Speaking Truth to Firepower: How the First Amendment Destabilizes the Second

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When the Supreme Court in District of Columbia v. Heller *declared that the Second Amendment protects an individual right to keep and bear arms, it set atop the federal judicial agenda the critical task of elaborating the right's scope, limits, and content. Following* Heller, *commentators routinely draw upon the First Amendment's protections for expressive freedom to support their proposals for Second Amendment doctrine. In this Article, Professor Magarian advocates a very different role for the First Amendment in explicating the Second, and he contends that our best understanding of First Amendment theory and doctrine severely diminishes the Second Amendment's legal potency. Professor Magarian first criticizes efforts to draw direct analogies between the First and Second Amendments, because the two amendments and their objects of protection diverge along critical descriptive, normative, and functional lines. He then contends that longstanding debates about whether constitutional speech protections primarily serve collectivist or individualist purposes present a useful model for interpreting the Second Amendment. The language of the Second Amendment's preamble, which* Heller *all but erased from the text, compels a collectivist reading of the Second Amendment. The individual right to keep and bear arms, contrary to the* Heller *Court's fixation on individual self-defense, must serve some collective interest. Many gun rights advocates have long urged that the Second Amendment serves a collective interest in deterring—and, if necessary, violently deposing—a tyrannical federal government. That theory of Second Amendment insurrectionism marks another point of contact with the First Amendment, because constitutional expressive freedom serves the conceptually similar function of protecting public debate in order to enable dynamic political change. Professor Magarian contends, however, that we should prefer debate to insurrection as a means of political change and that, in fact, the historical disparity in our legal culture's attention to the First and Second Amendments reflects a long-settled choice of debate over insurrection. Moreover, embracing Second Amendment insurrectionism would endanger our commitment to protecting dissident political speech under the First Amendment. Professor Magarian concludes that our insights about the First Amendment leave little space for the Second Amendment to develop as a meaningful constraint on government action.*

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Introduction

Since the Second Amendment's emergence into academic prominence in the 1970s, and especially since the Supreme Court's landmark 2008 decision in *District of Columbia v. Heller*[1] announced that the Amendment protects an individual right to keep and bear arms,[2] courts and commentators have compared and sometimes conflated the Second Amendment right with the First Amendment's protections for free expression. This trend has intensified since the Court's 2010 decision in *McDonald v. City of Chicago*,[3] in which the Court treated the Second Amendment like the First by extending its scope to encompass state as well as federal encroachments on the right to keep and bear arms.[4] Courts now must elaborate the scope, limits, and substantive content of the Second Amendment individual right. The First Amendment's extensive judicial development as a guarantor of expressive

1. 554 U.S. 570 (2008).
2. *Id.* at 595.
3. 130 S. Ct. 3020 (2010).
4. *Id.* at 3026.

freedom makes it an attractive starting point for fleshing out the legal concept of an individual right to keep and bear arms. Numerous commentators, encouraged by *Heller*, have moved far beyond that starting point, invoking specific elements of First Amendment doctrine as templates for parallel proposals in Second Amendment doctrine. By their accounts, what we know about the First Amendment both strengthens the legal case for a strong regime of Second Amendment rights and tells us a great deal about what that regime should do.

Prior scholarship has made no thorough, critical inquiry into how our long experience with the First Amendment should inform our new engagement with the Second Amendment. The high stakes of Second Amendment jurisprudence compel such an inquiry. For the first time in decades, the Court has announced a novel constitutional right. We know very little about how that right will affect the many and varied efforts that the federal and state governments make to regulate the possession and use of guns. Courts' ongoing efforts to fill in the Second Amendment blanks—what standard of constitutional review applies to Second Amendment claims, what sorts of interests the Second Amendment protects, what the government must show in order to vindicate various gun regulations—carry enormous implications for law and society. Strong reliance on the First Amendment to address these questions has already become a prominent mode of Second Amendment analysis. If we want our legal system to develop Second Amendment law effectively and wisely, we will need to understand how our insights about the First Amendment can, and cannot, usefully inform Second Amendment jurisprudence.

This Article examines in depth the First Amendment's implications for the Second. It advances the novel argument that, far from supporting a robust regime of Second Amendment rights, the First Amendment's protections of expressive freedom strongly destabilize the legal position of the Second Amendment. The Second Amendment's text, construed in light of First Amendment theory's extensive engagement with the distinction between collectivist and individualist justifications for rights, indicates that the individual right to keep and bear arms must serve a collectivist purpose. But the most coherent and familiar collectivist justification for the Second Amendment—the need to deter and, if necessary, violently overthrow a tyrannical federal government—clashes with the First Amendment's dynamic function of facilitating political change through public political debate. The First Amendment provides a better vehicle than the Second Amendment for dynamic political change, and an embrace of constitutionally sanctioned insurrectionism under the Second Amendment would threaten our commitment to uninhibited political debate under the First Amendment. What we know about the First Amendment, therefore, raises serious, perhaps fatal doubts about the vitality of the Second Amendment.

My argument proceeds in three parts. Part I critiques efforts to develop Second Amendment doctrine by analogy to First Amendment doctrine. I

begin by emphasizing critical differences between the freedom of speech and the right to keep and bear arms. Descriptively, speech depends on different conceptual principles than keeping and bearing arms, has more complex attributes, and makes for a more focused object of constitutional protection. Normatively, most people, in most circumstances, view speech as a positive and constructive phenomenon while viewing the bearing of arms as frequently undesirable and at best instrumentally necessary. Functionally, the *Heller* Court showed a much greater willingness to impose categorical limits on the right to keep and bear arms than it has shown in speech cases. *Heller* itself invoked First Amendment comparisons in framing the Second Amendment's scope, boundaries, and legal pedigree. Those comparisons muddy far more than they clarify. Post-*Heller* commentators have attempted to reason directly from the First Amendment to the Second, seeking to import First Amendment standards of review, First Amendment principles about the scope of rights, and various specific First Amendment doctrines into Second Amendment law. These analogies fail to provide useful guidance because they ignore the critical differences between speech, on the one hand, and keeping and bearing arms, on the other.

The Article's two remaining parts advance two distinct but related claims about how courts can sensibly draw upon First Amendment insights to explicate Second Amendment law. Part II contends that a prominent interpretive debate about the purpose of the First Amendment's protections for expression suggests a methodology for understanding the broad purpose of the Second Amendment. *Heller* emphatically rejects the position that the Second Amendment's preamble limits the amendment to guaranteeing the people's right, collectively, to constitute an armed state militia. In embracing the contrary position that the Second Amendment protects an individual right to keep and bear arms, *Heller* effectively reads the preamble out of the Constitution. First Amendment theory suggests a way to accommodate the core holding of *Heller* while restoring a significant function for the preamble. The Constitution can confer rights on individuals, as the First Amendment undeniably does, but—as First Amendment theorists frequently contend—for collectivist rather than individualist reasons. The preamble compels a collectivist construction of the Second Amendment, requiring justifications for the individual right to keep and bear arms that advance some collective interest. While this Article does not contest the core holdings of *Heller* and *McDonald* that the Second Amendment confers an individual right against the federal and state governments, my interpretive move in Part II challenges those decisions' primary justification for the Second Amendment: protection of individual self-defense.

Part III makes a critical substantive assessment, within the collectivist interpretive framework dictated by Part II, of the individual right to keep and bear arms. The most common collectivist justification for the individual right to keep and bear arms is that the people need guns in order to deter the federal government from becoming tyrannical and to mount an insurrection

should tyranny arise. This insurrectionist justification resonates with the First Amendment's function of protecting robust political debate and dissent. However, drawing on my prior writing about the dynamic political value of expressive freedom, I contend that insurrection and debate mark incompatible paths to political change. Second Amendment insurrectionism falls short of First Amendment dynamism normatively, because debate is more constructive and participatory than violence. Second Amendment insurrectionism also threatens the legal status of First Amendment dynamism, because recognizing a constitutionally permissible path to violent insurrection dramatically increases the cost of constitutionally protecting advocacy of violence. We cannot have both First Amendment dynamism and Second Amendment insurrectionism—and we have made our choice. The Supreme Court spent almost a century developing First Amendment doctrine, with special emphasis on the right to advocate violent revolution, before it ever bothered to recognize an individual right to keep and bear arms. That disparity embodies our society's embrace of debate, and rejection of insurrectionism, to promote dynamic political change.

This Article concludes that First Amendment doctrine and theory provide strong reasons to reject both an individualist construction of the Second Amendment and the most familiar and forceful collectivist justification for Second Amendment rights. The First Amendment, therefore, leaves the Second Amendment with little room to develop as a meaningful source of legal authority.

I. Why First Amendment Doctrine Fails as a Template for Second Amendment Doctrine

The Supreme Court in *District of Columbia v. Heller* held that the Second Amendment[5] guarantees an individual right to keep and bear arms.[6] Two years later, in *McDonald v. City of Chicago*, the Court held that the Fourteenth Amendment incorporates the Second Amendment right and makes it effective against the states.[7] These two decisions establish an important new constitutional right.[8] They tell us very little, however, about the scope, limits, and force of the individual right to keep and bear arms. They do not even settle what standard of review applies to Second Amendment claims.[9] The *Heller* Court and numerous other courts and

5. "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

6. 554 U.S. at 634–37.

7. 130 S. Ct. at 3026.

8. *See, e.g.*, Robin L. West, *Tragic Rights: The Rights Critique in the Age of Obama*, 53 WM. & MARY L. REV. 713, 728 (2011) (calling the Second Amendment individual right "[b]y far the most jurisprudentially far-reaching and singularly innovative Obama-Bush-era right").

9. The *Heller* Court stated that the District of Columbia ordinance it struck down would fail Second Amendment review "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights." 554 U.S. at 628 (footnote omitted).

commentators have drawn directly on elements of First Amendment doctrine in attempting to explicate Second Amendment doctrine. Unfortunately, critical normative, descriptive, and practical differences between the two Amendments and the rights they protect undermine those analogies.

A. The Allure, and Difficulty, of First Amendment Analogies

The First Amendment's protections for expression, like the Second Amendment's right to keep and bear arms, provide textually explicit guarantees of substantive (as distinct from procedural or comparative) individual rights. The First Amendment[10] therefore provides a useful starting point for thinking generally about the structure of Second Amendment jurisprudence.[11] For example, First Amendment doctrine prominently utilizes a combination of *ex ante* categorization and *ex post* case-by-case interest balancing, both techniques that Second Amendment doctrine probably will employ.[12] The First Amendment has also generated a deep, detailed body of judicial doctrine over a period of almost a century, and the right of expressive freedom carries a great sense of legal and cultural gravitas.[13] Accordingly, analogizing the Second Amendment to the First has

10. Throughout this Article, I use "First Amendment" as a shorthand reference for the Amendment's protections for expression: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

11. *See* United States v. Chester, 628 F.3d 673, 682 (4th Cir. 2010) (considering First Amendment law as a broad model for developing Second Amendment standards of review); United States v. Marzzarella, 614 F.3d 85, 89 n.4 (3d Cir. 2010) (positing that "the structure of First Amendment doctrine should inform our analysis of the Second Amendment"); Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 STAN. L. REV. 1, 22–23 (2012) (discussing the bases and appeal of doctrinal analogies from the First Amendment to the Second); Mark Tushnet, Heller *and the Perils of Compromise*, 13 LEWIS & CLARK L. REV. 419, 421–23 (2009) (suggesting that First Amendment law might provide a general template for Second Amendment review and emphasizing the prevalence of interest balancing in First Amendment review); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1254 (1994) (positing a "rule of reason" to constrain rights under the First and Second Amendments); Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1449–61 (2009) (drawing on First Amendment doctrine in discussing different dimensions of rights analysis that should inform the development of Second Amendment doctrine).

12. *See* Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 413–29 (2009) (discussing how and why Second Amendment doctrine likely will develop a combination of categorical and balancing methodologies); Tushnet, *supra* note 11, at 423–32 (discussing various analytic methods the Court might employ in Second Amendment cases); Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 715–26 (2007) (advocating and illustrating a "reasonable regulation" approach to Second Amendment review).

13. *See* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1795 (2004) (discussing the rhetorical power of appeals to the First Amendment).

not only practical utility but strategic appeal for advocates of a robust right to keep and bear arms.[14]

Even prior to *Heller*, some gun rights advocates pitched the analogy between the First and Second Amendments as a virtual identity, asserting that the Second Amendment's generic similarity to the First should compel courts to treat the two provisions alike. Sanford Levinson, in a seminal article, quoted a newspaper letter by "an ordinary citizen rather than an eminent law professor" who posed the question: "If the Second Amendment is not worth the paper it is written on, what price the First?"[15] Various eminent law professors embraced Levinson's rhetorical strategy, insisting that liberal elites' personal and political opposition to gun rights had led to an unjust and unsustainable contrast between a robust First Amendment and a moribund Second Amendment.[16] Upon closer consideration, however, "the freedom of speech" analogizes poorly to "the right . . . to keep and bear arms."

At the outset, several descriptive contrasts between the two rights arise. First, our free speech doctrine depends for its coherence on a strong distinction between speech and action. However elusive and malleable that distinction may be, it defines First Amendment law: Speech is matter, and action is antimatter.[17] The distinction creates a barrier against easily analogizing constitutional speech protection to what, axiomatically, it is not—constitutional protection for action, including keeping and bearing arms. Second, speech makes for a more complex and nuanced object of regulation than keeping and bearing arms. Speech may have intrinsic value and may serve any number of different purposes, while guns are purely utilitarian and serve a far narrower range of purposes.[18] Written and spoken communications involve dimensions of inflection, syntax, structure, and context that have no equivalents in the keeping and bearing of arms. Thus,

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14. *Cf.* Dolan v. City of Tigard, 512 U.S. 374, 392 (1994) ("We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.").

15. Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 658 (1989) (quoting Fred Donaldson, Letter to the Editor, AUSTIN AM.-STATESMAN, July 8, 1989, at A19, col. 4) (footnote omitted) (internal quotation marks omitted).

16. *See* L.A. Powe, Jr., *Guns, Words, and Constitutional Interpretation*, 38 WM. & MARY L. REV. 1311, 1398 (1997) ("[I]f 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."); Van Alstyne, *supra* note 11, at 1250 (arguing that "the governing principle . . . in the Second Amendment, is not different from the same principle governing the First Amendment's provisions on freedom of speech and the freedom of the press").

17. On the speech–action distinction's necessity to First Amendment doctrine, and the distinction's inevitable subjectivity, see STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING, TOO 105 (1994).

18. *See* Glenn Harlan Reynolds, *Guns and Gay Sex: Some Notes on Firearms, the Second Amendment, and "Reasonable Regulation,"* 75 TENN. L. REV. 137, 148 (2007) ("[T]he Second Amendment's right to arms is about capabilities more than expression.").

simple analogies from categories of words to categories of guns[19] operate at too broad a level of generality to aid Second Amendment analysis. Moreover, speech entails social interaction, a dimension that becomes even clearer in the First Amendment's parallel protections for the press and for the right of peaceable assembly. Creating or maintaining the preconditions for speech may occur within an individual's private space, but the First Amendment ultimately protects a social process of communication. Keeping and bearing arms, in contrast, most commonly occurs within an individual's private space, and neither keeping nor bearing arms requires social interaction.

Third, any analogy between the two provisions must identify the aspect of "the right to keep and bear arms" to which it means to compare "the freedom of speech." Speech takes many different forms,[20] and certainly the First Amendment's protection extends to maintaining the intellectual and material preconditions for expression.[21] Textually, however, "speech" in the First Amendment is a unitary object of protection. To "keep and bear arms" is a compound object of protection. To "keep" arms is to maintain the potential for using them. To "bear" arms, whether or not that term specifically connotes organized military activity, may be to prepare for their imminent use, or it may be to fire them. Thus, analogies from the First Amendment to the Second need to specify their terms, and doing so presents problems. Is having a gun in a desk drawer like speaking? Is carrying a gun on the street like speaking? Or is shooting a gun like speaking? Unless we believe that distinguishing these discrete aspects of keeping and bearing arms makes no meaningful analytic difference, the right to keep and bear arms cannot map neatly onto the freedom of speech.

These descriptive differences between the First and Second Amendments prefigure a crucial normative difference between the rights they protect. Most people, most of the time, think of expression as a constructive,

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19. *See* Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 GA. L. REV. 1, 45 n.104 (1996) (likening regulation of especially dangerous weapons to regulations of offensive speech); *id.* at 71 (comparing the federal assault weapons ban to "ban[ning] the use of words that contain diphthongs"); Michael P. O'Shea, *The Right to Defensive Arms After* District of Columbia v. Heller, 111 W. VA. L. REV. 349, 386–87 & n.168 (2009) (analogizing the popularity of certain weapons to individuals' choices to use offensive forms of speech); Elaine Scarry, *War and the Social Contract: Nuclear Policy, Distribution, and the Right to Bear Arms*, 139 U. PA. L. REV. 1257, 1268 (1991) (analogizing crime under the Second Amendment to pornography under the First Amendment); Volokh, *supra* note 11, at 1486 (analogizing bans on "certain means of expression" to bans on "certain kinds of guns"); *id.* at 1487–88 (analogizing "normally dangerous weapons" to "speech praising violence").

