THE REVOLUTIONARY SECOND AMENDMENT

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I. INTRODUCTION

In some sectors of the American populace, there is considerable doubt about the value of the Second Amendment.[1] Frequently the dissenting argument begins with affirmation of the libertarian principles underlying the Second Amendment but concludes that, all things considered, the benefits of the Second Amendment in terms of personal liberties aren't worth its costs in drive-by shootings, gunpoint muggings and schoolchildren murdered by classmates.[2] Its latter-day critics simply don't believe that the Second Amendment's guarantee that "the right of the people to keep and bear Arms shall not be infringed" really guarantees Americans much—or anything—of value.[3]

There was, however, an era of American history during which the Second Amendment's right to bear arms was widely perceived to reserve to the citizenry the profound ability to "alter or abolish" their government.[4] The ability to raise a standing

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

2. *See, e.g.*, *Grasping the Obvious Pathology*, N.Y. TIMES, Sept. 17, 1999, at A22 (labeling continued belief in the value of the Second Amendment a "parochial delusion").

3. "[T]here will be few tears shed if and when the Second Amendment is held to guarantee nothing more than the state National Guard." Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, *in* ANTONIN SCALIA ET AL., A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 43 (Amy Gutmann ed., 1997).

4. *See infra* Section II.C.

army, reserved to the federal government by the Constitution,[5] was considered a grave threat to popular liberty, justified only by its necessity for defense against foreign aggressors. The right to bear arms, subsequently enshrined in the Bill of Rights, was intended to check potential abuses by a tyrannical government armed with such a standing army.[6]

The Second Amendment is no longer interpreted to protect the right of the populace to retain the means necessary for popular overthrow of an oppressing government.[7] The individualist vision of the Second Amendment, as derived from a Reconstruction-era reinterpretation of the Amendment, is now predominant in policy makers' minds. The right to bear arms as a right of revolution, like the ability of the populace to practice that right, is a distant memory.

Consistent with the intention of the Second Amendment as a right of revolution, there was a time during the first American century when an armed citizenry could have overthrown the government, standing army and all. From the founding era through the middle of the nineteenth century, a populace determined to revolt would have been able by sheer numbers to best the enlisted forces of the American government.[8] Wars of that era were waged primarily by infantries carrying small arms, the same weapons held by millions of private citizens. As the twenty-first century begins, however, the Cold War and the role of the United States as global policeman have required American armed forces that are both more numerous and exponentially more sophisticated technologically than their predecessors.[9] The federal government can now muster war-waging capabilities that, though they might be used only at a terrible cost in American lives, could not be overcome by even the most determined of popular uprisings.[10] With modern weaponry and the diminished interest of American civilians in things martial, gone is the era

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5. U.S. CONST. art. I, § 8, cl. 12 ("[The Congress shall have the Power] To raise and support Armies . . . ").

6. AKHIL REED AMAR, THE BILL OF RIGHTS 47 (1998).

7. *See infra* Subsection IV.B.1.

8. *See infra* text accompanying notes 77-82.

9. *See infra* text accompanying notes 83-92.

10. *See* ALLAN R. MILLETT & PETER MASLOWSKI, FOR THE COMMON DEFENSE: A MILITARY HISTORY OF THE UNITED STATES 316-42 (1994).

when a concerted popular effort could have deterred even the most destructive resistance of the government to its own overthrow.

With these two passings—the disappearance from Second Amendment doctrine of the revolutionary focus and the death of the American citizenry's absolute ability to overthrow the government by force—so has gone the deepest, most profound, and most vital function of the Second Amendment. Insofar as the Second Amendment was once the ultimate check against the federal government in a elaborate system of checks and balances, the Amendment is a shadow of its former self. The Second Amendment has been the subject of a gradual disappearing act, no longer guarding absolutely the touchstone of robust democratic governance—a right of self-determination—but constitutionally requiring something that some Americans consider to be of questionable worth—a right to own guns. The Second Amendment is no longer afforded the status befitting the solemn political right it was intended to be, and it is no longer clear that it would have any modern meaning even if it were.

As a descriptive matter, dismissal of today's Second Amendment as a mere shadow of its former self should be uncontroversial, if somewhat novel, whether one is a staunch gun-control proponent or a card-carrying National Rifle Association ("NRA") member. Even if one views the right to bear arms as an inviolable right of individual self-defense—and many thoughtful, intelligent Americans share this vision[11]—it is imperative to acknowledge that the right to bear arms as a personal right of self-defense does not occupy the crucial position in the nation's democratic system that inheres to the right to bear arms as the ultimate check on tyrannical government. The former, not to be belittled, is a policy choice regarding personal safety in this nation; the latter is (or rather was) the touchstone of true democratic self-determination. Prudence and intellectual

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11. For a principled, if somewhat detached, defense of the individual right of self-protection, as well as a thorough discussion of the intent of the Second Amendment, see William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1241 n.43 (1994).

Frequent, dedicated and thoughtful defense of the Second Amendment's value has been a theme of the writing of Eugene Volokh. *See, e.g.*, Eugene Volokh, *Guns and the Constitution*, WALL ST. J., Apr. 12, 1999, at A23.

honesty require acknowledgment that the Second Amendment as the ultimate of checks on government, as a means to alter or abolish one's government, retains little content. With America's most fundamental political right severely diminished by the evolutionary march of technology, one cannot help but wonder: Whither the absolute right of popular self-determination?

Drawing on the underexamined distinction between civil rights and political rights, this Article differentiates the *political* right to bear arms, a collective right of revolution, from the *civil* right to bear arms, a personal right of self-defense. The distinction is crucial to formulating a coherent vision of the right to bear arms because these two Second Amendment paradigms can no longer coexist. The fundamental disconnect between the two conceptions is illuminated by analysis in terms of Second Amendment "symmetry," a concept used to formalize intuitions about the rough proportionality between the offensive ability to cause harm and the defensive ability to defend oneself that correspond to a given Second Amendment paradigm. The symmetry presupposed by the Second Amendment as a political right and the symmetry underlying the Second Amendment as a civil right were highly similar until approximately the Civil War. With the growth and increased sophistication of the federal government's ability to wage modern war, however, the ability of public arms-bearing to serve as a meaningful ultimate check on our government now directly conflicts with the ability of the right to bear arms to serve as a meaningful right of individual self-defense. This divergence of the two conceptions of Second Amendment symmetry has profound consequences for our understanding of the American system of checks and balances and, moreover, for the American democratic experiment.

This Article proceeds as follows: Part II describes the two dominant conceptions of the Second Amendment, called here the personal and the revolutionary,[12] and argues that the right to bear arms was originally conceived as a collective, revolutionary right, albeit one that presupposed individual gun ownership. Part III delineates the distiction between civil and political

12. This Article largely eschews use of the terms "individual" and "collective" as labels for visions of the Second Amendment because each has two often-elided connotations. *See infra* note 17.

rights and then applies the civil/political framework to illuminate the role of the Second Amendment in the pantheon of rights guaranteed by the Constitution.

Part IV examines two separate metamorphoses, one technological and one conceptual, that have forced fundamental reconceptualization of the right to bear arms in America. Section IV.A introduces the idea of symmetry in Second Amendment conceptualization and exposes the symmetries underlying the revolutionary and personal conceptions of the right to bear arms. That section then argues that while the two symmetries described could and did co-exist at the Founding and through much of the first American century, the global exigencies of the twentieth century have rendered the personal and revolutionary symmetries incompatible. Section IV.B describes the dramatic shift between Second Amendment paradigms, from revolutionary to personal, wrought by Reconstruction. It then argues that those changes have forced the right to bear arms, traditionally a political right, into the possibly ill-fitting role of a civil right. Part V discusses the resonance that the reconceptualization of the right to bear arms, particularly the foreclosure of the Second Amendment as a right of revolution, has in our understanding of the American democratic experiment.

II. CONCEPTIONS OF THE SECOND AMENDMENT

A robust understanding of the right to bear arms requires examination of perhaps the most basic inquiry regarding the Second Amendment: Exactly whose right to bear arms is it? The question of whose *right* it is, however, is not the question of whose *arms* they are. Outside the realm of pragmatic policy arguments, there is little debate on the latter issue: Whatever arms the Second Amendment protects, those protected arms can be owned by private citizens.

Some would argue that the most fundamental issue to understanding the Second Amendment is whether private citizens even have a right to bear arms or whether that right is afforded solely to "[a] well-regulated militia." The evidence is uncontroverted, however, that at no time during the existence of the Second Amendment, from its inception to the present, was the right to bear arms confined to, or intended to be confined to,

state-organized militias.[13] Not least among the evidence supporting individual ownership are the prominent precursors and contemporaries of the Second Amendment:

> [T]he Second Amendment is based on the British 1688 Bill of Rights and is related to right-to-bear-arms provisions in Framing-era state constitutions. The British right must have been individual; there were no states in England. Same for the state constitutional rights; a right mentioned in a state Bill of Rights, which protects citizens against the state government, can't belong to the state itself.[14]

The overwhelming evidence in support of an individual right to gun ownership does not prevent critics from arguing that the right accrues only to state militias.[15] As a matter of constitutional history, these latter arguments lack merit.

That point does not, however, resolve the more complicated issue: The question of the "ownership" of the intangible right to bear arms is independent of the question of the ownership of the arms themselves. It might be that arms are privately owned, and yet the right to use the weapons remains a collective right of the people.[16] It is not the ownership of guns that depends on

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13. *See, e.g.*, THE FEDERALIST No. 46 (James Madison) (Clinton Rossiter ed., 1961) (contrasting U.S. and European governments, even before the adoption of the Second Amendment, based on American willingness "to trust the people with arms"); Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139, 1141 (1996) ("Almost all [of] the qualified historians and constitutional-law scholars who have studied the subject (concur)."); Brannon P. Denning, *Gun Shy: The Second Amendment as an "Underenforced Constitutional Norm,"* 21 HARV. J.L. & PUB. POL'Y 719, 728-29 (1998) (contending that "almost all scholars who [have] studied the matter carefully" agree on an individual right to bear arms); Nelson Lund, *The Past and Future of the Individual's Right to Bear Arms*, 31 GA. L. REV. 1, 2 (1996) ("The serious literature on the subject is virtually unanimous. . . . "); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 475 (1995) (terming an individual right to bear arms the "Standard Model" of the Second Amendment).

