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Response

Analogies and Institutions in the First and Second Amendments: A Response to Professor Magarian

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Thomas Hobbes hated metaphors. He likened them to will-o'-the-wisps that lead men away from the path of reason and into a mire of absurdity.[1] Hobbes's contemporary, John Milton, considered metaphor a form of deception. In *Paradise Lost*, similes buzz about Lucifer like flies.[2]

Professor Magarian's article *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second* is a sober and cogent critique in the skeptical tradition of Hobbes and Milton.[3] It takes aim at those judges, gun rights activists, and scholars, like the present one, who traffic in First Amendment analogs for the Second Amendment.[4] Magarian's primary criticism is that we have used First Amendment analogs in a manner that is

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1. *See* THOMAS HOBBES, LEVIATHAN 65 (A.P. Martinich & Brian Battiste, eds., 2011) ("[M]etaphors, and senseless and ambiguous words are like *ignes fatui*; and reasoning upon them is wandering amongst innumerable absurdities; and their end, contention and sedition, or contempt.").

2. *See* STANLEY EUGENE FISH, SURPRISED BY SIN: THE READER IN PARADISE LOST 122, 124 (1998) (discussing association of metaphor, and rhetoric in general, with duplicity and imperfection).

3. Gregory P. Magarian, *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second*, 91 TEXAS L. REV. 49 (2012). As a matter of full disclosure, I read and commented on a prior version of Professor Magarian's article.

4. *See, e.g.*, United States v. Marzzarella, 614 F.3d 85, 89 n.4 (3d Cir. 2010) (calling the First Amendment analogs a "natural choice" for the Second Amendment); *see generally*, Darrell A.H. Miller, *Guns, Inc.:* Citizens United, McDonald, *and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887 (2011) (discussing the relationship between the First and Second Amendments with regard to potential corporate constitutional rights).

either too abstract to be analytically sound, or too raw and rigid to be doctrinally functional.[5] The inference is that the Second Amendment is sui generis and self-contained; it will generate, from its own text, context, history, and purpose, its own unique set of doctrines. In the end, these Second Amendment doctrines may bear superficial resemblance to free speech doctrines, but they do not reflect any deeper structural, historical, or ideological similarities between the two Amendments. To Magarian, free speech metaphors for firearms are obfuscations that undermine meaningful Second Amendment analysis, and lead only to confusion.[6] This is the first way in which the First Amendment destabilizes the Second.

Yet, Magarian is not completely averse to using the First Amendment to illuminate the Second. The second half of *Speaking Truth to Firepower* uses another literary device—the foil[7]—to argue for a relatively limited Second Amendment. This is not to accuse Magarian of bad faith.[8] Instead, I read Magarian as offering what he considers the proper use of First Amendment argument in Second Amendment cases. His core contention is that First Amendment free speech, either as originally conceived, or as it has developed over the past century, eclipses armed violence as the source of political dynamism in our nation.[9] Speech, rather than the gun, is how political change legitimately occurs. This is the second sense in which Magarian contends the First Amendment destabilizes the Second Amendment; the ascendancy of freedom of expression has weakened freedom to arms as the redoubt of liberty.[10]

Magarian's conclusions concerning the Second Amendment are well-reasoned, even if one does not agree in all the particulars. Although he writes the article as a critique of existing scholarship, his conclusions are not much different from some targets of his criticism. Numerous authors, including this one, have argued that the Court's *Heller* and *McDonald* decisions do not adequately account for the prefatory clause of the Second Amendment.[11] Several have argued that the flexible First Amendment

5. Magarian, *supra* note 3, at 63, 67.

6. *Id*. at 54–58.

7. A foil is "[a] character whose qualities or actions serve to emphasize those of the protagonist (or of some other character) by providing a strong contrast with them." CHRIS BALDICK, THE OXFORD DICTIONARY OF LITERARY TERMS 132 (3d ed. 2008).

8. *See* Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 468, 482 (2010) (providing a definition for bad faith borrowing from another doctrinal area).

9. Magarian, *supra* note 3, at 98.

10. *Id*. at 96–97.

