the interest, and no less restrictive alternative seemed likely to work because the laws against seditious conduct did not appear to deter all such conduct.<sup>27</sup> There certainly is no reason, though, to believe that such an argument would gain assent from the current Supreme Court, nor does it have much academic support.

Unless the constitutional law professor were asking an interpretive question about undiscussed constitutional provisions, analysis of the Second Amendment would not matter because, with a single limited exception,<sup>28</sup> no Constitutional Law

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20. See *id.* at 371.

21. See *Gitlow v. New York*, 268 U.S. 652, 669 (1925) (“Such utterances . . . involve danger to the public peace and to the security of the State. They threaten breaches of the peace and ultimate revolution. And the immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen.”).

22. *Schenck v. United States*, 249 U.S. 47 (1919).

23. *Debs v. United States*, 249 U.S. 211 (1919).

24. *Abrams v. United States*, 250 U.S. 616 (1919).

25. *Gitlow*, 268 U.S. 652.

26. *Whitney v. California*, 274 U.S. 357 (1927).

27. This argument is taken from Eugene Volokh, *Freedom of Speech, Permissible Tailoring, and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417 (1996).

28. In the third edition of their splendid casebook, Paul Brest and Sanford Levinson shoehorned in four pages about the Second Amendment, under the sub-heading: “Note: An Incorporation Conundrum: The Second Amendment.” PAUL BREST & SANFORD LEVINSON, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 550-54 (3d ed. 1992). The reason for the inclusion was Levinson’s discovery of the Second Amendment and his willingness to take it seriously. See Levinson, *supra* note 3.

I do not believe it an exaggeration to state that Levinson’s article made Second Amendment scholarship respectable. This Article follows the methodology used by Levinson and our mutual colleague Philip Bobbitt. By providing a comparative constitutional analysis with a well-accepted right (the First Amendment), and by evalu-

casebooks cover the Second Amendment.<sup>29</sup> Our hypothetical professor quickly could note that Thompson fails as a constitutional interpreter because the Second Amendment is not about political assassination—no constitution could be that stupid. “Only madmen . . . can suppose that militias have a constitutional right to levy war against the United States, which is treason by constitutional definition.”<sup>30</sup> Instead, by its very terms, the Amendment is addressed to the militia and military.<sup>31</sup> Therefore, it is not about duck hunting either; as John Ely has noted: “[T]he framers and ratifiers apparently opted against leaving to the future the attribution of purposes, choosing instead explicitly to legislate the goal in terms of which the provision was to be interpreted.”<sup>32</sup>

Hence for all practical purposes, the Second Amendment is a dead letter, deader indeed than the Third Amendment, which still could be violated at least theoretically.<sup>33</sup> Former Harvard Law School Dean and Solicitor General Erwin Griswold summed

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ating the increased scholarship that Levinson made legitimate, I hope to add to his analysis.

29. After much of this Article was written, the eighth edition of the Lockhart casebook was published. See WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW (8th ed. 1996). In a note following its discussion of *Dennis v. United States*, 341 U.S. 494 (1951), the authors ask: “Does the second amendment guarantee individuals (or groups) the right to bear arms for protection including protection against government tyranny? If the second amendment is so construed, does the second amendment shed light on the first?” *Id.* at 647 (footnote omitted). The questions are quite apt, although the casebook offers no guidance on how to answer them without reading the articles cited.

30. Garry Wills, *To Keep and Bear Arms*, N.Y. REV. BOOKS, Sept. 21, 1995, at 62, 69 (emphasis deleted) (citation omitted). In addition to the Treason Clause, Wills could have cited numerous other clauses authorizing the suppressions of rebellions and insurrections. See *infra* notes 522-25 and accompanying text.

31. In fairness to Thompson, she knew this. Her full statement was: “The militia is what the Second Amendment is about, because it isn’t about duck hunting; it’s about hunting politicians.” But what she meant by “militia” differs greatly from what a typical Constitutional Law scholar means.

32. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 95 (1980).

33. Cf. *Engblom v. Carey*, 677 F.2d 957 (2d Cir. 1982) (holding that the occupation of striking correction officers’ dormitory rooms by National Guardsmen would constitute a violation of the officers’ Third Amendment rights as long as the officers had a possessory interest in the rooms). See generally William Sutton Fields, *The Third Amendment: Constitutional Protection from the Involuntary Quartering of Soldiers*, 124 MIL. L. REV. 195 (1989) (discussing the Third Amendment).

it up tersely: "[T]hat the Second Amendment poses no barrier to strong gun laws is perhaps the most well-settled proposition in American constitutional law."<sup>34</sup> When someone of Griswold's stature can issue such a blanket statement, it indicates that there are others supporting this viewpoint.<sup>35</sup>

If someone knew nothing about the amendments, she might think it strange that the first of the amendments in the Bill of Rights enjoys a robust existence, but the very next is so stunted that it may be deemed dormant. If she knew something about legal scholarship, she would not even have to be cynical to wonder if the reason the First Amendment flourishes and the Second Amendment withers is that legal elites the one, but not the other. If that explanation should prove true, is such bias a legitimate way to interpret a constitution?<sup>36</sup>

There is no little irony in the dominant approaches to the first two amendments. The First Amendment has been construed to guarantee a right to advocate revolution, and almost all scholars applaud this construction.<sup>37</sup> Those same First Amendment scholars, however, would believe it absurd to construe the Second Amendment to have anything to do with revolution or, for that matter, any individual right. Yet among those who have written articles, as opposed to a sentence or a paragraph, on the Second Amendment in the last fifteen years, little credibility is given to categorically rejecting any connection between the Amendment and individual rights.<sup>38</sup> A substantial body of

34. Erwin N. Griswold, *Phantom Second Amendment 'Rights'*, WASH. POST., Nov. 4, 1990, at C7.

35. See generally Robert J. Cottrol, *Introduction*, in *GUN CONTROL AND THE CONSTITUTION: SOURCES AND EXPLORATIONS ON THE SECOND AMENDMENT* x (Robert J. Cottrol ed., 1994) (discussing the relationship between the debate over the Second Amendment and the debate over gun control).

36. Cf. Douglas Laycock, *Notes on the Role of Judicial Review, the Expansion of Federal Power, and the Structure of Constitutional Rights*, 99 YALE L.J. 1711, 1713 (1990) (arguing that the Supreme Court must make substantive judgments in order to balance the literal demands of the Constitution with the need for implied exceptions).

37. A significant exception to this widely held view is Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 37 (1971) (concluding that the advocacy of revolution should not be considered political speech because it violates the very premises that justify protecting political speech).

38. See, e.g., Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of*



scholarship, including work by Sanford Levinson,<sup>39</sup> Akhil Amar,<sup>40</sup> and William Van Alstyne,<sup>41</sup> has been synthesized by Glenn Reynolds into what he calls the "Standard Model" of the Second Amendment,<sup>42</sup> and this model concludes that the Amendment is precisely about revolution and individual rights.<sup>43</sup> The Second Amendment guarantees an individual right to bear arms because the Second Amendment is about fear of tyranny.<sup>44</sup> Yet the Standard Model thus far remains hermetically sealed from federal judicial interpretation.

Because this growing literature has framed the Second Amendment debate over whether there is a guarantee of an individual right to bear arms, I shall treat the debate, as addressed by the literature, on its own terms and assume that the dichotomy is between an individual right and a generic collective right that guarantees guns only in the context of a regulated state militia. It should be noted, however, that adherents to the collective right theory are split over the issue of who has the authority to regulate the militia. The dominant view is that the authority initially rests with the states, but is ultimately subject to federal control.<sup>45</sup> Under this view, neither an individual nor a state could control access to weapons; the Second Amendment is rendered nugatory.<sup>46</sup> A potential, but untested view, is that the ultimate control rests with the states.<sup>47</sup> This view sits un-

*the Second Amendment*, 82 MICH. L. REV. 204 (1983) (asserting that the Second Amendment does guarantee an individual's right to possess weapons); Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599 (1982) (making a substantially similar argument).

39. Levinson, *supra* note 3.

40. Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1205-11, 1261-62 (1992) [hereinafter Amar, *Fourteenth Amendment*]; Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1162-73 (1991) [hereinafter Amar, *Constitution*].

41. Van Alstyne, *supra* note 4.

42. See Reynolds, *supra* note 7, at 464.

43. See *id.* at 475.

44. See *id.* at 469-70.

45. See U.S. CONST. art. I, § 8, cls. 15 & 16; see also Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 VAL. U. L. REV. 107, 114-15 (1991) (discussing the significance of the "Militia Clauses" in interpreting the Second Amendment).

46. Cf. Henigan, *supra* note 45, at 115 (explaining that the Second Amendment cannot support insurrection because the militia is to function as an instrument of governmental authority).

47. See Glenn Harlan Reynolds & Don B. Kates, *The Second Amendment and*

easily with the outcome of the Civil War, and the use of the National Guard to integrate schools in Little Rock a century later.<sup>48</sup> The third collective rights position is similar to the individual rights view in that it eschews a role for government. According to this theory, the Second Amendment rests collectively with the people, who may choose to become an aroused populace to defend their liberty if it is endangered. This, indeed, is the claim of a right to revolution;<sup>49</sup> it looks much like the Standard Model, but is wedded to civic republicanism, and therefore would not constitutionally protect gun ownership for self-defense or as a hobby. This Article treats separately these greatly differing collective theories only where necessary.

## II. DOING CONSTITUTIONAL LAW

The Standard Model literature typically makes some passing references to the First Amendment. Second Amendment literature in general, however, is so wedded to the implicit assumption that originalism is the decisive mode for constitutional interpretation that the authors have not perceived or explored the interpretive interrelation of the two amendments. In hoping to further the Second Amendment debate, my goal is modest. I am interested *only* in the question of whether the Second Amendment has meaning today—not in what that meaning might be in any particular case. In determining whether the Second Amendment has meaning, one first must determine which of the two views, individual rights or collective rights, is more correct. If the collective rights theory is correct, the Second Amendment is, for all practical purposes, a dead letter. Thus any regulation of guns is allowable without regard to constitutional limitation, as

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*States' Rights: A Thought Experiment*, 36 WM. & MARY L. REV. 1737, 1738 (1995).

48. See *infra* notes 532-35 and accompanying text.

49. New Hampshire and Tennessee each placed an explicit right of revolution in their constitutions. See Reynolds, *supra* note 7, at 472 n.44. Other states simply recognized that the people had a right to change their government if they so wished, without specifying the means by which they might do so. Cf. Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 475-81 (1994) (discussing states' provisions for popular reform of governmental institutions).

Dean Griswold believed.<sup>50</sup> If the individual rights theory is correct, however, then the Second Amendment must be considered, as at least a potential constitutional barrier, in the context of regulatory efforts. I am concerned wholly with these questions.

What I propose to do is view the two amendments together, not as part of a general theory of constitutional law—for that would yield only the theory's preordained result—but instead from the perspective of a constitutional lawyer. That is, I propose to look at the two amendments in the context of *doing* constitutional law. As Philip Bobbitt's seminal work teaches, we *do* constitutional law by constructing and analyzing arguments based on those accepted ways that we have chosen to interpret our Constitution:<sup>51</sup> by its text, by its history, by the structure of the institutions the Constitution creates or recognizes, by the decisions of the Supreme Court, by the collective traditions of the American people, by the consequences of the decision, and possibly by moral philosophy or natural law.<sup>52</sup> By doing constitutional law in this manner, the First Amendment, which is by far the more familiar,<sup>53</sup> perhaps can help us understand and illuminate the Second.

Any rational approach to constitutional interpretation begins with text. Because, however, one side of the debate contends that the issues under consideration have been resolved authoritatively by the Supreme Court, I will begin with the Court's decisions.

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50. See *supra* note 34 and accompanying text.

51. See PHILIP BOBBITT, *CONSTITUTIONAL FATE* (1982) [hereinafter BOBBITT, *CONSTITUTIONAL FATE*]; PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991).

52. The perceptive reader will note that this model does not follow Bobbitt's modalities exactly. I refer to tradition where Bobbitt uses "ethical argument," and I use consequentialism where he uses the more Bickelian "prudential argument." See BOBBITT, *CONSTITUTIONAL FATE*, *supra* note 51, at 59, 93. Finally, Bobbitt does not accept that either natural law or a rights-based moral philosophy could be a source of constitutional argument, while I believe that decisions like *Roe v. Wade*, 410 U.S. 113 (1973), cannot be understood otherwise. *But see infra* text accompanying notes 588-91 (discussing the problems of natural law argument). See *generally* Symposium, *Philip Bobbitt's Constitutional Interpretation*, 72 *TEX. L. REV.* 1703 (1994) (addressing Bobbitt's theories of interpreting the constitution).

53. Because the First Amendment is more familiar, I will sketch the First Amendment analysis in each modality and then devote the bulk of my attention to the parallel Second Amendment analysis.

### A. Doctrine

There is little reason to belabor First Amendment doctrine and precedent. In the humble beginnings of Supreme Court interpretation during the first quarter of the twentieth century, the Court appeared incapable of believing that the First Amendment had any meaning in addition to the protections that the common law would offer. From *Patterson*<sup>54</sup> to *Whitney*,<sup>55</sup> the Court concluded that the speech in question might have a harmful effect and therefore could be suppressed.

Beginning with *Near*<sup>56</sup> and *Stromberg*<sup>57</sup> in 1931, and interrupted only by the anticommunist crusade, the Supreme Court made the First Amendment a bastion of individual liberty, a process culminating in Justice Harlan's powerful opinion in *Cohen v. California*.<sup>58</sup> This powerful protection for speech continues to the present as witnessed by decisions striking down bans on pornography,<sup>59</sup> indecency,<sup>60</sup> hate speech,<sup>61</sup> and flag

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54. *Patterson v. Colorado*, 205 U.S. 454 (1907) (holding that contempt is defined by local law, and that the Constitution did not provide any additional protection for articles and a cartoon that disparaged the Supreme Court of Colorado, and were ruled in contempt).

55. *Whitney v. California*, 274 U.S. 357 (1927) (stating that the freedom of speech is not absolute, and the state may punish those who abuse this freedom by saying things contrary to public peace or welfare).

56. *Near v. Minnesota*, 283 U.S. 697 (1931) (striking as unconstitutional a state statute enjoining the publication of a scandalous newspaper, as applied to publications charging government officials with corruption).

57. *Stromberg v. California*, 283 U.S. 359 (1931) (declaring unconstitutional part of a state statute criminalizing the display of a red flag as a symbol of opposition to organized government).

58. 403 U.S. 15 (1971) (reversing the defendant's conviction for disturbing the peace, when the conviction was based on his wearing a jacket emblazoned with "Fuck the Draft" into a courthouse).

59. See *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985) (declaring unconstitutional an ordinance prohibiting "pornography" because it discriminated against speech based on its content, without reference to the standard required for material to be obscene), *aff'd mem.*, 475 U.S. 1001 (1986).

60. See *Denver Area Educ. Telecomms. Consortium v. FCC*, 116 S. Ct. 2374 (1996) (striking as unconstitutionally broad a provision of the Cable Television Consumer Protection and Competition Act of 1992, which allowed cable operators to prohibit indecent programming on public access channels); *Sable Communications, Inc. v. FCC*, 492 U.S. 115 (1989) (holding that "dial-a-porn" amendments to the Communications Act of 1934, which banned indecent interstate commercial telephone messages, were unconstitutionally broad limitations on speech).

61. See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (holding unconstitutional a

burning.<sup>62</sup> Beyond protecting the right to offend, the Court has, contrary to the World War I cases, enshrined a right to advocate revolution.<sup>63</sup> Over the years, First Amendment jurisprudence has been so thoroughly doctrinalized that jargon dominates the opinions:<sup>64</sup> viewpoint-neutrality and content-neutrality,<sup>65</sup> time, place and manner,<sup>66</sup> secondary effects,<sup>67</sup> compelling interest,<sup>68</sup> least restrictive alternative,<sup>69</sup> substantial government interest,<sup>70</sup> and four-part tests.<sup>71</sup> As with any other mature doctrinal area, neither the text nor its surrounding history is perceived as

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city ordinance prohibiting the display of symbols that would arouse anger in others on the basis of their race, gender, or religion).

62. See *United States v. Eichman*, 496 U.S. 310 (1990) (subjecting the Flag Protection Act of 1989 to "the most exacting scrutiny," because its infringement of protected expression, and finding the Act unconstitutional); *Texas v. Johnson*, 491 U.S. 397 (1989) (interpreting flag burning as expressive conduct, protected by the First Amendment, and therefore concluding that a criminal conviction for flag burning was unconstitutional).

63. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (holding that advocacy of revolution is constitutionally protected unless it is directed to inciting imminent lawless action and is likely to produce such action).

64. See generally Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165 (1985) (criticizing the style of recent Supreme Court opinions as relying too heavily on formalized "tests" or "standards").

65. See, e.g., *R.A.V.*, 505 U.S. at 388-89; *Burson v. Freeman*, 504 U.S. 191, 196-98 (1992); *Boos v. Barry*, 485 U.S. 312, 318-21 (1988).

66. See, e.g., *Denver Area Educ. Telecomms. Consortium v. FCC*, 116 S. Ct. 2374, 2412-13 (1996); *Capitol Square Review & Advisory Bd. v. Pinette*, 115 S. Ct. 2440, 2446 (1995); *Burson*, 504 U.S. at 197.

67. See, e.g., *Barnes v. Glen Theatre, Inc.* 501 U.S. 560, 583-86 (1991); *Boos*, 485 U.S. at 320-21; *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-49 (1986).

68. See, e.g., *Burson*, 504 U.S. at 198-99; *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 657 (1999); *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 126 (1989); *Boos*, 485 U.S. at 321-29.

69. See, e.g., *Sable*, 492 U.S. at 129; *Boos*, 485 U.S. at 326.

70. See, e.g., *Florida Bar v. Went for It, Inc.*, 115 S. Ct. 2371, 2376 (1995); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 299 (1984); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 512 (1981).

71. See *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968) (establishing a four-part test for deciding when a government regulation that incidentally burdens speech is sufficiently justified); see also, e.g., *Barnes*, 501 U.S. at 567-72 (applying the *O'Brien* test).

being relevant to the disposition of the litigation,<sup>72</sup> with one possible exception.

Prior restraints doctrine is that exception. No one disputes that the First Amendment was designed to preclude *all* prior restraints.<sup>73</sup> The fact that current doctrine would allow *any* prior restraints makes press advocates very uneasy.<sup>74</sup> These enthusiasts typically become originalists,<sup>75</sup> and like most originalists, they believe that any move from originalism is unjustified.

The current doctrine on prior restraints suggests that it is very difficult, but not impossible, to get judicial approval for one. The "core" of the originalist conception therefore may be preserved—depending on whether the core is deemed a total ban on prior restraints or just a ban on most restraints. This point is worth making because it introduces the possibility that the "core" of the Second Amendment similarly could be protected by just a single decision of the Supreme Court.

Second Amendment doctrine is barely embryonic. There are only three relevant cases: *Cruikshank*,<sup>76</sup> *Presser*,<sup>77</sup> and *Miller*.<sup>78</sup> *Cruikshank* has no comparison in First Amendment doc-

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72. See Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249 (1995) (asserting that the doctrinal tests used by the Supreme Court mean little to the actual resolution of cases); Volokh, *supra* note 27.

73. See LEONARD W. LEVY, *LEGACY OF SUPPRESSION* 173 (1960) (explaining that freedom of the press initially was envisioned as freedom from prior restraints).

74. Prior restraints recently have been used in areas in which no criminal laws exist to prohibit dissemination of the information. See *McGraw-Hill Cos. v. Procter & Gamble Co.*, 116 S. Ct. 6 (1995) (mem.) (denying an application to stay the district court order that restrained publication of an article disclosing any information filed under seal with the district court); *United States v. Noriega*, 917 F.2d 1543 (11th Cir. 1990) (denying relief from the district court order restraining broadcast of recorded conversations between the criminal defendant and his attorney).

75. Press advocates almost always are originalists. For a discussion of prior restraints by nonoriginalists, see Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11 (1981); John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409 (1983); L.A. Powe, Jr., *The H-Bomb Injunction*, 61 U. COLO. L. REV. 55 (1990).

76. *United States v. Cruikshank*, 92 U.S. 542 (1875).

77. *Presser v. Illinois*, 116 U.S. 252 (1886).

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

trine, but *Presser* may be compared to *Patterson*<sup>79</sup> and *Miller* is analogous to *Schenck*.<sup>80</sup>

*Cruikshank* involved the federal convictions arising from the Colfax Massacre in Louisiana, "the bloodiest single act of carnage in all of Reconstruction," in which an armed band of the Ku Klux Klan killed more than one hundred blacks.<sup>81</sup> In part, indictments charged the defendants with denying the victims their federally protected rights to peaceably assemble and to bear arms.<sup>82</sup> Chief Justice Waite concluded that those rights existed prior to the Constitution and therefore were not created by it; the rights solely limited actions of the federal government, not those of private citizens.<sup>83</sup> Accordingly, the defendants had violated no federal rights.<sup>84</sup> Cruikshank and the other defendants only could be tried in the state courts for ordinary state law crimes, such as murder.<sup>85</sup>

*Presser* flowed directly from *Cruikshank*. In *Presser*, the Court upheld an Illinois statute prohibiting parading with arms except when done by the organized militia.<sup>86</sup> The statute had been enacted after Chicago's railroad strike of 1877, a controversy that left both sides arming themselves for the possibility of another strike.<sup>87</sup> *Presser* led a group of German union members who had formed an armed, uniformed company for purposes of self-defense.<sup>88</sup> The Court rejected *Presser's* Second Amendment claim, as it did all Bill of Rights claims against the states during that era, because the Fourteenth Amendment was not deemed to apply the Second Amendment to state government actions.<sup>89</sup> Although that conclusion would have been sufficient to decide the case, the Court also noted that to deny the states the power to

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79. *Patterson v. Colorado*, 205 U.S. 494 (1907).

80. *Schenck v. United States*, 249 U.S. 47 (1919).

81. ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877*, at 530 (1988).

82. *See United States v. Cruikshank*, 92 U.S. 542, 551-53 (1875).

83. *See id.* at 552-53.

84. *See id.*

85. *See id.* at 559.

86. *See Presser v. Illinois*, 116 U.S. 252, 264-66 (1886).

87. *See PAUL AVRICH, THE HAYMARKET TRAGEDY* 46 (1984).

88. *See id.* at 45-46.

89. *See Presser*, 116 U.S. at 265.

regulate, as Illinois had, would preclude an exercise of power "necessary to the public peace, safety and good order."<sup>90</sup>

Two decades later, *Patterson* applied a similar approach to a First Amendment argument.<sup>91</sup> After being found in constructive contempt for his editorials about the state supreme court, Patterson claimed First Amendment protection for his publications.<sup>92</sup> The Court did not decide expressly whether the First Amendment was a limitation solely against the Federal Government.<sup>93</sup> Justice Holmes, however, noted, in dicta, that even if the First Amendment did apply to the states, its function was limited to prohibiting prior restraints.<sup>94</sup> Because Patterson was being punished only for what he already had written, he therefore would lose, regardless of whether the First Amendment applied to the states.<sup>95</sup>

*Schenck* breezily assumed that *Patterson's* dictum that the First Amendment was limited to prohibiting prior restraints was incorrect.<sup>96</sup> The Court stated this new conclusion, however, in a passing phrase.<sup>97</sup> The *Schenck* opinion did not cite the text of the First Amendment nor did it mention any history or rationale for the inclusion of a free speech guarantee in the Bill of Rights.<sup>98</sup> Following the classically Holmesian approach, *Schenck* just got on with it.

Schenck was convicted of conspiring to obstruct the draft by circulating 15,000 copies of an antiwar diatribe to men eligible for the draft.<sup>99</sup> Finding the requisite *mens rea* for the criminal conviction was easy: "the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject

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90. *Id.* at 268.

91. *See Patterson v. Colorado*, 205 U.S. 454 (1907).

92. *See id.* at 458-59.

93. *See id.* at 462.

94. *See id.*

95. *See id.*

96. *See Schenck v. United States*, 249 U.S. 47, 51-52 (1919).

