2013

How to Stop Worrying and Learn to Love the Second Amendment: A Reply to Professor Magarian

Glenn Reynolds
Brannon P. Denning

2013

How to Stop Worrying and Learn to Love the Second Amendment: A Reply to Professor Magarian

Glenn Harlan Reynolds

How to Stop Worrying and Learn to Love the Second Amendment: A Reply to Professor Magarian

Glenn Harlan Reynolds

&

Brannon P. Denning

Texas Law Review Vol. 91 (2013)

Texas Law Review
See Also
Volume 91

Response

How to Stop Worrying and Learn to Love the Second Amendment: A Reply to Professor Magarian

Glenn H. Reynolds* & Brannon P. Denning**

I. Introduction

Following Supreme Court decisions in *Heller*[1] and *McDonald*,[2] it is now clear that the Supreme Court has placed individual self-defense at the core of the right to keep and bear arms.[3] As courts and scholars argue over the best method to "implement"[4] this right by designing doctrinal rules to apply in a variety of factual settings,[5] many scholars have found it useful to borrow from the Court's First Amendment doctrine.[6] Several of these

* Beauchamp Brogan Distinguished Professor of Law, University of Tennessee College of Law.

** Professor, Cumberland School of Law, Samford University. The authors thank the editors of the Texas Law Review and Professor Magarian for the opportunity to comment on his piece.

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

2. McDonald v. Chicago, 130 S. Ct. 3020 (2010).

3. District of Columbia v. Heller, 554 U.S. 570, 635 (2008) (holding that the Second Amendment protects the right to keep and bear arms in the home for self-defense); McDonald v. Chicago, 130 S. Ct. 3020, 3050 (2010) (following *Heller*).

4. *See* RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 41–42 (2001) (arguing that the Court's role is to "implement" constitutional understanding through the creation and application of constitutional doctrine). On the creation of these doctrinal "decision rules" to implement "constitutional operative propositions," see generally Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004).

5. *See, e.g.*, 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 (2009).

6. *See, e.g.*, Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375 (2009); Darrell A.H. Miller, *Guns as Smut: Defending the Home-*

commentators have argued that the First and Second Amendments share a common liberty-protecting heritage, so that borrowing from the former to implement the latter naturally follows.[7] In a recent article, however, Professor Greg Magarian offers a critique of this doctrinal borrowing[8] and further argues that the First and Second Amendments are actually in tension if not in diametric opposition.[9]

In this brief reply, we will take issue with the second of Professor Magarian's critiques. We argue first that the strict dichotomy he posits between an individual right to keep and bear arms aimed at deterring (and furnishing the means for ultimately opposing) governmental tyranny and a right securing the means for private self-defense is a false one. Further, we argue that, to the extent there is any tension between the First and Second Amendments, *Heller* and *McDonald* eased that tension by locating individual self-defense at the core of the right. Such "modernization"[10] of the right is preferable to Magarian's (implicit) conclusion that the Second Amendment should have no (or little) judicially enforceable content at all.[11]

Part II briefly summarizes Professor Magarian's argument. In Part III, we then take issue with his conclusion that the only interpretation consistent with the Amendment's text and history is that it was intended "to prevent a tyrannical government from disarming the people as a way to forestall popular insurrection" and that any other reading elides the Amendment's "preamble."[12] In Part IV, we argue that *Heller* and *McDonald*'s placement of individual self-defense at the core of the right to keep and bear arms can be read as a product of judicial review's "modernizing mission"—to borrow (and expand somewhat) a theory offered by David Strauss.[13] The Court's efforts, we argue, dissolve any ostensible tension between the rights guaranteed by the First and Second Amendments and should ease Professor Magarian's anxieties about the suitability of an individual right to private arms ownership in a liberal democracy.

Bound Second Amendment, 109 COLUM. L. REV. 1278 (2009); Eugene Volokh, *The First and Second Amendments*, 109 COLUM. L. REV. SIDEBAR 97 (2009).

7. *See, e.g.*, L.A. Powe, Jr., *Guns, Words, and Constitutional Interpretation*, 38 WM. & MARY L. REV. 1311 (1997).