11. *See, e.g.*, Akhil Reed Amar, Heller, HLR, *and Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 167 (2008) (suggesting that the word "militia" must have a technical meaning different from simply "the people"); Miller, *supra* note 4, at 955 (noting that the Militia Clauses "have not been completely swept out of the constitution").

standards of review—at least as they are currently understood—are ill-suited to settle difficult Second Amendment questions.[12] Many Second Amendment scholars (although by no means all) suggest that any insurrectionist impulse the Second Amendment may protect is now vestigial—if it ever protected such an impulse.[13] Magarian's contribution is less his conclusions about the Second Amendment, as it is his novel First Amendment arguments that support them. He makes a strong textual, intratextual, and ideological case that the Constitution protects speech as the primary, perhaps sole, legitimate method of political change. In this sense, *Speaking Truth to Firepower* is fresh and powerful.

Magarian does not commit to a particular methodology (textualism, original public meaning, original intent, original expected applications, living constitutionalism, common law constitutionalism, etc.) that supports his interpretive and normative conclusions.[14] This is a common hedge, employed by judges and scholars alike, and one cannot fault him too much for the evasion. But methodology does have consequences. One can argue that the Framers of the original Constitution were wary of insurrectionism when drafting the Second Amendment; one can argue that no common speaker of English in 1791 would have understood an insurrectionist purpose in the Second Amendment; or one can say that the experience of the Whiskey Rebellion, the Civil War, or domestic unrest in the twentieth century, quenched the Second Amendment's insurrectionist fire. All three lead to the same place—speech trumps guns when it comes to political change—but each approach carries with it different implications for future firearm adjudication.

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12. *See, e.g.*, Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L. J. 852, 930–31 (2013) (discussing the problems of using First Amendment standards of scrutiny); Lawrence Rosenthal, *Second Amendment Plumbing After* Heller*: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 URB. LAW. 1, 82 (2009) (footnote omitted) ("Seeking guidance from the standards of scrutiny under the First Amendment, although advocated by some, encounters serious problems.").

13. There are varying discussions of insurrectionism and the Second Amendment, at various levels of specificity and detail. *See, e.g.*, Carl T. Bogus, Heller *and Insurrectionism*, 59 SYRACUSE L. REV. 25, 256-58 (2008) (arguing both that insurrectionism, to the extent it existed at all, was "extinguished by the Civil War"); Joshua Horwitz & Casey Anderson, *Taking Gun Rights Seriously: The Insurrectionist Idea and Its Consequences*, 1 ALB. GOV'T L. REV. 496, 502 (2008) (describing it as "a gross perversion of the intent of the Framers" to ascribe an insurrectionist reading to the Second Amendment). *But see* David B. Kopel & Christopher C. Little, *Communitarians, Neorepublicans, and Guns: Assessing the Case for Firearms Prohibition*, 56 MD. L. REV. 438, 521 (1997) (identifying the right to insurrection in the Second Amendment).

14. Magarian, *supra* note 3, at 74 ("I follow an eclectic and normatively indeterminate textualist approach to constitutional interpretation, using and defending varied extrinsic interpretive aids . . . .").

Magarian is the weakest on the policy and doctrinal implications of his critique. If persuasion trumps coercion in all matters of constitutional decision making, how does that normative proposition decide cases? For example, if we accept the proposition that the Constitution maximizes the right to expression at the expense of the right to keep and bear arms, does that mean that regulations on political speech or hate speech meet constitutional muster only when offset by an incremental broadening of the right to keep and bear arms? If a person is denied constitutional protections for the political channels for change,[15] does that mean that she now possesses an increased moral or legal claim to the tools of political violence? How precisely are courts to maintain the balance struck between political dynamism through the pen and political dynamism through the sword? And what, if anything, does that dynamic have to say about the more pedestrian concerns that preoccupy *Heller* and *McDonald*—defense against burglars and robbers, rather than malicious government? On these points, *Speaking Truth to Firepower*, compelling as it is otherwise, has little to say.

Part I of this Essay responds to Magarian's central objection to analogies between the First and Second Amendments: that First Amendment analogies are used in a manner either too loose to be analytically rigorous, or too rigid to be practical. The Response acknowledges the strength of this criticism, and offers a modest defense of the utility of First Amendment analogs as framing devices for Second Amendment adjudication.

Part II of this Essay explores Magarian's own use of First Amendment framing devices for the Second Amendment and explains why the argument is effective, even if it is limited to resolving perhaps the least contentious issue concerning the scope of the Second Amendment: whether the Second Amendment legitimates armed rebellion.

Part III of this Essay concludes by reviewing Magarian's treatment of the issue of First and Second Amendment differences with respect to collective rights. This Part suggests that Magarian has identified a deeper issue of constitutional design and structure that his article does not completely pursue, and which could be used to address some of the issues that *Speaking Truth to Firepower* leaves unresolved.