14. Volokh, *Guns and the Constitution*, *supra* note 11, at A23.

15. *See, e.g.*, DENNIS A. HENIGAN ET AL., GUNS AND THE CONSTITUTION: THE MYTH OF THE SECOND AMENDMENT PROTECTION FOR FIREARMS IN AMERICA (1996) (arguing for the states'-right conception); Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 DAYTON L. REV. 5, 30 (1989) (same); Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 VAL. U. L. REV. 107 (1991) (same); Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and the Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57 (1995) (same); William M. Aukamp, *No "Individual" Gun Right*, NAT'L L.J., June 14, 1999, at A22 (same).

16. *See* Kevin J. Worthen, *The Right to Keep and Bear Arms in Light of*

this inquiry; it is the function of that ownership. Individual gun possession coupled with a collective, potentially revolutionary purpose would legitimize a different set of gun uses than individual gun possession for individual purposes, even though both purposes rely on public ownership of firearms. In considering the history and status of the Second Amendment, there are two polar conceptions of the instrumental ownership of the right to bear arms: The right might accrue to the people, to be used as the ultimate tool of popular sovereignty, for the purpose of checking a government bent on overreaching; or, in the alternative, the right might be a personal one, allowing Americans to protect their persons and homes from intrusions by other individuals. To avoid the confusion inherent in calling these the "collective" and "individual" conceptions of the Second Amendment, this Article will refer to the former as the "revolutionary" conception and the latter as the "personal" conception.[17]

A. The Revolutionary Conception

The revolutionary understanding of the Second Amendment is founded on the idea that the right to bear arms exists to protect the American populace from governmental tyranny. The revolutionary right to bear arms is premised on the normative assertion that while representative government will generally ensure non-tyrannical governance, it is still imperative that the populace retain the means with which to effectuate the most

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Thornton: *The People and Essential Attributes of Sovereignty*, 1998 BYU L. REV. 137, 163 ("[W]hile the right to keep and bear arms may ultimately be a collective right of the people to resist usurpation by force, if necessary, it seems that it can meaningfully be exercised only if each individual has the right to keep and bear arms.").

17. In the Second Amendment literature, "collective" is used either to mean individual ownership for collective purposes or to connote a states'-right regime. *See, e.g.*, Sam Cornell, *Commonplace or Anachronism: The Standard Model, The Second Amendment and the Problem of History in Contemporary Constitutional Theory*, 16 CONST. COMMENTARY 221 (1999). "Individual" is used to mean a vision based on either self-defense or, more broadly, any private ownership of arms. *See, e.g., id.* The latter "individual" regime thus contains the former "collective" regime, leading to much confusion. To avoid this uncertainty, this Article calls the narrower collective vision the "revolutionary" vision and the narrower individual conception the "personal" vision. The broader "collective" conception, much maligned in the literature, is here called the "states'-right" conception.

drastic of representative actions: the overthrow of an antidemocratic regime. If other vehicles for popular control of the government (particularly the vote) fail, the right to alter or abolish the government ensures that the citizenry possesses the ultimate trump card in the interaction between the governing and the governed. This so-called "right of revolution"[18] is a fundamentally collective right; it does not exist for just any dissatisfied citizen to attempt overthrow of the government.[19]

It is important here to reiterate that, though the revolutionary conception is juxtaposed with the personal conception, it too is based on a system of individual possession of weapons. The difference between the revolutionary and personal conceptions lies not in who holds the weapons, as both paradigms put those arms in the hands of ordinary citizens, but in the purpose of the Second Amendment.[20] The divergence between the two understandings stems from differing ideas about the right's functional aspect.[21] The revolutionary conception, though collective in purpose, is therefore markedly different from an understanding of the right to bear arms premised on the right of state militias or the National Guard to hold weapons.[22]

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18. This Article uses the phrase "right of revolution." Note, however, the argument made by Professor David Williams that the concept of a constitutional right of revolution is actually the sum of a natural right of revolution and a constitutional right to possess the means of revolution. David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551, 583 n.184 (1991) [hereinafter *Civic Republicanism*]. "[A] *constitutional* right to revolution may be nonsensical," and the United States certainly has nothing of the sort. *Id.* After all, the American justice system severely punishes, even executes, those who unsuccessfully attempt revolution.

19. *See* David C. Williams, *The Militia Movement and Second Amendment Revolution: Conjuring with the People*, 81 CORNELL L. REV. 879, 904-09 (1996); Worthen, *supra* note 16, at 165. Indeed, the Constitution explicitly provides for the federal government to "suppress Insurrections," U.S. CONST. art. I, § 8, cl. 15, implying that the Second Amendment's check must apply only as against an illegitimate government—that is, one unsupported by the populace acting as a collective sovereign.

20. *See* Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 215-16 (1983) (surveying primary sources that equate the "militia" with the "whole body of the people").

21. *See* Scott Bursor, Note, *Toward a Functional Framework for Interpreting the Second Amendment*, 74 TEX. L. REV. 1125, 1128 (1996).

22. Though some Americans may consider attractive an interpretive strategy that reserves the right to bear arms only to organized state-sponsored militias, it is widely accepted among scholars that this was not the prototype anticipated by the authors of the Bill of Rights. *See infra* Section II.C.

It is, for example, the revolutionary check that is central to Professor Elaine Scarry's argument that the Second Amendment reserves to the people ultimate veto power over the ability of the federal government to wage foreign wars.[23] Distilled to its essence, Scarry's argument is that nuclear weapons, because they do not require popular support in the way that traditional methods of waging war do, violate the purpose of the Second Amendment.[24] The right to bear arms, she implies, is at least partly about requiring the government to convince American citizens that the cause in question is worth risking their own lives.[25]

But the collectivist conception is central to an even more profound check than the one Scarry discusses. For Scarry, the Second Amendment is "a way of dispersing military power across the entire population."[26] This dispersion works not only as the limited checks she envisions—as both threshold and ongoing checks on the government's ability to wage foreign wars—but also as a method for requiring that the government, even if armed with a standing army, be responsive to the popular will in matters martial and otherwise. If the Bill of Rights was fundamentally about preserving "the transcendent sovereign right of a majority of the people themselves to alter or abolish government and thereby pronounce the last word on constitutional questions,"[27] then the revolutionary vision of the Second Amendment was necessarily first among equals, the most fundamental of the fundamental: It was the right to "alter and abolish" by force if necessary.[28]

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23. *See* Elaine Scarry, *War and the Social Contract: Nuclear Policy, Distribution, and the Right to Bear Arms*, 139 U. PA. L. REV. 1257 (1991).

24. *See id.*

25. *See id.* at 1298.

26. *See id.* at 1268-69.

27. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1133 (1991).

28. Professor Sanford Levinson notes that this differs markedly from Max Weber's definition of the state as the repository of a monopoly of legitimate means to violence. Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 650 (1989) (citing MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 156 (Talcott Parsons ed., A.M. Henderson & Talcott Parsons trans., 1947)). This is true only on a rigid understanding of sovereignty. The only state that lacks such a monopoly under this collectivist conception is the state acting in derogation of the will of the sovereign populace. Such a state is an illegitimate state—that is, no sovereign at all. In such situations, one might argue that legitimacy devolves

B. The Personal Conception

Relative to the rather abstract revolutionary conception of the right to bear arms, the personal conception is familiar and uncomplicated. It is the personal conception that underlies the frequent admonition from gun owners that when guns are outlawed, only outlaws will have guns.[29] The personal conception of the right to bear arms envisions a society in which individuals utilize arms and the threat value inherent in the possession of arms to protect themselves from the unlawful intrusions of other individuals.

It is the personal conception of the Second Amendment, for example, that is central to Professors Robert Cottrol and Raymond Diamond in their argument that the right to bear arms was and is a crucial freedom for blacks attempting to live lives free of racist violence.[30] Cottrol and Diamond argue that the Second Amendment guarantees to African-Americans the ability to protect themselves when the government—local, state or federal—is unable or unwilling to do so.[31] A similar government

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upon the popular sovereign, and the monopoly over the legitimate use of force belongs to the People. Williams, for example, notes that the right in question is limited: It must be a product of the body of the people; it must be a course of last resort; its inspiration must be the common good; and "its object must be a true tyrant." *Civic Republicanism*, *supra* note 18, at 582; *see also* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 410-17 (Peter Laslett ed., 1988) (defending a right of revolution against a government that threatens rather than serves the interests of its subjects).

29. This has been called "the unofficial motto of today's National Rifle Association." AMAR, THE BILL OF RIGHTS, *supra* note 6, at 266.

30. *See* Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991).

31. *Id.*; *see also* Dorothy E. Roberts, *The Meaning of Blacks' Fidelity to the Constitution*, *in* CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 228 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998). Cottrol and Diamond argue that the right is used both by black individuals and by blacks acting collectively. *See* Cottrol & Diamond, *supra* note 30, at 354-58. Both actions, however, fall under the personal rubric: The revolutionary conception involves the people checking a tyrannical government, while the personal conception implicates action by individuals or groups of individuals acting against other individuals or groups of individuals. Intergroup violence of a nonrevolutionary nature is consistent with the dangers of faction delineated throughout the Federalist. *See* THE FEDERALIST, *supra* note 13, No. 10 (James Madison) (describing faction and the risks it presented), No. 51 (James Madison) (distinguishing protections as against the government from those directed at other individuals or groups).

failure is presupposed by the NRA's advocacy of gun ownership as a deterrent to crime.[32]

C. The Revolutionary Origins of the Second Amendment

With the federal government's ability to raise a standing army as their sword of Damocles, the authors of the Bill of Rights were primarily concerned with the revolutionary conception of the right to bear arms.[33] Elbridge Gerry, for example, thought that the Constitution lacked a sufficient check on the government's ability to raise a standing army.[34] Samuel Adams "warned that 'it is always dangerous to the liberties of the people to have an army stationed among them, over which they have no control,' even potentially the continental army."[35] The right of citizens to bear arms addressed the founders' aversion to a standing army in two different ways. First, an armed populace could be organized into a militia for the common defense, thus allowing safety from foreign aggression with a lesser standing force.[36] Second, an armed populace mitigated some of the dan-

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32. *See, e.g.*, Paul H. Blackman, *Armed Citizens and Crime Control* (visited Sept. 24, 1999) <http://www.nraila.org> (describing gun ownership's effect on crime).