8. Gregory P. Magarian, *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second*, 91 TEXAS L. REV. 49, 53–72 (2012).

9. *See, e.g.*, *id.* at 98 ("First Amendment dynamism, therefore, stands as a distinctly important antithesis to Second Amendment insurrectionism.").

10. *See generally* David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859 (2009).

11. *See* Magarian, *supra* note 8, at 99 (arguing that unless "courts . . . identify a robust collectivist justification" for the right to keep and bear arms, "one that avoids the substantive failings of Second Amendment insurrectionism[,] . . . a future Supreme Court may need to acknowledge that *Heller* charted a constitutional road to nowhere").

12. *Id*. at 76.

13. Strauss, *supra* note 10.

II. Professor Magarian's Destabilization Thesis

Professor Magarian's article has three parts. First, he reviews and criticizes the scholars who have argued that the First and Second Amendments share a common concern—preservation of liberty and prevention of governmental oppression—and that implementation of the Second Amendment ought to naturally involve borrowing from the Court's free speech doctrine.[14] But while he dismisses attempts to transplant First Amendment decision rules into a Second Amendment context, he does think that the First Amendment can "generate other valuable, even decisive, tools for determining the shape and legal force of the Second Amendment right to keep and bear arms."[15]

In order to appreciate the proper relationship between the Amendments, however, Magarian argues that one has to understand the function of the Second Amendment, which, he argues, was obscured by *Heller* and *McDonald*'s emphasis on individual self-defense. The Court's focus, he contends, elides the preamble, which, for him, makes clear that prevention of governmental tyranny through a popular, well-regulated militia was the main—indeed the sole—purpose for the Amendment.[16] *Heller*'s insistence otherwise, he maintains, "undermines the right's importance for resisting tyranny."[17] Thus the Amendment, properly understood, embodies a "collectivist purpose"—popular resistance to tyranny—that the Court's decisions ignored.[18]

He concedes that First Amendment theorists too have argued whether the First Amendment is best regarded as embodying individualist or collectivist ends.[19] "Shifts in the Supreme Court's emphasis between collectivist and individualist justifications have made major differences in the development of First Amendment doctrine," citing as an example the debate over the Federal Communication Commission's now-defunct "fairness doctrine" and so-called "right of reply" laws.[20] Looking at recent Supreme Court cases, he observes that current doctrine "has moved decisively toward the individualist justification."[21] The unresolved tension between individualist and collectivist readings of the First Amendment, Professor Magarian argues, is what has contributed to the development of eclectic decision rules governing various free speech issues.

---

14. Magarian, *supra* note 8, at 53–72.
15. *Id*. at 72.
16. *Id*. at 76.
17. *Id*. at 78 (citation omitted).
18. *Id*. at 83–85.
19. *Id*. at 79–81.
20. *Id*. at 81–82.
21. *Id*. at 82.

But, he argues, no similar dialectic between individualist and collectivist interpretations is possible with the Second Amendment because, unlike the First, it contains a preamble that "reads as a statement of purpose" and "explains, in general terms, what interest the right is supposed to advance."[22] Under his reading, the preamble forecloses an individualist interpretation of the right to keep and bear arms, meaning that "the Second Amendment could only bar or constrain gun regulations that impeded a collective interest in maintaining 'the security of a free state.'"[23] Unlike the First Amendment, which lacks a limiting principle, the Second Amendment's preamble "forecloses justifying the individual right to keep and bear arms in individualist terms."[24]

The "insurrectionist theory" of the Second Amendment meanwhile sits uneasily beside a First Amendment that protects "open, robust political debate . . . including advocacy of violent revolution"[25] at least since the Supreme Court's decision in *Brandenburg v. Ohio*.[26] This commitment to the protection of speech advocating the violent overthrow of the government, he argues, "carries substantial reasons for not extending Second Amendment protection to acts of insurrection."[27] Having "long ago left the logic of insurrectionism behind,"[28] Professor Magarian worries that to re-embrace it via the Second Amendment would risk infusing our "gun culture" with insurrectionist thinking.[29] For the Constitution to provide some sanction for insurrection would in turn give "the political majority . . . a powerful reason to fear advocacy of insurrection."[30] As the majority feared insurrection becoming a reality, the majority might move against weapons-stockpiling "insurrectionists," which would, of course, validate their fears about overweening governmental power and the need for armed resistance, perhaps igniting a real conflict.