I. Magarian on the Abuse of First Amendment Analogs: Abstraction and Absurdity

Pro-gun advocacy swarms thick with analogies between speech and firearms. Hate guns? You must also hate free speech. Want to license someone's assault rifle? You probably want to license the Bible. Such

15. *Cf.* Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612 (2013) (declaring § 4(b) of the Voting Rights Act unconstitutional).

appeals are a common rhetorical device, and can be found everywhere from blog comment threads[16] to the official records of the United States Senate.[17] The United States Supreme Court is not beyond such appeals; Justice Scalia leveraged the First Amendment numerous times to declare an individual right to keep and bear arms in his *Heller* opinion.[18]

Speaking Truth to Firepower takes on these analogs, whether used by judges, advocates, or scholars, and attempts to show how misguided they are. Magarian's criticisms are well-grounded, but tend to undervalue the extent to which First Amendment analogs legitimate categoricalization in Second Amendment cases. Further, Magarian's second criticism, the more persuasive of the two, fails to fully appreciate the role that analogs can play in identifying institutions that shape both the First and the Second Amendments. Indeed, one of these institutions, the militia, plays a prominent role in the third portion of Magarian's own article, as discussed below.

Magarian criticizes some writers, including this one, for articulating First Amendment analogs at a trivial level of abstraction.[19] The First Amendment uses categories; the Second Amendment uses categories. Neither of these similarities, according to Magarian, tells us very much.[20]

Perhaps, but, they do tell us more than we knew before. The Second Amendment is a "vast *terra incognita*."[21] And it uses terms that are not as crystalline as many people think. "Keep," "bear," and "arms" cannot contain the full semantic content of the dictionary and still be functional as law.[22] Even if we limit the Amendment to the "operative" clause, these terms are

16. *See* Scott Wilson, Comment to *NJ v. Gun Owners, Again*, National Review Online (Sept. 28, 2011, 11:59 AM) (on file with author) (suggesting that persons cannot be made to get a license to buy a book or go to church).

17. *See e.g.*, *Proposals to Reduce Gun Violence: Protecting our Communities While Respecting the Second Amendment: Hearing Before the Subcomm. on the Constitution, Civil Rights & Human Rights of the S. Comm. on the Judiciary*, 113th Cong. 6 (2013) (statement of Charles J. Cooper, Partner, Cooper & Kirk, PLLC), http://www.judiciary.senate.gov/pdf/2-12-13CooperTestimony.pdf (comparing the right to keep a firearm in the home as the same as the right to express unpopular opinions). Senator Ted Cruz of Texas, for example, attempted to discredit fellow Senator Diane Feinstein's assault weapons legislation with the largely rhetorical question of what kind of books she would license. *See* Eyeder Peralta, *'I Am Not a Sixth Grader': Sens. Feinstein, Cruz Spar on 2nd Amendment*, NATIONAL PUBLIC RADIO (Mar. 14 2013), http://www.npr.org/blogs/thetwo-way/2013/03/14/174332925/i-am-not-a-sixth-grader-sens-feinstein-cruz-spar-on-2nd-amendment.

18. *See* District of Columbia v. Heller, 554 U.S. 570, 579–80, 582, 591, 595, 618, 629 n.27 (2008) (appealing to free speech or the First Amendment to support various interpretive points).

19. Magarian, *supra* note 3, at 67.

20. *Id.*; *cf.* Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 91 (2d Cir. 2012) ("We are hesitant to import *substantive* First Amendment principles wholesale into Second Amendment jurisprudence.").

21. United States v. Masciandaro, 638 F.3d 458, 475 (4th Cir. 2011).

22. *See* Miller, *supra* note 12, at 896–97.

cushioned by other terms, "the right" and "infringed"—terms that require construction.[23] A threshold issue in construing any constitutional protection is to determine what falls within the zone of protection and what falls outside that zone.[24] To say that the Second Amendment uses categories in the same way that the First Amendment does is to say that not all things that ordinary English-speakers understand as "speech" are in fact *First Amendment* speech; in the same way that not all things that ordinary English-speakers understand as "keep[ing]," or "bear[ing]," or "arms" are *Second Amendment* "keep[ing]," or "bear[ing]," or "arms."[25]

As I've written elsewhere, if you consult a dictionary, whether printed in 1791 or 2013, "keep" means "have," "bear" means "carry," "arm" means "weapon."[26] The mistake that many gun-rights activists make is to presume that this means that *any* example of something that meets the semantic sense of keep, bear, or arm is protected, and then place the burden on the defendant to show that the regulation is compelling, or important, or reasonable.[27] But only the most zealous free speech advocate suggests that *every* utterance is protected, subject only to some showing of a compelling, important, or reasonable reason for the regulation. Fighting words, obscenity, and libel are not First Amendment speech because their incremental contribution to public discourse is outweighed by their actual or potential detrimental effects. This a priori judgment is encoded in the very concept of "speech" that the First Amendment text is supposed to communicate.

