

# Texas Law Review

## *See Also*

Volume 91

### Response

## Second Things First: What Free Speech Can and Can't Say About Guns

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In the wake of the Supreme Court's landmark decisions in *District of Columbia v. Heller*<sup>1</sup> and *McDonald v. City of Chicago*,<sup>2</sup> courts and scholars remain deeply conflicted not only about the specific rules of Second Amendment doctrine, but about what even *counts* as a Second Amendment argument. An advocate might defend a particular gun control law on the basis that it effectively prevents violent deaths, only to be told that such a “freestanding ‘interest-balancing’ approach” is forbidden.<sup>3</sup> So the advocate might switch tacks and emphasize the law's similarity to the kinds of historically well-established restrictions approved in *Heller*,<sup>4</sup> only to learn that it would be “weird” if a law's constitutionality depended on its age.<sup>5</sup>

Little wonder, then, that courts and scholars have tried to import well-established doctrines from other areas of constitutional law. The most attractive source for this borrowing has been First Amendment doctrine,

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1. 554 U.S. 570 (2008).

2. 130 S. Ct. 3020 (2010).

3. *Heller*, 554 U.S. at 634. See generally Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375 (2009) [hereinafter Blocher, *Categoricalism*].

4. *Heller*, 554 U.S. at 626–27 (“[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”).

5. *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc).

which for all of its complications and internal incoherence<sup>6</sup> at least offers reliably familiar mechanisms for protecting the exercise of a right in the home,<sup>7</sup> in public places,<sup>8</sup> and in novel ways<sup>9</sup>—precisely the kinds of questions with which Second Amendment doctrine has begun to fumble.

Greg Magarian's *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second* warns against this trend, arguing that "analogies to First Amendment doctrine offer very little help in formulating Second Amendment doctrine."<sup>10</sup> This is not because the two Amendments are totally incomparable—indeed, Magarian's argument is premised on exploring their similarities. Where Magarian breaks from the general trend is in his finding that the comparison yields very little useful guidance. Specifically, he concludes that a proper reading of the Second Amendment "compels a collectivist construction"<sup>11</sup> that roots the individual right to keep and bear arms<sup>12</sup> in an insurrectionist justification: "to deter the federal government from becoming tyrannical and to mount an insurrection should tyranny arise."<sup>13</sup> That insurrectionist reading, Magarian argues, is flatly incompatible with the First Amendment's well-established role in protecting debate as the constitutionally preferred method of political dynamism.<sup>14</sup> Thus, although the First Amendment is not a useful template for the Second, it does cast a large and heavy shadow, giving the Second Amendment "little room to develop as a meaningful source of legal authority."<sup>15</sup>

6. See Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1270 (1995) ("[T]he Court's First Amendment jurisprudence . . . dances now macabrely on the edge of complete doctrinal disintegration.").

7. See, e.g., *Stanley v. Georgia*, 394 U.S. 557, 559 (1969) (protecting, on First and Fourteenth Amendment grounds, private possession of obscene materials). For an extended argument extending *Stanley's* rationale to the Second Amendment, see Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278 (2009).

8. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (allowing content-neutral "time, place, and manner" restrictions on speech so long as they serve an important government objective, are narrowly tailored, and preserve ample alternative means of communication).

9. See, e.g., *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011) (finding video games to be covered by the First Amendment).

10. Gregory P. Magarian, *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second*, 91 TEXAS L. REV. 49, 99 (2012).

11. *Id.* at 52.

12. Magarian does not contest the use of the "individual right" label, *id.* at 52, but then again neither did Justice Stevens in his *Heller* dissent. See *Heller*, 554 U.S. at 636 (Stevens, J., dissenting) ("The question presented by this case is not whether the Second Amendment protects a 'collective right' or an 'individual right.' Surely it protects a right that can be enforced by individuals. But a conclusion that the Second Amendment protects an individual right does not tell us anything about the scope of that right.").