97. *See id.* ("It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose . . .").

98. *See id.* at 52.

99. *See id.* at 49-51.



to the draft except to influence them to obstruct the carrying of it out."<sup>100</sup> Schenck's intent also sufficed for the Court to reject his First Amendment claim, because if the tendency of speech is to bring about a harm, then the speech may be punished.<sup>101</sup> "If the act, (speaking or circulating a paper), its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime."<sup>102</sup>

*Schenck* discussed the limitations on speech necessary "[w]hen a nation is at war."<sup>103</sup> *Gitlow* expanded *Schenck* to include times of peace, allowing the government to suppress speech if that speech had any chance of undermining the government.<sup>104</sup> The time for debating the war's origins and rationale was either prior to the war or after peace resumed, but not during the war.<sup>105</sup> Government had the power to suppress speech that could cause harm when government believed that to do so was appropriate.<sup>106</sup> Speech was no more protected by the First Amendment than it was protected by the political process or the common law had there been no First Amendment. In this sense *Patterson*, not its slight revision in *Schenck*, was correct because under *Schenck*, the only real effect of the First Amendment was to prohibit prior restraints.

*Miller*, the Court's only twentieth century Second Amendment case, involved a Congressional response to violence in the news and movies by outlawing specific weapons identified with "the gangster and the desperado":<sup>107</sup> submachine guns and sawed-

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100. *Id.* at 51.

101. *See id.* at 52.

102. *Id.*

103. *Id.* at 52.

104. *See Gitlow v. New York*, 268 U.S. 652, 666-70 (1925).

105. *See generally* LUCAS A. POWE, JR., *THE FOURTH ESTATE AND THE CONSTITUTION* 76-78 (1991) (explaining that the expression of any opposition to majoritarian policies is especially difficult in times of crisis).

106. *See Gitlow*, 268 U.S. at 667-70.

107. Brief for the United States at 7, *United States v. Miller*, 307 U.S. 174 (1939) (No. 696); *see also* *Kates*, *supra* note 38, at 247 ("During the decade of Prohibition, with its gang wars, and the subsequent depression years of John Dillinger and Bonnie and Clyde, sawed-off shotguns and submachine guns had become widely identified in the public mind as 'gangster weapons'.")

off shotguns.<sup>108</sup> Jack Miller and Frank Layton successfully challenged their indictments for possession of an unregistered sawed-off shotgun when the district judge held that the relevant section of the National Firearms Act of 1934<sup>109</sup> violated the Second Amendment.<sup>110</sup> On direct appeal, the Supreme Court unanimously reversed.<sup>111</sup>

One can distill three separate conclusions from *Miller*. First, the Second Amendment does not protect firearms that have no "reasonable relationship to the preservation or efficiency of a well regulated militia."<sup>112</sup> Second, the Amendment's purpose is "to assure the continuation and render possible the effectiveness of [the militia]."<sup>113</sup> Third, the militia is comprised of all adult males.<sup>114</sup> What *Miller* does not do is speak with clarity to the question constitutional law scholars now ask: What, if anything, *does* the Second Amendment protect?

The dispositive paragraph in the *Miller* opinion speaks of the absence of any evidence that a sawed-off shotgun has "some reasonable relationship to the preservation or efficiency of a well regulated militia" and the Court's inability to supply that evidence by judicial notice.<sup>115</sup> A reasonable reading of the paragraph is that if there were evidence of such a relationship, then Miller might well prevail; or perhaps, by analogy to *Schenck*, if there were such evidence, then the Second Amendment would have been implicated. The Court then would have been called upon to explain whether the Second Amendment encompassed more than a common law privilege and, if so, under what circumstances that privilege could be defeated.<sup>116</sup>

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108. See *Miller*, 307 U.S. 174.

109. 48 Stat. 1236 (1934).

110. See *United States v. Miller*, 26 F. Supp. 1002, 1003 (W.D. Ark.), *rev'd*, 307 U.S. 174 (1939).

111. See *Miller*, 307 U.S. at 183. Justice Douglas did not participate in the case. See *id.*

112. *Id.* at 178.

113. *Id.*

114. See *id.* at 179 (discussing the historical foundation of the militia, which "comprised all males physically capable of acting in concert for the common defense").

115. *Id.* at 178.

116. The government argued from *Cruikshank* that the Second Amendment created no rights at all, but simply recognized a preexisting common law right that obviously was defeasible by appropriate regulation. See Brief for the United States at 8-9, *Miller* (No. 696).

The problem with interpreting this portion of *Miller* as possibly protecting private possession of military weapons lies in the remainder of the opinion. The next paragraph of the opinion sets the tone by noting that the Constitution granted Congress power to regulate the militia.<sup>117</sup> The Second Amendment was intended "to assure the continuation and render possible the effectiveness" of the militia.<sup>118</sup> Therefore, "[i]t must be interpreted and applied with that end in view."<sup>119</sup> The Court follows this conclusion with an extended discussion of the militia during the period between independence and ratification.<sup>120</sup> In its conclusion, the opinion notes that "[m]ost if not all" states have a constitutional protection for bearing arms, but none would support Miller's claim.<sup>121</sup> Accordingly, the Court reversed and remanded the case.<sup>122</sup>

It is reasonable to read the second part of *Miller* as concluding that the Second Amendment is about the militia and nothing else.<sup>123</sup> All Second Amendment claims therefore must be measured by how well they effectuate a militia.<sup>124</sup> An individual right to bear arms, accordingly, might well not exist.<sup>125</sup> Alternatively, if it does exist, it would be limited to a right to bear arms to effectuate militia purposes.<sup>126</sup>

The standard academic reading of *Miller*, illustrated by John Ely, Laurence Tribe, and Michael Dorf, is the former.<sup>127</sup> It is this reading that underscores Dean Griswold's confident assertion that the Second Amendment addresses the militia, not guns.<sup>128</sup> Glenn Reynolds and Don Kates, by contrast, claimed that "the Court believed that the Second Amendment protects

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117. See *Miller*, 307 U.S. at 178.

118. *Id.*

119. *Id.*

120. See *id.* at 178-82.

121. *Id.* at 182.

122. See *id.* at 183.

123. The Government offered such a rationale as one of its three reasons for reversing the district court judge. See Brief for the United States at 15-20, *Miller* (No. 696).

124. See *id.* at 15-16.

125. See *id.* at 15.

126. See *id.* at 18.

127. See ELY, *supra* note 32, at 94-95; LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 11 (1991).

128. See *supra* note 34 and accompanying text.

some sort of individual right to keep and bear arms."<sup>129</sup> Both authors saw *Miller* as holding that "evidentiary hearings were required" on remand to determine whether a sawed-off shotgun was a militia weapon.<sup>130</sup> Although that is plausible, an alternative reading of *Miller* is equally plausible. Reynolds and Kates assumed that the "further proceedings" mentioned in the *Miller* holding<sup>131</sup> are the evidentiary hearing on the nature of the weapon. This conclusion is not necessarily true, because even if the Second Amendment guarantees no individual right, further proceedings would have been required to dispose of the now-reinstated indictment. *Miller* and Layton had prevailed on a demurrer; there was no trial and therefore no finding that they in fact possessed an unregistered sawed-off shotgun.<sup>132</sup> Every accused must either negotiate a plea or receive some form of trial before his case is deemed to be complete.

Reynolds has admitted that "the opinion is simply not very clear."<sup>133</sup> He still concluded that *Miller* may protect individual possession of militia weapons because the opinion cited the famous Tennessee case, *Aymette v. State*.<sup>134</sup> *Aymette*, like *Miller*, rejected a claim that individual possession of all weapons was protected, explaining that citizens do not need "the use of those weapons which are usually employed in private broils, and which are efficient only in the hands of the robber and the assassin. . . . The right to keep and bear *them* is not, therefore, secured by the [Tennessee C]onstitution."<sup>135</sup> After finding that the Tennessee Constitution operated like the Second Amendment,<sup>136</sup> *Aymette* held that if a weapon were a militia weapon, then the Tennessee Constitution guaranteed an individual right

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129. Reynolds, *supra* note 7, at 500; see also Kates, *supra* note 38, at 249 (noting that individuals can claim rights without being members of a formal military unit).

130. Reynolds, *supra* note 7, at 499; see also Kates, *supra* note 38, at 250 (arguing that the nonmilitary nature of sawed-off shotguns was not judicially noticeable).

131. See *Miller*, 307 U.S. at 183.

132. See *Miller*, 26 F. Supp. at 1003.

133. Reynolds, *supra* note 7, at 500.

134. 21 Tenn. 154 (2 Hum. 158) (1840); see *Miller*, 307 U.S. at 178; Reynolds, *supra* note 7, at 500-04.

135. *Aymette*, 21 Tenn. at 158 (emphasis added).

136. See *id.* at 157 (asserting that the state constitution was adopted "[i]n the same view" as was the Second Amendment).

to keep and bear it.<sup>137</sup> Reynolds said he believes that the *Miller* holding also extended the Second Amendment's protections to individuals.<sup>138</sup>

In contrast with the *Aymette* analysis, a different conclusion emerges when one compares the *Miller* opinion with the brief submitted by the United States. Such a comparison suggests that Reynolds may have overread *Miller* because, although the opinion did not use the examples from the government's brief, it did relate directly to the government's arguments.

The government's brief offered three reasons for reversal.<sup>139</sup> The last, and the one that the Court most clearly relied on, was that the Second Amendment protects only "those weapons which are ordinarily used for military or public defense purposes and does not relate to those weapons which are commonly used by criminals."<sup>140</sup> Reynolds said he believes that this statement embodies the complete holding of *Miller* and that the case was remanded to determine whether the sawed-off shotgun was such a weapon.<sup>141</sup>

Yet a second government argument, taken from *Cruikshank*, posited that the Second Amendment guaranteed no rights at all.<sup>142</sup> This argument looked to preexisting common law and noted that "it cannot be doubted that at least the carrying of weapons without lawful occasion or excuse was always a crime under the common law of England."<sup>143</sup> If *Miller's* hearing on the nature of the shotgun had concluded that it was a military weapon, then the government's argument that the Second Amendment just incorporated the common law would bring the appropriateness of the regulatory requirements to the fore. By analogy to *Schenck's* equation of the First Amendment and the common law,<sup>144</sup> it is conceivable that *Miller* could prevail on

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137. See *id.* at 158-60.

138. See Reynolds, *supra* note 7, at 504.

139. See Brief for the United States at 4-5, *Miller* (No. 696).

140. *Id.* at 18.

141. See Reynolds, *supra* note 7, at 499-500.

142. See Brief for the United States at 8-9, *Miller* (No. 696).

143. *Id.* at 9. In fact, the government's description of history is suspect. For a fuller and better history, see JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS* (1994).

144. See *Schenck v. United States*, 249 U.S. 47, 52 (1919); *supra* notes 96-106 and accompanying text.

the claim that a shotgun was a militia weapon and still lose on the merits of his Second Amendment claim. The opposite also may be true, however. Perhaps in choosing its disposition, the Court implicitly was rejecting this government argument without even addressing it. If so, Reynolds could be correct and the opinion was tracking *Aymette* perfectly, finding a protected right, but only when the defendant possesses a militia weapon.<sup>145</sup>

The final government argument addressed the principle of collective rights.<sup>146</sup> Only if individuals were "members of the state militia or other similar military organization provided for by law"<sup>147</sup> could possession of weapons be justified, because the Second Amendment "did not permit the keeping of arms for purposes of private defense."<sup>148</sup> The Court did not mention this theory, but if the Court had not been concerned with collective rights, the *Miller* opinion's discussion of the militia would have been irrelevant.

There is no other constitutional law case, having supposedly settled an issue, that is more appropriate for reconsideration or at least elaboration. First, the *Miller* decision was unanimous, often an indication that it was not carefully considered.<sup>149</sup> Second, Justice McReynolds competes favorably for the position of worst Justice of this century, suggesting that any surviving handiwork, lacking a modern consideration, might be suspect. Third, the *Miller* case was wholly one-sided, a detail realized only by Second Amendment scholars. After their indictment had been quashed, Miller and Layton were free to leave the jurisdiction and they apparently did, never to be heard from again.<sup>150</sup>

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145. See Reynolds, *supra* note 7, at 503-04.

146. See Brief for the United States at 18-20, *Miller* (No. 696).

147. *Id.* at 5; see *id.* at 15.

148. *Id.* at 12; see *id.* at 15.

149. See *City of Dallas v. Stanglin*, 490 U.S. 19 (1989) (rejecting unanimously First Amendment association and Equal Protection challenges to a Dallas ordinance that required licensing of youth dance halls and restricted the halls' admission policies and hours of operation). But see *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (overturning unanimously a city law banning animal sacrifice as violative of the First Amendment Free Exercise Clause because the law burdened only members of certain religions); *Collins v. City of Harker Heights*, 503 U.S. 115 (1992) (denying unanimously a section 1983 remedy for a municipal employee killed at work, after determining that the city's failure to train or warn employees about known hazards could not violate the Due Process Clause).

150. See Kates, *supra* note 38, at 248 n.189 (explaining that the defendants "simply

No one entered an appearance for either at the Supreme Court.<sup>151</sup> The government appealed, filed its jurisdictional statement and brief, and then argued the case without opposition.<sup>152</sup> It's hard to lose under those circumstances. Fourth, while those who claim that the Second Amendment guarantees no individual right hasten to embrace *Miller*, they extrapolate too much from the opinion's holding of what the Second Amendment does not do and fail to address what it does do.<sup>153</sup>

That is the totality of the Court's Second Amendment jurisprudence: The Amendment does not apply to the states<sup>154</sup> and does not protect individual possession of weapons lacking militia use.<sup>155</sup> The former conclusion is a century old and not easily harmonized with mid-twentieth century cases on the incorporation of the Bill of Rights.<sup>156</sup> The latter is a half-century old and is a slim reed indeed for any larger proposition, such as the assertion that Congress could prohibit the individual possession of weapons having militia use, a category that includes most weapons proscribed by modern Congressional legislation. More recently, in both 1983<sup>157</sup> and 1995,<sup>158</sup> the Court denied certiorari in federal cases in which a Second Amendment incorporation claim had been raised and rejected.

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disappeared into the criminal milieu from which they had involuntarily surfaced").

151. See *Miller*, 307 U.S. at 175. Nor is there any report of subsequent proceedings in the case.

152. See *id.* at 174-75.

153. See, e.g., ELY, *supra* note 32, at 94-95; TRIBE & DORF, *supra* note 127, at 11.

154. See *Presser v. Illinois*, 116 U.S. 252, 264-66 (1886); *supra* notes 86-90 and accompanying text.

155. See *Miller*, 307 U.S. at 178; *supra* notes 107-48 and accompanying text.

156. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968) (holding that the Fourteenth Amendment guarantees a jury trial in all criminal cases for which the Sixth Amendment would provide a jury trial, were the cases tried in federal court); see also discussion *infra* Part II.D.

157. See *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983) (upholding a village gun control ordinance on the basis that the Second Amendment's limitations apply only to the National government, thereby leaving states free to regulate weapon ownership).

158. See *Love v. Pepersack*, 47 F.3d 120 (4th Cir.), *cert. denied*, 116 S. Ct. 64 (1995) (finding police denial of an application to purchase a handgun justifiable under the Second Amendment when the applicant failed to demonstrate that her possession of a weapon would preserve or ensure the effectiveness of the militia).

What may seem surprising is how easily the analogy of *Miller* to *Schenck* may be replaced by a comparison of *Miller* to *Near*, the case in which the Supreme Court held that Minnesota's "Gag Law"<sup>159</sup> was an unconstitutional prior restraint.<sup>160</sup> The Gag Law violated the First Amendment's prohibition on prior restraints because it dealt with libel of public officials rather than obscenity or national security, which the Court treated as exceptions to the bar on prior restraints.<sup>161</sup> *Near* therefore protected most but not all speech against prior restraints.<sup>162</sup>

If Reynolds and Kates read *Miller* correctly—i.e., if the Court implicitly concluded that, if a sawed-off shotgun was a militia weapon, then registration could not be required as a condition of private possession<sup>163</sup>—then *Near* rather than *Schenck* is the appropriate First Amendment analogy to the Second Amendment issues in *Miller*. Private possession of all militia arms would be protected by the Second Amendment and only nonmilitia weaponry could be regulated. Although I already have suggested that the Reynolds-Kates reading of *Miller* may be incorrect, that is not the point here. It would take little for a willing Court to read *Miller* as Reynolds and Kates do. If the Court were to adopt such an interpretation, that one minor shift would cause Second Amendment doctrine to fall into line with the core idea of *Near*, rather than *Schenck*'s common law bad tendency test.

In retrospect, it seems strange that so much weight would be placed on three Supreme Court decisions, two of which are profoundly out of step with the jurisprudence of the last half century. Quite simply, these opinions cannot bear the weight that has been placed upon them. Dean Griswold was wrong; the issue has not been resolved authoritatively by the Court.<sup>164</sup> Indeed, to use another *Miller* analogy, it is as if someone read *Miller v. California*,<sup>165</sup> which permitted obscene publications to be

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159. MINN. STAT. §§ 10123-1 to 10123-3 (1927).

160. See *Near v. Minnesota*, 283 U.S. 697 (1931).

161. See *id.* at 716.

162. See *id.* at 715-16.

163. See *supra* notes 129-30 and accompanying text.

164. See *supra* note 34 and accompanying text.

165. 413 U.S. 15 (1973) (holding that obscene material is not protected by the First



banned, and concluded that there was no right to read Shakespeare's *A Midsummer Night's Dream*.

The Court eventually *may* hold that the Second Amendment guarantees no individual right to keep and bear arms, but the Court has yet to do so. The same cannot be said for the lower federal courts<sup>166</sup> that have "uniformly held that the Second Amendment preserves a collective, rather than individual, right."<sup>167</sup> Nevertheless, constitutional law scholars never have been in the habit of deferring to the random panels of lower courts on constitutional issues and there is no good reason why they should do so in this one area.

### B. Text

Text must be the starting point for any serious constitutional analysis, even if it necessarily serves only as a starting point. Justices Hugo Black and William O. Douglas, the two strongest judicial supporters of First Amendment rights, proclaimed that text was a stopping place as well. To these Justices, "no law"<sup>168</sup> really meant "no law."<sup>169</sup> Yet, as Sanford Levinson notes, "literalism' is a hopelessly failing approach to interpreting [the First Amendment]."<sup>170</sup> Could anyone seriously believe that the words "no law" preclude all laws regulating speech? Perjury is

Amendment, and reformulating a three-part test to determine when a work is obscene).

166. For a critique of decisions by lower courts, see Brannon P. Denning, *Can the Simple Cite Be Trusted?: Lower Court Interpretations of United States v. Miller and the Second Amendment*, 26 CUMB. L. REV. 961 (1995-96).

167. *Love v. Peppersack*, 47 F.3d 120, 124 (4th Cir.), *cert. denied*, 116 S. Ct. 64 (1995); see also *TRIBE & DORF*, *supra* note 127, at 11 ("[T]he Second Amendment has not been interpreted by the courts to prohibit regulation of private gun ownership."); Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57, 136 (1995) (charging Standard Model scholars with the "failure . . . to discuss a central aspect of the legal 'truth' about the Second Amendment—that the courts constantly reject the gun lobby's broad-individual-right position").

168. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . .").

169. See *Barenblatt v. United States*, 360 U.S. 109, 143-44 (1959) (Black, J., dissenting) ("[U]nless we once again accept the notion that the Bill of Rights means what it says and that this Court must enforce that meaning, I am of the opinion that our great charter of liberty will be more honored in the breach than in the observance.").

170. Levinson, *supra* note 3, at 644.

speech; so is a misleading stock prospectus—are both therefore protected? What counts as speech? Pornography? Draft card or flag burning? Campaign contributions and expenditures? At best the Constitution's text provides a rhetorical tilt toward protection of speech and the press. Our traditions and the Court's doctrine, not the text, have created today's strong First Amendment.

Second Amendment interpreters offer a wide variety of readings of that Amendment's text. No other amendment has its own preface. Consequently, all interpreters must decide how to balance the preface, "[a] well regulated Militia, being necessary to the security of a free State," with the subsequent clause articulating a noninfringeable "right of the people to keep and bear Arms."<sup>171</sup> Levinson has noted that the Constitution was hardly a model of linguistic clarity, and "perhaps one of the worst drafted of all its provisions" was the Second Amendment.<sup>172</sup> Van Alstyne has observed that "[p]erhaps no provision in the Constitution causes one to stumble quite so much on a first reading, or second, or third reading" as does the Second Amendment.<sup>173</sup> Even Amar's apt conclusion, that the preface precludes an argument that a standing army is necessary to the security of a free State,<sup>174</sup> does not come instantly to the unaided reader.

If the drafters' goal was to create an individual right to bear arms, they hardly could improve on the statement that "the right of the people to keep and bear Arms, shall not be infringed."<sup>175</sup> Conversely, if the goal were to create instead a collective right, no amendment would have been necessary because existing traditions and the explicit text of the Constitution already recognized such a right.<sup>176</sup> The Framers apparently split the differences between these opposing positions in drafting the Second Amendment.

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171. U.S. CONST. amend. II.

172. Levinson, *supra* note 3, at 644.

173. Van Alstyne, *supra* note 4, at 1236; *see also* Kates, *supra* note 38, at 217 (describing the wording of the Second Amendment as "opaque").

174. *See* Amar, *Constitution*, *supra* note 40, at 1172.

175. U.S. CONST. amend. II.

176. U.S. CONST. art. I, § 8, cl. 15 (authorizing Congress "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions").

Nevertheless, to some, like the National Rifle Association, the preface bears so little relevance to the right that the preface might as well have been written in invisible ink.<sup>177</sup> A better view is that expressed by Reynolds and Van Alstyne, who limit the preface by arguing that it does not control: "[W]hatever the meaning of the Amendment's reference to a 'well-regulated militia,' that reference does not modify the right recognized by the Amendment."<sup>178</sup> Still, if Reynolds and Van Alstyne's conclusion is correct, then exactly what does the Second Amendment's preface do? The assertion that the preface does not modify what follows may be correct, especially because the preface, lacking a verb, cannot stand on its own; this is not, however, an unassailable reading of the text. No other clause in the Bill of Rights has its own statement of purpose,<sup>179</sup> and it is reasonable to conclude that the stated purpose has *something* to do with what follows.

Don Kates, Robert Cottrol, and Raymond Diamond have imaginatively overcome the problem of reading the preface as a limitation by arguing instead that it is an amplification.<sup>180</sup> Thus, in addition to recognizing the individual right to keep and bear arms, the preface supports the right to collectively maintain a militia.<sup>181</sup> This conclusion seems to derive from their view that the text and its history are so clear about the existence of an individual right that the right must be taken as a given and therefore the preface, needing some meaning, necessarily be-

177. The language emblazoned on the former NRA Headquarters in Washington, D.C. is: "The right of the people to keep and bear arms, shall not be infringed." As one critic pointed out, however, the preamble is "conveniently overlooked." See Paul K. Vickrey, *2nd Amendment 'Right' is a Myth*, CHI. TRIB., Apr. 24, 1996, at 14.

178. Reynolds, *supra* note 7, at 466-67. The quotation in the text, in fact, is Reynolds summarizing Van Alstyne, *supra* note 4, at 1242 (asserting that the "express guarantee" of the Second Amendment, that people have an individual right to own guns, cannot be limited by other terms of the Amendment).

179. In contrast, several clauses in the body of the Constitution contain their own preambles. For example, U.S. CONST. art. I, § 8, cl. 8, the Copyright and Patent Clause, aims "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

180. See Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 YALE L.J. 995, 1001 (1995); Kates, *supra* note 38, at 217-18.