33. Though this has been a contested point in the scholarly literature, the debate has focused mainly on whether there was a personal strain accompanying the revolutionary conception of the Second Amendment. Those who examine the relevant primary sources will accept that whether or not the authors of the Bill of Rights were interested in a right to bear arms for personal purposes, they were unquestionably intending to create a collective right. *See, e.g.*, AMAR, THE BILL OF RIGHTS, *supra* note 6, at 49.

> ([O]ther concerns can be placed under the language's spacious canopy. But to see the un-Reconstructed amendment as primarily concerned with an individual right to hunt or to protect one's home is like viewing the heart of the speech and assembly clauses as the right of persons to meet to play bridge or to have sex.)

(citations omitted).

34. Scarry, *supra* note 23, at 1274 (citing A. PRESCOTT, DRAFTING THE FEDERAL CONSTITUTION: A REARRANGEMENT OF MADISON'S NOTES GIVING CONSECUTIVE DEVELOPMENTS OF PROVISIONS IN THE CONSTITUTION OF THE UNITED STATES, SUPPLEMENTED BY DOCUMENTS PERTAINING TO THE PHILADELPHIA CONVENTION AND TO THE RATIFICATION PROCESSES, AND INCLUDING INSERTIONS BY THE COMPILER 515 (1941)); *see also* Williams, *supra* note 18, at 553 ("The republican framers of the Second Amendment were painfully aware that ultimate political power would lie with those who controlled the means of force.").

35. HALBROOK, *infra* note 78, at 62 (quoting 3 SAMUEL ADAMS, WRITINGS 230 (1906)).

36. *See* ALLAN R. MILLETT & PETER MASLOWSKI, FOR THE COMMON DEFENSE: A

ger of the standing army by countering possible abuses.[37] Both causes were furthered by the popular militia, which was presupposed by the Second Amendment's purposive clause and premised upon participation by "a large percentage of adult males."[38]

The Second Amendment was the Bill of Rights' answer to the federal government's ability to raise a standing army: It was the guarantee to the populace that the instruments with which they might alter and abolish the government, even with its standing army, would not be taken from them.[39] "If the amendment is not about the critical difference between the vaunted 'wellregulated Militia' of 'the people' and the disfavored standing army, it is about nothing."[40] The right was patently collective:

MILITARY HISTORY OF THE UNITED STATES OF AMERICA 53 (1984) (observing a "'dual army' tradition that combined a citizen-soldier reserve (the militia), which supplied large numbers of partially trained soldiers, with a small professional force that provided military expertise and staying power"); Marguerite A. Driessen, *Private Organizations and the Militia Status: They Don't Make Militias Like They Used To*, 1998 BYU L. REV. 1, 6; Kopel, *infra* note 119, at 1355-56.

37. Driessen, *supra* note 36, at 1357.

38. MILLETT & MASLOWSKI, *supra* note 36, at 54.

39. In a recent exchange in the *N.Y.U. Law Review*, Professors Eugene Volokh and David Williams debated the correct interpretation of the Second Amendment. *See* Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998) [hereinafter *Commonplace*]; David C. Williams, *Response: The Unitary Second Amendment*, 73 N.Y.U. L. REV. 822 (1998) [hereinafter *Unitary*]; Eugene Volokh, *Rejoinder: The Amazing Vanishing Second Amendment*, 73 N.Y.U. L. REV. 831 (1998) [hereinafter *Vanishing*]. Volokh argues that the subject of the operative clause of the Amendment—"the right of the people"—must trump contrary interpretations premised on the "militia" language of the justification clause. *See Commonplace*, *supra*, at 809-11. Williams responds that "the people," in light of the purposive clause, must be interpreted to have some collective connotation. *See Unitary*, *supra*, at 824. He further argues that the fractured polity of today abrogates any collective usage of the right to bear arms. *Id.* at 825-26. Notably, both professors agree that, whether under a collective or individualist conception, the Second Amendment was intended to protect individual ownership of arms. *See Vanishing*, *supra*, at 833.

The revolutionary conception described here incorporates the strengths of both professors' arguments, but it is closer to Volokh's understanding. As Williams argues, the revolutionary purpose of the Second Amendment should color our understanding of the operative clause. *Unitary*, *supra*, at 829. Volokh, however, rightly points out that the contention that our polity is too fractured for collective action is insufficient to repeal the Second Amendment, *Vanishing*, *supra*, at 837-41, and that the justification clause cannot trump the clear statement that "the right of the people . . . shall not be infringed." *Id.* It may, at most, resolve ambiguities in the operative clause. *Commonplace*, *supra*, at 807-08.

40. AMAR, THE BILL OF RIGHTS, *supra* note 6, at 56.

"The right to arms belonged to all, but as a collective right, [it was] a right of the universal militia and not of separate private individuals."[41] It was consumately militaristic: "Bearing arms" was simply not so broad or civilian as "carrying guns."[42] Whatever ancillary purposes it might have had, the Bill of Rights, including the Second Amendment, was originally and primarily about protecting the majority from a tyrannical government.[43]

III. POLITICAL RIGHTS, CIVIL RIGHTS AND THE ORIGINAL INTENT OF THE SECOND AMENDMENT

The popular conception of the Bill of Rights is as a protector of civil liberties. The ten amendments are widely viewed as counter-majoritarian checks on the whims of tyrannical majorities.[44] Prior to the adoption of the Bill of Rights, however, James Madison famously described a dual-purpose system of rights.[45] One purpose is, as conventional wisdom notes, to check the passions of majorities. The other, though often overlooked, is just as fundamental: promoting popular sovereignty through effective majoritarian governance.[46] Contrary to modern perception, Madison apparently believed that the latter was such an obvious goal that it might obscure the former: "It is of great

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41. *Civic Republicanism*, *supra* note 18, at 614. In fact, the right did not belong to all, but only to citizens. This does not, however, detract from Williams' point.

42. Aymette v. State, 21 Tenn. (2 Hum.) 154, 161 (1840); AMAR, THE BILL OF RIGHTS, *supra* note 6, at 262.

43. While Professor Williams believes that the right belongs to the whole "Body of the People," *Unitary*, *supra* note 39, at 822, Professor Volokh correctly points out that there is little evidence that the right was not that of the "bulk or great majority of the people." *Vanishing*, *supra* note 39, at 832, 834; *see also* Steven Brower, Letter to the Editor, N.Y. TIMES, Editorials/Letters, June 13, 1999, at 16 ("While it is frightening to believe that the Constitution contains the seeds of violent revolution, we must remember that this country was born through radical means.").

44. *See, e.g.*, ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962).

45. *See* THE FEDERALIST, *supra* note 13, No. 51 (James Madison).

46. *See id.*; *see also* Scarry, *supra* note 23, at 1275 (arguing that the Bill of Rights is increasingly viewed as presenting rights that ensure the consent of the governed and "sponsor later revisions in the Constitution"); Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COL. L. REV. 749, 761 (1994) [hereinafter *Republican Government*]; Amar, *The Bill of Rights as a Constitution*, *supra* note 27, at 1206 (discussing Madison and Federalist No. 51).

importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part."[47]

A. Differentiating Civil and Political Rights

The constitutional protection of rights can be divided between establishing political rights and recognizing civil rights, a distinction corresponding to William Blackstone's dichotomy between "primary," or "principal," rights and "auxiliary" rights.[48] Civil rights—free exercise, search-and-seizure regulations, takings rules, the prohibition on cruel and unusual punishments[49]—are generally those aimed at protecting minorities from the tyranny of the majority. They are prohibitionary rights that protect some societal value, not active instruments for the institution of government processes. They are negative liberties, prohibitions on government interference in some area or on some ground. Blackstone described one primary right as "the immediate gift of God"[50] and others as "strictly natural"[51] and "founded in nature."[52] Though they may have beneficial effects on good governance, there is no need to justify protection of the free exercise of religion, for example, or other civil rights in terms of processual outcomes or other consequences. The bearer of a civil right is entitled to be let alone in some part of her life or similarly to take some action without outside interference. Civil rights tend to be stable and non-decreasing—absolute prohibitions, corresponding to a societal ethos, that should not change with changed circumstances.[53]

Political rights, by contrast, are not similarly organic.[54]

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47. THE FEDERALIST, *supra* note 13, No. 51 (James Madison).

48. Though we might disagree with his categorization of particular rights, Blackstone's "absolute" rights are conceptually akin to today's civil rights, while those he denominated "auxiliary" are analogous to modern political rights. *See generally* 1 WILLIAM BLACKSTONE, COMMENTARIES *122-45 (1821).

49. *See* U.S. CONST. amends. I (free exercise), IV (search and seizure, due process and takings) and VIII (cruel and unusual punishments).

50. 1 BLACKSTONE, *supra* note 48, at *129.

51. *Id.* at *134.

52. *Id.* at *138.

53. *See id.* at *127.

54. Further, they are only for the "citizen," however defined. *See* Amar, *The Bill*

Voting and holding public office are paradigmatic political rights; enshrined in the Bill of Rights are the political rights to assemble and to a free press. Unlike civil rights, political rights are endogenous to the system of governance; indeed, they are the very instruments from which the mechanisms of governance are formed. The Constitution establishes a federal voting mechanism, for example, not because the Framers believed that voting was intrinsically necessary to personal dignity,[55] but because voting was a worthy mechanism for the production of constrained, representative government. Political rights are part of an elaborate balancing necessary to control the profound principal-agent relationship enshrined in the Constitution.[56] They are not God-given, natural or wholly exogenous to the system of governance. They are instrumental. Blackstone saw the motivation for political rights thus:

> But in vain would these [primary] rights be declared, ascertained, and protected by the dead letter of the laws, if the [C]onstitution had provided no other method to secure their actual enjoyment. It has, therefore, established certain other auxiliary subordinate rights of the subject, which serve principally as outworks or barriers, to protect and maintain inviolate the . . . great and primary rights . . .[57]

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of Rights as a Constitution, *supra* note 27, at 1146-47. All free members of the society have civil rights. *See* 1 BLACKSTONE, *supra* note 48, at *127.

55. They might, however, have believed it had some ancillary benefit on the virtues of the citizenry. *See infra* note 60 and accompanying text.