20. *See* United States v. Stevens, 130 S. Ct. 1577, 1586, 1591 (2010) (stating that "the protection of the First Amendment presumptively extends to many forms of speech"); United States v. O'Brien, 391 U.S. 367, 376 (1968) (discussing the category of expressive conduct as an object of First Amendment protection).

21. *See, e.g.*, Bd. of Educ. v. Pico, 457 U.S. 853, 871–72 (1982) (plurality opinion) (finding that a school district's removal of "offensive" books from a school library violated students' First Amendment rights).

desirable activity that advances personal fulfillment and social welfare. Speech can cause harm in many circumstances, and advocates of strong First Amendment protection sometimes underestimate that capacity for harm.[22] In general, though, most of us want to live in a world where people regularly and vigorously express themselves. In contrast, with the obvious exception of target shooting and the more contentious exception of hunting, most people, most of the time, think of bearing arms—preparing for their imminent use, or firing them—as at best an instrumental necessity. Most of us, albeit with great divergences on the details, acknowledge limited justifications for shooting at people: usually some assortment of war, law enforcement, and self-defense. But these are exigencies we accept, not opportunities we cultivate. Even to the extent one considers bearing arms desirable, speech remains more important for individuals and society: How many avid hunters would give up communication before they gave up hunting?[23] The normative gulf between speaking and bearing arms widens when we consider the Constitution's core mission of forging a political community. Our democratic commitments necessitate speech in the service of politics.[24] In contrast, the idea of bearing arms in the service of politics presents great problems.[25]

The descriptive differences between the First and Second Amendments and the normative differences in how we view the activities the Amendments protect help to explain an important functional difference that further complicates analogies between the Amendments. The *Heller* Court stepped well outside the dispute before it to declare that Second Amendment doctrine, however it might develop, must accommodate several important categories of gun regulations, including "longstanding prohibitions on the possession of firearms by felons and the mentally ill, . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, [and] laws imposing conditions and qualifications on the

22. *See* Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321, 1322–23 (1992) (discussing the possibility of reallocating costs of harm from speech). *But see* C. Edwin Baker, *Harm, Liberty, and Free Speech*, 70 S. CAL. L. REV. 979, 981 (1997) (arguing that First Amendment law should bar regulation of speech based on harm).

23. This degree of normative concern does not extend to "keeping" arms—simple gun ownership. *See* Brannon P. Denning & Glenn H. Reynolds, Heller*, High Water(mark)? Lower Courts and the New Right to Keep and Bear Arms*, 60 HASTINGS L.J. 1245, 1261 (2009) (arguing that *Heller* "normalized" the idea of gun ownership). Even here, however, we find deeper normative divisions that characterize commonly held views about speech. People differ sharply in their judgments about the circumstances in which self-defense concerns warrant gun ownership; about whether, in various circumstances, the posited self-defense benefits of gun ownership outweigh the potential safety costs; and about the social desirability of accumulating larger numbers of guns, or owning more powerful guns. In contrast, most people welcome individuals' and institutions' varied efforts to maintain and develop their capacities for expression. Moreover, keeping arms, like bearing arms, matters less to most people than communicating.

24. *See generally* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1960).

25. *See infra* subpart III(B) (critiquing Second Amendment insurrectionism).

commercial sale of arms."[26] The Court also announced that the Second Amendment does not extend to "dangerous and unusual weapons."[27] Moreover, the Court made clear that these categorically permissible sorts of regulations were only "examples," not an "exhaustive" list.[28] In contrast, recent Court decisions about depictions of violence have emphatically disavowed the practice of finding new categorical exceptions to First Amendment speech protection.[29] Of course, First Amendment doctrine recognizes significant exceptions to the rule of expressive freedom.[30] But the *Heller* Court's sweeping, categorical limitations on the core of Second Amendment protection reflect and reinforce the difference between the First and Second Amendments' normative pedigrees. The Court appears more comfortable with laws that restrict guns than with laws that restrict speech.

Beginning with *Heller*, efforts to elaborate the newly recognized Second Amendment individual right to keep and bear arms by analogy to First Amendment doctrine have proliferated. The descriptive, normative, and functional differences that I have outlined between the constitutional categories of speech, on the one hand, and keeping and bearing arms, on the other, fatally undercut those efforts.

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26. District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008).

27. *Id.* at 627 (internal quotations marks omitted).

28. *Id.* at 627 n.26.

29. *See* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2733–35 (2011) (refusing to adopt a categorical exception to the First Amendment for violent video games); United States v. Stevens, 130 S. Ct. 1577, 1584–86 (2010) (refusing to adopt a categorical exception to the First Amendment for depictions of violent animal cruelty); *see also* Ezell v. City of Chi., 651 F.3d 684, 702 (7th Cir. 2011) (referencing these decisions in a post-*Heller* Second Amendment case). Joseph Blocher maintains that the Court in *Heller* "signaled its preference for a categorical approach to both [the First and Second] Amendments." Blocher, *supra* note 12, at 407. He bases this conclusion on the *Heller* Court's favorable reference to a recent reaffirmation of child pornography's categorical exclusion from First Amendment protection. *See id.* at 406–07 (discussing United States v. Williams, 128 S. Ct. 1830 (2008), *cited in Heller*, 554 U.S. at 595). The Court's doctrine on child pornography, however, rests not on a true categorical exclusion of speech but on a conceptual distinction between speech and action. *See* New York v. Ferber, 458 U.S. 747, 758–64 (1982) (defining the unprotected category of child pornography by reference to the exploitation of actual children in the production of photographic materials); *Williams*, 128 S. Ct. at 1836 (same). *Williams* does formalize the exclusion from First Amendment protection of a different category of speech: proposals of illegal transactions. *Id.* at 1841. But *Williams* itself calls little attention to that move, and the *Heller* Court's citation of *Williams*, while cryptic, most sensibly supports Blocher's premise that the Court meant to refer to its child pornography doctrine. *Heller*, 554 U.S. at 595.

30. First Amendment doctrine recognizes a limited number of categorical exceptions to expressive freedom. *See, e.g.*, Miller v. California, 413 U.S. 15, 23–24 (1973) (defining and limiting obscenity as an unprotected category of speech). Where the government regulates protected speech, the Court usually balances the speaker's expressive interest against the government's regulatory interest, a process in which the government frequently prevails. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 376–77 (1968) (announcing a lenient balancing test for government regulations of conduct that incidentally burden protected speech). In addition, many government restrictions of speech never come under First Amendment scrutiny. *See generally* Schauer, *supra* note 13.

B. Heller*'s Bad Example*

Justice Scalia's majority opinion in *Heller* vividly illustrates the hazards of analogizing directly from the First Amendment to the Second. The opinion invokes the First Amendment as a basis for determining the scope, jurisprudential bounds, and historical grounding of Second Amendment rights. Close analysis of these analogies shows that none of them does any useful analytic work.

Justice Scalia initially uses First Amendment analogy to help establish the scope of the Second Amendment right to keep and bear arms. In addressing "the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment," he avers that, "[j]ust as the First Amendment protects modern forms of communications . . . the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding."[31] Justice Scalia makes a sound point about the need for historical elasticity in interpreting both the First and Second Amendments. But his analogy—First Amendment doctrine on post-Founding innovations in communication provides a model for Second Amendment doctrine on post-Founding innovations in weaponry—overreaches. Leaving aside doubts about Justice Scalia's First Amendment premise,[32] the analogy depends on an unsustainable identity between speech and guns. The conclusion that protecting Internet speech makes sense under the First Amendment does not address, let alone answer, the question whether protecting, say, machine guns makes sense under the Second.[33] Indeed, *Heller* holds that the Second Amendment does not protect private possession of "weapons that are most useful in military service—M–16 rifles and the like."[34]

Justice Scalia repeatedly invokes the First Amendment to set the terms for proper judicial analysis of Second Amendment rights. One First Amendment analogy establishes the Second Amendment's limited character: "[W]e do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*."[35]

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31. *Heller*, 554 U.S. at 582 (citations omitted).

32. *Cf.* Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291, 318 (2000) (suggesting a justification under the Second Amendment for allowing regulation of advanced weapons technologies in light of the Court's allowance under the First Amendment for regulation of broadcasting).

33. *Cf.* Blocher, *supra* note 12, at 423–29 (criticizing the *Heller* Court for failing to identify the normative values that supported its categorical rhetoric about Second Amendment rights).

34. *Heller*, 554 U.S. at 627; *cf.* Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103, 110 (2000) (suggesting that changes in the lethality of firearms since the 1780s limit the relevance of evidence from that era about the meaning of the Second Amendment).

35. *Heller*, 554 U.S. at 595.

Another answers Justice Breyer's call in dissent for an interest-balancing approach to Second Amendment rights.[36] "The First Amendment," Justice Scalia declares, "contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong-headed views. The Second Amendment is no different."[37] In a related point, Justice Scalia rejects the possibility of rational basis review for violations of enumerated rights, including First and Second Amendment rights.[38] Here the analogies simply misstate First Amendment doctrine. The Court has barred distinctions among purposes of speech in First Amendment cases.[39] It uses balancing both to set the boundaries of the unprotected speech categories Justice Scalia takes for granted[40] and to weigh speakers' interests in protected expression against the government's regulatory interests.[41] It subjects some free speech claims to rational basis review.[42]

Finally, Justice Scalia enlists the First Amendment to validate the Second Amendment's historical pedigree. He claims that "it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right."[43] Aside from its tossed-off quality, this assertion reflects a failure to consider how much or how little the two "pre-existing rights" at issue have in common, let alone how and to what extent their similarities and differences matter for effectuating them. Justice

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36. *See id.* at 689 (Breyer, J., dissenting) ("[A]ny attempt *in theory* to apply strict scrutiny to gun regulations will *in practice* turn into an interest-balancing inquiry . . . . I would simply adopt such an interest-balancing inquiry explicitly.").

37. *Id.* at 635. Justice Scalia begins his attack on Justice Breyer's interest-balancing proposal by advancing a modest argument that the proposal falls outside the Court's established tiers of scrutiny. *See id.* ("[Breyer] proposes, explicitly at least, none of the traditionally expressed levels (strict scrutiny, intermediate scrutiny, rational basis), but rather a judge-empowering 'interest-balancing inquiry' . . . ."). But his conclusion that "[t]he Second Amendment . . . . elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home" confirms that he means to discredit Second Amendment interest balancing entirely. *Id.*

38. *See id.* at 628 n.27 (arguing that the Court uses rational basis review to "evaluat[e] laws under constitutional commands that are themselves prohibitions on irrational laws" such that "the same test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it freedom of speech . . . or the right to keep and bear arms").

39. *See, e.g.*, Police Dep't of Chi. v. Mosley, 408 U.S. 92, 102 (1972) (striking down an ordinance that barred picketing near schools but exempted labor picketing).

40. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (classifying "fighting" words as an unprotected category of speech because "any benefit that may be derived from them is clearly outweighed by the social interest in order and morality").

41. *See, e.g.*, Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2724–30 (2010) (rejecting a First Amendment challenge to a federal prohibition on providing "material support" to terrorists because of the government's interest in fighting terrorism).

42. *See, e.g.*, Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 683 (1992) (stating that government restrictions on speech in nonpublic forums "need only satisfy a requirement of reasonableness").

43. *Heller*, 554 U.S. at 592; *see also id.* at 603 (criticizing Justice Stevens' dissent for relying on drafting history materials "to interpret a text that was widely understood to codify a pre-existing right, rather than to fashion a new one").

Scalia further argues that the First Amendment's history should squelch any questions about the Court's delay in announcing that the Second Amendment protects an individual right: "It should be unsurprising that such a significant matter has been for so long judicially unresolved. . . . This Court first held a law to violate the First Amendment's guarantee of freedom of speech in 1931, almost 150 years after the Amendment was ratified . . . ."[44] Simple arithmetic dramatically distinguishes pre-1931 dormancy from pre-2008 dormancy. The numbers diverge even further when we recall that the Supreme Court began grappling seriously with the First Amendment's speech protections in 1919.[45] For reasons I develop below, that eighty-nine-year gap represents no small handicap in what emerges as an evolutionary competition between constitutional doctrines.[46]

*C. Failed First Amendment Analogies in Post-*Heller *Law and Commentary*

Since *Heller*, gun-rights advocates have pressed increasingly ambitious analogies between the First and Second Amendments, arguing that particular elements of First Amendment doctrine should generate direct Second Amendment parallels. These analogies replicate the *Heller* Court's failure to grapple with the descriptive, normative, and functional differences between First and Second Amendment rights.

1. Standards of Review.—The most common sort of doctrinal analogy from the First Amendment to the Second seeks to import a First Amendment standard of review into Second Amendment law. Advocates for a strong Second Amendment routinely argue that strict constitutional scrutiny, the baseline standard of review for content-based government regulations of speech, should apply to many or most government regulations of guns.[47]

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44. *Id.* at 625–26 (citing Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931)); *see also* Van Alstyne, *supra* note 11, at 1241 (citing the First Amendment's period of dormancy in an attempt to downplay the significance of the Second Amendment's period of dormancy).

45. *See infra* notes 219–25 and accompanying text (discussing the Court's early First Amendment decisions).

46. *See infra* subpart III(B).

47. *See* Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEXAS L. REV. 237, 271–72 (2004) [hereinafter Barnett, *Organized Militia*] (suggesting that gun regulations should receive "the same scrutiny as laws restricting the liberty of speech and the press"); Christopher A. Chrisman, *Mind the Gap: The Missing Standard of Review Under the Second Amendment (and Where to Find It)*, 4 GEO. J.L. & PUB. POL'Y 289, 291 (2006) (calling for courts in Second Amendment cases "to adopt the same standard used by courts considering laws that restrict or impact other personal liberties which, like the right to bear arms, are intended to preserve popular control over the Government. . . . includ[ing] the freedoms of speech and assembly and the right to vote"); Volokh, *supra* note 11, at 1466–70 (characterizing many instances of strict First Amendment scrutiny as effectively rules of per se invalidation, and urging comparable review of gun laws); *see also* Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 LAW & CONTEMP. PROBS. 143, 145–46 (1986) ("[R]easonable gun controls are no more foreclosed by the second amendment than is reasonable regulation of speech by the first

Thus, Glenn Reynolds, invoking two areas in which the Court has employed strict scrutiny, calls on courts "to treat the regulation of gun ownership with the same skepticism previously applied to the regulation of gay sex and communist propaganda."[48] Some gun rights advocates go further. Nelson Lund, maintaining that "the right of self-defense is more fundamentally rooted in our political traditions than are First Amendment rights,"[49] insists that First Amendment standards of review should define the minimum protection for Second Amendment rights.[50] Joyce Lee Malcolm states the essential claim for the standard-of-review analogy: "Since fundamental rights are not to be separated into first- and second-class status, the strict scrutiny applied to the First Amendment freedom of the press and freedom of speech should also be applied to Second Amendment rights."[51]

The notion that review of one "fundamental" constitutional right should track review of another, while superficially appealing, makes little sense in the general context of current constitutional rights doctrine or in the particular context of First and Second Amendment rights. As a general matter, the Court over the past two decades has disaggregated its standards of review for constitutional rights claims. In substantive due process, the Court has moved from strict scrutiny to a right-specific approach.[52] In equal protection, the Court has taken both a more lenient approach to strict

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amendment."); David B. Kopel, *The Second Amendment in the Tenth Circuit: Three Decades of (Mostly) Harmless Error*, 86 DENV. U. L. REV. 901, 935 (2009) (emphasizing the importance of assessing gun regulations for their "tailoring" of means to ends); Gary E. Barnett, Note, *The Reasonable Regulation of the Right to Keep and Bear Arms*, 6 GEO. J.L. & PUB. POL'Y 607, 626–27 (2008) [hereinafter G. Barnett, *Reasonable Regulation*] (proposing First Amendment tailoring analysis as a model for Second Amendment doctrine).

48. Reynolds, *supra* note 18, at 149 (footnotes omitted).

49. Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103, 123 (1987).

50. *See id.* at 104 ("The claim to the tools needed for exercising one's lawful right to protect [one's self] from criminal violence should be given at least as respectful a hearing as the First Amendment claims of Nazis and pornographers . . . ."); Nelson Lund, *The Second Amendment,* Heller*, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1376 (2009) ("[T]he Second Amendment requires courts to treat the right it protects with at least the same vigorous care that courts have exhibited in . . . First Amendment cases."); David G. Browne, Note, *Treating the Pen and the Sword as Constitutional Equals: How and Why the Supreme Court Should Apply Its First Amendment Expertise to the Great Second Amendment Debate*, 44 WM. & MARY L. REV. 2287, 2292 (2003) (arguing that "at *minimum* courts should adopt the varying levels of scrutiny applied in First Amendment cases" when evaluating Second Amendment claims).

51. Lawrence Rosenthal & Joyce Lee Malcolm, McDonald v. Chicago*: Which Standard of Scrutiny Should Apply to Gun Control Laws?*, 105 NW. U. L. REV. 437, 455 (2011) (footnote omitted); *see also* Ezell v. City of Chi., 651 F.3d 684, 707–08 (7th Cir. 2011) (constructing an entire structure of Second Amendment standards of review based on First Amendment analogies).