181. See Cottrol & Diamond, *supra* note 180, at 1001; Kates, *supra* note 38, at 217-18.

comes an amplification of the individual right.<sup>182</sup> This reasoning is a little too circular to persuade anyone but the already persuaded. Without arguing an amplification theory, Van Alstyne reached the same result more directly by defining the textual right as an unconditional one "to keep and bear arms," not as the right to join a militia.<sup>183</sup>

Other commentators, relying on the same text, have gone significantly farther in the other direction. Instead of suggesting that the preface has *something* to do with what follows, they have concluded that the purpose in the preface has *everything* to do with what follows. The ensuing right exists only to the extent that the preface authorized it.<sup>184</sup> Tribe and Dorf, following Ely's lead, concluded:

The only purpose it enacted is the one contained in its text, for only its words are law. And in modern circumstances, those words most plausibly may be read to preserve a power of the state militias against abolition by the federal government, not the asserted right of individuals to possess all manner of lethal weapons.<sup>185</sup>

This textual interpretation also can be bolstered by a common usage English language claim. No one has heard a hunter state that he is "going to bear arms and shoot ducks."<sup>186</sup>

There are two problems with this confident textualism that guarantees only a collective right via the militia, and thus ex-

182. See Cottroll & Diamond, *supra* note 180, at 1001-03.

Closer examination of the second clause further supports the individual rights interpretation. The phrase "to bear arms" is ambiguous. It could be interpreted either as bearing arms for militia purposes or as bearing arms for private purposes. An individual right to *keep* arms, however, can only be looked upon as a private right . . . .

*Id.* at 1002.

183. See Van Alstyne, *supra* note 4, at 1243-44.

184. See TRIBE & DORF, *supra* note 127, at 11; ELY, *supra* note 32, at 94-95.

185. TRIBE & DORF, *supra* note 127, at 11 (emphasis omitted).

186. It is possible, however, that someone might have said that two centuries ago. See generally Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to "Bear Arms"*, LAW & CONTEMP. PROBS., Winter 1986, at 151, 153 (presenting an historical argument that "bearing guns" meant carrying guns as a hunter would do).

cludes private possession of guns. The first is Madison's placement of the clause. When Madison introduced the amendments in Congress, he proposed interlineation with the Constitution.<sup>187</sup> Madison's proposed "Second Amendment," along with his press, speech, and religion guarantees, was to be placed in the grab bag of Article I, Section 9, after the prohibition against bills of attainder and ex post facto laws and before the limitation on direct taxation.<sup>188</sup> As he initially drafted it, the clause read: "The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person."<sup>189</sup>

If the collective rights theory were correct, then Madison should have placed his "Second Amendment" either in Article I Section 8, with the militia clauses,<sup>190</sup> or in Article IV, Section 4, the Guarantee Clause.<sup>191</sup> The conscientious objector provision does not resolve the problem, for Madison's arms-bearing clause was split from the religion clauses by the speech and press clause.<sup>192</sup> Furthermore, Madison's preparatory notes for his speech about the amendments state: "They relate Ist. to private rights."<sup>193</sup>

An even greater problem is the conscious parallelism of "the right of the people" in the Second Amendment with the identical language in the First and Fourth Amendments.<sup>194</sup> No one ever has claimed that "the right of the people" "peaceably to assemble, and to petition the Government"<sup>195</sup> and "to be secure in

187. See James Madison, Amendments to the Constitution, in 12 THE PAPERS OF JAMES MADISON 200-03 (Charles F. Hobson & Robert A. Rutland eds., 1979) [hereinafter PAPERS OF JAMES MADISON].

188. See *id.* at 201.

189. *Id.*

190. U.S. CONST. art. I, § 8, cl. 15 & 16.

191. U.S. CONST. art. IV, § 4.

192. See 12 PAPERS OF JAMES MADISON, *supra* note 187, at 201.

193. James Madison, Notes for Speech in Congress, in 12 PAPERS OF JAMES MADISON, *supra* note 187, at 193. His notes contained no "2nd."

194. See Kates, *supra* note 38, at 218.

195. U.S. CONST. amend. I.

their persons, houses, papers, and effects"<sup>196</sup> creates only collective rights, not rights for individuals. To date, I am unaware of any constitutional scholar, including Tribe and Dorf, who has attempted to explain why "the right of the people" in the First and Fourth Amendments is an individual right, but "the right of the people" in the Second Amendment is not.<sup>197</sup>

Garry Wills, however, has taken exactly this position. Wills has written that "[e]very term in the Second Amendment, taken singly, has as its first and most obvious meaning a military meaning."<sup>198</sup> Wills's argument means "the people," too, must be interpreted in a military sense, and he is prepared to explain such an interpretation.<sup>199</sup> The people are the militia and this "was always the *populous armadas*, in the corporate sense . . . . The whole people is the *corpus sanum*, what Madison calls 'the people at large' . . . [that] was often contrasted with the rulers (*senatus populusque*)."<sup>200</sup>

An appropriate response to Wills's Latin exegesis is that "we must never forget that it is a *constitution* we are expounding,"<sup>201</sup> and that Wills forgot this principle. Constitutional interpretation must be possible even for those who lack the classical education of the English aristocrat or his American pretender. Indeed, textual argument depends on this, because it claims to draw legitimacy from the tacit consent of contemporary citizens whose acquiescence hardly could be inferred if the text were recondite.

For those who rely on a purely textual argument to provide an authoritative interpretation of the Second Amendment, these anomalies—the Amendment's preface, the conscious parallelism of its terminology with other amendments, and Madison's intended placement of the Amendment—must be explained coherently. A possible synthesis would be that the citizen has a right to keep and bear arms, but only to the extent that possessing weapons makes the citizen available for militia service. Under

196. U.S. CONST. amend. IV.

197. See also U.S. CONST. amends. IX, X (referring to "the people").

198. Wills, *supra* note 30, at 72.

199. See *id.* at 71.

200. *Id.*

201. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

this construction, an individual could own a military weapon, but the government could prevent its use for either hunting or self-defense. This interpretation splits the differences between the two polar viewpoints and probably would be unsatisfactory to both.<sup>202</sup>

Any outside interpreter, coming to the debate with an open mind, will unlikely be persuaded solely by textual argument. Other modes of interpretation are necessary for the text of the Constitution to come alive more than two centuries after its inception. Textual analysis, as the Second Amendment shows, is best for setting the range of possible solutions. Despite the confident textualism of Justices Black and Douglas, if textual answers were that clear there would be no litigation on the issue.<sup>203</sup> Because the Second Amendment's text asks more questions than it answers, those wishing a fuller interpretation naturally turn elsewhere. Here, again, the divergent interpretations show. Those whose interpretation favors an individual right turn to history to find answers to each relevant textual question, and then assume, either implicitly or explicitly, that the debate is finished. Those who favor a collective rights interpretation explicitly assert that the text has been interpreted authoritatively by the Supreme Court and therefore one need look no further.

### C. History

Second Amendment scholars feel most comfortable discussing history. They claim that the Amendment's history is known and that it freezes the Amendment's meaning.<sup>204</sup> To the best of my

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202. Individual rights adherents would be dismayed that hunting is barred and that the use of a gun in self-defense would make the victim the criminal. Collective rights adherents would know that the existence of guns in private hands necessarily would lead to their use. Both sides would be correct.

203. Compare *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934) (explaining that when constitutional provisions are so specific and particularized that they do not require construction, no questions arise), with *Hans v. Louisiana*, 134 U.S. 1, 10-11 (1890) (establishing that the Eleventh Amendment neither says what it means nor means what it says).

204. See, e.g., Cottrol & Diamond, *supra* note 180, at 999 n.17 ("[T]he Second Amendment debate is fundamentally a debate about historical meaning . . . ."); Charles J. Dunlap, Jr., *Revolt of the Masses: Armed Civilians and the Insurrectionary Theory of the Second Amendment*, 62 TENN. L. REV. 643, 651 (1995) ("[Analysis of

knowledge, no First Amendment scholar believes that the First Amendment's history is dispositive of its meaning.

The First and Second Amendments share the common history of the adoption of the Constitution, their inclusion in James Madison's proposed Bill of Rights, and their joint ratification.<sup>205</sup> When the Antifederalists read the work of the Philadelphia Convention, they saw too much centralized power built on broad grants of authority: the taxing power, the power to raise an army, and the elastic "necessary and proper" clause. The Antifederalists wanted to block the Constitution's adoption, and the best political route was its failure to include a bill of rights.<sup>206</sup>

The Federalists, especially Alexander Hamilton, saw the Antifederalist argument for what it was: a deal breaker.<sup>207</sup> Others, including Madison, eventually and reluctantly came to believe that a bill of rights was not inconsistent with the premises of the Constitution and indeed might improve it.<sup>208</sup> As Speaker of the House, Madison thus introduced and shepherded the Bill of Rights through the legislative process.<sup>209</sup> But the debates were not extensive in the House, unrecorded in the Senate, and sparse again in the States.<sup>210</sup> Interpreting the meaning of the provisions necessarily means going outside of their legislative history, with one primary exception. The purpose of the Bill of Rights was to limit what the federal government

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the Framers' original intent] has come to dominate Second Amendment discussion.".)

205. See 12 PAPERS OF JAMES MADISON, *supra* note 187, at 201; Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301, 301-02.

206. See generally Finkelman, *supra* note 205, at 314 (stating that the proposed Constitution's lack of a bill of rights raised the most Antifederalist complaints).

207. See generally *id.* at 320 (mentioning that most Federalists did not take seriously their opponents' demands for a bill of rights).

208. See *id.* at 337 describing the reasons for which Madison eventually was convinced that a bill of rights had to be added to the Constitution; see also JACK N. RAKOVE, ORIGINAL MEANINGS 330-36 (1996) (discussing Madison's involvement in creating the Bill of Rights).

209. See Finkelman, *supra* note 205.

210. See generally *id.* at 341-43 (addressing progress of the constitutional amendments in the legislature).



could do.<sup>211</sup> Any interpretation of a provision of the Bill of Rights as a grant of federal power is *ipso facto* wrong.<sup>212</sup>

The relevant history of the First Amendment was essentially the history following Parliament's abolition of licensing of publications in 1694-1695 and the subsequent seditious libel prosecutions from *Zenger* onward.<sup>213</sup> Because of William Blackstone's *Commentaries* and the end of licensing, it generally was accepted that the First Amendment barred prior restraints; seditious libel was the contested ground, and the debate was waged on both sides of the Atlantic.<sup>214</sup> The relevant history of the Second Amendment, by contrast, seems trapped in England prior to the Glorious Revolution and then modestly supplemented in North America by the rhetoric and fears surrounding the Constitution's ratification.<sup>215</sup>

The historical debate on the First Amendment can be framed succinctly. The central question is whether the Framers, when they guaranteed freedom of the press, intended to go beyond the scope of Blackstone's *Commentaries*, which defined the freedom as "laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published."<sup>216</sup> Leonard Levy's influential work answered the question negatively and argued that Blackstone represents the entirety of the law because, with a single aberrant exception that produced no following, no one claimed that seditious libel was included in guar-

211. See RAKOVE, *supra* note 208, at 333.

212. Compare Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 784-87 (1987) (arguing that the First Amendment grants the state power to regulate speech in order to enhance public discourse), with L.A. Powe, Jr., *Scholarship and Markets*, 56 GEO. WASH. L. REV. 172, 182-84 (1987) (criticizing Fiss for using a limitation on government action to justify government regulation).

213. See, e.g., LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 8-10 (1985) (explaining the use of seditious libel prosecution as a method of controlling the press [hereinafter LEVY, FREE PRESS]; LEVY, *supra* note 73, at 8-11 (discussing the end of licensing as well as the operation of libel principle).

214. See LEVY, FREE PRESS, *supra* note 213, at 10-15.

215. See generally Roy G. Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 HASTINGS CONST. L.Q. 961 (1975) (discussing the history of the Second Amendment from feudal England to the modern day), reprinted in Cottrol, *supra* note 35, at 185.

216. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*151-52.

anted free speech.<sup>217</sup> Most other scholars have disagreed with Levy, arguing that he asked the wrong question and therefore ignored the meaning of his own excellent research.<sup>218</sup>

Levy's is a tight, historical thesis. If the First Amendment were repudiating Blackstone, surely there would be more evidence than the writing of an isolated author, questioning seditious libel, but not all libel.<sup>219</sup> Levy claims that there is no other evidence.<sup>220</sup>

The civic republican ideology of the English Country Whigs found fertile ground in North America, and works like John Trenchard and Thomas Gordon's *Cato's Letters* were read widely, reprinted, and quoted.<sup>221</sup> Americans agreed with Trenchard and Gordon that freedom of the press was one of the "great Bulwark[s] of Liberty,"<sup>222</sup> and Americans supported this principle in their state constitutions.<sup>223</sup> Nevertheless, although Trenchard and Gordon were skeptical about British uses of seditious libel, they never suggested its abolition,<sup>224</sup> nor did the great American innovation in *Zenger*.<sup>225</sup> Only when the Sedition Act crisis arose at the end of the century did a handful of prominent Jeffersonians, from Albert Gallatin and Madison in

217. See LEVY, *FREE PRESS*, *supra* note 213, at 197, 208-09.

218. See, e.g., David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455 (1983); POWE, *supra* note 105, at 25-50; David M. Rabban, *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 STAN. L. REV. 795 (1985); Dwight L. Teeter, *Press Freedom and the Public Printing: Pennsylvania, 1775-83*, 45 JOURNALISM Q. 445 (1968); Dwight L. Teeter, *The Printer and the Chief Justice: Seditious Libel in 1782-83*, 45 JOURNALISM Q. 235 (1968); Dwight L. Teeter, *A Legacy of Expression: Philadelphia Newspapers and Congress During the War for Independence, 1775-1783*, (1966) (unpublished Ph.D. dissertation, University of Wisconsin).

219. See LEVY, *FREE PRESS*, *supra* note 213, at 208-09 (noting that the isolated author was Junius Wilkes).

220. See *id.* at 209 (asserting that Junius Wilkes "engendered no progeny"). The correspondence between John Adams and William Cushing in 1789, however, can and should be read to indicate that both men had moved beyond Blackstone in their conception of freedom of the press. See *id.* at 198-200.

221. See *id.* at 109-118.

222. *Id.* at 110 (quoting *Cato's Letters*).

223. Cf. *id.* at 113-14 (asserting that *Cato's Letters* was the most influential 18th century work on freedom of the press).

224. See *id.* at 111-13.

225. See *id.* at 119.

the political arena to St. George Tucker in writing the first American edition of Blackstone, claim that the First Amendment had transformed the common law.<sup>226</sup> That claim, according to Levy, arose circumstantially and did not reflect American thinking of a decade earlier.<sup>227</sup>

Levy noted that American printers during the Revolution acted as though the doctrine of seditious libel did not exist; there was "nearly [an] epidemic degree of seditious libel."<sup>228</sup> Levy found it mysterious "[t]hat so many courageous and irresponsible editors daily risked imprisonment [after 1776]."<sup>229</sup> Seditious libel, as Levy and others have documented, was rampant, though prosecutions for it were rare.<sup>230</sup> Levy's thesis precludes his believing that those in the trenches may have best understood what the law in action really was. The printers perhaps understood that the celebrations of the importance of freedom of the press meant that they had the freedom to write as they pleased.

After declaring independence from England, twelve states<sup>231</sup> drafted new constitutions, and ten of those included freedom of the press in their declarations of rights.<sup>232</sup> A majority of states proposing amendments to the federal constitution wanted freedom of the press added.<sup>233</sup> As David Anderson concluded, "[t]he revolutionary state constitutions, the ratifying conventions, and the First Congress produced numerous expressions [that] leave little doubt that press freedom was viewed as being closely related to the experiment of representative self-government."<sup>234</sup> Yet Levy suggested initially that all of this originated from a desire to prevent prior restraints.<sup>235</sup> That is an unlikely reality for

226. *Cf. id.* at 297-304.

227. *Cf. id.* at 297 (explaining how passage of the Sedition Act brought out the libertarianism in Americans).

228. *Id.* at x.

229. *Id.* at xvi.

230. *See id.* at 144-45.

231. References to the states involve 14 total states—the 13 original states and Vermont. *Cf. id.* at 183.

232. *See id.* at 191.

233. *See* BERNARD SCHWARTZ, *THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE BILL OF RIGHTS* 157 (1992).

234. Anderson, *supra* note 218, at 533.

235. *See* LEVY, *FREE PRESS*, *supra* note 213, at xi-xii. In this book, Levy sought to

two reasons. First, the rhetoric is disproportionate to such a narrow problem. Second, prior restraints were an English problem; they had not been an issue in America. Is it reasonable to assume that Americans were so passionate about settling a century-old English debate that had not affected them?

To be sure, in expressing the importance of liberty of the press, Americans did not define its scope and, with a single exception, did not claim that it repudiated Blackstone.<sup>236</sup> Blackstone's conception of freedom of the press was one of limiting the monarch in a system where parliament was now sovereign.<sup>237</sup> When the Sedition Act crisis came to the fore, Gallatin, Madison, and Tucker had no difficulty articulating that Blackstone's conception of sovereignty did not apply in America because sovereignty rested in the people, not the government, and that fact precluded the people's agents from limiting the people's debate.<sup>238</sup>

The debate over whether the First Amendment had a broader scope than that conceived of by Blackstone is a perfect historical debate. Only accuracy, not law, turns on its outcome. The Supreme Court cemented its individualist First Amendment jurisprudence in the decade following publication of Levy's original book.<sup>239</sup> Indeed, the Court's opinion in *New York Times Co. v. Sullivan* resurrected the Sedition Act 163 years after its statutory death in order to slay it properly; the historical debate over

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correct some of the misleading impressions he left with his earlier book, *Legacy of Suppression*, *supra* note 73. Levy clarified his position by explaining that although freedom of the press may begin with its immunity from prior restraints, it is not necessarily this limited. See LEVY, *FREE PRESS*, *supra* note 213, at xi.

236. See LEVY, *FREE PRESS*, *supra* note 213, at 208-09 (describing the writings of "Junius Wilkes," pen name of the first writer who explicitly "rejected [Blackstone's] principle of subsequent punishment [and] the standard of falsity as a test of criminality").

237. See *id.* at 316.

238. See *id.* at 316-17 (presenting Madison's analysis of the differences between British and American governments, and the consequences of those differences on the freedoms enjoyed by the press).

239. LEVY, *supra* note 73. The Court's actions thereby put the lie to Justice Black's fear: "I hope you are right but I am afraid you are not in believing that Dean Levy's book has done no damage to the First Amendment." Leonard W. Levy, *Anecdote*, 13 CONST. COMMENTARY 1, 3 (1996) (quoting Justice Hugo Black).

Note that Levy himself revised his views in the time between publishing *Legacy of Suppression* and *Emergence of a Free Press*. See LEVY, *FREE PRESS*, *supra* note 213, at vii.

the First Amendment during this period did not influence the Court a whit.<sup>240</sup>

If Levy's initial theory that First Amendment protection was limited to preventing prior restraints was correct, then the Court's decisions cannot be squared with the Framers' views. If those who dissent from Levy's original thesis are correct, then historical justifications for broadly interpreting the First Amendment are fully available. In neither case, however, does history set the scope of the First Amendment. The Supreme Court's free expression jurisprudence rests on notions of individual liberty that gained prominence in the mid-twentieth century, strongly reinforced by its reading of our traditions. History offers a powerful rhetorical connection between the abuses of the past and those of the present. This is not originalism, however, for no one claims that without the examples from the Colonial Era to serve as modern reference points, the decisions of the present would be different.

With respect to the Second Amendment, however, the Standard Model claims that by adopting originalism the outcomes of the few relevant decisions would differ. Because the United States has not habitually disarmed citizens, the connection between the past and present in the Second Amendment is more attenuated than it has been in First Amendment opinions. Nevertheless, that past can inform the present.

The right to bear arms was not one of the ancient rights of Englishmen; it was a product of the tumultuous events from the English Civil War to the Glorious Revolution.<sup>241</sup> During the Interregnum, Oliver Cromwell's New Model Army made sporadic efforts to disarm Royalist and Catholic opponents of the regime.<sup>242</sup> With the Restoration, the British continued their fear of religious warfare and Catholicism, but also acquired "a rooted aversion to standing armies and an abiding dread of military rule."<sup>243</sup>

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240. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 273-77 (1964).

241. See MALCOLM, *supra* note 143, at 9 ("No claim was made for a right for Englishmen to be armed either in Magna Carta or in subsequent listings of English liberties before 1689.")

242. See *id.* at 22-28.

243. *Id.* at 30 (quoting C.H. FIRTH, *CROMWELL'S ARMY* 381 (4th ed. 1962)).

King Charles II governed a country that, because of the Civil War, was well armed and contained numerous potential enemies.<sup>244</sup> He successfully created a "select militia" as a politically reliable voluntary army, gave it extensive training, and selectively disarmed those whom he distrusted.<sup>245</sup> The principal legal justification was the Game Act of 1671.<sup>246</sup> This Act abandoned the need to prove that guns or bows had been used illegally to hunt and instead simply listed them as prohibited weapons, essentially turning all but the gentry into potential criminals.<sup>247</sup> Although the law made possession of weapons illegal for most people, it was "enforced with a decided ambivalence."<sup>248</sup> Whatever Charles II had done, James II did more vigorously, and the latter's attempts to enforce disarmament through the Game Act resulted in stricter enforcement against Protestants, while simultaneously leaving Catholics armed.<sup>249</sup>

The Glorious Revolution swept away James II and his policy of disarming Protestants.<sup>250</sup> Included in the British Declaration of Rights is a recognition that at least some Protestants have the right to bear arms: "That the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions, and as allowed by Law."<sup>251</sup> The lessons of the Civil War were reinforced: An unpopular government would attempt to achieve a monopoly on weapons and, if successful, such a monopoly would have untoward consequences only for those viewed as opponents of the regime.

Yet less than a decade later, after the Treaty of Ryswick, William III made clear that he wished to maintain a large standing

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244. See *id.* at 31-33.

245. See Cottrol & Diamond, *supra* note 180, at 1009.

246. 22 & 23 Car. II, ch. 25 (1671).

247. See MALCOLM, *supra* note 143, at 69-76. The property qualifications to hunt, and therefore to legally own a gun, were 50 times greater than those needed for eligibility to vote. See 4 BLACKSTONE, *supra* note 216, at \*175.

248. Cottrol & Diamond, *supra* note 180, at 1009.

249. See *id.* at 1009-10.

250. See *id.* at 1010.

251. 1 W. & M., Sess. 2, ch. 2 (1689), quoted in Joyce Lee Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 HASTINGS CONST. L.Q. 285, 307 (1983).

army.<sup>252</sup> This launched John Trenchard on his successful career as a pamphleteer.<sup>253</sup> Like James Harrington's *Oceana*<sup>254</sup> during the Interregnum, Trenchard's civic republicanism saw an active and vital citizenry as essential to the preservation of liberty.<sup>255</sup> Trenchard claimed that the reason Englishmen alone remained free was that they relied on the citizen militia rather than a standing army:

And if we enquire how these unhappy nations have lost that precious jewel *Liberty*, and we as yet preserved it, we shall find their miseries and our happiness proceed from this, that their necessities or indiscretion have permitted a standing army to be kept amongst them, and our situation rather than our prudence, hath as yet defended us from it.<sup>256</sup>

Like liberty of the press, a citizen militia, not a "select militia," was essential to the preservation of freedom.<sup>257</sup>

The colonists devoured the republican ideology of the Country Whigs,<sup>258</sup> but hardly needed it to justify a militia any more than they needed Blackstone to know that they could be armed.<sup>259</sup> In the decade after the French and Indian War, colonists also did not need to be reminded that, as Englishmen, they did not like Thomas Gage's Redcoats,<sup>260</sup> although the Decla-

252. See MALCOLM, *supra* note 143, at 124.

253. See *id.* at 125.

254. JAMES HARRINGTON, *COMMONWEALTH OF OCEANA* (1656).

255. See MALCOLM, *supra* note 143, at 125.

256. *Id.* at 125 (quoting JOHN TRENCHARD, *AN ARGUMENT SHEWING THAT A STANDING ARMY IS INCONSISTENT WITH A FREE GOVERNMENT, AND ABSOLUTELY DESTRUCTIVE TO THE CONSTITUTION OF THE ENGLISH MONARCHY* 114-15 (1697)).

257. See *id.* ("There were dangers in a militia of propertyless men and in a 'select militia' whose members were chosen for their political or religious affiliations. Trenchard recommended that the militia 'consist of the same persons as have the property'.").