56. *See* Amar, *The Bill of Rights as a Constitution*, *supra* note 27, at 1133. Political rights control this principal-agent relationship not only as the profound check on government discussed here—that is, as a guarantee that the principals (the citizenry) can remove the agents (its elected representatives) as they deem necessary. *See id.* Political rights also function on two other levels. First, and most basically, they are the cogs by which the government works. They create a finder of fact in trials and provide the mechanism for determining which individuals will leave their local community to serve the nation in the capital. *See* U.S. CONST. art. I, §§ 2-3, amends. VI, VII, XVII. Second, they are the public opinion polls that the government often uses to determine which choices to make and which courses to follow. In this role, they are less checks on government and more choices among a menu of options presented by the government. By electing certain persons and not others, we indicate preferences—for big or small government, for more spending on health care and less on antitrust suits against major software manufacturers. Only on the third and deepest of levels are political rights checks on government—only where there is a conflict of interests between the government and the popular sovereign.

57. 1 BLACKSTONE, *supra* note 48, at *140-41.

One benefit of the creation of political rights is thus the protection of civil rights.[58]

Civil rights can be enjoyed passively; political rights are realized only through action by the citizenry. Civil rights directly determine the fates of their holders, while political rights determine the fate of the government directly and the fates of the rights-holders only indirectly. Much more than civil rights, political rights are malleable—they are adaptable, depending on popular will, to changed circumstances.[59] Their strength stems from that malleability. Theirs is the power to reflect the beliefs of the people and to contest government action that is considered unfair, unjust or wrong, whether or not there exists in the Constitution a specific prohibition (such as an enumerated *civil* right) on that action. If the popular sovereign believes that the Constitution fails to protect some would-be civil right, it is through the mechanisms of political rights that the people can force governmental recognition of the new civil right. Political rights are inherently functional; it would be insulting to say the same of civil rights.

One can imagine a just government with a set of political rights different from those the Founders selected.[60] A government that does not respect the American set of civil rights, however—without equal protection,[61] freedom of religion,[62] or due

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58. In Blackstone's view, the impetus for provision of auxiliary rights lies soundly in the protection of primary rights. *See id.* In a society that prizes self-determination, political rights exist not solely to protect civil rights, but also as a mechanism to ensure representative government. *Id.* at *134.

59. The voting right, for example, changes with changed circumstances, as with the shift to popularly elected senators. *Compare* U.S. CONST. art. I, § 3, *with* U.S. CONST. amend. XVII. The right to free exercise, as a contrary example, should not change. *See, e.g.*, 1 BLACKSTONE, *supra* note 48, at *127 and accompanying text.

60. Germany does not become unjust simply because its citizens do not sit on juries, and the United States cannot be called an unjust society simply because it allows only a subset of its population—natural-born citizens over the age of 35—to hold its highest office, when some other countries do not so limit their presidencies/premierships/prime ministerships.

Some might argue that a system without voting would be inherently unjust, but that intuition stems from the inseparable relationship between voting, a political right, and collective self-determination, a foundational value of our system. Further, the great majority of American voting is simply selection of delegates, not popular legislation by referenda. This attenuation from full self-government typifies the instrumental nature of voting and other political rights.

61. *See* U.S. CONST. amend. XIV.

process of law,[63] for example—would be more troubling. It is the civil rights protected by our Constitution that make the document much more than a simple prescription for the structures of government: The Constitution circumscribes a set of fundamental rights, not to be infringed by the federal government, for all people. But it is the political rights enshrined in the Constitution that give it constantly renewed vitality. They ensure, as Scarry puts it, "perpetual consent."[64] The Constitution can be responsive to the will of the popular sovereign because of the political rights that ensure its malleability. That responsive flexibility ensures that the citizenry cannot be trapped by oversights in the original document into a system of governance of which they collectively do not approve. In this way, political rights are both greater and lesser than civil rights. Their role in the process of governing is far greater: They are the essential instruments of functioning democracy. They are active roles to be played by the citizenry, providing solid checks on government overreaching. But what do they protect? They exist not for their own sake, but as mechanisms for the effectuation of representative government, including but not limited to the popular enforcement of the civil rights retained by the populace.[65] They serve further as devices for recognition of other (as-yet unenumerated) civil rights suggested by the popular will, whether or not those rights are being respected by the government.

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62. *See* U.S. CONST. amend. I. The same could be said of freedom of speech, though it enjoys dual status: It is both a political right and a civil right. Although some contend that it was transformed into a civil right by Reconstruction, *see* Amar, *The Bill of Rights as a Constitution*, *supra* note 27, at 1201-03, the right clearly still retains political efficacy. *See, e.g.*, OWEN FISS, THE IRONY OF FREE SPEECH (1996).

63. *See* U.S. CONST. amends. V, XIV.

64. *See* Scarry, *supra* note 23, at 1276.

65. Civic republicans may argue that political rights are part of the dialectic that leads the citizenry to virtue, just as the citizenry must create a virtuous system of political rights. In this deeper sense, political rights are at least partly rights for their own sake, with "their own sake" understood broadly. *See generally* Williams, *The Militia Movement and the Second Amendment*, *supra* note 19 (discussing the necessity of political participation for formation of the virtuous citizenry in civic republican conceptions of democracy).

B. The Right to Bear Arms: Political or Civil Right?

Where does the Second Amendment fit into this rights framework? The collective nature of the Second Amendment as originally understood demands recognition that when the Bill of Rights was authored, the right to bear arms was a political right: It served as a check on the government, and it was retained by citizens only.[66] Like voting and holding public office, it was an instrumental check on the new and dangerous federal government.[67] Blackstone claimed that the "last auxiliary right of the subject . . . is that of having arms for their defence . . . . [The right] is indeed a public allowance under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression."[68]

Blackstone astutely observed that the right to arms was not just another political right. Rather, it was "the ultimate 'checking value' in a republican polity . . . the ability of an armed populace, presumptively motivated by a shared commitment to the common good, to resist governmental tyranny."[69] The most powerful ability of the new federal government, and the most feared, was its ability to raise a standing army.[70] The armed public, by contrast, was not only an advantage in defending U.S. borders, it was also the most central, most indispensable check on government retained by the citizenry.[71] In resisting a tyrant,

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66. *See Civic Republicanism*, *supra* note 18, at 574 ("This *armato populato* did have one limit: it included only citizens, not all residents.").

67. *See* Amar, *The Bill of Rights as a Constitution*, *supra* note 27, at 1162; *Republican Government*, *supra* note 46, at 771-73.

68. 1 BLACKSTONE, *supra* note 48, at *143-44.

69. Levinson, *supra* note 28, at 648 (citing Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103 (1987)).

70. *See* THE FEDERALIST, *supra* note 13, at Nos. 8, 24, 26, 29 (Alexander Hamilton), Nos. 41, 45, 46 (James Madison) (variously describing the necessity for, and possible abuses by, the standing army); *Civic Republicanism*, *supra* note 18, at 574 ("[T]hose who surrendered the sword to the standing army gained a luxurious way of life but lost their moral character and their only guarantee of liberty in the bargain."); *supra* notes 25-35 and accompanying text.

71. *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1889, at 746 (Carolina Academic Press 1970) ("the palladium of the liberties

it was the ultimate right: Where the vote had been suspended, public office foreclosed, and trials conducted not by jury but by Star Chamber, there still remained the drastic ability of the people to take up arms against the abusive government, destroy it, and begin anew. Armed revolt was the last resort of an oppressed citizenry.

IV. METAMORPHOSES

Though the Second Amendment was first conceived as a political right, that understanding destabilized within a century. Two transformations and the interaction between them fundamentally shifted the way we think about the right to bear arms. While one transformation, based on evolving technological capabilities and "symmetry" between government and citizenry, was forcing a decision between the personal and revolutionary conceptions, another, based on a shifting political atmosphere, was supplementing or supplanting the original understanding of the Second Amendment.

A. Second Amendment Symmetry

Although the Second Amendment says that the right to bear arms "shall not be infringed," in practice the Second Amendment jurisprudence of the federal courts does not preserve the right of each American to "keep and bear" whatever arms he chooses.[72] Today the right to keep and bears arms is a decidedly limited right.[73] No American has the right to own a nuclear weapon; for that matter, there is a statutory prohibition obstructing the right to own a fully automatic weapon.[74] The Congress and the courts limit which arms fall within the purview of the Second Amendment; even the staunchest of gun-ownership advocates

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of a republic"); David Harmer, *Securing a Free State: Why the Second Amendment Matters*, 1998 BYU L. REV. 55, 57.

72. *Cf.* JOHN HART ELY, DEMOCRACY AND DISTRUST 94-95 (1980) (asserting that federal courts have interpreted the Second Amendment to protect only the right to state-organized militias).

73. Laurence H. Tribe & Akhil Reed Amar, *Well-Regulated Militia, and More*, N.Y. TIMES, Oct. 28, 1999, at A31.

74. *See* 18 U.S.C. § 922(v)(1) (1994).

cannot but acknowledge the necessity of some of these limitations.[75] Decisions about these limits are informed by two factors: knowledge of the available technology and a normative decision about symmetry.

1. Symmetry Generally.—"Symmetry," as the term is used here, is an analytic device reflecting a rough proportionality between the arms available to those for whom the right exists and the arms available to those against whom the right is protecting. Any conception of the right to bear arms necessarily presupposes at minimum the ability of the party for whom the right exists to use the right effectively against the party against whom the right stands. Otherwise, the right is a nullity: Unless it can effectively protect its "owners," the right has only symbolic content. The personal right to bear arms, therefore, must allow Americans to protect themselves against those who would cause them unlawful harms; the revolutionary right, on the other hand, must ensure for the citizenry the ability to throw off the shackles of oppressive government.[76]

The theory underlying conceptions of Second Amendment symmetry becomes intuitively clear with a pair of simple examples. Imagine a revolutionary doctrine that reserved to the people the right to bear arms in the form of slingshots, while the government was armed with its current arsenal. Clearly, the symmetry necessary to give content to the "right to bear arms" is missing; as against the government, the right is effectively set at naught. At the other extreme, consider a personal doctrine that included inherently offensive weapons, such as grenade launchers, in the category of protected arms. Though any individual would have the right to possess such weapons, the right as a self-defense mechanism would again be set at naught: Simply owning a grenade launcher does not enable one to counter the attacks of an intruder also wielding a grenade launcher. Though either of these crude examples is debatable, the point is not: Effectuating the purpose of the Second Amendment presupposes some rough proportionality between the arms available to

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75. *See, e.g.*, FIELD MANUAL OF THE FREE MILITIA 39 (1994).

76. The lesser "right of resistance" does not give full content to the right to bear arms. *See infra* text accompanying notes 86-89.

Americans and the weapons held by those against whom Americans are to defend themselves.