52. *Compare* Roe v. Wade, 410 U.S. 113, 165–66 (1973) (announcing a strict scrutiny standard of review for restrictions on access to abortion), *with* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992) (plurality opinion) (creating a distinctive "undue burden" standard for abortion restrictions).

scrutiny[53] and a more rigorous approach to intermediate scrutiny.[54] In the increasingly important category of gay rights challenges, it has refused to announce any standard of review at all.[55] As to the free exercise of religion, the Court has lurched from strict scrutiny to near-complete disregard for violations of a seemingly fundamental right.[56] Even in free speech law, the Court has devised increasingly diverse justifications for fine distinctions among standards of review.[57] Whatever the virtues or vices of these varied moves, they reflect the Court's increasing conviction that nuances and complexities in review of constitutional rights claims foreclose a one-size-fits-all approach. Moreover, even the Court's inconsistent application of strict scrutiny applies only to a narrow range of rights guarantees, leaving other protections to more lenient review.[58]

In the particular context of First and Second Amendment rights, even if we set aside the textual differences between the two provisions,[59] the considerations that determine the Court's varying standards of review for speech regulations have little or no relevance for gun regulations. First Amendment standards of review depend primarily on whether the challenged regulation restricts speech based on its viewpoint, its content, or some factor unrelated to its content.[60] Those distinctions underscore First Amendment

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53. *See* Grutter v. Bollinger, 539 U.S. 306, 341 (2003) (upholding, under strict scrutiny, a law school's race-conscious admissions policy).

54. *See* United States v. Virginia, 518 U.S. 515, 557 (1996) (striking down, under intermediate scrutiny, a military academy's male-only admissions policy).

55. *See* Lawrence v. Texas, 539 U.S. 558, 578–79 (2003) (striking down state restrictions on gay sex as a violation of the Due Process Clause without announcing any standard of review); Romer v. Evans, 517 U.S. 620, 635–36 (1996) (striking down, under the Equal Protection Clause, a state ban on measures that restricted sexual orientation discrimination, on the assumption that the ban would fail any level of constitutional scrutiny).

56. *Compare* Sherbert v. Verner, 374 U.S. 398, 403 (1963) (announcing a strict scrutiny standard for review of incidental government restrictions on the right to free exercise of religion), *with* Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 884–85 (1990) (announcing a rational basis standard for review of incidental government restrictions on free exercise rights).

57. *See* Ark. Educ. Television Comm'n. v. Forbes, 523 U.S. 666, 675, 677–78 (1998) (distinguishing between a "nonforum" and a "nonpublic forum" in devising a standard of review for content decisions by public broadcasters and then carving out a special exception to that standard for televised candidate debates); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 662 (1994) (plurality opinion) (justifying application of intermediate scrutiny to a government mandate that cable systems carry particular channels). The Court's inability to settle firmly on a standard of review for commercial speech regulations exemplifies the growing instability of tiered scrutiny in free speech doctrine. *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 487–88, 516 (1996) (striking down a ban on alcohol price advertising without producing a majority for any part of the analysis, including the standard of review).

58. *See* Winkler, *supra* note 12, at 693–96 (discussing the relative rarity of strict scrutiny in constitutional rights jurisprudence).

59. *See id.* at 707 (suggesting that the difference between the First Amendment's flatly prohibitory language and the Second Amendment's more instrumental language might direct a more lenient standard of review under the Second Amendment).

60. *See, e.g.*, Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828–31 (1995) (discussing the legal significance of distinguishing these three categories of speech regulations).

doctrine's predominant emphasis on protecting ideas from willful government censorship.[61] No conceptually similar distinction serves to differentiate gun regulations for constitutional purposes.[62] We cannot usefully identify "content-based" gun regulations, whether we treat that category as a filter for discerning impermissible government motives[63] or as a template for classifying impermissible objects of regulation.[64] First Amendment standards of review also depend, in many cases, on the nature of government property the speaker uses to reach an audience.[65] We can imagine a Second Amendment parallel where the government enjoyed greater latitude to restrict guns on publicly owned property.[66] But even there, different considerations would drive the two regimes. First Amendment doctrine seeks to balance the government's duty to maintain public order against the special utility of government property for expression.[67] In contrast, people do not need government property in order to keep and bear arms. Thus, in the Second Amendment context, any different standard(s) of review for government property presumably would turn on the legal importance and factual legitimacy of the government's particular safety concerns about guns.

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61. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 267–70 (1981) (emphasizing the strong First Amendment presumption against content-based regulations of speech).

62. *See* Tushnet, *supra* note 11, at 430 (suggesting that the distinction between content-based and content-neutral regulations lacks any useful analog in the Second Amendment context). Second Amendment doctrine could apply varying standards of review based on distinctions in the intent and/or effects of different gun regulations, but such a regime would require an independent assessment of why, how, and to what extent the Second Amendment protects the right to keep and bear arms.

63. *Cf.* Reynolds, *supra* note 18, at 147 (urging, by analogy to the First Amendment and other constitutional rights protections, that courts should scrutinize public safety justifications offered to justify gun regulations for signs of "inten[t] to extinguish or seriously undermine" the right to keep and bear arms); G. Barnett, *Reasonable Regulation*, *supra* note 47, at 622–24 (arguing that courts should treat gun regulations as "content-based" if they reflect impermissible motives, such as distaste for particular types of weapons); Browne, *supra* note 50, at 2306–08 (suggesting that courts should scrutinize ostensible "time, place, and manner" regulations of guns for improper motives).

64. *Cf.* Chrisman, *supra* note 47, at 321–23 (arguing that courts should treat gun regulations as "content-based" if they target some but not all weapons or gun owners); Janice Baker, Comment, *The Next Step in Second Amendment Analysis: Incorporating the Right to Bear Arms Into the Fourteenth Amendment*, 28 U. DAYTON L. REV. 35, 57–59 (2002) (arguing, by analogy to First Amendment doctrine, for strict scrutiny of gun regulations that target particular classes of gun owners).

65. *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–46 (1983) (discussing the different standards of review that apply to speech restrictions on different categories of government property).

66. *See* G. Barnett, *Reasonable Regulation*, *supra* note 47, at 624–26 (attempting to apply First Amendment forum categories directly to Second Amendment law). For an even more ambitious, and therefore even more misguided, attempt at a spatial analogy between the First and Second Amendments, see Ezell v. City of Chi., 651 F.3d 684, 697 (7th Cir. 2011) (striking down a municipality's ban on firing ranges based, in part, on First Amendment doctrine's refusal to allow speech restrictions where opportunities exist to speak elsewhere).

67. *See, e.g.*, Cox v. Louisiana, 379 U.S. 536, 554 (1965) (discussing the importance of both speech rights and "an organized society maintaining public order").

According to Eugene Volokh, any law that "significantly impair[s] the ability of people to protect themselves" should trigger heightened Second Amendment scrutiny, just as significant impairment of expressive opportunities triggers heightened First Amendment scrutiny.[68] Volokh argues, for example, that courts cannot properly subject concealed carry bans to a lenient Second Amendment analysis because such bans "leave[] people without ample alternative means of defending themselves in public places."[69] As to both guns and speech, this sort of analysis requires a theory of the purposes behind the right and a conceptual framework for identifying what, exactly, the right bars the government from doing. The descriptive, normative, and functional differences between the First and Second Amendments render analogies between them unhelpful in conceptualizing the Second Amendment right. Volokh's First Amendment analogy grants "self-defense" at least the breadth and significance of "expression" without asking whether the two categories are comparably broad, resistant to policy distinctions, and committed under the Constitution to individual autonomy. The descriptive, normative, and functional differences that I have outlined between the First and Second Amendments compel, and complicate, that inquiry.[70]

2. Scope of Protection.—Other prominent analogies between the First and Second Amendments, offered from a wider range of normative perspectives on gun rights, concern the proper scope of the individual right to keep and bear arms. Darrell Miller has argued at length,[71] and other commentators have suggested,[72] that First Amendment obscenity doctrine provides a useful model for the Second Amendment's application to carrying guns in public. *Stanley v. Georgia*[73] grants First Amendment protection to possession in the home of sexually explicit materials that rise (or sink) to the

68. Volokh, *supra* note 11, at 1458 (citing City of Ladue v. Gilleo, 512 U.S. 43, 55 (1994)).

69. *Id.* at 1459. Indeed, Volokh views spatial restrictions on guns as substantially more problematic than spatial restrictions on speech: "Some rights, such as free speech, may be only slightly burdened by laws that bar speech in some places but allow it in many other places. But self-defense has to take place wherever the person happens to be." *Id.* at 1515.

70. I would be remiss if I failed to note that Daniel Conkle got major satirical mileage, at Justice Scalia's expense, out of the idea that First Amendment standards of review might apply to Second Amendment claims—fifteen years before Justice Scalia wrote *Heller*. Daniel O. Conkle, *The New First Amendment and Its Impact on the Second*, 68 IND. L.J. 679, 682–84 (1993).

71. Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1292–303 (2009).

72. *See* Michael C. Dorf, *Does* Heller *Protect a Right to Carry Guns Outside the Home?*, 59 SYRACUSE L. REV. 225, 231–33 (2008) (suggesting that an analog to categorical First Amendment exclusions could justify upholding location-specific gun regulations); Tushnet, *supra* note 11, at 423–25 (same).

73. 394 U.S. 557, 568 (1969) (extending First Amendment protection to possession of obscene material in the home).

level of legal obscenity, whose public sale and display *Miller v. California*[74] categorically excludes from First Amendment protection. Miller posits that the "privilege of the home works a kind of alchemy with the Constitution," with location in the home transforming unprotected obscenity into "First Amendment speech"[75] and publicly dangerous guns into privately protected ones. This analogy presumes that the *Stanley* Court's protection for possessing obscenity in the home reflects a broad principle of privacy and autonomy, unrelated to any distinctive analysis of the harms obscene material might cause outside and inside the home.[76] The First Amendment, however, does not make the home a safe haven for other unprotected speech.[77] Conversely, the Court has emphasized moral harms to justify banning the public display of obscene materials to willing audiences.[78] Not even the most ardent advocate of gun regulations suggests that moral considerations alone compel prohibitions on carrying guns in public. The Court has never resolved the tension between the privacy concerns of *Stanley* and the moral concerns of *Miller*, and its denunciation of purely moral regulations in *Lawrence v. Texas*[79] suggests that no such resolution may be possible. Miller advances forceful arguments for distinguishing between gun regulations inside and outside the home based on his critique of Second Amendment insurrectionism[80] and on pragmatic concerns.[81] But his obscenity analogy

74. 413 U.S. 15, 23–24 (1973) (setting forth First Amendment guidelines for permissible state regulations of "obscenity").

75. Miller, *supra* note 71, at 1305. Miller also grounds his argument in other constitutional rights guarantees. *See id.* at 1304–05 (discussing the importance of the home in establishing Third Amendment, Fourth Amendment, and substantive due process protections).

76. *See* Dorf, *supra* note 72, at 233 (noting that the doctrinal distinction between home possession and public possession of obscenity does not turn on the ostensible harm that obscenity does outside the home). Professor Miller argues that, outside the home, the "dignity and liberty" protected by the First Amendment "must surrender to public purpose," notably democratic deliberation. Miller, *supra* note 71, at 1307–08. But he neither explains how obscene materials frustrate public purposes nor provides any theoretical basis for weighing dignity and liberty interests against public purposes. His argument therefore remains grounded in an abstract account of privacy and autonomy. Interestingly, Professor Volokh's harsh critique of Miller's argument echoes Miller's portrayal of *Stanley* in abstract privacy and autonomy terms. *See* Eugene Volokh, *The First and Second Amendments*, 109 COLUM. L. REV. SIDEBAR 97, 98 (2009) ("Only the special 'solicitude to protect the privacies of the life within [the home]' leads to the prohibition on punishment for mere home possession of obscenity.").

77. For example, the Court allows states to prohibit possession and viewing of child pornography without regard to location. *See* Osborne v. Ohio, 495 U.S. 103, 111 (1990).

78. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 69 (1973) (rejecting a First Amendment challenge to the exhibition of an obscene film to a paying audience in a closed theater, partially because of States' "right . . . to maintain a decent society"); *see also Miller*, 413 U.S. at 24 (substantially basing the permissibility of obscenity regulations on the application of "contemporary community standards").

79. 539 U.S. 558, 577 (2003) ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice . . . ." (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting))).

80. *See* Miller, *supra* note 71, at 1313, 1336–40 (positing insurrectionism as the most important argument for public possession of guns and arguing that failings of the insurrectionist position

does nothing more than model, without justifying, a categorical approach to doctrine at an unhelpfully broad level of abstraction.

Professor Miller posits another scope analogy from First Amendment to Second Amendment doctrine, suggesting that the Court's recognition of corporate free speech rights, most recently in *Citizens United v. Federal Election Commission*,[82] might justify a parallel recognition of corporate Second Amendment rights.[83] Here Miller seems much more interested in making sense of the legal doctrines about corporations' constitutional rights than in providing any concrete prescription for Second Amendment doctrine.[84] But the analogy, even as a mere linchpin for that deeper discussion, falls flat. Miller emphasizes the First and Second Amendments' textual similarities,[85] and he ascribes to the Court's First and Second Amendment doctrines two critical, common interests: advancing autonomy and curbing excessive government discretion.[86] Both doctrines do indeed promote those interests, but neither human autonomy nor government excess matters in a vacuum; we value distinctive sorts of autonomy differently in various contexts, and we trust government in varying degrees to regulate different kinds of behavior. Moreover, extending the logic of corporate rights into Second Amendment doctrine would impair the government's legal monopoly on the use of force, a cornerstone of sovereignty that has nothing to do with the First Amendment.[87] As with the obscenity analogy, the

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bolster the case against strong Second Amendment protection of public possession). For my assessment of Second Amendment insurrectionism and its interaction with First Amendment concerns, see *infra* subpart III(B).

81. *See* Miller, *supra* note 71, at 1350–55 (arguing that political and pragmatic considerations counsel in favor of stronger Second Amendment protection for gun possession in the home than in public).

82. 130 S. Ct. 876 (2010).

83. *See* Darrell A.H. Miller, *Guns, Inc.:* Citizens United, McDonald, *and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887, 902–05 (2011) (arguing that the Court's references in *Heller* and *McDonald* to the First Amendment as an interpretive analog for the Second Amendment suggest that Second Amendment rights may extend to corporations).

84. *See id.* at 946–56 (sketching a framework for a comprehensive reevaluation of corporate constitutional rights).

85. *See id.* at 903 (stating that "the First and Second Amendments appear to be textual counterparts" because they both speak in "strong, prohibitory" terms).

86. *See id.* at 904 (noting that both the First and Second Amendments serve the dual functions of advancing personal liberty and autonomy and checking overweening government).

87. Miller suggests that, just as the Court in *Citizens United* meant to deter "government control of democratic discourse," the Court in *Heller* and *McDonald* "expressed concern that tyranny could reign when government possesses a monopoly on the tools (if not also the legitimacy) of violence." *Id.* at 904. I take seriously the *Heller* Court's indulgence of Second Amendment insurrectionism. *See infra* note 140 and accompanying text. Even so, I think Miller's analogy implausibly conflates the canonical free speech rhetoric that fueled *Citizens United* with a highly problematic Second Amendment theory that the *Heller* Court handled quite gingerly. In addition, as Miller's parenthetical hedge implies, even Second Amendment insurrectionism does not entail abridging the government's monopoly on the use of force in ordinary (non-tyrannical) circumstances. In contrast, First Amendment theory—even when employed to justify regulations of money in politics—axiomatically rejects government control of democratic discourse.

corporate rights analogy might provide a helpful lever for discrediting the First Amendment doctrine at issue: perhaps granting corporations a constitutional right to influence electoral politics makes no more sense than granting them a constitutional right to amass arsenals. But the analogy provides no help in formulating Second Amendment doctrine.

Professor Volokh suggests that First Amendment law offers a basis for extending the scope of the Second Amendment to protect noncitizens' right to keep and bear arms.[88] Again, this analogy ignores the distinct considerations and values that support First and Second Amendment rights. One influential justification for extending First Amendment rights to noncitizens is that noncitizens can contribute fresh ideas to debates about matters of public concern, benefiting the domestic polity.[89] That justification subsumes any concerns that noncitizens might use expression or assemblies to harm domestic interests. In contrast, noncitizens' possession of guns offers no plausibly comparable collective benefit, while armed noncitizens seem at least arguably more likely than armed citizens to pose a meaningful danger to the state. That justificatory gap might prove false or surmountable, and alternative justifications, perhaps grounded in individual autonomy, might apply to speech rights and gun rights alike.[90] But the questions of noncitizens' rights in the First and Second Amendment settings require separate inquiries based on the distinctive liberty interests and policy priorities at stake.

Proceeding from the First Amendment's well-established protection against compelled speech,[91] Joseph Blocher suggests that courts should construe the Second Amendment as conferring a similar protection against the compelled keeping of arms.[92] Blocher's argument, unlike the others discussed in this subpart, acknowledges the limited value of First

88. *See* Volokh, *supra* note 11, at 1514 (grounding the analogy in both Amendments' references to "the right of the people").