258. See generally BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 34-54 (1967) (discussing the influence of Country Whig writers in the colonies).

259. See 1 BLACKSTONE, *supra* note 216, at \*143 (discussing "the fifth and last auxiliary right," that of owning weapons for one's defense).

260. Cf. JOHN PHILLIP REID, *IN DEFIANCE OF THE LAW* 5-6 (1981) (quoting a 1770 resolution of the Massachusetts House of Representatives: "A military Force . . . if posted among the People, without their express Consent, is itself, one of the greatest

ration of Independence proclaimed exactly that.<sup>261</sup> The untamed conditions of North America made local militias essential, and negated any need for restrictive game laws. Blackstone stated that bearing arms served "to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property."<sup>262</sup> Virtually all adult free white males in the colonies were required to be in the militia and to provide their own arms;<sup>263</sup> in some isolated areas the law even required a person to be armed whenever he was away from his home.<sup>264</sup>

Bernard Bailyn has detailed the colonists' embrace of the Country Whigs' civic republican ideology, for whom Trenchard and Thomas Gordon were successful advocates on the western side of the Atlantic.<sup>265</sup> Edmund Morgan's recent summary of militia ideology, although more succinct, is remarkably similar to Trenchard's.<sup>266</sup> "[T]hese independent yeomen, armed and embodied in a militia, are also a popular government's best protection against its enemies, whether they be aggressive for-

Grievances, and threatens the total subversion of a free Constitution").

261. See THE DECLARATION OF INDEPENDENCE (U.S. 1776) ("[The King of Great Britain] has kept among us, in times of peace, standing armies [and ships of war], without the consent of our legislatures. He has affected to render the military independent of, and superior to the civil power."), reprinted in 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 251, 252-53 (Bernard Schwartz ed., 1971) [hereinafter DOCUMENTARY HISTORY].

262. 1 BLACKSTONE, *supra* note 216, at 141.

263. See Kates, *supra* note 38, at 214-15.

With slight variations, the different colonies imposed a duty to keep arms and to muster occasionally for drill upon virtually every able-bodied white man between the age of majority and a designated cut-off age. Moreover, the duty to keep arms applied to every household, not just to those containing persons subject to militia service.

*Id.* at 215; see also *infra* note 337 (noting the citizen soldier's obligation to arm himself).

264. See, e.g., MALCOLM, *supra* note 143, at 139 (listing mid-17th century Virginia and Newport, Rhode Island, as other areas where one was required to be armed at all times); Kates, *supra* note 38, at 215-16 (discussing a 1770 Georgia law that required all men to carry a gun every time they attended church and authorized church officials to search parishioners up to 14 times a year in order to monitor their compliance).

265. See BAILYN, *supra* note 258, at 34-54. No discussion of the First Amendment's origins would fail to mention *Cato's Letters*, by Trenchard and Gordon. See *supra* text accompanying notes 221-24.

266. See EDMUND MORGAN, *INVENTING THE PEOPLE* 156-57 (1988).



eign monarchs or scheming demagogues within the nation itself."<sup>267</sup>

Revolutionary constitutions spoke to Second Amendment concerns, especially the importance of a militia, but not with the consistency or clarity with which the constitutions addressed freedom of the press. Recall that ten of the twelve states that drafted new constitutions included a declaration of rights protecting freedom of the press.<sup>268</sup> By contrast, only eight states dealt with any aspect of the Second Amendment, and here there was considerable linguistic and possibly substantive diversity.<sup>269</sup> It is worth noting that only two mentioned freedom of speech.<sup>270</sup>

Delaware,<sup>271</sup> Maryland,<sup>272</sup> and Virginia<sup>273</sup> praised the militia as the natural defense of a free state, while they simultaneously condemned a standing army as a threat to liberty. New Hampshire<sup>274</sup> and Massachusetts<sup>275</sup> agreed with this logic, but also added that free men have a right of "enjoying and defending life and liberty."<sup>276</sup> Massachusetts also specifically referred to "a right to keep and to bear arms" in the context of "common defence."<sup>277</sup> A similar provision, granting people a

267. *Id.* at 156.

268. References to the states involve 14 total states, including the 13 original states and Vermont. Two of these 14, Connecticut and Rhode Island, retained their Colonial charters rather than drafting new constitutions; New York and New Jersey did not develop declarations of rights. Malcolm erroneously lumped Georgia and South Carolina in the group of states without declarations of rights. See MALCOLM, *supra* note 143, at 149. These states, however, protected rights that they deemed to be fundamental in the body of their constitutions.

269. See *id.* at 146-50.

270. These states were Pennsylvania and Vermont. See SCHWARTZ, *supra* note 233, at 87.

271. See DEL. DECLARATION OF RIGHTS §§ 18, 19 (1776), reprinted in 1 DOCUMENTARY HISTORY, *supra* note 261, at 276, 278.

272. See MD. DECLARATION OF RIGHTS §§ XXV, XXVI (1776), reprinted in 1 DOCUMENTARY HISTORY, *supra* note 261, at 280, 282.

273. See VA. DECLARATION OF RIGHTS § 13 (1776), reprinted in 1 DOCUMENTARY HISTORY, *supra* note 261, at 234, 235.

274. See N.H. BILL OF RIGHTS §§ XXIV, XXV (1783), reprinted in 1 DOCUMENTARY HISTORY, *supra* note 261, at 375, 378.

275. See MASS. DECLARATION OF RIGHTS § XVII (1780), reprinted in 1 DOCUMENTARY HISTORY, *supra* note 261, at 339, 342-43.

276. N.H. BILL OF RIGHTS § II (1783), reprinted in 1 DOCUMENTARY HISTORY, *supra* note 261, at 357; see also MASS. DECLARATION OF RIGHTS § I (1780), reprinted in, 1 DOCUMENTARY HISTORY, *supra* note 261, at 339, 340.

277. MASS. DECLARATION OF RIGHTS § XVII (1780), reprinted in 1 DOCUMENTARY

right to bear arms for the "defence of the State," appears in the North Carolina constitution.<sup>278</sup>

After the typical condemnation of standing armies, the highly democratic constitution of Pennsylvania declared: "the people have a right to bear arms for the defence of themselves and the state."<sup>279</sup> Vermont, a year later, largely copied Pennsylvania's declaration of rights.<sup>280</sup> Pennsylvania and Vermont were also the only two states that expressly protected freedom of speech.<sup>281</sup> The remaining two states, Georgia and South Carolina, were silent on the militia and arms although they both had press clauses.<sup>282</sup>

The proposed Federal Constitution was anything but silent on military issues; it gave numerous military powers to Congress. Article I explicitly gave Congress the powers (1) to "raise and support armies," (2) to "provide and maintain a navy," and (3) to "make rules for the government and regulation of the land and naval forces."<sup>283</sup> The document then turned to the militia and authorized Congress to "provide for organizing, arming, and disciplining" a militia, and to "provide for calling forth the militia to execute the laws of the Union [and] suppress insurrections."<sup>284</sup> The reasons for granting Congress the power to maintain an army were expressed in a letter written by Gouverneur Morris.<sup>285</sup> For all the rhetoric about militias as an essential element of freedom, they were ineffective fighting forces during

HISTORY, *supra* note 261, at 339, 342.

278. See N.C. DECLARATION OF RIGHTS § XVII (1776), *reprinted in* 1 DOCUMENTARY HISTORY, *supra* note 261, at 286, 287.

279. PA. DECLARATION OF RIGHTS § XIII (1776), *reprinted in* 1 DOCUMENTARY HISTORY, *supra* note 261, at 263, 266.

280. See VT. DECLARATION OF RIGHTS § XV (1777), *reprinted in* 1 DOCUMENTARY HISTORY, *supra* note 261, at 319, 324.

281. See SCHWARTZ, *supra* note 233, at 87.

282. See generally GA. CONST. (1777), *reprinted in* 1 DOCUMENTARY HISTORY, *supra* note 261, at 291; S.C. CONST. (1778), *reprinted in* 1 DOCUMENTARY HISTORY, *supra* note 261, at 325.

283. U.S. CONST. art. I, § 8, cls. 12-14.

284. *Id.* cls. 15, 16.

285. See Letter from Gouverneur Morris to Moss Kent (Jan. 12, 1815), *reprinted in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 420 (Max Farrand ed., 1937) ("Those, who, during the Revolutionary storm, had confidential acquaintance with the conduct of affairs, knew well that to rely on militia was to lean on a broken reed.") [hereinafter Morris Letter].

Revolution.<sup>286</sup> The Constitutional Convention yielded to necessity rather than ideology and authorized a standing army.<sup>287</sup>

The Constitution's ratification would have meant that the battle over control of military force, and the ability of the national government to take action against rebellions and insurrections, had been won decisively by the national government. The Antifederalists understood this all too well. The military provisions frightened the Antifederalists, probably more than did any other part of the nationalizing Constitution.

In *The Federalist No. 46*, Madison tried to calm Antifederalists' fears by "disprov[ing] the reality" of what he claimed was "the visionary supposition that the Federal Government may previously accumulate a military force for the projects of ambition."<sup>288</sup> After focusing on how unlikely it was that the people would "silently and patiently" wait, he turned to the practical military issue, to show that "State Governments with the people on their side would be able to repel the danger."<sup>289</sup> A standing army's size inherently is limited and the state militias therefore could defeat it.<sup>290</sup> Madison then contrasted America with Europe where, despite large standing armies, "the governments are afraid to trust the people with arms."<sup>291</sup> If Europeans, those "debased subjects of arbitrary power," had the advantages of Americans, they, too, would be free.<sup>292</sup> Madison concluded, "Let us . . . no longer insult" Americans by suggesting that they might be tamed into submission.<sup>293</sup> If the federal government were to lack "the confidence of the people, [then] its

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286. See MORGAN, *supra* note 266, at 160-65 (noting the contrast between the ideology of the militia and its ineffectiveness).

287. See generally Morris Letter, *supra* note 285, at 421 ("[T]o rely on undisciplined, ill-officered men, though each were individually as brave as Caesar, to resist the well-directed impulse of veterans, is to act in defiance of reason and experience.").

288. THE FEDERALIST NO. 46, at 298 (James Madison) (Clinton Rossiter ed., 1961).

289. *Id.* at 299.

290. See *id.* Here, as a propagandist, Madison ignored the Convention's conclusion that militias were ineffective. See *id.* Indeed, he cited their success in the Revolutionary War. See *id.*

291. *Id.*

292. *Id.* at 300.

293. *Id.*

schemes of usurpation will be easily defeated by the State governments, who will be supported by the people."<sup>294</sup>

Madison, like everyone else, pro or con, equated the militia with "the people." At the Virginia ratifying convention, George Mason, who had refused to sign the proposed Constitution in Philadelphia, partially because it lacked a declaration of rights,<sup>295</sup> asked rhetorically, "Who are the militia?" and then answered, "They consist now of the whole people . . . ."<sup>296</sup> His fear was that if "that paper on the table" were not amended, the militia might not be so inclusive in the future.<sup>297</sup> It was important to the preservation of liberty that the true militia, rather than the "select militia," be available. Thus the Federal Farmer,<sup>298</sup> attacking the Constitution, tied together the preservation of liberty and the wide distribution of arms: "[T]o preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them."<sup>299</sup>

The Federalists were honorable men, so the Antifederalists did not have to take up arms against the newly created central government.<sup>300</sup> Because the Federalists were both honorable and sagacious men, amendments to the Constitution were forthcoming. Seven states proposed some amendment of the Constitution.<sup>301</sup> South Carolina desired an amendment reserving rights

294. *Id.*

295. See Finkelman, *supra* note 205, at 305-06.

296. *The Debates in the Convention of the Commonwealth of Virginia on the Adoption of the Federal Constitution* (June 14, 1788) (statement of George Mason), reprinted in 3 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 425 (Jonathan Elliot ed., 1836).

297. See *id.* at 425-26.

298. Although the *Letters from the Federal Farmer* were written by an anonymous Antifederalist, scholars now believe that the author was actually Melancton Smith. See RAKOVE, *supra* note 208, at 228-29.

299. LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN 124 (Walter Hartwell Bennett ed., 1978) (No. XVII, Jan. 25, 1788).

300. *But see infra* text accompanying notes 600-02 (discussing the Whiskey Rebellion).

301. See SCHWARTZ, *supra* note 233, at 158. This total includes Massachusetts, Maryland, South Carolina, New Hampshire, New York, North Carolina, and Virginia. See *id.* It excludes Pennsylvania, a state that discussed but did not propose amendments, see *id.* at 123, and does not recognize the Maryland minority amendments. See generally *id.* at 130 (distinguishing between the Maryland majority and minority amendments). Schwartz included both Pennsylvania and the Maryland mi-

to the states,<sup>302</sup> while Massachusetts wanted reserved states' rights and a guarantee of civil juries.<sup>303</sup> All other states requested those guarantees, as well as numerous others. Four states wanted a right to bear arms. Virginia, New York, and North Carolina proposed that the people should have a right to keep and bear arms.<sup>304</sup> New Hampshire demanded that "Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion."<sup>305</sup> In comparison, four states also wished to guarantee freedom of the press,<sup>306</sup> but only three would have guaranteed freedom of speech.<sup>307</sup>

Ten days after Madison introduced the Bill of Rights,<sup>308</sup> Tench Coxe<sup>309</sup> published a defense of Madison's proposals:

As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow citizens, the people are confirmed by the next article in their right to keep and bear their private arms.<sup>310</sup>

nority in his totals. *See id.* at 158.

The amendments proposed to the Pennsylvania Ratifying Convention included free press, free speech, and arms clauses. *See id.* at 123-25. A majority of the delegates at the Maryland Ratifying Convention accepted a free press amendment, but neither the majority nor the minority included an arms clause. *See id.* at 130-33.

302. *See id.* at 133.

303. *See id.* at 128-29.

304. *See Va. Ratifying Convention* (June 27, 1788) ("[T]he people have a right to keep and bear arms . . . ."), reprinted in 2 DOCUMENTARY HISTORY, *supra* note 261, at 762, 842; *N.Y. Proposed Amendments* (1788) ("[T]he People have a right to keep and bear Arms . . . ."), reprinted in 2 DOCUMENTARY HISTORY, *supra* note 261, at 911, 912; *N.C. Convention Debates* (Aug. 1, 1788) ("[T]he people have a right to keep and bear arms . . . ."), reprinted in 2 DOCUMENTARY HISTORY, *supra* note 261, at 933, 968.

305. *N.H. Proposed Amendments* (1788), reprinted in 2 DOCUMENTARY HISTORY, *supra* note 261, at 760, 761.

306. *See* SCHWARTZ, *supra* note 233, at 157. These four states were Maryland, New York, North Carolina, and Virginia. *See id.*

307. *See id.* These three states were North Carolina, Pennsylvania, and Virginia. *See id.*

308. *See supra* notes 187-89 and accompanying text (discussing Madison's proposed arms clause).

309. Over the years Coxe was occasionally an ally of Madison. *See* Douglas R. Egerton, *Coxe, Tench*, in JAMES MADISON AND THE AMERICAN NATION 1751-1836: AN ENCYCLOPEDIA 102 (Robert A. Rutland ed., 1994).

310. A Pennsylvanian [Tench Coxe], *Remarks on the First Part of the Amendments to*

Coxe forwarded a copy to Madison,<sup>311</sup> who replied immediately, commending Coxe's efforts.<sup>312</sup>

Madison's proposals were sent to the House acting as a Committee of the Whole,<sup>313</sup> and the future Second Amendment emerged still looking awkward. "Country" became "state" and the references to the militia and the right to bear arms were reversed: "A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms."<sup>314</sup> The final form of the amendment was the Senate's.<sup>315</sup> As it did with the future First Amendment, the Senate made the language more economical by dropping the definition of militia,<sup>316</sup> changing "best security" to "necessary" and dropping the conscientious objection clause.<sup>317</sup>

What did the Framers intend? Although the record is somewhat ambiguous, the Standard Model individual rights theory has far more to support it than does the collective rights theory

*the Federal Constitution*, PHILA. FED. GAZETTE, June 18, 1789, at 2, quoted in Kates, *supra* note 38, at 224. Within three weeks of its initial publication, New York and Boston newspapers had reprinted Coxe's essay. See Kates, *supra* note 38, at 224 n.81.

311. See Letter from Tench Coxe to James Madison (June 18, 1789), in 12 PAPERS OF JAMES MADISON, *supra* note 187, at 239, 241 n.1.

312. See Letter from James Madison to Tench Coxe (June 24, 1789), in 12 PAPERS OF JAMES MADISON, *supra* note 187, at 257 ("How far the experiment [of amendments] may succeed in any of these respects is wholly uncertain. It will however be greatly favored by explanatory strictures of a healing tendency, and is therefore already indebted to the co-operation of your pen.")

313. See 2 DOCUMENTARY HISTORY, *supra* note 261, at 1009.

314. *Id.* at 1107.

315. See *id.* at 1159.

316. Given the widely understood distinction between a militia of the people and a "select" militia, as illustrated by George Mason's rhetorical query, see *supra* text accompanying note 296, linguistic economy seems to be the reason for the change. A definition of "militia" was unnecessary when everyone agreed about its meaning. I am unaware of anyone, even Garry Wills, who has suggested that dropping the definition caused "militia" to be redefined. See generally *infra* text accompanying notes 340-67 (discussing Garry Wills).

317. See 2 DOCUMENTARY HISTORY, *supra* note 261, at 1164. In its final form, the amendment read: "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." *Id.*

that necessarily negates an individual right. The Second Amendment was a reaction against the military clauses of Article I of the Constitution and a recognition of how deeply Americans felt about an armed citizenry that could defend its rights and liberties as it had so recently in the Revolutionary War.

The only historians who have refuted the individual rights theory, albeit from very different viewpoints, are Lawrence Delbert Cress and Garry Wills. Cress wrote that the history of the Second Amendment demonstrates civic republicanism, pure and simple: public virtue with its emphasis on the character and the duties of the citizen.<sup>318</sup> Civic republicanism, by definition, excludes the possibility of an individual right.<sup>319</sup> Wills wrote that the same history surrounding the adoption of the Second Amendment confirms his linguistic analysis that, in context, the amendment means nothing; Madison just snookered everyone.<sup>320</sup>

Cress began with the irrefutable conclusion that the citizen militia traces its lineage directly back to civic republican ideology.<sup>321</sup> He also ended with this premise, concluding that every statement about arms must be interpreted in light of this corporate view of society.<sup>322</sup> Cress took the statements of civic republicanism very seriously. Because republicanism is corporate and hierarchical, rather than individual and egalitarian, Cress viewed the militia as "reinforc[ing] the deferential social and political relationships that ensured order and a respect for

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318. See Lawrence Delbert Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. AM. HIST. 22, 23-24 (1984) ("In the eighteenth century, citizenship, which was defined in part by militia service, connoted civic virtue, a commitment to the greater public good, not an insistence on individual prerogative.").

319. Two other scholars, who wrote of the amendment and its tight relation to civic republicanism, nevertheless concluded that it embraces an individual right. See Levinson, *supra* note 3; David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991).

320. See Wills, *supra* note 30, at 72 (stating that Madison proposed the Second Amendment to "win acceptance of the new government" among its critics).

321. See Cress, *supra* note 318, at 22 ("[T]he people of the United States incorporated the essence of [Machiavelli's] ideas into the language of the Second Amendment.").

322. See *id.* at 24 ("[S]eventeenth- and eighteenth-century republican theorists understood access to arms to be a communal, rather than individual, right.").

authority throughout society."<sup>323</sup> Citizenship entailed duties, not prerogatives, and one of those duties was militia service.<sup>324</sup>

The problems with Cress's approach are twofold. First, his position rests on the conclusion that the civic republicanism of England remained unchanged in the dramatically different setting of Colonial America, where hunting game was not a problem and Indians occasionally were. I concede that this premise may be correct.<sup>325</sup> Second, significant contrary evidence suggests that more than republicanism is at work. Cress believed such statements are not entitled to credit because they are "clearly out of touch" with prevailing ideology.<sup>326</sup> Yet that assertion implicitly requires Cress to place Thomas Jefferson out of touch with his times, a conclusion that is not possible.<sup>327</sup>

Jefferson's initial proposed Virginia constitution did not even mention the militia, but it did guarantee that "no freeman shall ever be debarred the use of arms."<sup>328</sup> Years later Jefferson wrote to George Washington, in language that sounds like the

323. *Id.* at 29.

324. *See id.* at 23-24.

325. *Cf.* BAILYN, *supra* note 258, at 43 ("To say simply that this tradition of opposition thought was quickly transmitted to America and widely appreciated there is to understate the fact. Opposition thought, in the form it acquired at the turn of the seventeenth century and in the early eighteenth century, was devoured by the colonists.")

Note that Bailyn's statement does not claim that North American conditions did not change some of the meanings of civic republican. To be accurate, Cress's position still requires that changed conditions did not change actual meaning.

326. *See* Lawrence Delbert Cress, *The Second Amendment and the Right to Bear Arms: An Exchange*, 71 J. AM. HIST. 587, 593 (1984). Cress stated that he "cited several examples [of individual rights theory] myself" in his initial article. *See id.* In that article, however, he attempted to shape examples contrary to his republican theory into seeming republican. For example, Cress stated that "[t]he principles evoked by those resolutions [allowing arms for killing game and forbidding taking arms from citizens] were, however, much more akin to the classical republican understanding of the armed citizenry than appears at first glance." Cress, *supra* note 318, at 34.

327. Jefferson was in France and marginal to the Constitution's framing. *See* WILLARD STERNE RANDALL, *THOMAS JEFFERSON: A LIFE* 427, 493 (1993) (noting that Thomas Jefferson moved to Paris in mid-1786 and returned to the United States on November 23, 1789). On the other hand, he hardly was out of touch with the prevalent ideology of the times and this is the conclusion that Cress's argument requires.

328. *First Draft by Jefferson of the Va. Const.*, in 1 THE PAPERS OF THOMAS JEFFERSON 337, 344 (Julian P. Boyd et al. eds., 1950) [hereinafter PAPERS OF THOMAS JEFFERSON].



words of an NRA executive, "one loves to possess arms."<sup>329</sup> Jefferson believed that guns were important to an individual's independence and character. He advised his nephew that "[g]ames played with the ball and others of that nature, are too violent for the body and stamp no character on the mind."<sup>330</sup> Instead, Jefferson stated, "I advise the gun. While this gives a moderate exercise to the body, it gives boldness, enterprize, and independance to the mind" and should be "the constant companion of your walks."<sup>331</sup> Jefferson's advice flows directly out of republicanism, but his proposed guarantee is purely in terms of an individual right.

Cress wished "to place citizenship, especially the idea of citizens in arms, in a context compatible with the republican theory of revolutionary America."<sup>332</sup> This demands a literal and monolithic ideology of civic republicanism, one that even Cress acknowledged "may have been anachronistic in 1789."<sup>333</sup> Why, then, should the Framers be expected to comply with an anachronism? "Common sense [holds] that a society that was unwilling to allow all adult males to vote would not embrace a constitutional principle ensuring their right to own firearms."<sup>334</sup> In 1775, however, General Thomas Gage ordered citizens of Boston to turn in their arms, and many complied.<sup>335</sup> Commenting in this incident, the Continental Congress declared, "They accordingly delivered up their Arms, but in open violation of Honour . . ."<sup>336</sup> The society that Cress describes already *required* those nonvoting adult males to *own* firearms for their militia service.<sup>337</sup> One may speculate as to how the citizens

329. Letter from Thomas Jefferson to George Washington (June 19, 1796), in 9 WRITINGS OF THOMAS JEFFERSON 339, 341 (Albert Ellery Bergh ed., 1907).

330. Letter from Thomas Jefferson to Peter Carr, in 8 PAPERS OF THOMAS JEFFERSON, *supra* note 328, at 405, 407.

331. *Id.*

332. Cress, *supra* note 318, at 23.

333. Cress, *supra* note 326, at 593.

334. *Id.*

335. See Halbrook, *supra* note 186, at 151 (stating that the citizens turned in 1778 muskets, 634 pistols, 973 bayonets, and 38 blunderbusses).