These symmetries necessarily inform our national decisions on the Second Amendment, implicating questions of what technologies are available and whom the right is intended to check. Because the threats protected against are so different, the symmetry underlying the personal conception of the Second Amendment, which exists as against other individuals, can be very different from that underlying the revolutionary conception, a conception premised on popular overthrow of the government and its standing army. Cottrol and Diamond's individualistic argument, for example, requires a Second Amendment symmetry that preserves the right to at least some weapons with which blacks might protect themselves against the Klan, but it allows no weapons with which the Klan might leave blacks unable to defend themselves. The personal conception of the right to bear arms is a fundamentally defensive vision, and the choice of acceptable technology reflects this. The revolutionary conception of the Second Amendment, however, has both offensive and defensive components: In order to "alter or abolish" the government, the people must be able to confront the standing army proactively. The revolutionary conception of symmetry requires the legalization of a different set of arms than does the personal conception of symmetry. Further, the symmetries underlying any given reading of the Second Amendment will shift over time as power relationships and available technologies evolve.

2. Divergence of Personal and Revolutionary Symmetries.—During the Founding, the symmetries underlying the two conceptions of the Second Amendment were not in conflict. Assuming arguendo that the authors of the Bill of Rights were concerned about a personal right to bear arms, a single symmetry would have covered both the personal and the revolutionary concerns. The weapons used for self-defense were the very same weapons that allowed the colonists to "organize and mobilize their citizens into an effective fighting force capable of besting even a large standing army"[77]—as they did, not infrequently, during the War for Independence.[78] Forces made up in large

77. AMAR, THE BILL OF RIGHTS, *supra* note 6, at 50.

78. *See* STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION

part of ordinary citizens were able to defeat professional troops on numerous occasions.[79] In light of these real successes, Madison "envisioned a militia consisting of virtually the entire white male population, writing that a militia of 500,000 citizens could prevent any excesses that might be perpetrated by the national government and its regular army."[80]

The same was roughly true during the Civil War, but accelerated technological changes began to occur about the time of that war. There had certainly been technological advances since the Founding,[81] but the War between the States was fought primarily by farmers and ranchers drawn into state militia, fighting as infantrymen and equipped only with rifles and bayonets.[82] The weapons needed to fight the federal government's standing army, were such a thing necessary, were still by and large the weapons used to defend one's family and home. The symmetries underlying the personal and revolutionary conceptions of the Second Amendment could still be reconciled.

Shift forward a century. The picture is a very different one. The United States is no longer a place where states or other nonfederal bodies could organize and mobilize a fighting force consisting of their citizens, able to best the federal standing army. Even with state national guards, the national armed forces' vastly superior technology and professionalism would be difficult to resist;[83] without those national guard forces (and it

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OF A CONSTITUTIONAL RIGHT 63 (1994).

79. *See* RUSSELL F. WEIGLEY, THE AMERICAN WAY OF WAR: A HISTORY OF UNITED STATES MILITARY STRATEGY AND POLICY 18-39 (1973); Cottrol & Diamond, *supra* note 30, at 315.

80. Cottrol & Diamond, *supra* note 30, at 330 (citing THE FEDERALIST, *supra* note 13, No. 46 (James Madison)).

81. Though there were advances in military technology between the Revolutionary and Civil Wars, *see* WEIGLEY, *supra* note 79, at 90-91, those advances were generally differences of degree and not kind. Between 1776 and 1865, cannons became more accurate and powerful, *see id.*; in the eighty years following the Civil War, on the other hand, the United States developed atomic weapons and an air force. *See id.* at 223-41 (air force), 363-81 (atom bomb). Further, antebellum advances in technology primarily improved technologies available to the populace, as with the shift from muskets to more accurate but widely available rifles. *See id.* at 90-91; MILLETT & MASLOWSKI, *supra* note 36, at 129-30. The same has not been true in the twentieth century; the harbinger of this shift was the 1862 production of the first machine gun by Richard Gatling, *see* MILLETT & MASLOWSKI, *supra* note 36, at 130.

82. *See* WEIGLEY, *supra* note 79, at 129-30.

83. *See* MILLETT & MASLOWSKI, *supra* note 36, at 133 (professionalism), 316-42

is not clear that they should be considered when envisioning a "right of the people"[84]), the citizen forces would stand little chance to withstand an American military bent on defeating them.[85]

It is true that any level of armedness by the populace serves as some deterrent to a government considering an oppressive strategy.[86] Though this point is important, it does not address the fact that the Second Amendment cannot be solely about a right of *resistance*—to which this argument is directed—but that it fundamentally involves a right of *revolution*.[87] The ability to alter or abolish a tyrannical government that has no interest in leaving power requires much greater power than the ability to force the government to "calculate the possibilities of its soldiers and officials being injured or killed."[88] The power to overthrow the government is vastly different from the ability to force the government to consider the costs of oppressing citizens. The latter stands as the ultimate check on tyrannical regimes; the former is analogically akin to making the vote strictly advisory and warning the government that its citizenry will make it costly to ignore their nonbinding referenda. The concern here must not be with methods of increasing the cost of oppressing citizens, but with the absolute ability to prevent such oppression. It is

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(superior technology).

84. *See* Amar, *The Bill of Rights as a Constitution*, *supra* note 27, at 1166 ("If this reading were accepted, the Second Amendment would be at base a right of state governments rather than citizens.").

85. One possible objection—"What about Vietnam?"—is inapposite here for a variety of reasons. Chief among these reasons are the organized army that opposed American troops and the political considerations that prevented the United States from mounting an effective campaign. *See* WEIGLEY, *supra* note 79, at 441-77. *But see* Bursor, *supra* note 21, at 1140 (objecting to the above assertion based on the U.S. experience in Vietnam).

The Vietnam objection does, however, lead to one point of clarification. For the purpose of testing "the ultimate check," it is not satisfactory to conclude that the People could succeed in a limited war, such as Vietnam. Rather, for the check to have full meaning, the People must be able to defeat a government bent on subverting the popular will at all (nonsuicidal) costs. This was the meaning of the right in the eyes of the Founders. For the People truly to retain the robust right to alter or abolish, a full-scale conflict must be the touchstone of the analysis. *Cf. infra* text accompanying notes 86-89 (arguing that the Second Amendment is only fully effectuated by a right of revolution, not a right of resistance).

86. Levinson, *supra* note 28, at 657; Lund, *supra* note 13, at 56-58.

87. *Civic Republicanism*, *supra* note 18, at 583-84.

88. *Levinson, supra note 28, at 657.*

only the latter that represents the full ability to alter or abolish the government.[89]

This is not to say that the lesser ability to resist the federal standing army—without the robust ability to defeat it—does not have value. Clearly such a second-best Second Amendment could have great deterrent effects and could serve as a beneficial popular protection against an overreaching government. At the least, it forces governmental concern about the collateral consequences of a tyrannical course of action. Such an effect is not to be belittled. Still, this second-best Second Amendment does not preserve the full right of revolution, of complete self-determination by radical means if necessary, that the authors of the Bill of Rights envisioned.

The growth of the standing army and the modern technology of the military-industrial complex, coupled with the pre-World War II addition of an air corps, have made the American war machine almost incomparably more powerful than it was only a century before.[90] The story could not be more different on the side of the people. Due to the cost of technology, legislative and judicial restrictions, and protection provided by professional police forces, Americans are less prepared to defend themselves than ever before.[91] Any thought of a fully effectuated revolutionary conception of the Second Amendment is dead, except in the heads of militant extremists: Courts, legislatures, and the general population all appear to believe, whether explicitly or tacitly, that the Second Amendment no longer provides the American people with an absolute, realizable collective ability to alter or abolish their government by means of force.[92] Professor Williams argues that without the universal citizen militia, the republican Second Amendment has no meaning.[93] It is possible that his point is quite moot: Even if there were a universal citizen militia, with each citizen armed with the simple weapons

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89. *See infra* Section V.B (detailing the implications of this analysis for understanding the role of the popular sovereign in American democracy).

90. MILLETT & MASLOWSKI, *supra* note 10, at xiii; WEIGLEY, *supra* note 79, at 223-41.

91. MILLETT & MASLOWSKI, *supra* note 10, at xii-xiii (noting that the professionalism of the armed forces has taken military power out of civilian hands).

92. *See, e.g.*, Aukamp, *supra* note 15, at A22. Unqualified acceptance of this argument is not at all critical to the greater thesis of this Article.

93. *Civic Republicanism*, *supra* note 18, at 554.

allowed by law, that militia would be outmatched by the Army's tanks and rockets, by the Air Force's bombers, by the Navy's heavy guns, by the sheer size of the American military complex, and by the citizenry's lack of familiarity with things military.

Even attempts to incorporate the "well-regulated militia" clause of the Second Amendment into contemporary jurisprudence result in holdings that support the personal symmetry rather than the proportionality required to provide an effective check on government. The Supreme Court has held that "the Second Amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia.'"[94] But neither does it guarantee in practice the right "to keep and bear a firearm" that *does* have "some reasonable relationship to the preservation or efficiency of a well regulated militia."[95] Proving that proposition is as easy as trying to buy a fully automatic rifle: unquestionably of use in the preservation of a well-regulated militia[96] but difficult to defend within an individualist paradigm and, notably, illegal.[97]

Because the symmetries underlying the formations of the Second Amendment can no longer co-exist—because the Second Amendment can no longer stand both as a right of self-defense and as the ultimate check on government—the modern era for the first time presents a situation where the personal and revolutionary conceptions of the Second Amendment can no longer be viewed as complementary visions, as dual purposes of the Amendment.[98] The right to bear arms can no longer both de-

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94. Lewis v. United States, 445 U.S. 55, 65 n.8 (1980) (discussing the holding of United States v. Miller, 307 U.S. 174 (1939)). On *Miller*, see Sanford Levinson, *Is the Second Amendment Finally Becoming Recognized as Part of the Constitution? Voices from the Courts*, 1998 BYU L. REV. 127, 128-29 ("I dare say that no other 1939 case (or, even more certainly, no other case written by the egregious Justice McReynolds), is relied on so often by political liberals as providing a definitive statement about an important constitutional norm.").

95. Kates, *supra* note 20, at 248 (citing *Miller*, 307 U.S. at 178).

96. FIELD MANUAL OF THE FREE MILITIA, *supra* note 75, at 39.

97. *See* 18 U.S.C. § 922(v)(1) (1994); *see also* Van Alstyne, *supra* note 11, at 1253 ("[O]ne does not derive from [the history of the Second Amendment] that each citizen has an uncircumscribable personal constitutional right to acquire, to own, and to employ any and all such arms as one might desire.").