13. Magarian, *supra* note 10, at 52–53. Presumably the same reasoning would have to apply to tyrannies of state and even local governments after *McDonald*.

14. *Id.* at 87–98 (describing the "constitutional triumph of First Amendment dynamism over Second Amendment insurrectionism").

15. *Id.* at 53.

This review will focus on two of the many issues raised by Magarian's complex article. Part I discusses intra-constitutional comparativism, arguing—in agreement with Magarian—that doctrinal analogies are useful only to the degree that they are premised on relevant similarities. Many Second Amendment arguments—not only those Magarian criticizes, but others “internal” to the Amendment—fail this basic test. Part II focuses on the relationship between auxiliary and direct rights to insurrection, arguing that Magarian's criticism is particularly strong as to the latter, but that the Second Amendment might nonetheless protect the former. To the degree that it does, the conflict with the First Amendment is not quite so sharp. The review concludes by suggesting that the Second Amendment, like the First, might be animated by many different values, and that this complicates both Magarian's criticism and the future of Second Amendment doctrine.

### I. Amendments and Analogies

Because I am among the intra-constitutional comparativists Magarian criticizes,<sup>16</sup> I should perhaps begin by explaining why the comparison between the First and Second Amendments has proven so attractive to those of us who have employed it. The primary reason is the howling vacuum of guidance in *Heller* itself.<sup>17</sup>

It would, of course, be too much to expect that *Heller* would provide a roadmap for all future Second Amendment litigation. But the opinion is deficient even within its own four corners. It is, for example, extremely difficult (if not impossible) to follow the methodological road *Heller* describes—a kind of categorical historicism, rather than application of traditional tiers of scrutiny—and reach the destinations it does: approving bans on possession by felons and the mentally ill<sup>18</sup> or of “dangerous and unusual” weapons.<sup>19</sup> I have argued elsewhere that some elements of the opinion's categorical approach border on the incoherent.<sup>20</sup>

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16. See *id.* at 68–69 (describing and criticizing Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 STAN. L. REV. 1 (2012) [hereinafter Blocher, *Right Not to Keep*]).

17. See, e.g., Carlton F.W. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1371 (2009); J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 280 (2009).

18. See, e.g., Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 731 (2012) (“Although Justice Scalia's opinion in *Heller* characterized disarming felons as a long-standing tradition, federal law did not disqualify any felons from possessing firearms until 1938 and did not disqualify nonviolent felons until 1961.”).

19. See 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, 1480–83 (2009) (describing the difficulty of applying the test).

20. Blocher, *Categoricalism*, *supra* note 3, at 423–29.

Faced with a *tabula rasa* and charged with filling it, courts and scholars have reached for the First Amendment.<sup>21</sup> This is understandable. Though it is too awkward and complicated to inspire a passionate embrace, free-speech doctrine is nonetheless a friend with substantial benefits, familiarity primary among them. Like the Second, the First Amendment protects the individual exercise of a right that can have enormous social costs and arguably serves a variety of values, including individual autonomy and protection of democracy.

This does not mean, of course, that these similarities or the Amendments' proximity in the Bill of Rights are sufficient to justify unchecked importation of speech-governing rules into the realm of firearms. Magarian is absolutely right to criticize some of these efforts, particularly the truly deficient argument that gun licensing is an unconstitutional "prior restraint." Magarian cites and criticizes an article and a student note pursuing this line of reasoning,<sup>22</sup> which has also been deployed by prominent gun-rights advocates who should know much better.<sup>23</sup> Prior restraint doctrine is and has always been a unique feature of free speech doctrine—indeed, it has often been called the *only* intended feature of the free speech clause.<sup>24</sup> And as Magarian points out:

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. 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.<sup>25</sup>

The First Amendment has constitutionalized the idea that, although there may be "danger flowing from speech," in most circumstances "the remedy to be applied is more speech,"<sup>26</sup> rather than *ex ante* restrictions. The Second Amendment does not similarly provide that the sole remedy to be

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21. See, e.g., *Ezell v. City of Chicago*, 651 F.3d 684, 706–07 (7th Cir. 2011) (noting that several circuits have begun to "adapt First Amendment doctrine to the Second Amendment context" and pointing to multiple scholarly articles that support this approach); *United States v. Marzarella*, 614 F.3d 85, 96–97 (3d Cir. 2010) (rejecting automatic application of strict scrutiny to firearms restrictions in accordance with the varying levels of scrutiny applied to particular First Amendment claims).