89. *See* MEIKLEJOHN, *supra* note 24, at 118–19 (contending that the First Amendment extends the right of free expression to anyone, including a noncitizen, whose speech might help citizens to make political decisions).

90. For an argument that noncitizens should enjoy Second Amendment rights that is premised on the *Heller* Court's individual self-defense rationale for the right to keep and bear arms, see Pratheepan Gulasekaram, *"The People" of the Second Amendment: Citizenship and the Right to Bear Arms*, 85 N.Y.U. L. REV. 1521, 1570–77 (2010) (arguing that limiting the phrase "the people" in the Second Amendment to citizens clashes with the *Heller* Court's self-defense justification for the right to keep and bear arms).

91. *See, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (sustaining a First Amendment challenge to a state requirement that schoolchildren recite the Pledge of Allegiance and salute the flag).

92. *See* Blocher, *supra* note 11, at 18–48 (discussing the right not to speak, as well as related "rights not to" under the First Amendment, and applying similar concepts in the Second Amendment context). Blocher also proposes a parallel right not to bear arms, a right with less frequent practical utility and lesser protective force than the affirmative right to bear arms. *See id.* at 48–50.

Amendment analogies[93] and frames both the Second Amendment claim and its First Amendment referent in terms of specific, distinct values that Blocher ascribes to the two provisions.[94] Those caveats allow Blocher to advance a persuasive proposal for Second Amendment doctrine to which his First Amendment analogy makes a positive contribution. Even so, the analogy causes problems for the argument. Blocher's call for a common approach to government compulsions under the First and Second Amendments depends on his premise that the First Amendment bars compelled speech because compelling speech undermines the same substantive First Amendment values as restricting speech.[95] But the First Amendment might instead bar compelled speech in order to facilitate conceptually distinct and prior bars against restricting expression: "freedom of speech" has less meaning, and thus less value, if what you say may just be what the government is making you say.[96] On this alternative account, the compelled-speech principle has little salience for the Second Amendment: nothing about forcing people to keep arms undermines the liberty of people who choose to keep arms. Thus, even the soundest First Amendment analogy raises the question of whether the Second Amendment argument would stand better on its own.

3. Specific Regulations.—Finally, several commentators have condemned specific categories of gun regulations by analogy to superficially similar speech regulations. The single most ill-conceived analogy from the First Amendment to the Second seeks to transpose the First Amendment's strong prohibition against prior restraints into Second Amendment law.[97] The prior-restraint principle bars the government from imposing arbitrary licensing schemes or enjoining expression before publication.[98] The

93. *See id.* at 23 (emphasizing that "the argument here does not depend on whether the First and Second Amendments are comparable in all respects").

94. *See id.* at 6 (suggesting a functional parallel between First Amendment values of personal autonomy and the marketplace of ideas, and the core Second Amendment value, per *Heller*, of individual self-defense).

95. *See id.* at 18 ("The existence and contours of [the right not to speak] are tied directly to underlying First Amendment values . . . . This suggests that not-*X* rights can spring from the rationales and purposes of *X* rights.").

96. *See, e.g.*, Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 573–75 (1995) (sustaining a First Amendment challenge to a state requirement that parade organizers admit marchers whose views the organizers did not wish to advocate because the requirement undermined communication of the organizers' chosen message). Blocher portrays *Hurley* as simply promoting the substantive First Amendment value of autonomy. Blocher, *supra* note 11, at 20. That portrayal misses the procedural dimension of *Hurley*, under which barring compelled speech facilitates the substantive values that inhere in speaking. *See Hurley*, 515 U.S. at 577 (explaining that prohibitions on compelled speech discourage misattributing viewpoints to a particular speaker).

97. *See* Chrisman, *supra* note 47, at 327 (arguing that Second Amendment law should import the First Amendment prohibition against prior restraints); Browne, *supra* note 50, at 2304–06 (same).

98. *See, e.g.*, Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123, 134–37 (1992) (striking down a permit system for expressive uses of public property because it tied usage fees to projected

principle's greatest significance is historical: before the Supreme Court began to develop substantive speech protections under the First Amendment, people understood the First Amendment at least, and perhaps at most, to bar prior restraints.[99] Nothing in the Second Amendment's history suggests any similar grounding; indeed, gun licensing figured prominently in English and American law before and after the Amendment's adoption.[100] More important, the prior-restraint principle in First Amendment doctrine reflects a judgment not only that speech deserves strong protection but also that government can adequately remedy legally cognizable harms from speech after the fact.[101] Allowing restrictions on guns only after their use would bar government from preventing even the most predictable, severe harms from guns, such as shootings of family members by individuals subject to restraining orders[102] or use of machine guns in crimes.[103] Speech and guns cause different sorts of harms.[104] That critical difference justifies, indeed compels, distinct sorts of procedural restrictions on government regulation.[105]

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costs of maintaining public order); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 703, 722–23 (1931) (barring an injunction against future publication of a newspaper based on its alleged past publication of "malicious, scandalous and defamatory" content).

99. *See Near*, 283 U.S. at 713 ("[I]t has been generally, if not universally, considered that it is the chief purpose of the guaranty [of liberty of the press] to prevent previous restraints upon publication.").

100. *See* Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 CLEV. ST. L. REV. 1, 26–27, 51–54 (2012) (contrasting the longstanding practice of gun licensing under English and early American law with prohibitions on prior restraints of speech); *see also* Saul Cornell, *The Early American Origins of the Modern Gun Control Debate: The Right to Bear Arms, Firearms Regulation, and the Lessons of History*, 17 STAN. L. & POL'Y REV. 571, 573 (2006) (criticizing conjunction of First and Second Amendment rights as ahistorical).

101. *See Near*, 283 U.S. at 714–16 (discussing the validity of subsequent penalties for harmful speech, notwithstanding the prior restraint doctrine). The Court has never wavered from this basic judgment, although it has indicated that extreme threats to national security would warrant an exception. *See id.* at 716 ("No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." (footnote omitted)).

102. *See* Chrisman, *supra* note 47, at 326–27 (arguing that the Court should strike down the federal prohibition on gun ownership by people under restraining orders as an impermissible prior restraint).

103. *See* Browne, *supra* note 50, at 2305–06 (arguing that the Court should strike down the federal prohibition on owning a machine gun as an impermissible prior restraint).

104. *See* Akhil Reed Amar, *The Second Amendment: A Case Study in Constitutional Interpretation*, 2001 UTAH L. REV. 889, 895 (distinguishing treatment of felons under the First and Second Amendments); Charles, *supra* note 100, at 52–54 (contrasting the "public utility" of restrictions on guns and speech). *But see* Lund, *supra* note 19, at 67–69 (equating abuses of Second Amendment rights with abuses of First Amendment rights).

105. Post-*Heller* federal courts have adopted or considered procedural constraints for gun regulations based on First Amendment analogies. *See* Ezell v. City of Chi., 651 F.3d 684, 699 (7th Cir. 2011) (adopting a presumption of irreparable harm for Second Amendment violations by reference to First Amendment cases because the two Amendments protect "similarly intangible and unquantifiable interests"); *id.* at 709 (requiring the government to prove its basis for gun regulations with the same sort of empirical evidence required for speech regulations); United States v. Masciandaro, 648 F. Supp. 2d 779, 793–94 (E.D. Va. 2009) (expressing strong doubt about the

Other arguments for directly importing First Amendment prohibitions into Second Amendment law, while not as reckless as the prior-restraint analogy, reflect similar disregard for the distinct concerns behind the two provisions. Calvin Massey, while not advocating a full-scale Second Amendment embrace of the prior-restraint principle, argues for shielding guns, like speech, from arbitrary licensing.[106] But permissible licensing systems for speech often serve to allocate scarce expressive resources, such as access to public facilities.[107] Should states be able to use gun licensing to limit the number of people who may carry guns in public?[108] Conversely, licensing systems for speech may not select speakers based on the content of their ideas.[109] Should states be barred from using gun licensing to mandate, for example, successful completion of a safety training course? The First Amendment analogy has no value for resolving these Second Amendment questions. David Kopel argues that the First Amendment bar against requiring people who purchase politically unpopular literature to register with the government[110] should apply directly to guns, because both speech and guns "are specifically protected by the Constitution" and serve as "tools of political dissent."[111] Kopel fails to assess the distinctive ways in which speech and guns advance political dissent, and accordingly, he offers no useful insights about whether registration requirements in the two settings would do comparable damage. Professor Volokh draws a parallel between waiting periods for gun purchases and time lapses associated with other constitutional rights, including First Amendment constraints on processing times for demonstration permits.[112] That analogy disregards the distinctive normative value of political demonstrations, the practical differences between coordinating a demonstration and purchasing a gun, and the possibility that imposing "cooling off" periods and performing checks related

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validity of the First Amendment overbreadth principle in the Second Amendment setting and holding that, in any event, the defendant had failed to make the necessary factual showing for a Second Amendment overbreadth claim).

106. *See* Calvin Massey, *Guns, Extremists, and the Constitution*, 57 WASH. & LEE L. REV. 1095, 1128–29 (2000) (arguing that the prior-restraint principle should substantially constrain efforts to license gun ownership).

107. *See* Cox v. New Hampshire, 312 U.S. 569, 574–76 (1941) (upholding states' authority to require licenses for parades on public streets).

108. Professor Massey argues that the Second Amendment should bar the use of gun licensing to limit the number of "concealed carry" permits. *See* Massey, *supra* note 106, at 1129.

109. *See* Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123, 134–36 (1992) (tying the impermissibility of a permit scheme to its divergent treatment of applicants based on the contents of their speech).

110. *See* Lamont v. Postmaster Gen., 381 U.S. 301, 307 (1965) (striking down a Post Office requirement that recipients of "communist political propaganda" sign a form before receiving the material).

111. David B. Kopel, *Trust the People: The Case Against Gun Control*, CATO INST. POL'Y ANALYSIS, July 11, 1988, at 25.

112. *See* Volokh, *supra* note 11, at 1540–41.

to gun purchases might distinctly justify time delays in the Second Amendment setting.[113]

All of the varied attempts that this subpart has discussed to draw direct analogies between the First and Second Amendments run aground on the descriptive, normative, and functional differences between the two Amendments and the rights they protect.[114] Perhaps the Court should apply strict scrutiny to most or all gun regulations, impose an especially stringent Second Amendment bar on regulations of guns in the home, and skeptically review requirements to license guns. Justification for any of those moves, however, would need to draw upon the distinctive characteristics of keeping and bearing arms and the distinctive liberty interests the Second Amendment serves. Any direct parallels between sound First Amendment doctrine and sound Second Amendment doctrine will be incidental.

Our understanding of the First Amendment can, however, generate other valuable, even decisive, tools for determining the shape and legal force of the Second Amendment right to keep and bear arms. Insights from First Amendment theory suggest an approach to settling a key matter of Second Amendment interpretation, and the two Amendments' divergent methodologies for pursuing common political goals can inform a critical assessment of the Second Amendment's substantive content. The rest of this Article develops those connections.

II. Interpretive Echoes: Individual Rights, Collective Rights, and First Amendment Theory's Third Way

Our understanding of the First Amendment can help resolve one of the greatest difficulties and one of the deepest challenges that *Heller* left for Second Amendment jurisprudence. The difficulty is that *Heller* articulated an individual right to keep and bear arms in a manner that stripped the Second Amendment's preamble of any reason for being. The challenge lies in resolving the tension between collectivist and individualist justifications

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113. Volokh recognizes that this and some other moves from the First Amendment to the Second "are not perfect analogies." *Id.* at 1541. He makes, but then heavily qualifies, a comparison between taxes and fees on speech and guns. *Id.* at 1542–44. *But cf.* Philip J. Cook et al., *Gun Control After* Heller*: Threats and Sideshows From a Social Welfare Perspective*, 56 UCLA L. REV. 1041, 1083–88 (2009) (critiquing the idea of importing into Second Amendment doctrine the First Amendment prohibition against certain taxes and other burdens targeted at speech). He rejects a broad First Amendment analogy to gun registration. *See* Volokh, *supra*, at 1545–46 (observing that gun registration requirements burden the right to self-defense less than speech licensing requirements burden expressive freedom). He also acknowledges that "[m]any kinds of arms are fungible for self-defense purposes in a way that viewpoints are not fungible for free speech purposes." *Id.* at 1548.

114. These same differences complicate efforts to derive First Amendment doctrine from Second Amendment doctrine. *See* Edward Lee, *Guns and Speech Technologies: How the Right to Bear Arms Affects Copyright Regulations of Speech Technologies*, 17 WM. & MARY BILL RTS. J. 1037, 1041 (2009) (arguing that "[j]ust as bans on guns that serve the purpose of self-defense violate the Second Amendment, bans on technologies that serve the purpose of self-expression violate the First Amendment's Free Press Clause").

for the individual right to keep and bear arms. Debates about the purpose of free speech protection reveal a compelling ground for treating the Second Amendment right as embodying a collectivist rather than an individualist purpose, without upsetting the *Heller* Court's holding that the right protects individuals.[115] This interpretive move, which looks only to the structure of the First Amendment debate for help in evaluating the Second Amendment on its own terms, carries major implications for the substantive content of the individual right to keep and bear arms.

My interpretive methodology diverges from the *Heller* Court's approach to constitutional interpretation. Justice Scalia's majority opinion in *Heller* represents, to date, the high-water mark of originalism, and particularly of reliance on constitutional terms' "original public meaning," in the Supreme Court's constitutional jurisprudence.[116] Skeptics[117] and even the occasional advocate[118] of originalism have strongly criticized the *Heller* Court's version of originalist methodology. The capacity of originalist evidence to resolve the issues presented in *Heller* remains in doubt.[119] Moreover, the decision

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115. L.A. Powe has previously sought to import First Amendment principles to the task of Second Amendment interpretation. *See* Powe, *supra* note 16, at 1320. Powe's discussion, which predates *Heller* by a decade, attempts to resolve the individual versus collective rights controversy by applying a survey of constitutional interpretive methodologies to the then-sparse landscape of Second Amendment doctrine. *See id.* at 1318–20 (demarcating the scope and approach of Powe's inquiry); *see also* Lund, *supra* note 19, at 20 (invoking the First Amendment's text to argue that the Second Amendment protects an individual right); George A. Mocsary, Note, *Explaining Away the Obvious: The Infeasibility of Characterizing the Second Amendment as a Nonindividual Right*, 76 FORDHAM L. REV. 2113, 2171 (2008) (same). That sort of interpretive analysis has little relevance for present efforts to determine the meaning of the individual right *Heller* recognized. Moreover, Powe scorns the project of assessing the First Amendment's purpose, which I contend enables First Amendment theory's useful contribution to a sound interpretation of the Second Amendment. *See* Powe, *supra* note 16, at 1393 (disdaining "moral philosophy and natural law" as grounds for discerning the First Amendment's purpose, on the ground that "the well-founded distrust of government" provides a sufficient explanation). *But cf.* Blocher, *supra* note 12, at 402 n.123 (noting the salience of the collectivist versus individualist purpose debate in the First and Second Amendment contexts).

116. *See* District of Columbia v. Heller, 554 U.S. 570, 605 (2008) (explaining and defending the Court's interpretive focus on the original meaning of the Second Amendment's language in the polity from which it emerged); *see also* Cass R. Sunstein, *Second Amendment Minimalism:* Heller *as* Griswold, 122 HARV. L. REV. 246, 249 (2008) (calling *Heller* "unique" in its emphasis on original public meaning).

117. *See* Saul Cornell, *Originalism on Trial: The Use and Abuse of History in* District of Columbia v. Heller, 69 OHIO ST. L.J. 625, 626–36 (2008) (criticizing the originalism of *Heller* as ahistorical and intellectually dishonest); David Thomas Konig, *Why the Second Amendment Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America*, 56 UCLA L. REV. 1295, 1307–17 (2009) (criticizing *Heller* for failing to recognize and contend with uncertainties, familiar to the founding generation, about the capacity of language to convey a stable, unitary meaning); Mark Tushnet, Heller *and the New Originalism*, 69 OHIO ST. L.J. 609, 616–23 (2008) (describing and critiquing the original public meaning approach as practiced in *Heller*).

118. *See* Lund, *supra* note 50, at 1349–68 (criticizing the *Heller* majority for various departures from or abuses of proper originalist methodology).

119. *See* Christopher L. Eisgruber, *Moral Principle and the Second Amendment*, *in* GUNS, CRIME, AND PUNISHMENT IN AMERICA 140, 150 (2003) (pronouncing originalist approaches to the

may well turn on contemporary politics rather than any meaningful understanding of the past.[120] Debates over the viability of originalism as a general matter have raged for decades.[121] Rather than reprising those debates here, I simply note my view that originalism suffers from decisive failings. I follow an eclectic and normatively indeterminate textualist approach to constitutional interpretation, using and defending varied extrinsic interpretive aids—including but not limited to historical sources—to resolve ambiguities or address novel problems. Where the constitutional text resists precise application, this interpretive approach may seek to discern the purpose of the provision at issue, rather than its supposed specific intent.[122]

I do not challenge here the *Heller* Court's central holding, that the Second Amendment protects an individual rather than a collective right to keep and bear arms. Likewise, I do not engage the central holding of *McDonald*, that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right against the states. Several considerations lead me, for present purposes, to take these holdings as given. First, I doubt the Court will reconsider them any time soon. The individual versus collective rights question and, to a lesser extent, the incorporation question, have dominated arguments about the Second Amendment for decades.[123] Their resolution marks a watershed, and the Court would have to

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twenty-first-century Second Amendment as "batty, even by the standards of originalism"); Daniel A. Farber, *Disarmed by Time: The Second Amendment and the Failure of Originalism*, 76 CHI.-KENT L. REV. 167, 170–75 (2000) (discussing, in the Second Amendment context, evidentiary problems inherent in originalism); Rakove, *supra* note 34, at 119–60 (critically analyzing the originalist case for an individual Second Amendment right and concluding that the Framers of the Second Amendment did not consider the sorts of regulatory questions at issue in contemporary gun rights debates).