98. Because technological evolution was gradual, it is impossible to pinpoint exactly when this incompatibility first occurred. We can presume, though, that it

fend individuals and provide a threat to the government. If the Second Amendment effectively checked government, it would be far too powerful to defend on an individual-to-individual basis. If it allowed Americans successfully to defend themselves against other individuals, the right to bear arms would be far less effective as against the government.

B. Reconstruction's Reconceptualization

At the same time that evolving technologies were beginning to shift the conception of symmetry underlying the revolutionary Second Amendment—thereby making impossible the coexistence of the individualist and the collective understandings of the right to bear arms—the political atmosphere in the United States was working to influence the inevitable decision between the two understandings. Though the right to bear arms was first conceived as a collective check on government,[99] Reconstruction and its attendant concerns pressed the Second Amendment into a new and different service: protection of blacks from racial violence.[100] This metamorphosis is illuminated clearly by the perceived transformation of the right to bear arms from a political to a civil right. The insights from that transformation are not limited to an explanation of the method of choosing between the two understandings; the shift from a political to a civil right also sheds light on the broader changes wrought by the transformation.

1. From Revolutionary to Personal.—The focus on the revolutionary right disappeared during Reconstruction, replaced by a personal conception. Arms-bearing was increasingly seen as giving blacks a right to self-protection and communal protection from racist violence.[101] The foremost danger in federal legislators' minds was no longer the national government; now it was southern state governments and the Klan.[102] In fact, the

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happened sometime around the Civil War, well before the United States became "the arsenal of democracy."

99. Levinson, *supra* note 28, at 649.

100. ERIC FONER, RECONSTRUCTION 258 (1988).

101. STEPHEN P. HALBROOK, A RIGHT TO BEAR ARMS: STATE AND FEDERAL BILLS OF RIGHTS AND CONSTITUTIONAL GUARANTEES 111 (1989).

102. David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998

federal government's standing army, far from a looming threat to liberty, was a tool for countering racist violence.[103] If states in the newly defeated Confederacy would not protect the rights, persons or property of freedmen, then the Second and Fourteenth Amendments would at least not allow those governments to deprive freedmen of the ability to protect themselves.[104]

Not infrequently, reinterpretation of a constitutional provision puts a new gloss on the old law, and sometimes the old meaning fades from the popular consciousness.[105] An obvious example is the Fourth Amendment.[106] Whatever fondness we might feel for the safeguards currently provided by American criminal procedure, it is clear that the federal courts' modern criminal procedure jurisprudence conflates the reasonableness requirement of the search-and-seizure clause and the probable-cause requirement of the warrant requirement, which the au-

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BYU L. REV. 1359, 1447-53. *But see* United States v. Cruikshank, 92 U.S. 542 (1876) (rejecting judicially the enforcement of the Second Amendment through the Fourteenth Amendment against the states—a rejection not reversed until DeJonge v. Oregon, 299 U.S. 353 (1937)); MICHAEL LES BENEDICT, THE BLESSINGS OF LIBERTY: A CONCISE HISTORY OF THE CONSTITUTION OF THE UNITED STATES 309 (1996) (arguing that federal courts have still not incorporated the Second Amendment); Denning, *supra* note 13, at 752-54 (same); Steven H. Gunn, *A Lawyer's Guide to the Second Amendment*, 1998 BYU L. REV. 35, 44 n.31 (collecting cases).

103. ERIC FONER, *supra* note 100, at 271-77.

104. *See generally* Stephen P. Halbrook, *Personal Security, Personal Liberty, and the "Constitutional Right to Bear Arms": Visions of the Framers of the Fourteenth Amendment*, 5 SETON HALL CONST. L.J. 341 (1995) (discussing the disarmament of freedmen). Concern about anti-black violence sparked adoption of the Fourteenth Amendment, intended by at least some northern Republicans to enforce the Bill of Rights as against state governments. FONER, *supra* note 100, at 258-59; Kopel, *supra* note 102, at 1451-53.

Cottrol and Diamond, for example, believe that the threat value of a personal conception of the Second Amendment is premised on its provision to blacks a means of defense, when the police cannot be relied upon to provide such. Cottrol & Diamond, *supra* note 30, at 361.

105. This statement is made not to condone such a transformation as an acceptable method of constitutional interpretation but simply to make the positive point that it does occur. *But cf.* Scalia, *supra* note 3, at 41-47 (condemning the idea of a "living constitution").

106. U.S. CONST. amend. IV.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

thors of the Bill of Rights intended to be separate.[107] This mistranslation of the Fourth Amendment's historical intent produces a crabbed doctrine in which most warrantless searches and seizures are presumptively unreasonable.[108] Rights were similarly reconstrued during the Reconstruction period:

> Although generally sound, the process of incorporation has had the unfortunate effect of blinding us to the ways in which the Bill has thereby been transformed . . . Originally drafted to protect the general citizenry from a possibly unrepresentative government, the Bill has been pressed into the service of protecting vulnerable minorities from dominant social majorities.[109]

Nowhere is this more true, or does this have more impact, than with regard to the Second Amendment. When Reconstruction and incorporation placed the emphasis on a personal right to bear arms, the revolutionary vision quickly faded from public awareness.[110]

The demise of the revolutionary understanding was not, however, a necessary step in the rise of the personal conception of the right to bear arms. The personal conception replaced the revolutionary conception, but it could just as well have served as a complement to the revolutionary vision. There was nothing in the sudden preeminence of the Second Amendment as a means for individual protection that required elimination of the Second Amendment as a check on government; there was no reason during Reconstruction that the two understandings could not have coexisted. The postbellum period featured less distrust of the federal government and its standing army, but more confidence in the government is certainly not a sufficient reason for doing away with our ultimate check on it.[111] The choice of the

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107. *See* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE 12-20 (1997).

108. *See, e.g.*, Michigan v. Clifford, 464 U.S. 287 (1984) (holding the search of a fire-ravaged home unreasonable for lack of a warrant).

109. AMAR, THE BILL OF RIGHTS, *supra* note 6, at 7.

110. *See id.* at 259.

111. There is a third view: that the right to bear arms in the form of guns has become a personal right, while the revolutionary right to bear arms might feature a broader conception of arms. Under this conception, modems might constructively be considered "arms" for the purpose of the revolutionary Second Amendment. *See* AMAR, THE BILL OF RIGHTS, *supra* note 6, at 49-50. While the point that evolving conditions of human existence must color interpretations of the Constitution is well-

personal conception succeeding the revolutionary, over the two conceptions complementing one another, raises two issues: Does the Second Amendment still reserve to the people the ultimate check, the ability to alter or abolish their government by force? If not, what then?

2. From Political Right to Civil.—Civil rights and political rights exist for very different purposes. They are not interchangeable. Taking a political right and reconceptualizing it as a civil right takes something that is instrumental and makes it essential—even though envisioning the right as fundamental and noninstrumental might make little sense or might deprive the right of its efficacy as a tool for governing or both. Transforming a civil right into a political right could have equally disfiguring effects, as the right might lose its sanctity, all the while failing to function as a political right.[112] No one would question that reinterpreting rights so that they become nullities (as with the privileges and immunities clause[113]) unquestionably has some effect, possibly a detrimental one, on the delicate balances spelled out in the Constitution. The same is true when we reinterpret a political right to be a civil right, possibly depriving it of its efficacy as an active check on government, or read a civil right as a political right, which could rob the right of its sacrosanct status.

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taken—"arms" is not, after all, limited to muskets and other 18th-century armaments—this particular example is unsatisfying. Modems may be protected by the Bill of Rights—but if so, they are protected by the *First* Amendment as instrumentalities of speech. Both arms and speech serve to preserve the "free state" Professor Amar focuses on in this point; however, the passage of time and the evolution of technology should not obscure the fundamental balance between the First and Second Amendments. The First Amendment protects, *inter alia*, the right of the People to attempt to persuade their fellow citizens and their government by nonviolent means, while the Second Amendment guards the means to coerce with force, should that persuasion fail.

112. The Free Exercise Clause, for example, a fundamental civil right, would make little sense as a political right (how would it function?) and, at the same time, might lose some of the luster that comes with the inviolable character of a civil right.

113. *See* U.S. CONST. amend. XIV, § 1; Levinson, *supra* note 28, at 127 ("[L]itigation based on the 'privileges or immunities' clause of the Fourteenth Amendment basically came to an end following the evisceration of that Clause in the aptly named *Slaughterhouse Cases*." (internal citations omitted)). *But see* Saenz v. Roe, 526 U.S. 489 (1999).

It was just this sort of transformation, from political right to civil, that the Reconstruction reconceptualization of the Second Amendment effected. Far from being a protection against the federal government, the right to bear arms in the immediately postbellum era was perceived as a protection for blacks against violence practiced by the Klan and racist southern state governments.[114] It was a right not of popular self-determination, but of individual defense against tyranny wreaked by other individuals.[115] Even as against state governments, the right to bear arms was not a right of revolution. Rather, it protected a subset of citizens from state governments seeking to disarm them and thereby allowed them self-defense against racially motivated violence.[116] Far from a collective check on government, this is exactly the sort of factional dispute that Federalist No. 10 addressed.[117] With the transformation of the Second Amendment from a revolutionary right into a personal right, the conceptual focus of the right to bear arms shifted from instrumental, political efficacy as against the federal government to its purportedly foundational position among the rights of men. The right to bear arms appeared no longer as a check on the federal government; rather, it was viewed as a fundamental assurance that citizens would not be impotent in the face of harassment and violence by other citizens, even those citizens representing lesser governments.[118]

This perceived transformation was both a demotion and a promotion. When the Second Amendment was seen as a political right, it existed only as a tool to protect the fundamental right of collective self-determination, the basic ability to alter or abolish the government.[119] The Second Amendment as a civil right,

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114. *See supra* note 98 and accompanying text.

115. *See* AMAR, THE BILL OF RIGHTS, *supra* note 6, at 259.

116. *See* FONER, *supra* note 100, at 119-23; Cottrol & Diamond, *supra* note 30, at 333-49.

117. *See* THE FEDERALIST, *supra* note 13, No. 10 (James Madison).

118. *See* AMAR, THE BILL OF RIGHTS, *supra* note 6, at 258-59, 266 ("The Creation motto, in effect, was that if arms were outlawed, only the central government would have arms. In Reconstruction a new vision was aborning: when guns were outlawed, only the Klan would have guns.").