In the end, Magarian, like Churchill,[31] prefers jaw-jaw to war-war: "Debate enables meaningful democratic political change," he writes, "while threatened or actual insurrection does not."[32] Thus he views the First Amendment not as an analogue to the Second, but rather as its "antithesis."[33]

***

22. *Id*. at 83.
23. *Id*. at 84.
24. *Id*. at 85–86.
25. *Id*. at 88.
26. 395 U.S. 444 (1969) (per curiam).
27. Magarian, *supra* note 8, at 92.
28. *Id*. at 97.
29. *Id*. at 96.
30. *Id*. at 94–95.
31. RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS 359 (2010).
32. *Id*. *at* 94.
33. *Id*. at 98.

So what are the consequences of this antagonism between the allegedly "insurrectionist" Second Amendment and the tolerant-of-violent-advocacy First? It's not clear at the end of Professor Magarian's article. On the one hand he claims that he is neither calling into question the Second Amendment as an individual right, nor calling on the Court to reverse either *Heller* or *McDonald*.[34] On the other, the strong implication is that both the dynamic interpretation of the First Amendment and what he sees as the ineluctable consequences of the Second Amendment leaves the latter with little constructive role to play in our polity and little enforceable judicial content.

The tension he finds between the First and Second Amendments, moreover, depends entirely on accepting his argument that the right to keep and bear arms sounds exclusively in a collective purpose to resist tyranny, leading him to embrace a straw man: that the Second Amendment guarantees a constitutional (and presumably judicially enforceable) right to engage in armed resistance. By shining a spotlight on the preamble that mentions the "well regulated militia," Professor Magarian obscures that operative part of the Amendment—that part that guarantees "the right of the people *to keep and bear arms*."[35] The Second Amendment does *not* guarantee a right to revolution, to armed resistance, or even the right to "alter or abolish" government if it becomes tyrannical. Those rights are enshrined in constitutions worldwide,[36] and in various state constitutions.[37] But whatever the legal effect of such rights, they aren't a part of the Second Amendment, though the Framers would certainly have been familiar with such provisions.[38]

Mindful that the Bill of Rights is not a suicide pact,[39] and suspicious of any interpretive method that renders a constitutional right a nullity, the remainder of this comment will make two arguments. First, that Magarian's "insurrectionist" Second Amendment is not the only, or even the most

34. *Id*. at 74–75.

35. U.S. CONST. amend. II (emphasis added).

36. *See generally* Tom Ginsburg, Daniel Lansberg-Rodriguez & Mila Versteeg, *When to Overthrow Your Government: The Right to Resist in the World's Constitutions*, 60 UCLA L. REV. (forthcoming 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2125186.

37. *See, e.g.*, KY. CONST. § 4 ("All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety, happiness and the protection of property. For the advancement of these ends, they have at all times an inalienable and indefeasible right to alter, reform or abolish their government in such manner as they may deem proper.").

38. Incidentally, the Framers might take issue with Professor Magarian's conclusion that "threatened or actual insurrection does not" lead to "meaningful democratic political change," Magarian, *supra* note 8, at 94, though his point is well-taken that insurrection ought not to become a habit.

39. *Cf.* Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) (warning against "doctrinaire logic" untempered by "practical wisdom" that would "convert the constitutional Bill of Rights into a suicide pact").

natural, reading of the Amendment. It is possible to read the Amendment as embodying a dual collectivist–individualist nature that Professor Magarian ascribes to the First Amendment. In the alternative, we argue that a series of developments since the ratification of the Bill of Rights has "modernized" the Amendment, enabling individual self-defense to replace common resistance to tyranny at the core of the right to keep and bear arms, while still maintaining the potential of at least deterring would-be tyrants.