120. *See* Cornell, *supra* note 117, at 630 (deriding the *Heller* Court's references to historical materials as "entirely arbitrary and result oriented"); Brannon P. Denning and Glenn H. Reynolds, *Five Takes on* District of Columbia v. Heller, 69 OHIO ST. L.J. 671, 676–78 (2008) (positing that *Heller* validated a majoritarian political position against outliers); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 201–36 (2008) (attributing *Heller* to the influence of late twentieth-century conservative social movements); Sunstein, *supra* note 116, at 263–64 (arguing that the *Heller* Court acted to reject a policy that lay outside the political mainstream). For a thorough, pre-*Heller* development of the claim that constitutional disputes over the Second Amendment occupy a subordinate position to cultural arguments about guns, see generally MARK V. TUSHNET, OUT OF RANGE: WHY THE CONSTITUTION CAN'T END THE BATTLE OVER GUNS (2007).

121. *Compare, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 1 (1977) (arguing that the Supreme Court's Fourteenth Amendment doctrine represents a "continuing revision of the Constitution under the guise of interpretation"), *with* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 225 (1980) (contending that "the practice of supplementing and derogating from the text and original understanding is itself part of our constitutional tradition").

122. *Cf.* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 291 (1996) (distinguishing between the Framers' "linguistic intentions," which roughly correspond with purpose, and "legal intentions," which roughly correspond with specific intent).

123. *See* Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1164 (1991) (arguing that the Second Amendment created an individual right, but one that the preamble

expend enormous institutional capital to revisit them. In contrast, the Court could reassess the aspects of *Heller* my analysis calls into question, including the decision's fixation on individual self-defense, with relative ease. Second, both central holdings have some appeal under my nonoriginalist approach to constitutional interpretation.[124] Our dominant liberal conception of individual rights has eclipsed the civic republican notion of rights designed to effectuate collective duties, which provides the most persuasive historical explanation for the Second Amendment.[125] Similarly, after a long period of uncertainty, the Court over the past four decades has taken every opportunity to incorporate provisions of the Bill of Rights into the Fourteenth Amendment.[126] Third, the Court's settlement of the individual rights and incorporation questions opens up a trove of other practically significant and intellectually challenging questions about the nature and scope of the newly individualized, newly incorporated right to keep and bear arms that deserve sustained attention.

A. Heller *and the Disappearing Preamble*

The Second Amendment states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[127] *Heller* primarily considers whether the Amendment protects an individual right to keep and bear arms or merely a collective right to form a well-regulated militia.[128] Addressing the Second

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grounded in collectivist concerns); Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI.-KENT L. REV. 3, 3–8 (2000) (documenting the academic dominance of the preamble-derived collective right position prior to 1970); Powe, *supra* note 16, at 1317–18, 1374–76, 1383–87 (applying various constitutional interpretive methodologies to the individual versus collective right controversy).

124. *See, e.g.*, Adam Winkler, Heller's *Catch-22*, 56 UCLA L. REV. 1551, 1574 (2009) ("The living Constitution strongly supports the *Heller* majority's recognition of an individual right to keep and bear arms.").

125. *See* Amar, *supra* note 104, at 890–95 (setting forth a historically grounded republican reading of the Second Amendment); Cornell, *supra* note 100, at 572 (describing the Founding-era right to bear arms as a civic right that "belonged to citizens who exercised it when they acted collectively for public defense"); David Thomas Konig, *The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of "the Right of the People to Keep and Bear Arms,"* 22 LAW & HIST. REV. 119, 120–21, 153 (2004) (describing the civic republican roots of the Second Amendment and characterizing the right to keep and bear arms as an "individual right exercised collectively"); Rakove, *supra* note 34, at 155–60 (conceptualizing the Second Amendment as a "declaratory right"); H. Richard Uviller & William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 CHI.-KENT L. REV. 403, 556–61 (2000) (contrasting the republican roots of the Second Amendment with the more liberal sense of rights that frames our contemporary understanding of other constitutional rights guarantees); David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551, 553, 563 (1991) (grounding the Second Amendment in a civic republican tradition that saw the militia as a check against the danger of government corruption).

126. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (adopting a selective approach to incorporation questions that, in practice, strongly favors incorporation).

127. U.S. CONST. amend. II.

128. District of Columbia v. Heller, 554 U.S. 570, 577 (2008).

Amendment's unusual structure,[129] Justice Scalia's majority opinion explains that the preamble "announces a purpose" for the Second Amendment's operative clause.[130] He acknowledges a "requirement of logical connection" between the two clauses that "may cause a prefatory clause to resolve an ambiguity in the operative clause," but he makes clear that "apart from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause."[131] He therefore places primary emphasis on the Amendment's operative clause. He finds, largely based on the established meaning elsewhere in the Bill of Rights of the phrase "right of the People," that the Amendment protects an individual right.[132] Returning to the preamble, he finds the phrase "well-regulated Militia" to refer to all able-bodied men, subject to proper training and discipline,[133] and "security of a free state" to mean "security of a free polity."[134] Putting the two clauses together, Justice Scalia concludes that the preamble merely explains the immediate reason that the Framers included in the Constitution an individual right to keep and bear arms: to prevent a tyrannical government from disarming the people as a way to forestall popular insurrection.[135]

Justice Scalia insists that the substance of the Second Amendment, which he portrays as codifying a pre-existing right to keep and bear arms,[136] has nothing to do with maintaining any sort of organized militia and virtually everything to do with preserving the individual right to self-defense. He avers that "most [Americans of the founding generation] undoubtedly thought [the right] even more important for self-defense and hunting."[137] The preamble, in his analysis, "can only show that self-defense had little to do with the right's *codification*; [self-defense] was the *central component* of the right itself."[138] To support this view, he notes rights-based objections after the Civil War to southern states' practice of disarming African Americans who wanted to defend themselves against racist attacks.[139] For

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129. Professor Volokh has argued that the Second Amendment's structure was, in fact, "commonplace" in the context of its times, because many state constitutional provisions included prefatory clauses. Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 794–95 (1998). But given that the Framers of the United States Constitution well knew of the usages to which Volokh refers, their decision to employ that structure only in the Second Amendment, and a similar justificatory device only in the Copyright Clause, *see* U.S. CONST. art. I, sec. 8, cl. 8 (granting Congress the power to confer intellectual property rights "[t]o promote the Progress of Science and useful Arts"), renders it unusual, and therefore significant.

130. *Heller*, 554 U.S. at 577.

131. *Id.* at 577–78.

132. *Id.* at 579.

133. *Id.* at 595.

134. *Id.* at 597.

135. *Id.* at 598–99.

136. *Id.* at 592–93; *see also supra* note 43 and accompanying text.

137. *Heller*, 554 U.S. at 599.

138. *Id.*

139. *Id.* at 614–16. Leading commentators anticipated this argument. *See* Amar, *supra* note 104, at 907 ("History, however, does provide some support for a broad libertarian reading of the

Justice Scalia, the present-day irrelevance of what the founding generation would have understood as the "militia" does nothing to diminish the operative force of the Second Amendment. He bridges the gap between the preamble and the self-defense theme by invoking the insurrectionist justification for the Second Amendment. The Framers, he argues, could not have intended the Second Amendment merely to facilitate maintenance of an organized militia, because such a reading "does not assure the existence of a 'citizens' militia' as a safeguard against tyranny."[140] The Court's subsequent decision in *McDonald* reaffirms individual self-defense as the primary object of the Second Amendment right.[141]

The *Heller* Court's interpretation of the Second Amendment presents several problems, even if we set aside doubts about the Court's original public meaning methodology. First, Justice Scalia offers scant support for his assertion that the Second Amendment codified a pre-existing right, a surprising deficit given his strenuous efforts to ground his analysis in history.[142] That assertion bears a great deal of weight, allowing Justice Scalia to define the scope of the Second Amendment by reference to its real or imagined folkways. Second, his argument that the founding generation cared about the right to keep and bear arms mainly because of self-defense and hunting elides the difference between the social fact of keeping and bearing arms and a constitutional right to keep and bear arms. Even if Justice Scalia's social history is accurate—he offers no support for his assertion—we cannot be sure whether people considered their interests in self-defense and hunting sufficiently weighty to override various government interests in regulating firearms.[143] Third, Justice Scalia's proclamation that individual

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right to 'keep and bear Arms,' but the best historical argument for libertarians comes not from the Founding but from Reconstruction."); Sanford Levinson, *The Historians' Counterattack: Some Reflections on the Historiography of the Second Amendment*, *in* GUNS, CRIME, AND PUNISHMENT IN AMERICA, *supra* note 119, at 91, 108 ("[A]ny 'originalist' analysis of the Second Amendment, at least with regard to limitations on *state* regulation, must rest on the Reconstruction debates and not at all on the debates of 1789–91 . . . .").

140. *Heller*, 554 U.S. at 600; *see also id.* at 598 (asserting that "when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny").

141. *See* McDonald v. Chicago, 130 S. Ct. 3020, 3036 (2010) (holding the Second Amendment fundamental to our scheme of ordered liberty because "[s]elf-defense is a basic right, recognized by many legal systems from ancient times to the present day").

142. Justice Scalia simply points out that the 1689 Declaration of Right secured English Protestants' right to arms against the Crown, then asserts that "[t]his right has long been understood to be the predecessor to our Second Amendment." *Heller*, 554 U.S. at 592–93. Even taken on its own sketchy terms, that assertion does not establish that an individual right to keep and bear arms existed in the United States before the Second Amendment was adopted. Justice Scalia's only other support for his pre-existing right claim is that the Second Amendment's syntax—"[the right] shall not be infringed"—establishes the right's prior existence. *Id.* at 592 (quoting United States v. Cruikshank, 92 U.S. 542, 553 (1876)).

143. *See* Cornell, *supra* note 100, at 574 (contending that the founding generation relied on the common law to protect the right of individual self-defense and noting that even antebellum courts upheld substantial gun regulations); Konig, *supra* note 125, at 143 (suggesting that the founding generation probably thought of guns as subject to state regulation in the same manner as other

self-defense was, and remains, "the *central component*" of the Second Amendment right to keep and bear arms[144] rests on dubious history[145] and undermines the right's importance for resisting tyranny.[146]

Justice Scalia's treatment of the relationship between the Second Amendment's preamble and operative clause presents especially thorny problems. We can chart possible accounts of that relationship along a spectrum, from the weakest assessment of the preamble to the strongest:

1. The preamble is surplusage.
2. The preamble explains the immediate reason that led the Framers to include the Second Amendment in the Constitution, but as long as the operative clause bears some relationship to that reason, the preamble plays no role in setting the scope of the Second Amendment right.
3. The preamble describes the Framers' purpose for including an individual right to keep and bear arms in the Second Amendment, and it therefore plays a substantive role in setting the scope of the right.
4. The preamble reduces the Second Amendment to guaranteeing not an individual right but rather a collective right, cognizable only in the context of an organized militia.

The central holding of *Heller* forecloses Option 4.[147] Option 1 dismisses a piece of interpretive evidence on which several generations of courts and commentators placed substantial emphasis.[148] More importantly, it disregards text. The preamble indicates that the Framers wanted subsequent readers and interpreters of the Bill of Rights to know, and care, why they had added this particular provision to the Constitution. One need

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property); Rakove, *supra* note 34, at 145–46 (arguing that evidence from the 1780s does not indicate whether people would have supported restraints on state regulation of private firearm ownership); David C. Williams, *Death to Tyrants:* District of Columbia v. Heller *and the Uses of Guns*, 69 OHIO ST. L.J. 641, 652–53 (2008) (pointing out the lack of eighteenth-century evidence to show any concern about federal interference with individual self-defense).

144. *Heller*, 554 U.S. at 599 (emphasis in original).

145. *See generally* David Thomas Konig, "Heller, *Guns, and History: The Judicial Invention of Tradition,"* 3 NORTHEASTERN U. L.J. 175 (2011); *see also* Williams, *supra* note 143, at 652–53 (emphasizing that *Heller* presents no direct evidence that the Framers intended to guarantee a right to keep and bear arms for individual self-defense).

146. *See* Williams, *supra* note 143, at 659–67 (indicting *Heller* for covertly abandoning the insurrectionist justification for the Second Amendment in order to advance the Court's preferred justification, individual self-defense).

147. *See Heller*, 554 U.S. at 592 (holding that the Second Amendment guarantees an individual right to bear arms).

148. *See* United States v. Miller, 307 U.S. 174, 178 (1939) (rejecting a Second Amendment claim where the charged conduct lacked "some reasonable relationship to the preservation or efficiency of a well regulated militia"); Bogus, *supra* note 123, at 3–8 (documenting the academic dominance of the preamble-derived collective right position prior to 1970); *see also* Amar, *supra* note 123, at 1164 (arguing that the Second Amendment created an individual right, but one that the preamble grounded in republican concerns about self-government rather than individual concerns about hunting or self-defense).

not embrace originalism to conclude that a conspicuous expression of the Framers' purpose warrants some deference. Option 2, Justice Scalia's choice, entails an awkward discontinuity between the right and its justification,[149] which grows especially wide when he refuses to extend Second Amendment protection to the possession and use of military weapons.[150] More important, Option 2 collapses into Option 1. If Justice Scalia's interpretive argument is right, then the preamble does no real work, and it never did.[151] The preamble is nothing more than a gratuitous explanatory footnote to the free-standing operative clause of the Second Amendment.

Perhaps we might accept Justice Scalia's erasure of the preamble if we believed that giving effect to the preamble required us to embrace Option 4 and that Option 4 embodied a more pernicious sort of interpretive error than Option 1. But Option 3 delivers us from that Hobson's choice. It allows for both a meaningful preamble and an individual right to keep and bear arms. In reaching that accommodation, a long-standing debate about the First Amendment's purpose provides a useful interpretive model.

B. The Collectivist Versus Individualist Purpose Debate in First Amendment Theory

The First Amendment states that, "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[152] In contrast to Second Amendment debates, no one denies that the First Amendment protects individuals' right to expressive freedom. The most persistent and significant fault line in theoretical arguments about the First Amendment's purpose divides collectivist from individualist

149. Tushnet, *supra* note 117, at 620–21. Professor Van Alstyne commits the same sort of error when he tries to explain away the preamble as a mere consequence of the "predicate" individual right to keep and bear arms. Van Alstyne, *supra* note 11, at 1243.

150. *See Heller*, 554 U.S. at 627 (holding that weapons "most useful in military service . . . may be banned" without running afoul of the Second Amendment).

151. *See* Cornell, *supra* note 117, at 633 (charging that *Heller* "effectively erases the preamble"); Konig, *supra* note 117, at 1297 ("Justice Scalia does not so much seek to understand the meaning of the preamble as to assert that it had, and thus continues to have, little meaning."). Chris Eisgruber, writing years before *Heller*, prefigured Justice Scalia's approach to the preamble, arguing that the preamble simply "tells us something about why the framing generation thought that the 'right to keep and bear arms' was sufficiently important to deserve explicit mention in the Constitution." Eisgruber, *supra* note 119, at 141–42. For Eisgruber, that reading supports a view that the Second Amendment states an "abstract moral principle," granting individuals "those rights to gun ownership and military service which ought to belong to citizens of all free governments." *Id.* at 140. Eisgruber's principle, like the *Heller* Court's originalism, leads to a substantive understanding of the Second Amendment as primarily focused on individual self-defense. The major problem with Eisgruber's version of the *Heller* argument is that he offers no basis for construing the Second Amendment at the particular level of generality on which his "abstract moral principle" operates.

152. U.S. CONST. amend. I.

justifications for that individual right.[153] These two sorts of justifications are not simple or mutually exclusive, in the First Amendment context or elsewhere. Few free speech theorists argue for one sort of justification to the complete exclusion of the other, and the Supreme Court over the years has given each one substantial credence.[154] Nonetheless, collectivist and individualist justifications stand in strong conceptual tension, and choices between them can incline courts toward opposite results in difficult free speech cases.