In this sense, the First Amendment analogy to unprotected "speech" is helpful. It *does* advance our understanding of the Second Amendment to accept that some kinds of dangerous or unusual devices—a vial of anthrax, for example—is not, and cannot be, a Second Amendment "arm," irrespective of its semantic meaning, or its utility for self-defense, even if the precise method for determining what is in fact a "not-arm," has yet to fully emerge.[28] The fact that the Second Amendment text contemplates a yet

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23. *Id*. at 897; *cf.* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1773 (2004) (observing that one approach to the indeterminate nature of the word "speech" in the First Amendment is to note that the First Amendment protects "the freedom of speech").

24. This is a point that Professor Blocher makes well in Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 387 (2009).

25. *See* Schauer, *supra* note 23, at 1771 (discussing theories of what does not count as First Amendment speech); U.S. CONST. amend. II.

26. Miller, *supra* note 12, at 897.

27. *See* Peralta, *supra* note 17.

28. One frequently urged approach is that any weapon "in common use" is protected by the Second Amendment. *See* District of Columbia v. Heller, 554 U.S. 570, 624 (2008). But, as Laurence Tribe, among others have noted, that leads to a severe circularity problem. *See Proposals to Reduce Gun Violence: Protecting our Communities While Respecting the Second Amendment: Hearing Before the Subcomm. on the Constitution, Civil Rights & Human Rights of the S. Comm. on*

undefined set of pre-packaged "not-arms" (or "not-bearing" or "not-keeping") means at the very least we are working within an analytical frame more sturdy and circumscribed than Fourth Amendment "reasonableness," or the glittering tautology of "due process," or the unmanageably broad concept of "self-defense."

Further, accepting that in both the First and Second Amendments, plain text is not really all that plain is an important concession both as a matter of popular constitutionalism and as a matter of constitutional implementation. As a matter of popular constitutionalism, the fact that most Americans accept that their most cherished constitutional value—free speech—is hemmed in by historically- and judicially-constructed extra-textual constraints, helps legitimate such extra-textual constraints in the Second Amendment.[29] As a matter of implementation, First Amendment analogs bolster the case for constitutional construction, that is, the development of doctrine designed to make the text work as law.[30] The history of free expression jurisprudence has been to layer non-textual doctrine onto the Amendment to make it functional over time. Few are willing to say that the Republic has abandoned a commitment to free expression simply because judges must devise a test to determine whether a threat is protected by the First Amendment.[31] Appeals to the First Amendment—even at the broad level of categoricalism—thus help provide cover for Second Amendment decision rules that will inevitably depart from the strict grammatical meaning of the Second Amendment's operative terms.

Magarian also argues that writers searching for First and Second Amendment parallels fail fully to appreciate the functional and ideological differences between these two Amendments.[32] Their lack of discernment leads these writers astray. Either they wind up blundering about in the thicket of First Amendment doctrine, looking for an analogous standard of

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the Judiciary, 113th Cong. 13–14 (2013) (statement of Laurence Tribe, Carl M. Loeb University Professor, Harvard Law School), http://www.judiciary.senate.gov/pdf/2-12-13Tribe Testimony.pdf. If the market is suddenly flooded with vials of anthrax, or machine guns, or short-barreled shotguns, then suddenly the arm is in common use and becomes constitutional. *See also* Michael P. O'Shea, *The Right to Defensive Arms after* District of Columbia v. Heller, 111 W. VA. L. REV. 349, 381 (2009) ("[A] constitutional rule that uses the presence or absence of particular arms in common use as a gauge of the constitutionality of firearms legislation runs a serious risk of harmful circularity.").

29. *See* Tebbe & Tsai, *supra* note 8, at 493 (discussing the legitimating function of borrowing from one area of law for another).

30. For more on the distinction between interpretation and construction, see generally Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010).