III. Revisiting the Collective Versus Individual Right Discussion

Professor Magarian argues that the first clause (or "preamble") of the Second Amendment "compels a collectivist construction of the Second Amendment."[40] This is a rather strong statement considering that in *Heller* and *McDonald* not a single Justice, whether in the majority or in dissent, endorsed the collective rights view that for several decades was the most-commonly-heard interpretation of the right to arms. To be fair, Magarian has something rather different in mind from former Chief Justice Warren Burger's claim that the Second Amendment serves to protect the independence of state militias, or as Burger called them, "state armies,"[41] which—given the rather drastic consequences of adopting Burger's approach[42]—is probably just as well.

Nonetheless, the argument that the Second Amendment's preamble compels a collectivist interpretation would itself be more compelling were it not for William Van Alstyne's discussion of just this topic,[43] which is rather

---

40. Magarian, *supra* note 8, at 52.

41. *See Press Conference Concerning Introduction of the Public Health and Safety Act of 1992*, June 26, 1992, *available in* LEXIS, Nexis Library, ARCNWS File.

42. For a discussion of those consequences see Glenn Harlan Reynolds & Don B. Kates, *The Second Amendment and States' Rights: A Thought Experiment*, 36 WM. & MARY L. REV. 1737 (1995). A short summary might be the Tom Lehrer line: "We'll try to stay serene and calm/When Alabama gets the bomb." TOM LEHRER, *Who's Next?*, *on* THAT WAS THE YEAR THAT WAS (Reprise Records 1965).

43. William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1243–44 (1994). Van Alstyne writes:

> [T]he Second Amendment adheres to the guarantee of the right of the people to keep and bear arms as the predicate for the other provision to which it speaks, i.e., the provision respecting a militia, as distinct from a standing army separately subject to congressional regulation and control. Specifically, it looks to an ultimate reliance on the common citizen who has a right to keep and bear arms rather than only to some standing army, or only to some other politically separated, defined, and detached armed cadre, as an essential source of security of a free state. . . . [The Second Amendment] expressly *embraces* that right and indeed it erects the very scaffolding of a free state upon *that* guarantee. *It derives its definition of a well-regulated militia in just this way for a "free State"*: The militia to be well-regulated is a militia to be drawn from just such people (i.e., people with a right to keep and bear arms) rather than from some other source (i.e., from people without rights to keep and bear arms).

Id.

airily dismissed in a footnote.[44] But there is that business of a "well regulated militia," and presumably that language is meant to mean or do something—just as, presumably, the preamble to the Constitution itself is meant to mean or do something, though there seems to be some disagreement on that topic as well. But what, exactly?

Well, one possibility Magarian might have considered is that the language of the preamble is a command, aimed not at individuals but at the federal government. If a well-regulated militia is "necessary to the security of a free state," then it follows, presumably, that a state lacking such a militia is either insecure or unfree. One might argue—as Magarian pretty much does—that whatever the truth of this statement at the time of the Framers, such a view is obsolete because now we have a professional army and professional police. But such an argument faces two difficulties. First, of course, we do not get to write commands out of the Constitution simply because we think they are obsolete; the Article V amendment process is the approved method for addressing such changes and has been used in that fashion in the past. Second, it is not at all clear that the presence of professional soldiers and police addresses either the security or the freedom that the Framers had in mind.

The Framers, after all, were as concerned with security against internal threats and tyranny as they were in protecting against an—even then not very likely—invasion from Canada or Mexico. The militia provided a different kind of protection than that provided by professional police or professional soldiers precisely because it was not a professional organization and thus not subject to the kinds of institutional corruption and self-dealing that professional entities are. (The function of the militia in this regard is, as Akhil Amar has noted, that of "jurors with guns"—outsiders to the system who are involved as a check on the system's permanent members: "amateurs rather than professionals, suspicious of centralized professional authority—standing armies for the militia, professional judges and prosecutors for the jury."[45]) The absence of such a body now, except for a few entries on the statute books here and there, might be read not as a diminution of the right to arms, but rather as a suggestion that there is something illegitimate about our near-total reliance on professional soldiers and professional police, just as it would be illegitimate to rely on courts composed entirely of professional judges and prosecutors, without a jury. (And arguments that juries are obsolete, because judges and prosecutors are now more professional than in the Framing era, would be persuasive to few.)