22. See Magarian, *supra* note 10, at 69 & n.97.

23. See, e.g., Brief of Second Amendment Foundation, Inc. et al. as Amici Curiae Supporting Appellants Seeking Reversal at 18, *Peruta v. Cnty. of San Diego*, No. 10-56971 (9th Cir. May 31, 2011) (arguing that "there is no better, indeed, there may be no other, logical interpretive tool" for evaluating gun permit requirements).

24. Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 651–52 (1955).

25. Magarian, *supra* note 10, at 70 (internal citations omitted).

26. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

applied to gun violence is more guns. Fortunately, judges have recognized as much and have consistently declined to import prior restraint rules.<sup>27</sup>

Magarian can convincingly debunk such poor analogies without delving deeply into a theory of analogical reasoning itself—the arguments he criticizes are so unbalanced that a slight push is sufficient to upend them. But others of his targets are on better footing, and taking them down requires a correspondingly stronger foundation. Because Magarian criticizes *the analogy itself*, and not simply the doctrinal results thereof, he must do so on the basis of what makes an analogy appropriate, not just what First or Second Amendment doctrine require. Fully attacking an analogy requires a theory of analogy.

This is of course an unfair thing for a reviewer to ask. It would be impossible for Magarian or any other scholar to fully provide such a theory in the course of making an argument from it. The nature of analogical reasoning is in some sense the very heart of legal reasoning, and has deservedly commanded substantial attention from generations of legal theorists.<sup>28</sup> But even a brief and superficial skim of that literature can help provide a fulcrum for Magarian’s criticism.

One basic and relatively uncontroversial point is that analogical reasoning is a process of picking out *relevant* similarities.<sup>29</sup> For example, one could compare the First and Third Amendments on the basis that both involve odd numbers, or compare—as *Heller* did—references to “the People” throughout the Constitution.<sup>30</sup> Both of these are forms of analogical reasoning based on shared characteristics, but only the latter is even arguably defensible.<sup>31</sup> The reason for that must have something to do with the fact that we attribute significance to similarities in words, particularly within the

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27. See, e.g., *Kachalsky v. County of Westchester*, 2012 WL 5907502, at \*9–10 (2d Cir. November 27, 2012); *Hightower v. City of Boston*, 693 F.3d 61, 80–81 (1st Cir. 2012); *Woollard v. Sheridan*, 863 F. Supp. 2d 462, 471–73 (D. Md. 2012).

28. See, e.g., FREDERICK SCHAUER, *THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING* 85–102 (2009); Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 934–36 (1996); Cass R. Sunstein, *Commentary, On Analogical Reasoning*, 106 HARV. L. REV. 741, 744 (1993).

29. See SCHAUER, *supra* note 28, at 85–102 (discussing analogical reasoning and arguing that it must be rooted in relevant similarities); Sunstein, *supra* note 28, at 744 (“For analogical reasoning to work well, we have to say that the relevant, known similarities give us good reason to believe that there are further similarities and thus help to answer an open question.”); see also Brewer, *supra* note 28, at 933 (claiming that most accounts of analogy hold that “analogical argument moves not by similarity alone, but by ‘relevant’ similarity”).

30. *Heller*, 554 U.S. at 580 (“[I]n all six other provisions of the Constitution that mention ‘the people,’ the term unambiguously refers to all members of the political community, not an unspecified subset.”).