336. *Declaration of the Causes and Necessity of Taking Up Arms* (July 6, 1775) reprinted in 1 PAPERS OF THOMAS JEFFERSON, *supra* note 328, at 213.

337. "America's strength rested in 'making every citizen a soldier, and every soldier a citizen; not only *permitting* every man to arm, but *obliging* him to arm.'" Robert

might have reacted to a similar proclamation to disarm coming from General Alexander Hamilton in February 1801.<sup>338</sup>

One would anticipate that the citizens would not have reacted positively to such a demand. The answer to this hypothetical becomes more clear if the First Amendment scholars have framed a correct theory of sovereignty. If there had been a shift from a Blackstonian conception to a belief in sovereignty of the people,<sup>339</sup> then it seems inconceivable that the people would have turned over their arms after ratifying the Second Amendment.

Wills believes the history of the Second Amendment supports his linguistic exegesis of its text so that the truly informed reader will understand that, in context, the Amendment adds nothing to the Constitution.<sup>340</sup> In 1789, when the Bill of Rights first was introduced,<sup>341</sup> Congress could create a standing army as well as organize and regulate militias.<sup>342</sup> Congress still had these powers in 1792, after the amendments to the Constitution were ratified.<sup>343</sup> According to Wills, there is no individual right to possess arms in the Constitution and the Second Amendment did not grant such a right. What the Second Amendment provides is what the Constitution provided already: a right to bear arms in a well-regulated militia.<sup>344</sup>

E. Shalhope, *The Armed Citizen in the Early Republic*, LAW & CONTEMP. PROBS., Winter 1986, at 125, 131 (quoting J. BARLOW, *ADVICE TO THE PRIVILEGED ORDERS IN THE SEVERAL STATES OF EUROPE: RESULTING FROM THE NECESSITY AND PROPRIETY OF A GENERAL REVOLUTION IN THE PRINCIPLE OF GOVERNMENT*, PARTS I AND II, at 16 (1792)).

338. The Governors of Virginia and Pennsylvania were ready to call out the militia if the Federalists in Congress usurped the election of 1800 and blocked the selection of Thomas Jefferson or Aaron Burr as president. See 4 DUMAS MALONE, *JEFFERSON THE PRESIDENT: FIRST TERM, 1801-1805*, at 7-11 (1970).

339. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 315, 404-05 (1819) ("The government of the Union . . . is, emphatically and truly, a government of the people. In form, and in substance, it emirates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.").

340. See Wills, *supra* note 30, at 72.

341. See 2 DOCUMENTARY HISTORY, *supra* note 261, at 1006.

342. See U.S. CONST. art. I, § 8, cls. 12, 15, 16.

343. See 2 DOCUMENTARY HISTORY, *supra* note 261, at 1171; see also Wills, *supra* note 30, at 72 (explaining that the passage of the Second Amendment did not affect Congress's powers to establish a standing army or organize a militia).

344. See Wills, *supra* note 30, at 72.

Wills derided the historical claims for an individual right by making two points on how to assess the relevant history. First, he claimed that much of the evidence offered by the Standard Model advocates is distorted and false.<sup>345</sup> Second, he asserted that statements about arms and standing armies made during the ratification debates do not count as evidence because they were aimed at the military clauses in the proposed Constitution, not at the Second Amendment.<sup>346</sup>

As to Wills's first point, I do not pretend to be a Second Amendment historian,<sup>347</sup> but I am deeply skeptical of a blanket and unsupported claim that all other scholars are mistaken.<sup>348</sup> Wills's second point is absurd on its face. If statements made about standing armies, militias, and arms in the aftermath of the Glorious Revolution count as evidence<sup>349</sup> then, a fortiori, statements made a century later also count. If our only evidence about the provisions of the Bill of Rights is limited to what was said after ratification of the Constitution and before ratification of the Amendments three years later, then we indeed have an impoverished record.

Wills's conclusion that the Second Amendment adds nothing to the Constitution seems so stark even to himself that he asks, "[w]hy, then, did Madison propose the Second Amendment?"<sup>350</sup> This question is especially baffling if Wills is correct and the Amendment "had no real meaning."<sup>351</sup> The answer, Wills concluded, is that Madison snookered the Antifederalist opposition.<sup>352</sup> The Second and Third Amendments<sup>353</sup> were simply

345. *See id.* at 64-65.

346. *See id.* at 70.

347. My critique of Cress and Wills is based on my independent evaluation of their claims as historical arguments in the context of America in the last quarter of the 18th century.

348. Wills may have behaved more like an advocate and less like an historian when reading the historical record. That may be the reason he did not mention figures such as Tench Coxe.

349. *See, e.g.,* MALCOLM, *supra* note 143 (discussing the interpretation of the Second Amendment in light of English influences from the Middle Ages onward); Kates, *supra* note 38, at 235-39 (discussing gun prohibition in England).

350. Wills, *supra* note 30, at 72.

351. *Id.* (commenting that Madison proposed the Second Amendment "[f]or the same reason that he proposed the Third," and that it therefore, like the Third Amendment, had no meaning).

352. *See id.* According to Wills, Madison knew that he could best counter the

part of "anti-royal rhetoric."<sup>354</sup> Thus the Third Amendment "had no real meaning in a government that is *authorized* to build barracks, forts, and camps."<sup>355</sup> Wills's conclusion is demonstrably short-sighted. Of course Congress can build forts, but if the costs of maintaining a standing army proved great, Congress might wish to economize by quartering troops in private homes. Furthermore, quartering troops "on" a population need not only be a cost cutting measure. It might operate as a direct punishment of recalcitrant groups or areas.<sup>356</sup> The Third Amendment speaks directly to these issues with real meaning.

A more charitable, traditional, and correct view of Madison is that he entered the ratification debates and wrote *The Federalist* essays believing that a bill of rights was unnecessary and potentially harmful, because of the inability to list all human rights and therefore the costs of possibly omitting something important.<sup>357</sup> Thomas Jefferson disagreed with Madison about the need for a bill of rights.<sup>358</sup> The Antifederalists vehemently disagreed,<sup>359</sup> and Madison's opponent in the election for the First Congress, James Monroe, disagreed as well.<sup>360</sup> Madison then became a supporter of a bill of rights.<sup>361</sup> Wills claimed that this

Antifederalists' opposition to the Constitution by accommodating them with the creation of a bill of rights. *See id.* When drafting the Second Amendment, Madison "crafted an amendment that did not prevent the standing army (and was not meant to) but drew on popular terms that were used for that purpose in the past." *Id.*

353. "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." U.S. CONST. amend. III.

354. *See* Wills, *supra* note 30, at 72.

355. *Id.*

356. Note that even aside from the quartering of troops in private homes, the Declaration of Independence complained about Britain leaving a standing army in the colonies after the conclusion of the French and Indian War. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776), reprinted in 1 DOCUMENTARY HISTORY, *supra* note 261, at 251, 253; *see also supra* notes 260-61 and accompanying text.

357. *See, e.g.,* Finkelman, *supra* note 205, at 309-13 (explaining the various reasons that Madison and other Federalists opposed having a bill of rights).

358. *See id.* at 331-33 (stating that Thomas Jefferson made repeated pleas to Madison for a bill of rights).

359. *See id.* at 314 (establishing that the Antifederalists' most common complaint about the proposed Constitution was that it lacked a bill of rights).

360. *See id.* at 335 (stating that Monroe called for another convention in order to make amendments to the constitution).

361. *See id.*

support was tactical, quoting Madison's statement that "this will kill the opposition everywhere."<sup>362</sup>

Wills is only partially correct, as Jack Rakove's extraordinary new book, *Original Meanings*, shows.<sup>363</sup> Madison's support for a bill of rights was, indeed, reluctant. The experiences of his adult life had convinced him that the dangers in a republic were those stemming from majoritarian excess. He was skeptical that any limitations—parchment barriers—could check a determined majority. That applied to a bill of rights as well.<sup>364</sup> Nevertheless, Madison did not need to do anything in 1789. There was no implicit, much less explicit promise of amendments to gain ratification in the decisive and divided states of Virginia, Massachusetts, and New York. The imperative for amendments had passed. "Most Federalists had grown indifferent to the questions, nor were former Anti-Federalists now sitting in Congress any more insistent, largely because they knew that the substantive changes desired in the Constitution lay beyond their reach."<sup>365</sup>

On June 8, 1789, Madison introduced his bill of rights and delivered a sophisticated justification, invoking judicial supervision<sup>366</sup> as well as the need and method of protecting against omissions.<sup>367</sup> Wills would have us believe that Madison did not mean what he said; he was just carrying on a charade. The only evidence that Wills offers to support this theory is that

362. See Wills, *supra* note 30, at 72. Madison made the statement in a letter to Richard Peters during the House deliberations on the amendments to the Constitution. See Letter from James Madison to Richard Peters (Aug. 19, 1789), in 12 PAPERS OF JAMES MADISON, *supra* note 187, at 346-47. See *id.* Madison offered a number of thoughts about the amendments, including the one quoted by Wills. Madison clearly wished to preclude the possibility of the Antifederalists "blow[ing] the trumpet for a second Convention," which might undo the work of the Philadelphia Convention. See *id.*

363. RAKOVE, *supra* note 208.

364. See *id.* at 310-16.

365. *Id.* at 330.

366. See *House of Representatives Debates, May-June, 1789* (June 8, 1789) (statement of James Madison), in 2 DOCUMENTARY HISTORY, *supra* note 261, at 1031 ("[The courts] will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.").

367. See *id.* at 1027 ("The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people.").

Antifederalists like Robert Whitehill and Patrick Henry, who had demanded a bill of rights during the ratification debates, "changed their stance and opposed the amendments."<sup>368</sup> A better reason ought to be offered to justify not taking Madison at his word.

Wills's claim that Madison snookered the Antifederalists by offering them military amendments without meaning could be generalized. Wills's rationale could as easily be applied to guarantees of press, speech, religion, jury trials, search warrants, everything. Yet evidence exists that Madison cared deeply about the religion clauses, as they are perfectly consistent with his famous 1785 statement, *A Memorial and Remonstrance*.<sup>369</sup> Is Wills asking us to doubt Madison's sincerity on this point too? Most likely, Wills implicitly is making the claim that Madison was serious about parts of the Bill of Rights, but not others. According to this theory, he cared about the clauses having meaning, not those lacking meaning: the Second and Third Amendments.<sup>370</sup> This analytical process has been a lengthy circle, but it is still a circle. Wills has divined Madison's intent from Wills's own extended linguistic analysis of the amendments:<sup>371</sup> because they mean nothing to Wills, ergo Madison intended them to mean nothing.

Let us nevertheless assume that Wills is correct and that Madison truly intended the Second Amendment to be meaningless. So what? The *people*, not Madison, adopted the Second Amendment because sovereignty rested in the people.<sup>372</sup> The

368. See Wills, *supra* note 30, at 72 (emphasis omitted). It is interesting that Wills relied on Whitehill here, given that he earlier chided others for relying on Whitehill, whom he described as an obstructionist willing to "throw up any, even the wildest, objection to the Constitution." *Id.* at 65. Henry's change of position may be more plausible given his implacable opposition to the Constitution. He had hoped that the lack of a bill of rights would be a dealbreaker. See *id.* at 72. The only serious chance of eradicating the ratified Constitution was to hold a second convention, something that Madison's proposed bill of rights likely would make impossible. This does not make Henry the arbiter of Madison's veracity.

369. See James Madison, *A Memorial and Remonstrance*, in 8 PAPERS OF JAMES MADISON, *supra* note 187, at 298.

370. See *supra* note 351.

371. At this point, as so often occurs at difficult interpretive points, one interpretive modality slides into another. For Wills, text and intent may well have become one and the same.

372. See *supra* note 339. The People, of course, did so through their representative

people adopted the Second Amendment as written, not Madison's "shrewd ploy." Therefore, the controlling understanding of the Second Amendment would be the understanding of the people, not the understanding of the deceivers. By definition, if the Framers intend a ruse, their masked intent is irrelevant.<sup>373</sup>

At this point, doctrinal argument answers the question of what to do with meaningless text. At least since *Marbury v. Madison*, it has been a canon of constitutional construction that "[i]t cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it."<sup>374</sup> Thus Wills could be right, but *Marbury* renders his conclusion irrelevant. If there are alternative constructions that could give the Second Amendment meaning, they must be adopted.<sup>375</sup> As we have seen, such constructions are available. By *Marbury's* own terms they would prevail over a construction that rendered the amendment without effect. It makes no sense to declare a clause a dead letter when an alternate reading gives it meaningful life.

Although I find myself surprised by my own words, the historical claim for the individual rights view of the Second Amend-

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bodies. Historical argument depends on the understanding of those who adopted the relevant provision. With the Constitution itself, ascertaining the people's intent is ambiguous because the Convention was an extralegal body and the Framers' intent is normally, but not necessarily, the best evidence of the people's and ratifiers' intent. With subsequent amendments, however, the ambiguity vanishes. The intent of both the proposing Congress and ratifying state legislatures counts because both are constitutionally essential to the process as the designated representatives of the people. See generally Douglas Laycock, "Nonpreferential" Aid to Religion: A Fake Claim About Original Intent, 27 WM. & MARY L. REV. 875 (1986) (rejecting the theory that the Establishment Clause of the First Amendment permits nonpreferential aid to religion, after analyzing the intent of Congress in passing the Amendment).

373. Wills should know this. His Second Amendment writings are less an example of his normally sure historical analysis, than they are of bad lawyering. By this point more than a few readers may be wondering why I am eviscerating an article in *The New York Review of Books*, Wills, *supra* note 30, that is written by someone who has won two Pulitzer Prizes for his historical writing but who has no legal training. The answer is that this article, along with Cress's work, *supra* note 318, constitutes the entire historical claim that the Second Amendment does not guarantee individual rights. See *supra* notes 318-20 and accompanying text. The others who have asserted this claim have made no serious effort to support it historically.

374. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803).

375. See *id.*

ment seems at least as strong as the historical claim for a strongly individualist First Amendment. Words and guns enabled a successful revolution, and it is not surprising that the founding generation thought highly of both. William Cushing, Chief Justice of the Supreme Judicial Court of Massachusetts, wrote in a letter to John Adams: "Without this liberty of the press could we have supported our liberties against british administration? or could our revolution have taken place? Pretty certainly it could not."<sup>376</sup> There are far more references from authoritative sources of an individual right to bear arms than there are for a right of the press going beyond prior restraints.<sup>377</sup>

Originalism reached its nadir with the debate over Robert Bork's nomination to the Supreme Court.<sup>378</sup> It seemingly became more acceptable as two other Yalies, Bruce Ackerman and Akhil Amar, have attempted to create a liberal originalism.<sup>379</sup> The neutral observer is likely to be uneasy about ceding constitutional determinations either to advocate-historians, whether they be liberal or conservative (or Ivy pedigreed) or to those dead for longer than a century and a half. Like life itself, the Constitution is for the living. Still, constitutional interpretation owes some homage to the concerns of the ratifying generation.<sup>380</sup> One need not accept originalism, but in construing the Second Amendment or any other provision of the Constitution, it is important to acknowledge what that generation intended.

#### D. Tradition

Traditional argument acknowledges that our understanding of the Constitution changes as the nation changes, and it requires a sensitive reading of where we have been to fashion the Consti-

376. Letter from William Cushing, Chief Justice of Massachusetts, to John Adams (Feb. 18, 1789), *quoted in* LEVY, *FREE PRESS*, *supra* note 213, at 199.

377. *See, e.g.*, Kates, *supra* note 38; Reynolds, *supra* note 7; Shalhope, *supra* note 38.

378. *See* Book Note, *The Priest Who Kept His Faith but Lost His Job*, 103 HARV. L. REV. 2074, 2077 (1990) (noting that Bork, who "casts himself as the high priest of originalism," was rejected as a Supreme Court nominee).

379. *See generally* BRUCE ACKERMAN, *WE THE PEOPLE* (1991); Amar, *Constitution*, *supra* note 40; Amar, *Fourteenth Amendment*, *supra* note 40.

380. *See supra* note 372 and accompanying text.



tution to accommodate where we are going. No one has ever explained it better than Justice John M. Harlan when he stated that decisions must recognize "the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing" and it serves to highlight the balance between "liberty [of the individual] and the demands of organized society."<sup>381</sup> This principle distinguishes traditional argument from historical argument. The former looks to all our history to fix the meaning of a provision in the present; the latter looks to the pre-Constitution history to fix the meaning of a provision at the founding.

Justice Harlan was explaining traditional argument in its natural setting, determining the contours of due process,<sup>382</sup> where a less elevated description of the process is that it takes a right we value highly and protects it even more. Nevertheless, traditional argument is not confined to due process. Because of the selective incorporation doctrine, traditional argument is fundamental to whether a particular provision of the Bill of Rights is incorporated and applied to the states through the Fourteenth Amendment. When Justice Cardozo explained that the First Amendment was "the matrix, the indispensable condition, of nearly every other form of freedom,"<sup>383</sup> he did so in the context of explaining why the First Amendment applies to the states but the Double Jeopardy Clause does not.<sup>384</sup>

Traditional argument, as explained by Justice Harlan, also plays a central role in First Amendment jurisprudence.<sup>385</sup> It is

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381. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

382. *See id.* (Harlan, J., dissenting).

383. *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

384. *See id.* at 326-28.

385. Amazingly, we have had a First Amendment tradition from the beginning because of the work of Zechariah Chafee. *See* ZECHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* (1941); ZECHARIAH CHAFEE, JR., *FREEDOM OF SPEECH* (1920); Zechariah Chafee, Jr., *Freedom of Speech*, *THE NEW REPUBLIC*, Nov. 16, 1918, at 66; Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 *HARV. L. REV.* 932 (1919).

Chafee misrepresented Holmes's initial position to help foster the "cause" of free speech. *See* David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 *U. CHI. L. REV.* 1205, 1211 (1983) (stating that Chafee misconstrued Holmes's opinions in order to reach the conclusion that they both had the same libertarian views); David M. Rabban, *The First Amendment in its Forgotten Years*, 90 *YALE L.J.*

not coincidence that the title of Harry Kalven's posthumous magnum opus on the First Amendment is *A Worthy Tradition*,<sup>386</sup> and the title perfectly summarizes the role of tradition in First Amendment argument. A dominant strand of First Amendment thought incorporates a whiggish view of history as almost always progressing, hopefully approaching perfection.

Our First Amendment tradition is well understood. Milton's *Areopagitica*,<sup>387</sup> the end of licensing,<sup>388</sup> *Zenger*,<sup>389</sup> and the American Revolution are antecedents. Then there is the First Amendment, too quickly followed by the fall from grace of the Sedition Act.<sup>390</sup> The tradition moves to the suppression of dissent in World War I, highlighting the great dissenting opinions of Justices Holmes and Brandeis,<sup>391</sup> celebrates their moving from dissents to doctrine and the creation of the "preferred position."<sup>392</sup> The tradition is then dismayed by the regression of *Dennis*<sup>393</sup> and the communist cases,<sup>394</sup> but simultaneously acquired new dissenting heroes in Justices Black and Douglas, and applauds the restoration of the First Amendment with the Civil

514, 589-91 (1990) [hereinafter Rabban, *Forgotten Years*].

386. HARRY KALVEN, JR., *A WORTHY TRADITION* (Jamie Kalven ed., 1988).

387. John Milton, *Areopagitica*, in *THE PROSE OF JOHN MILTON* 265 (J. Max Patrick ed., 1967). Readers' knowledge of Milton's classic is too often limited to the frequently quoted sentences. Thankfully, Vincent Blasi has brought the full work alive in a recent paper. Vincent Blasi, *Milton's Areopagitica and the Modern First Amendment*, YALE L. SCH. OCCASIONAL PAPERS (Visited Oct. 7, 1996) <<http://www.yale.edu/lawweb/lawschool/occpaper/blasi.html>>.

388. See *supra* note 213 and accompanying text.

389. See LEVY, *FREE PRESS*, *supra* note 213, at 38-45; POWE, *supra* note 105, at 7-15 (discussing the *Zenger* case, a prosecution for seditious libel); *supra* text accompanying notes 224-25.

390. See *supra* note 226 and accompanying text.

391. See *Gilbert v. Minnesota*, 254 U.S. 300, 334 (1920) (Brandeis, J., dissenting); *Pierce v. United States*, 252 U.S. 239, 253 (1920) (Brandeis & Holmes, J.J., dissenting); *Schaefer v. United States*, 251 U.S. 466, 482 (1920) (Brandeis & Holmes, J.J., dissenting); *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

392. See *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943) ("Freedom of press, freedom of speech, freedom of religion are in a preferred position.").

393. *Dennis v. United States*, 341 U.S. 494 (1951).

394. See, e.g., *Yates v. United States*, 354 U.S. 298 (1957).

Rights Cases.<sup>395</sup> From *Sullivan*<sup>396</sup> to *Brandenburg*<sup>397</sup> to *Cohen*,<sup>398</sup> First Amendment doctrine was "working itself pure."<sup>399</sup> That this whiggish history is incomplete and wrong<sup>400</sup> is not important; what is important is that the First Amendment celebrates the whiggish tale as if it were true.

The consequence of the First Amendment's worthy tradition is a doctrine that grants extraordinary protection to expression. Although that doctrine largely was developed to protect liberal minorities from conservative majorities, it has proven quite impervious to the efforts of the last fifteen years to censor conservative speech. The First Amendment literature is gleefully incorporating the rejection of censorious liberals into the tradition.<sup>401</sup>

It is not surprising that there is no comparable Second Amendment tradition, for the Second Amendment experience largely is the mirror image of the First. When the First Amendment was ignored and "forgotten"<sup>402</sup> in the nineteenth century, the Second Amendment was celebrated. Where as the First Amendment freely crosses the Atlantic to embrace John

395. See, e.g., *Edwards v. South Carolina*, 372 U.S. 229 (1963); HARRY KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* (1965).

396. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

397. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

398. *Cohen v. California*, 403 U.S. 15 (1971).

399. KALVEN, *supra* note 386, at xvii.

400. See L.A. Powe, Jr., *Justice Douglas After Fifty Years: The First Amendment, McCarthyism and Rights*, 6 CONST. COMMENTARY 267 (1989) (discussing Justice Douglas's influence on the Supreme Court's First Amendment jurisprudence); see also David M. Rabban, *The Free Speech League, the ACLU, and Changing Conceptions of Free Speech in American History*, 45 STAN. L. REV. 47 (1992) (discussing the influence of the ACLU and The Free Speech League on the Supreme Court's post-World War I First Amendment jurisprudence); David M. Rabban, *The IWW Free Speech Fights and Popular Conceptions of Free Expression Before World War I*, 80 VA. L. REV. 1055 (1994) (discussing the effects of the IWW free speech fights on the Supreme Court's interpretation of the First Amendment).

401. See Larry Alexander, *Banning Hate Speech and the Sticks and Stones Defence*, 13 CONST. COMMENTARY 71 (1996); Mark A. Graber, *Old Wine in New Bottles: The Constitutional Status of Unconstitutional Speech*, 48 VAND. L. REV. 349 (1995); L.A. Powe, Jr., *The Free Speech Paradigm and Its Critics*, in PROCEEDINGS OF THE SIXTH ANNUAL SYMPOSIUM OF THE CONSTITUTIONAL LAW RESOURCE CENTER 48 (Stanley Ingber ed., 1995).

402. See generally Rabban, *Forgotten Years*, *supra* note 385 (discussing the historical interpretation of the First Amendment prior to 1917).