Furthermore, the limits imposed on the federal government by reliance on a militia were in some sense like those imposed by a jury—there were just

44. Magarian, *supra* note 8, at 79 n.149.

45. *Re-Examining the Bill of Rights*, A.B.A. J., Jan. 1999, at 86, 86.

some things the militia wouldn't, or couldn't, do. For example, when the federal government attempted to send militias into Mexico in 1912, the militias balked, citing their constitutional role as repelling invasion, suppressing insurrection, or enforcing the law. None of these were implicated by an incursion into a foreign country. Surprisingly, perhaps, Attorney General Wickersham agreed.[46] The result, of course, was an immediate change in the law, a change that made national defense much less collectivist and much more statist: the militia was replaced with the modern National Guard, subject to federalization by decree of the President and then, conveniently enough, employable in the same fashion as a standing army.[47]

So if we are to take a "collective" lesson from the preamble to the Second Amendment, rather than concluding that the right to arms is obsolete, we might instead ponder whether we have taken a wrong turn in other areas, producing a state that is, in some fundamental sense, both insecure and unfree. Surveying the state of the nation today, it is certainly possible to find support for this proposition. But there are further implications as well.

Though the Framers may have seen the militia as "jurors with guns," the militia that they envisioned was vulnerable in a way that juries are not—because it depended on the government to provide the organizational structure for a well-regulated militia, the militia could simply wither away through government inaction, as, indeed, it has. But every criminal trial requires a jury (though the appearance of rampant plea bargaining in modern America suggests that this institution is not as strong as it once was either).

In this light, the Second Amendment could be understood as an example of very careful drafting indeed: a government obligation (to maintain a militia) coupled with an individual right (to keep and bear arms) that ensures that the key element of a universal militia (an armed citizenry) cannot be extinguished by government neglect. At the very least, the clear constitutional statement regarding the necessity of a well-regulated (universal) militia for the security of a free state should give us pause. As noted, the logical consequence of this statement is that a state lacking such a militia is either insecure or unfree. In light of what is known about the purposes of the Second Amendment and the Framers' views regarding standing armies and armed citizens, an interpretation of the first clause of the Second Amendment as requiring universal militias seems well-founded. It is certainly better grounded in the Constitution's text, history, and purposes

46. *See* Auth. of President to Send Militia into a Foreign Country, 29 Op. Att'y Gen. 322, 329 (1912).

47. *See generally* Patrick Todd Mullins, Note, *the Militia Clauses, the National Guard, and Federalism: A Constitutional Tug of War*, 57 GEO. WASH. L. REV. 328, 333 (1988) (detailing the history of the federalization of the militia system and the concomitant erosion of state control over an ostensibly state institution).

than many other constitutional arguments that have attained general acceptance.

At any rate, if there are, as Magarian argues, collectivist lessons to be taken from the Second Amendment's preamble, we suggest that those lessons might more plausibly involve duties on the part of the "free state" to which it refers, than an abrogation of the rights that are the subject of the Second Amendment's operative clause. Such duties may be less politically congenial than the notion of circumscribing the right to arms, but they are also, we believe, better founded within the text and purposes of the Second Amendment.

Finally, we would be remiss if we failed to note that there is a bit of self-dealing in Professor Magarian's elevation of the pen above the sword. It is easy to understand why a law professor might value rhetoric over riflery, but there is no particular reason to believe that those value choices were shared by the Framers. Churchill may have believed that jaw-jaw is better than war-war, but he also recognized that there were limits to what could be accomplished by jaw-jawing—and there is a reason why, in the Framers' day, the slogan *Ultima Ratio Regis* was engraved on cannons, and not upon printing presses.

IV. The Second Amendment and Judicial Review's "Modernizing Mission"

David Strauss recently identified a model of judicial review that seeks "to bring laws up to date, rather than deferring to tradition; and that anticipates and accommodates, rather than limits, developments in popular opinion."[48] What Strauss terms judicial review's "modernizing mission," is, he argues, an antidote to the countermajoritarian difficulty.[49] Modernization has two components: First, "courts will strike down a statute if it no longer reflects popular opinion or if the trends in popular opinion are running against it."[50] As he explains, modernization keys constitutionality to the degree of support a statute still claims—whether it "is a product of a bygone era" or is "supported by a political consensus."[51] Modernization, then, enforces consensus against outliers.