31. *See* United States v. Jeffries, 692 F.3d 473, 478 (6th Cir. 2012) (Sutton, J., dubitante) (discussing a test to separate a "true threat" from protected speech).

32. *See* Magarian, *supra* note 3, at 72.

review (strict, intermediate, rational, content neutral, viewpoint neutral, "time, place, and manner," etc.) or, worse, they foolishly proclaim that a specific regulation on firearms must be constitutionally infirm, because no such regulation is permitted on speech. The result, Magarian implies, are arguments that range from the clumsy to the crackpot. In this section of the critique, *Speaking Truth to Firepower* shines.

As Magarian explains, a fundamental problem with superimposing First Amendment doctrine onto the Second is that the speech/action and content/incident distinction in free speech analysis does not neatly map onto firearm regulations.[33] The First Amendment says you can take a bullhorn away from a person because it will wake up the neighbors, but you can't take away the bullhorn because he shouts "the Speaker of the House is a Communist." If you fashion Second Amendment doctrine along similar lines, it leads to the incomprehensible conclusion that the assassin can only be disarmed after he aims his gun at the Speaker of the House.

The problem is amplified, Magarian notes, by the fact that most of the traditional forms of scrutiny for speech—strict, intermediate, and rational basis—are triggered by a distinction between regulations that target the content of the speech, as opposed to those which are content neutral.[34] But, as Magarian points out, there really is no content-neutral regulation of firearms.[35] All regulations are of the firearm. It is meaningful to say that a regulation forbidding bullhorns in public parks does not target speech; it is nonsense to say that a regulation forbidding firearms in public parks does not target guns.[36]

Magarian criticizes wooden application of First Amendment doctrine in Second Amendment cases.[37] His critique is delivered with appropriate scholarly reserve, but it is cutting. To argue that children have a Second Amendment right to bring a pistol to school, simply because they have a First Amendment right to bring a *picture* of a pistol to school is risible—deservedly so.[38] Nevertheless, a core and periphery approach to the Second Amendment, loosely based upon the First Amendment, is not so easily ridiculed, as Magarian concedes. Despite some objectors,[39] this two-step

33. *Id*. at 55–56.

34. *Id*. at 63–65.

35. *Id*. at 63–64.

36. *See id.* at 64–65.

37. *Id*. at 70–71 (calling some of these arguments "ill-conceived" and "reckless").

38. *Cf.* Turner v. Sw. City Sch. Dist., 82 F. Supp. 2d 757, 766 (S.D. Ohio 1999) (rejecting plaintiff's First Amendment argument that prohibitions against bringing "look-alike" guns to school covers photographs and thus is overbroad); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) (discussing First Amendment constitutional rights of students).

39. *See* Heller v. District of Columbia, 670 F.3d 1244, 1277 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (rejecting traditional balancing approaches based on the First Amendment); National

core and periphery approach has been the dominant method of Second Amendment adjudication in the lower courts to date.[40]

The problem Magarian identifies is not so much that the core and periphery approach comes from the First Amendment, it is that attempts to define core Second Amendment values by reference to the First are often inapt. Magarian is correct: a right to firearms cannot advance autonomy interests in the same way, and to the same degree, as speech; if it did, it would mean that prisoners—who still possess free speech rights grounded in notions of autonomy—would retain a corresponding right to guns.[41] Similarly, Magarian correctly observes that the First Amendment right to form a political advocacy organization does not necessarily entail the right to form an *armed* political advocacy organization.[42]

But even here, Magarian is perhaps too dismissive of the values that the First and Second Amendments may in fact share. To recognize that the First and the Second Amendments share certain values concerning autonomy or association is not to suggest they should be treated exactly alike in all circumstances. If anything, the recognition that these rights share certain values drives a search for institutional and doctrinal constraints, suited to the right and possibly reflected in the constitutional text, that organize these values. So, for instance, one can say that the home is an institution that structures our understanding of autonomy. Or, one can say that a political

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Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms and Explosives, No. 11–10959, 2013 WL 1809749, at *4 (5th Cir. Apr. 30, 2013) (Jones, J., dissenting from denial of hearing en banc) ("[W]e should presuppose that the fundamental right to keep and bear arms is not itself subject to interest balancing.")