31. By contrast, if one were attempting to show which constitutional provisions have been linked to the concept of privacy, then the former analogy makes more sense. See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (linking the First, Third, Fourth, Fifth, and Ninth Amendments to privacy).

confines of the Constitution itself,<sup>32</sup> but not to the odd- or even-numbering of constitutional amendments. Whether there is some deeper reason for this is hard to say, and scholars have long struggled to provide a theory of relevance to drive analogical reasoning.<sup>33</sup> As no less authority than H.L.A. Hart put it, “until it is established what resemblance and differences are relevant, ‘Treat like cases alike’ must remain an empty form. To fill it we must know when, for the purposes in hand, cases are to be regarded as alike and what differences are relevant.”<sup>34</sup>

This might sound like analytic philosophy, but its application to Second Amendment doctrine is easy enough to see. Magarian’s argument against the First-Second Amendment analogy, after all, is premised on his conclusion that the similarities between the Amendments are simply not as relevant as their differences. The question, of course, is *what* kinds of similarities matter. Magarian’s mostly-implicit conclusion is that the Amendments should be interpreted in light of the values they are designed to protect, and that the “insurrectionist” purpose of the Second Amendment is incompatible with the First Amendment’s already-instantiated protection of speech as the mechanism of political change and the prevention of tyranny.

The second Part of this Response will address that argument in more detail, but it is worth noting that the problem with analogical reasoning in the context of the Second Amendment runs even deeper. Two examples should suffice to illustrate the point. In *Heller* and *McDonald*, the Court approved as constitutional various contemporary gun control laws that are “longstanding” or rooted in traditional restrictions:

[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.<sup>35</sup>

To provide guidance for future courts in cases involving other laws not specifically blessed in *Heller*, there must be some way to draw analogies from those categories to others. What about gun owners convicted of violent misdemeanors? Nonviolent felons? Undocumented aliens? Drawing purpose-based lines from the Court’s approved categories to others is exceedingly difficult. If the “core” of the Second Amendment is self-

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32. See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 789 (1999) (“[S]trongly parallel language is a strong (presumptive) argument for parallel interpretation.”). *But see* Adrian Vermeule & Ernest A. Young, *Hercules, Herbert, and Amar: The Trouble with Intratextualism*, 113 HARV. L. REV. 730, 731 (2000) (noting that the many provisions of the Constitution were adopted in different times and circumstances and with different rationales).

33. Cf. Sunstein, *supra* note 28, at 773–74 (noting that analogical reasoning does not provide its own, necessary “theory of relevant similarities and differences”).

34. H.L.A. HART, *THE CONCEPT OF LAW* 155 (1961).

35. *Heller*, 554 U.S. at 626–27 & n. 26.

defense,<sup>36</sup> then why should it not extend to felons and the mentally ill, both of whom have self-defense rights? If instead the core of the Amendment is the protection of insurrection or deterrence of tyranny,<sup>37</sup> then why should “dangerous and unusual” weapons or “government buildings” be exempted? If one cannot connect the dots even within the opinion itself, then it is hard to imagine how they can be extended to cover future cases.

Similar questions of analogical reasoning arise when it comes to defining the “Arms” covered by the Second Amendment. In the case that became *Heller*, the U.S. Court of Appeals for the D.C. Circuit concluded that constitutional coverage should extend to “lineal descendant[s] of . . . founding-era weapon[s]” that are “in ‘common use’ today.”<sup>38</sup> Though the Supreme Court did not specifically adopt this test, echoes of it appeared both at oral argument<sup>39</sup> and in the *Heller* opinion.<sup>40</sup> But what makes a modern gun a “descendant” of another? Barrel length? Caliber? Muzzle velocity? Capacity for repeating fire? One way to answer the question would be to say that the characteristics that matter are those relevant to the values or purpose of the Amendment itself.<sup>41</sup> This would suggest that the modern-day Buntline (the weapon Dick Heller sought to register) is a lineal descendant of colonial-era pistols because “the American people have considered the handgun to be the quintessential self-defense weapon.”<sup>42</sup> What makes the guns relevantly similar, then, is their popularity for effectuating the right of self-defense, which *Heller* identified as the “core” of the Second Amendment.<sup>43</sup> But the purpose-based approach runs into problems as well, for the Court specifically *excludes* military weapons from scope of the Amendment,<sup>44</sup> even while concluding that protecting the militia was a reason for the Amendment’s inclusion in the Constitution.<sup>45</sup> How can that be squared with the argument that self-defense interests guide the definition of “Arms”?