Second, "a modernizing court must be prepared to change course—and uphold a statute that the court previously struck down—if it becomes apparent that popular sentiment has moved in a different direction from what the court anticipated."[52] If a court misapprehends the consensus and a "statute had popular support after all," it must be prepared to confess error

48. Strauss, *supra* note 10, at 860.
49. *Id*.
50. *Id*. at 861.
51. *Id*. at 862.
52. *Id*. at 861.

and uphold what it previously invalidated.[53] Pushback from the political process against a court's decision, for example, is evidence a court miscalculated.[54]

We also suggest that a third type of modernization can occur, one that Strauss does not mention explicitly, but which we think is consistent with his idea. Not only does modernization occur at the retail level, with the Court assessing individual statutes in light of shifts in public opinion, but also at the wholesale level in the form of changed understandings, of constitutional provisions, or even entire bodies of constitutional doctrine.[55]

While *Heller* and *McDonald* can be understood as modernizing opinions, as Strauss defines the term, the ratification of the Fourteenth Amendment, we think, began the modernization of the Second Amendment nearly one hundred and fifty years earlier, bringing the right to keep and bear arms' individualist component into sharper relief. This modernization, we argue, dissolves the tension that Professor Magarian finds between the First and Second Amendments.

As Akhil Amar and others have pointed out, the right to keep and bear arms underwent a reinterpretation in light of the Civil War and Reconstruction.[56] Professor Amar explains that "[c]reation-era arms bearing was collective, exercised in a well-regulated militia embodying a republican right of the people, collectively understood. Reconstruction gun-toting was individualistic, accentuating not group rights of the citizenry but self-regarding 'privileges' of discrete 'citizens' to individual self-protection."[57] Numerous references were made during the debates over the ratification of the Fourteenth Amendment to the need to secure for the Freedmen the rights of citizens, including the right to keep and bear arms for self-defense.[58] The

53. *Id*. at 862.

54. *Id*.

55. Though Strauss doesn't explicitly mention this phenomenon as an aspect of modernization, he does discuss the shift from economic to noneconomic substantive due process in considerable detail. *Id*. at 874–87. He writes that "modernization is . . . the central unifying theme of the substantive due process cases that have been decided in the last forty years." *Id*. at 875. We also note that the First Amendment Professor Magarian celebrates is itself a product of similar modernization. *See generally* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA (Lee C. Bollinger & Geoffrey R. Stone eds., 2002).

56. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877 (1988); STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866–1876 (1998).

57. AMAR, *supra* note 56, at 259. For reasons discussed above, we think that Professor Amar overstates the collective nature of the framing-era Second Amendment. *See supra* notes 41–48 and accompanying text.

58. *See, e.g.*, CURTIS, *supra* note 56, at 138, 140, 164; *see also id*. at 203 (noting that "the Second Amendment right to bear arms . . . [was] regarded by framers of the Fourteenth Amendment as [a] particularly precious right[]"); HALBROOK, *supra* note 56, at 42 (writing that "to a man, the

leading historian of Reconstruction concluded that "it is abundantly clear that Republicans wished to give constitutional sanction to states' obligation to respect such key provisions as freedom of speech, the right to bear arms, trial by impartial jury, and protection against cruel and unusual punishment and unreasonable search and seizure."[59]

This shift is reflected in the public understanding of the Second Amendment's guarantee. By the mid-1990s, overwhelming majorities saw the Second Amendment as guaranteeing the right to private ownership of firearms.[60] Most of the public, moreover, wants guns for self-defense, to hunt, or for target shooting—among gun owners comparatively little thought is given to the possible need to oppose the government *en masse* at some future date.[61]

Though it took the Court a while, *Heller* and *McDonald* finally caught up with public opinion. Justice Scalia wrote in *Heller* that "the inherent right of self-defense has been central to the Second Amendment right."[62] *McDonald* reiterated this understanding, holding that "[s]elf-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in *Heller*, we held that individual self-defense is 'the *central component*' of the Second Amendment right."[63] In both cases, placing the right to own weapons for self-defense at the core of the Second Amendment resulted in the invalidation of gun laws that made lawful self-defense in the home nearly impossible. The Court's invalidation of these laws, then, resembled a familiar modernizing pattern: the Court ratifies a popular constitutional understanding and then enforces it against outlier statutes.[64]

