

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

**S**INCE THE Second Amendment's emergence into academic prominence in the 1970s, and especially since the Supreme Court's landmark 2008 decision in *District of Columbia v. Heller* announced that the amendment protects an individual right to keep and bear arms, courts and commentators have compared and sometimes conflated the Second Amendment right with the First Amendment's protections for free expression. This trend has intensified since the Court's 2010 decision in *McDonald v. Chicago*, in which the Court treated the Second Amendment like the First by extending its scope to encompass state as well as federal encroachments on the right to keep and bear arms.

Courts now face a massive task in elaborating the scope, limits, and substantive content of the Second Amendment individual right. The First Amendment's extensive judicial development as a guarantor of expressive freedom makes it an attractive starting point for fleshing out the legal concept of an individual right to keep and bear arms. Numerous commentators, encouraged by *Heller*, have moved far beyond that starting point, invoking specific elements of First Amendment doctrine as templates for parallel proposals in Second Amendment doctrine. By their accounts, what we know about the First

Amendment both strengthens the legal case for a strong regime of Second Amendment rights and tells us a great deal about what that regime should do.



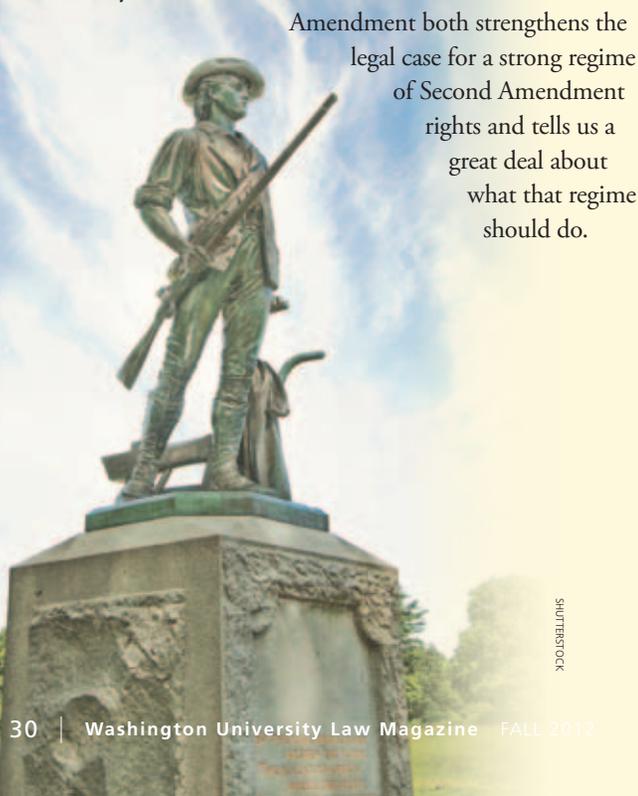
Prior scholarship has made no thorough, critical inquiry into how our long experience with the First Amendment should inform our new engagement with the Second Amendment. The high stakes of Second Amendment jurisprudence compel such an inquiry. For the first time in decades, the Court has announced a novel constitutional right. So far we know very little about how that right will affect the many and varied efforts that the federal and state governments make to regulate the possession and use of guns.

**COURTS' ONGOING EFFORTS** to fill in the Second Amendment blanks—what standard of review applies to Second Amendment claims, what sorts of interests the Second Amend-

ment protects, what the government needs to show in order to vindicate various gun regulations—carry enormous implications for law and society. Strong reliance on the First Amendment to address these questions has already become a dominant mode of Second Amendment analysis. If we want our legal system to develop Second Amendment law effectively and wisely, we will need to understand how our insights about the First Amendment can, and cannot, usefully inform Second Amendment jurisprudence.

This article examines in depth the First Amendment's implications for the Second. It advances the novel argument that, far from supporting a robust regime of Second Amendment rights, the First Amendment's guarantees of expressive freedom strongly destabilize the legal position of the Second Amendment. The Second Amendment's text, construed in light of First Amendment theory's extensive engagement with the distinction between collectivist and individualist justifications for rights, indicates that the individual right to keep and bear arms must serve a collectivist purpose.