40. *See, e.g.*, United States v. Marzzarella, 614 F.3d 85, 94 (3d Cir. 2010); United States v. Chester, 628 F.3d 673, 682 (4th Cir. 2010); Heller v. District of Columbia, 670 F.3d 1244, 1257 (D.C. Cir. 2011); Ezell v. City of Chicago, 651 F.3d 684, 698 (7th Cir. 2011). For more on the origins of the core and periphery idea, and its application in the First and Second Amendments, see Blocher, *supra* note 24, at 394–95, and Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923, 976 (2009).

41. *See* Magarian, *supra* note 3, at 67 ("[N]either 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."); Joseph Blocher, *Second Things First: What Free Speech Can and Can't Say About Guns*, 91 TEXAS L. REV. SEE ALSO 37, 40–41 (2012).

42. Magarian criticizes my exploration of the ideological similarities between the monopoly on the tools of violence and the monopoly on political speech. Magarian, *supra* note 3, at 67, n.87. But my discussion in that Article is mostly descriptive of what the Court has been doing, and predictive of where it could be going. *See* Miller, *supra* note 4, at 904. It is not a statement of what the Court should do. I have argued elsewhere that insurrection can only be used as a legal value in the sense that *Heller* uses it—to sustain the proposition that universal citizen disarmament in the home is constitutionally invalid. Arguments that go beyond that bare minimum are primarily arguments from politics, morality, or from brute force, but not arguments from law in any positivist sense of the word. *See* Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1313 (2009).

party or advocacy organization is an institution that structures our understanding of freedom of association, freedom of expression, or the right to petition the government. Certain constitutional values may converge in some of these institutions. For example, First Amendment values of autonomy and association, Second Amendment values of self-defense, and Fourth Amendment values of privacy, tend to converge in some extra-textual constitutional concept we call the "home."[43] But that convergence is not an argument against analogical reasoning, as much as it is an argument for recognizing that an institution exists, that it exerts a force that shapes the constitutional right under consideration, and that such shaping must be harmonized with other constitutional values, tradition, and text. Without such an analytical inquiry, the features of these institutions and values, what Laurence Tribe has described as the "invisible constitution," may remain hidden.[44]

II. Magarian on the Use of First Amendment Analogs: Foiling the Second Amendment

Although Magarian takes many of us to task for insufficiently rigorous use of First Amendment analogs, Magarian does not believe the First Amendment is useless for Second Amendment construction. Instead, Magarian suggests that it is through *contrast* that the First Amendment brings the Second into relief. For Magarian, the First and Second Amendments are foils, and whether through original intention, common law development, original public understanding, or the "eclectic" approach of Magarian, the First Amendment has displaced the Second with respect to political dynamism.

Speaking Truth to Firepower marshals strong arguments for the First Amendment's foiling of the Second Amendment. Textually, Magarian notes that the Second Amendment, unlike the First, contains a prefatory clause concerning the militia and a free state.[45] This textual difference, according to Magarian, supports a distinction between the First Amendment's more individualistic construction and the Second Amendment's "collective" one.[46] Doctrinally, Magarian notes that the half-century of expanding protection for free expression—even to protecting advocacy of violence in *Brandenburg v. Ohio*—simply cannot be paired with equal protections to the tools for

43. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 34 (2001) (recognizing that "the interior of homes [is] the prototypical . . . area of protected privacy").

44. *See* LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION 2 , 156 (2008) (identifying the home as part of the "invisible constitution").

45. U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free state . . . .").

46. Magarian, *supra* note 3, at 85.

violence.[47] As Magarian succinctly puts it: "We cannot have both First Amendment dynamism and Second Amendment insurrectionism . . . we have made our choice [for the First Amendment]."[48] Magarian also makes a few nods towards, perhaps, a historical understanding that the Second Amendment does not protect insurrection.[49]

Magarian seems unwilling to commit himself to a certain methodology for his conclusions about the scope of the Second Amendment right. This is a familiar peccadillo of scholars (including this one), advocates, and judges. Nevertheless, it matters. An argument that freedom of speech displaces arms as the mechanism for political dynamism is far more convincing if one understands the value of insurrection as experienced in the American Civil War, rather than in the American War of Independence. And understanding that the American Civil War has as much to say about the Second Amendment as the American War of Independence requires some methodology that accepts the Constitution can change over time, whether one labels that change "framework originalism," or "living constitutionalism," or "common law constitutionalism," or something else.

For all of Magarian's strong points that the First Amendment is a foil to the Second, his argument is trained on a relatively narrow proposition—that the Second Amendment cannot be read to legitimate open armed rebellion. If, as Jack Balkin has observed, the purpose of a constitution—any constitution—is "to make politics possible,"[50] then this is not an earth-shattering proposition. To say that the Constitution commits the Republic to political dynamism only through free expression *is* something—it helps justify why *Heller* disclaims an individual right to own an M-16 rifle or an aircraft carrier[51]—but it does not go much further than that.