Collectivist justifications for the First Amendment maintain that the Constitution protects expression in order to advance some shared societal goal. While some collectivist arguments focus on the shared interest in pursuing truth in diverse matters,[155] collectivists most commonly emphasize the value of free expression for facilitating democratic self-government. Writing from opposite ends of the ideological spectrum and with different concerns in mind, Alexander Meiklejohn[156] and Robert Bork[157] both contend that courts should invoke the First Amendment only for the purpose of enabling free and open political debate. Subsequent theorists, most notably Owen Fiss[158] and Cass Sunstein,[159] downplay the exclusive character of the Meiklejohn–Bork argument while refining and amplifying the idea that courts in First Amendment cases should primarily consider the relative values of expressive freedom and government regulations for a robust, inclusive democratic process. First Amendment collectivists believe that constitutional protection for expressive freedom should give members of the political community access to the widest possible range of political ideas

153. My brief discussion here of the collectivist versus individualist debate in free speech theory draws on my more extensive examination of that debate elsewhere. *See, e.g.*, Gregory P. Magarian, *Regulating Political Parties Under a "Public Rights" First Amendment*, 44 WM. & MARY L. REV. 1939, 1947–59, 1972–91 (2003) (describing and contrasting "private rights" and "public rights" theories of the First Amendment).

154. Justice Brandeis, in a canonical discussion of the First Amendment's purpose, stated: "Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means." Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

155. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (positing "that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which [men's] wishes safely can be carried out").

156. *See generally* MEIKLEJOHN, *supra* note 24.

157. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20–21 (1971) (applying the First Amendment "only to speech that is explicitly political").

158. *See* OWEN M. FISS, THE IRONY OF FREE SPEECH 83 (1996) (defending speech regulations that "try[] to enhance the robustness of public debate, not impose an orthodoxy").

159. *See* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 15–16 (1993) (balancing free speech ideals against the protection of democratic processes that may limit expressive freedom).

while also ensuring broad distribution of opportunities to participate in democratic self-government.[160]

Individualist justifications for the First Amendment posit that constitutional protections for expressive freedom primarily advance individual autonomy. First Amendment individualists argue that constitutional expressive freedom advances autonomy by preventing government from undermining the personal satisfaction and informational benefits that individuals derive from communication.[161] They recognize the social and political value of expressive freedom, but they subordinate that value to individual autonomy.[162] Martin Redish sees all the myriad benefits of expression as components of a larger, overarching interest in individual self-fulfillment.[163] Robert Post recognizes the democratic grounding of expressive freedom but views the First Amendment as safeguarding a sphere of autonomy necessary to "the open-ended search for collective self-definition."[164] Ed Baker portrays the Free Speech Clause as providing a robust protection for individual autonomy[165] while relegating collectivist interests in speech to the narrower precincts of the Press Clause.[166] First Amendment individualists mistrust all government regulations of speech, and they criticize collectivists' more consequentialist approach to evaluating speech regulations as unduly credulous toward government.[167] Conversely, collectivists criticize individualists' unwavering opposition to speech regulations as both unrealistic and excessively formalist.[168]

Shifts in the Supreme Court's emphasis between collectivist and individualist justifications have made major differences in the development of First Amendment doctrine. The field of media regulation provides a

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160. For a discussion of the interplay between these two aspects of a democracy-focused free speech theory, see Gregory P. Magarian, *The Jurisprudence of Colliding First Amendment Interests: From the Dead End of Neutrality to the Open Road of Participation-Enhancing Review*, 83 NOTRE DAME L. REV. 185, 254–56 (2007).

161. *See* ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 274 (1995) (positing that where public discourse limits expressive freedom in favor of rational democratic efficiency, "a particular concept of national identity is placed beyond the reach of the communicative processes of self-determination").

162. *See id.* at 276 (interpreting public discourse as a means of discovering and reconciling heterogeneous identities in the collective).

163. *See generally* Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982) (incorporating traditionally theorized grounds for free speech protections, such as "the 'political process,' 'checking,' and 'marketplace-of-ideas' values" into a general conception of self-realization).

164. POST, *supra* note 161, at 275.

165. *See* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 990–1009 (1978) (developing a conception of free speech focused on individual liberty).

166. *See* C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 919 (2002) (positing that the Press Clause serves collective democratic and social goals).

167. *See, e.g.*, POST, *supra* note 161, at 288–89 (arguing that collectivists' allowance for democracy-enhancing speech regulation violates essential free speech principles).

168. *See, e.g.*, SUNSTEIN, *supra* note 159, at 4–7 (describing and critiquing the "absolutist" position against government regulation of speech).

classic example. In *Red Lion Broadcasting Co. v. FCC*,[169] the Court rejected a First Amendment challenge to an element of the FCC's "fairness doctrine" that mandated a right of reply for anyone criticized by name on the broadcast airwaves.[170] Just five years later, the Court in *Miami Herald Publishing Co. v. Tornillo*[171] reached a diametrically opposite conclusion in a challenge to a state right-of-reply statute that applied to the print media.[172] Important facts distinguished the two cases: the Court in *Red Lion* noted the scarcity of the broadcast spectrum,[173] and *Miami Herald* involved a state rather than a federal regulation and a more established expressive medium.[174] But the difference in the two results turns substantially on the Court's divergent accounts of the First Amendment's purpose. The *Red Lion* Court rejected the view that the First Amendment primarily protects speakers' autonomy in favor of "[the people's] collective right to have the [broadcast] medium function consistently with the ends and purposes of the First Amendment."[175] In contrast, the *Miami Herald* Court elevated the interest in press autonomy over the state's asserted interest in promoting the public's access to diverse viewpoints.[176]

Current First Amendment doctrine has moved decisively toward the individualist justification for expressive freedom. This tendency appears in the Court's renewed emphasis on matters of direct government censorship, as distinct from distribution of expressive opportunities,[177] but it emerges most strongly from the Court's approach to the major distributive issue it has lately considered: campaign-finance regulation. The Court's decision in *Citizens United v. FEC*,[178] which struck down federal restrictions on corporate spending in election campaigns, foregrounds collectivist political

169. 395 U.S. 367 (1969).

170. *Id.* at 395–96.

171. 418 U.S. 241 (1974).

172. *Id.* at 258.

173. *See Red Lion*, 395 U.S. at 390 (discussing the regulatory significance of broadcast spectrum scarcity). Most accounts of *Red Lion* overstate the importance of spectrum scarcity to the Court's analysis, overlooking the majority's emphasis on "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences." *Id.*

174. *Miami Herald*, 418 U.S. at 244 (discussing Florida's attempt to enforce its right-of-reply statute against a newspaper).

175. *Red Lion*, 395 U.S. at 390.

176. *See Miami Herald*, 418 U.S. at 256 ("[A] compulsion to publish that which '"reason" tells [newspapers] should not be published' is unconstitutional. A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated." (quoting Associated Press v. United States, 326 U.S. 1, 20 n.18 (1945))).

177. *See* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2742 (2011) (striking down a state ban on violent video games); United States v. Stevens, 130 S. Ct. 1577, 1592 (2010) (striking down a federal ban on certain depictions of violent animal cruelty).

178. 130 S. Ct. 876 (2010).

arguments for restricting government regulation of money in politics.[179] But given the uncertain informational and participatory effects of large corporate campaign expenditures, the Court's posture manifests a more straightforward concern for corporations' autonomous expressive interests.[180] The Court's individualist commitments drove its decision in *Davis v. FEC*,[181] which struck down a federal law that increased campaign contribution limits for candidates who ran against wealthy, self-financing opponents.[182] The decision to insulate self-funding candidates from any sort of restriction on their ability to convert personal wealth into political capital vindicates "the fundamental nature of the right to spend personal funds for campaign speech"[183] without regard to the collective democratic valences of the regulated and unregulated allocations of expressive power.

Prior to *Heller*, debate about the Second Amendment focused on the individual or collective nature of the right to keep and bear arms. *Heller* has settled that dispute and therefore invites inquiry into the collectivist or individualist purpose of the individual right. The parallel First Amendment debate has advanced on abstract, theoretical terms because the text and history of the First Amendment say nothing conclusive about the purpose of constitutional speech protection. The Second Amendment's preamble marks a critical difference from the First Amendment. The preamble, recovered from the *Heller* Court's neglect, reads as a statement of purpose. That statement allows Second Amendment analysis to track the First Amendment collectivist–individualist purpose debate but with far greater confidence about the outcome.

C. The Preamble as a Statement of Collectivist Purpose for the Individual Right to Keep and Bear Arms

The preamble indicates that the Second Amendment right to keep and bear arms serves an interest that the people share in common: "the security of a free state." The particular instrument through which the Second Amendment originally served that interest—"a well-regulated militia"—has lost its salience. Even so, the Constitution sets forth the right, and the preamble explains, in general terms, what interest the right is supposed to advance. In contrast to Justice Scalia's marginalization of the preamble in

179. *See id.* at 898, 904–05 (offering political process rationales for protecting corporations' right to spend money in election campaigns).

180. *See id.* at 907 (lamenting that "[t]he Government has 'muffle[d] the voices that best represent the most significant segments of the economy'" (quoting McConnell v. FEC, 540 U.S. 93, 257–58 (2003) (opinion of Scalia, J.))).

181. 554 U.S. 724 (2008).

182. *Id.* at 728–29, 744–45.

183. *Id.* at 738.

Heller,[184] we can give it effect by treating it as setting forth a collectivist purpose for the individual right to keep and bear arms.[185] Under this approach, the Second Amendment could only bar or constrain gun regulations that impeded a collective interest in maintaining "the security of a free state." Reading the preamble as a statement of purpose rescues it from the vacuum to which *Heller* consigned it, gives some credit to the interpretive emphasis that decades' worth of pre-*Heller* jurists and commentators placed on the preamble, accommodates the *Heller* Court's holding that the Second Amendment protects an individual right, and offers a strong basis for determining the scope and contours of the right to keep and bear arms.

Justice Scalia in *Heller* argues, in effect, that the contemporary irrelevance of the Framers' conception of the militia should lead us to dismiss the preamble and thus allow the Second Amendment right to float freely.[186] Once a well-regulated militia is no longer necessary to the security of a free state, the preamble has lost its predicate—its reason for significance—and we can, indeed must, ignore it going forward.[187] Ironically, this argument closely resembles the contentions of some Second Amendment skeptics that the present-day irrelevance of the eighteenth-century conception of the militia should foreclose courts from giving any effect to the Second Amendment.[188] Justice Scalia diverges from those skeptics by construing the "well regulated militia" language as the predicate

184. *See supra* notes 129–35 and accompanying text (noting Justice Scalia's view that the Second Amendment's preamble only provides a clarifying function for the Amendment's operative clause, which he views as protecting an individual right).

185. *See* Konig, *supra* note 125, at 156 (describing the conventional role of preambles in the Founding era as providing "a positive guide for understanding the purpose of the text of the statute in relation to other enactments"); Konig, *supra* note 117, at 1326–30 (elaborating on the purposive significance of eighteenth-century preambles).

186. District of Columbia v. Heller, 554 U.S. 570, 627–28 (2008) ("But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.").

187. *See supra* notes 136–40 and accompanying text (describing Justice Scalia's argument that the Framers of the Second Amendment meant to protect an individual right to self-defense, not merely to maintain a well-regulated militia).

188. *See* Dorf, *supra* note 32, at 338–44 (suggesting that the Second Amendment has grown obsolete and considering limiting constructions that might give it force); Uviller & Merkel, *supra* note 125, at 428–29 (arguing that the obsolescence of the militia renders the Second Amendment dormant, along the lines of the Third Amendment); Williams, *supra* note 125, at 596 (contending that the absence, historically and at present, of a universal militia indicates "that the Amendment, as worded, is meaningless"); *see also* Amar, *supra* note 123, at 1172 ("If the [Second] Amendment is not about the critical difference between the vaunted 'well regulated Militia' of 'the people' and the despised standing army, it is about nothing."). Randy Barnett and Don Kates try to refute the obsolescence argument with, of all things, a poorly constructed analogy to the First Amendment. *See* Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139, 1227 (1996) (positing the disappearance of the nineteenth-century militia and the increased cost of establishing a daily newspaper as comparable factors for assessing the present content of constitutional rights).

only for the preamble, not for the Second Amendment as a whole.[189] That parsing of the Amendment seems dubious. The irrelevance of the militia concept still leaves the "security of a free state" language in place, directly before the words "the right of the people to keep and bear arms." The Framers posited a relationship among three concepts: the militia, the security of a free state, and the (individual, per *Heller*) right to keep and bear arms. The militia's passage into irrelevance does not negate or obscure the relationship between the two remaining concepts. The Second Amendment still grounds the right to keep and bear arms in our common interest in preserving the security of a free state. The preamble tells us that the right to keep and bear arms serves collectivist rather than individualist ends.

This collectivist reading immediately casts doubt on the Court's conclusion in *Heller* and *McDonald* that the Second Amendment primarily serves to protect individual self-defense, a conclusion that elevates individual autonomy over the collective interest associated with the preamble.[190] The interest in possessing and using arms for hunting, which the *Heller* Court posited as another popular underpinning of the Second Amendment right, fares similarly poorly if we understand the Second Amendment to serve a collectivist purpose. The interest in gun collecting, the interest in target shooting, the interest in self-actualization through firepower—all of these have weight as matters of social reality and public policy, but none of them has much, if anything, to do with maintaining "the security of a free state." I am not proposing an anachronistic limitation of the Second Amendment to uses of arms that literally serve the interest in maintaining a public militia,[191] nor am I licensing a purposive reading broad enough to transform the Amendment into a free-standing civic republican charter.[192] I only suggest that the Amendment's textually articulated purpose should frame our legal understanding of the individual right to keep and bear arms.

The purposive significance of the preamble means that Second Amendment jurisprudence must differ in a crucial way from First Amendment jurisprudence. The Framers' failure to explain conclusively why the First Amendment protects expressive freedom has enabled the Court to develop an eclectic jurisprudence of free speech. The Court may extol political debate as the core object of constitutional speech protection, but

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189. *See supra* notes 130–36 and accompanying text; *Heller*, 554 U.S. at 578 (declaring that the preamble does not limit or expand the scope of the Second Amendment's operative clause).

190. The *Heller* Court's argument that the African–American experience following the Civil War substantially altered the Second Amendment's original meaning, see *supra* note 139 and accompanying text, does nothing to alleviate the doubt. The systematic, largely government-sanctioned repression of African Americans resembled government tyranny far more than it resembled the street crime that animates the present-day rhetoric of individual self-defense.

191. *See* O'Shea, *supra* note 19, at 355–57 (formulating and discussing a purposive interpretation of the Second Amendment focused on the maintenance of an actual militia).

192. *See* Williams, *supra* note 125, at 602–14 (suggesting that courts might construe the Second Amendment to embody various civic republican alternatives to the eighteenth-century conception of the militia, such as universal public service).

nothing in the First Amendment's text forecloses full protection for scientific, artistic, or sexually explicit speech that lacks political content, and the Court has protected a wide range of nonpolitical expression.[193] In contrast, the Second Amendment's preamble forecloses justifying the individual right to keep and bear arms in individualist terms. The "security of a free state" language narrows the purpose of the Second Amendment in a collectivist direction that First Amendment jurisprudence need not, and does not, replicate. Thus, I reject the argument that, just as the First Amendment's core political purpose does not foreclose protection for commercial speech, the Second Amendment's core republican purpose does not foreclose protection for armed individual self-defense.[194]

Perhaps facilitating individual self-defense also advances collective security. Professor Massey, for example, has argued that the two goals "reinforce one another by emphasizing the common theme of defense: of self, of other individuals, and of the community as a whole."[195] But an argument for the collectivist value of individual self-defense must do more than simply deny any conceptual difference between individual and collective interests. Knowledge that everyone has the right to armed self-defense might foster a sense of collective safety and security, and our efforts to protect ourselves might also serve to protect our neighbors and our communities. On the other hand, individual self-defense initiatives might undermine collective security by increasing fears about armed confrontations or by prompting criminals to increase their firepower. Nothing in the Second Amendment's text or history requires us to accept broad and uncertain conjectures about the nature and consequences of individual gun ownership for collective interests. Commentators have advanced a substantial argument that, in 1789, people thought of individual self-defense as part and parcel of the militia's collective function.[196] But that linkage becomes unsustainable in

193. *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 758–70 (1976) (justifying First Amendment protection for commercial speech).

194. *See* Amar, *supra* note 104, at 905–07 (suggesting that the republican purposes of both the First and Second Amendments can support individualist extensions); Barnett & Kates, *supra* note 188, at 1224–25 (arguing, by analogy to the First Amendment, that accepting a "social benefit" explanation for the Second Amendment's enactment would not foreclose extending the Amendment's effective scope to protect individual rights).

195. Massey, *supra* note 106, at 1106; *see also* Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 267–68 (1983) (identifying insurrectionism and individual self-defense as complementary Second Amendment values); Lund, *supra* note 49, at 117–21 (arguing for a conceptual linkage between individual self-defense and collective political security); O'Shea, *supra* note 19, at 351 (arguing that bearing arms for individual self-defense may benefit the community by deterring crime).