Of course, the fact that Second Amendment doctrine suffers from many potential defects of analogical reasoning is not a point against Magarian’s argument that the First Amendment analogy in particular is problematic.

36. *Heller*, 554 U.S. at 599, 630.

37. *See supra* note 13.

38. *Parker v. District of Columbia*, 478 F.3d 370, 398 (D.C. Cir. 2007).

39. Transcript of Oral Argument at 47, *Heller*, 554 U.S. 570 (No. 07-290) (Justice Scalia suggesting that “Arm” in the Second Amendment is used in a “specialized sense” to denote a weapon “that was used in militias and . . . nowadays commonly held”).

40. *Heller*, 554 U.S. at 627 (treating a weapon’s “unusual” nature as a ground for its prohibition).

41. Blocher, *Categoricalism*, *supra* note 3, at 417 (“The question in *Heller*, then, was not whether modern handguns are connected to Founding-era weapons by some technological link but rather whether they are connected by some meaningful constitutional principle.”).

42. *Heller*, 554 U.S. at 629.

43. *Id.* at 630.

44. *Id.* at 627–28.

45. *Id.* at 599.

The point of this discussion is simply to suggest that Magarian has identified a problem that is even broader than the specific examples he discusses.

## II. Insurrection and the Constitution

These questions go to the very heart of legal reasoning; analogizing and distinguishing legal authorities (including historical ones) is in some sense simply what lawyers *do*. Magarian's approach to this analogical question is, as noted above, to say that the Second Amendment's first clause—"A well-regulated militia being necessary to the security of a free State"—requires that the second clause—"the right of the People to keep and bear Arms shall not be infringed"—be read through a "collectivist" lens.<sup>46</sup> The leading collectivist theory, in turn, is that the Second Amendment protects an "insurrectionist" right, one rooted in the notion that an armed populace will be able to either deter or fight off a tyrannical government.<sup>47</sup> And that insurrectionist-collectivist reading is simply not open, Magarian argues, because the First Amendment's protection of political change through peaceful debate has occupied the field.<sup>48</sup>

I share Magarian's frustration with the Court's inability to make sense of the Second Amendment's first clause. In *Heller*, the majority concluded that the militia-related language in that clause "can only show that self-defense had little to do with the right's *codification*; it was the *central component* of the right itself."<sup>49</sup> This is problematic reasoning, to say the least.<sup>50</sup> But whatever its faults on this point, *Heller* does clearly state that the "central component" and "core" of the Second Amendment right is individual self-defense,<sup>51</sup> which is why many of us have tried to interpret it in light of that announced purpose.<sup>52</sup>

For the purposes of this review, however, I will instead take as given Magarian's conclusion that the Second Amendment should be read with an insurrectionary purpose in mind. And that raises a first-order question that is implicit throughout Magarian's analysis: How can there *be* a constitutional right to insurrection? Of course, nearly all constitutional rights are designed to limit or check government power,<sup>53</sup> but that is different from having a right to insurrection itself. The former is auxiliary, the latter direct, and

46. Magarian, *supra* note 10, at 52.

47. *Id.* at 52–53.

48. *Id.* at 87–98.