Magarian's foiling the right to keep and bear arms with speech also raises some conceptual problems. If free speech is the primary mechanism for political dynamism—if the Skokie marchers cannot carry rifles with them because they have the First Amendment on their side[52]—then what happens when that expression is limited through regulation? Is Magarian's argument that dynamism through expression and dynamism through threats of violence

47. *Id*. at 94.

48. *Id*. at 53.

49. *Id*. at 97 (discussing historical examples of insurrection as sapping the Second Amendment of insurrectionary meaning).

50. Jack M. Balkin, *Constitutional Hardball and Constitutional Crises*, 26 QUINNIPIAC L. REV. 579, 592 (2008).

51. *See* District of Columbia v. Heller, 554 U.S. 570, 627 (2008) (discussing military-type weapons that can be banned).

52. *Cf.* Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978) (striking down various regulations restricting Nazis from marching in Skokie, Illinois).

are zero-sum propositions, and that any diminution of the one must be offset with a corresponding increase of the other? Could it really be that if legal protections for minorities to express themselves through the franchise are curtailed, for example, that they acquire an increased moral—even constitutional—right to achieve political dynamism through force?[53]

Further, Magarian's free speech foil doesn't offer a strong account of what a constitutional commitment to free speech means when the potential antagonist isn't a criminal government, but just a criminal. Here, Magarian's argument seems to sputter. It is unclear what the First Amendment foil means for the woman who says that she should be able to obtain a firearm for home defense free from any license requirement whatsoever. Magarian could be saying that the constitutional commitment to change through free expression includes a broader commitment to rational deliberation and a well-ordered society.[54] In that case, such a commitment would supersede any claims the woman may have to unfettered access to a firearm. Magarian could be saying that licensing firearms is the legal mechanism by which the constitutional commitment to political dynamism through speech is maintained. In other words, Magarian could be suggesting that if arms are *too* freely available, even for personal self-defense, they are either apt to fall in the hands of those who are committed *only* to violent political dynamism, or their omnipresence frustrates peaceful and orderly political change by creating a climate in which violent political activity becomes the *first* rather than the *last* resort.[55] Licensing of firearms is therefore necessary to maintain speech's predominance in political dynamism. Or Magarian could be saying none of these things. It will be interesting to see if he pursues the implications of his thesis further. *Speaking Truth to Firepower* undoubtedly possesses significant conceptual punch; it's just that it is loosed against a relatively easy target.

III. Magarian and the Once and Future Militia Clause

Perhaps the most provocative, and under-explored, aspect of *Speaking Truth to Firepower* is its treatment of how the First Amendment and Second

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53. *Cf. New Black Panthers Back at Philly Voting Site*, FOX NEWS, Nov. 6, 2012, http://www.foxnews.com/politics/2012/11/06/new-black-panthers-back-at-philly-voting-site/ (discussing private citizen dressed in a "trademark black beret, combat-style uniform and heavy boots" acting as a poll watcher).

54. *See* David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 334–35, 354–60 (1991) (discussing the justification for free expression by reference to a "persuasion principle").

55. *See* Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 704 (2007) (suggesting that too many arms, or too dangerous of arms, makes democratic deliberation too difficult); *see also* Bogus, *supra* note 13, at 257 (noting that a problem with insurrectionist theories is that, for some, tyranny is not "a future prospect, but a present reality").

Amendment diverge with respect to their understanding of collective and individual rights. Magarian expertly lays out the various alternatives the prefatory clause must have in Second Amendment construction. He makes a compelling argument that the Militia Clause, even after *Heller*, must exert some textual control over how the individual right to keep and bear arms is construed.[56] Magarian's primary point is that the Second Amendment cannot protect individual rights nearly to the degree that the First Amendment does, because the Second Amendment, unlike the First, states a collective purpose for the right to keep and bear arms.[57] Magarian does not say that the right is solely collective, a position that he concedes has been vanquished by *Heller* and *McDonald*.[58] Instead, Magarian uses the Militia Clause to articulate a difference between political dynamism through speech and political dynamism through violence. The former is protected and the latter cannot be. This is a strong textual move. But Magarian's insights about the Militia Clause could go further.