***

The modernized Second Amendment places individual self-defense at its core, in line with shifts in the popular conception of the right that began with the proposal and ratification of the Fourteenth Amendment. Not only can this modernized right to keep and bear arms coexist quite comfortably with a robust First Amendment, one might argue that the evolution was essential to preserve First Amendment rights to criticize government. The

---

same two-thirds-plus members of Congress who voted for the proposed Fourteenth Amendment also voted for the proposition contained in both Freedmen's Bureau bills that the constitutional right to bear arms is included in the rights of personal liberty and personal security").

59. FONER, *supra* note 56, at 258.

60. For discussion of public opinion polling, see MARK V. TUSHNET, OUT OF RANGE: WHY THE CONSTITUTION CAN'T END THE BATTLE OVER GUNS 127–28 (2007).

61. *See, e.g.*, Monte Whaley, *Why Own a Gun? Colorado Gun Owners Speak Out*, DENVER POST, Oct. 28, 2012, http://www.denverpost.com/news/ci_21871702/guns-are-used-food-and-not-trophies-hunter (last updated Oct. 31, 2012).

62. District of Columbia v. Heller, 554 U.S. 570, 628 (2008).

63. McDonald v. Chicago, 130 S. Ct. 3020, 3036 (2010) (footnote and citation omitted).

64. *Cf.* Lawrence v. Texas, 539 U.S. 558 (2003); Griswold v. Connecticut, 381 U.S. 479 (1965).

Court has made clear that the state has no duty to protect individuals' lives as such[65] and that no one has a constitutional right to police protection.[66] Depriving individuals of the means for self-defense potentially puts them at the mercy of the state should the state choose to withdraw police protection. Such vulnerability could work a particular hardship on government critics.

This modernized right to keep and bear arms does not necessarily eclipse a collectivist interpretation of the Second Amendment either. At the very least, a widely-armed populace dramatically raises the costs for any would-be tyrant. And we would note that if anyone does make a serious bid for the position of tyrant, a robust First Amendment would probably not prove as much of an obstacle as Professor Magarian would hope, *Brandenburg v. Ohio* notwithstanding.

V. Conclusion

Professor Magarian argues that the Second Amendment's right to keep and bear arms cannot be understood outside of an "insurrectionary" context. In the absence of an institution, like the militia, ready to perform that function, he argues, the Amendment no longer has much work to do. Further, he argues, the First Amendment's right to free speech now does much of the opposing-tyranny work that was earlier expected of the Second Amendment. The two now exist in tension, which he implicitly resolves in favor of the First, at the expense of the Second.

We argue that Professor Magarian's tension between the "individualist" and "collectivist" readings of the Second Amendment is largely of his own making. No less than the First, the Second Amendment can be read to embody both an individualist right (the right "to keep and bear arms") and a collective purpose (an armed populace would be useful for deterring the would-be tyrant). The Framers likely would have understood individual self-defense to have been the right to societal self-defense writ small.

In addition, the popular understanding of the core of the right began shifting to this individual rights reading beginning at least in mid-nineteenth century. The Framers of the Fourteenth Amendment sought to secure the right to keep and bear arms for Freedmen, not so they could rise up against the government, but rather so they could protect themselves and their families from violence. This "modernized" right maps onto most people's understanding of the right today, as reflected in the Court's decisions in *Heller* and *McDonald*.

---

65. *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189 (1989).

66. *See* Castle Rock v. Gonzales, 545 U.S. 748, 761–66 (2005) (reasoning that there is no property or liberty interest in public enforcement of restraining orders because police protection may be granted or denied at the discretion of the police).

At the very least, the tradition in the U.S. has been toward an expansion and updating of rights—not one of rendering them devoid of enforceable content. The more the Second Amendment is treated like ordinary constitutional law, the less scary it will eventually seem to those who worry about its revolutionary roots.