196. *See* Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENT. 87, 103 (1992) (arguing that the natural law tradition conflated the values of individual and collective self-defense); Lund, *supra* note 19, at 59 ("[T]he people who gave us the Second Amendment drew no fundamental distinction between an individual's right to defend himself against a robber or a marauding Indian and that same individual's right to band together with others in a state-regulated militia." (footnote omitted)); Massey, *supra* note 106, at 1106 (offering historical evidence that "to the founding generation the right and obligation to defend

the absence of the eighteenth-century militia. More broadly, as Robin West has argued, constitutionalizing an individual right of self-defense undercuts any conception of an interdependent society that assigns the state to protect public safety.[197]

How can the Second Amendment's individual right to keep and bear arms, absent the eighteenth-century militia, advance our collective interest in maintaining "the security of a free state"? One possibility, relevant in the Founding era, is that private possession of guns enables the people to repel foreign invaders. But, aside from the fact that the idea of a foreign invasion (as distinct from a foreign attack) has grown obsolete, we have standing military forces to confront foreign enemies now. A second possibility is that private possession of guns enables the people to enforce the law. But, even if vigilante justice ever advanced law and order, we have police forces to fight crime now. In contrast, a third possibility continues to resonate in discussions of the Second Amendment. As the *Heller* Court acknowledged, advocates for an individual right to keep and bear arms long have argued that the Second Amendment advances collective security by enabling the people to discourage federal tyranny and, if necessary, depose tyrannical rule by armed insurrection. This insurrectionist justification embodies a collectivist purpose for the Second Amendment's individual right to keep and bear arms, fulfilling the interpretive mandate that I have derived from First Amendment theory. As the final part of this Article explains, however, First Amendment law poses a different, decisive problem for Second Amendment insurrectionism.

III. The Constitutional Triumph of First Amendment Dynamism Over Second Amendment Insurrectionism

At its best, our liberal democracy maintains a powerful commitment to political dynamism, resisting the entrenchment of political power and celebrating the constant possibility of significant political change. Political dynamism advances collective interests in several ways. It fosters novel solutions to difficult problems. It promises a meaningful political stake to groups and individuals who presently lack political influence. It resists the tendency of established power and familiar ideas to perpetuate themselves. The view that the Second Amendment enables the people to threaten and ultimately mount a violent insurrection against a tyrannical federal government derives normative appeal from the idea that insurrection might embody political dynamism in extreme conditions. But constitutional law has developed a different vehicle for political dynamism: the First

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oneself was indistinguishable from the right and obligation to defend the community" (footnote omitted)).

197. *See* West, *supra* note 8, at 728–32 (contending that recognizing a Second Amendment right to use a gun in self-defense, even when retreat is possible, exemplifies a contemporary conception of rights as replacing the foregone functions of a failed state).

Amendment's protections for open, robust political debate, notably including advocacy of violent revolution. In this final Part, I contend that the development of expressive freedom under the First Amendment represents not just an alternative but a rebuke to Second Amendment insurrectionism. The First Amendment insights discussed in Part II, by helping to show how the Second Amendment's preamble directs a collectivist purpose for the right to keep and bear arms, push Second Amendment law toward insurrectionism. Now I explain how the First Amendment's substantive importance for fostering political dynamism renders Second Amendment insurrectionism both unnecessary and dangerous to our liberal democracy.

A. The Insurrectionist Justification for the Individual Right to Keep and Bear Arms

Historians and legal scholars substantially agree that the Second Amendment advanced a civic republican commitment to empowering the militia as a check against the danger of a tyrannical federal government.[198] Those whom I call Second Amendment insurrectionists believe that the original impetus for the Second Amendment still justifies an individual right to keep and bear arms. Future-President Ronald Reagan, writing in an emphatic present tense in 1975, summarized the position: "The second amendment gives the individual citizen a means of protection against the despotism of the state."[199] Second Amendment insurrectionism has long animated many arguments for an individual Second Amendment right to keep and bear arms. Indeed, Jack Rakove posits insurrectionism as "the key *functional* argument on which the individual right interpretation also depends."[200] The collective right theory, by maintaining that the Second Amendment provided merely for state governments to organize and deploy a militia, subordinates the Second Amendment right to state authority. Opposition to that theory shades easily into the view that the Second Amendment not only transcends government organization but provides a basis for correcting abuses of government power.

Second Amendment insurrectionists frame their argument in collectivist terms. They view insurrection against a tyrannical government as a mechanism for preserving law and order.[201] The right to insurrection belongs

198. *See supra* note 125 and accompanying text (contending that the most persuasive historical explanation for the Second Amendment comes from the civic republican notion of rights as a means to effectuate collective duties).

199. Ronald Reagan, *Ronald Reagan Champions Gun Ownership*, GUNS & AMMO, Sept. 1975, at 34.

200. Rakove, *supra* note 34, at 108 (emphasis in original).

201. *See* Robert Weisberg, *Values, Violence, and the Second Amendment: American Character, Constitutionalism, and Crime*, 39 HOUS. L. REV. 1, 25–26 (2002) (identifying vigilantes and domestic terrorists with a strain of legalistic thinking focused on civic order). For a thorough account of insurrectionist reasoning, as manifested in the contemporary militia movement, see

to all individuals who choose to arm themselves.[202] Second Amendment insurrectionists remain "quite vague about the actual mechanics of any projected revolution; they simply assert that when the time comes, the People will act."[203] Although some insurrectionists acknowledge that arming the people sufficiently to wage war against the modern federal government would be difficult and perhaps even unwise, they maintain that the Second Amendment, at a minimum, enables people to arm themselves heavily enough to make the cost of tyranny unacceptably high for the government.[204]

Second Amendment insurrectionists present their account as consistent with the Amendment's text,[205] but they place primary reliance on historical sources.[206] That reliance begins with Founding-era figures, such as Tench Coxe, Pennsylvania delegate to the Continental Congress. Coxe stated:

> As civil rulers, not having their duty to the people, duly before them, may attempt to tyrannize, and as the military forces which shall be occasionally raised to defend our country, might pervert their power to the injury of their fellow-citizens, the people are confirmed by the [Second Amendment] in their right to keep and bear their private arms.[207]

Perhaps the favorite Founding-era source for the insurrectionist position is James Madison's argument in Federalist 46 about the importance and utility of an armed populace for resisting the tyranny of a standing army. Against that threat Madison posited

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David C. Williams, *The Militia Movement and Second Amendment Revolution: Conjuring With the People*, 81 CORNELL L. REV. 879, 924–46 (1996).

202. *See* Williams, *supra* note 201, at 896–97 (contrasting this contemporary individual right account of insurrectionism with the eighteenth-century conception of a right of revolution, which required a virtuous militia of the entire people).

203. *Id.* at 917–18.

204. *See* Kates, *supra* note 195, at 270–71 (arguing for the deterrent value of enabling popular insurrection against tyrannical rule); Lund, *supra* note 49, at 114–15 (same); *see also* Powe, *supra* note 16, at 1383–84 (suggesting that Second Amendment doctrine might allow armed deterrence of, but not necessarily armed resistance to, government tyranny).

205. *See, e.g.*, Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 466–67 (1995) (arguing, in the course of advocating the insurrectionist justification, that the text of the Second Amendment supports an individual right to keep and bear arms).

206. Excellent reasons exist to question the relationship of present-day insurrectionist theory to the historical texts on which insurrectionists place such heavy reliance. As David Konig points out: "If the bearing of arms was so vital that it required constitutional protection, that right was seen as inextricably linked to the collective responsibility of militia service." Konig, *supra* note 125, at 143; *see also* Rakove, *supra* note 34, at 129 (arguing that the records of the Constitutional Convention do not support "the contention that the militia would henceforth exist as a spontaneous manifestation of the community at large"). I mean only to document contemporary Second Amendment insurrectionists' use of history, not to validate it.

207. Stephen P. Halbrook & David B. Kopel, *Tench Coxe and the Right to Keep and Bear Arms, 1787–1823*, 7 WM. & MARY BILL RTS. J. 347, 367 (1999) (quoting "A Pennsylvanian" (Tench Coxe), *Remarks on the First Part of the Amendments to the Federal Constitution*, FED. GAZETTE (Phila.), June 18, 1789, *reprinted in* THE ORIGIN OF THE SECOND AMENDMENT: A DOCUMENTARY HISTORY OF THE BILL OF RIGHTS IN COMMENTARIES ON LIBERTY, FREE GOVERNMENT, AND AN ARMED POPULACE, 1787–1792, at 670–72 (David E. Young ed., 1995)).

> a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence. It may well be doubted whether a militia thus circumstanced could ever be conquered by [twenty-five or thirty thousand] regular troops.[208]

Insurrectionist theorists also cite antebellum legal thinkers, primarily St. George Tucker and Joseph Story. Tucker called the Second Amendment "the true palladium of liberty" because of its value for resisting tyranny.[209] Justice Story considered the Second Amendment a check on the strong federal government that he advocated. Echoing Tucker, he wrote:

> The right of the citizens to keep and bear arms has justly been considered as the palladium of the liberties of a republic; since 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.[210]

Second Amendment insurrectionists view these and similar statements as establishing that the individual right to keep and bear arms serves primarily to deter, and potentially depose, a tyrannical federal government.

Second Amendment insurrectionism retains substantial support within the conservative–libertarian core of gun rights advocacy.[211] Judge Alex Kozinski, for example, writes:

> The Second Amendment is a doomsday provision, one designed for those exceptionally rare circumstances where all other rights have failed—where the government refuses to stand for reelection and silences those who protest; where courts have lost the courage to

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208. THE FEDERALIST NO. 46, at 296 (James Madison) (Clinton Rossiter ed., Signet Classic 2003) (1961); *see also* Williams, *supra* note 201, at 895–96 (describing insurrectionists' more general reliance on the revolutionary rhetoric of Thomas Jefferson and Patrick Henry).

209. David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1377 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES app. at 300 (St. George Tucker ed., Lawbook Exchange, Ltd. 1996) (1803)); *see also id.* at 1373–81 (discussing Tucker's interpretation of the Second Amendment).

210. *Id.* at 1390 (footnote omitted) (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 746 (Fred B. Rothman & Co. 1991) (1833)).

211. *See* Chrisman, *supra* note 47, at 306 (calling the Second Amendment "an auxiliary, negative right that is designed to ensure the power of the American people to protect and, if necessary, restore their rights from an overbearing Government"); Stephen P. Halbrook, *The Right of the People or the Power of the State: Bearing Arms, Arming Militias, and the Second Amendment*, 26 VAL. U. L. REV. 131, 205 (1991) (identifying insurrectionist rhetoric with "[t]he philosophy behind the Second Amendment"); Kates, *supra* note 195, at 270–71 (arguing for the contemporary validity of insurrectionist reasoning); Lund, *supra* note 49, at 111–16 (characterizing the Second Amendment as a protection for political freedom against government tyranny). For other scholarly advocacy of Second Amendment insurrectionism, see Scarry, *supra* note 19, at 1301–09 (conceptualizing the Second Amendment as a distributional principle of political authority); Van Alstyne, *supra* note 11, at 1249 (positing the Second Amendment as rejecting "a vision of the security state" in favor of an armed populace as a "source[] of security within a free state").

> oppose, or can find no one to enforce their decrees. However improbable these contingencies may seem today, facing them unprepared is a mistake a free people get to make only once.[212]

Since the 1980s, Second Amendment insurrectionism has also gained sympathy from prominent liberal legal academics. Professor Levinson, in his first pass at the Second Amendment, linked insurrectionism with First Amendment values when he suggested that "the ultimate 'checking value' in a republican polity is the ability of an armed populace . . . to resist governmental tyranny."[213] He later showed more decisive support for Second Amendment insurrectionism, characterizing an individual right to keep and bear arms as "protection[] for dissenters."[214] Akhil Amar has argued that the Second Amendment's reference to "the people" served to "conjur[e] up the Constitution's bedrock principle of popular sovereignty and its concomitant popular right to alter or abolish the national government" and that its reference to a "free State" reflects a "structural concern with democratic self-government,"[215] although he also argues that the Reconstruction Amendments shifted the Amendment's focus from insurrection to individual self-defense.[216]

On the judicial front, *Heller* hedges insurrectionist bets. As discussed above, the *Heller* Court submerged the insurrectionist justification when it elevated individual self-defense to the pinnacle of Second Amendment concern.[217] At the same time, the Court indulged insurrectionism when it posited the capacity of a "citizens' militia" to combat government tyranny as a key reason for rejecting the collective rights view of the Second Amendment.[218]

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212. Silveira v. Lockyer, 328 F.3d 567, 570 (9th Cir. 2003) (Kozinski, J., dissenting).

213. Levinson, *supra* note 15, at 648.

214. Eugene Volokh et al., *The Second Amendment as Teaching Tool in Constitutional Law Classes*, 48 J. LEGAL EDUC. 591, 602 (1998) (section written by Levinson).

215. Amar, *supra* note 123, at 1163; *see also* AKHIL REED AMAR & ALAN HIRSCH, FOR THE PEOPLE: WHAT THE CONSTITUTION REALLY SAYS ABOUT YOUR RIGHTS 171 (1998) ("The Framers recognized that self-government requires the People's access to bullets as well as ballots. The armed citizenry (militia) was expected to protect against not only foreign enemies, but also a potentially tyrannical federal government.").

216. *See* Amar, *supra* note 104, at 911 ("The Reconstruction generation embraced private gun ownership because local police officials in the South could not be trusted to protect blacks.").

217. *See supra* notes 136–39 and accompanying text (discussing the *Heller* Court's elevation of the self-defense rationale for the Second Amendment over the militia justification in the Amendment's preamble).

218. *See supra* note 140 and accompanying text. David Williams, who calls the *Heller* Court's subversion of Second Amendment insurrectionism "noteworthy for its cowardice," nonetheless acknowledges that "*Heller* clearly does advance [the insurrectionist justification], again and again." Williams, *supra* note 143, at 642, 648.

B. How First Amendment Dynamism Forecloses Second Amendment Insurrectionism

Questions about how to deal with the danger of violent insurrection have played a crucial role in the development of First Amendment doctrine, particularly where that doctrine reflects what this Article has described as the collectivist political justification for constitutional expressive freedom.[219] Elsewhere I have written extensively about that course of development,[220] and I reprise the story only briefly here. Our nation's primal free speech quandary asks whether the First Amendment protects political dissidents who advocate forcible overthrow of the government. The Supreme Court's eventual decision to extend First Amendment protection to advocacy of violent revolution embodies a commitment to expressive freedom as a source of political dynamism. That commitment carries substantial reasons for not extending Second Amendment protection to acts of insurrection.[221]

The Court considered the problem of violent advocacy for fifty years before finally granting such speech First Amendment protection. Justice Holmes initially led the Court in allowing the government to punish advocacy of lawbreaking that created a "clear and present danger" of unlawful conduct.[222] The clear and present danger test elided any distinction between advocacy and action, a problem Justice Holmes quickly recognized. He and Justice Brandeis, in a series of dissents and concurrences, insisted that a meaningful system of expressive freedom must extend even to advocacy of violent revolution.[223] They emphasized the critical difference

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219. *See supra* notes 155–68 and accompanying text (comparing collectivist and individualist theories of the First Amendment).

220. *See* Gregory P. Magarian, *Religious Argument, Free Speech Theory, and Democratic Dynamism*, 86 NOTRE DAME L. REV. 119, 150–57 (2011) (discussing the Supreme Court's line of subversive advocacy decisions).

221. Prior commentators have made only passing mention of the First Amendment's possible implications for Second Amendment insurrectionism. *See* Amar, *supra* note 104, at 896 ("[B]ecause ballots and the First Amendment have generally worked to prevent full-blown federal tyranny, bullets and the Second Amendment need not bear as much weight today as some pessimists anticipated two centuries ago."); Carl T. Bogus, Heller *and Insurrectionism*, 59 SYRACUSE L. REV. 253, 255 (2008) (listing the First Amendment among constitutional protections against tyranny that obviate Second Amendment insurrectionism); Dorf, *supra* note 32, at 322, 331 (using the speech–action distinction to criticize Second Amendment insurrectionism and asserting the importance of the First Amendment for ensuring government accountability); Eisgruber, *supra* note 119, at 152 (arguing that democratic norms require resort to deliberation and voting, rather than violence, to settle political disputes); Miller, *supra* note 71, at 1317–18 (arguing that Second Amendment insurrectionism clashes, as a matter of originalist interpretation, with the First Amendment right to peaceable assembly); *see also* West, *supra* note 8, at 745 (advocating a reinvigoration of the political community as an alternative to the *Heller* conception of privatized self-defense).

222. Schenck v. United States, 249 U.S. 47, 52 (1919).

223. *See, e.g.*, Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) ("[E]ven advocacy of violation [of laws], however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on."); Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) ("If in the long run the beliefs expressed in proletarian dictatorship

between words and acts of insurrection. In Justice Brandeis's bold summation: "Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty."[224] He insisted that only direct incitements to violence against the state—speech that permitted no opportunity for contemplation or debate—should be subject to legal constraint.[225] The Court, however, would take several decades to catch up with Holmes and Brandeis. In *Dennis v. United States*,[226] decided at the height of the post-World War II Red Scare, the Court upheld convictions of U.S. Communist Party leaders for advocating forcible overthrow of the government.[227] The prevailing opinions in *Dennis* expressed palpable fear about the danger that communist advocacy might actually bring about violent revolution.[228] Only in *Brandenburg v. Ohio*,[229] almost two decades later, did the Court make clear that the First Amendment protected advocacy of violent action, allowing the government to restrict only incitements likely to spark imminent violence.[230] With the *Brandenburg* Court's resolution of First Amendment law's formative question, protection for advocacy of violence became a foundation of our constitutional commitment to free speech.