Magarian centers his piece on the destabilizing effect of the First Amendment on the Second. But, in fact, the most destabilizing effects on the Second Amendment don't actually come from the First Amendment; they come from *Heller* and *McDonald* themselves. *Heller* and *McDonald* codified two conceptual revolutions in Second Amendment jurisprudence: first, the migration of self-defense as a legal concept away from the common law, the Ninth Amendment, or the concept of due process,[59] to the Second Amendment; and second, the delegitimation of the organized militia as an institution that structures the right to keep and bear arms. As a matter of Reconstruction history in particular, there is a strong reason to believe that this destabilization of the foundations of the Second Amendment are historically supportable. Reconstruction legislators were profoundly distrustful that former Confederate states would accord to the Freedmen equal access to self-defense protections; Reconstruction legislators often spoke imprecisely about a right to arms and a right to self-defense; and Reconstruction legislators were also actively, and rightly, skeptical that the former Confederate state militias, once reconstituted, would protect the Freedmen.

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56. Magarian, *supra* note 3, at 84–87.

57. *Id*. at 85–86.

58. *Id*. at 78–79.

59. *See* Michael W. McConnell, *The Ninth Amendment in Light of Text and History*, 2010 CATO SUP. CT. REV. 13, 24 (discussing self-defense and its relationship to natural law, common law, and the Ninth Amendment); *see also* Montana v. Egelhoff, 518 U.S. 37, 56 (1996) (plurality opinion) (suggesting that jury must be able to hear self-defense evidence as a matter of fundamental due process).

But whatever the historical legitimacy of this conceptual revolution, it leaves the Second Amendment in disarray. Whereas at one time the Militia Clause could structure answers to questions like: Is a short-barreled shotgun an "arm" that the Second Amendment protects?[60] Or, Can I form a socialist gun club and march through the largest city in Illinois?[61] Now, after Reconstruction, *Heller*, and *McDonald*, these questions become much more problematic, because the "degree of fit between the prefatory clause and the protected right" have loosened.[62] Instead, the courts are left with a hodgepodge of history, conventions, common law, and policy considerations from which to structure a wide-open claim to "keep and bear arms" for "confrontation."[63]

What Magarian's article suggests, but does not completely explore, is that the prefatory clause may not only exert an interpretive gravity on the narrow question of political dynamism (persuasion or violence), but may exert interpretive gravity on broader questions of Second Amendment construction and scope. For example, it may be possible to say that, because the Militia Clause, including its signature idea of "well-regulated," is still in the Second Amendment, certain types of behaviors—policing one's neighborhood as a self-appointed community watchman, for example—are not assertions of totally individual rights. A posse of self-appointed community watchmen looks far more like a militia than a simple group of private citizens. A person who takes it upon himself to exercise deadly force to prevent a crime is not necessarily asserting solely individual rights either. Individuals who apprehend or harm criminals in public places, even in self-defense, have long been understood to be asserting a power uniquely belonging to the sovereign.[64] And if that is true, then the residual presence of Second Amendment references to a "well regulated Militia" may help explain, textually, why governments may still have something to say about

60. *See* United States v. Miller, 307 U.S. 174, 178 (1939).

61. *See* Presser v. Illinois, 116 U.S. 252, 264 (1886).

62. *See* District of Columbia v. Heller, 554 U.S. 570, 627 (2008).

63. *See id.* at 592.

64. *See* Joseph H. Beale, Jr., *Retreat from a Murderous Assault*, 16 HARV. L. REV. 567, 567–68 (1903) (discussing how homicide, even in self-defense, was a crime unless committed in exercise of the kings writ); David McCord & Sandra K. Lyons, *Moral Reasoning and the Criminal Law: The Example of Self-Defense*, 30 AM. CRIM. L. REV. 97, 138 (1992) (noting that the "kings of England . . . adopted a blanket rule that all homicides were criminal but that self-defense was a factor which might result in granting of a royal pardon"); Rollin M. Perkins, *A Re-examination of Malice Aforethought*, 43 YALE L. J. 537, 539 (1934) ("According to the ancient common law of England, only those homicides were innocent which were caused in the enforcement of justice. . ."). *See also* 2 FREDERICK POLLACK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 479 (2d ed. 1899) (noting that at English common law "the sphere of justifiable homicide was very narrow, and the cases which fell within it . . . would have been regarded less as cases of legitimate self-defence [sic] than as executions").

when, under what circumstances, and with what weapons, such an awesome power may be exercised.