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

50. For a criticism of the reasoning, see Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1350–52 (2009). To be clear, Lund himself believes that there are good answers to these questions, but that *Heller* simply fails to provide them. *Id.* at 1351–52.

51. *Heller*, 554 U.S. at 599, 630.

52. See, e.g., Blocher, *Right Not to Keep*, *supra* note 16, at 13–18 (examining the Second Amendment's terms "carry" and "bear" through the lens of self-defense).

53. There are some arguable exceptions, such as the Thirteenth Amendment.

those characteristics—and therefore the impact of Magarian’s critique—are significant different.

As a constitutional matter, Second Amendment insurrectionism is at its weakest, and Magarian’s critique at its strongest, with regard to the notion of a direct right to insurrection. Even holding aside the First Amendment analogy, it is simply difficult to imagine how such a constitutional right would function. Would an arms-bearing insurrectionist, prosecuted for violating a gun control law, come to a court and ask a judge (a representative of the tyrannical government) for the tyrannical government to sanction an insurrectionist attack on itself? American history has resolved—at great cost—the question of whether armed secession is a constitutional option, and “no serious scholar or politician now argues that a right to secede exists under American constitutional law.”<sup>54</sup> If the right to armed insurrection cannot be validly exercised by millions of people in concert, how could it be validly invoked by individuals?<sup>55</sup>

But the fact that the Constitution does not (and perhaps cannot) protect a right to insurrection proper does not mean that the Second Amendment—or other constitutional provisions and amendments, including the First—have nothing at all to say about the subject. The Constitution can sow the seeds of its own destruction without having the capacity to reap them. It seems possible, in other words, that the Second Amendment protects an “auxiliary” right<sup>56</sup>—one that enables insurrection without blessing it. This is the version of the insurrection right that allows people to prepare for a tyrannical “doomsday,”<sup>57</sup> and perhaps even prevent that doomsday from coming, but does not protect the actual *act* of violent insurrection. Many constitutional provisions, including but not limited to speech, arguably function in this way.

These auxiliary rights have surprisingly nuanced relationships with the underlying interests they are designed to protect. Consider the self-defense reading of the Second Amendment, which treats self-defense as the core and central component of the right.<sup>58</sup> This seems simple enough, but is in some senses exactly backwards: The right to defend oneself against immediate threats of harm precedes *Heller* and indeed the Second Amendment itself. Like the possible insurrectionist right discussed above, it arguably exists outside of the Constitution, and the closer one gets to that core the less one

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54. Cass R. Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633, 633 (1991).

55. For further analysis, see Darrell A.H. Miller, *Retail Rebellion and the Second Amendment*, 86 IND. L.J. 939 (2011).

56. See Michael Steven Green, *The Paradox of Auxiliary Rights: The Privilege Against Self-Incrimination and the Right to Keep and Bear Arms*, 52 DUKE L.J. 113, 116 (2002).

57. *Silveira v. Lockyer*, 328 F.3d 567, 570 (9th Cir. 2003) (Kozinski, J., dissenting), quoted in Magarian, *supra* note 10, at 90–91.

58. *Heller*, 554 U.S. at 599, 630.

needs to invoke the Amendment.<sup>59</sup> What the Second protects is a particular means: the right to have particular weapons on hand should the need ever arise to use them for self-defense.<sup>60</sup>

These issues regarding the relationship between insurrection and constitutionalism complicate Magarian's critique. As to the former, it seems reasonable enough to argue, as Magarian does, that our constitutional system emphasizes political dynamism through peaceful speech, rather than through violence. But treating speech as the primary means of *directly* opposing actual or potential tyranny does not mean that arms-bearing cannot serve as an *auxiliary* check, alongside other rights like association, assembly, and even jury trials. Magarian surmises that "even if actual insurrection never breaks out, gun proliferation will present a far greater danger of distorting and discouraging political debate."<sup>61</sup> But the world it depicts—one of largely unchecked gun proliferation—is generally the one we already live in, and it seems to work reasonably well. Outside of some urban areas, few Americans face stringent gun control laws, which is one reason why *Heller* and *McDonald* have not done much to change the legal landscape. Unless the political will emerges to pass stricter gun laws,<sup>62</sup> it seems unlikely that a revitalized Second Amendment—whether grounded in insurrection or some other value—will have much of a target.