The development of the First Amendment as a source of political dynamism supports two distinct analyses, both of which create deep problems for Second Amendment insurrectionism. From one perspective, the story of the Court's progress from *Schenck* to *Brandenburg* forms a heroic narrative. *Dennis* crystallized a deep conundrum for liberal democracy: Does our liberal commitment to open debate require the state to stand by while the people consider destroying their civil and political rights, including the right to free speech? The Court in *Brandenburg* embraced the conclusion that Holmes and Brandeis had urged decades before: Only a society that opens itself to advocacy of its own destruction deserves to be called a liberal democracy. Our constitutional culture has grown comfortable with, and justifiably proud of, that conclusion. At the same time, the doctrinal narrative forms a cautionary tale. When the stakes of speech protection appeared highest—when people as smart and thoughtful as the majority Justices in *Dennis* sincerely feared communist revolution—the

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are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.").

224. *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring).

225. *See id.* (Brandeis, J., concurring) (setting forth and urging a highly speech-protective standard of review for speech that advocates violence).

226. 341 U.S. 494 (1951).

227. *Id.* at 516–17.

228. *See, e.g.*, *id.* at 510–11 (plurality opinion) (stressing "[t]he formation by [the Communist Party] of such a highly organized conspiracy, with rigidly disciplined members . . . coupled with the inflammable nature of world conditions [and] similar uprisings in other countries").

229. 395 U.S. 444 (1969) (per curiam).

230. *See id.* at 447 (adopting a highly speech-protective standard of review for speech that advocates violence).

Court cast expressive freedom aside. Although the *Brandenburg* Court announced a brave doctrine, the Justices there had no need to find the sort of courage the *Dennis* Court would have needed in 1951 to overturn the convictions of Communist Party leaders. In 2012, when our society stands a suitcase bomb away from existential terror, when we once again face a mystifying foreign threat, we need to ask just how much weight our commitment to *Brandenburg* can bear.[231]

The heroic narrative of First Amendment dynamism provides one reason to reject Second Amendment insurrectionism: Debate enables meaningful democratic political change, while threatened or actual insurrection does not.[232] Justices Holmes and Brandeis made their case for absolute freedom of political debate in terms that resonate with the rhetoric of Second Amendment insurrectionism. Free speech advocates understand the importance of facilitating political change and making government uncomfortable. They encourage broad-based participation in political self-determination. They refuse to fear uncertainty and even chaos. But advocacy of insurrection and acts of insurrection involve very different processes. Advocacy requires communication and persuasion. Pursuit of political change through advocacy gives the government, and whatever individuals and groups that support the government, the same opportunities as would-be revolutionaries to speak and persuade, to listen and adjust. Political advocacy, through testing and interaction, can generate ideas that no individual or community would have developed alone. In contrast, under common insurrectionist logic, any agitated individual or aggrieved group may decide what types and number of arms to stockpile in order to deter tyranny and, ultimately, when to resort to violence.[233]

The cautionary tale of First Amendment dynamism provides a different reason to reject Second Amendment insurrectionism: If the Constitution provides a path to actual insurrection, then the political majority has a

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231. *See* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2724–30 (2010) (holding that a ban on speech that confers "material support" on designated foreign terrorist organizations does not violate the First Amendment). For a discussion of this concern, see Magarian, *supra* note 220, at 150–59.

232. This reason tracks the normative difference between the Court's allowance for broad exceptions to Second Amendment protection and its more rigid protection for First Amendment rights. *See supra* notes 26–30 and accompanying text.

233. This point has rightly attracted widespread notice. *See* Bogus, *supra* note 221, at 254–57 (discussing the founding generation's justified anxiety about mob violence); Dorf, *supra* note 32, at 320 (noting that "placing a right to rebel against tyranny in the hands of individuals risks violence by every would-be Spartacus"); Farber, *supra* note 119, at 186 (portraying Second Amendment insurrectionism as "a counter-majoritarian debacle"); Konig, *supra* note 117, at 1335–37 (discussing the Framers' mistrust of an untrammeled popular right to revolution); Massey, *supra* note 106, at 1105–06 (contending that Second Amendment insurrectionism untenably confers on individuals an unconstrained right to revolution); Weisberg, *supra* note 201, at 26 (associating Second Amendment insurrectionism with "perverse rationalization by malevolent killers"); Williams, *supra* note 125, at 590–92 (criticizing the contemporary insurrectionist view as licensing illegitimate rebellion by a subgroup of the people).

powerful reason to fear advocacy of insurrection. If, as a matter of both constitutional law and the social norms that constitutional law fosters, we encouraged people to arm themselves in the event the government might become tyrannical, then advocacy of insurrection would define not the end point of constitutionally grounded resistance to state power but merely an initial step toward the farther end point of violent action. Our First Amendment tradition recognizes that speech can be dangerous, and accepting that danger serves our liberal democratic convictions. But no civil libertarian believes that the Constitution requires the state to accept the active consequences of dangerous speech. Second Amendment insurrectionism indulges a combustible ambiguity on this point. On the one hand, no one argues that the Second Amendment forecloses the state from resisting armed insurrection. On the other hand, Second Amendment insurrectionism depends on the premise that the government may become so tyrannical as to lose its legitimacy and justify insurrection. At that juncture, the insurrectionists, and not the state, are advancing the constitutional design, and constitutionally protected speech has animated constitutionally sanctioned violence.[234] Faced with that prospect, the Court might choose to suppress advocacy of violence in order to discourage acts of violence, disinterring Justice Holmes's original, speech-restrictive notion of "clear and present danger."

Some gun rights advocates argue that a constitutional allowance for armed insurrection can coexist with, and even complement, expressive freedom in promoting dynamic political change. Professor Levinson, for example, maintains that the First and Second Amendments "should be read together" as safeguarding political dissent.[235] The problem with this view is that insurrection short-circuits political debate in order to impose on the polity the insurrectionists' justification for violence. Even keeping arms to enable insurrection would undermine debate by fostering a climate of mistrust and fear.[236] Professor Volokh belittles the suggestion that widespread gun possession casts any shadow over political discourse, citing the long experience of political vitality in states that have placed few

234. *See* Dorf, *supra* note 32, at 322 ("It would be a bizarre doctrine indeed that permitted one either to teach the (abstract) necessity of overthrowing the government *or* to stockpile weapons, but not to engage in both otherwise protected activities.").

235. Volokh et al., *supra* note 214, at 602; *see also* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 49 (1998) (suggesting that a democracy-focused contemporary interpretation of the Second Amendment might include communications technologies within the term "arms").

236. *See* Williams, *supra* note 201, at 951 (describing the tension between the modes of insurrectionism and ordinary politics); *see also* Winkler, *supra* note 12, at 704 ("[I]f everyone had access to howitzers and machine guns, representative democracy would likely be harder . . . to achieve.").

restrictions on carrying guns.[237] His argument, whatever its real or imagined merits in a pre-*Heller* world, runs into trouble in a post-*Heller* world. Before *Heller*, local political cultures and gun cultures could develop organically, consistent with local practices and preferences. *Heller* changes the environment by introducing a nationwide, constitutionally mandatory regime of gun rights. Second Amendment insurrectionism compounds the problem. Volokh describes and contemplates, in the primary terms of *Heller*, a world where people get and keep guns for individual self-defense.[238] But if we understand the Second Amendment in insurrectionist terms, then insurrectionism will permeate our gun culture. Many people whose stockpiles the government would prefer to regulate will keep and have guns not to defend against crime but to deter tyranny and enable insurrection. In that scenario, even if actual insurrection never breaks out, gun proliferation will present a far greater danger of distorting and discouraging political debate.

The divergence of the First and Second Amendments' developmental paths underscores the difficulty of nurturing public debate while also enabling violent insurrection. For the two centuries before the *Heller* Court's awkward conflation of insurrectionist history with contemporary self-defense rhetoric, we allowed the Second Amendment ideal of constitutionally sanctioned insurrection to rot on the vine.[239] That long period of dormancy severely complicates efforts to make insurrectionism, at this late date, a basis for Second Amendment law. The gulf between the sort of weapons commonly held by private citizens and the sort of weapons necessary to threaten government power, nonexistent in 1789, has grown continually wider since then.[240] Even as the federal military and law enforcement apparatus has grown ever more formidable, federal law has barred private ownership of military-grade arms, a prohibition the *Heller* Court took pains to validate.[241] Meanwhile, the First Amendment spent the latter half of the Second Amendment's dormancy growing with, and shaping, our political and legal norms. The First Amendment's protections for expressive freedom,

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237. *See* Volokh, *supra* note 76, at 102–03 (positing that New Hampshire, Vermont, and Washington, which have long imposed few restrictions on carrying guns, enjoy the same level of robust political discourse as more restrictive states like Hawaii, Maryland, and New York).

238. *See id.* at 98 ("Guns do serve the self-defense value that the Court has found to be embodied in the Second Amendment.").

239. *See* Lund, *supra* note 49, at 104 (lamenting the Supreme Court's deep engagement with First Amendment questions while it ignored the Second Amendment); Lund, *supra* note 19, at 49–50 (describing and criticizing the Supreme Court's refusal for decades to take up the question of Second Amendment incorporation).

240. *See supra* notes 31–34 and accompanying text (noting the technological gulf between eighteenth-century and modern weapons); *see also* Williams, *supra* note 143, at 662–66 (discussing the effects of evolving weapons technology on the legal and practical premises of Second Amendment insurrectionism).

241. *See* District of Columbia v. Heller, 554 U.S. 570, 627 (2008) (discussing with approval "the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons'").

including freedom to advocate violent revolution, have fostered a legal and political culture that the Founding era's advocates of Second Amendment insurrectionism would scarcely recognize. We long ago left the logic of insurrectionism behind.

I do not mean to overstate the First Amendment's role in what has been, even if we set aside the implausibility of actual insurrection, a long and multifaceted discrediting of Second Amendment insurrectionism. Abiding constitutional values and deep historical experience cut against insurrectionism. The impetus for insurrectionism may have died even before the Second Amendment was born, with the original Constitution's establishment of electoral accountability and divided government as checks against tyranny.[242] If insurrectionism retained any persuasive force under the structural Constitution, that force may well have dissipated after our early national experience with local rebellions.[243] The recalibration of individual rights and the federal balance prompted by the Civil War and embodied in the Reconstruction Amendments also cut against the insurrectionist ideal.[244]

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242. *See* Bogus, *supra* note 221, at 255–56 (contending that constitutional provisions for divided government reflect the founding generation's remedy for the danger of tyranny); Konig, *supra* note 117, at 1337–40 (discussing the role of alternative constitutional guarantees of popular sovereignty in eroding Second Amendment insurrectionism during the early years of the Republic); Miller, *supra* note 71, at 1317–36 (advancing various arguments against Second Amendment insurrectionism based on history and constitutional structure); Rakove, *supra* note 34, at 165 (raising against the idea of Second Amendment insurrectionism "the impression that the strength of our constitutional culture lies elsewhere, in the commitment of our citizenry to principles of representative government, equality, and (increasingly) tolerance"); Uviller & Merkel, *supra* note 125, at 580–90 (contending that Madisonian constitutionalism fatally undermined the radical impulse behind Second Amendment insurrectionism); Williams, *supra* note 201, at 947–52 (emphasizing the vitality of ordinary politics as an alternative to Second Amendment insurrectionism); s*ee also* Dorf, *supra* note 32, at 331 (suggesting that "[a]s the democracy matures, the risk that a tyrant will seize the reins of government diminishes"); Steven J. Heyman, *Natural Rights and the Second Amendment*, 76 CHI.-KENT L. REV. 237, 281–82 (2000) (arguing, as a matter of natural rights theory, that the Second Amendment limits the right of revolution to the confines of an organized militia as part of the broader constitutional design).

243. *See* Bogus, *supra* note 221, at 254–55 (contending that the federal government's responses to Shays' Rebellion of 1786 and the Whisky Rebellion of 1794 demonstrate rejection of Second Amendment insurrectionism); Konig, *supra* note 125, at 148–49 (discussing Shays' Rebellion as an affront to the Revolution's republican principles and a departure from the founding generation's conception of a well-organized militia); Massey, *supra* note 106, at 1105 (calling the Whisky Rebellion a "clear repudiation" of Second Amendment insurrectionism). Historians have conceptualized suppression of rebellion, within the civic republican tradition, as a duty that ran parallel to opposing tyranny. *See* Cornell, *supra* note 100, at 572 ("The militia provided colonists with a means of protecting themselves from external threats and served as a means of preserving public order against the danger of insurrection."); Williams, *supra* note 125, at 582–83 (contending that both suppression of rebellion and opposition to tyranny embodied the militia's duty to pursue the common good).

244. *See* Dorf, *supra* note 32, at 321 (arguing that the Civil War undermined a state-focused notion of Second Amendment insurrectionism); Brent J. McIntosh, *The Revolutionary Second Amendment*, 51 ALA. L. REV. 673, 693–705 (2000) (contending that technological and conceptual shifts during and following the Civil War caused personal self-defense to eclipse insurrectionism as the dominant Second Amendment paradigm); *see also* Amar, *supra* note 104, at 907 (positing that

David Williams, who strongly supports the insurrectionist account of the Second Amendment's origins, makes a particularly compelling case that our society has simply grown too diverse to support the conception of a unitary people that civic republican tradition requires for a legitimate revolution.[245]

Even so, our ideas about constitutional protection for political speech have played a central role in substantiating our rejection of armed insurrection as a path to political change. We tend to think of the Constitution's structural checks and balances as negative constraints on political action rather than openings to political change. Our two-party political system serves the same sort of function, forcing advocates for novel or unpopular policies to join broad-based political coalitions at the electoral stage. These features of our constitutional democracy use stability to discourage tyranny. In contrast, First Amendment dynamism, like Second Amendment insurrectionism, uses instability to discourage tyranny.[246] Structural safeguards do not speak to the political restlessness that can animate insurrectionism. Indeed, institutions that enhance stability may encourage entrenchment of the political status quo, even as they constrain the government's power.[247] Freedom of political dissent and debate allows dissidents to challenge the status quo. Constitutional protection for political speech, including advocacy of violent revolution, impedes both the sort of tyranny that concerned the Framers and the sort of banal political inertia that may well present a more immediate and common threat to the vitality of our liberal democracy.[248] First Amendment dynamism, therefore, stands as a distinctly important antithesis to Second Amendment insurrectionism.

Conclusion

After *Heller* and *McDonald*, elaboration of Second Amendment doctrine has become an urgent task with high legal stakes. The temptation to use established First Amendment law as a template for emerging Second Amendment law exerts a strong pull, and courts certainly should confront

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the best arguments for a broad, libertarian reading of the Second Amendment "come not from the Founding but from Reconstruction").

245. *See* Williams, *supra* note 201, at 904–24 (contending that the contemporary United States cannot satisfy the preconditions for a right to revolution as embodied in the Second Amendment). Williams ascribes to the Second Amendment's republican progenitors a set of strict limits on the right of revolution they manifested in the amendment: "It must be a product of the 'body' of the people, i.e., the great majority acting by consensus; it must be a course of last resort; its inspiration must be a commitment to the common good; and its object must be a true tyrant, committed to large-scale abuse . . . ." Williams, *supra* note 125, at 582.

246. *See, e.g.*, THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 11–15 (1963) (discussing the role of free speech in preserving a balance between stability and change).

247. *See* Magarian, *supra* note 153, at 2010–43 (criticizing the Court's jurisprudence on regulation of political parties for advancing political stability at a steep cost in political dynamism).

248. *See* Magarian, *supra* note 220, at 173 (criticizing our political culture's excessive concern for stability and urging a greater commitment to political dynamism).

new challenges with the lessons of experience in mind. But courts must think carefully and critically about how the First Amendment does, and does not, illuminate the Second. The right to free speech differs in important descriptive, normative, and functional ways from the right to keep and bear arms. As a consequence, analogies to First Amendment doctrine offer very little help in formulating Second Amendment doctrine. Courts instead should assess what the two Amendments actually have in common. Both protect individual rights that might primarily serve either collectivist or individualist goals. Determining which sort of goal animates the First Amendment makes for hard interpretive going, but the Second Amendment's preamble provides a powerful textual basis for construing the right to keep and bear arms in collectivist terms. The Second Amendment has its roots in a collectivist purpose that many advocates for gun rights still emphasize: arming the people to deter government tyranny and enable violent insurrection. But here the First Amendment comes into play again. We have spent almost a century developing the First Amendment as a vehicle for dynamic political change. Countenancing a Second Amendment right to insurrection would both clash with that First Amendment protection and undermine it.

Sound consideration of the Second Amendment alongside the First leaves the individual right to keep and bear arms with questionable legal force. The Supreme Court's invocation of individual self-defense to justify the Second Amendment right wilts under the preamble's glare. If courts want to make something of the Second Amendment, they must identify a robust collectivist justification for the individual right to keep and bear arms, one that avoids the substantive failings of Second Amendment insurrectionism. Absent any such justification, a future Supreme Court may need to acknowledge that *Heller* charted a constitutional road to nowhere.