Milton<sup>403</sup> and John Stuart Mill,<sup>404</sup> the Second Amendment seemingly draws blanks. When the First Amendment began its incredible ascendancy after the dissents by Justices Holmes and Brandeis,<sup>405</sup> the Second Amendment got Justice McReynolds's opinion in *Miller*.<sup>406</sup>

Yet, as the history shows, there was once a *gravitas* to the Second Amendment. We have seen the importance to the First Amendment of St. George Tucker's American edition of *Blackstone's Commentaries*.<sup>407</sup> When Tucker placed sovereignty in the people, he cut through the prior restraint/subsequent punishment dichotomy, because a sovereign people could not at any time be silenced by their temporary agents.<sup>408</sup> To the extent that we credit Tucker with his prescience about the First Amendment, we must note also that he exalted the Second Amendment. Furthermore, Tucker thought that the Second Amendment, not the First, held the key to American liberty.<sup>409</sup> After quoting the Amendment, he stated: "This may be considered as the true palladium of liberty."<sup>410</sup>

Tucker contrasted the United States with Great Britain where he believed that "the right of keeping arms is effectually taken away from the people of England."<sup>411</sup> This was not so in America, because of the Second Amendment's guarantee that people could bear arms "without any qualification as to their condition or degree, as is the case in the British government."<sup>412</sup> Accordingly, Americans could exercise the "right of self defence[,] the first law of nature."<sup>413</sup> Americans could also protect their "liberty" which, in lands with standing armies but no individual right to bear arms, "if not already annihilated, [was] on the

403. See Milton, *supra* note 387.

404. JOHN STUART MILL, ON LIBERTY (1859).

405. See *supra* note 391 and accompanying text.

406. See *supra* notes 107-53 and accompanying text.

407. See 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES, app. at 300 (1803) [hereinafter TUCKER'S BLACKSTONE].

408. See *id.*, app. at 297.

409. See *id.*, app. at 300.

410. *Id.*

411. 2 *id.* at 143 n.41.

412. *Id.* at 143 n.40.

413. 1 *id.*, app. at 300.

brink of destruction."<sup>414</sup> Just as Tucker cut through the prior restraint/subsequent punishment dichotomy to note that to be effective, the First Amendment had to prohibit both, so he broke through the private possession/state control dichotomy to conclude that to be effective, the Second Amendment had to guarantee individual possession of arms.

A quarter of a century later, Justice Joseph Story reiterated Tucker's praise of the Second Amendment.<sup>415</sup> Like Tucker, Story called it "the palladium of the liberties of a republic" and stated that it "offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist, and triumph over them."<sup>416</sup> Story, however, added a cautionary note based on the fact that militia service was falling from favor and was perceived as burdensome.<sup>417</sup>

Possibly because of the waning favor of the militia, it was during this period that the first post-Constitution state constitutions that omitted a right to bear arms clause were written. Iowa,<sup>418</sup> Wisconsin,<sup>419</sup> Minnesota,<sup>420</sup> and California<sup>421</sup> did not guarantee the right. During the same period, however, Arkansas,<sup>422</sup> Michigan,<sup>423</sup> Texas,<sup>424</sup> and Oregon<sup>425</sup> did. One of the Civil War states, Kansas, guaranteed a right to bear arms,<sup>426</sup> but Nevada<sup>427</sup> and West Virginia<sup>428</sup> did not. The debates in Congress in the immediate aftermath of the Civil War demon-

414. *Id.*

415. See JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (Boston, Hilliard, Gray, and Co., abridged ed. 1833).

416. *Id.* § 1001.

417. See *id.*

418. See 3 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 434-48 (William F. Swindler ed., 1974).

419. See 10 *id.* at 418-45 (1979).

420. See 5 *id.* at 303-18 (1975).

421. See 1 *id.* at 469-508 (1973).

422. See *id.* at 381, 382.

423. See 5 *id.* at 204, 205 (1975).

424. See 9 *id.* at 249, 258 (1979).

425. See 8 *id.* at 205, 206.

426. See 4 *id.* at 82, 83 (1975).

427. See 6 *id.* at 263-282 (1976).

428. See 10 *id.* at 341-61 (1979).

strated, however, that an armed populace had lost little of its importance to a new generation of constitutional framers.<sup>429</sup>

The Bill of Rights had responded to perceived fears of a strong and overreaching Federal Government.<sup>430</sup> The Fourteenth Amendment responded to actual abuses by state governments in the years leading to the Civil War and especially in the year after the surrender at Appomattox, when Southern State after Southern State adopted laws to reduce the freedmen to serfdom.<sup>431</sup> Congress first responded by adopting the Freedmen's Bureau Act<sup>432</sup> and the Civil Rights Act<sup>433</sup> over presidential vetoes and objections that the Thirteenth Amendment did not provide constitutional authority for their provisions.<sup>434</sup> The Fourteenth Amendment was designed, in part, to end any such questions.<sup>435</sup> Additionally, as Eric Foner stated, the Fourteenth Amendment "was deemed necessary, in part, precisely because [freedom of speech, the right to bear arms, trial by impartial jury, and protection against cruel and unusual punishment and unreasonable search and seizure were] being systematically violated in the South in 1866" and Congress wished to guarantee the protection of these rights against future state abridgement.<sup>436</sup>

Evidence exists for the proposition that the Framers of the Fourteenth Amendment intended to incorporate the protections of the entire Bill of Rights against state action.<sup>437</sup> There is even better evidence that they intended to guarantee freedom of speech, the right to bear arms, and the right to an impartial jury against state action.<sup>438</sup> The Fourteenth Amendment targeted the South and the actual abuses being perpetrated

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429. See STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED* 135-42 (1984).

430. See STORY, *supra* note 415, §§ 980-81.

431. See FONER, *supra* note 81, at 258-59.

432. ch. 90, 13 Stat. 507 (1865).

433. ch. 31, 14 Stat. 27 (1866).

434. See FONER, *supra* note 81, at 243-50.

435. See *id.* at 258-59.

436. See *id.*

437. See generally MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE* (1986) (discussing the historical development of the Fourteenth Amendment, and its subsequent interpretation by the courts).

438. Cf. HALBROOK, *supra* note 429, at 107-23.

there.<sup>439</sup> The newly freed blacks needed to be able to protect themselves.<sup>440</sup>

Evidence of the Framers' intent to incorporate the whole Bill of Rights was central to Justice Black,<sup>441</sup> but has been irrelevant to the other Justices, who collectively have taken a variety of approaches to the issue of the applicability of the Bill of Rights to the states.<sup>442</sup> At one time, when *Cruikshank*,<sup>443</sup> *Presser*,<sup>444</sup> and *Patterson*<sup>445</sup> were newly decided, the Bill of Rights had no applicability to the states.<sup>446</sup> Beginning with *Palko v. Connecticut*,<sup>447</sup> however, the Court, openly and self-consciously, began to selectively incorporate some guarantees but not others.<sup>448</sup> Justice Cardozo explained that although certain provisions of the Bill of Rights might "have value and importance," that was not enough; instead, they had to be "the very essence of a scheme of ordered liberty."<sup>449</sup> In other words, only those provisions "so rooted in the traditions and conscience of our people as to be ranked as fundamental" were incorporated.<sup>450</sup>

*Palko* collapsed in the 1960s when the Court was incorporating every provision of the Bill of Rights that it considered.<sup>451</sup> *Duncan v. Louisiana* explained the newer approach as rejecting *Palko's* idealized and imagined system and inquiring into the

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439. See FONER, *supra* note 81, at 258-59.

440. See, e.g., HALBROOK, *supra* note 429, at 110.

441. *Adamson v. California*, 332 U.S. 46, 71-72 (1947) (Black, J., dissenting).

442. See, e.g., *Maxwell v. Dow*, 176 U.S. 581, 601-02 (1900) (discounting the significance of congressional debate over the Fourteenth Amendment).

443. *United States v. Cruikshank*, 92 U.S. 542 (1875).

444. *Presser v. Illinois*, 116 U.S. 252 (1886).

445. *Patterson v. Colorado*, 205 U.S. 454 (1907).

446. "The [F]irst [A]mendment . . . like the other amendments proposed and adopted at the same time, was not intended to limit the powers of the state government in respect to their own citizens, but to operate upon the National government alone." *Cruikshank*, 92 U.S. at 552.

447. 302 U.S. 319 (1937).

448. The Court had already, but without serious explanation, incorporated the speech, press, and takings clauses. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (speech and press); *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 236-37 (1897) (takings).

449. *Palko*, 302 U.S. at 325.

450. *Id.* (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

451. See CURTIS, *supra* note 437, at 202-03.

reality of American practice.<sup>452</sup> Thus the right of a criminal jury trial was incorporated because all states guaranteed it;<sup>453</sup> for purposes of incorporation, a right is fundamental if it appears in the Bill of Rights and it is widely accepted by the states, either through their constitutions or their common law.<sup>454</sup> The rash of Supreme Court incorporation decisions, however, left two obvious provisions for incorporation untouched: the Second and Seventh Amendments.<sup>455</sup> Both issues have been raised, but the Court has refused to review them.<sup>456</sup>

If review were granted on a Second Amendment case, the "correct" outcome might not be so clear. Under the *Duncan* approach, the Second Amendment claim easily is stated: the right to bear arms is found in the Bill of Rights and in forty-three of the fifty state constitutions (including the two states admitted to the union in the mid-twentieth century).<sup>457</sup> The argument against incorporation could come from one of several directions. The first would be consequentialist and easily stated: Guns kill, so allowing civilians to have them is bad policy. The second is likely to be the least persuasive: Forty-three states is a lot, but not enough to override the values of federalism and the wishes of the other seven.<sup>458</sup> The third would be that simply balancing

452. See *Duncan v. Louisiana*, 391 U.S. 145, 154-55 (1968).

453. See *id.* at 155-56.

454. See, e.g., *Benton v. Maryland*, 395 U.S. 784, 795 (1969) (finding the guarantee against double jeopardy to be fundamental).

455. "The Seventh Amendment governs proceedings in federal court, but not in state court . . ." *Gasperini v. Center for Humanities, Inc.*, 116 S. Ct. 2211, 2222 (1996). The Third Amendment and the Fifth Amendment right to a grand jury also are not incorporated. The former probably would be if any state violated it; the latter is not because too many states have discarded the grand jury requirement.

456. See *Love v. Peppersack*, 47 F.3d 120 (4th Cir.), *cert. denied*, 116 S. Ct. 64 (1995) (involving the Second Amendment); *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983) (involving the Second Amendment); *Colclasure v. Kansas City Life Ins. Co.*, 720 S.W.2d 916 (Ark. 1986), *cert. denied*, 481 U.S. 1069 (1987) (involving the Seventh Amendment); *Sharpe v. State ex rel. Oklahoma Bar Ass'n*, 448 P.2d 301 (Okla. 1968), *cert. denied*, 394 U.S. 904 (1969) (involving the Seventh Amendment).

457. See David B. Kopel et al., *A Tale of Three Cities: The Right to Bear Arms in State Supreme Courts*, 68 TEMP. L. REV. 1177, 1180 n.13 (1995) (listing the relevant text from all the state constitutions). Only Illinois facially seems to allow negation of the very right protected: "Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed." ILL. CONST. art. 1, § 22.

458. California, Iowa, Maryland, Minnesota, New Jersey, New York, and Wisconsin.



the decisions of forty-three states against the decisions of seven misses the point of our traditions. A long time ago, there was a tradition of bearing arms, but that tradition has been lost for most of a century, and it is not to be regained by judicial fiat.

If incorporation is not certain under *Duncan*, how might the issue be decided under *Palko*? If the question is whether the right was of the "very essence of ordered liberty" in 1791 or 1868, then the answers would be "yes" and "probably yes." Calling the Second Amendment the "palladium of liberty"<sup>459</sup> is roughly equivalent to calling the First Amendment the "indispensable condition[ ] of nearly every other form of freedom."<sup>460</sup> If the date were 1937, however, it would seem inconceivable that the elite in American society would talk of the Second Amendment in such terms. After 1968, and the assassinations of Martin Luther King, Jr. and Robert Kennedy, inconceivable becomes impossible.

The collective rights theory obviates all of these problems dealing with incorporation.<sup>461</sup> If no individual can claim the right to bear arms, there is no issue. If the "right" exists in the State, incorporation against state interference is utterly incomprehensible.<sup>462</sup>

The collective rights theory, however, has weaknesses stemming from the debates in the post-Civil War thirty-ninth Congress. Militia service had now disappeared from the discussions of the right to bear arms.<sup>463</sup> Northern Republicans were hardly interested in creating a new Southern armed force, but they were interested in protecting blacks.<sup>464</sup> Also, the civic republicanism prevalent in the founding generation was gone. There was no argument about the necessary preconditions of civic

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See Kopel et al., *supra* note 457, at 1180 n.13 (omitting these states from the list of those with constitutional guarantees of a right to bear arms).

459. See *supra* notes 410 & 416 and accompanying text.

460. *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

461. See *supra* text accompanying notes 45-49.

462. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 299 n.6 (2d ed. 1988). The Establishment Clause posed an identical problem and this was part of the reason for recognizing that it must create an individual right. See, e.g., *Everson v. Board of Educ.*, 330 U.S. 1, 15-16 (1947).

463. Cf. HALBROOK, *supra* note 429, at 139.

464. See *id.* at 109-10.

virtue; Republicans cared about self-defense for their allies in an openly hostile environment.<sup>465</sup> No one has offered any evidence to suggest that the Framers or ratifiers of the Fourteenth Amendment thought in terms of a collective right to own guns.

This creates an interesting originalist possibility. Even assuming that the Second Amendment is about a collective right, the Fourteenth Amendment, linguistically and by intent, was not.<sup>466</sup> Therefore, if the collective rights theory has any controlling historical validity, the federal government could limit arms to organized militias, but state governments could not. A right that the Fourteenth Amendment protects is individual and states may not abridge it, once the Court declares that right to be encompassed by the Fourteenth Amendment.<sup>467</sup>

Through 1866, there was a strong, consistent belief in the right to bear arms. This belief is reflected years later in Thomas Cooley's *General Principles of Constitutional Law*, in which he wrote that "the people, from whom the militia must be taken, shall have the right to keep and bear arms, and they need no permission or regulation of law for the purpose."<sup>468</sup> Yet this view was shattered within a century. The beginnings came during Reconstruction, when, not surprisingly, the Republicans' belief that the freedmen needed to be armed was not shared by white southerners.<sup>469</sup> Clayton Cramer has noted that the years following the Civil War witnessed a burst of legislation to restrict the right to carry arms, in both the former Confederacy and former slave-states that had remained in the Union.<sup>470</sup>

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465. See CURTIS, *supra* note 437, at 55-56.

466. Cf. *id.* at 219.

467. Daniel Polsby has suggested that Congress use its powers under section five of the Fourteenth Amendment in order to establish legislatively that the Second Amendment is applicable against the states. See Daniel D. Polsby, *Second Reading*, REASON, Mar. 1996, at 32, 34. Such drastic action probably would result in a Supreme Court ruling on the issue.

468. THOMAS COOLEY, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* 282 (Boston, Little, Brown, and Co., 2d ed. 1891).

469. See WILLIAM ARCHIBALD DUNNING, *RECONSTRUCTION, POLITICAL AND ECONOMIC 1865-1877*, at 58 (1907) ("The restrictions in respect to bearing arms, testifying in court, and keeping labor contracts were justified by well-established traits and habits of the negroes . . .").

470. See CLAYTON E. CRAMER, *FOR THE DEFENSE OF THEMSELVES AND THE STATE: THE ORIGINAL INTENT AND JUDICIAL INTERPRETATION OF THE RIGHT TO KEEP AND*

Kates suggests that the target of the legislation was the freedmen, and there is no reason to doubt this conclusion.<sup>471</sup> Thus, even as convictions of white defendants were overturned, the laws were upheld for use in other circumstances.<sup>472</sup> In 1941, a Florida Supreme Court judge in exactly these circumstances quite candidly said that everyone knew why these laws had been enacted: blacks, but not whites, were to be disarmed.<sup>473</sup>

The South led, and eventually the rest of the nation followed, with restrictions on both the concealed and open carrying of weapons.<sup>474</sup> New York's Sullivan Law of 1911<sup>475</sup> required the licensing of handguns after both the *New York Times* and the *New York Tribune* complained of armed immigrants.<sup>476</sup> On the West Coast, fears of Asian immigrants led to restrictive measures.<sup>477</sup> Fear of those who were different led whites to demand limitations on bearing arms.

In the twentieth century both laws and elite opinion have questioned the Second Amendment, and this questioning became virtually universal after the assassinations of King and Kennedy. As a result, the collective rights theory "flowered in the 1960s or '70s as a prop in national political debates about gun control laws."<sup>478</sup> As the elite's disdain for guns grew, the Second Amendment became the only provision of the Bill of Rights to be attacked publicly by (retired) Supreme Court Justices Warren Burger<sup>479</sup> and Lewis Powell.<sup>480</sup> The epithet "gun nut" too

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BEAR ARMS 97-140 (1994).

471. See Don B. Kates, Jr., *Toward a History of Handgun Prohibition in the United States*, in *RESTRICTING HANDGUNS* 7, 14-15 (Don B. Kates, Jr. ed., 1979).

472. See, e.g., CRAMER, *supra* note 470, at 138.

473. See *Watson v. Stone*, 4 So. 2d 700, 703 (Fla. 1941) (Buford, J., concurring).

474. See, e.g., Kates, *supra* note 471, at 14-15.

475. N.Y. PENAL LAW § 1897 (Consol. 1911).

476. See, e.g., DAVID B. KOPEL, *THE SAMURAI, THE MOUNTIE, AND THE COWBOY: SHOULD AMERICA ADOPT THE GUN CONTROLS OF OTHER DEMOCRACIES?* 342-43 (1992).

477. *Cf. id.* at 343.

478. Polsby, *supra* note 467, at 35. The collective rights theory first was adopted by that name in *City of Salina v. Blaksley*, 83 P. 619, 620 (Kan. 1905), but had one judicial antecedent in *State v. Buzzard*, 4 Ark. \*18, \*24-\*25 (1842), which held that the right to bear arms was limited to the militia.

479. See Cottroll & Diamond, *supra* note 180, at 997 n.8 (citing Warren Burger's comment, on the *MacNeil/Lehrer Newshour* (PBS television broadcast, Dec. 16, 1991) that the inclusion of the Second Amendment in the Bill of Rights was a mistake).

480. See Nancy Blodgett, *Powell: What Right to Own Guns?*, ABA JOURNAL, Oct. 1,

often placed NRA members in similar categories with racists, cult members like Branch Davidians, and pornographers. When celebrating the bicentennial of the Bill of Rights, the *St. Louis Post-Dispatch* offered a Second Amendment story that contained a lengthy segment by a woman whose brother had been shot by a criminal.<sup>481</sup> It did not run a parallel piece about a Holocaust survivor describing her feelings about the Nazi march in Skokie.<sup>482</sup>

If one needed a synthesis, all that would be required is to open the pages of the 1989 *Yale Law Journal* to Professor Wendy Brown's comments about a helpful hunter who, as a good Samaritan, assisted her and a companion, far from the nearest AAA tow truck, with a car problem: Brown stereotypes the hunter as a would-be rapist.<sup>483</sup> Yet for all the negative stereotypes among elites, four states amended their constitutions in the 1980s to protect, for the first time, the right to possess arms.<sup>484</sup> Furthermore, nonelite opinion seems to believe, contrary to Dean Griswold,<sup>485</sup> that there is a right to bear arms.<sup>486</sup>

Like the actions of the white South after the Civil War, there is ample material here for the making and telling of a tradition.<sup>487</sup> But what makes the First Amendment tradition

1988, at 30 (citing Powell's assertion at ABA annual meeting that handguns may be barred despite the Second Amendment).

481. See Tim Poor, *The Gun Debate: For Regulation*, ST. LOUIS POST-DISPATCH, Nov. 19, 1991, at C1.

482. Cf. *Collin v. Smith*, 578 F.2d 1197 (1978) (holding that members of the National Socialist Party of America had a constitutionally protected right to hold a demonstration in Skokie, Illinois, even though the demonstration would involve the use of Nazi symbols that were highly offensive to the town's Jewish population).

483. See Wendy Brown, *Guns, Cowboys, Philadelphia Mayors, and Civic Republicanism: On Sanford Levinson's The Embarrassing Second Amendment*, 99 YALE L.J. 661, 666 (1989). But see Douglas Laycock, *Vicious Stereotypes in Polite Society*, 8 CONST. COMMENTARY 395, 397-403 (1991) (denouncing Brown's stereotyping of the hunter who had assisted her).

484. Delaware, Nebraska, North Dakota, and West Virginia. See generally, Kopel et al., *supra* note 457, at 1180 n.13.

485. See *supra* note 34 and accompanying text.

486. See Gordon Witken et al., *The Fight to Bear Arms*, U.S. NEWS & WORLD REP., May 22, 1995 at 28, 29 (citing statistics showing that 75% of American voters believe the Constitution guarantees them the right to own guns).

487. The material surely would include examples of liberal hypocrisy. One such example is newspaper columnist Carl Rowan, who publicly advocated banning guns

successful—a combination of academic and judicial support, as well as popular support by the press—is missing at both ends of Second Amendment tradition. Academics claiming Second Amendment parity with other rights have been too wedded to historical and textual argument—unable to see that there is much more to constitutional argument and analysis. What the Second Amendment needs is a coherent tradition that embraces the good while explaining and accommodating the bad.<sup>488</sup> Perhaps, however, such a tradition cannot yet be written.

This requires considering the interesting constitutional possibility that the Second Amendment died sometime in the past 125 years. David Williams has authored two excellent articles that combine taking the Second Amendment seriously with proclaiming its death.<sup>489</sup> Both articles center on the civic republican basis of the Amendment.<sup>490</sup> The first article joined Professor Brown in proclaiming civic virtue dead and suggesting that the Second Amendment went with it.<sup>491</sup> There are three problems with this thesis. First, someone more authoritative than an academic must sign civic virtue's death certificate. Second, there is more to the Second Amendment than republicanism—especially in the events surrounding the inception of the Fourteenth Amendment, when republicanism was nonexistent. Third, the Second Amendment can exist without republicanism, even though Williams may find this prospect "terrifying."<sup>492</sup>

Williams's second article states that the Second Amendment presupposed a unitary "people," and as a nation we no longer

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and yet owned an unregistered gun himself, which he used to shoot at trespassers in his yard. See *Columnist Rowan Shoots Man Who Entered Yard*, CHICAGO TRIB., June 15, 1988, at 3; Carl Rowan, *Deranged Must be Disarmed*, SAN DIEGO UNION-TRIB., Aug. 25, 1986, at B7. Another example is the *New York Times* editorializing against guns, although its publisher is one of the few New York residents granted a permit to carry a concealed weapon. See Kates, *supra* note 38, at 208 & n.17; *The Real Politics of Guns*, N.Y. TIMES, May 6, 1983, at A30.

488. Some readers may believe that such a tradition already has been written. My best answer is that I think I would know it if I read it. Quite obviously, supplying a Second Amendment tradition is vastly beyond the scope of this enterprise.

489. See Williams, *supra* note 1; Williams, *supra* note 319.

490. See Williams, *supra* note 1, at 881, 887; Williams, *supra* note 319, at 552-53.

491. See Williams, *supra* note 319, at 554-56.

492. See *id.* at 553.

are one people.<sup>493</sup> Again, there are three problems with this thesis, paralleling those of his initial attempt. First, this conclusion would make too many Yale professors unemployable.<sup>494</sup> Second, the Constitution seems to presume conclusively that we are one people. Third, the right to bear arms can exist in a many-peopled society.

Still, Williams highlights an important question of whether unamended parts of the Constitution can die.<sup>495</sup> Bruce Ackerman's concept of "constitutional moments"<sup>496</sup> might explain how this could happen, but it seems unhelpful here because even if Ackerman's concept is valid, if the Second Amendment is dead, it slipped away over time and not in a constitutional moment. The Second Amendment tradition may be the opposite of the First's and may really consist of the telling of how a right went from the "palladium of liberty"<sup>497</sup> to the constitutional graveyard.

The Contracts Clause,<sup>498</sup> the heart of nineteenth century rights jurisprudence,<sup>499</sup> offers an interesting analogy of constitutional morbidity. Recall that the core of early Contracts Clause jurisprudence was a prohibition on state enactment of debtor relief laws.<sup>500</sup> Recall also that Chief Justice Hughes sustained the Minnesota Mortgage Moratorium Law in *Home Building and Loan Association v. Blaisdell*.<sup>501</sup>

Chief Justice Hughes's opinion in *Blaisdell* spent a lot of time trying to explain why the debtor relief law did not impair the obligation of contract as the text of the Contracts Clause, its history, and prior Supreme Court opinions indicated.<sup>502</sup> A fair

493. See Williams, *supra* note 1, at 908-11.

494. Cf. Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119, 1147 (1995) ("Who today speaks of 'We the People,' other than demagogues, originalists, and Yale law professors?").