119. There might be those who would object that, even during the authoring of the Bill of Rights, the right to own a gun was not only a political right but also a fundamental one—a civil right. Underlying the Second Amendment, one might argue,

however, would be, like all civil rights, a right disconnected from the processes of government. The Second Amendment would no longer determine the fate of the government as a political right would.[120] As a civil right, the Second Amendment would determine the fate of individuals: It would give everyone the (now fundamental) right to defend oneself. The right to own a gun would be premised on the idea that, as Cottrol and Diamond remark in closing, "it is unwise to place the means of protection totally in the hands of the state"; "self-defense is also a right."[121]

That truth should not obscure the situation at hand: Reconstruction appears to have transformed the right to bear arms from the ultimate check on government overreaching, as it was intended and for which it has great value, apparently into a civil right, guaranteeing a universal right to self-defense in the form of gun-ownership in spite of possible objections to this constitutional reinterpretation and without regard for any pragmatic cost-benefit analysis that might be conducted regarding mass gun-ownership.

The right to bear arms was undergoing two parallel trans-

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was a more fundamental right to possess a firearm. The right to "bear arms"—a decidedly militaristic right—must have been based on some more basic right to have guns.

This, however, proves too much. There was a fundamental right to have a gun at the Founding in the same way that there was a fundamental right to have, for example, a butter churn. *See* David B. Kopel, *It Isn't About Duck-Hunting: The British Origins of the Right to Bear Arms*, 93 MICH. L. REV. 1333, 1352 (1995). Guns were a necessity at the time for many citizens, to hunt with, to shoot foxes near the henhouse, to defend themselves in an era preceding professional police forces. *See id.* In fact, after 1689, the English (after whose right ours is patterned) considered possession of arms by citizens both a right and a *duty* for the common defense. *See id.* at 1352 (reviewing JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (1994)). In the years following the American Revolution, why *shouldn't* citizens own guns? Indeed, gun ownership was crucial to a political right.) There was no counterargument. It is, however, only the political right—only the militaristic "right to keep and bear arms"—that is enshrined in the Second Amendment. Today, most Americans no longer hunt for food or raise chickens, and most are protected by a professional police force. If only the militaristic political right is textually protected, then this says little about the right to have a gun for nonmilitaristic purposes.

120. *See* AMAR, THE BILL OF RIGHTS, *supra* note 6, at 258 ("Reconstruction Republicans recast arms bearing as a core *civil* right, utterly divorced from the militia and other political rights and responsibilities.").

121. Cottrol & Diamond, *supra* note 30, at 361.

formations in the postbellum period. Reconstruction shifted the popular focus of the Second Amendment from a collective check on government to an individual right of self-defense. The profound depth of the fissure between these two conceptions was masked, however, by their peaceful coexistence. It was not until the late nineteenth century, with its global political developments and the attendant evolution of military technology, that a choice between the revolutionary and personal understandings was necessary. It was the international political situation of the twentieth century that forced a decision between conceptions, but it was domestic political considerations that were informing the content of that decision. When the time came to choose, it was the Reconstruction-era Second Amendment—the personal right to bear arms, the civil right of self-defense—that survived in the public eye.

Forced to choose between the two understandings of the right to bear arms, Americans might well opt for self-defense. As a matter of public policy, the choice could not be more sound: A nation of private arsenals could be literally unlivable.[122] Extrapolating from the schoolhouse shootings and drug murders of a populace armed only with handguns and rifles, it is probable that a United States where citizens privately own the means to counter the standing army would indeed be a dangerous nation.[123] As a matter of public policy, presented only with two competing interpretations—arms for self-defense or arms to counter the government—the choice of self-defense may be a wise one. But interpretation of the Second Amendment is decidedly not a simple policy question; it is rather a constitutional question.[124] At the time of the Founding, the symmetry inherent in the revolutionary conception of the Second Amendment had some value as a political right, a check on the government. That check reserved to the citizenry ultimate veto power over the government as a whole, even if that power had to be exercised by force of arms. That check no longer exists in its most robust form, leaving Americans to wonder whether their cher-

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122. *See* Aukamp, *supra* note 15, at A22.

123. This is not to argue that armedness is the root of these regrettable phenomena but to point out that, insofar as such incidents do occur, they would be more lethal with more powerful weapons.

124. *See* Scalia, *supra* note 3, at 41-44.

ished system of government, the elaborate web of checks and balances, is somehow diminished for want of the most profound of political rights: the right to destroy a tyrannical government by physical force and begin anew.

V. IMPLICATIONS

Recognition that the Second Amendment as envisioned today is inconsistent with the right to bear arms as originally understood raises at least two questions. First: Is a revolutionary conception of the Second Amendment, one consistent with its authors' intent, still possible? Second: How has the transformation of the right to bear arms affected the American system of governance? The answer to the first question is no—at least not fully. The answer to the second question is that the changed Second Amendment theoretically means everything for our understanding of the American democratic experiment—except that it has yet to have any effect in practice.

A. A Revolutionary Right for Today?

It is a safe guess that the NRA would hesitate to endorse a Second Amendment that would fully enable citizens to alter or abolish the modern government. The powerful offensive weapons necessitated by such a right would essentially abolish the right of self-defense that the NRA holds so dear. Because a modern right of revolution would require a population armed to the teeth, most prohibitions on weapons would disappear.[125] Licensing of weapons, too, would have to cease: If the Second Amendment stands as a check against the government, then delivering a list of where that check's instruments reside to the very government they are checking is deeply problematic.[126]

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125. *See* FIELD MANUAL OF THE FREE MILITIA, *supra* note 75, at 39.

126. *See id.* Professor Laurence Tribe appears to dissent from this proposition and from the broader proposition that the Second Amendment was conceived as an absolute check on the federal standing army: "All rights limit what the government may do, *but never absolutely*. . . . [A]s long as government doesn't disarm the citizenry by limiting firearms possession and use to government bodies, it may subject private possession and use to reasonable eligibility requirements and restrictions on the type of weapon used." Laurence H. Tribe, Letter to the Editor, N.Y. TIMES, Edi-

Even with the demise of those restrictions, popular unfamiliarity with weapons of any kind and the prohibitive cost of such a state of armedness means that it is no longer realistic to conceive the Second Amendment as a robust check on potential governmental tyranny.[127] Massively overhauling Second Amendment doctrines to restore the right to bear arms to the pantheon of political rights may not be a viable goal.[128] Further, the Second Amendment only protects the right to "keep and bear arms," implying that weapons that cannot be *borne* by a citizen fall outside its ambit.[129] This makes the arming of citizens to the level required to check abusive government not only impossible, but also outside the requirements of the constitutional text.[130]

If the Second Amendment thus cannot be modified so that it checks the government, perhaps the government can be modified so that it is checked by the Second Amendment. It may be possible to work from the other direction, to modify not Second Amendment jurisprudence but the federal government itself so that the right to bear arms once again becomes an adequate check on federal overreaching. Professor Scarry's contention that the government should not have nuclear weapons because their use does not require citizen approval is a variety of this argument.[131] Her argument may be exactly wrong, though, in that terribly powerful nuclear weapons may be among the more permissible of major military technologies under a Second Amendment-compatible government. Nuclear weapons, whether or not they ably guard our borders, are of little use in domestic disputes.[132] The more undiscriminating and destructive the war-

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torials/Letters, June 13, 1999, at 16 (emphasis added). One may agree with Professor Tribe's moderate stance as a matter of policy and still concede that it would make little sense as a statement of original intent.

127. It is perhaps this concern that implicitly underlies Professor Van Alstyne's suggestions that handguns are clearly protected while howitzers might not be. *See* Van Alstyne, *supra* note 11, at 1254.

128. In a recent article, Brannon Denning offered a prescription for reinvigorating the Second Amendment. *See* Denning, *supra* note 13. His proposal, however, would provide a robust right of self-defense, not a check on abusive government. *See id.* at 754-86.

129. *See* Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to "Bear Arms,"* 49 LAW & CONTEMP. PROBS. 151, 157-60 (1986).

130. *See id.*

131. *See* Scarry, *supra* note 23, at 1296-99; *supra* text accompanying notes 23-28.

132. *See* WEIGLEY, *supra* note 79, at 477 ("[I]t is difficult to imagine the strategic

head (and therefore, presumably, the better it protects against foreign aggression), the less effective it is as a tool to control the American populace. The massive standing army, on the other hand, as well as other modern military technology that can be used to combat either foreign aggression or domestic popular uprising is a much greater threat to the Second Amendment's ability to alter or abolish the government.

The discrepancy between this argument and Scarry's stems from her focus on the Second Amendment as a check on the government's ability to wage foreign wars, when a primary concern of the authors of the Bill of Rights was actually the government's ability to wage domestic wars, wars against the People. Scarry conceives of the "consent" inherent in the Second Amendment as a popular check on the government's ability to declare war, but the consent made possible by the right to bear arms is even more fundamental than that. It is not a veto power over an admittedly momentous subset of the government's foreign affairs decisions—it is a veto power over the government itself. A free-standing missile is not the realization of everything that was feared in a standing army, despite Scarry's claim.[133] A well-armed standing army, capable of putting down any domestic uprising, still epitomizes those fears. Missiles, especially nuclear missiles, have many of the virtues of the standing army, but not so many of the vices: They discourage invasion but are an inexact and inefficient means of putting down popular revolt.

Still, our global situation will not allow us to modify the federal government and its standing army such that it is checked effectively by an armed populace. Even if we accept that an armed citizenry has a full right of revolution against a government armed primarily with nuclear weapons and without a standing army, advocating such a regime would be the constitutional equivalent of cutting off one's nose to spite one's face. First, it would leave the United States with a tragic binary choice in military interventions in foreign lands: drastic nuclear strikes or no action at all. Second, it would explicitly usurp the constitutionally enumerated power of the Congress to "raise and

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nuclear forces as hurting . . . without destroying.").

133. *See* Scarry, *supra* note 23, at 1285.

support Armies."[134] Third, the ability to check the American government would be empty if it concomitantly encouraged invasion by governments less willing to recognize the right to bear arms. The international threats and conflicts of the modern age prevent the United States from reforming the federal government so that it is checked by a popular right to bear arms.