But the most coherent and familiar collectivist justification for the Second Amendment—the need to deter and, if necessary, violently overthrow a tyrannical federal government—clashes with the First Amendment's dynamic function of facilitating political change through public political debate. The First Amendment provides a better vehicle than the Second Amendment for dynamic political change, and an embrace of constitutionally sanctioned insurrectionism under the Second Amendment would threaten our commitment to uninhibited political debate under the First Amendment. What we know about the First



Amendment therefore raises serious, perhaps fatal doubts about the vitality of the Second Amendment.

My argument proceeds in three parts. Part I critiques efforts to develop Second Amendment doctrine by analogy to First Amendment doctrine. I begin by emphasizing critical differences between the freedom of speech and the right to keep and bear arms. Descriptively, speech depends on different conceptual principles than keeping and bearing arms, has more complex attributes, and makes for a unitary object of constitutional protection. Normatively, most people, in most circumstances, view speech as a positive and constructive phenomenon while viewing the bearing of arms as at best instrumentally necessary and frequently undesirable.

**FUNCTIONALLY, THE *HELLER* COURT** showed a much greater willingness to impose categorical limits on the right to keep and bear arms than it has shown in speech cases. *Heller* itself invoked First Amendment comparisons in framing the Second Amendment's scope, boundaries, and legal pedigree. All of those comparisons muddy far more than they clarify. Post-*Heller* commentators have attempted to reason directly from the First Amendment to the Second, seeking to import First Amendment standards of review, First Amendment principles about the scope of rights, and various specific First Amendment doctrines into Second Amendment law. These analogies fail to provide useful guidance because they ignore the critical differences between speech, on one hand, and keeping and bearing arms, on the other.

The article's two remaining parts advance two distinct but related claims about how courts can sensibly draw upon First Amendment insights to explicate Second Amendment law. Part II contends that a prominent interpretive debate about the purpose of the First Amendment's protections for expression maps a methodology for understanding the broad purpose of the Second Amendment. *Heller* emphatically rejects the position that the Second Amendment's preamble limits the amendment to guaranteeing the people's right, collectively, to constitute an armed state militia. In embracing the contrary position that the Second Amendment protects an individual right to keep and bear arms, *Heller* effectively reads the preamble out of the Constitution.

First Amendment theory suggests a way to accommodate the core holding of *Heller* while restoring a significant function for the preamble. The Constitution can confer rights on individuals, as the First Amendment undeniably does, but as First Amendment theorists frequently have argued—for

collectivist rather than individualist reasons. The preamble compels a collectivist construction of the Second Amendment, requiring justifications for the individual right to keep and bear arms that advance some collective interest. While this article does not contest the core holdings of *Heller* and *McDonald* that the Second Amendment confers an individual right against both the federal and state governments, my interpretive move in Part II challenges those decisions' primary justification for the Second Amendment: protection of individual self-defense.

**PART III MAKES A CRITICAL** substantive assessment, within the collectivist interpretive framework dictated by Part II, of the individual right to keep and bear arms. The most common collectivist justification for the individual right to keep and bear arms is that the people need guns in order to deter the federal government from becoming tyrannical and to mount an insurrection should tyranny arise. This insurrectionist justification resonates with the First Amendment's function of protecting robust political debate and dissent. However, drawing on my prior work on the dynamic political value of expressive freedom, I contend that insurrection and debate mark incompatible paths to political change.

Second Amendment insurrectionism falls short of First Amendment dynamism normatively, because debate is more constructive and participatory than violence. Second Amendment insurrectionism also threatens the legal status of First Amendment dynamism, because recognizing a constitutionally permissible path to violent insurrection dramatically increases the cost of constitutionally protecting advocacy of violence. We cannot have both First Amendment dynamism and Second Amendment insurrectionism—and in fact we have made our choice. The Supreme Court spent almost a century developing First Amendment doctrine, with special emphasis on the right to advocate violent revolution, before it bothered to recognize an individual right to keep and bear arms. That disparity embodies our society's embrace of debate, and rejection of insurrectionism, as the vehicle for dynamic political change.

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

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