495. See Williams, *supra* note 319, at 554.

496. See Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1022 (1984).

497. See *supra* text accompanying notes 410 & 416.

498. U.S. CONST. art I, § 10, cl. 1.

499. See BENJAMIN FLETCHER WRIGHT, JR., *THE CONTRACT CLAUSE OF THE CONSTITUTION* 257-58 (1938).

500. See *id.* at 19.

501. 290 U.S. 398 (1934).

502. See *id.* at 442-44.

reading seems to be that: (1) times change,<sup>503</sup> (2) Minnesota had not adopted repudiation of debts as state policy,<sup>504</sup> and therefore (3) reasonable, temporary impairments are constitutional.<sup>505</sup>

A like analysis fits the Second Amendment quite well; (1) obviously times change and rights change with them,<sup>506</sup> (2) neither the federal Government nor any state has ever adopted a policy of *total* gun control; and (3) accordingly, reasonable limits on gun ownership are constitutional. Putting together points (2) and (3) in practical and doctrinal terms means that so long as at least one type of weapon, such as hunting rifles, is not banned, any other regulation would be valid.<sup>507</sup>

The subsequent history of the Contracts Clause is not wholly consistent with my suggested reading of *Blaisdell*, but it is close enough for constitutional analysis. Only twice in the six decades since *Blaisdell* has the Court found that a state statute went too far in eliminating rights of contract.<sup>508</sup> Actually, Second Amendment advocates might envy such a record, because it far exceeds theirs. Nevertheless, traditional argument, with its emphasis on what history teaches us, can cut two ways. It can overprotect the highly popular and it can underprotect the consistently unpopular.

In the former situation, it takes something that is well protected—like freedom of expression, liberty of contract, or sexual intimacies in marriage—and protects it even more. The result typically is that outlying communities are brought within a national consensus.

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503. Cf. *Missouri v. Holland*, 252 U.S. 416, 434 (1920) ("We must consider what this country has become" in interpreting the Constitution).

504. See *Blaisdell*, 290 U.S. at 439 (stating that states would not be permitted to adopt a policy of repudiating debts or destroying contracts).

505. See *id.*

506. See *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 669 (1966) (noting that "rights under the Equal Protection Clause are not tied to historic notions of equality").

507. Such regulation would be upheld because it would be subject only to the rational basis test.

508. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978) (striking down a Minnesota statute that imposed a penalty on certain employers for terminating their employee pension plan); *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977) (prohibiting retroactive repeal of an interstate covenant that would have impacted Port Authority bond holders).

The latter situation, underprotecting the consistently unpopular, is more troubling because it is a way that a constitutional provision may wither or die without formal action of Congress and the state legislatures to change it. Obviously, a guarantee of a right found in the Constitution got there because it once was thought to be important. In the case of the right to keep and bear arms, this lasted at least through the Reconstruction Era.<sup>509</sup> Over time, however, majorities, aided by the opinions of the dominant elite, have wished the right would vanish. Indeed, legal elites have claimed that *Miller* already did the disappearing act.<sup>510</sup> To the extent that traditional argument gives a constitutional imprimatur to this, it is troubling, just as *Blaisdell* was troubling.

It is troubling because a shift in tradition would justify a majority committing exactly the type of abuse the Constitution was designed to prevent. In *Blaisdell*, changed circumstances meant that a majority could impose debtor relief laws on the mortgageholding minority.<sup>511</sup> It may have been no big deal in these circumstances, because banks and the like could be expected to protect themselves.<sup>512</sup> In the Second Amendment context, however, changed tradition could mean that a majority may disarm a minority it wishes to oppress, even in the face of language and an expired tradition that guaranteed the minority a right to keep and bear arms, partially to preclude government oppression. To put it bluntly, traditional argument would justify committing one of the abuses the Amendment was aimed at precluding. As such it offers confirmation of Madison's underlying worry that declarations of rights were but "parchment barriers."<sup>513</sup>

Thus, when we celebrate tradition, we must recognize that it is not a one-way ratchet, nor is it necessarily a good thing. Having said that, it seems inescapable that despite text and history,

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509. See *supra* note 429 and accompanying text.

510. But see *supra* notes 149-58 and accompanying text (noting the thinness of such arguments).

511. See *supra* notes 501-05 and accompanying text.

512. Justice Brennan made a similar claim when he voted in support of the legislation at issue in *United States Trust Co. v. New Jersey*, 431 U.S. 1, 62 n.18 (Brennan, J., dissenting).

513. See RAKOVE, *supra* note 208, at 310-16.



the differences in evolution of their respective traditions seem to best explain the relative constitutional status of the first two amendments.

### *E. Structure*

Structural argument takes as its starting point the particular structures and institutions established or recognized by the Constitution, and the relationships among them. Normally, this involves either the checks and balances found among the three branches of the federal government, the existence of the States and federalism, or the relationship between representative government and the citizenry. However, as Justice Stewart reminded everyone two decades ago, the Framers created another structure in the First Amendment: an autonomous press with its ability to check the excesses of government.<sup>514</sup> He did not mention the Second Amendment, but an arms-bearing populace, either inside or outside a militia, also empowers the citizens as another check on government.

The press, Edmund Burke's Fourth Estate,<sup>515</sup> has perceived itself, and in turn has been perceived, as an independent watchdog on the government, especially when the three branches of government are identified singularly as "The Government." In Stewart's words, the First Amendment's guarantee of freedom of the press is "a *structural* provision" operating "to create a fourth institution outside the Government as an additional check on the three official branches."<sup>516</sup>

First Amendment doctrine has been fashioned to serve the Fourth Estate model.<sup>517</sup> First, and foremost, the press is autonomous. Government may not dictate the content of a newspaper.<sup>518</sup> Second, as the *Pentagon Papers* Cases demonstrate, on-

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514. See Potter Stewart, "Or of the Press", 26 HASTINGS L.J. 631, 634 (1975).

515. See POWE, *supra* note 105, at 260-61 (noting Burke's characterization of the press as the "Fourth Estate").

516. *Id.* at 633-34; see also Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527.

517. See POWE, *supra* note 105, at 260-87.

518. See *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (striking down Florida's statutory mandate that political candidates be provided with equal print space in which to reply to editorial comments).

ly in the most extreme situations may government preclude the press from publishing damaging information about the government's actions.<sup>519</sup> "The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government."<sup>520</sup> Should the various branches of government establish a policy, the First Amendment guarantees that the press will be an independent actor with full ability to challenge the policy. Freedom of speech and the press is, in Justice Cardozo's words, "the matrix, the indispensable condition, of nearly every other form of freedom."<sup>521</sup>

In a structural interpretation, the Second Amendment walks hand-in-hand with the First. If the First Amendment exposure and protest of government tyranny fail to stop or change a tyrannical government, then there is always the Second Amendment and the implicit threat that the people will fight for their liberties. Structural argument will support either the individual rights theory or the collective rights theory. A widely armed populace offers a keen check on a government bent on usurpation. Similarly, an armed militia, although obviously no match for a standing army, is equally available as an immediate check and as a long-term underground option.

Nevertheless, unlike the First Amendment, the text of the Constitution is not silent about the federal government's ability to suppress *armed* dissent. Article III of the Constitution defines treason as "levying War against" the United States.<sup>522</sup> Three other constitutional provisions give the federal government authority against armed rebellion: Article I gives Congress the power to call forth the militia to "suppress Insurrections,"<sup>523</sup> under Article I Congress also may suspend the writ of habeas corpus "when in Cases of Rebellion . . . the public Safety may require it,"<sup>524</sup> and Article IV allows the United States, upon

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519. See *New York Times Co. v. United States*, 403 U.S. 713 (1971).

520. *Id.* at 717 (Black, J., concurring).

521. *Palko v. Connecticut*, 302 U.S. 319, 327 (1937); see also *supra* text accompanying note 383.

522. See U.S. CONST. art. III, § 3, cl. 1.

523. See *id.* art. I, § 8, cl. 15.

524. See *id.* art. I, § 9, cl. 2.

application, to protect a State "against domestic Violence."<sup>525</sup> It is inconceivable that the Second Amendment limits these provisions in any way. If someone takes up arms against the United States, that person is going to be met with justified constitutional force.

So how does the Second Amendment square with this? At first, as Garry Wills has claimed,<sup>526</sup> it seems not to. A second look suggests, however, a structural accommodation. Possibly the Second Amendment can best be understood to incorporate a common law rule against prior restraints.<sup>527</sup> This theory means that, just as Blackstone's Englishmen had the right to own a printing press but could be punished for its use against the government,<sup>528</sup> the American people have the right to keep arms available for the revolution but no right to put them to use in rebellion or insurrection.<sup>529</sup> Checks and balances have their own logic. Their purpose is to make action difficult, and the Constitution accomplishes this through the pairing of the Second Amendment with the various rebellion suppression clauses in the body of the Constitution.

The Federal Government, knowing it faces an armed citizenry, will be more circumspect in its actions, while simultaneously serving as a check on the would-be revolutionaries through its own army. On the one hand, if the checks and balances work properly, no federal rebellions will occur. If one begins, however, it should easily be put down. On the other hand, a revolution of and by the people should succeed just as the American Revolution did.<sup>530</sup>

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525. See *id.* art. 4, § 4.

526. See *supra* notes 320, 340-44 and accompanying text.

527. Many thanks to Doug Laycock for suggesting the analogy upon reading an earlier draft of this Article.

528. See *supra* notes 213-17 and accompanying text.

529. See *Commonwealth v. Blanding*, 20 Mass. (3 Pick.) 304, 313 (1825) ("The liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse; like the right to *keep* fire arms, which does not protect him who uses them for annoyance or destruction.") (emphasis added).

530. This was Madison's point in *The Federalist Papers*. See THE FEDERALIST NO. 46 (James Madison); see also *infra* notes 600-02 and accompanying text (discussing the Whiskey Rebellion).

The collective rights theory perceives the Second Amendment as protecting a well-organized State militia to serve as a check on federal tyranny.<sup>531</sup> To students of American history, this sounds familiar. The various Southern state militias protected the South from Northern aggression under Lincoln. The only problem is that the South lost. Having lost, and having been forced to accept the Northern terms of peace—the Thirteenth and Fourteenth Amendments—as well as Northern occupying troops, is it conceivable that the constitutional right lasted beyond Appomattox?<sup>532</sup> Perhaps it is. The Constitution does not guarantee successful revolution, much less immunity for unsuccessful revolutionaries. No one would expect it to. The Southern failure shows that, in discussing a checking power, it is essential to remember that the checks really do operate both ways.

Now fast-forward to Little Rock in 1957. With the Arkansas National Guard preventing the desegregation of Central High School, President Eisenhower made the decisions to send in the 101st Airborne and to federalize the Guard to remove it as a potential opposition force.<sup>533</sup> Does anyone believe that Governor Orval Faubus successfully could have opposed federalizing the Guard on the ground that the Second Amendment secured an independent military to the States to oppose national tyranny?<sup>534</sup>

If the collective rights theory is correct, then its view of the Second Amendment must have some meaning, and that meaning has to include an independent state right to void a national order federalizing the Guard. Otherwise, what could a collective rights constitutional amendment do and mean? We know that Governor Faubus could not have exercised any constitutional right with respect to the Arkansas National Guard, and this necessarily means the collective rights theory either is wrong or dead. What is interesting is that no one espousing a collective rights view of the Second Amendment has stated that the

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531. See Reynolds & Kates, *supra* note 47, at 1738.

532. See Kates, *supra* note 38, at 212 (“State’s right analysis renders the amendment little more than a holdover from an era of constitutional philosophy that received its death knell in the decision rendered at Appomattox Courthouse.”).

533. See *Cooper v. Aaron*, 358 U.S. 1, 9-12 (1958).

534. If so, the result of *Cooper* should dispel that belief. See *id.* at 16-19.

Amendment expired with the Confederacy. That, at least, would be an honest reading of constitutional history.<sup>535</sup>

The individual rights theory offers fewer such interpretive problems, especially with the analogy to the common law rule against prior restraints. It is conceivable that after the Civil War, the checking value of an armed citizenry might have fallen into disrepute. We know, however, that it did not.

The Republicans in the Reconstruction Congress understood the precarious position of the freed blacks and the white unionists within the South and they knew that without arms, they were at the tender mercies of the losers of the war.<sup>536</sup> By both word and deed, they supported a right to bear arms as an essential ingredient of freedom under the newly adopted Thirteenth Amendment.<sup>537</sup> The Freedman's Bureau Act thus spoke to the "right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and [property,] including the constitutional right to bear arms . . ."<sup>538</sup> Lest the point be missed, Congress expressed similar thoughts when it drafted the Fourteenth Amendment. As Senator Jacob Howard stated on introducing the amendment, it was designed to protect "personal rights" such as the "right to keep and to bear arms."<sup>539</sup>

There are two possible readings of this. One is that the individual rights view, held even by advocates of the slavocracy like Chief Justice Taney,<sup>540</sup> was correct and that it continued after

535. See generally *Testa v. Kaat*, 330 U.S. 386, 390 (1947) (acknowledging that the fundamental issues of federal supremacy were resolved by the Civil War).

536. See, e.g., HALBROOK, *supra* note 429, at 109 ("In Mississippi rebel State forces, men who were in the rebel armies, are traversing the State, visiting the freedman, disarming them, perpetrating murders and outrages on them . . . ." (quoting Senator Henry Wilson)).

537. See CURTIS, *supra* note 437, at 52-53, 72, 140.

538. Act of July 16, 1866, ch. 200, § 14, 14 Stat. 173, 176-77 (continuing in force and amending the Freedman's Bureau Act).

539. CONG. GLOBE, 39th Cong., 1st Sess. 2764-65 (1866).

540. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 450 (1857).

Nor can Congress deny to the people the right to keep and bear arms, nor the right to trial by jury, nor compel any one to be a witness against himself in a criminal proceeding.

These powers, and others, in relation to rights of person . . . are, in express and positive terms, denied to the General Government . . .

the war. The other is that the collective rights view was correct prior to the Civil War, was lost, was transformed into an individual rights claim during Reconstruction, and was codified in that form in the Fourteenth Amendment.<sup>541</sup>

To sum up, structural argument seems to point to one of two conclusions. Either the Second Amendment was about collective rights and is now dead, or else it is about individual rights and remains alive, at least to some extent. In keeping with the assumption that a constitutional provision ought to have some meaning if possible, it seems that structural argument, even more than historical argument, throws its weight to the Standard Model individual rights theory.

### *F. Consequentialism*

Although consequentialist argument has its roots in the nineteenth century,<sup>542</sup> it is quintessentially a twentieth century form. It embraces both the policy-oriented demand for the more effective legal rule and the realist insight that judges operate within the confines of the political climate. Consequentialist argument need not prevail, but no area of constitutional law is immune from its influence because, as Philip Bobbitt has described, it is "actuated by the political and economic circumstances surrounding" a case.<sup>543</sup> Although theoretically consequentialist argument can cut either way, its most frequent use is to limit the sweep of the asserted right.<sup>544</sup>

Much of modern First Amendment doctrine is a rejection of the consequentialist argument inherent in the bad tendency test,

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#### *Id.*

541. Akhil Reed Amar writes of the transformation of the Second Amendment from its original fear of the federal standing army to an individual rights basis. See Amar, *Fourteenth Amendment*, *supra* note 40, at 1260-62.

542. See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873) (limiting the scope of the Privileges and Immunities Clause because otherwise all important rights would be subject to federal supervision); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 536 (1842) (holding that the Fugitive Slave Clause was a fundamental, partially self-executing, article, but could not be supplemented by state laws upon recapture of a slave).

543. See BOBBITT, *CONSTITUTIONAL FATE*, *supra* note 51, at 61 (discussing prudential argument, Bobbitt's term for what this Article calls consequentialist argument).

544. See *id.* ("[Consequentialists] generally hold that in times of national emergency even the plainest of constitutional limitation can be ignored.").

alleging that if certain types of speech are allowed to occur, bad things will happen. As we saw, *Schenck* applied such a test, articulating the concern that the safety and well being of society were put at risk by the defendants' speech.<sup>545</sup> The communist cases, especially *Dennis*, rested on the similar fear that without taking action now against those who conspired to advocate overthrow of the government in the future, we left the door open too widely to those unacceptable consequences—even if no such revolution ever would be attempted.<sup>546</sup>

Following the communist cases, however, these arguments decisively were rejected. A doctrinalist might have some difficulties explaining the shift from *American Communications Ass'n v. Douds*,<sup>547</sup> *Dennis*, and *Barenblatt v. United States*<sup>548</sup> to *Shelton v. Tucker*,<sup>549</sup> *Gibson v. Florida Legislative Investigation Committee*,<sup>550</sup> and *Bond v. Floyd*.<sup>551</sup> A consequentialist, however, would not, because he simply would point out that times, litigants, and attitudes had changed.

The new conclusion was that the earlier decisions mistakenly had inverted the risks. Properly understood, the First Amend-

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545. See *Schenck v. United States*, 249 U.S. 47 (1919); *supra* notes 96-102 and accompanying text.

546. See *Dennis v. United States*, 341 U.S. 494, 509 (1951) (“[A]n attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent.”).

547. 339 U.S. 382 (1950) (upholding the validity of section 9(h) of the National Labor Relations Act, which denied certification benefits to labor organizations that failed to file non-Communist affidavits, on the grounds that Communists in Union leadership positions represented a serious threat of disruptive political strikes).

548. 360 U.S. 109 (1959) (sustaining the conviction of an individual who refused to testify before the House Subcommittee on Un-American Activities, because the governmental interest in preventing a Communist revolution outweighed individual First Amendment rights).

549. 364 U.S. 479 (1960) (striking down an Arkansas requirement that teachers list organizations to which they belong on the grounds that such a requirement deprived individuals of their right of associational freedom).

550. 372 U.S. 539 (1963) (reversing the conviction of the President of the Miami NAACP, who refused to comply with a legislative order to divulge membership records, on the grounds that, given the lack of evidence of Communist activity, the right to associate outweighed the state's interest).

551. 385 U.S. 116 (1966) (holding that Georgia's refusal to seat a duly elected black representative because of his open opposition to the United States' Vietnam policy was a violation of the representative's First Amendment rights).

ment was designed to preclude government from assessing the risks as it did because the risk that government will overprotect the status quo is *always* greater than the risk of lawless action,<sup>552</sup> absent an incitement to imminent lawlessness.<sup>553</sup>

That same rejection of earlier rules through consequentialism explains the failure of the recent efforts to suppress either pornography or hate speech. Efforts to strip hitherto protected speech of its enshrined shelter, by creating new categories of unprotected speech, relied on two premises: first, the speech in question was not valuable, and second, it caused harm. Pornography creates violence against women.<sup>554</sup> Hate speech silences and stigmatizes its victims.<sup>555</sup>

Even assuming that the claimed harm actually does flow from the speech, the speech still may be protected. Of course, speech may cause harms; otherwise there would never be any reason for anyone to wish to censor it. For First Amendment purposes, the risks of overreaction, of a majority taking its anger and fear out on a despised minority, nevertheless precludes regulation even if the majority makes a strong case that the failure to regulate will exacerbate the harms. The consequentialist argument favoring regulation fails because an alternative consequentialist argument prevails: If speech turns to action, the actor will be punished, and this is sufficient even if it necessarily means that some harms will go unredressed.

Both sides of the First Amendment debate recognize that words wound. If only guns and bullets could be so limited in their effects. Instead, guns and bullets kill. In 1985 some 665,000 crimes—that is about 1800 a day—were committed with

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552. Justice Douglas was especially emphatic about this point in his concurring opinion in *Brandenburg*. See *Brandenburg v. Ohio*, 395 U.S. 444, 454 (1969) (Douglas, J., concurring); *supra* notes 13-17 and accompanying text.

553. See *Brandenburg*, 395 U.S. at 447.

554. The Indianapolis City Council found that pornography harmed women socially and promoted physical violence. Holding that adult women can protect themselves from being victimized by pornography a federal court struck down the city's anti-pornography ordinance. See *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

555. The City of St. Paul adopted an "anti-hate speech" ordinance designed to protect individuals from victimization. The Supreme Court found that the ordinance, on its face, violated the First Amendment. See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).



guns. In 1986 and 1987 there were about 40,000 murders per year, with sixty percent being committed with guns—that is roughly eighty per day. Especially since the Martin Luther King, Jr. and Kennedy assassinations, it has been easy to make the case that guns are evil and their elimination effectively would reduce violence in an admittedly violent society.<sup>556</sup> In the 1960s and 1970s, the robbery rate jumped sixfold and the murder rate doubled, while handgun ownership also doubled.<sup>557</sup> Common sense demonstrates that gun availability has a net positive effect on both the frequency and seriousness of violent acts. That is the consequentialist argument for limiting the Second Amendment to something sensible, like hunting rifles. The argument has been in full-flower for three decades and is “now the editorial opinion of virtually every influential newspaper and magazine . . . .”<sup>558</sup>

But guns don't kill, people do. We do not ban words just because they cause harm; Second Amendment supporters claim that the same should be true for guns. An obvious criticism of this argument is that the harms caused by guns are more certain and are of greater magnitude than are harms caused by words. If words actually killed eighty people each day, there would be much higher demand for regulation, and that demand would beget a supply.

Indeed, as a First Amendment observer, I am accustomed to seeing regulations of speech: perjury, fraud, incitement, obscenity, and the ubiquitous broadcast “indecentcy.” What seems surprising to me is that, given the differences in consequences, there is not *more* regulation of guns.

What may seem surprising, however, is that the conclusion that guns were evil and that eliminating them would be an efficacious way of reducing violence occurred *prior* to any scholarship on those factual assumptions. As Frank Zimring and Gordon Hawkins, two of the important original researchers have noted, those who believe in gun control did not feel “any great

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556. Cf. FRANK E. ZIMRING & GORDON HAWKINS, *THE CITIZEN'S GUIDE TO GUN CONTROL* xi (1987).

557. See Daniel D. Polsby, *The False Promise of Gun Control*, *ATLANTIC MONTHLY*, Mar. 1994, at 57.

558. *Id.*

need for factual support to buttress [their] foregone conclusions" because they assumed that the conclusions were self-evidently true.<sup>559</sup> Serious research only began in the mid-1970s.<sup>560</sup>

That research offers conclusions ranging from the intuitive to the surprising. First, not all laws deter equally. Given the number of guns in society, it is far more likely that responsible individuals who never would use guns criminally will yield up their weapons than will the irresponsible and criminal gun owners.<sup>561</sup> Second, using a gun to commit a crime may be a wash so far as violence goes. When aggressors have guns they are less likely to physically attack their victims, and less likely to injure the victim given an attack, but more likely to kill the victim, if an injury occurs.<sup>562</sup>

The initial debate never considered the victim as anything but a passive nonactor. Gary Kleck, whose recent book, *Point Blank*, was declared by the American Society of Criminologists to be the single-most important contribution to criminology in the previous several years, changed the debate by considering the victim and the effects of self-defense attempts.<sup>563</sup> Although serious debate about the number of times a gun is used in self-defense continues,<sup>564</sup> there seems to be some agreement that doing so is effective and that the incidence of self-defense use was decidedly underestimated by the researchers who concluded that armed aggressors are more likely to inflict fatal injuries.<sup>565</sup> When victims resist with a gun, they are less likely to be attacked, injured, or robbed.<sup>566</sup> Indeed, Kleck concludes that a victim who submits is far more likely to be injured than one who

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559. See ZIMRING & HAWKINS, *supra* note 556, at xi. They note an identical attitude on the part of those who oppose gun control. See *id.*

560. See Don B. Kates, Jr., et al., *Guns and Public Health: Epidemic of Violence or Pandemic of Propaganda?*, 62 TENN. L. REV. 513, 525 (1995).

561. See *id.* at 527.

562. See Gary Kleck, Address to the National Academy of Sciences/National Research Council Panel on the Understanding and Prevention of Violence (April 3, 1990), *quoted in id.* at 525.