What this suggests is that the Second Amendment can continue to play a role as an auxiliary anti-tyranny right, even if the First Amendment has pride of place with regard to direct insurrection. The more fundamental question, which Magarian certainly does not have to address for his argument to succeed, is how close the Constitution can come to directly protecting its own destruction. As Magarian's argument suggests, that is a question with important practical doctrinal implications.

### III. The Second-Best Second Amendment

Magarian's rich article raises far more difficult and important questions than this short review can ask, let alone answer. I will close with one more.

In First Amendment circles, there seems to be increasing agreement that there is simply no way to understand free speech doctrine through the lens of a single animating value. As Frederick Schauer argues in *The Second-Best*

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59. *United States v. Gomez*, 92 F.3d 770, 778 (9th Cir. 1996) (concluding, prior to *Heller*, that a convicted felon facing threat of violence was entitled to present a justification defense to a felon-in-possession charge).

60. Alan Brownstein, *The Constitutionalization of Self-Defense in Tort and Criminal Law, Grammatically-Correct Originalism, and Other Second Amendment Musings*, 60 HASTINGS L.J. 1205, 1207 (2009) ("The majority opinion describes the right to keep and bear arms as essentially the right to have a firearm available for immediate self-defense purposes.").

61. Magarian, *supra* note 10, at 96.

62. *See generally* KRISTIN A. GOSS, *DISARMED: THE MISSING MOVEMENT FOR GUN CONTROL IN AMERICA* (2006) (describing factors that have inhibited the enactment of stronger gun control measures).

*First Amendment*, “the very idea of free speech is a crude implement, to the core, protecting acts that its background justifications would not protect, and failing to protect acts that its background justifications would protect.”<sup>63</sup> Those background justifications are themselves diverse, as Robert Post notes: “There is in fact no general free speech principle.”<sup>64</sup>

It seems entirely likely, if not inevitable, that the modern Second Amendment is and will continue to be animated by a similar plurality of values. Among these will be the insurrectionary value Magarian criticizes, and perhaps also some echoes of the “well-regulated militia” who stubbornly persist in the Amendment’s first clause.<sup>65</sup> Courts will also surely emphasize the self-defense interest that *Heller* itself identifies as the Amendment’s “core” and “*central component*.”<sup>66</sup>

This value plurality significantly complicates matters, even if one can establish a lexical priority of those values.<sup>67</sup> It would, for example, take some force away from Magarian’s argument against the insurrectionist view. For even if the Second Amendment has little room “to develop as a meaningful source of legal authority”<sup>68</sup> against laws regulating insurrection, it might still be an important limitation for constitutional constraints of self-defense.

On another level, a value-pluralistic Second Amendment would make it even harder to employ (or, for that matter, to criticize) analogies between the First and Second Amendments. The more that the Second Amendment acts as a rough proxy for many different underlying values—self-defense and insurrection among them—the harder it will be to criticize arguments that draw on those values. Second Amendment doctrine will, like, First Amendment doctrine, become murky and chaotic. But the inevitability of that doctrinal night is no reason for courts and scholars to go gently. Magarian, to his credit, rages against it.

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63. Frederick Schauer, *The Second-Best Second Amendment*, 31 WM. & MARY L. REV. 1, 13 (1989).

64. Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1255 (1995).

65. See generally Lawrence Rosenthal, *Second Amendment Plumbing After Heller: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 URB. LAW. 1 (2009).

66. 554 U.S. at 599, 630.

67. Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2371 (2000) (arguing for a lexical priority of First Amendment values).

68. Magarian, *supra* note 10, at 53.