At its most basic, the original understanding of the right to bear arms was decisively abrogated not by judicial activism[135] or congressional hubris,[136] but by the forward march of military technology. The door to repealing the Founder's conception of the Second Amendment was opened by Reconstruction's reinterpretation of the amendment as a right of self-defense; the Founder's revolutionary conception was then gradually but decisively repealed before the turn of the century by the exigencies of the modern world and modern warfare. Reconstruction made the constructive repeal of the right to bear arms as the final check on government possible; the twentieth century's wars and its military sophistication made the repeal certain.

B. Resonance in Conceptions of American Democracy

This would be a primarily academic exercise if it were not for the fact that the right to bear arms was conceived as one of

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134. U.S. CONST. art. I, § 8, cl. 12.

135. The demise of the collective right to bear arms, however, creates difficulties for originalist interpretations of the Second Amendment. The dilemma for originalists is the mirror image of the type of problem that spawned the canon of statutory construction—despised by textualists—that holds *cessante ratione legis, cessat et ipsa lex*. It is not that the reason for the law has disappeared; on the contrary, the concern motivating the law may be as pressing as ever, but the ability of the law to deal with that concern has disappeared.

Frederick Schauer describes the Second Amendment as an example of Type I error, viewed ex post, on the part of the Founders. That is, he believes that the right to bear arms is a "false positive," a provision addressed to a no-longer-extant problem. *See* Frederick Schauer, *The Constitution of Fear*, *in* CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES, *supra* note 31. The preceding analysis, however, suggests that this is true only insofar as a concern that can no longer be addressed by the provision in question should be regarded as nonexistent for the purposes of that provision.

136. At least, it was not abrogated solely by these. *But see* ELY, *supra* note 72, at 94-95 (arguing that courts have interpreted-away the original intent of the Second Amendment); Scalia, *supra* note 3, at 41-44 (same).

the basic pillars of the balanced government constructed by the Founders. It was the absolute right of the governed to alter or abolish the government, by force if necessary. There can be no more foundational political right than this. Americans' ultimate check on government is done away with, and in its stead the nation is left with the small consolation that its citizens can own guns for self-defense.[137] Never mind that it is often the guns themselves, in the wrong hands, that make guns for self-defense desirable.[138] Even if the guns-for-self-defense theory worked perfectly—no crime and no collateral effects—we should still wonder what effect this transformation of the Second Amendment has had on the delicate balance of power in our nation.

What little remains of the Second Amendment, though it may very well have some worth in our society, has to do less with the militaristic "right to bear arms" than with appeasement of gun owners. The right to own a gun if a person can afford one, the right that is now guaranteed by the vaunted Second Amendment, means little compared to the right to alter or abolish our government. The right to keep a shotgun behind the door to fend off unwanted intruders may be a fundamental civil right in the eyes of millions of gun owners, but it is a poor substitute indeed for the ultimate right of popular self-determination. The Second Amendment of today—even at its best, even at its most empowering—pales in comparison to the Founders' Second Amendment, which enshrined the ultimate political right, the unqualified right of the popular sovereign to dissent decisively from tyrannical governance.

The disappearance of an ultimate check on government necessarily sounds, in both normative and positive senses, in our conception of the American democratic experiment. On the normative front, general ambivalence about the demise of the popular right of revolution can be read as a strong, unspoken signal about the view the modern American polity takes of its govern-

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137. Many would contend, however, that this option is not without value. *See* Van Alstyne, *supra* note 11, at 1248 n.43.

138. Again, it bears emphasizing that this is not a controversial point. The NRA would consider it contestable to claim that we all would be better off if there were no guns but would surely consider it obvious that gun ownership by criminals is one case, among others, for gun ownership by noncriminals. *See supra* text accompanying note 29.

ment, especially when juxtaposed with the view taken by the polity of the Founders' era. The bare truth of the matter is that the great majority of the populace no longer regards the Second Amendment as the ultimate check on the federal government's power. We no longer believe that we would be able to overthrow a government bent on oppressing us.

More importantly, many people seem unconcerned about the Second Amendment's value as a check on the government.[139] Americans' behavior manifests an outward confidence that the other checks in our balanced system of government are sufficient. Americans appear to believe, first, that there will not soon be a need to alter or abolish the government by force of arms and, second, that retaining the remote prospect of doing so with the concomitant expense of having a society laden with more and better weapons is simply not worth the gamble. Perhaps Americans have confidence in the second-best Second Amendment; perhaps they believe that the threat value of popular resistance, even if insufficient to constitute revolutionary force, is a right properly calibrated to the current political situation. It appears that if people, even in legal academia, continue to ignore the Second Amendment—it will become increasingly irrelevant, except as a nuisance and a danger, to a great many people.[140] The only groups that seem to believe in the modern worth of the Founders' conception of the right to bear arms are fringe groups: modern militias, fashioning themselves as the direct descendants of the Founding-era militias. But few of these groups are truly interested in a collective right of revolution as conceived by Madison and Hamilton. They are, rather, government-averse and individually isolationist. It is ironic indeed that the only groups in America that can claim to champion the cause of the Founders' Second Amendment, though their vision is a bit off-target, are factions regarded by much of the citizenry as threats to liberty.[141] They are in fact some of the same fac-

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139. *See* Scalia, *supra* note 3, at 43.

140. *See* Levinson, *supra* note 28, at 639-40 & nn.13-18; *see generally* Denning, *supra* note 13 (characterizing the Second Amendment as "unenforced"); *see also* AMAR, THE BILL OF RIGHTS, *supra* note 6, at 297 (noting that if he weren't such a textualist, Amar would skip the Second Amendment).

141. Indeed, many would consider them the very factions that Madison derided. *See* THE FEDERALIST, *supra* note 13, No. 46 (James Madison).

tions that the personal Second Amendment protects against.

The truth today's militias miss when they protest the pervasive apathy of the citizenry regarding things martial is that there is a kernel of truth hidden within this popular ambivalence. In a world where the United States must be able to check the actions of foreign aggressors and terrorists and to respond to international cries for help, there can be no acceptable symmetry in physical force between the U.S. government and the American people. Many Americans appear to believe that the world has evolved beyond the Founders' conception of the Second Amendment—for this one purpose at least, the vision of these otherwise-prescient men no longer rings true in a world of armor-piercing shells and surgical bombing strikes.[142] With that acceptance comes popular acknowledgment that Americans have, in exchange for safety in a world of international military capability, traded in our ultimate assurance of self-determined, representative governance.

The acknowledgment that this exchange was voluntarily made,[143] however, does not exhaust the resonance that the diminished Second Amendment has in our conception of democracy.

Moving from normative to positive, it is imperative that Americans recognize that—even if we willingly accept the exchange of a collective right of revolution for safety in the global military theater—the demise of the right to bear arms as a check on government cannot but have had an effect on the balance of power in America. Though countervailing forces might be at work in other areas of government, the diminished Second Amendment necessarily empowers the federal armed forces at the expense of the state militias and the federal government at the expense of state governments. Both of those transformations have been clearly visible over the course of the American democratic experiment.

More importantly, the demise of the Second Amendment as a right of revolution has empowered the federal government at

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142. *Grasping the Obvious Pathology*, *supra* note 2, at A22 ("A handgun is not a tool for defending democracy. It is, increasingly, a symbol of fearful individualism, an emblem of resistance to this democracy itself.").

143. Perhaps it was not so much voluntarily made as it was considered acceptable from an ex post standpoint.

the expense of the populace. The Founders believed that the American government would be truly answerable to the citizenry; if it were not so, it could be abolished by force of a collective uprising. With the disappearance of the revolutionary right to bear arms, governance in the United States is no longer solely dependent on the imprimatur of the people. It is, to use a metaphor, no longer clear who is ultimately pushing the buttons of American governance. In a very real sense, it is unclear that the American populace still retains a robust right of self-determination.

VI. Conclusion

The Founders left this nation with an amazing experiment in self-governance, one built on a system of intricate and ingenious checks and balances. Foremost among those checks was the ultimate right of self-determination: the popular right to take up arms and overthrow the government. Though the right to bear arms might have also incorporated an individual right of self-defense, the right of revolution was reserved specifically to the People, for collective use only. Reconstruction, however, presented a set of pressures fundamentally different from those of the founding era, and the focus of the right to bear arms shifted from a revolutionary right as against the government to a personal right of self-defense. The right to alter or abolish the government was, in the postbellum world, forgotten but not gone.

Soon after this shift, the modern world witnessed a terrifying revolution in the means of waging war—from Vicksburg to Verdun in five decades, from trench warfare to the atom bomb in three more. For the first time, the same defensive arms presupposed by an individual right of self-defense could not also reserve to the people the collective ability to overthrow an abusive government. It was this transformation that effectively did away with our ability to check our government by force of arms and eliminated the only absolute means of realizing the most fundamental of rights, the right to alter or abolish our government.

The Second Amendment as originally intended now stands on par with the privileges and immunities clause and the im-

port-export clause: Compared to the part they were intended to play in our balanced government, their functions are set at nearly nothing. And while the civil right to bear arms might be of some value to Americans, the constructive repeal of the political right to bear arms is far more fundamental and disturbing than the constitutional desuetude burdening the other two clauses because it was the right to bear arms that was our final, ultimate, absolute check on the government.

In the end, Second Amendment scholarship has been asking the wrong questions. Instead of considering the wisdom of repealing the Second Amendment, Americans ought to ponder whether the Reconstruction reinterpretation has already done so, or whether modern military technology has done so without our consent. Is the citizenry left somehow poorer for the elimination of its most profound check on government? How could it not be? The answer is not simply a matter of gun-control policy; rather, it sounds in ideas about the American democratic experiment and the citizenry's own place therein. It seems that Americans have decided that they simply can no longer provide a forcible check on abusive government—a calculus undertaken, perhaps, in light of the costs that the lesser civil right to bear arms is perceived by many to have wrought on American society.

Aside from the normative judgment of the American people regarding the worth of the Second Amendment as a political right, there is a further descriptive point to be made. Even if Americans agree with the constructive abolition of the right to bear arms as a check on abusive government, they should not imagine that the loss of the right has left the balance of power in American politics unchanged. The disappearance of the popular check on federal overreaching cannot but have shifted power from informal militia to armed force, from state government to federal, from governed to governing—are these shifts that Americans should or do support? Most importantly, when the People no longer have the absolute ability to alter or abolish our government by force, can they still claim to have the ultimate right of self-determination in any meaningful sense? That Americans live in an era of relative calm and well-being is no excuse for ignoring this most fundamental question.