563. GARY KLECK, *POINT BLANK: GUNS AND VIOLENCE IN AMERICA* (1991).

564. Numbers range from 2,000,000 to just under 100,000 per year. See Kates et al., *supra* note 560, at 537-38.

565. See *id.* at 539-42.

566. See KLECK, *supra* note 563, at 149 tbl.4.

resists with a gun, but far less likely to be injured than someone resisting with any other weapon.<sup>567</sup>

Certainly, I lack the expertise to decide this debate. I am enough of a realist, however, to understand that the view that gun control may not yield any benefits will not prevail even if it is correct. The issue is far too emotional. For legislative purposes, it seems safe to say that if the standards of due process or equal protection are applied to a general ban on guns, the ban would be valid because reasonable legislatures should be free to decide either way. If the Second Amendment has any substance, however, then the evidence is far too ambiguous to support a general ban, no matter how intuitive the ban might be. Proponents of a ban throw out data about guns and violence with a *res ipsa loquitur* tag.<sup>568</sup> As Kleck has shown, however, the evidence does not speak entirely for itself and it contains a number of contested premises.<sup>569</sup> Other constitutional rights are not overridden based on such contested data and conclusions. That is the key. If the Amendment has substance, then it creates presumptions that tilt the debate.

On a final consequentialist note, no one can read any Second Amendment literature without realizing that the "holocaust argument" looms large.<sup>570</sup> If there is a well-armed citizenry, then the government will be reluctant to begin policies of oppression that could lead to a holocaust. Is it a sufficient answer that this does not sound like the United States?<sup>571</sup> Would a neutral observer think it sounded like Germany in 1900 or Bosnia in 1984—when the Olympics were held in Sarajevo?

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567. See *id.* Of robbery and assault targets, respectively, 17.4% and 12.1% who resisted with guns were injured; 24.7% and 27.3% of those who submitted were injured; 29.5% and 40.3% of those who resisted with a knife were injured; and, 22% and 25.1% of those who resisted with some other kind of weapon were injured.

568. This certainly is the position of the public health literature. See Kates et al., *supra* note 560, at 547, 552.

569. See generally KLECK, *supra* note 563, at 101-319.

570. See, e.g., Wendy Kaminer, *Second Thoughts on the Second Amendment*, ATLANTIC MONTHLY, Mar. 1996, at 32, 44; Reynolds, *supra* note 7, at 482-83.

571. See Kaminer, *supra* note 570, at 44-45.

### G. *Rights Analysis*

Because moral philosophy or natural law normally offer guidance where the Constitution seems not to, they may be useful in the analysis of Ninth Amendment or substantive due process cases, but little else. Thus, moral philosophy and natural law are absent from First Amendment analysis for the obvious reason that other modalities of interpretation yield relevant information. This is not to say that moral philosophy could not be used; the First Amendment may rest on something more than a belief that speech and a free press must be protected because governments possess an inherent desire to entrench themselves and their views.<sup>572</sup>

If the First Amendment does rest on something more than the well-founded distrust of government, then that something is likely to be found in philosophy, as the current followers of Alexander Meiklejohn assert in their efforts to theorize about the necessary limits on freedom of expression.<sup>573</sup> Like Meiklejohn, they have disdain for the speech of the people, coupled with high respect for the speech of those who claim to know what the people want.<sup>574</sup> Unlike Meiklejohn, who attempted to overprotect the class of speech he favored, his current followers use rights philosophy in conjunction with, but intended as a substitute for, consequentialism, in their desire to narrow the range of protected speech and speakers.<sup>575</sup> The fact remains, however, that the Court really has not been animated by such concerns.

Moral philosophy and natural law arguments may appear in Second Amendment argument because the Court's Second

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572. My writings reflect that I believe this is what the First Amendment is about, and, indeed that the history of broadcast regulation demonstrates the wisdom of that conclusion. See generally LUCAS A. POWE, *BROADCASTING AND THE FIRST AMENDMENT* (1987); POWE, *supra* note 105.

573. See CASS SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993); Owen M. Fiss, *Free Speech and Social Structure*, 71 *IOWA L. REV.* 1405 (1986) (arguing that sometimes the speech of some citizens must be restricted in order to strengthen the relative voice of others); Fiss, *supra* note 212 (arguing that the State should play a legitimate role in regulating speech).

574. See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 22-27 (1948) (arguing that, because radio had not fulfilled what Meiklejohn saw as its potential, it was not entitled to any constitutional protection).

575. See Fiss, *supra* note 212, at 790-94.

Amendment analysis is so barren. Indeed, one article claiming a right to bear arms is subtitled: *An Individual Right to Arms Viewed Through the Ninth Amendment*.<sup>576</sup>

At the time of the Framing, self-defense was perceived as an important individual right. Among others, Thomas Hobbes and St. George Tucker viewed self-defense as the first law of nature,<sup>577</sup> and while much else may have changed in the ensuing centuries, I doubt that this sentiment has. Instead, an argument against the self-defense rationale would be a consequentialist variant of "times change": more guns beget more problems and the creation of professional police forces obviates the need for weaponry to be used in self-defense.

Let us first ask how a homeowner might choose to protect herself in her home. One answer might be to request and obtain increased police patrols of the neighborhood. If the available resources do not allow this, she could call "911" when the security of her home is breached or threatened. What if, because of well-documented police negligence, or simply a lack of resources, assistance is not forthcoming? One could reply that our legal system, inexact though it may be, at least offers compensation for injury, but in this case one would be wrong.

Under the facts just suggested, the injured homeowner or her heirs would be unsuccessful in a suit against the police force or local government.<sup>578</sup> She would learn that absent unusual circumstances, not present in this situation, the police owe her no duty to come to her aid. The duties of the police go to the people collectively, not to any specific individual.<sup>579</sup> At least this dem-

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576. See Nicholas J. Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment*, 24 RUTGERS L.J. 1 (1992) (arguing that a right to arms indeed springs from the Ninth Amendment). Nelson Lund took a similar view without fully dressing it in Ninth Amendment garb. See Nelson Lund, *The Second Amendment, Political Liberty and the Right to Self-Preservation*, 39 ALA. L. REV. 103, 123 (1987) (asserting that the right to self-protection is "fundamentally rooted in our political traditions").

577. See THOMAS HOBBS, LEVIATHAN 107 (E.P. Dutton ed., 1950) ("[T]he [sum] of the Right of Nature . . . is, *By all means we can, to defend our selves.*"); 1 TUCKER'S BLACKSTONE, *supra* note 407, at app. at 300 ("The right of self defence is the first law of nature . . .").

578. See, e.g., *Warren v. District of Columbia*, 444 A.2d 1 (D.C. 1981) (en banc) (absolving the police department of any civil liability for failure to provide adequate police services).

579. See *id.* at 3.

onstrates a true collective rights theory. The police cannot respond to every call, or be everywhere under the limited resources allocated to them by society; thus there is no specific duty to be anywhere and no liability.

Let us move from a hypothetical to a real case. Martha Bethel is a city judge in Montana's Bitterroot Valley.<sup>580</sup> A defendant in her court claimed to be a "freeman," and therefore not bound by Montana's laws requiring a driver's license, car registration, and insurance.<sup>581</sup> The freeman served Bethel with a legal-looking document from a so-called "common law court," informing her that unless all charges against him were dropped, a warrant for her arrest would be issued and she would be tried for criminal and treasonous actions.<sup>582</sup> Instead, when the freeman failed to appear for trial, Bethel issued a warrant for his arrest.<sup>583</sup> Thereafter, she was followed home from the courthouse at night, received an anonymous call confirming the exact location of her house, and subsequently received death threats.<sup>584</sup> When she asked for a police escort and protection, the sheriff refused, stating that he lacked the staff.<sup>585</sup> The FBI (properly) declined jurisdiction.<sup>586</sup> The freeman is now a fugitive and Bethel is scared.<sup>587</sup> What should she do?<sup>588</sup>

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[A] government and its agents are under no general duty to provide public services, such as police protection, to any particular individual citizen. . . . The duty to provide public services is owed to the public at large, and, absent a special relationship between the police and an individual, no specific legal duty exists.

*Id.*

580. See Stephanie Mansfield, *Nightmare in Big Sky Country*, GOOD HOUSEKEEPING, Nov. 1995, at 136, 137.

581. See *id.*

582. See *id.*

583. See *id.*

584. See *id.*

585. See *id.* There was a similar case in New York, in which the victim made "repeated and almost pathetic pleas for aid [which] were received with little more than indifference." *Riss v. New York City*, 240 N.E.2d 860, 862 (N.Y. 1968). The victim then was blinded in one eye, lost a good portion of her vision in the other, and was permanently scarred when lye was thrown in her face. See *id.* She lost her case against the police on the same rationale as did the claimants in *Warren*: "Because [the city] owe[s] a duty to everybody, [the city] owe[s] it to nobody." *Id.*

586. See Mansfield, *supra* note 580, at 137.

587. See *id.*

588. She sleeps with a semiautomatic rifle under the bed, monitors a police radio,

Should we tell Bethel that if she arms herself, she becomes the criminal? Is there any moral way to tell her that we cannot protect her, so that her practical options are to pray, to move, or to violate the law in order to defend herself? Note that the first two options are constitutional rights.<sup>589</sup> Drawing on fundamental rights analysis, the final option might be as well.<sup>590</sup>

If the argument that she has a fundamental right to defend herself works for Bethel, it should work for the security-seeking homeowner as well. The difference in their situations is largely that Bethel fears one man and the homeowner fears many. That is not a difference of constitutional dimension.

What, then, of the rights of the freeman in his claim that he needs arms to fight against the despotic governments of Montana and the United States? If his argument appeals to natural law, he is going to lose as a matter of positive law. It is all but impossible to imagine an adjudicator listening to a natural law argument under the Constitution against the Constitution, although it is conceivable that the freeman might prevail under either historical or structural argument.<sup>591</sup> It is equally unlikely that the freeman could make a natural rights argument to be in either an unorganized or an organized militia. Wherever that right is established, it is neither moral philosophy nor natural law.

I implied at the beginning of this section that a moral philosophy/natural rights argument is the last refuge of a constitutional

keeps her drapes stapled shut and has a planned escape route into the nearby cottonwoods. *See id.*

589. *See* United States v. Guest, 383 U.S. 745 (1966) (travel); Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963) (prayer); Edwards v. California, 314 U.S. 160 (1941) (travel).

590. *See* United States v. Gomez, 81 F.3d 846, 850 & n.7 (9th Cir. 1996) (holding that a justification defense is available under federal law that makes it criminal for a felon to be in possession of a firearm). Gomez was indicted on two counts of being a felon in possession of a firearm. *See id.* at 849. However, he had a legitimate justification, insofar as he was under the threat of death or serious injury after being named as an informant in a solicitation of murder indictment against an alleged drug conspirator. *See id.* at 851-52. The government disclosed Gomez's name in the indictment, without ever warning him that they were planning to do so. *See id.* at 848-49. As introduced by Judge Kozinski, "This case gives fresh meaning to the phrase, 'I'm from the government and I'm here to help you.'" *Id.* at 848.

591. *Cf.* *The Bank Bill* (Feb. 2, 1791), ("Where a meaning is clear, the consequences, whatever they may be are to be admitted . . ."), in 13 PAPERS OF JAMES MADISON, *supra* note 187, at 372, 374 (discussing the proper interpretation of the Constitution).

loser because by definition it cannot be grounded elsewhere in the Constitution.<sup>592</sup> The self-defense argument flowing from Hobbes to Bethel's situation, however, can be grounded rather easily in historical or traditional argument. Thus to the extent it resonates, it is likely to reinforce the conclusion that the historical core of the Second Amendment includes a right to arm for self-defense, just as the Pennsylvania and Vermont constitutions stated in the 1770s.<sup>593</sup> More broadly, these observations support Bobbitt's claim that rights-based analysis is not a legitimate modality of constitutional argument.<sup>594</sup> Indeed, at least in areas removed from due process or the Ninth Amendment, it seems parasitical, because, when it is likely to succeed, it does so by illuminating an argument under an accepted modality.

### III. CONCLUSION

If we leave the freemen of Montana and return to Linda Thompson of the Unorganized Militia, the easiest thing to note is that I analyzed the First Amendment issues in purely doctrinal terms. All of the issues raised by her statements have gone before the Supreme Court and have been authoritatively answered. In fact, the First Amendment is such a mature area of the law that it is possible to illustrate all the modalities with actual cases.

The Second Amendment analysis, in contrast, provides the useful reminder that serious constitutional analysis is possible without judicial precedents. Indeed, the Second Amendment demonstrates that when the precedents are few, doing constitutional law by examining text, history, structure, consequences, and tradition is likely to yield a far more complete and textured analysis than attempts to divine the meaning of a handful of Supreme Court decisions.<sup>595</sup> This analysis is a marked improvement over simple Second Amendment originalism as well.

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592. See *supra* text preceding note 572.

593. See *supra* text accompanying notes 279-80.

594. See Philip Bobbitt, *Reflections Inspired by My Critics*, 72 TEX. L. REV. 1869, 1910-11 (1994).

595. I concede that this analysis is not particularly helpful to the second-order application issues of what weapons may be possessed.



When I began this Article, I thought that I knew its likely outcome, but I did not care what that was. In one sense, I am not surprised that doing constitutional law supports an individual rights view of the Second Amendment; many fine scholars had reached that conclusion before me. What did surprise me was how much Second Amendment analysis parallels First Amendment analysis. Consequently, if we take the First Amendment seriously, it is extremely difficult not to do so with the Second.

Yet we know that has not been the case. In Justice Cardozo's words, the First Amendment is the "indispensable condition" of our liberties.<sup>596</sup> The Second Amendment, by contrast, seems a dated relic of the eighteenth century. However much Second Amendment analysis parallels the analysis of the First, this dichotomy still seems real and the reasons are bundled in a package of opposites: representative government versus nonrepresentative government, speech versus action, and individual versus group.

Freedom of speech could have been inferred from either the Guaranty Clause<sup>597</sup> or the fact that the Federal Government was also republican. If we are to have republican government, then we must have republican deliberation. As we increase the franchise, through state policies and constitutional amendment, freedom of speech and the press are essential attributes of the representative government being created. Freedom of speech loses none of its rationale in a move from nonrepresentative to representative government.

The Second Amendment does not fare so well. The Country Whig ideology and the American Revolution saw the armed people as a check on a nonrepresentative government. The armed people constituted the "palladium of liberty"<sup>598</sup> because liberty always is at risk when sovereignty rests in any place other than the people. It is unclear to me how well anyone understood the functions and purposes of an armed populace in a fully representative country. After all, no one had lived in such a world. This may be where the First and Second Amendment traditions fully

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596. See *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

597. U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every state in this union a Republican Form of Government . . .").

598. See STORY, *supra* note 415, § 1001; 1 TUCKER'S BLACKSTONE, *supra* note 407, app. at 300.

split—especially if we cannot claim to have been a fully representative democracy prior to implementation of the Voting Rights Act of 1965.<sup>599</sup>

Once we established a representative democracy, why shouldn't the First Amendment, in combination with the ballot box, be a sufficient check on government? It should go without saying that resort to the ballot box must precede a resort to arms. Those who would make no effort to change the system peacefully cannot be heard to claim that it is necessary to change it by force. Even the Communists proffered political candidates and would have accepted victory through ballots if it had been possible.

But what if speaking and voting fail? First, what does it mean to fail? To lose a fair election? Consider Washington's actions in putting down the Whiskey Rebellion.<sup>600</sup> The whiskey rebels mimicked the arguments of the Revolution in complaining of taxation without representation.<sup>601</sup> From Washington's perspective the difference was that the tea and stamp taxes had in fact been passed without representation, but the whiskey rebels "had three members in the House, although their actual population justified only two."<sup>602</sup> Their actions were therefore illegitimate and force was justified in putting down the rebellion.

What if a group loses not one, but rather a series of fair elections like the Communists did? If this is the case, it will not come as a surprise that the majority will use all necessary means to suppress the revolt. But what if the group loses a rigged election, or somehow a majority takes on the attributes of a despotic government and turns the tyranny of the majority into reality? Then we return to a theory that animated the Second Amendment, a theory that seems more consistent with a

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599. See STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS* 116-18 (1996).

600. See RICHARD BROOKHISER, *FOUNDING FATHER: REDISCOVERING GEORGE WASHINGTON* 88 (1996).

601. See *id.* at 90.

602. See JAMES THOMAS FLEXNER, *GEORGE WASHINGTON: ANGUISH AND FAREWELL* (1793-1799), at 164 (1969); see also THOMAS P. SLAUGHTER, *THE WHISKEY REBELLION* 120 (1986) (noting that Washington spoke disparagingly of the rebellious Western Pennsylvanians, because the money raised from the tax was being used to protect from Indians the very community opposing the tax).

nonrepresentative government than does one in which the franchise is shared widely.

Still, it is theoretically possible for a fully democratic majority to systematically oppress a weaponless minority, so that minority may be remediless. The Framers knew that previous republics had been lost; although representative government is a great guarantee that the liberties of the people will be respected, it is not a complete guarantee. Nothing is a complete guarantee.

I do not have full answers for these explicit and implicit questions, but they leave me skeptical about how conditions supporting rebellion could justify resort to arms rather than the ballot. Near the end of his career, Justice Douglas, the strongest Supreme Court supporter of free speech, spoke to this issue. In a case involving the criminal anarchy statute used in *Gitlow*<sup>603</sup> (and clearly unconstitutional under *Brandenburg*), he nevertheless refused to strike down an indictment that included advocacy, but also charged "overt acts [which] relate to the acquisition of weapons, gunpowder, and the like, and the storing of gasoline to start fires. Persuasion by such means plainly has no First Amendment protection."<sup>604</sup> What would he have said to advocating shooting politicians in conjunction with joining the armed but "unorganized" militia?

Perhaps that unorganized militia offers a beginning for creating harmony between the First and the Second Amendments. Justice Jackson's First Amendment concern about people banding together to "gang up' on the Government"<sup>605</sup> or their fellow citizens is salient and suggests a Second Amendment corollary: military groups not under state control are *per se* dangerous and are not constitutionally protected.<sup>606</sup> Ironically, *Presser* was ultimately right, albeit for the wrong reasons.<sup>607</sup> Van Alstyne's textual reasoning, that the right is to keep and bear arms, not

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603. *Gitlow v. New York*, 268 U.S. 652 (1925).

604. *Samuels v. Mackell*, 401 U.S. 66, 75 (1971) (Douglas, J., concurring).

605. *Dennis v. United States*, 341 U.S. 494, 577 (1951) (Jackson, J., concurring).

606. Several western state constitutions prohibit private armies although they protect the right to bear arms. *See, e.g.*, ARIZ. REV. STAT. ANN. § 26-123 (West 1956); IDAHO CODE § 46-802 (1987); NEV. REV. STAT. ANN. § 203.080 (Michie 1992); WASH. REV. CODE ANN. § 38.40.120 (West 1961); WYO. STAT. § 19-1-106 (Michie 1977).

607. *See Presser v. Illinois*, 116 U.S. 252 (1886); *supra* text accompanying notes 86-90.

the right to belong to a militia,<sup>608</sup> is not only correct; it is prescient.<sup>609</sup>

Action without the concert of others, however, is different. The Bill of Rights creates spheres of autonomy from government in which individuals can choose whether to exercise a set of guarantees. The Second Amendment is no less a part of these guarantees than speech, religion, protection from self-incrimination, or the right to be paid if government takes your property. The Second Amendment's pedigree and birth certificate are remarkably similar to the First's, and the Second Amendment is entitled to meaning if meaning can be suggested sensibly. Thus, like all other constitutional law scholars who have taken the time to analyze the Second Amendment, I join with them reluctantly singing the Monkees' refrain: "I'm a believer."<sup>610</sup>

But saying "I believe" nevertheless requires some answer to the query "in what?" The First Amendment's underlying dichotomy between speech and action is helpful. Beginning with Justice Brandeis in *Whitney*, the dominant First Amendment conclusion has been the rejection of a tort-like theory of causation.<sup>611</sup> The First Amendment has been interpreted to preclude ascription of causation to the speaker, unless the action is immediate. Instead, the cause of the harm is the actor who commits the nonspeech act. We do not convict the person who advocates shooting officials; we do convict those who attempt to fire the shots. Still, this dichotomy between speech and action places the Second Amendment in an unhappy position. Buying, possessing, and carrying a gun, from a First Amendment perspective, are action. At that point, First Amendment doctrine allows the State to act in response.

It gets worse when the individual possessing a weapon joins with other similarly situated individuals. The First Amendment

608. See Van Alstyne, *supra* note 4, at 1242-44.

609. See Reynolds, *supra* note 7, at 511 n.222.

610. THE MONKEES, *I'm A Believer*, on MORE OF THE MONKEES (Colgems Records, 1967). I should note that had I written a passing reference some years ago, as Ely did, see *supra* note 32, I am sure that it would have been no more insightful than his statements. Those writing in the 1990s lack the same excuse.

611. See *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., dissenting). The culmination of this trend was *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

tradition, rightly or wrongly, always has celebrated the lone dissenter. When that dissenter joins with others, his dissent may look like conspiracy. That is the teaching of the communist cases, and it still lives, at least in situations where the "conspirators" acquire weapons.<sup>612</sup>

If we import a speech/action dichotomy into the Second Amendment and the First Amendment determination that getting a gun *is* action applies, then the Second Amendment has no meaning. Because this cannot be true where sensible alternatives exist, the rule against prior restraints offers a sound meaning. The Second Amendment should be interpreted to guarantee an individual right to keep and bear appropriate arms, but no right to use them unlawfully and no right to join with other individuals in an armed band not controlled by the state.<sup>613</sup>

This, naturally, leads to the question that I announced I was avoiding from the outset: What arms are appropriate? The answer to that question should be determined by open, rational, and fair debate, while recognizing that the Second Amendment is a "real" part of the Constitution. As a contrary illustration, consider the incredible exchange on the floor of the House of Representatives on March 21, 1996, during the debate over repeal of the assault weapons ban. It began with Representative Patrick Kennedy shaking in anger, and concluded with Representative Gerald Solomon pointing at Kennedy and shouting the conclusion of his response.

[Kennedy:] Families like mine all across this country know all too well what the damage of weapons can do. And you want to arm our people even more. You want to add more magazines to the assault weapons so they can spray and kill even more people. Shame on you! What in the world are you thinking when you're opening up the debate on this issue? My God! All I have to say to you is play with the devil, die with the devil! There are families out there you'll never

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612. Cf. *Samuels v. Mackell*, 401 U.S. 66, 75 (1971) (Douglas, J., concurring).

613. See, e.g., Joelle E. Polesky, Comment, *The Rise of Private Militia: A First and Second Amendment Analysis of the Right to Organize and the Right to Train*, 144 U. PA. L. REV. 1593 (1996) (concluding that the Second Amendment grants the states the power to regulate the militia and the possession of weapons related to the militia and therefore private militias find no protection in the Constitution).

know . . . Mr. Chairman, you'll never [k]now what it's like because you don't have someone in your family killed. It's not the person who[s] killed, it's the whole family that's affected. You're asking the wrong question! It's not about crime. It's about the families and victims of crime. That's what we're advocating in proposing this ban, and that's why we should keep this ban in place. . . .

[Solomon:] I have great respect for he and his family, but I'm going to tell you something. When he stands up and questions the integrity of those of us that have this bill on the floor, the gentlemen ought to be a little more careful. And let me tell you why! . . .

[Kennedy:] Tell me. . . .

[Solomon:] My wife live[s] alone five days a week in a rural area in upstate New York! She has the right to defend herself when I'm not there, son! And don't you ever-

[Kennedy:] -know the facts about this-

[Solomon:] -forget it. Don't you ever forget it!<sup>614</sup>

Kennedy, whose argument could apply to any weapon, implicitly believed that the Constitution was irrelevant to the issues of gun control; Solomon seemed to believe that the Second Amendment was absolute (and that his wife might need an Uzi). Clearly both are wrong. If the Second Amendment debate were taken seriously, maybe the First Amendment debate on the Second Amendment would be taken seriously too.

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614. 142 CONG. REC. H2675 (1996).